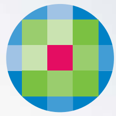
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Mercer/CCH Guide for Employers

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ALL THINGS BEING UNEQUAL: QUEBEC'S RENEWED FOCUS ON PAY EQUITY

By: Enda Wong, Dave J.G. McKechnie, and Kelly Francis.
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Advertisements have appeared across the province of Quebec with a clear message: if you work for an employer with at least 10 employees, you may be entitled to a salary adjustment. Given this renewed focus on pay equity, Quebec employers need to understand their obligations.

what is "pay equity"?

The *Pay Equity Act*[1] (the "Act") requires employers to address disparities in wages of employees occupying positions in "predominantly female job categories".

To achieve pay equity, an employer must ensure that persons occupying "predominantly female job categories" receive equal remuneration to that obtained by persons occupying "predominantly male job categories" that are of equal value to the business.

The concept of "pay equity" should not be confused with "pay equality" which is the right of employees who perform equivalent work at the same place of business to be paid equal wages. While "pay equity" issues fall under the jurisdiction of the Commission de l'équité salariale (the "Commission"), "pay equality" issues must be addressed to the Commission des droits de la personne et des droits de la jeunesse as "pay equality" rights are protected by the Quebec *Charter of Human Rights and Freedoms*.

Determining whether a job category is predominantly male or female is pivotal in achieving pay equity. In making this determination, the following factors must be considered:

- whether, owing to gender-based occupational stereotyping, the job category in question is commonly associated with women or men;

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- whether within the enterprise, 60% or more of the positions in that category are held by employees of the same sex;
- the difference between the rate of representation of women or men in the job category and their rate of representation in the total workforce of the employer; and,
- whether historically, a particular job category was predominantly female or predominantly male, in that particular business.

to whom does the act apply?

In May 2009, the Act was amended to require Quebec employers who had at least 10 employees before March 12, 2004 to enact or update their pay equity plans by December 31, 2010. Employers falling within this category who have not yet updated or enacted pay equity plans have missed the deadline and must take steps to achieve compliance as soon as possible or risk being fined.

An employer who does not currently have 10 employees becomes subject to the Act on January 1 of the year following which it employs 10 employees. An employer will then have four years from January 1 to comply with the Act.

what are an employer's obligations under the Act?

An employer's obligations pursuant to the Act depends on the size of its business as well as what stage of the pay equity process it is in. For example, an employer with 100 or more employees is required to establish at least one pay equity committee.

Employers subject to the Act must take steps to determine the salary adjustments required to attain pay equity by:

- identifying "predominantly female job categories" and "predominantly male job categories".
- establishing a method of evaluation and comparing "predominantly female job categories" with "predominantly male job categories".
- if salary adjustments are necessary, calculating these adjustments and determining terms and conditions for payment.
- posting the pay equity plan for 60 days in prominent places easily accessible to employees.[2]

Postings must, among other things, inform the employees of the sexual predominance of the listed job categories and of the necessary salary adjustments, if any. If subsequent to the posting the employees request modifications, the employer must post the plan with or without the requested modifications. Additionally, the employees' recourses under the Act must be set out in each posting.

Every employer must evaluate the maintenance of pay equity in its business every five years and the results of the evaluation must be posted. All documents, information and postings must be preserved for the following five years.

An employer who is late in fulfilling its obligations under the Act may be fined. While employees entitled to salary adjustments and who have not filed a complaint with the Commission by May 30, 2011 have now missed out on their opportunity to receive salary adjustments retroactive to November 21, 2001, employers may still be liable for retroactive payments of five years, should an employee file a claim with the Commission.

Notes:

[1] R.S.Q., c. E-12.001.

[2] The number of postings varies depending on the size of the business.

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One in two of all Canadian employees are disengaged

Ability to do a quality job, reputation of company are key to gaining commitment, says Mercer

Toronto, June 20, 2011

That message comes through loud and clear in Mercer's new *What's Working*™ survey, conducted over the past two quarters among nearly 30,000 workers in 17 countries, including more than 2,000 workers in Canada.[1]

Slightly more than one in three (36 per cent) Canadian workers are seriously considering leaving their organization at the present time, up sharply from 26 per cent in 2006. Meanwhile, another 22 per cent are indifferent about leaving but are increasingly dissatisfied with their employers and yield the lowest score on key measures of engagement, a term that describes a combination of an employee's loyalty, commitment, and motivation.

