LEGAL QUESTIONS AND ANSWERS

Research answers to the questions presented by the members of the Professional Golfers' Association of Alberta regarding various employment issues arising under the Alberta Employment Standards Code (the "Code"). The following is the result of that analysis. This document is for discussion purposes only. Its contents do not hold the PGA of Alberta or its Members liable in any way.

For a seasonal salaried employee, does the employer have to provide holiday pay or days in lieu to satisfy government regulations?

For a seasonal hourly employee, does the employer have to provide holiday pay or days in lieu to satisfy government regulations?

Yes, the employer must pay holiday pay in such situations, regardless of whether the employee is seasonal salaried or seasonal hourly.

Under the Code, the only employees who are exempt (i.e. ineligible) from application of the general holidays and general holiday pay are:

- employees on a farm or a ranch
- salespersons who mainly work outside the employer's place of business
- various other types of salespersons
- professionals such as real estate brokers, and licensed insurance and securities salespersons
- instructors or counselors at a non-profit educational or recreational camp
- extras in a film or video production
- employees covered by other Acts (academic staff)
- municipal police officers.

According to the Code and the regulation thereunder, employees eligible for holiday pay are those who have:

- worked for the employer for at least 30 working days or shifts in the year before the general holiday,
- worked their last scheduled shift before, and the first scheduled shift after, the holiday (employees will remain eligible if they have the employer's permission to be absent for either or both of these shifts), and
- have not refused to work on the general holiday when asked to do so.

The following rules apply to the payment of employees on a general holiday:

- *Eligible employee – normally scheduled to work on day of the holiday – does not work*
  The employee is entitled to be paid at least average wages for the day (normally this would be regular wages for the day).

- *Eligible employee – normally scheduled to work on day of the holiday – works*
  Employee is entitled to the usual wage for the day PLUS time-and-a-half for all hours worked, **or**
  Employee can be paid regular wages for the day of the holiday and, before their next annual vacation, be given another holiday off with pay. The replacement holiday must be a day on which the employee is normally scheduled to work.

- *Eligible employee – not normally scheduled to work on day of the holiday – does not work*
  Employee is not entitled to receive pay for the holiday nor another day off with pay.

- *Eligible employee* – not normally scheduled to work on day of the holiday – works
  Employee is entitled to be paid time-and-a-half for all hours worked

- *Ineligible employee – does not work on day of the holiday*
  Employee is not entitled to receive pay for the holiday nor another day off with pay.

- *Ineligible employee – works on day of the holiday*
  Employee is entitled to be paid at regular rates of pay for all hours worked.

If employees work an irregular schedule and there is doubt about whether the holiday is a day on which the employee is normally scheduled to work, it is to be resolved as follows; if during at least five of the last nine weeks, the employee regularly worked on the day of the week that the general holiday falls, the holiday is to be considered a day that would normally have been a workday for the employee.

Are employers obliged to pay overtime or bank hours for those employees working more than the 44 hour per week allotment?

What are overtime pay rates?

Yes. All employees, including those who are paid a weekly, monthly, or annual salary, must be paid overtime pay for overtime hours they work. According to the Code and the regulation thereunder, the only employees who are exempt from overtime and overtime pay are:

- employees on a farm or a ranch
- domestic employees
- various types of salespersons
- professionals such as real estate brokers, and licensed insurance and securities salespersons
- professions such as architects, engineers, lawyers, psychologists and information systems professionals
- managers, supervisors and those employed in a confidential capacity
- licensed land agents
- instructors or counselors at a non-profit educational or recreational camp
- extras in a film or video production
- employees covered by other Acts (academic staff)
- municipal police officers.

Overtime is required to be paid for all hours worked in excess of eight hours a day, and/or 44 hours a week. Overtime hours are to be calculated both on a daily and on a weekly basis. The higher of the two numbers is overtime hours worked in the week.

Overtime must be paid at the rate of at least 1.5 times the employee's regular wage rate. The sole exception applies where the overtime is accumulated under an overtime agreement.

