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CLE

As the economic downturn deepens, the potential for costly employment law disputes increases. Learn how to minimize your risks.

# Employment Law 2009

*Proactively Managing Legal Risk in Challenging Times*

20 top experts will give you practical advice on new and recurring issues, including:

- Implementing change in the workplace – how far can you go before you trigger a constructive dismissal claim?
- What is the scope of a dismissed employee's duty to mitigate?
- The latest cases on "just cause"
- Overtime class action lawsuits – is your organization next?
- Successful strategies for managing workplace absences
- Monitoring and controlling employees' use of technology and company property

**Plus! Judges Panel: Employment Terminations - A View from the Bench**

**Pre-Conference Workshop - April 27, 2009**

A. *Employment Standards Act, 2000: The Complete Guide*

**Post-Conference Workshops - April 29, 2009**

- B. Terminations Without Cause: What are Your Options?
- C. Attendance Management: Key Strategies for HR Professionals
- D. Conducting Proper Workplace Investigations

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### CONFERENCE DATE

April 28, 2009

### WORKSHOPS

April 27 & 29, 2009

### LOCATION

Osgoode Professional  
Development Centre  
1 Dundas St. W., 26th Floor  
Toronto, ON

### CHAIR

Stuart E. Rudner  
Miller Thomson LLP

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# Employment Law 2009

## *Proactively Managing Legal Risk in Challenging Times*

**“Excellent content, speakers and structure”**

**Yasmin Visram, Senior Counsel  
Industrial Alliance Insurance  
and Financial Services Inc.  
(2007)**

**A**gainst an ominous background of a deepening global recession, employment law continues to develop at a rapid pace. In the past year alone, there have been four landmark employment law cases decided in the Supreme Court that will have a significant impact on HR practice for some time to come. As the recession intensifies, the need to stay current has never been more critical.

This topical one day *Osgoode Professional Development* program was designed to provide you with the latest advice, strategies, tips and tools that you will need to keep abreast of recent developments, and help you to minimize claims and reduce liability in today's turbulent economic times.

Whether you are a human resource professional, in-house counsel or lawyer in private practice, this essential program will give you a comprehensive update and practical advice on those employment law issues most likely to hit your desk this year. Register now for this definitive update on the most important employment law developments.

**Plus!** Take advantage of the optional interactive workshops that will provide in-depth instruction in key areas which are prime sources of employment liability:

### **Pre-Conference Workshop**

A. *Employment Standards Act, 2000: The Complete Guide*

### **Post-Conference Workshops**

B. *Terminations Without Cause: What are Your Options?*

C. *Attendance Management: Key Strategies for HR Professionals*

D. *Conducting Proper Workplace Investigations*

These intensive sessions are an ideal opportunity to get your questions answered by leading employment law practitioners. Enrollment in these workshops will be strictly limited, so don't delay your registration.

**Register now by visiting [www.osgoodepd.ca](http://www.osgoodepd.ca), calling 416.597.9725 or 1.888.923.3394, emailing [opd@osgoode.yorku.ca](mailto:opd@osgoode.yorku.ca) or faxing 416.597.9736.**

## **Chair**

**Stuart E. Rudner, Miller Thomson LLP**

## **Faculty**

**The Hon. Justice Todd L. Archibald  
Superior Court of Justice**

**Adrienne Campbell, Miller Thomson LLP**

**The Hon. Justice Randall S. Echlin  
Superior Court of Justice**

**Michael P. Fitzgibbon, Borden Ladner  
Gervais LLP**

**Chris Foulon, Israel Foulon LLP**

**P.A. Neena Gupta, Gowling Lafleur  
Henderson LLP (Waterloo)**

**Natalie C. MacDonald, Grosman, Grosman  
& Gale LLP**

**Ronald S. Minken, Minken & Associates  
Professional Corporation**

**Richard J. Nixon, Davis LLP**

**The Hon. Justice Gladys I. Pardu  
Superior Court of Justice**

**Janice Rubin, Rubin Thomlinson LLP**

**The Hon. Justice John R. Sproat  
Superior Court of Justice**

**Ian J. Turnbull, The Canadian Privacy  
Institute**

# Agenda

## PRE-CONFERENCE WORKSHOP

**A. Employment Standards, Act 2000:  
The Complete Guide**  
April 27, 2009, 1:00 p.m. - 4:00 p.m.

### Workshop Leaders

**Stuart E. Rudner**, Miller Thomson LLP  
**Erik Marshall**, Miller Thomson LLP

This Pre-Conference Workshop is geared to give you an opportunity to deepen and expand your knowledge of the *Employment Standards Act, 2000*, the key piece of legislation that establishes minimum employment standards for workplaces in Ontario. Topics covered include:

