When Your Policies Create Liability You Didn't Intend

September 3, 2026

Christine Ashton
Dan Condon

Wilson Vukelich LLP
Lawyers

Overview

- Workplace policies are intended to reduce legal risk, but poorly drafted or overly prescriptive policies can unintentionally create additional obligations for employers
- Employers should carefully review policy language to ensure it complies with legal requirements while preserving appropriate flexibility and discretion
- This webinar will review legal issues relating to artificial intelligence, workplace recordings, and employee social media activity, and provide practical guidance for employers navigating these evolving challenges
- This webinar should not be relied on in lieu of legal advice, and you should always consult with your employment lawyer to understand your legal rights and obligations

Agenda

1. Impairment Policy
2. Progressive Discipline Policy
3. Overtime Policy
4. Workplace Violence, Harassment and Anti-Discrimination Policies
5. Workplace Investigation Policy
6. Reservation of Rights

1) Impairment Policy

- Employers have an obligation to maintain a safe workplace, and impairment can create significant health and safety risks for the impaired employee, their coworkers, customers and members of the public
- Impairment is not limited to alcohol or illegal drugs and can arise from a wide range of circumstances, including cannabis, prescription or over-the-counter medication, medical conditions, fatigue, stress and other factors that affect an employee's ability to safely perform their work
- An impairment policy allows the employer to clearly establish that employees must be fit to safely perform their work and must not report to work or continue working where impairment creates a safety concern
- The policy should also establish what employees are expected to do if they are impaired or believe that medication or another medical issue may affect their ability to safely perform their duties
- This gives the employer an opportunity to assess the circumstances before an incident occurs and determine whether the employee can continue working, requires modified duties, requires accommodation or should take a leave of absence
- A clear policy is particularly important in safety-sensitive workplaces or positions, where even a relatively minor degree of impairment can create significant consequences

1) Impairment Policy
Mistake #1: Treating It as a “Drug and Alcohol Policy”

- A common mistake is to have a “Drug and Alcohol Policy” that focuses only on the use of alcohol, cannabis and illegal drugs
- The real workplace concern is impairment, which can arise from a much broader range of causes, including prescription and over-the-counter medication, medical conditions, fatigue and stress
- Employers have obligations under occupational health and safety legislation to take reasonable precautions to protect workers from workplace hazards, including hazards created by an impaired employee
- If the policy only addresses drugs and alcohol, the employer may fail to identify, require disclosure of, or properly respond to other forms of impairment that create a workplace safety risk
- To avoid this issue, the policy should address impairment generally, with alcohol, cannabis, illegal drugs, medication, medical conditions and fatigue identified as examples of circumstances that may result in impairment

1) Impairment Policy
Mistake #2: Prohibiting All Drug or Medication Use

- Another common mistake is to broadly prohibit employees from using or being under the influence of any drugs or medication at work
- While employers can prohibit recreational substance use and require employees to be fit for work, some employees will legitimately use prescription medication or medicinal cannabis in connection with a disability or medical condition
- A policy that simply prohibits the use of these substances can conflict with the employer's obligations under human rights legislation
- To avoid this issue, the policy should distinguish between recreational and medicinal substances

1) Impairment Policy

Mistake #3: Requiring Disclosure of Medication Rather Than Impairment

- Employers need employees to raise potential impairment concerns, but the policy should not require employees to disclose every prescription medication, medical treatment or diagnosis
- The relevant workplace issue is whether the employee is actually or potentially impaired and whether that impairment affects their ability to safely perform their duties
- A policy requiring broad disclosure of medications can result in the employer violating human rights obligations
- To avoid this issue, the policy should require employees to disclose actual or potential impairment and any resulting workplace limitations, rather than requiring disclosure simply because an employee takes medication
- Where additional medical information is required, the employer can then request information reasonably necessary to understand the employee's restrictions and accommodation needs

2) Progressive Discipline Policy

- Progressive discipline can be an important tool for correcting behaviour before it becomes serious enough to warrant termination and for demonstrating that an employee was given a reasonable opportunity to improve
- A documented disciplinary process can also provide important evidence where an employer later needs to establish that an employee was aware of the concern, understood the required improvement and failed to correct the behaviour
- Employers should have a progressive discipline policy to provide a consistent framework for addressing misconduct and performance concerns

