

McCarthy Tétrault Co-Counsel:
Labour & Employment Quarterly

Volume 3, Issue 4
December 2009

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McCarthy
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Welcome to Volume 3, Issue 4 of McCarthy Tétrault's *Labour and Employment Quarterly*.

As a new Knowledge Management Lawyer at McCarthy Tétrault, I am pleased to have worked on this publication for you!

In our [National Report](#), we brief you on recent decisions from our courts. In these cases, which are about random drug testing, monitoring attendance without discrimination, and post-employment restrictive covenants, the news is clear (if not always good), and we tell employers what it means for you.

In our [Ontario Report](#), we update you on the *Accessibility for Ontarians with Disabilities Act, 2005*, new legislation that adds another layer to your obligations to accommodate employees with disabilities, and on what you should look out for as this new legislation gets into gear.

In our [Western Report](#), we tell you about a B.C. case involving the termination of employment of employees on LTD in the context of a plant closure. We highlight the importance of exercising caution when terminating employment for non-culpable absenteeism, and explain how to do so.

In our [Québec Report](#), we tell you about a case that involves the protection of unionized work provided for in the collective agreement beyond the borders of Québec, and we explain how you can factor-in this case to the wording of provisions of collective agreements.

In our [Immigration Corner](#), we tell you how to plan ahead and how to plan well, to avoid issues when dealing with foreign nationals who enter Canada on business trips.

We conclude with a [Q & A](#) and some tips for employers on the hot topic of video surveillance. We tell you that whether your video surveillance measure is appropriate – or not – will depend partly on how you go about implementing it, and we help you to consider how to weigh your legitimate interests against employees' privacy.

As the year draws to an end, and having had great conferences for our clients in [Toronto](#) and in [Montréal](#) this fall, we are looking to what lies ahead in 2010: our labour and employment law conferences in Vancouver in March, and in Calgary in May. We hope that many of you will benefit from these events.

McCarthy
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McCarthy Tétrault is proud of its position as a leader in all areas of law. With offices across Canada, we are able to meet our clients' needs through the strength of an integrated single partnership. Our Labour & Employment Group has the experience and expertise to assist you with all the complexities of labour and employment law that affects your business.

We hope you enjoy our publication.

[Lisa Chamandy](#)

Editor

December 2009

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National Report

Year in Review – Key Labour and Employment Decisions of 2009

As another year draws to an end, we are once again reflecting on what the past year has brought to the labour and employment scene in Canada. For better or for worse, the courts this year have given employers much-needed clarity on a number of unresolved issues. Here, we recap some of the key labour and employment decisions of 2009 – our annual "cheat sheet" to help employers stay on top of the most recent developments.

Hard Line on Random Drug Testing Confirmed

Over the past several years, we have kept you up to speed on the evolving debate over employee drug and alcohol testing. In the most recent chapter, the Court of Appeal for Ontario maintained the hardline approach to random drug testing in its May 2009 decision in *Imperial Oil and Communications, Energy & Paperworkers Union of Canada, Local 900*.

After its random drug-testing policy was rejected by the Court of Appeal for Ontario in the highly publicized *Entrop* case – largely on the ground that the urinalysis process could not measure current impairment – Imperial Oil immediately began to investigate other, more effective, drug-testing technologies. It finally settled on saliva swab testing, and implemented a new policy for random mandatory testing in safety-sensitive positions. Again, the Union challenged the policy, claiming it was unconstitutional.

The arbitration board, the Ontario Divisional Court, and the Court of Appeal were unanimous in holding that the policy should be struck down. The Court of Appeal concluded that the company's policy of testing without reasonable cause – even in safety-sensitive positions – was an "unwarranted intrusion" on employees' privacy and "an unjustifiable affront to their dignity."