If an employee is paid by a combination of salary and incentive pay, and the salary is greater than minimum wage, the salary establishes the hourly rate for the purpose of calculating overtime entitlements.

Some employers and employees agree to replace overtime pay wholly or partly with time off with pay. This is done through the use of an overtime agreement. An overtime agreement allows overtime hours to be banked and later taken off with pay, hour for hour, during regular work hours. There are a number of rules that apply with respect to overtime agreements:

- The agreement can be between an employer and a single employee or with a group of employees, or the overtime agreement can be part of a collective agreement.
- Overtime hours are calculated the same way under an overtime agreement as it would be if overtime pay is to be paid at time-and-a-half.
- The Code requires an overtime agreement to be in writing. Employers must give employees who are covered by an overtime agreement a copy of the agreement.
- Time off must be taken within three months of the end of the pay period in which the overtime was earned.
- If time off is not taken, overtime hours must be paid out at time–and-a-half.

If it is raining, does the employer have the right to contact a staff member before their scheduled shift to tell them not to come in? If so, is the employer still obligated to pay a minimum number of hours?

What is the minimum number of hours an employer must pay if a staff member comes to work but is sent home?

An employer *does* have the right to contact a staff member before their scheduled shift to tell them not to come in. The Code requires 24 hours' notice of a 'shift change.' However, if the employer *actually reaches* the employee before they come in, even on less than 24 hours' notice, the employer is not obligated to pay a minimum number of hours.

If an employee reports to work as scheduled, or as requested, or the employee arrives and is told there is no work available (that is, the employer did not reach the employee directly prior to their shift), or work is provided for only a short period, employees must receive an amount which is at least equal to 3 hours pay at minimum wage. Currently this amounts to $17.70 (3 hours x $5.90 per hour). *For example:* 1.5 hours worked times the employee's regular rate of $10/hour = $15. The $15 payment is less than $17.70. Therefore, the employee must receive at least $17.70 for this time worked.

Can an employer get the employee to sign a contract or waiver to alter his rights?

No, the Code establishes minimum standards of employment for employers and employees in the workplace. Part 1, Section 4 of the legislation specifically states:

> An agreement that this Act or a provision of it does not apply, or that the remedies provided by it are not to be available for an employee is against public policy and void.

Due to weather or other circumstances, if a salaried employee works less time than the legal standard, can the employer bank the hours he/she is owed by the staff member?

No. See response to question (4) and (5). In fact, if the employee works only 6 hours one day (2 hours less than the daily standard) and 10 hours the next, the employer must still pay the employee 2 hours overtime for the extra 2 hours worked the second day.

Does an employer have to pay severance to a seasonal salaried employee, a full time salaried employee, or a seasonal hourly employee? How much and how is this determined?

Where a contract expires and the club does not renew, is the employee entitled to severance?

What is the Value of a Contract? Is it better just to be an employee?

As the standards apply to all Alberta employers and employees except:

- those who are subject to federal legislation,

- construction employees,
- employees covered by other Acts (academic staff),
- municipal police officers, or
- where the employment is casual and intermittent, with the employee deciding whether or not to work when requested to do so by the employer, termination notice or pay in lieu is required in all cases where an employee is let go, regardless of whether an employee is a seasonal salaried employee, a full time salaried employee, or a seasonal hourly employee (subject to the qualification below).

However, where the employee was hired for a definite term or task of less than 12 months, at the end of which the employment terminates, or where the employee was hired on a seasonal basis and *at the end of the season* the employment is terminated, notice or severance is not required. Severance pay is also not required where the employee has been employed for 3 months or less.

The employer must give written termination notice of:

- one week for employment of more than 3 months, but less than 2 years;
- two weeks for employment of 2 years or more, but less than 4 years;
- four weeks for employment of 4 years or more, but less than 6 years;
- five weeks for employment of 6 years or more, but less than 8 years;
- six weeks for employment of 8 years or more, but less than 10 years;
- eight weeks for employment of 10 years or more.

The employer may provide termination pay for the appropriate period or a combination of termination notice and termination pay.