2) Progressive Discipline Policy

- One of the most common drafting mistakes is to state that discipline will proceed through a specific sequence, such as verbal warning, written warning, final warning, suspension and then termination
- When this mistake is made, it can create a contractual obligation to follow the promised procedure
- The employee can argue that you breached the employment agreement by skipping the promised process
- It may also be used to establish that as an employer, you do not yet have just cause
- As an employer you should preserve discretion to determine the appropriate response having regard to the nature and seriousness of the misconduct and the employee’s overall disciplinary record
- This should also include allowing you to determine whether the concern is appropriately addressed through discipline, performance management, or another process

2) Overtime Policy

- Most employees across Canada are entitled to overtime pay at a premium rate once they work beyond the applicable overtime threshold
- For example, overtime pay entitlement applies at 44 hours per week in Ontario, 40 hours per week in Quebec, or 8 hours per day or 40 hours per week in British Columbia
- These overtime entitlements can apply to both hourly and salaried employees, subject to certain exemptions

3) Overtime Policy

- It is important that employers have an overtime policy that clearly explains when employees are entitled to overtime pay, how overtime is calculated, how hours are recorded, and the process for requesting and approving overtime
- This can become particularly important for salaried employees, remote employees, managers who may not actually fall within a statutory exemption, and employees who routinely work beyond their scheduled hours
- Without a clear policy and reliable tracking system, extra hours can accumulate over months or years before an employer realizes the extent of its potential liability
- What begins as employees “pitching in” to get the work done can therefore result in a significant claim for unpaid overtime

3) Overtime Policy

- A properly drafted overtime policy can help employers manage both compliance obligations and overtime costs
- The policy can require employees to obtain approval before working overtime and establish who has authority to approve additional hours
- This allows employers to identify excessive overtime, redistribute work where appropriate, and prevent employees from simply deciding on their own to routinely work additional hours
- The policy should also explain when overtime will be paid and, where permitted, whether overtime may instead be addressed through paid time off
- Where permitted by applicable employment standards legislation, employers can also use written averaging agreements to calculate overtime over a period of multiple weeks, which can reduce overtime liability where employees’ hours fluctuate from week to week
- For example, if an employee works 50 hours in week one and 30 hours in week two, they may otherwise be entitled to 6 hours of overtime for week one, whereas under a valid two-week averaging agreement the 80 hours are averaged over the two weeks, potentially resulting in no overtime entitlement

3) Overtime Policy

- One of the biggest risks with an overtime policy is that the language can unintentionally give employees greater overtime rights than they would otherwise have under employment standards legislation
- This can happen in a number of different ways, including by expanding who is entitled to overtime, lowering the threshold for when overtime begins, increasing the applicable overtime rate, or failing to properly address how salary applies to overtime hours

3) Overtime Policy

Mistake #1: Giving Overtime to Employees Who Are Otherwise Exempt

- Employment standards legislation contains exemptions from overtime for certain employees and occupations
- However, an employer can extinguish this exemption if its own policy promises overtime to "all employees"
- For example, a policy that states that "all employees will receive overtime pay for hours worked over the applicable threshold" may create a contractual overtime entitlement for an employee who would otherwise be exempt
- Overtime policies should clearly identify that overtime entitlements are subject to applicable statutory exemptions

3) Overtime Policy

Mistake #2: Making Overtime Payable Earlier Than Required

- Employers also need to distinguish between an employee's normal hours of work and the point at which the employee becomes entitled to overtime pay
- For example, where the statutory threshold is 44 hours per week, an employee who works 40 hours may believe they are entitled to both straight time and overtime pay when they work more than 40 hours
- If the employer intends to provide only the statutory minimum, the policy should expressly state that overtime pay begins only when the employee exceeds the applicable statutory overtime threshold
- Regular or scheduled hours should be defined separately and should not be used as the trigger for overtime pay unless the employer intentionally wants to provide a greater entitlement