"This erosion in employee sentiment has business consequences that reach well beyond the direct costs of employee turnover", said Madeline Avedon, Principal, Mercer's Human Capital business. "Canadian employees, in particular, are more engaged when they can deliver quality service and have a positive view of their company." Of the top six survey questions that employees most correlated to their engagement, four focus on commitment to quality and future success of the organization. "Diminished respect for and lack of confidence in an organization can undermine the innovation and productivity gains businesses rely on from their workforces", she said.

Scores for career development and performance management remain low; however, employees credit their employers for improvements in these areas, including higher scores in implementing formal feedback programs (54 per cent said they had a formal performance appraisal or review in the past 12 months compared to 46 per cent in 2006). These data also confirm the correlation between performance management and a highly engaged workforce.

"Employees who received performance reviews in the last year are significantly more positive about their organization and its ability to manage talent", said Ms. Avedon. For example, among those who received a performance review in the last year, 62 per cent believe there is opportunity for growth and development with their company, compared to 42 per cent among those who did not receive a performance review. "A formal feedback program is important, but it's the manager's ability to meet the employee's need for feedback, encourage discussion and drive performance that forms the critical links to employee engagement and desired improvements in productivity", said Ms. Avedon. Other key data highlight employees' concerns about work and reflect an evolving employment relationship – one generally characterized as a series of takeaways and a tightening of any "extras" in response to today's struggling economy:

- Employees regard base pay as the most important element of the employment deal by a wide margin, yet only a little more than half (53 per cent) say they are satisfied with their base pay, and only slightly more (58 per cent) feel they are paid fairly given their performance and contributions.
- Only 43 per cent of Canadian employees believe they are doing enough to financially prepare for retirement, and just 40 per cent believe their employers are doing enough to help them prepare.
- Sixty-six per cent rate their overall benefits program as good or very good, while 58 per cent say they are satisfied with their health care benefits. However, only 53 per cent say their benefits are as good as, or better, than those of others in their industry, down from 65 per cent.

As a result, overall scores are down consistently across key engagement measures while intention to leave is up across all employee segments, with the youngest workers most likely to be eyeing a departure – 43 per cent of employees age 25–34 and 45 per cent of employees 24 and younger.

Mercer's survey reinforces the importance of knowing what is going on inside employee minds, which changes over time and evolves as new generations join the workforce. "To better understand what drives engagement on a broader scale, employers must periodically take the pulse of their own employees to identify specific areas of concern and link employee opinion to outcomes such as productivity and retention", said Pete Foley, PhD, a Principal at Mercer and employee research consultant. "Only then can informed decisions be made regarding trade-offs and investments in the employment relationship, developing specific leadership skills and enhancing managerial effectiveness on the front line."

The findings from Mercer's *What's Working* survey are part of a 2011 explorative series entitled "Inside Employees' Minds: Navigating the New Rules of Engagement". A dedicated Web site (**www.mercer.com/insideemployeesminds**) will feature videos, podcasts, and other intellectual capital to help employers better understand and create ways to increase employee engagement.

Notes:

[1] The survey sample does not include workers from the public sector.

Highlights of the Federal Budget

On June 6, 2011, Minister of Finance James M. Flaherty reintroduced federal Budget 2011, "The Next Phase of Canada's Economic Action Plan – A Low-Tax Plan for Jobs and Growth". The Budget had been previously released on March 22, 2011; however, that Budget was not adopted prior to the dissolution of Parliament on March 26, 2011.

The 2011 federal Budget contains the following measures related to Employment Insurance ("EI") and employment standards.

EI Hiring Credit for Small Business

To encourage additional hiring by small businesses, Budget 2011 proposes a temporary Hiring Credit for Small Business of up to $1,000 against a small employer's increase in its 2011 EI premiums over those paid in 2010. This temporary credit will be available to approximately 525,000 employers whose total EI premiums were at or below $10,000 in 2010, reducing their 2011 payroll costs by about $165 million.