Where the wages of an employee vary from one pay period to another, the average of the employee's wages for the three month period immediately prior to the termination is to be used.

With respect to whether a written contract is better than not having one, it is always better to have a written agreement to eliminate any confusion or debate at a later date. One thing that must be kept in mind, however, is that the written agreement must contain terms <u>at least</u> as favourable as the Employment Standards Code minimum or the whole contract might be void. Without written terms, the implied term under the Code and at common law would apply. Therefore, it is always better to particularize the employment relationship in writing.

Can an employee be terminated at any time?

There are two situations where an employer may not dismiss an employee:

- when an employee is on maternity or parental leave,
- when an employee's wages are garnisheed.

Otherwise, proper notice or termination pay must be provided when dismissing an employee, as described in questions (9) and (10).

How important is it to document meetings, reprimands, evaluations and all other staff communications?

What is the best way to terminate a seasonal employee/long term employee?

For "no cause" terminations, a seasonal employee should simply be advised that they will not be required the following season when their seasonal contract concludes. For non-seasonal employees, a "no cause" termination will result in the employer having to provide both employment standards and common law reasonable notice, or payment in lieu thereof.

For a "cause" termination, the emphasis on "due process" is part of a trend of the courts to apply principles of substantive fairness to the employment relationship by asserting that employment is not simply a matter of private contract, but also a social institution that ought to be reflective of the values of Canadian society as construed by the court. Part of this trend includes the imposition on employer's of a duty of "good faith and fair dealing" in the manner in which an employee is dismissed: *Wallace* v. *United Grain Growers* (1997), 152 D.L.R. (4th) 1 (S.C.C.).

The courts are paying greater attention to the steps taken by employers in arriving at the decision to dismiss employees for cause. Failure to act on the basis of the new standards suggested in the courts may result in a court finding that the employee was wrongfully dismissed.

As a result of the decision by the Supreme Court of Canada in *McKinley v. B. C. Tel* (2001), 200 D.L.R. (4th) 385, employers who contemplate dismissing an employee for cause need heightened sensitivity to the process they follow before and when conducting the dismissal, in the information they collect to justify the dismissal, and in weighing the balance between the crime and the penalty. Some advice and potential considerations are as follows:

Implement policies concerning conduct. If policies have been implemented, follow them if they are applicable to the situation of the employee in question.

When warning an employee about unacceptable behaviour, verbal warnings should be followed up with written confirmation. A written statement should cover all the areas of concern, but be as specific and clear as possible.

If the conduct or the situation is sufficiently serious, a written warning should state that termination of employment will result if the conduct continues.

If problems with competence or performance have been identified, the employer should usually give the employee a reasonable period of time to correct the problem.

When wrongdoing, theft, or dishonesty are the issue, a full investigation of the situation seems to be a requirement in all but the most obvious cases.

When an investigation of wrongdoing or dishonesty leads to a conclusion that the employer has cause of dismissal, a prudent employer will not summarily terminate. The prudent course is usually to put these conclusions to the employee, and give him or her an opportunity to respond.

Before deciding on termination, consideration of whether alternatives short of dismissal are proper is a prudent course.

Keep detailed written information well organized and in a safe place, particularly where such evidence was crucial to a finding of dishonest conduct, theft, or other serious misconduct.

Finally, employers are called upon to weigh the misconduct against all the circumstances of the employment relationship with a view to doing justice as between the employer and the employee. The courts appear to be demanding that employers pose that question from a perspective which takes into account both the interest of the employer and the employee.

What are the basic questions that cannot be asked during an interview?

Section 8 of the Alberta *Human Rights, Citizenship and Multiculturalism Act* prohibits discrimination in employment, including job advertisements, applications and interviews, on the basis of race, religious beliefs, colour, gender, physical disability, mental disability, marital status, age, ancestry, place of origin, family status and

source of income of any person. This section now also includes sexual orientation pursuant to the recent Supreme Court of Canada decision in *Vriend v. Alberta* (1998) 1 S.C.R. 493.

Questions asked during an interview should only relate to job-related requirements and past job performance. The following may be inappropriate:

- Questions eliciting information about physical characteristics, which may give rise to a complaint of discrimination on the basis of race or colour.