3) Overtime Policy

Mistake #3: Accidentally Increasing the Overtime Rate

- Employers also need to be careful where employees receive additional premiums for particular hours of work, such as shift premiums, weekend premiums or other enhanced rates
- Problems arise where the policy promises a premium without explaining whether the premium already satisfies, in whole or in part, the applicable overtime obligation
- Without this explanation, you may have unintentionally stacked one premium on top of another
- The result can be an overtime rate that is substantially higher than either the legislation or the employer intended
- The policy should therefore clearly explain how other premiums interact with overtime and avoid language that inadvertently creates cumulative or “stacked” premium payments

3) Overtime Policy

Mistake #3: Accidentally Increasing the Overtime Rate

- Employers also need to be careful where employees receive additional premiums for particular hours of work, such as shift premiums, weekend premiums or other enhanced rates
- Problems arise where the policy promises a premium without explaining whether the premium already satisfies, in whole or in part, the applicable overtime obligation
- Without this explanation, the employer may have unintentionally stacked one premium on top of another
- The result can be an overtime rate that is substantially higher than either the legislation or the employer intended
- The policy should therefore clearly explain how other premiums interact with overtime and avoid language that inadvertently creates cumulative or "stacked" premium payments

3) Overtime Policy

Mistake #4: Failing to Address How Salary Applies to Overtime

- A common drafting mistake is to state the employee's salary and normal hours of work, but not confirm that the salary compensates the employee for all straight-time hours worked
- Without that language, the employee may argue that the salary only compensates them for their normal scheduled hours, with additional straight-time pay owing for hours worked beyond that schedule
- This can also increase the amount owing once overtime is triggered, because the employer may be required to pay the full overtime rate rather than only the additional 0.5 premium needed to bring the employee up to time-and-a-half
- To avoid this result, the employment agreement and overtime policy should expressly confirm, where permitted by applicable legislation, that the employee's salary compensates them for all straight-time hours worked and that only the applicable overtime premium is payable once the statutory overtime threshold is exceeded

4) Workplace Violence, Harassment and Anti-Discrimination Policies

- Employers have obligations under the *Occupational Health and Safety Act* (“*OHSA*”), the *Human Rights Code* (the “*Code*”) and at common law to prevent violence, harassment and discrimination in the workplace
- As part of this obligation, employers are required to have written policies which address workplace violence, harassment and discrimination
- Failing to have proper policies in place can expose employers to financial liability
- This can include harassment and human rights complaints, constructive dismissal claims and Ministry of Labour Orders and prosecutions

4) Workplace Violence, Harassment and Anti-Discrimination Policies

Mistake #1: Not Providing an Alternate Reporting Process

- Normally, an employer will hope that a workplace dispute can be resolved without it having to be escalated to a full investigation
- This can lead some written policies to state that an employee must make all complaints to their direct supervisor/manager
- At times, however, an employee may feel the need to make a complaint relating to their supervisor or manager
- As such, having a policy which requires the reporting of a complaint to be made to the employee's supervisor or manager is problematic
- Employers have to be mindful to provide an employee with options when it comes to reporting

4) Workplace Violence, Harassment and Anti-Discrimination Policies

Mistake #1: Not Providing an Alternate Reporting Process

- Policies need to provide an alternate contact, usually an employee in the company's HR department for situations where the supervisor is the alleged harasser
- Depending on the circumstances, the alternate contact can be (and should be) an outside third-party

4) Workplace Violence, Harassment and Anti-Discrimination Policies

Mistake #2: Not Having the Policies Apply to Remote/Hybrid Workers

- It is not uncommon to see policies drafted based on the premise that all employees work at the employer's physical premises or that the policies only apply at the employer's premises
- As everyone knows, this is no longer the case
- While Robert Half has reported that the first 6 months of 2026 has seen a drop in the number of remote and hybrid job postings, a sizable minority of employees still work either a fully remote, or a hybrid, work arrangement
- On this point, Statistics Canada found that in 2025 about 17.4% of Canadian workers worked mostly from home (down from 24% during the Pandemic)
- Given that it appears that some level of remote and hybrid work arrangements will continue to exist, the impact of remote and hybrid work arrangements, such as remote work environments and home offices, should be addressed in these policies