- The scope of the ESA - who's covered by it, and who's not?
- Hours of work
- Overtime pay
- The minimum wage
- Public holidays
- Vacation with pay
- Leaves of absence - when does an employee qualify?
  - pregnancy leave
  - parental leave
  - family medical leave
  - personal emergency leave
  - what obligations do employees have when on leave?
- Termination of employment
  - general notice requirements
  - individual vs. mass terminations
  - what are requirements during the notice period
  - calculating severance pay
- Complaints and enforcement

This session will give you the tools you need to know and apply the key provisions of the *Employment Standards Act, 2000*, and will help you to respond effectively to the challenges of ESA complaints and enforcement.

**Tuesday, April 28, 2009**

**8:00 Registration and Continental Breakfast**

**8:25 Introduction from the Chair**  
**Stuart E. Rudner**, Miller Thomson LLP

Stuart E. Rudner will provide an overview of the past year, which has seen an unprecedented number of cases decided in the *Supreme Court of Canada*.

**8:40 Judges Panel - Employment Terminations:  
A View from the Bench**

### Moderator

**Stuart E. Rudner**, Miller Thomson LLP

### Panellists

**The Hon. Justice Todd L. Archibald**, Superior Court of Justice  
**The Hon. Justice Randall S. Echlin**, Superior Court of Justice  
**The Hon. Justice John R. Sproat**, Superior Court of Justice  
**The Hon. Justice Gladys I. Pardu**, Superior Court of Justice

- How do judges determine what is a just cause for dismissal?
- Using employment agreements to detail notice obligations

- Types of terminations - working notice, salary continuance, lump sums
- How should employers assess notice periods?
- How do you rebut the presumptions regarding position as a factor?
- Avoiding bad faith claims
- Dealing with bonuses, commissions, pensions and other employment related benefits
- Can you terminate someone who is on leave?

**9:40 Damages in Wrongful Dismissal Claims in the post-Honda era**

**Natalie C. MacDonald**, Grosman, Grosman & Gale LLP

- What types of damages are available?
- "The Damages Formerly Known As Wallace"
- Punitive damages - where are we now?
- Avoiding duplication of damages
- Is position/character of employment still relevant?

**10:20 Refreshment Break**

**10:35 Effectively Managing the Use of Technology and Company Property**

**Michael P. Fitzgibbon**, Borden Ladner Gervais LLP

- Use of cell phones, lap tops and other workplace technology
- When should employees' electronic activities be monitored?
- Should you allow access to social networking sites?
- Employee blogs - what are the limits of "free speech" in the employment context?
- Monitoring employee emails, web-surfing and postings on blogs and social networking sites
- Tips for drafting, implementing and maintaining effective property and technology use policies

**11:15 Overtime Class Actions Lawsuits: Is Your Organization Next?**

**Richard J. Nixon**, Davis LLP

CIBC, CIBC World Markets Inc, Scotiabank, CN Rail all face overtime class action lawsuits, and KPMG recently settled a \$20 million lawsuit on the same issue. Research suggests many employers are not complying with statutory requirements in this area.

- When are class proceedings likely?
- Federal and provincial obligations to pay overtime
- Tips and tools to help identify exposure - the beneficial role of workplace audits
- Dealing with potential or actual class actions

**12:00 Networking Luncheon**

**1:00 "Just Cause" Round-Up**

**Ronald S. Minken**, Minken & Associates Professional Corporation

The law is clear - allegations of just cause must be considered using a contextual approach. As a result, there are no "hard and fast" rules for determining what is, and is not, just cause for summary dismissal. The same transgression may be just cause in one case and not just cause in another. So how are employers to make an informed

# Agenda

decision? An experienced employment lawyer will guide you through the maze.

## 1:30 The Scope of the Employee's Duty to Mitigate Adrienne Campbell, Miller Thomson LLP

- The scope of the duty to mitigate: has it changed in light of the SCC's decision in *Evans v. Teamsters Local Union No. 31*
- Do the same principles apply to constructively dismissed and wrongfully dismissed employees?
- What sort of employment will a dismissed employee be obligated to accept?
- When do employees have to return to the employer that dismissed them?