EI Work-Sharing Program Extended

The work-sharing program protects jobs and avoids layoffs by offering EI benefits to workers willing to work a reduced workweek while their company recovers. Budget 2011 provides $10 million in additional support by making available an extension of up to 16 weeks for active or recently terminated work-sharing agreements. The extension will be phased out by October 2011.

EI Pilot Projects Renewed

In October 2010, the government announced the continuation of three EI pilot projects. The Extra Five Weeks pilot project was renewed until 2012, while the other two – Working While on Claim and Best 14 Weeks – were scheduled to expire in the summer of 2011. Budget 2011 provides $420 million to renew these two pilots for one year.

The Working While on Claim pilot project, available across Canada, will allow EI claimants to earn additional money while receiving income support. It will be renewed until August 2012.

The Best 14 Weeks pilot project, which allows claimants in 25 regions of higher unemployment to have their EI benefits calculated based on the highest 14 weeks of earnings over the year preceding a claim, will be renewed until June 2012.

Limiting EI Premium Rate Increases and Launching EI Consultations

The increase in EI premiums is limited to five cents per $100 of insurable earnings for 2011 and 10 cents for subsequent years. The government will be launching Web-based and roundtable consultations on how to improve the EI rate-setting mechanism to ensure more stable, predictable rates going forward.

Expanding the Wage Earner Protection Program

The Wage Earner Protection Program ("WEPP") provides guaranteed and timely compensation to workers for unpaid wages, vacation pay, severance pay, and termination pay earned in the six months preceding an employer's bankruptcy or receivership. Budget 2011 will extend the WEPP to also cover employees who lose their jobs when their employer's attempt at restructuring takes longer than six months, is subsequently unsuccessful, and ends in bankruptcy or receivership. The enhanced protection is estimated to provide an additional $4.5 million annually in support to workers affected by the bankruptcy of their employer.

Eliminating the Mandatory Retirement Age

The government proposes to introduce amendments to the *Canadian Human Rights Act* and the *Canada Labour Code* to prohibit federally regulated employers from setting a mandatory retirement age unless there is a *bona fide* occupational requirement. This would allow Canadians to choose how long they wish to remain active in the labour force. The government will review other Acts to further this objective.

Legislative Update

British Columbia

Bill 217 (Private Member's Bill): *Workplace Bullying Prevention Act*

Bill 217 aims to reduce and eliminate workplace bullying by modifying the *Worker's Compensation Act* to allow incidents of workplace harassment to be investigated, compensated, and dealt with in the same manner as workplace accidents. As well, it provides less strenuous requirements for the award of compensation for mental stress in situations that involve harassment.

The Bill received first reading on June 2, 2011.

Manitoba

Bill 23: *The Employment Standards Code Amendment Act*

Bill 23, *The Employment Standards Code Amendment Act*, which will make it easier for employers and employees to enter into flexible work hour agreements, has received Royal Assent. Flexible hour agreements could accommodate employers' needs while allowing employees to better balance their work hours with their home and family needs.

The Bill's major amendments:

- extend the exceptions to the Code's statutory holiday provisions to climate-controlled agricultural businesses;
- allow an employer and employee to enter into a written flextime agreement, in which an employee may work up to 10 hours per day or 40 hours per week;
- replace the "wilful misconduct" standard for termination without notice with a "just cause" standard;
- continue the requirement to pay a wage in lieu of notice under paragraph 61(1)(*b*) whether or not the employee has obtained other employment during the notice period; and
- allow an employer to apply for an averaging permit to increase employees' hours in a workweek, or to average the hours across a longer period; 75% of affected employees must be in favour of such a permit for it to be granted.

Bill 23 (now S.M. 2011, c. 13) received first reading on April 20, 2011, second reading on June 6, and third reading and Royal Assent on June 16. It will come into force on January 1, 2012.

