Confronting the Most Common Employment Law Issues Faced by Trucking Companies:

Progressive Discipline, Termination, Accommodation, and Documentation

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Introduction

An estimated 8.4 million people are employed in the U.S. in jobs related to the transportation industry[1] with approximately 400,000 people in Canada in similar positions.[2] As of 2022, approximately 3.45 million of those U.S. transportation workers were truck drivers in the U.S.[3] with such 320,000 drivers being reported in Canada.[4] As of April 2023, there were over 750,000 active motor carriers in the U.S.[5] and over 46,000 in Canada.[6] Clearly, transportation is an industry which is ripe with the need for good Human Resource professionals and employment lawyers. However, the unique nature of the transportation industry, mixed with arduous employment laws in the U.S. and Canada creates the need for creative problem solving, unfailing documentation, and steadfast resolve when it comes to everyday employment law issues.

This article seeks to confront many of the common everyday employment law issues faced by trucking companies by using hypothetical examples and discussing the legal issues raised by each hypothetical as well as the various practical and creative ways to solve these issues.

***Hypothetical #1*:**

A Driver has been poorly performing for months. She takes a long time to get to her destination, taking longer breaks than mandated/allowed, getting lost on routes, and not delivering on time. Her poor performance is communicated to her and documented multiple times, following established company protocol. The Driver has been placed on a documented Performance Improvement Plan (PIP) with detailed expectations around timeliness, following routes provided, and communicating with dispatch if the driver gets lost. Despite this, another month goes by with the exact same poor performance, and no improvement seen. Before any further action can be taken, the Driver contacts HR and asks for accommodation for nausea/morning sickness with her pregnancy.

U.S. Perspective

This hypothetical presents a myriad of employment law issues with a variety of legal challenges, which can open an employer up to liability if these issues are not addressed consistently, timely, and in compliance with State and Federal laws.

Managing poor performance can be a challenge for many employers, especially when attempting to navigate multiple poor performance and/or policy violations. While Progressive discipline is a structured approach used by employers to address employee misconduct or performance issues while maintaining fairness and compliance with employment laws, it should be based on a coaching model. Progressive discipline based on a coaching premise, rather than a rigid disciplinary policy, allows employers the opportunity to develop strategic coaching and communication that can be tailored to the different communication styles of a multigenerational workforce, and to provide the employee the ability to improve and develop.

Progressive discipline involves a series of escalating consequences for employee misconduct or performance deficiencies with the primary goal being to correct behavior and deter future violations. Typical steps in progressive discipline include verbal warnings, written warnings, suspension, and ultimately termination. Documentation is critical in progressive discipline as it provides a record of the employee's behavior, a timeline of the behavior or violation, and the employer's expectations to correct the behavior.

On the other hand, Performance Improvement Plans (PIPs) are more formal documents that outline specific expectations and goals for an employee whose performance is below standard. Often, PIPs are used when an employee's performance deficiencies are ongoing or systemic, rather than isolated incidents of misconduct. A PIP provides a more detailed outline of the performance issues with clear guidance and timelines for improving the behavior and consequences for failing to meet expectations. In some cases, a PIP may be initiated as part of the progressive discipline process, particularly when performance deficiencies are identified through progressive discipline steps.

It is imperative for employers to ensure that they have clear policies and procedures outlining expectations for employee conduct, performance standards, disciplinary processes and that policies, procedures, and disciplinary measures are applied consistently, regardless of the employee's position or tenure with the company.

This hypothetical also addresses a common issue seen by employers; continuing with progressive discipline after an ADA, or other employment law, issue arises. The Pregnancy Discrimination Act (PDA) and the Americans with Disabilities Act (ADA) are two key federal laws that address workplace discrimination and accommodation, particularly in the context of pregnancy and disabilities. While they have distinct focuses, there are overlapping areas where they intersect, particularly concerning accommodations for pregnancy-related conditions.

Pregnancy Discrimination Act (PDA)

The PDA, enacted as an amendment to Title VII of the Civil Rights Act of 1964, prohibits discrimination on the basis of pregnancy, childbirth, or related medical conditions in employment. It mandates that employers treat pregnant employees or applicants in the same manner as other employees or applicants who are similar in their ability or inability to work. The PDA prohibits adverse employment actions, such as termination, demotion, or denial of promotion, based on an individual's pregnancy status.

Americans with Disabilities Act (ADA)

The ADA is a comprehensive federal law that prohibits discrimination against individuals with disabilities in various aspects of life, including employment, public accommodations, and telecommunications. It defines a disability as a physical or mental impairment that substantially limits one or more major life activity, a record of such an impairment, or being regarded as having such an impairment. The ADA requires covered employers to provide reasonable accommodations to qualified individuals with disabilities, unless doing so would impose an undue hardship on the employer.

While pregnancy itself is not considered a disability under the ADA, pregnancy-related medical conditions may qualify as disabilities if they substantially limit a major life activity. For example, conditions such as gestational diabetes, severe morning sickness, or pregnancy-related complications may meet the definition of a disability under the ADA if they substantially limit the individual's ability to perform major life activities such as eating, sleeping, or standing. In cases where pregnancy-related conditions meet the ADA's definition of disability, employers may be required to provide reasonable accommodations to affected employees, such as modified work duties, additional breaks, or temporary reassignment.

Both the ADA and PDA have an interactive process component that employers should be proactive in initiating. While neither the ADA nor the PDA have a specified timeframe for when the interactive process must be initiated, the EEOC, emphasizes the importance of promptly beginning the process once a request for accommodation has been received. The interactive process involves a dialogue between the employer and the employee to identify the specific limitations posed by the employee's disability and explore potential accommodations that would enable the employee to perform the essential job duties. While the PDA does not have as formal interactive process requirement, it is best for employers to conduct the interactive process in the same manner.

