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Comprehensive one-day coverage of the key developments in employment law over the past year

# Employment Law 2010

## Proactively Managing Legal Risk in Challenging Times

Get strategic and practical advice from judges and employment law experts on:

- Damages for wrongful dismissal post *Honda v. Keays*: where are we now?
- Are the floodgates open? Employment litigation under the new *Rules of Civil Procedure*
- Implementing workplace change without triggering a claim for constructive dismissal
- Effective employee performance management: tips and tools
- "Just cause" round-up (or just what do you have to do to get fired these days?)
- Protecting the business from departing employees: the latest on restrictive covenants
- Dealing with employees' use (and abuse) of social networking sites both at work and outside the workplace
- References 101: what every employer should know

**Plus!** Don't miss the Optional Post-Conference Workshops

- A. *Employment Terminations: Best Practices*
- B. *Recruitment and Hiring: The Legal and Practical Guide*
- C. *Emergency Planning: The Complete Guide to Employers' Duties and Obligations in Times of Crisis*

### Chair

Stuart E. Rudner, Miller Thomson LLP

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Conference  
Webcast  
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### DATE & TIME

April 26, 2010

8:25 a.m. - 4:45 p.m. EDT/EST

### OPTIONAL WORKSHOPS

April 27, 2010

9:00 a.m. - 12:00 p.m.

1:00 p.m. - 4:00 p.m.

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# Employment Law 2010

## *Proactively Managing Legal Risk in Challenging Times*

**Are you doing what you should to manage evolving risks?**

In today's volatile economic environment, employment law continues to develop at a rapid pace. Human resource professionals and their advisers face a plethora of new court and human rights decisions, new legislation making it easier for employees to bring wrongful dismissal claims, as well as the challenges posed by the economic recession. The need to keep up-to-date has never been more paramount.

This timely *Osgoode* program will provide you, in one information-packed day, 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.

**Whether you are a human resources professional, in-house counsel, an employer, manager or a lawyer in private practice, don't miss this opportunity to get a comprehensive update and practical advice on the employment law issues most likely to hit your desk this year.**

Also, take advantage of the post-conference workshops which will provide in-depth instruction in three key areas:

*A. Employment Terminations: Best Practices*

*B. Recruitment and Hiring: The Legal and Practical Guide*

*C. Emergency Planning: The Complete Guide to Employers' Duties and Obligations in Times of Crisis*

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### Chair

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

### Faculty

**Claude Balthazard, Ph.D, Director  
HR Excellence, Human Resources  
Professionals Association**

**Peter L. Biro, WeirFoulds LLP**

**Jules B. Bloch, Jules B. Bloch Mediation/  
Arbitration Inc.**

**Jack Braithwaite, Weaver, Simmons LLP  
Sudbury, Ontario**

**Jonathan L. Dye, Heenan Blaikie LLP**

**Jennifer M. Fantini  
Borden Ladner Gervais LLP**

**The Hon. Justice Douglas K. Gray  
Superior Court of Justice**

**M. Norman Grosman, Grosman  
Grosman & Gale LLP**

**Richard J. Nixon, Davis LLP**

**The Hon. Justice John C. Murray  
Superior Court of Justice**

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

**Claire Pressman, References &  
More Services Ltd.**

**Andrew J. Roman, Miller Thomson LLP**

**Karen M. Sargeant, Fasken Martineau  
DuMoulin LLP**

**Carol S. VandenHoek, Miller Thomson LLP**

# Agenda

Monday, April 26, 2010

## 8:00 Registration and Continental Breakfast

## 8:25 Welcome and Introduction from the Chair

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

An overview of the past year, highlighting the cases you need to know about.

## 8:40 Judges Panel – Assessing Damages for Wrongful Dismissal in the Post *Honda v. Keays* World: Where Are We Now?

**Moderator**

**Jules B. Bloch, Jules B. Bloch Mediation/Arbitration Inc.**

**Panellists**

**The Hon. Justice John C. Murray, Superior Court of Justice**

**The Hon. Justice Douglas K. Gray, Superior Court of Justice**

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

## 9:30 New Rules on Civil Procedure: What Every HR Professional Should Know

**Carol S. VandenHoek, Miller Thomson LLP**

As of January 1, 2010 Ontario's Rules of Civil Procedure are changing. Employers must be aware of the significant impact these changes will have on employment litigation, and they should prepare for a greater number of wrongful dismissal cases ending up before the courts.