Bill 33: *The Pension Benefits Amendment Act*

Bill 33 was introduced into the legislature with the goal of strengthening the Manitoba *Pension Benefits Act* by allowing the Pension Commission's Office of the Superintendent to act against employers who fail to make the required contributions to their company pension plans. The major amendments are as follows:

- expand the superintendent's powers to issue orders for contributions that have not been made into existing company pension plans;
- allow the superintendent to file orders in court to secure enforcement;
- authorize the superintendent to register a lien against all property (including real property) of a defaulting employer in the amount of the undeposited contributions;
- hold a corporation's directors liable for contributions to the plan that the employer has failed to pay; and
- permit the superintendent to issue administrative penalties to parties that do not comply with the Act or Regulation and other administrative matters such as filings and filing deadlines.

Bill 33 (now S.M. 2011, c. 23) received first reading on May 30, 2011, second reading on June 8, 2011, third reading and Royal Assent on June 16, 2011, and comes into force on January 1, 2012.

Nova Scotia

New Form of Reservist Leave Now Available

While Nova Scotia, like most other Canadian provinces, has provided for reservists' leave for actual deployment or training required for deployment, it recently added a second type of reservists' leave.

Effective May 1, 2011, Nova Scotia also provides leave for reservists participating in ongoing annual training not related to deployment. All reservists who have been employed with their employer for one year are entitled to up to 20 days' unpaid training leave per year in order to take ongoing annual reservist training. This means that the reservist does not have to use vacation leave for this training. The 20 days include necessary travel time. The total 20-day entitlement may be broken up into shorter periods so long as they do not add up to more than 20 days.

An employee who intends to take a leave of absence for the purpose of annual training must provide his or her employer with reasonable notice of his or her intention to take the leave. Reasonable notice is at least four weeks' notice in advance, except in an emergency situation, in which case reasonable notice is as much notice as is reasonably practical. An employee on annual training leave must return to work no later than the next regularly scheduled working day following the training and any related travel time.

An employer can require an employee to provide a certificate from an official with the Reserves confirming that the employee requires the leave for a period of training. During the leave, the employer must let the employee maintain, at the employee's own expense, any benefit plans to which the employee belongs.

Ontario

Ontario Regulation 191/11 under the *Accessibility for Ontarians with Disabilities Act, 2005*

Ontario has published the final Integrated Accessibility Standards in the form of O. Reg. 191/11 under the *Accessibility for Ontarians with Disabilities Act, 2005* ("AODA"), which was filed on June 3 and comes into force July 1, 2011. The Integrated Accessibility Standards follow on from the already published AODA Customer Service Standard (O. Reg. 429/07).

The Regulation includes three separate accessibility standards focusing on the areas of information and communication, employment, and transportation, Although the Regulation comes into force on July 1, 2011, compliance will be phased in between 2012 and 2015.

The Regulation requires, amongst other things, that all obligated organizations draft and implement an accessibility policy setting out how the organization intends to achieve accessibility by meeting its legislated obligations. Obligated organizations will also be required to provide training on the requirements of the accessibility standards referred to in the Regulation, and also on the *Human Rights Code* as it pertains to persons with disabilities. In addition, under the employment accessibility standard, most employers will be required to develop individual accommodation plans for employees with disabilities.

To read more about the new accessibility standards or read the Regulation itself, please visit: **www.mcss.gov.on.ca/en/mcss/programs/accessibility/index.aspx**.

Quebec

New Pay Equity Reporting Obligations

On March 1, 2011, Quebec's *Regulation respecting the report on pay equity*, R.R.Q. c. E-12.001, r. 1, came into force. The Regulation requires the following employers to submit an annual report on pay equity:

- an employer registered under the *Act respecting the legal publicity of enterprises* which, under that Act, is subject to the obligation to file an annual declaration for

the current year, and which declared six employees or more in its previous annual declaration or in any other document standing in lieu of the last annual updating under that Act;

- the Conseil du trésor, as an employer deemed to be the employer in the public service enterprise and the parapublic sector enterprise under section 3 of the *Pay Equity Act*;
- an employer registered in the central database of public bodies and corporations provided for by Order in Council 1870-93 dated December 15, 1993, except if the employer is in the public service enterprise or the parapublic sector enterprise;
- a group of employers recognized as the employer of a single enterprise by the Commission de l'équité salariale pursuant to section 12.1 of the *Pay Equity Act*; and
- any employer registered under the *Act respecting the legal publicity of enterprises* which, not having six employees or more or being exempt from the obligation to file an annual declaration, has already submitted a report on pay equity in which the employer declared that it was subject to the *Pay Equity Act*.