Overall, while the PDA specifically addresses pregnancy discrimination, the ADA extends protections to individuals with disabilities, including pregnancy-related disabilities, ensuring that they receive equal treatment and reasonable accommodations in the workplace. Employers must navigate the requirements of both laws to effectively address the needs of pregnant employees and individuals with disabilities while ensuring compliance with legal obligations.

In the hypothetical presented above, the employer has documented the poor performance on several occasions and has taken the appropriate step to place the driver on a PIP, which outlines in detail the expectations and timelines for improvement to the driver’s performance, in writing. The detailed documentation is imperative as it will serve as the foundation to show when the performance issue began and when the communication and plan for improvement were implemented. In this case, the documentation and PIP were issued at least one month prior to the driver’s notification to HR that she was pregnant and needed to request an accommodation. Since the driver is experiencing morning sickness, it may meet the definition of a disability under the ADA. While the employer would be obligated to begin the interactive process under the ADA with the driver and may be required to provide an accommodation, the driver must still be able to perform the essential functions of her job. If the driver’s poor performance continues, the employer

should continue to document and move through the progressive discipline process. The EEOC has stated "…reasonable accommodation never requires excusing poor performance or its consequences."[7] However, the fact that the employee did not ask for an accommodation until being placed on a PIP does not relieve the Company of its obligation to provide reasonable accommodation if the employee has a disability and an accommodation will help improve her performance.[8] Employers should take into consideration the facts of each situation and consider the applicable State and Federal laws before taking any action.

Canadian Perspective

When analyzing any employment issue in Canada, it is necessary to first determine whether the employer is subject to federal or provincial employment laws. A "federal work, undertaking or business" must comply with the Canada Labour Code ("CLC") and other federal employment-related legislation such as the *Canadian Human Rights Act*

A federal work, undertaking or business is defined under section 2 of the CLC, and in accordance with subsection 2(b) it includes a "railway, canal, telegraph or other work or undertaking connecting any province with any other province or extending beyond the limits of a province". This definition has been interpreted to include any asset-based trucking company that operates its trucks inter-provincially or across the Canada-US border. If the trucking company operates wholly within one province, it will not be a federal undertaking and will therefore be subject to the applicable provincial employment standards legislation of the province in which its employees work. In Ontario, for example, this includes the *Employment Standards Act, 2000* ("ESA"), the *Human Rights Code*, and the *Occupational Health and Safety Act*.

A freight forwarder, or load broker, engaged in arranging for the transportation of goods between provinces, or across an international border, is not subject to the CLC as it is not performing any inter-provincial carriage.

Once it is determined which jurisdiction the employer is under, the applicable employment standards legislation must be reviewed. The employment standards legislation sets out the minimum requirements that an employer must meet; the employer cannot contract out of these requirements. It is open to an employer to provide more generous standards, so workplace policies and individual employment contracts must also be considered.

This hypothetical raises issues relating to managing employee performance as well as the duty to accommodate an employee under applicable human rights legislation.

Managing Employee Performance

While managing employee performance is important to all employers, it is of particular importance to federally regulated employers. This is because under the CLC an employer cannot terminate a non-managerial employee who has 12 months of continuous service unless the employer has "just cause" to terminate, or can demonstrate a bona fide lack of work or discontinuance of a function.

If terminated, a federally regulated employee can, within 90 days of the date of termination, bring an unjust dismissal complaint under the CLC, which is adjudicated by the Canada Industrial

Relations Board ("CIRB"). If the employer is not able to show that the dismissal was "just", the employee may be awarded all wages lost as a result of the unjust dismissal, as well as be reinstated to their former position. Employment and Social Development Canada ("ESDC") oversees the Federal Labour Program. ESDC views dismissal as the last and most serious step that an employer can take in the disciplinary process. In order to show that the termination was just, it is imperative that the employer have a clear disciplinary policy, that it complies with that policy, and that it applies the policy in a consistent manner. The employer must have a well-documented disciplinary history and performance appraisals which include the dates and details of infractions, comments of supervisors, disciplinary action taken, remedial efforts made by the employee, so that it can show a pattern of unacceptable behaviour resulting in a culminating or final incident which is the basis for the dismissal. The employer must also be able to show that the employee has been warned that the misconduct was not acceptable and that further inappropriate behaviour could lead to dismissal. Only in the clearest of cases will workplace performance issues result in an employer being able to terminate a non-managerial employee and prevail in an unjust dismissal complaint proceeding.

Contrast this with a provincially regulated employer who can terminate an employee "without cause" so long as the employer provides the employee with reasonable notice of termination, or pay in lieu thereof (and there is no human rights factor or reprisal at play).

Duty to Accommodate

In this case the employee is seeking accommodation due to illness resulting from her pregnancy. This engages the applicable human rights laws. Under both the federal and provincial human rights legislation, every person has the right to equal treatment with respect to employment without discrimination based on, among other grounds, sex, gender identity, and gender expression. These grounds include the fact of a pregnancy, and any complications arising from the pregnancy. An employer has a duty to accommodate the employee to the point of undue hardship. The accommodation process is a two-way street in which both the employer and the employee engage in discussions and the sharing of information, to the extent required, to understand the employee's limitations and what accommodation may be suitable.