This decision confirms that employers in Ontario, much like those in other provinces, including Québec and British Columbia, must tread very softly when it comes to employee drug testing, which will only be permitted in very specific circumstances. That said, courts in other provinces, in particular, the Alberta Court of Appeal in *Chiasson v. Kellogg Brown*, have been more permissive with employer drug testing in safety-sensitive workplaces. This debate may well end up before the Supreme Court of Canada (SCC).

Until then, employers should be cautious and seek advice before proceeding with any form of employee testing, including alcohol or drug testing.

Employers Can Monitor Attendance without Discriminating

In *Coast Mountain Bus v. CAW-Canada*, the British Columbia Superior Court gave employers a much-needed break by affirming their right to monitor and manage employee attendance without running afoul of discrimination laws.

Facing unacceptable rates of absenteeism, Coast introduced an Attendance Management Program (AMP) that set out a formal step-by-step procedure for dealing with problematic absenteeism cases, ultimately culminating in possible termination if attendance standards were not met. The union challenged the AMP, arguing that it discriminated against employees with chronic or serious disabilities.

The court found that the AMP was not discriminatory. Even though it would apply to individuals with chronic, recurring and other disabilities, it did not target those employees arbitrarily. Rather, it was based on an objective determination: as compared to the average, the employees were absent more days.

The court concluded that there is nothing systemically discriminatory about monitoring employee attendance. In fact, it considered that employers have an obligation to warn employees of their attendance concerns and of the potential consequences.

Finally, referring to recent SCC case law, the court found that monitoring the absences of employees who are regularly absent from work is a genuine work requirement and a fundamental right of the employer under the employment contract.

This decision gives employers comfort that they can, and should, monitor and enforce reasonable attendance standards – with appropriate accommodation, of course, for employees with more serious or chronic disabilities.

Further Clarity on Post-Employment Restrictive Covenants

At the end of 2008, the decision of the Court of Appeal for Ontario in *H.L. Staebler Company Limited v. Allan*, followed closely by the SCC decision in *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc.*, gave employers valuable guidance on the extent to which they can restrict competition by departing employees. This trend continued into 2009 with the SCC decision in *Shafron v. KRG Insurance Brokers*.

In *Staebler*, the court set out the framework for determining whether a contractual restrictive covenant is “reasonable,” and therefore, enforceable. Two key points can be drawn from *Staebler*. First, referring to the 1978 SCC decision in *Elsley Estate v. J.G. Collins Insurance Agencies*, the court confirmed that, in most cases, a non-solicitation clause will be sufficient to protect the employer’s legitimate business interests, and that a non-competition clause will only be warranted in “exceptional circumstances.” Second, a clause that is overly broad in terms of its duration or territory, or because it restricts competition generally, will not be read down to make it valid.

The onus is therefore on employers to draft restrictive covenants that are strictly limited to what is reasonable, taking into consideration the nature of their business and the position occupied by the departing employee.

In *RBC Dominion*, the SCC considered the obligations of departing employees who are *not* bound by contractual restrictive covenants.

On the positive side, the SCC confirmed that even non-fiduciary employees have a duty to give reasonable notice of resignation, and they may be subject to pay damages if they do not. As well, employees are held to a general duty of good faith in the discharge of their employment contract, and to a duty of confidentiality. A breach of either of these obligations by departing employees can make them liable for any damages caused, or to pay punitive damages.

On the down side, the SCC confirmed that non-fiduciary employees have no legal duty not to compete unfairly against their former employer, even during the reasonable notice of resignation period. Therefore, employers concerned about potential competition from departing employees should make sure to have written restrictive covenant agreements in place.

In *Shafron*, the SCC considered the validity of a restrictive covenant that prevented Mr. Shafron (who had joined KRG with the sale of his insurance company) from competing with KRG within the "Metropolitan City of Vancouver" for a period of three years following the termination of his employment. When Mr. Shafron left KRG to join an insurance broker practising in the neighbouring suburb of Richmond, and brought with him a significant number of customers, KRG sued to enforce the restrictive covenant.