An employer registered under the *Act respecting the legal publicity of enterprises* to whom this reporting obligation applies must submit its pay equity report during the period applicable to the employer for filing its annual declaration under section 45 of the *Act respecting the legal publicity of enterprises*. Other employers must submit their reports within six months of March 1 of every year.

See the lead story in this issue of the MERCER/CCH GUIDE FOR EMPLOYERS for more information on Quebec's new pay equity requirements.

Saskatchewan

Saskatchewan Human Rights Code Amended

Bill 160 (now S.S. 2011, c. 17), the *Saskatchewan Human Rights Code Amendment Act, 2011*, which received Royal Assent on May 18, 2011, has been proclaimed in force effective July 1, 2011.

The amendments introduce significant changes to the province's human rights complaints process, including the transfer of the Saskatchewan Human Rights Tribunal's powers to the Saskatchewan Court of Queen's Bench. The amendments aim to streamline the complaints process and to allow more complaints to be resolved without proceeding to litigation in the courts.

On the Case

Characterization of income replacement benefits as earnings was reasonable

• • • **Canada** • • • Steel left his employment and began receiving Employment Insurance benefits on July 29, 2007. After a car accident in December 2007, Steel received a lump-sum payment from his insurer in May 2008, as income replacement. Steel claimed that he was entitled to a write-off of these benefits because of the significant delay he experienced in receiving Employment Insurance benefits after leaving his employment. The Commission determined that the income replacement payment constituted earnings, and allocated these earnings to the period from December 2007 to June 2008. Since Steel was unable to return to similar work after the accident, his claim was transformed to a sickness benefit claim, with a maximum period of 15 weeks. The Commission requested repayment of benefits totalling $9,115. The Board of Referees upheld the decision of the Commission. The Umpire confirmed the Board's finding with respect to the allocation of income replacement benefits as earnings, although it disregarded concessions made by the Commission in reducing the overpayment amount and agreeing that Steel was entitled to regular benefits up to the date of his motor vehicle accident. Steel brought an application for judicial review.

The application for judicial review was allowed, in part. There was no evidence that Steel had made a proper request for a write-off. Therefore, there was no basis for the Commission to make a determination that the request was denied. Without a decision by the Commission, there was no basis upon which the Board or the Umpire could decide the issues Steel raised concerning a write-off of his indebtedness. The Umpire did not err in affirming the Commission's characterization of the income replacement benefits as earnings. As a result of the Commission's concessions before the Umpire, the Umpire erred by affirming the Commission's quantification of the overpayment, and the overpayment should have been reduced to $6,146.

Steel v. Attorney General of Canada, 2011 CLLC ¶240-005 (F.C.A.)

Employee induced to leave former position

• • • **Alberta** • • • Dias was offered the position of Games Manager for the Paragon's casino. Eighteen months later, Dias was terminated, and was paid one week's severance and vacation pay. Dias had previously worked as a Games Manager at a rival casino. He had been enticed to leave his former employment by an offer of more money, more benefits, more bonuses, and a promise of opportunity for advancement at Paragon. After his termination, Dias was unable to obtain a similar position in the casino industry, and was required to change careers. Dias brought a wrongful dismissal action.

Q & A

What types of questions are not permitted on employment application forms?

From a human rights perspective, as a general rule, employers should not include on application forms any questions that relate directly or indirectly to the prohibited grounds of discrimination in the jurisdiction in which the applicant is applying for employment.

The following list is not exhaustive, but provides some examples of questions (grouped by prohibited grounds of discrimination) that should *not* be asked on an application form:

- *Race*: What colour are your eyes or hair? How tall are you? How much do you weigh? What is your mother tongue or first language?
- *Creed or Religion*: What religious institutions do you attend? How frequently? What religious holidays do you celebrate?
- *Citizenship, Place of Origin, or Ethnic Origin*: Do you have Canadian citizenship? Do you have Canadian experience?
- *Sex or Marital Status*: What was your last name before marriage? Do you prefer Mrs., Miss, or Ms.? Are you married, divorced, common-law, single, or separated?
- *Family Status*: Do you have any children or dependants? Do you have child care arrangements?
- *Age*: What is your date of birth?
- *Disability*: List any medical conditions that you have. Have you ever applied for Workers' Compensation? Do you take medication? Do you drink or use drugs? Do you require accommodation for any form of disability?