The Ontario Human Rights Commission describes the duty to accommodate has having both a substantive and a procedural component. The procedural component is the process undertaken to determine the appropriate form of accommodation, and the substantive component is the actual accommodation provided to the employee. Even where there is no actual accommodation that could have been provided, if the employer fails to engage in the process of determining what accommodation may be required, they will be in breach of the human rights legislation. The employer bears the burden of demonstrating undue hardship and in order to be able to rely on this, the employer must demonstrate that accommodation would carry a prohibitive cost or have an impact on health and safety requirements.

In Hypothetical #1, the employer should consider whether any of the employee's behaviours may be the result of the pregnancy and, if so, that behaviour should not be subject to discipline. Any misconduct not related to the pregnancy is still subject to performance management and where

required, discipline. As for the appropriate accommodation, in this case it could include reduced hours, a later start time, a move to non-driving role (if the employer is large enough to be able to offer this), or place the employee on an unpaid job-protected leave of absence.

Hypothetical #2:

A Driver has worked for the same company for three (3) years without problems. The Driver's annual motor vehicle report (MVR) comes back from the company's consumer reporting agency with a speeding ticket that the driver received while on personal time in a personal vehicle for speeds in excess of twenty-five (25) mph over the speed limit. The Company's Safety Council meets to review the Driver's safety performance and risk and decides to terminate the Driver based on this ticket. The Driver files a class action Fair Credit Reporting Act (FCRA) lawsuit claiming he was not provided with a proper FCRA disclosure and authorization prior to the Company procuring his most recent MVR, even though he did sign one at the time of his initial hiring, and that he was not provided the required pre-adverse action letter prior to termination.

U.S Perspective

The Fair Credit Reporting Act (FCRA)[9] is a trap for the unwary employer. With damages that range from $100 to $1,000 per violation,[10] the numbers can add up quickly, particularly for larger trucking companies that have a high volume of drivers. Hiring a driver in the transportation industry uniquely intersects with the FCRA, as the Federal Motor Carrier Safety Administration (FMCSA) regulations require companies hiring commercial drivers to procure consumer reports in the hiring process and ongoing throughout the employment relationship. It's common in the hiring processes for motor carriers to pull not only the required MVR and criminal background checks but also the CDLIS, SSN verification, prior employment verifications, and others – all of which are considered consumer reports under the FCRA. Furthermore, motor carriers are required to get an annual MVR on each commercial driver they employ.

When a consumer report is to be used for employment purposes, the FCRA imposes very specific requirements relating to providing a proper FCRA disclosure as well as obtaining authorization from the consumer (i.e. the driver).[11] Furthermore, employers are required to follow an adverse action process prior to taking any employment action which would be considered adverse to the consumer based on the information reported in a consumer report.[12] The strict nature of the FCRA requirements has created a niche market for FCRA consumer litigation around technical violations of the law. In 2023, over 5500 cases were filed alleging violations of the FCRA and the filings so far in 2024 have increased 19.6%.[13]

In this hypothetical, there are two main legal issues under the FCRA. The first is whether the driver was required to be provided with a *new* FCRA disclosure and sign a *new* FCRA authorization prior to when the employer pulled the driver's annual MVR. The driver was provided with an FCRA disclosure and signed FCRA authorization at the time of hire, three (3) years prior to the time the annual MVR was procured in this hypothetical. Let's assume for this hypothetical that the FCRA authorization signed by this driver had specific language which authorized the company to pull consumer reports throughout the employment relationship (commonly referred to as

"evergreen" language) and did not set or limit the time frame for which it is no longer valid. In such a case, where the FCRA authorization does not set a time frame for when it expires, there is no federal law which determines an "expiration date" or, rather, a time frame upon which the FCRA authorization is no longer valid. Further, no federal court has, to date, ever adopted any such ruling. However, a clever plaintiff's lawyer may claim that evergreen language contained in this FCRA authorization is unlawful, because: 1) it is extraneous information; 2) it is not within the driver's reasonable expectations that an FCRA authorization signed 3 years previously would still be valid; or 23) such language makes the disclosure and authorization no longer "clear and conspicuous."

Nevertheless, obtaining a new FCRA authorization each year is advisable for a number of reasons:

- To ensure that the employer is using the most up to date FCRA Disclosure and Authorization as common provisions in forms from just a few years ago are now being held as unlawful;
- If an employer updates their forms for new employees hired on, but still relies on an old unlawful form for ongoing MVRs, then each MVR obtained under the old form constitutes a new violation under the FCRA;
- If the employer lists the consumer reporting agencies used in their FCRA Disclosure and Authorization, but the employer changes consumer reporting agencies and does not update their FCRA Disclosure and Authorization or get a new one signed with the proper consumer reporting agency then a violation has occurred;
- It avoids surprise on the part of the driver and/or allegations of retaliation or unfairness in the rescreening process. In other words, if the driver had violations over the past year, and they are required to sign an FCRA Authorization for their annual MVR, the driver will know and/or expect that some action is likely coming.

Thus, while not technically required, for all of these reasons, an employer will greatly mitigate their FCRA risk by diligently providing a new FCRA Disclosure and getting a new FCRA Authorization each year from the driver.