The SCC found that the geographic scope of the clause, i.e., the "Metropolitan City of Vancouver," was ambiguous. As such, the employer could not enforce it. In doing so, the SCC confirmed that, in order to be enforceable,

a restrictive covenant must be reasonable and unambiguous in respect of: (1) the geographical scope, (2) the time limit, *and* (3) the activities it seeks to restrict. The SCC also noted that such clauses in employment contracts will be scrutinized more closely than those in sale of business or other commercial agreements.

Finally, employers should be aware that the SCC has now made it very clear that courts will not read down a restrictive covenant to make it legal and enforceable and, except in limited circumstances, will not strike down only the unreasonable part of the clause and leave the remainder intact.

Looking Forward

As noted at the outset, for better or for worse, the key decisions of 2009 have brought employers clarity on their rights and obligations with respect to certain significant issues that were previously unresolved. With the challenges posed by the tough economic times we have been through, there is no doubt we can expect new issues to come before the courts next year. We will continue, as always, to keep you ahead of the curve by informing you about recent cases and developments as they occur.

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Ontario Report

Another Layer to Employers' Accommodation Obligations

The *Accessibility for Ontarians with Disabilities Act, 2005 (AODA)* is one of many pieces of legislation dealing with accommodation of persons with disabilities in Ontario. The *AODA* mandates the creation of so-called "Accessibility Standard(s)" that set specific accessibility obligations for specific categories of organizations. To date, five Accessibility Standards have been proposed, including the Customer Service Standard, the only one to have become law.

Employers and organizations are only beginning to have to grapple with *AODA* obligations, despite the *AODA* having received Royal Assent over four years ago. This is because of the *AODA*'s delayed compliance timelines and the long process mandated by the *AODA* for the creation of Accessibility Standards.

Yet as these Accessibility Standards begin to come on line, the time is right for employers to consider these questions:

- How does the *AODA* fit into the overall legislative scheme?
- How does one participate in the development of Accessibility Standards?
- How will the Customer Service Standard impact employers?

- What will the proposed Employment Standard look like?
- How will the *AODA* likely be administered and enforced?

Here is a brief overview for you.

The *AODA* within the Overall Legislative Scheme

Employers should understand that the *AODA* does not diminish the obligations imposed by any other law. In the case of a conflict between the *AODA* and another law or regulation, the one that governs is the one that provides for the highest level of accessibility. As such, the *AODA*'s obligations must be reviewed alongside other legislative accessibility and accommodation requirements.

Participating in Developing Accessibility Standards

Under the *AODA*, standards committees create proposed Accessibility Standards. This involves a public process where interested stakeholders may provide suggestions and comments regarding the content of each Accessibility Standard.

The proposed Accessibility Standards are then made available for a 45-day period for broader public comment at the Ministry of Community and Social Services website,¹ where further information about how to submit comments on

¹ <http://www.accesson.ca/mcss/english/pillars/accessibilityOntario/index>

the proposed Accessibility Standards can also be found. The Minister then decides whether to recommend that the proposed Accessibility Standard become a regulation.

The Customer Service Standard

The Customer Service Standard will apply to designated public sector organizations on January 1, 2010 and to all other goods or services providers on January 1, 2012. Employers should be aware that organizations with at least 20 employees in Ontario must ensure that people involved with providing services receive *specific* training on providing services to persons with disabilities.

The Proposed Employment Standard

The proposed Employment Standard was released for public review between February and May of this year. If passed as law, this standard would apply to *all* organizations with paid employees in the private and the public sectors. The requirements and compliance deadlines would vary based on the size of the organization.

The proposed standard would impose certain obligations. Here are some highlights:

- **A Policy Statement** governing the inclusive design of employment systems and processes and the removal of barriers for those with disabilities;
- **Policies and Training** implementing the Policy Statement;

- **Recruitment, Assessment, Selection and Hiring Requirements**, including developing, adopting and maintaining specific types of procedures for accommodating employees;
- **Retention Requirements**, including specific requirements for retaining and accommodating employees with disabilities, such as creating individual accommodation plans; and
- **Making Specific Categories of Information and Communication Accessible** by placing them in formats compliant with the *Accessible Information and Communications Standard* (which has not been adopted yet).