Notwithstanding the above prohibited questions on citizenship, employers are permitted to ask whether applicants are legally entitled to work in Canada. Employers should, however, wait to request proof of entitlement to work in Canada until after a conditional offer of employment is made.

Some jurisdictions allow exemptions from the general rule. For example, in Ontario, special interest organizations such as religious, philanthropic, educational, fraternal, or social institutions, or organizations engaged in serving the needs of persons identified by race, ancestry, place of origin, colour, ethnic origin, creed, sex, age, marital status, or disability, may give preference in employment to persons similarly identified if the qualification is reasonable and genuine because of the nature of the employment. Employers should review the human rights legislation in their jurisdiction carefully to determine if any exemptions apply to their organization.

The action was allowed. Dias had a mid-management position, and it was difficult to find similar work in the industry. Although he was only in his position for 18 months, Dias had been employed for a long period of time in a secure position with another company, but had been induced to leave that employment by Paragon. Therefore, Dias was awarded four months' reasonable notice.

Dias v. Paragon Gaming EC Company, 2011 CLLC ¶210-014 (Alta. Prov. Ct.)

Failure to give notice was not an offence in respect of the discharge of an employee

• • • **British Columbia** • • • Servisair provided aviation ground services at Vancouver International Airport. Employees in the cabin grooming service were unionized and covered by a collective agreement. Servisair determined that the cabin grooming division was not profitable, and advised the union to make changes. When the union refused to negotiate, Servisair notified employees that the cabin grooming service would likely be outsourced to a third party. The union then entered into negotiations and agreed to a new wage package, which was voted down by its members. Servisair then decided to close the division. It gave notice that the division would be closing, although it did not specify a date. Servisair gave written notice on April 18, 2008 that employees would be terminated as of May 25, 2008, and applied for a waiver of the termination notice requirement. The waiver application was denied. Individual termination letters were sent to each employee. Servisair plead guilty to failing to notify the Minister of Labour of its intention to terminate a group of 50 or more employees 16 weeks prior to termination, and failing to provide a statement in writing to each employee two weeks before termination setting out the particulars of their employment. At issue was the appropriate penalty.

An award of damages was granted. A conviction for failing to give the required notice to the Minister was not an offence in respect of the discharge of an employee. There was no clear relationship between the termination notice to the employees and the notice to the Minister. In

this situation, the employees were aware long before the notice to the Minister that their department was closing and their jobs would be terminated at some point in the near future. Therefore, the Court would not use its discretion to award wages for the period between May 26 and August 7. The company was ordered to pay $3,000 for failure to provide notice to the Minister, and $1,500 for failure to provide statements of wages and benefits within the required time frame.

Regina v. Servisair Inc, 2011 CLLC ¶210-025 (B.C. Prov. Ct.)

Restrictive covenant was overly broad and unreasonable

• • • **Ontario** • • • When Mason was hired to work for Chem-Trend, a worldwide company, he signed a document that included a restrictive covenant. Upon termination, he was restricted, for one year, from competing with Chem-Trend by providing services to, or soliciting business from, Chem-Trend's customers. When Mason was terminated, he brought a wrongful dismissal action, as well as a separate application alleging that the restrictive covenant was unenforceable. The trial judge dismissed the application, finding that the restrictive covenant was clear, unambiguous, and reasonable (see 2011 CLLC ¶210-005). Mason appealed.

The appeal was allowed. The restrictive covenant at issue was clear and unambiguous. However, the trial judge erred in finding that a complete prohibition on competing with the company was not an overly broad restriction. There was a separate covenant in the agreement protecting trade secrets and confidential information. The prohibition on dealing with former customers of the company was also overly broad, in particular the requirement that Mason not deal with any former customers in competition with the company. Given the worldwide nature of the company, it was impossible to know which former customers Mason could not deal with. Therefore, the complete prohibition on competition for one year was overly broad and unworkable; consequently, the restrictive covenant was unreasonable and unenforceable.