## 2:10 Managing Confidential Information in the Workplace Ian J. Turnbull, The Canadian Privacy Institute

- What information is considered private and/or personal?
- What information should be kept in the employee file?
- Where should you keep medical and other personal information?
- What safeguards must be in place to protect personal information?
- Who is entitled to access the employee file?
- Are job applicants entitled to see the references relating to their application?

## 2:45 Refreshment Break

## 3:00 Employees' Duties During and Post-Employment P.A. Neena Gupta, Gowling Lafleur Henderson LLP (Waterloo)

- The impact of *RBC Securities v. Merrill Lynch Canada Inc.*
- Who has fiduciary duties?
- Is there a duty of good faith?
- What information can former employees use?
- Can former employees solicit their clients?
- Are non-competition covenants ever enforceable?
- What are non-dealing clauses?
- Are the former employee's obligations different during the notice period?
- How are damages calculated when there is a breach

## 3:40 How to Manage Workplace Change Without Triggering Claims for Constructive Dismissal Chris Foulon, Israel Foulon LLP

As organizations begin to tighten their belts during the current global recession, hiring freezes and/or layoffs may mean employees being asked to take on new tasks or responsibilities, or to accept cuts in pay and/or benefits. This session will explore the extent to which employees can be required to accept such changes without triggering a claim for constructive dismissal.

- The impact of *Wronko v. Western*
- What is a constructive dismissal?
- What are fundamental terms of the employment agreement?
- What constitutes a substantial change?
- How much of a decrease in remuneration is substantial?
- How can you impose new terms on existing employees?
  - what can you offer them?
  - can you provide notice of the change?
  - what do you do if they refuse?

## 4:20 Employment References: Dos and Don'ts Janice Rubin, Rubin Thomlinson LLP

- Is there good reason not to provide subjective references?
- Can you be sued for "wrongful hiring" if you give a positive reference?
- Can you be sued for defamation if you give a negative reference?
- Is it "bad faith" to refuse to provide a letter of reference?
- Controlling who provides written and verbal references
- What to include in them

## 4:50 Conference Concludes

### POST CONFERENCE WORKSHOPS

#### Workshop B Terminations Without Cause: What Are Your Options? April 29, 2009, 9:00 a.m. - 12:00 p.m.

Peter Israel, Israel Foulon LLP  
Barry Fisher, Barry Fisher Arbitration & Mediation

This workshop, led by two senior employment law practitioners, focuses on the key elements in employment terminations without cause and looks at the options available.

- The pros and cons of different types of dismissals without cause:
  - working notice
  - salary continuance
  - lump-sum payments
- Bonuses, commissions and car allowances - what should go into the severance package?
- Working notice and incentive programs
- Dealing with benefits such as long term disability and life insurance
- Addressing pension plans, stock options and profit sharing
- Drafting termination documents
- The letter of reference - options, risks and realities

Barry Fisher is an experienced barrister, mediator and arbitrator. Barry trained as a mediator at the Academy of Mediation in Toronto, Harvard Law School and ADR Associates in Washington D.C. Barry is the creator of the *Wrongful Dismissal Database*, which contains over 2500 cases and is extensively used by lawyers, judges and human resource professionals across Canada.

Peter Israel is the founding partner of Israel Foulon LLP. With more than 30 years of experience, Mr. Israel regularly advises and represents executives, in-house counsel and management, in matters and actions dealing with preventative policies, recruitment, employment agreements, collective agreements, grievances, matters relating to health and safety and human rights in the context of employment terminations, layoffs, plant closures, successor employer obligations etc. in both the federal and provincial arenas.

## Workshop C

### Attendance Management: Key Strategies for HR Professionals

April 29, 2009, 1:00 p.m. - 4:00 p.m.

Nancy Shapiro, Koskie Minsky LLP

Jonathan Laurence Dye, Heenan Blaikie LLP

Attendance management is arguably the number one workplace challenge for human resource professionals today. Widespread absenteeism causes disruption to the workplace, compromises efficiency and blunts productivity and morale. This workshop is intended as an essential guide for handling attendance concerns at work.

- Developing an effective attendance management policy
- When to require doctors notes
- When can you require a visit to the company doctor
- Legislative and common law obligations in accommodating a disability – the latest developments
- The impact of *Honda v. Keays*
- What amounts to undue hardship?
- What amounts to a disability today?
- Drug, alcohol and gambling addictions
- The employer's role in identifying mental/psychological difficulties experienced by their employees
- What are the most common mistakes you should avoid?
- Access to information, confidentiality and privacy
- How to develop practical back to work strategies
- How do you adequately prepare for an aging workforce: what are the specific challenges that you face?
- Making the decision to dismiss when accommodation fails – dos and don'ts

Nancy Shapiro represents both employers and employees in issues surrounding hiring, termination, discipline, disability and constructive dismissal. Nancy was recently elected the Continuing Legal Education Liaison of the Ontario Bar Association's Labour and Employment Law Executive Committee.