- Expanding the scope of the Small Claims Court and its likely impact on wrongful dismissal claims
- Summary judgment motions: tactical considerations for employers
- Examinations for discovery under the new rules: what you need to know

## 10:00 Changing the Terms of Employment: Tips and Tools for Avoiding Constructive Dismissal Claims

**Jonathan L. Dye, Heenan Blaikie LLP**

In today's challenging economic climate, hiring freezes and layoffs may mean remaining employees being asked to take on new tasks or responsibilities. Belt tightening may also mean that employees are subject to cuts in their pay and benefits. This session will explore the extent to which employees can be required to accept such changes without triggering a claim for constructive dismissal. It will also offer creative solutions to the challenges facing employers in this context.

## 10:40 Refreshment Break

## 10:55 The Duty to Accommodate and Religious Observance: What Are Your Obligations?

**Richard J. Nixon, Davis LLP**

- Do you have to give employees time off to observe religious holidays - and what if they're not even "religious"?
- Is it true that all non-Christian employees are entitled to two paid days off for religious holidays?
- Can you insist that employees use vacation days or banked overtime for religious holidays?
- Do you have to provide time and space for employees to pray while at work?
- Do you have to hire someone who will be unable to work the required days/hours because of religious requirements?

## 11:30 Effective Performance Management: Best Practices

**M. Norman Grosman, Grosman, Grosman & Gale LLP**

**Claude Balthazard, Ph.D, Director, HR Excellence, Human Resources Professionals Association**

An effective performance management system is essential on a number of fronts. In addition to correcting poor performance, in the context of wrongful dismissal or human rights claims, it can be used to effectively rebut claims of harassment, discrimination or retaliation. Also, effective performance management can go a long way to help retain talented staff by giving them valuable feedback, and by expressly acknowledging their contributions to the business.

- Conducting performance reviews: dos and don'ts
- The importance of timely and accurate documentation regarding performance deficiencies
- The need for regular communications with staff
- Progressive discipline
- Effectively coordinating the response from management and human resources

## 12:15 Networking Luncheon

## 1:15 Challenging Human Rights Tribunal Proceedings Where the Process is Being Abused By Employees and Job Applicants

**Andrew J. Roman, Miller Thomson LLP**

- Do proceedings before the Ontario Human Rights Tribunal reward a complainant simply for being a complainant?
- If someone who cannot do the job as advertised or posted is not hired, and complains that this was because of handicap, (even if, in fact, they have no handicap), will you have to pay that person compensation for not hiring them?
- If you are put through a hearing and win, or if the complainant withdraws the complaint on the eve of the hearing, can you recover any part of your costs?

## 2:00 "Just Cause" Round-Up

**Jack Braithwaite, Weaver, Simmons LLP, Sudbury, Ontario**

- What does one have to do to get fired nowadays?
- A review of the recent cases where just cause has been alleged

## 2:40 Refreshment Break

## 2:55 More Restrictions on Restrictive Covenants

**Jennifer M. Fantini, Borden Ladner Gervais LLP**

The decision by the Supreme Court of Canada in *Shafroon v. KRG Insurance Brokers (Western) Inc.* illustrates the need to draft very clear, reasonable and unambiguous restrictive covenants. Failure to do so will leave the employer exposed to departing employees.

- No rewriting and no "reading down"
- "Notional" severance and "blue pencil" severance
- Ambiguity and unreasonableness: will "ladder" or "Russian doll" clauses in employment contracts now routinely fail because they are ambiguous?
- When will the doctrine of rectification apply?

# Agenda

## 3:30 Employees Use of Social Networking Sites: Practical Steps for Employers

Peter L. Biro, WeirFoulds LLP

The legal implications for employers of their employees' ever increasing presence on the web through blogs, social networking sites such as "Facebook", "MySpace", or other forms of social media, evolve almost daily. In this session, Peter Biro looks at how to actively control the legal risks associated with these activities.