Mason v. Chem-Trend LP, 2011 CLLC ¶210-027 (Ont. C.A.)

Employer not required to release e-mails which had no relation to business affairs

• • • **Ontario** • • • The City of Ottawa allowed employees to use e-mail for personal purposes, although it retained the right to monitor the e-mail system. O'Connor, who worked as a solicitor for the City, used his work e-mail address to send and receive e-mails related to volunteer work he did for the Children's Aid Society. The respondent, Dunn, made a request under the *Municipal Freedom and Protection of Privacy Act* for the disclosure of all e-mails, letters, and faxes sent or received by O'Connor to and from anyone at the Children's Aid Society. The City refused to release the information, claiming that the communications did not relate to O'Connor's duties as a solicitor and, therefore, were not within the City's custody or control. When Dunn appealed to the Information and Privacy Commissioner, an arbitrator determined that the e-mails were within the custody and control of the City. The City brought an application for judicial review.

The application for judicial review was allowed. The intent of the legislature in enacting the *Privacy Act* was to enhance democratic values by providing citizens with access to government information. Interpreting the term "custody or control" to include private communications of employees unrelated to government business would do nothing to advance the purpose of the legislation. This issue was not addressed by the arbitrator in her decision. The documents were not in the care and control of the City. The Children's Aid Society was not an agency subject to freedom of information legislation, and O'Connor was not subject to having his personal documents seized and passed over to any member of the public requesting them. Their communications did not have any connection to the functioning of the government or the business affairs of the City of Ottawa. Therefore, the arbitrator erred in law in finding that the records were within the custody or control of the City of Ottawa.

City of Ottawa v. Ontario (Information and Privacy Commissioner), 2011 CLLC ¶210-030 (Ont. S.C.J.)

NEWS FROM THE U.S.

The article below, "Exit interviews can also be used to reveal good", appeared in *Ideas and Trends*, #723, June 1, 2011, published by CCH Incorporated, United States, a Wolters Kluwer business, and is reproduced with permission. If you wish to place an order or would like more information on U.S. products, please contact our Customer Satisfaction Hotline at (416) 224-2248 or 1-800-268-4522.

Exit interviews can also be used to reveal good

Many HR professionals use exit interviews as a way to identify and articulate why employees are leaving to help reduce employee turnover. What many HR professionals overlook is a chance to identify areas that ARE working in the organization. The latest trend in exit interviews is to focus on the bright side, and work to replicate that across the company. Increasing the "good" at a company can go

just as far as decreasing the "bad" when it comes to employee retention and morale.

Nationally recognized expert Beth N. Carvin, CEO of Nobscot Corporation, participated in the following interview with CCH, a Wolters Kluwer company. Carvin discussed the latest trends in exit interviews.

CCH: What do you think HR is getting right about exit interviews and what are they getting wrong?

Carvin: Most HR practitioners understand the value of exit interviews. They really want to get feedback on the drivers of turnover. Many put in a valiant effort in order to do so. The challenge is that most HR departments have not changed their exit interview tactics to go along with the times. They make the effort to meet employees or call them. They ask probing questions. They take notes. They share them with colleagues. Then put them in the file. Some compile the information in a spreadsheet.

This method leaves you with some understanding of where issues are occurring but in the form of anecdotal clues rather than objective evidence.

While other HR processes have modernized with technology, the exit interviews in most companies are still done manually. Some of the challenges with conducting exit interviews the "old-fashioned" way: employees today rarely open up verbally; they are difficult to reach by telephone; and looking at exit interview results one at a time doesn't provide objective, actionable data.

CCH: Are exit interviews worthwhile with every departing employee or should HR be selective?

Carvin: Some companies limit who they exit interview due to limited resources. If they do, they should start with the highest turnover areas rather than basing it on the level of the employees. Any area where turnover is costly or it's difficult to recruit replacements is also a good place to start. For example in banking, there tends to be high turnover in the teller area and the call center. Healthcare may have turnover and difficulty recruiting nurses.

