



# INSIGHTS

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## IN THIS ISSUE...

### Do you want to walk in these shoes?

- Risks associated with discontinuing disability benefits during the notice period.

### Seven Steps of Health

- At least 50% of cancers are preventable. Take the following 7 steps to reduce your risk.

### Announcements

- New RWAM Booklets and Administration Manuals
- EFT Support for WI Claims

## Do you want to walk in these shoes?



Employers who discontinue disability benefits during the notice period risk stepping into the shoes of their insurer if a terminated employee becomes disabled during this period. Employer liability could also extend past the expiry of the notice period.

In January 2006, the Ontario Court of Appeal ("Court") in *Egan v. Alcatel* held that an employer has an obligation to continue coverage of employment benefits, including disability benefits, throughout the common-law reasonable notice period, for a wrongfully terminated employee.

Alcatel terminated Ms. Egan's employment (as part of a mass termination) just 20 months after her employment commenced. Alcatel offered her twelve weeks of salary reflecting statutory notice and severance under the Employment Standards Act of Ontario ("ESA"). The notice also stated that all benefits, including short and long-term disability coverage, would terminate at the end of the statutory notice period. Shortly after the end of the statutory notice period, Ms. Egan became disabled and remained so for one year. The insurer denied benefits as the disability arose after the employer terminated her coverage.

Ms. Egan sued for damages for wrongful dismissal and for damages for lost disability benefits. At trial, it was found that Alcatel had induced her to leave a 20-year secure senior position to go to work for them. As a result, the trial judge increased the common-law reasonable notice period to nine months. The trial judge did not award any damages for lost disability benefits since the wrongful dismissal damages awarded represented her full salary for the entire reasonable notice period for her loss (she was "made whole" for her loss). Both Alcatel and Egan appealed.

On appeal, the Court upheld the 9-month notice period. It also found that Ms. Egan was entitled to the continuation of all compensation, including employee benefits, during the common law notice period. The Court reviewed the trial judge's award calculation and awarded Ms. Egan damages equal to her full salary from her termination date to her disability date and an amount equal to the STD and LTD benefits she would have received during her 1-year disability period - even though this period extended beyond the end of the 9-month notice period. As her disability benefits were non-taxable, these damages were grossed-up to account for the taxes on such amount.

The Egan case is of concern because the Court made the employer responsible for the disability coverage for a disability that arose after the ESA notice period. Also, employers may be required to increase such amounts to reflect taxation. In this case, Ms. Egan was disabled for one year. However, if a terminated employee becomes permanently disabled, the liability could be more significant.

The approach taken in Egan has been criticized for various reasons - but it currently stands in Ontario since on August 3, 2006 the Supreme Court of Canada dismissed an application for leave to appeal the Court's decision.

In another 2005 wrongful dismissal case, a company associated with Stelco was found liable for damages in excess of \$350,000. In this case, a 17-year employee, Deborah Held, was fired for absenteeism and the employer terminated her LTD benefit. Offered 9 months' pay in lieu of notice, she refused, sued the employer and was awarded 12 months. Ms. Held also became totally disabled from working within the 12-month period and disentitled to benefits through the insurer, Sun Life. Ms. Held received damages for LTD benefits lost up to the date of trial as well as compensation for future benefits.

Employers should:

- 1 Review their disability contracts to determine the extent of their disability coverage. Also check the wording in employee benefit handbooks carefully.
- 1 Insurance contracts generally contain an "actively at work" requirement, however insurers may agree to continue disability coverage up to the end of the statutory notice period. Provisions for other benefits should also be checked.
- 1 Explore the possibility of obtaining 'bridge' coverage. At least one specialty carrier in Canada, Reliable Life, offers a product that insures terminated employees during the 'notice' period. This coverage is expensive and is subject to individual underwriting.
- 1 Review any promises regarding notice or compensation in lieu of notice very carefully that may have been made (for example, in an employment contract, company policy or staff handbook). Simple promises of 'salary and benefit continuation' will be interpreted in an employee's favour and may expose the employer to uninsured risks.