Jonathan Laurence Dye is a partner at Heenan Blaikie. His practice focuses on employment law, primarily advising clients on such matters as wrongful dismissal, workplace human rights, employment standards and employment issues in corporate transactions. Jonathan is currently the Chair of the Labour and Employment Section of the Ontario Bar Association. He is a prolific author, and has written dozens of articles for a wide range of legal periodicals. An accomplished speaker, Jonathan has chaired and spoken at numerous employment law and workplace human rights' conferences.

## Workshop D

### Conducting Proper Workplace Investigations

April 29, 2009, 1:00 p.m. - 4:00 p.m.

Madeleine L.S. Loewenberg, Sherrard Kuzz LLP

Lauren Bernardi, Bernardi Human Resource Law, Mississauga

When faced with allegations of employee workplace misconduct, are you equipped to conduct a proper and

effective workplace investigation? Are you aware of the laws that govern the investigative process, and the problems and pitfalls that lie in wait? If you are not, and you get it wrong, the consequences could be severe indeed. Madeleine Loewenberg and Lauren Bernardi, will give you practical advice, strategies, tips and tools for carrying out effective investigations.

#### The Investigative Process

- Objective of the investigation
- Role of advisors
- Role of the investigator
- Attributes of effective investigators

#### Pre-Investigative Steps

- Getting it in writing
- Benefits of a proper complaint
- Preparing an investigation plan
- Notifying the parties
- Documentation

#### Interviewing

- Do's and don'ts
- Listening skills – active listening exercise
- What to tell the complainant, respondent and witnesses
- Creating questions
- Why people are reluctant to complain – group exercise
- Confidentiality
- Internal biases
- Off the record statements

#### Making a Finding

- One person's word against another's
- Assessing credibility
- The burden of proof
- Similar fact evidence
- Preparing the report

#### After a Finding

- Remedies to consider
- What if the complaint is malicious
- Repairing strained relationships
- Preventing retaliation and further incidents

Lauren Bernardi is an employment lawyer and HR advisor who has been providing strategic advice and representation to a wide range of individuals and organizations for more than 15 years, and has run countless workplace investigations. She is the author of *Powerful Employment Policies* (Canada Law Book) and the *Recruitment Workbook & Disk* (Butterworths).

Madeleine Loewenberg regularly appears before a broad range of courts and administrative tribunals. She lectures and leads workshops for the employment and labour bar, employer associations and clients on a wide variety of topics related to her practice. She is a frequent contributor to *Canadian Employment Law*, *Employment Law at Work* and *Workplace News*.

# Registration

Get practical employment law advice  
for uncertain and volatile times

**Yes.** Register me for:  *Employment Law 2009*

Workshop(s)  **A:** *Employment Standards Act 2000*  **B:** *Terminations Without Cause*

Choose one of  **C:** *Attendance Management* or  **D:** *Workplace Investigations*

I am unable to attend. Please send me information about ordering program materials.

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Fees include attendance, program materials, continental breakfast, lunch and break refreshments.

Please inquire about group discounts, financial assistance and CLE credits.

## CLE Credits

Approved in accordance with the requirements of the LSUC Certified Specialist Program, the BC CPD, the NY CLE Board (for transitional and non-transitional lawyers) and HRPAAO.

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## Program Changes

We will make every effort to present the program as advertised, but it may be necessary to change the date, location, speakers or content with little or no notice. In the event of program cancellation, York University and Osgoode Hall Law School's liability is limited to reimbursement of paid fees.

## Dates & Times

Tuesday, April 28, 2009 - 8:25 a.m. - 4:50 p.m.

Pre-Conference Workshop A - Monday, April 27, 2009: 1:00 p.m. - 4:00 p.m.

Wednesday, April 29, 2009 - Workshop B - 9:00 a.m. - 12:00 p.m.;

Workshop C - 1:00 p.m. - 4:00 p.m.; Workshop D - 1:00 p.m. - 4:00 p.m.

Please arrive a half hour early for sign-in and material pick-up.

Dress is business casual.

## Cancellations and Substitutions

Substitution of registrants is permitted at any time. If you are unable to find a substitute a full refund (less \$50 administration fee) is available if a cancellation request is received in writing 14 days prior to the program date. No other refund is available.

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