CCH: Why is it such a good idea for HR to identify areas that are working in an organization through exit interviews?

Carvin: Exit interviews used to be only about finding the negatives. That is still a primary usage but today we see a number of other uses of exit interviews as well. One area is focusing on the "bright spots".

There are three uses of bright spots:

1. Provide positive feedback, rewards and recognition to those who are doing a great job;
2. Replicate your successes from one area to another; identify mentors from the success areas to help the more troubled areas; and
3. Learn which programs are highly valued by employees so that when cutting costs you don't accidentally cut an important program and create a turnover problem that costs more than the savings from cutting the program.

CCH: Is there still value in asking about "the bad?"

Carvin: Absolutely. The cost of turnover is so high that exit interviews still remain the best way to get to the real drivers of turnover. We call those drivers "irritations". They are the things that build up over time and eventually cause the employee to seek employment elsewhere. Remember, when you hire an employee they are at their peak of excitement. They don't plan to leave. Something happens between the time they enthusiastically accept the job offer to when they begin to look at opportunities elsewhere. The exit interviews, when done properly, help you pinpoint where, when, and why things go wrong.

Make sure you include both quantitative (numerically rated) questions and qualitative (open ended and comments). The questions can include items about the work environment, direct supervisor, compensation, the work itself, and the company.

CCH: Are there other trends you are seeing in exit interviews right now besides focusing on the positive?

Carvin: A couple of other trends – using exit interviews to measure the success of diversity initiatives. When you can easily track your exit interview response data by gender and race you can begin to see if women and people of color are experiencing the workplace the same or differently from the white males.

Another trend is combining exit interviews with new hire surveys. This allows you to capture a full picture of data. New hire surveys help you audit the recruitment process, onboarding, initial training, and socialization (fitting into the company). When this is combined with the exit interview data you can get a real life cycle of information to identify where things are going wrong . . . or right!

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Expert lists pitfalls to checking social media when making a hiring decision

(Posted July 5, 2011)

Can using social media and other technologies to find and screen candidates put an employer at legal risk? "Absolutely", says David P. Jones, PhD, author of *MILLION DOLLAR HIRE: Build Your Bottom Line, One Employee at a Time* (Jossey-Bass, 2011). "Often, without knowing it, companies violate a host of laws when they use social media sources to recruit top talent, or when they use these sites to collect information about potential candidates. And social media aren't the only technology solutions that can open the door to legal problems."

Jones advises any hiring manager to use technology to recruit and screen candidates. He says, "As in other areas of a business, technology brings a faster-better-cheaper package of payoffs to recruiting and hiring. Just be careful, though, that how you use it doesn't bring faster-bigger-more expensive legal challenges."

Jones advises on some of the pitfalls:

- **Know what you're looking for.** Before you begin the hunt, lay out clearly the basic qualifications the job demands. Focus your technology on screening for just these factors. Don't stray into areas unrelated to what you need.

- **Be careful what your Internet searches or social networking reviews capture.** Pulling information off Facebook, Linkedin or other sites that's outside what the job demands can lay the foundation for a candidate claiming they were passed over because someone made a wrong interpretation about their personal lifestyle information.

- **If you purchase Internet-scraped information about candidates, be careful.** Did you know that doing this makes you subject to the [U.S.] federal government's *Fair Credit Reporting Act* ("FCRA") in how you use the data, or seek permission from the candidate? [Note that while this point refers to U.S. legislation, similar requirements exist in Canadian provincial laws.]

- **If you source candidates from the Internet, think about where you look.** A plaintiff's attorney can claim you selected sites where few minorities or women, for example, visit. This alone can produce an argument that you intentionally discriminated in your sourcing strategy.

- **If a vendor tells you their recruiting or screening technology is legal, get the details.** Review your overall recruiting and hiring program to find potential pitfalls, too. There are new laws, regulations, and court decisions coming down all the time.

Jones adds, "The Internet and technology have reinvented how the best companies find the best talent. faster, better, cheaper. But nothing's risk-free. Drawing a payoff from making great hiring decisions always brings the risk of legal challenge. Setting up the right controls, and training the people who use the technology, is the best way to reduce them."

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