- Are you potentially on the hook for claims of defamation, harassment or discrimination as a result of an employee's postings on a blog or social networking site?
- What information gathered from social networking sites can employers legitimately use when making employment decisions?
- Adequately addressing privacy concerns: monitoring employees use of technology
- Using social networking sites for employment screening
- Recent cases
- Tips and tools for drafting clear, effective employment policies governing employees' use of social media sites and blogs

## 4:05 Giving Employment References and Reference Checking: What Can You Do and What Should You Do?

Karen M. Sargeant, Fasken Martineau DuMoulin LLP

Claire Pressman, References & More Services Ltd.

- What are the former employers main concerns about giving a reference? Are these concerns justified?
- "No comment" policies – should you be moving beyond start and end dates of employment and job title?
- Are the concerns about defamation realistic?
- An otherwise positive reference omits negative information about the former employee: are you on the hook?
- Why outsource reference checking?
- Effective policies and procedures for giving references and checking references

## 4:45 Conference Concludes

**Workshop A (Back by popular demand!)  
Employment Terminations: Best Practices  
Tuesday, April 27, 2010 9:00 a.m. - 12:00 p.m.**

Peter Israel, Israel Foulon LLP

Barry Fisher, Barry Fisher Arbitration & Mediation

Given the changes to the Ontario Rules for Civil Procedure that came into force on January 1, 2010, it is likely that more wrongful dismissal claims will come before the courts. More than ever before, employers, human resources professionals and their advisors need to keep abreast of this constantly changing and evolving area of law.

Returning for the third time, this highly praised workshop focuses on the key elements in employment terminations, and highlights the best practices to adopt to enable you to avoid costly errors and mistakes. Two very experienced lawyers, Barry Fisher and Peter Israel will guide you through the maze. You will learn about the common problems and pitfalls surrounding the termination issue, and strategies, tools and tips for avoiding them. More specifically you will learn:

- What are the statutory requirements for lawful terminations?  
An overview of the applicable statutory provisions governing the termination of the employment relationship

- What are the very latest cases on notice requirements?
- The dos and don'ts of drafting a termination letter: What should be in it, and what should be left out?
- How do you go about structuring a severance package, and how do you deal with claims for bonus, commissions, pension plans, life and health insurance benefit extensions?
- What are the important considerations when dealing with large scale employment terminations?
- Releases that work: How to draft an effective release and waiver of claims. What effect does a release have in the context of a *Human Rights* complaint?
- Best practices for conducting the termination interview
- How to deal with requests for references
- What is the role of arbitration and mediation in the context of terminations?

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. He has authored numerous articles on wrongful dismissal, mediation practice and labour arbitration, and he is a popular speaker at legal conferences and seminars. Barry is the creator of the *Wrongful Dismissal Database*, which contains over 2500 cases and is extensively used by lawyers, judges and human resources professionals across Canada.

Peter Israel is the founding partner of Israel Foulon LLP, a boutique practice specializing in Employment and Labour Law. With more than 30 years of experience, Peter 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 B Recruitment and Hiring: The Legal and Practical Guide

Tuesday, April 27, 2010 1:00 p.m. - 4:00 p.m.

Sarah C. Crossley, Ogilvy Renault LLP

Madeleine L.S. Loewenberg, Sherrard Kuzz LLP

In this interactive session, Madeleine Loewenberg and Sarah Crossley examine and explain the key considerations, obligations and duties in play during the hiring and recruitment process.

- Laws impacting the hiring process – an overview
- Job postings and recruitment – dos and don'ts
- Obtaining and checking employment references
- Conducting background checks, including criminal record checks
- Avoiding discrimination claims in hiring: statements/questions that you should avoid during the job interview (or steps to be taken not to fall foul of provincial Human Rights Codes)
- The importance of note taking and record keeping during the interview process
- Avoiding claims of "wrongful hire"
- Avoiding making oral job offers during candidate interviews
- What should go into an offer letter? What shouldn't go in
- Should the offer of employment be conditional on the receipt of satisfactory references?
- Special considerations when hiring immigrant workers: What are an employer's obligations to determine if a worker is legally entitled to work in Canada?