Administration and Enforcement of the AODA

Although this administrative scheme is really only beginning to take effect, you should be aware of certain important elements:

- **Annual Reporting Requirements** will be imposed on many organizations relating to the Accessibility Standards with which they must comply. The *AODA* permits organizations to avoid this reporting requirement where the organization agrees with the Minister to exceed its obligations under the Accessibility Standard in another respect.
- **Inspectors** will monitor compliance with the *AODA*.
- **Directors** will be responsible for the application of the *AODA*, making

compliance orders where a person or organization has contravened the *AODA*, and ordering that an organization pay administrative penalties. The amounts of such penalties have not been established yet.

- **Offences** will carry penalties of up to \$100,000 for corporations and \$50,000 for individuals for each day or part of a day on which an offence occurs.
- **Appeals of Director's Orders to a Tribunal** are possible, but, at present, no such tribunal has been designated for this purpose.

Lessons for Employers

We expect that many of the questions relating to how the *AODA* will be applied and enforced will be answered with the requirement that designated public sector employees comply with the Customer Service Standard beginning on January 1, 2010. For now, employers should stay tuned for the development of the proposed Employment Standard.

You should take note of your obligations under the Customer Service Standard and prepare to implement all required procedures by the timeline that applies to your organization.

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Western Report

Termination of Employment of Employees on LTD in the Context of a Plant Closure

In the recent case of *USWA v. Weyerhaeuser*, the British Columbia Human Rights Tribunal decided that the company had discriminated against four employees on long-term disability (LTD) when it terminated their employment just months before announcing the permanent shutdown of their place of employment.

What Happened?

Sometime in 2004, the employer initiated a program to terminate the employment of certain employees for non-culpable absenteeism. It was not until April 2007, however, that the employer implemented the program, which resulted in the dismissal of four employees who had been on LTD for periods ranging from four months to 13 years.

In determining which employees to dismiss, the employer considered how long each employee had been away from the workplace, their ability to return to the workplace in the foreseeable future, and their LTD classification. There was no contact with any of the employees prior to the termination to inquire about their condition, their ability to return to work, or their prospects of rehabilitation.

The termination letters gave each employee the opportunity to provide information about their medical condition and prognosis to the employer to demonstrate that they would soon

be able to return to work. If they provided that information, or asked for a period of time in which to do so, their termination decision would be deferred. None of the employees exercised this option.

The terminations were not grieved by the Union, because the employees would “be taken care of” by the continuation of LTD benefits.

On September 17, 2007, the employer announced the permanent shutdown of the mill. However, there is evidence that the employer knew of the near certainty of the shutdown as early as January 2007.

Under the collective agreement, all mill employees were to receive severance pay at the time of shutdown. The Union brought a representative complaint on behalf of the four employees, alleging that the employer had terminated their employment to avoid paying severance and had thus discriminated against them on the basis of their respective disabilities.

What did the Human Rights Tribunal Decide?

The Tribunal accepted, generally, that if an employer has in place a *bona fide* termination program targeted at employees with extensive non-culpable absenteeism – and actually follows it – then the application of that program to an individual employee is not discriminatory, even if it results in the loss of entitlement to severance pay.

Although Weyerhaeuser had a *bona fide* termination program, the termination of the

four employees’ employment was not a *bona fide* application of that program because:

- no employee had previously been terminated for non-culpable absenteeism;
- the decision to close the mill was made before the implementation of the program;
- the HR manager who implemented the program was aware of the impending closure prior to the terminations; and
- the HR manager had conducted a cursory and rushed review of the employees prior to terminating their employment.

The Tribunal found that the only *bona fide* reason for terminating employment for non-culpable absenteeism is that the employment contract is frustrated because the employee can no longer provide the work for which he or she was contracted. The employer’s knowledge of the impending closure meant that the employment relationship with the four employees would have soon ended in any event. Accordingly, the *bona fide* reason for termination of their employment was absent.