4) Workplace Violence, Harassment and Anti-Discrimination Policies

Mistake #3: Having a Policy that Fails to Meet Minimum Legislative Requirements

- In addition to having written policies employers must ensure that the policies are accurate and meet all required legislative requirements
- For instance, an employer which has Workplace Violence and Harassment Policies but does not have procedures and/or fails to provide for an investigatory process to be followed, is in violation of *OHSA*

4) Workplace Violence, Harassment and Anti-Discrimination Policies

Mistake #4: Failing to be Aware of Legislative Differences in Different Jurisdictions

- Many employers have employees in provinces throughout Canada and even in Canada and other countries
- Policies must be drafted in such a way that the policy on its face complies with the legislative requirements in all the jurisdictions where the policy is being applied
- When drafting Anti-Discrimination Policies, employers must be mindful to do so in a way which does not cause the employer to inadvertently be non-compliant with relevant legislation
- For instance, there are differences in the prohibited grounds of discrimination between the provinces. As such, only listing the prohibited grounds of discrimination of one province could lead to the policy not being compliant for employees in another province

4) Workplace Violence, Harassment and Anti-Discrimination Policies

Mistake #5: Not Reviewing Policies Annually as well as Immediately Upon Legislation Changes

- If an employer is not reviewing and updating its policies and is not monitoring for legislative changes, this can cause the employer to have policies which violate legislation and expose the employer to liability
- As an example of this, Ontario's ***Working for Workers Five Act, 2024*** amended *OHSA*'s definition of workplace harassment and workplace sexual harassment to include harassment that occurs in a workplace "virtually, through the use of information and communications technology"
- Accordingly, employers must now ensure that the definition of workplace harassment and workplace sexual harassment in their policies include electronic means such as email, text and social media

4) Workplace Violence, Harassment and Anti-Discrimination Policies

Mistake #5: Not Reviewing Policies Annually as well as Immediately Upon Legislation Changes

- Policies and procedures should be treated as a living document. They need to be reviewed and consulted, not just left on a shelf or posted on an employee bulletin board, and never looked at again

4) Workplace Violence, Harassment and Anti-Discrimination Policies

Mistake #6: The Failure to Provide Policies to an Employee and to Train Employees on the Policies

- In order to ensure compliance with *OHSA*, the *Code* and the common law, it is not enough for employers to just have prepared written policies and procedures
- Instead, an employer must be able to demonstrate that its employees have been provided the written policies and, most importantly, that the employer provides ongoing training with respect to the policies and procedures
- A common error made by employers is that they provide a copy of a policy and do train their employees on a policy when it is first created, but then nothing is done to ensure that training is provided to employees hired after the creation of the policies and procedures, or after a policy or procedure is changed

4) Workplace Violence, Harassment and Anti-Discrimination Policies

Mistake #7: Having Policies but Not Having Written Procedures

- Until relatively recently, it was not uncommon for some employers to only have a 1-page policy which briefly stated that discrimination and harassment in the workplace was not permitted
- This is no longer sufficient. It is no longer enough for an employer to have a basic policy which just states that workplace violence and harassment as well as discrimination in the workplace are not permitted
- Employers must not only have more fulsome policies which address specific matters, employers must also have procedures in place which outline both the process to be followed by employees in order to make complaints in the workplace as well as how an employer will investigate complaints

5) Workplace Investigation Policy

- *OHSA* requires an employer to investigate all incidents and complaints of workplace harassment
- With respect to the nature of the investigation to be conducted, this will depend on the circumstances and the nature of the complaint
- That being said, an investigation must take place
- In order to avoid potentially significant liabilities, employers need to implement a fulsome investigation process to address complaints of workplace violence, harassment and discrimination
- The risk of failing to do so is real. For instance, sexual harassment damage awards made under the *Code* normally range between $50,000.00 - $150,000.00, or even higher in extreme cases

5) Workplace Investigation Policy

Mistake #1: Having an Informal Resolution Only Policy

- Employers cannot have an investigation policy which provides that all workplace complaints must be handled informally
- Rather, a formal investigation process is required even if it is not necessary to formally investigate all complaints