The second FCRA issue in this hypothetical involves the employer's failure to provide the driver with a pre-adverse action letter (or notice), prior to terminating the driver. Pursuant to 15 U.S.C. §1681b(b)(3), the FCRA requires that before taking adverse action based in whole or in part on a consumer report, the employer intending to take such action must provide the individual with what is commonly referred to as a pre-adverse action letter in which the individual is provided a copy of the consumer report along with a copy of the FCRA Summary of Rights. This pre-adverse action letter is required to be provided within a reasonable amount of time prior to taking adverse action, in an effort to allow the individual to dispute the information in the consumer report. While the FCRA does not set out a specified period of time which is deemed a "reasonable amount of time," certain state fair credit reporting laws have definitely stated a required minimum amount of time which must be provided to a consumer before taking final adverse action. For example, California has a minimum waiting period of five (5) calendar days,[14] Illinois has a minimum of five (5) business days,[15] the City of Philadelphia, PA has the longest waiting time, stating that an employer must wait a minimum of ten (10) business days between sending a pre-adverse action

letter and sending a final adverse action letter.[16] As such, it's advisable for nationwide employers to build an adverse action process which incorporates at least 10 business days after the pre-adverse action letter before taking final adverse employment action, which should include sending a final adverse action letter consistent with the FCRA requirements. Nevertheless, in this hypothetical, the employer did not provide the driver with any pre-adverse action letter or notice, even though the adverse action against the driver was based on the driver's motor vehicle record (a consumer report). In this instance, a plaintiff's lawyer would likely only file the case as a class action lawsuit, where the driver was the representative of a class of plaintiffs similarly situated. Discovery would look into how many drivers (potentially over the last five (5) years) had been terminated based on a consumer report without being provided with a pre-adverse action letter. While the damages for a single technical violation would be actual damages or a maximum of $1,000 statutory damages per violation, along with attorneys' fees and costs and potential punitive damages (as decided by the court),[17] these damages can add up if a carrier has terminated numerous drivers without providing adverse action letters.

Notably, the hypothetical leaves out crucial details regarding whether any state fair credit laws, if any, are at issue. Each state has their own fair credit consumer protection law equivalent to the FCRA with varying degrees of severity, many of which impose additional requirements and notices on employers. For example, some analyses under California's Consumer Credit Reporting Agencies Act (CCCRA), conclude that a new fresh FCRA disclosure must be provided and authorization received for each consumer report that is procured. However, the unique challenge of trucking leaves open the question of which state law or laws apply. Is it where the driver resides? Is it where the employer's principal place of business is located? Is it where the driver works? Where does a driver, who drives across multiple states, work? Is it the location of the terminal they report to or the state in which they spend a majority of their time traveling in? Is it a mix of of one or more states together? All questions which are left to the courts in each particular jurisdiction to decide, some of which have resolved the issue and others which have not. An employer's most prudent action is to comply with not only the FCRA but also with each potentially applicable state law requirement.

Canadian Perspective

There is no law similar to the FCRA in Canada. The employer's obligation to maintain certain driving records for its drivers is a function of both the requirements of the applicable provincial licencing authority, as well as the company's own workplace policies.

Using Ontario as an example, as part of the Ministry of Transportation's ("MTO") licensing requirements, trucking companies are required to maintain a driver file which contains a CVOR Driver's Abstract for the previous 12 months (this lists all events that occur while the driver is operating a commercial motor vehicle), a record of all convictions or administrative penalties for the previous 24 months, any collision while operating a commercial motor vehicle, and confirmation of dangerous goods training, if received. The MTO recommends that the driver file also include the application form, a 3-year employment history, a record of all collisions, in any type of vehicle, training records and the current medical certificate, which could be satisfied by way of a copy of the driver's abstract or driver's licence, as a commercial driver must submit a

medical report every 5 years if under age 46, every 3 years if between 46 and 64, and every year if age 65 or older.

The ability to terminate an employee who has a conviction for a speeding ticket in their own vehicle will depend on the employer's workplace policies regarding off duty conduct, the driver's duty to report any highway safety violation, whether in a personal vehicle or commercial motor vehicle, and any minimum standards set by the company for the number of demerit points on the driver's record.

As described in Hypothetical #2, whether termination for not disclosing a conviction, or even the fact of conviction, amounts to unjust dismissal in a federally regulated workplace will depend on the written workplace policies, the employee's history of non-compliance, previous warnings, overall disciplinary record. Absent a clear pattern of misconduct, with warnings that termination of employment is possible, it is unlikely that this off duty speeding conviction would amount to just cause for dismissal. For the provincially regulated employer, they may be able to terminate the employee with or without case, again, depending on workplace policies and the employee's record. If there is not enough of a record to support termination for cause, the provincially regulated employer can terminate without cause by providing reasonable notice of termination.

***Hypothetical #3*:**

A Dispatcher has been employed with the same motor carrier for 3 years. During that time, his demeanor and performance have been concerns, but only one official write-up for the use of a racial slur has occurred. The Company decides to put the Dispatcher on a PIP regarding his temperamental, argumentative behavior as well as blatant favoritism when assigning loads but before they can communicate with the Dispatcher or start the PIP, the Dispatcher requests leave under the Family and Medical leave Act (FMLA) for substance abuse treatment. The Company grants the FMLA leave, decides there is no point in starting the PIP prior to the Dispatcher going out on leave, and never mentions the PIP to the Employee prior to leave. Upon his return he is immediately made aware of and put on the PIP, which includes third-party management classes and 8 bi-monthly meetings with HR to work on PIP objectives. The first 3 meetings are held as planned, but the member of HR handling the matter unexpectedly leaves the Company. No more meetings are held and the third-party classes are never provided. Two more complaints are lodged against the Dispatcher alleging favoritism and aggressive verbal behavior. The Company terminates the Dispatcher, who files a wrongful termination claim alleging that the PIP was a mere fiction and that Company terminated him due to his disclosure of his previous substance abuse issue.