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## Walking in These Shoes..., cont'd

- I In your termination letter, state clearly which benefits are being continued during the notice period and which are not.
- I Review and ensure releases obtained in exchange for a severance package. Ideally, it should explicitly release all entitlements under the ESA, including a release of any claim for disability benefits against both the employer and its insurers. This could be problematic where a termination agreement cannot be negotiated and the employee takes legal action or otherwise refuses to sign the release.
- I Consider giving employees working notice instead of compensation for notice. Disability coverage will likely continue during a working notice period but this should be confirmed. However, many employers find working notice impractical since the employee may not be productive, and may be disruptive, during the notice period.
- I Most important, obtain qualified legal advice before terminating an employee. Also, contact your benefits provider in advance regarding possible benefits extension and termination.

Reproduced in part from Mercer Human Resource Consulting "Communiqué" (May 2006) (additional information & commentary from other sources)



## ANNOUNCEMENTS

### New and Improved - Employee Benefit Booklets - Administration Manual

Current RWAM Clients will be receiving new administration manuals and revised and improved booklets approximately one month after the group's renewal date.

### EFT Support for WI Claims

Effective immediately, EFT payment support is now available for WI Disability Payments.

## Seven Steps to Health

**At least 50% of cancers can be prevented through healthy living and policies that protect the public. Take the following steps to reduce your risk of developing cancer.**

### 1 Be a non-smoker and avoid second hand smoke

Smoking causes about 30% of all cancer deaths in Canada. Lung cancer is the leading cause of death for men and women in Canada. Smoking also increases your risk of developing cancers of the mouth, throat, larynx, cervix, pancreas, esophagus, colon, rectum, kidney and bladder.

Non-smokers exposed to second-hand smoke are also at higher risk of getting cancer and other lung diseases. Health Canada estimates that more than 300 non-smokers die from lung cancer each year because of second-hand smoke. If you are a smoker, quit. If you are a non-smoker, avoid second-hand smoke.

### 2 Eat 5-10 servings of vegetables and fruit a day

Choose high fibre, lower fat foods. If you drink alcohol, limit your intake to 1-2 drinks a day.

Research suggests as much as one-third of all cancers may be related to what we eat and drink. Eat 5 to 10 servings of vegetables and fruit a day. Eat plenty of whole grain fibres and keep your dietary fat intake low. For a healthy diet, balance your daily meals with foods from the 4 food groups described in Canada's Food Guide to Healthy Eating. If you drink alcohol, limit your consumption. Having one or more alcoholic drinks a day is associated with a slight increase in breast cancer risk. If you are pregnant or breast-feeding, avoid alcohol.

### 3 Be physically active on a regular basis

Most people know that regular exercise is necessary to remain healthy. Not only will this help you maintain a healthy body weight, studies strongly suggest that exercise reduces your risk of colon cancer. Also, the evidence of a link between physical activity and breast cancer is convincing.

### 4 Protect yourself and your family from the sun

Even though we are heading into the fall/winter season, the sun's rays continue to be harmful. Not only do we have to contend with the direct sun, but the reflections off the snow only amplify the power of the sun. Check your skin regularly and

report any changes to your doctor. This year alone, tens of thousands of Canadians will develop skin cancer because of over exposure to UV (ultraviolet light). Skin cancer is the most frequently diagnosed cancer in Canada.

Reduce sun exposure during peak periods - early afternoon. Seek shade. Keep babies under one year old out of direct sun. Tanning parlours and sunlamps are not safe. When you are in the sun, always remember SLIP, SLAP, SLOP. Slip on clothing to cover your skin, Slap on a wide-brimmed hat, and Slop on sunscreen (SPF 15 or higher).

### 5 Follow cancer screening guidelines

For women, discuss mammography, Pap tests, and breast exams with a health professional. For men, discuss testicular exams and prostate screening for colon and rectal cancers. Even people with healthy lifestyles can develop cancer. One way to detect cancer early is to have regular screening tests. These tests can often find cancer when it is still in an early stage. The earlier the cancer is found, the more successful the treatment is likely to be.

### 6 Visit your doctor or dentist if you notice any change in your normal state of health

Know your body and report any changes to your doctor or dentist as soon as possible (for example, sores that do not heal, a cough which goes on for more than 4 weeks or a change in bowel habits). Health care professionals are trained to spot the early warning signs of cancer and other diseases.

### 7 Follow health and safety instructions at home and at work when dealing with hazardous materials

At home and at work, take care to follow safety instructions when using, storing and disposing of household pesticides or any other chemicals. Health Canada and Environment Canada have guidelines for handling cancer-causing substances. By following these guidelines, you can protect yourself against the risk posed by these materials. These guidelines are printed on the packaging and posted in workplaces.

Source: Canadian Cancer Society