Under those circumstances, the Tribunal found, it was more likely than not that the employer had terminated the employees’ employment to avoid paying them severance, thereby discriminating against them on the basis of their respective disabilities.

The Tribunal ordered the employer to reinstate the employees, credit them with the seniority they would have earned but for their

termination, and pay them severance. Additional awards were made for injury to dignity, feelings and self-respect in amounts ranging from \$5,000 to \$20,000.

Lessons for Employers

This case reminds us of the need for caution when making the decision to terminate employment for non-culpable absenteeism. You should consider the following:

- Ensure you map and follow a sound process – the process you follow is as important as making the right decision.
- Create a program for terminating employment for non-culpable absenteeism that has: (i) automated reminders for following up with employees and medical professionals on a regular basis; (ii) a system for regularly and systematically exploring and documenting accommodation efforts; and (iii) a stand-alone review process of any decision to terminate employment.
- Implement the program in a timely manner, put someone in charge, and provide training to the administrators.
- Apply the program in a consistent way to all employees.
- Before making the decision to terminate employment: (i) ensure that up-to-date information on the employee's medical prognosis has been gathered; (ii) consult with the employee (and the Union, if

applicable); and (iii) revisit whether the employee will be able to return to work in the foreseeable future.

- Do not rush to terminate employment regardless of the duration of the employee's absence, the severity of his or her medical condition, or any other circumstances – and do not give undue consideration to any one factor.
- Unless you have obtained legal advice, do not terminate employment for non-culpable absenteeism if the employment relationship is going to come to an end in any event, or if the termination will lead to some other adverse consequence (other than the loss of employment).

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Québec Report

New Developments on the Issue of Clauses Limiting the Transfer of Tasks

It is already well established in the case law that Article 45 of the *Labour Code* is only applicable within Québec and has no extra-territorial reach. As such, an employer may sell, assign or transfer either part or all of its operations to another province without affecting the transfer of the certification or of the collective agreement, as the case may be.

However, can the provisions of a collective agreement limit an employer's right to transfer work performed in an establishment located in Québec to one of its other establishments located outside the province?

This issue was considered by the Superior Court of Québec in *Parmalat Canada v. Tremblay*,² in the context of a review of an arbitration award.

What happened?

The union was certified to represent all office and laboratory employees, except for the company's executive secretary. The address indicated in the certificate was that of the factory in Victoriaville, Québec.

Under the collective agreement:

2.02 An employee excluded from the bargaining unit shall not carry out work

usually carried out by an employee if this could result in the layoff or in the continuation of the layoff of an employee. [Translation]

The parties had asked an arbitrator to determine whether Parmalat had the right to transfer work carried out by an employee in the Victoriaville factory to a factory located in Ontario, with the understanding that this could result in layoffs.

The Arbitrator

The arbitrator concluded that the employer did not have this right. It was held that the collective agreement clause that forbade the transfer of work to employees outside the bargaining unit applied not only to the establishment in Victoriaville, but also to any other establishment, even one located outside Québec. Surprisingly, the arbitrator decided that such a collective agreement clause, irrespective of the context in which it had been imposed, should serve to protect the employment of employees covered by the certificate, regardless of where they are situated.

The Superior Court of Québec

The employer asked the Superior Court to review the arbitrator's decision, raising, in particular, its alleged extraterritorial reach.

The court noted that while the inclusion of the civic address in the text of the agreement was unprecedented in other collective agreements,

² D.T.E. 2009T-665

this mere fact did not mean that the parties intended to limit the reach of the contractual clauses to the factory in Victoriaville. In this regard, we note that Parmalat had “inherited” both the collective agreement and the certification following the purchase of the factory from Lactantia Ltd. At the time of the purchase, there was but one establishment. The court concluded that the parties were considered to have taken into account the new reality of the business.