U.S. Perspective

The FMLA is a labor law which requires certain employers in the United States to provide qualifying employees with job-protected leave for specific reasons related to medical treatment and family care.[18] In order to be covered by the FMLA, an employer must have at least 50 employees within a 75-mile radius, and an employee must have worked for a minimum of 1,250 hours over the course of the last 12 months, with at least 12 months of continuous employment for

that same employer. FMLA leave may be requested by a qualifying employee for the following reasons:

- For the employee to recover from a serious illness;
- For the employee to care for certain seriously ill family members; and/or
- To care for a new child.

FMLA leave is unpaid, and qualifying employees must follow specific protocol in providing notice to their employer of their intent to take FMLA leave and in documenting the underlying cause for taking said leave. During approved FMLA leave, an employer is required to maintain any and all employment benefits which the employee possessed prior to taking leave. Additionally, upon the completion of FMLA leave, the employee has a general right to return to their same position, or a position which is substantially similar in compensation, responsibility, and benefits.

These parameters obviously create certain concerns for employers when handling potential adverse employment decisions for employees who are taking, or have taken, FMLA leave. Further, in addition to the requirements which apply federally under the FMLA, certain states have enacted either separate leave-related acts or have expanded upon the terms of the FMLA to include employers with fewer than 50 employees,[19] or to apply to a larger range of family members for whom an employee may be allowed to provide care in order to qualify for FMLA-type leave.[20]

The protocol involved in requesting and obtaining FMLA leave may involve verification with medical professionals regarding treatment and the need for leave, as well as obtaining medical opinions from several sources. This necessarily means that there is the potential for a great deal of disclosure to an employer regarding an employee's medical condition. Any time an employer gains information about an employee's medical status, either through inquiry or happenstance, it has the ability to create an additional burden on the employer with regard to appropriate accommodations or potential disparate or discriminatory treatment. Therefore, employers must take great care in the handling such situations.

Employers are expressly not allowed to retaliate in any fashion against an employee for requesting or taking FMLA leave, however, an employer may terminate an employee either during or following FMLA leave if the employer can show that the employee would have been terminated regardless of their leave status for some other legitimate, non-discriminatory reason.[21] There is no limitation regarding how long an employer must wait following an employee's return from FMLA in order to terminate that employee for a legitimate reason. The FMLA does not give an employee greater job protection than they would have in the course of their normal employment. In this circumstance, the timing of the Dispatcher's termination being so close to the return from FMLA leave will likely look suspicious, but the employer has documentation of behavior that would reasonably lead to the Dispatcher's termination completely aside from the issue of FMLA leave.

An additional concern in this scenario is the delicate situation surrounding substance abuse disorder. Like many other medical conditions, substance abuse disorder can directly impact an individual's work performance—especially in a safety-sensitive industry like transportation that

has many specific regulations. Additionally, there is a very real social stigma that comes along with substance abuse disorder—even for those individuals who make the decision to seek and receive treatment for their substance use. The Dispatcher has claimed that he feels he is being terminated on the basis of his disclosure that he sought treatment for substance abuse. As has already been discussed, while the employer has no right to terminate the Dispatcher solely for taking FMLA leave to attend substance abuse treatment, this particular employer can show that there were other reasons for the Dispatcher's termination.

But employers may wonder if they have an obligation to treat the employee differently based on the disclosure of a substance abuse problem under other laws, such as the Americans with Disabilities Act (ADA). Under the ADA, employers may not discriminate against, and must provide reasonable accommodations for, certain individuals with disabilities. An employee is considered to have a "disability" for the purposes of the ADA if they have a physical or mental impairment that substantially limits one or more major life activities, have a record of having such an impairment, or is viewed by others/their employer as having such an impairment.[22] While current users of illegal drugs are not protected under the ADA, those who are engaged in active treatment, or have successfully completed a drug rehabilitation program, are entitled to protection.[23] Individuals with Alcohol Use Disorder are covered under the ADA, however, individuals can still be disciplined or terminated for use of alcohol on the job or for use which impairs job performance.[24] Therefore, while an employer does not have to provide a reasonable accommodation related to the actual use of alcohol, they may be required to accommodate the attendance of ongoing twelve-step-type meetings, and may not terminate an individual's employment solely due to them having Alcohol Use Disorder.

In this scenario, as with the concerns with the timing of the termination with the FMLA leave, there is substantial documentation regarding termination for legitimate, non-discriminatory reasons, in order for the Company to show that the termination was not related to the Dispatcher's disclosure of his current or former substance use disorder.

Finally, we face concerns about whether the employer had the right to terminate the Dispatcher even though the employer failed to perform all of the tasks it outlined in its own PIP. While most PIP-related lawsuits involve claims that the PIP was an action of discrimination or retaliation, employees can bring, and have successfully brought, wrongful termination lawsuits regarding inadequate PIP processes. In this circumstance, the Company not only failed to follow its own explicit terms, but also failed to provide the adequate support necessary for compliance with the PIP when it did not supply the required third-party courses and abruptly cancelled the HR meetings with the Dispatcher. Courts generally view PIPs as collaborative efforts between employers and employees, rather than an additional prescriptive list of policies for the employee to follow. Therefore, when an employer fails to participate sufficiently in its required actions under a PIP, a court may hold them liable for such failure.

Canadian Perspective

This scenario raises issues about an employer's duty to investigate certain workplace conduct, the duty to accommodate under human rights legislation, and the ability to terminate an employee, with or without cause.