# Agenda

- What are the penalties for failing to exercise the necessary “due diligence” in this context
- Determining the form, structure and content of the contract of employment – what should go in, and what should be left out?
- Tips and tools for crafting a valid, enforceable contract that fits in with organizational needs – one size does not fit all!
- Drafting provisions relating to severance pay, bonuses, commission, stock options, career counseling, continuance of insurance
- The essential policies and procedures – harassment, privacy, use of technology, benefits, discipline, absenteeism, overtime, retirement and health and safety.
- Conducting effective policy and handbook reviews – common errors and/or omissions

**Madeleine L.S. Loewenberg** is a partner at Sherrard Kuzz LLP. She 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. Madeleine is a frequent contributor to *Canadian Employment Law*, *Employment Law at Work* and *Workplace News*.

**Sarah C. Crossley** is a partner at Ogilvy Renault LLP. Sarah advises employers on a variety of employment and labour matters, including terminations, human rights, collective agreement administration, employment agreements, policy development, discipline and discharge. She regularly acts as employer counsel in wrongful dismissal litigation, grievance arbitrations and human rights complaints and frequently provides seminars and training for clients on a variety of matters, including human rights, harassment, discrimination, terminations and effective workplace management.

- What constitutes an emergency?
- The differences between union and non-union workplaces
  - collective agreement considerations versus employment contracts
  - HR policies and procedures
- Valuable tips and tools for preparing and implementing a comprehensive emergency plan for your workplace, including:
  - the identification of roles and responsibilities
  - the importance of effective communication
  - anticipating the unexpected in an emergency
  - organizational policy and practical considerations
  - how to de-brief and evaluate the effectiveness of your plan

**Jordan Rodney** is the President of *Maximum People Performance Inc.* a people development organization that partners with its clients to maximize the performance of their people. He is a lawyer, an instructor at the Schulich School of Business, and a results-driven Human Resources professional with experience in employee and labour relations, negotiation, facilitation and change management. Jordan incorporates a variety of tools, assessments and continuous improvement methodologies to help his clients improve their performance. He obtained his LL.B from the University of Western Ontario, and a Masters of Industrial Relations from Queen's University.

**Daniel J. McKeown** is a member of Miller Thomson's Labour & Employment Law Practice Group, based in the Waterloo office. He has considerable expertise in labour and employment law, including wrongful dismissal litigation, employment standards and human rights. Prior to joining Miller Thomson, Daniel served as Nortel's Senior Counsel, Labour & Employment, for approximately ten years.

## Workshop C

***Emergency Planning: The Complete Guide to Employers' Duties and Obligations in Times of Crisis***  
Tuesday, April 27, 2010 1:00 p.m. - 4:00 p.m.

**Daniel J. McKeown**, Miller Thomson LLP

**Jordan Rodney**, Maximum People Performance Inc.

Daniel McKeown and Jordan Rodney will review workplace laws and operational considerations that are relevant in the context of emergencies, such as pandemics, and will discuss what employers need to consider in contingency planning. In this interactive workshop, you will learn:

- The current statutory regime in Ontario, including:
  - *Occupational Health and Safety Act* - ensuring the health and safety of workers, providing information, instruction and supervision, work refusals
  - *The Employment Standards Act, 2000* - emergency leave; declared emergency; personal emergency leave; family medical leave; hours of work and overtime
  - *Human Rights Code* - right to equal treatment without discrimination because of disability – actual or perceived
  - *Personal Health Information Protection Act* - privacy vs. reporting obligations, and managing medical information before, during and after the crisis
  - *Workplace Safety and Insurance Act*
  - *Employment Insurance Act*

## Who Should Attend

- Human Resources Professionals
- Senior Managers and Supervisors
- Attendance and Accommodation Managers
- In-house Counsel
- External Counsel who represent employers and employees
- Human Resources Consultants
- VPs, Directors, Business Owners
- Arbitrators and Mediators

# Registration

Learn the latest tips, tools and strategies you'll need to avoid costly mistakes

Register me for:  Employment Law 2010  Conference  Workshop A  Workshop B or  Workshop C

I will attend:  On site  Via webcast - single viewer (conference only)

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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.

## 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.

## Dates & Times

Monday, April 26, 2010 – 8:25 a.m. – 4:45 p.m. EDT/EST

Optional Workshops: Tuesday, April 27, 2010

Workshop A: 9:00 a.m. – 12:00 p.m.; Workshops B & C: 1:00 p.m. – 4:00 p.m.

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

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