5) Workplace Investigation Policy
Mistake #2: Promise Complete Confidentiality

- Employers should not, either in a policy or during an investigation, advise a complainant that the information they provide will not be shared or disclosed to others
- For instance, *OHSA* requires employers to communicate the results of a workplace investigation to both the complainant and the respondent
- Furthermore, in order to properly conduct an investigation, employers will inevitably have to disclose the substance of allegations to respondents and potentially also to witnesses

5) Workplace Investigation Policy

Mistake #3: Failure to Complete the Investigation in a Timely Manner

- While *OHSA* does not provide a specific timeline under which a workplace investigation must be conducted or completed, it is in the employer's best interest to do so in a timely manner
- If an employer is too slow in responding to, or completing, an investigation, it becomes more likely that an employee will resort to making a complaint with the Ministry of Labour, under the *Code* or by way of a civil claim
- Ignoring a matter will not make it go away, and attempting to do so can expose an employer to significant damages
- For example, in a recent Ontario decision, ***Rutledge v. MarkHaven Inc.***, a Court awarded bad faith and moral damages against an employer in the amount of $50,000.00, stemming from an employer's failure to properly conduct a workplace harassment investigation

5) Workplace Investigation Policy

Mistake #4: No Follow-Up After the Investigation is Completed

- It is not enough for an employer to conduct an investigation and to then communicate the results of the investigation
- If a violation of the policy has been found then, in addition to the finding, the investigation policy must also have a process in place to ensure that any written warnings, discipline or employee training which are recommended by the investigator are implemented
- The investigation policy should also provide for specific requirements for follow-ups, reviews and monitoring of go forward compliance after the conclusion of an investigation

6) Reservation of Rights

- When drafting workplace policies, including employment agreements, employers should be mindful to include reservation of rights clauses in the documents
- A reservation of rights clause can permit an employer to make changes to policies and to employee's terms and conditions of employment, while avoiding claims of constructive dismissal
- As is the case with all written policies and employment agreements, however, errors in drafting can lead to inadvertent employer liability

6) Reservation of Rights

Mistake #1: An Employer's Reservation of Rights Cannot Violate Legislative Entitlements

- For instance, a Progressive Discipline Policy or Employment Agreement which provides that an employer can terminate an employee's employment for any reason without providing any notice of termination or without any pay in lieu of notice, would be found to violate the Ontario *Employment Standards Act, 2000*, as well as the *Code* and the common law
- This can lead to termination provisions contained in Employment Agreement or Handbooks to be deemed unenforceable
- As a result, the employee's termination rights will not be limited and the terminated employee will be fully entitled to receive pay in lieu of notice at common law

6) Reservation of Rights
Mistake #2: Using Vague Language

- It is a basic premise in Canadian employment law that there is an inherent power imbalance between employers and employees
- As a result, any written documents prepared by the employer will be interpretated adverse the employer's interest
- This can be the case with vague reservation of rights provisions
- An example of a vague reservation of rights clause is as follows:
    - The employer reserves all rights, remedies, claims and defences at law or in equity and nothing shall be construed as a waiver
- Reservation of rights clauses using language similar to the above have been found to be unenforceable as they do not advise the other party as to what specific rights are being reserved and what specific changes can be made

6) Reservation of Rights
Mistake #2: Using Vague Language

- In an employment context, with the above clause an employee would not have a clear understanding of what rights they are agreeing to waive
- Rather than relying on "catch-all" clauses, employees should have specific reservation of rights provisions for all matters which they wish to be able to change
- A reservation of rights clause which attempts to reserve everything at once, will most times wind up reserving no rights

Managing your HR Issues

Wilson Vukelich LLP can help ensure that your employment and labour law matters are handled effectively and efficiently, and in a manner that is reflective of new legal developments and obligations. If you have any questions or require further information, please contact:

Dan Condon	Christine Ashton
905.940.5505	905.940.0526
dcondon@wvllp.ca	cashton@wvllp.ca

Wilson Vukelich LLP
Lawyers