Workplace Violence and Harassment

An employee's aggressive behaviour in the workplace may constitute a breach of applicable workplace violence or harassment laws. Under Ontario's Occupational Health and Safety Act, an employer is required to have a policy that sets out the procedure for dealing with workplace violence and workplace harassment. Workplace violence is defined as the exercise of physical force by a person against a worker, in a workplace, that causes or could cause physical injury to the worker, an attempt to exercise physical force against a worker, in a workplace, that could cause physical injury to the worker or a statement or behaviour that is reasonable for a worker to interpret as a threat to exercise physical force against the worker, in a workplace, that could cause physical injury to the worker.

Workplace harassment means engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome, and includes workplace sexual harassment. An employer has a duty to develop a program for workplace violence that includes measures and procedures for controlling risks identified in the assessment of risks (which employers must undertake), how to summon immediate assistance if violence occurs or is likely to occur, and to how to report workplace violence. The employer must also set out how it will investigate and deal with incidents of or complaints about workplace violence. Similarly, with workplace harassment the employer must develop a program and policy that includes procedures for reporting incidents of workplace harassment, that incidents or complaints will be subject to an investigation appropriate in the circumstances, and provide a written report, including any corrective action, to the complainant and respondent.

The CLC was amended in January 2021 to strengthen the former framework for harassment and violence prevention. It includes a new definition of harassment and violence as "any action, conduct or comment, including of a sexual nature, that can reasonably be expected to cause offence, humiliation or other physical or psychological injury or illness to an employee, including any prescribed action, conduct or comment". The CLC also provides an easier process for reporting any harassment or violence experienced or witnessed. The employer must conduct a review of any workplace harassment or violence and take measures to ensure a safe workplace, investigate any complaint, or any incident they become aware of workplace violence or harassment, and how the results will be communicated to the complainant and the alleged harasser.

In this scenario, even if the employer has addressed the aggressive behaviour by way of discipline, the employer must also ensure that it has undertaken a proper workplace investigation, in compliance with the applicable health and safety legislation.

Duty to Accommodate

Substance abuse is considered a disability under human rights legislation in Canada. In this scenario, the employer has accommodated the employee by providing him with a leave of absence to seek treatment. Upon his return to work the employee continues to engage in unacceptable behaviour. Where the behaviour may be an indication that the employee continues to be dealing with substance abuse, the employer has a duty to inquire further by initiating a discussion with the employee about whether there is a need for further accommodation. Given the nature of substance abuse, more than one discussion may be required. If the employee admits that he is still struggling with substance abuse, the employer and employee must engage in further accommodation discussions. This is a co-operative process and may require information from a medical professional, confirming what accommodation the employee requires. When requesting medical information, employers must use the least intrusive means possible and respect the employee's privacy rights. Any request for medical information must be limited to what is needed in order to assess the accommodation needs in light of the employee's essential duties.

If the employee denies that his conduct in the workplace is in any way linked to ongoing substance abuse issues, the employer is free to continue carrying out disciplinary action.

Termination of Employment

For a federally regulated employer, and as discussed in hypothetical #1 above, it is imperative that there is proper documentation showing the clear steps taken to address employee misconduct, including following the requirements of any disciplinary policy, in order to be able to show that the termination was just.

Whether the employer is federally or provincially regulated, if the employee's substance abuse was "a" factor in the decision to terminate his employment, even if is only a minor factor, this constitutes a breach of the employee's human rights. For that reason, proper documentation is crucial in order for the employer to establish that the reason for termination was not based, even in part, on the employee's disclosure of substance abuse.

Hypothetical #4 and #5: A Comparison

Dispatcher for a trucking company who performs the primary responsibilities of assigning drivers assigning drivers to routes, coordinating shipments, and ensuring compliance with transportation regulations is classified as an exempt employee and does not receive overtime pay.

Freight broker works for a logistics company, job responsibilities include negotiating transportation rates, coordinating shipments, and managing client relationships is classified as exempt and does not receive overtime pay.

U.S Perspective

The Fair Labor Standards Act (FLSA) is a federal labor law enacted in the United States in 1938. It sets standards for minimum wage, overtime pay, recordkeeping, and child labor. The FLSA is

enforced by the Wage and Hour Division of the Department of Labor. The FLSA regulates overtime exempt status by defining certain categories of employees who are exempt from the law's overtime pay requirements.

The FLSA exemptions are primarily categorized into executive, administrative, professional, outside sales, and computer employee exemptions. To qualify for exemption, employees must meet certain criteria regarding their job duties and salary basis. Analyzing whether a position qualifies for exemption requires a thorough understanding of both the FLSA regulations and the specific duties and responsibilities associated with the position in question.[25]

Executive Exemption: Employees must primarily manage the enterprise or a recognized department or subdivision, regularly direct the work of at least two or more full-time employees, and have the authority to hire or fire other employees or their suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees must be given particular weight.

Administrative Exemption: Employees must perform office or non-manual work directly related to the management or general business operations of the employer or the employer's customers and exercise discretion and independent judgment with respect to matters of significance.

Professional Exemption: Employees must perform work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction.

Outside Sales Exemption: Employees must customarily and regularly engage away from the employer's place of business in making sales or obtaining orders or contracts for services or for the use of facilities.

Computer Employee Exemption: Employees must be primarily engaged in computer systems analysis and programming or other similarly skilled computer-related occupations and be paid at least $684 per week on a salary or fee basis.