- Inquiries as to religious affiliations, customs observed, willingness to work on a specific day, or involvement in club memberships or social organizations, which may give rise to a complaint of discrimination on the basis of religion or ethnic background.

- Inquiries about Canadian citizenship, landed immigrant status or permanent residency, which may give rise to a complaint of discrimination on the basis of race, ancestry, or place or origin.

- Even requests for a social insurance number at the application stage may be prohibited because a social insurance number may reveal information about an applicant's place of origin or citizenship status. However, an employer is permitted to ask whether an applicant is legally entitled to work in Canada.

- Questions about an applicant's mother tongue or language skills, which may give rise to a complaint of discrimination on the basis of race or ethnic origin. However, an employer can ask an applicant whether he or she understands, reads, writes or speaks specific languages required for the position.

- Inquiries into marital status, including inquiries as to maiden name or classification of "Mr. Mrs., Miss, Ms.", are inappropriate.

- Asking an applicant's age or date of birth is prohibited. However, it is permissible to ask whether an applicant is between the ages of 18 and 65.

In conclusion, an employer is wise to inquire only into those areas which relate to job performance and job-related characteristics when asking questions either on an application form, during the interview process or when contacting an applicant's references.

What is the definition of harassment/sexual harassment?

Harassment - Harassment occurs when someone is subjected to unwelcome verbal or physical conduct. Harassment is a form of discrimination which is prohibited in Alberta in the *Human Rights, Citizenship and Multiculturalism Act* under the following grounds:

- Race
- Religious beliefs
- Colour
- Gender
- Physical or mental disability
- Age
- Ancestry
- Place of origin
- Marital status
- Source of income
- Family status
- Sexual orientation

Unwanted physical contact, attention, demands, jokes or insults are harassment when they occur under any of the areas protected in the *Alberta Human Rights, Citizenship and Multiculturalism Act*. These areas are publications, notices, signs and other public representations; accommodations, goods services and facilities customarily available to the public; tenancy; *employment practices including job applications and advertisements*; membership in trade unions, employers' organizations or occupational associations.

Verbal or physical abuse, threats, derogatory remarks, jokes, innuendo or taunts about appearance or beliefs are all examples of harassment; the display of pornographic, racist or offensive images; practical jokes that result in awkwardness or embarrassment; unwelcome invitations or requests, either indirect or explicit; intimidation, leering or other objectionable gestures; condescension or paternalism that undermines self-confidence, unwanted physical contact such as touching, patting, pinching or punching are all examples of harassment. Harassment can also be outright physical assault.

Employers are legally responsible for actively discouraging and prohibiting humiliating conduct or language that results in one employee's working conditions being less favourable than another's. Also, when a co-worker harasses another employee, the employer may be held responsible.

When a supervisor harasses an employee, it is an abuse of authority and the employer may be held responsible. It is inappropriate behaviour that may deny equal employment opportunity to the employee who is harassed.

Sexual Harassment

Sexual harassment is a form of discrimination under the *Human Rights, Citizenship and Multiculturalism Act* on the grounds of gender. Sexual harassment is unwanted, often coercive, sexual behaviour directed by one person toward another. It is emotionally abusive and creates an unhealthy, unproductive atmosphere in the workplace.

Sexual harassment can be expressed in many ways, from very subtle to most obvious, through any of the following:

- suggestive remarks, sexual jokes or compromising invitations
- verbal abuse
- visual display of suggestive images
- leering or whistling
- patting, rubbing or other unwanted physical contact
- outright demands for sexual favours
- physical assault.

The Supreme Court of Canada has decided that in cases of proven sexual harassment, employers are responsible for the actions of their employees. Lack of awareness by management does not necessarily eliminate this liability. In Alberta, employers are responsible for maintaining a work environment free from sexual harassment for all employees, customers and clients. A supervisor who neglects to follow up on a complaint of sexual harassment may be liable under the *Human Rights, Citizenship and Multiculturalism Act* for failing to take prompt and appropriate action.