The court also dismissed the employer's argument with respect to the extraterritorial reach of the arbitrator's decision. According to the court, the employer had contractually limited its freedom to outsource tasks to other employees outside the bargaining unit. In the court's view, employees outside the bargaining unit include not only employees of the establishment identified by the collective agreement, but employees of any other of the employer's establishments as well.

According to the court, the arbitrator's interpretation of such an undertaking affects in no way the geographical reach of the certificate. Rather, the undertaking merely serves to protect the employment of the persons working in the certified establishment.

Lessons for Employers

You need to pay particular attention to the provisions of collective agreement dealing with outsourcing tasks, and to their wording. The extraterritorial reach of such a clause shall not be sufficient to limit its application; the employer who wishes to control subcontracting or

outsourcing with respect to one establishment or geographic region will have to do so using express terms.

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Immigration Corner

Avoiding Issues for Foreign Nationals Entering Canada on Business Trips

You are the Human Resources Director for a Canadian-based company that has affiliates and subsidiaries in numerous countries. One of your responsibilities is to manage the logistics of facilitating the flow of foreign nationals coming to your company for business-related purposes. All individuals are subject to Canadian immigration laws that apply to temporary foreign workers, unless they are either a Canadian citizen or a Canadian permanent resident. Undertaking *strategic advanced planning* for such business trips is critical to ensuring the seamless entry of your employees, business partners or service providers into Canada.

Travelling to Canada for Business

If a work permit is necessary for an individual to participate in business activities in Canada, the next step is to determine what category he or she may be eligible under, and where the person is eligible to apply for the permit. If the person is eligible to apply for a work permit at the border, he or she should travel with supporting documentation that explicitly states the legal basis for the issuance of a work permit. This documentation comprises a positive labour market opinion (LMO) from Service Canada, or, in the case of a work permit application being made in one of the many LMO-exempt categories, support letters from the employer that explain how the person

meets all the legal criteria for inclusion in the particular category.

In some cases, it is important to provide evidence of work experience and educational achievements. For example, under the North American Free Trade Agreement (NAFTA) there is an LMO-exempt category called NAFTA Professional, which has some 60 different occupational subcategories — each with a different set of criteria for qualification based on work experience and educational level. Failure to provide evidence of such achievements may lead to problems at the port of entry, such as excessive delays — and, in some cases, denial of entry to the country.

Carrying supporting materials is also very helpful if a person is trying to gain entry to Canada in a work-permit-exempt category.

Temporary Resident Visas

If a person is a national of a prescribed country such as South Africa, that person requires a special entry document called a temporary resident visa (TRV). This visa must be obtained through a Canadian Consulate — in advance — and cannot be applied for at the border. It is required regardless of the purpose of the trip or the duration of the stay, and without it, the employee may be refused entry to Canada. If a person requires a TRV, that person is precluded from applying either for a work permit or for entry in a work-permit-exempt category at the

port of entry. He or she must do so through a Canadian Consulate.

Criminality

If the person has a previous criminal record, he or she may be denied entry to the country. Determining whether the criminality will result in a person being classified as criminally inadmissible is critical. In some instances, a special temporary immigration pardon – called a temporary resident permit – may be applied for at the port of entry in order to overcome the inadmissibility, and it should be accompanied by supporting materials.

Medicals

An individual may be required under certain circumstances to take an “immigration medical examination” prior to travelling to Canada. If a medical is necessary, then the person is prohibited from applying for a work permit at the port of entry, and he or she must do so through a Canadian Consulate.

Lessons for Employers

What does this mean for you? There are certain things to take care of ahead of time, for instance:

- Check in advance to see if the foreign national can enter Canada without a temporary resident visa or medical exam.
- Do not make the assumption that the person does not require a work permit without consulting an immigration expert first.