In the hypothetical above, if the dispatcher's primary duties involve assigning drivers to routes, coordinating shipments, and managing logistical operations, they may be considered to perform administrative functions directly related to the management of the trucking company's operations. Based on the provided job responsibilities of assigning drivers, coordinating shipments, and ensuring compliance with transportation regulations, the dispatcher may be classified as an exempt employee under the FLSA. However, it is crucial to conduct a comprehensive review of the dispatcher's actual job duties, considering factors such as decision-making authority, specialized knowledge, and the overall nature of their role, to ensure compliance with FLSA regulations.

On the other hand, if the Freight Broker's primary duties involve responsibilities related to coordinating shipments, including arranging transportation logistics, tracking shipments, and managing delivery schedules, it may be considered requiring organizational skills and decision-making abilities. Additionally, if the freight broker's duties involve significant decision-making authority regarding rate negotiation, shipment coordination, and client management, they may

meet the requirements for the administrative exemption. For the Freight Broker to qualify for the administrative exemption, the freight broker must perform office or non-manual work directly related to the management or general business operations of the employer. This includes exercising discretion and independent judgment with respect to matters of significance. If the freight broker's duties involve significant decision-making authority regarding rate negotiation, shipment coordination, and client management, they may meet the requirements for the administrative exemption.

However, A recent federal district court decision highlights the danger of classifying freight brokers as exempt from the payment of overtime. In *Robert Hendricks v. Total Quality Logistics, LLC*, the court held that TQL's Logistics Account Executives should be classified as non-exempt from the payment of overtime because:

1. They were primarily involved in the production of the very service TQL provides rather than the overall management of business operations; and
2. They did not exercise sufficient discretion and independent judgment.[26]

Under the FLSA, there is a vast distinction between an employee being primarily involved in the "production of a service provided by a company" and "work related to management or general business operations." This distinction is crucial in determining whether an employee qualifies for an exemption under the FLSA.

An employee involved in the production of a service provided by the company typically performs tasks directly related to the core functions of the business. This includes activities such as providing services to customers, negotiating transportation rates, and potentially coordinating and/or arranging shipments. In contrast, an employee performing work related to the management or general business operations are typically engaged in tasks that support the overall management or administrative functions of the company. These tasks may include activities such as managing delivery schedules or tracking shipments.[27]

The primary difference between these two categories is directly correlated with the nature of the work performed and its relationship to the core business activities of the company. An employee who is involved in the production of a service provided by the company is typically engaged in tasks that are directly related to the company's primary revenue-generating activities while an employee performing work related to the management or general business is typically engaged in tasks that support the overall administration and management of the company.

Again, it is imperative to conduct a comprehensive assessment of the freight broker's actual job duties, considering factors such as decision-making authority, specialized knowledge, and the overall nature of their role, to ensure compliance with FLSA regulations.

Canadian Perspective

Whether an employer is federally or provincially regulated, an employee's entitlement to overtime pay is based on the work that they do, as certain types of work are exempt from the overtime

provisions of the applicable employment standards legislation. Whether an employee is paid by way of an hourly rate, or salary, does not have any impact on their entitlement to overtime pay.

Under the CLC the standard hours of work are 8 hours per day and 40 hours in a week, and hours worked in excess of the standard hours are subject to overtime pay or time off in lieu thereof. Certain positions, namely managers, superintendents, and certain professions such as legal and medical, are exempt from overtime pay. In the trucking industry a city motor vehicle driver who drives within a 10-mile radius of their home terminal, is entitled to overtime pay for work that exceeds 9 hours a day or 45 hours a week. A highway motor vehicle driver (which is defined as a driver who is not a city motor vehicle driver) is entitled to overtime pay for hours worked in excess of 60 hours in a week (but time spent when relieved from duties regarding the vehicle are not counted).

Under the ESA the standard hours of work are 44 hours in a week. The common exemption to overtime pay is if the employee is a manager or supervisor. Other exemptions include a travelling salesperson, paid by commission, or a real estate broker, or those in the legal profession. In the trucking industry, a local cartage driver, which is a driver who drives within a municipality, is entitled to overtime pay if they work more than 50 hours in a week. A highway transport driver is entitled to overtime if they work more than 60 hours in a week, and only the hours during which the driver is directly responsible for the truck, are counted.

Ontario's ESA also addresses the "mixed work" scenario, in which an employee performs both managerial and non-managerial work. If at least 50% of the hours worked are in the role that is eligible for overtime (non-managerial), then the employee qualifies for overtime. The CLC does not include a 50% rule, rather the ESDC analyzes the totality of the work the employee performs to determine whether or not they are truly managerial.

***Hypothetical #6*:**

A female warehouse manager has bipolar disorder which requires certain medication and multiple doctor's visits each month. Employer requests that she go through the intermittent FMLA process to protect her time and position, and so that employer can properly plan for coverage of managerial oversight in the warehouse. The Manager states that other managers at her level of seniority, all of whom are male, are allowed to take off time for personal doctor appointments without going through the FMLA process, simply shifting their working hours a few hours one way or another. The Manager refuses to complete FMLA paperwork and claims she will bring a discrimination suit for being treated differently than her male counterparts if they don't accommodate her requests. The Employer states that the positions are not comparable, as the male managers are all in office settings where the employees under them do not require constant, direct oversight the way the employees in the warehouse do.

U.S. Perspective

One of the more difficult aspects of handling FMLA leave is the fact that it can actually be taken intermittently, in separate, non-consecutive increments for the same underlying cause. This can result in an arrangement that looks like a reduced work schedule, or it can result in multiple blocks

of several hours taken off at a time on a non-set schedule. While FMLA leave requests ideally involve 30 days' advance notice to an employer, if the need for leave is not foreseeable, the employee requesting the leave must give notice as soon as practically possible to do so. Circumstances like the one in this hypothetical, where an employee needs occasional leave for medical appointments to treat a chronic condition, or where unforeseen flare-ups may occur, as situations where it is often appropriate to apply for and use intermittent FMLA leave, as the condition and need for time off is known at the outset, but there is not a need for leave on a continuous basis.