- If a work permit is necessary, determine whether one may be obtained at the port of entry, or must be applied for in advance through a consulate.
- Determine whether a work permit may only be secured after Service Canada has issued a Positive Labour Market Opinion.
- If the person does require a work permit and is eligible to apply at the port of entry, ensure that he or she is properly equipped with the correct supporting materials.
- Remember that even if the person does not require a work permit, he or she still may require supporting materials to secure entry in a specific work-permit-exempt category.
- Make the person aware of admissibility issues such as prior criminal convictions.

Above all, you need to remember that advanced planning and analysis are critical!

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Tips / Q&A

“I always feel like ... somebody’s watching me ... ”

Employers may have legitimate reasons for wanting to place employees under video surveillance, such as vulnerability to theft or sabotage, or even concern about safety.

Here we aim to assist you in finding a balance between protecting your legitimate interests and not invading your employees’ ever-increasing rights to privacy.

Q: When can an employer use video surveillance to monitor employees?

A: Courts and arbitrators have focused on determining how the specific video surveillance was implemented and why, with the help of four considerations:

- Is the surveillance necessary for **legitimate or reasonable business interests**? Such interests include loss-prevention and safety or security risks.
- Is the collected information limited to that **necessary** to the purpose? The scope of the surveillance will be deemed reasonable only if it is restricted to what is necessary to the expressed purpose.
- To what extent is the **employee’s privacy** affected? Surveillance for productivity issues, or where employees have a reasonable

expectation of privacy, is usually held to be unreasonable unless there is a significant business interest at stake.

- Were effective **alternatives** considered? Video surveillance is a significant step, or even a last resort. If effective alternatives that are less invasive of privacy do exist, then it may be seen as unreasonable to use video surveillance. That said, an employer would not be required to use inefficient or very costly alternatives, provided the measure is reasonable and necessary.

Q: What about surreptitious surveillance by cameras whose locations and purposes are not known to the employees?

A: Varying standards exist regarding surreptitious video surveillance, and such surveillance should be reserved for certain situations, such as: where substantial evidence of wrongdoing already exists or where less invasive measures have already been exhausted. The decision for such surveillance should be made at a senior management level.

Tips for Employers

- Before implementing video surveillance, consider viable alternatives and maintain records that can be used as evidence if need be.

- If the video surveillance is to be open and with a business or security purpose: identify this purpose; make it known to employees; restrict the surveillance to that specific use; and be prepared to demonstrate its need.
- If the video surveillance is considered necessary, ensure that the surveillance is reasonable and that its intrusive effect on privacy is limited. Weigh the employees' loss of privacy against the employer's benefit, to ensure the proportionality of the measure.
- Review any relevant collective agreement for any stipulated restrictions.
- Since some arbitrators have required that an employer confront an employee with its suspicions, prior to video surveillance, consider whether confronting the employee is possible, or whether it would undermine your subsequent surveillance.
- Consider the various kinds of video surveillance equipment and choose the one most suitable, keeping in mind that admissibility in court depends on a videotape being a true and accurate reproduction.
- Consider contracting with a reputable investigation or security services provider to set up and maintain the surveillance system.
- Whether you hire a security services provider or do your own taping, know: who created the tape; who, if anyone, edited the tape; and that the tape has been securely maintained and un-tampered.
- Ensure that the video surveillance documents the acts in question, portraying them clearly, without bias or manipulation. A videotape whose prejudicial effect exceeds its probative value can be excluded from evidence.
- The videotapes should clearly mark the *correct* time and date when they were made and should not be edited for content or regarding time, lighting or continuity.
- Ensure that a witness will be available to testify that he or she knows when, where and under what circumstances the videotape was made, and that the tape is a fair and accurate reproduction. Ensure that only one person does the actual videotaping and that only one person (preferably the same person) maintains secure custody of the tapes.
- The individual conducting covert video surveillance of an employee should be prepared to respond if the employee discovers the surveillance, responding to questions briefly and honestly, i.e., that he or she is videotaping the employee's activities; that he or she was asked to do so; and, if the employee demands to know by whom, by responding that he or she is not at liberty to say.

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