Any time employers have to handle FMLA leave, staffing can become a concern. With continuous FMLA leave, this can often be handled by bringing in temporary workers or adjusting for overtime hours for employees who are not on leave. With intermittent FMLA leave, this can be harder to handle, as there may not be enough days or hours of leave to justify bringing in a temporary worker.

If an employee has a serious health condition which would typically fall under the parameters of FMLA leave, the employer can, in fact, require them to use FMLA leave for the time off required for the treatment or handling of that condition. The only instances where an employer cannot "force" an employee to use FMLA leave is if that employee does not, in fact, have a "serious health condition" that would prevent them from working.[28] Even in such circumstances, an employee likely will not be able to bring a successful claim for FMLA interference unless that employee runs out of available FMLA leave due to the employer forcing them to take purportedly unnecessary leave.[29]

In this circumstance, leave could also be considered a reasonable accommodation under the ADA. As the ADA does not contain an explicit list of what conditions are covered, some individuals with Bipolar Disorder would be considered to have a "disability" as it pertains to the ADA, and some would not. It all depends on the extent to which the Bipolar Disorder affects the employee's ability to perform their job duties. In this circumstance, time off is necessary to handle the "disability", so it would likely qualify. However, leave, when provided as a reasonable accommodation under the ADA, is taken unpaid, just like FMLA leave. Therefore, there is no real benefit to the Manager in taking leave as an ADA accommodation rather than FMLA leave.

In order for the Manager to have a claim of disparate treatment for the handling of her time-off requests, she would need to show that she was not only treated differently than the other managers, but that she was treated differently than those managers based on a protected characteristic, such as race, color, religion, sex, pregnancy, gender identity, sexual orientation, national origin, disability, and/or genetic information.[30] While the implication in the hypothetical is that the Manager may intend to bring a claim based on her sex or gender identity, given that the other purportedly "similarly situated employees" are male, she would not likely be able to show a *prima facie* case that this different treatment was based on her gender or sex. The Manager may also claim that she is being treated differently due to a disability, as her leave request is based on her Bipolar Disorder, and we aren't certain the underlying causes, reasons, or frequency for the male managers' leave.

Assuming the Manager made a successful *prima facie* case that she was treated differently due to her disability, the employer must then present a case that the reason for the disparate treatment is due to a legitimate, non-discriminatory reason: in this case, the fact that the staffing and planning concerns are different for the Manager's distinct, specialized position. Aside from other evidence not presented in this hypothetical showing that the employer's reasoning was merely pretextual, this will likely be accepted as a legitimate, non-discriminatory reason for the disparate treatment.

However, regardless of whether there exists a valid discrimination claim in this circumstance, it is advisable to require employees to follow the same leave request protocols in order to avoid situations of perceived discrimination or favoritism.

Canadian Perspective

This scenario engages employment standards legislation and human rights considerations.

For federally regulated employes, the CLC provides for a number of job-protected leaves of absence as follows:

- Medical Leave (unpaid)
  - This is a leave of up to 27 weeks per calendar year for, among other things, illness, injury or attending a medical appointment
- Medical Leave (paid)
  - An employee is entitled to up to 10 days of medical leave with pay per year for, among other things, illness, injury or attending a medical appointment
  - After the initial 30 day qualifying period an employee earns 3 days of paid leave, and for each additional month of continuous employment the employee earns an additional day, up to 10 days
  - Employee can carry over any unused days to the next calendar year
  - Employer may require that they be taken in full day increments
  - Employee is to provide written notice of the leave to the employer of 4 weeks, if practicable, otherwise, as much notice as possible

If a medical leave of absence (paid or unpaid) is 5 days or longer, the employer may require a certificate from a health care practitioner, and the employee must comply if the request is made no later than 15 days of the employee's return to work. The certificate must confirm that the employee was unable to work for the time they were absent from work.

Each province's employment standards legislation may also include job-protected sick leaves. Under the ESA, an employee who has been employed for at least 2 weeks is entitled to 3 unpaid days of sick leave for a personal illness or injury, or personal medical emergency, or to attend a personal medical appointment to treat an illness. The employer can treat the leave as a part of a day but is not required to do so. The employee is to advise the employer in advance of taking the leave, if possible, and the notice does not have to be in writing. An employer may require an employee who takes this leave to provide evidence that is reasonable in the circumstances that they were entitled to the leave.

Whether the employer is federally or provincially regulated, the employer cannot threaten, terminate, penalize or discipline an employee for taking a leave.

In addition to the employee in this scenario being able to access a statutory leave of absence (paid or unpaid), the employee may also be entitled to time away from work to attend medical appointments as part of the employer's duty to accommodate the employee.

A bipolar disorder is considered a "disability" under the human rights legislation. When considering an accommodation, the Ontario Human Rights Commission describes 3 principles of accommodation as follows:

- Respect for dignity
- Respect for individualization
- Integration and full participation

These principles will require the employer to consider this employee's request based on her unique facts. The employer will need to take the request in good faith, and consider it afresh, and not by comparing her to the other workers. The other important part of the duty to accommodate is the requirement for integration and full participation. This means that as part of the accommodation the employer should strive to ensure that the employee is still able to fully participate in the workplace, including with respect to compensation. This may mean allowing the employee to make up hours on other days, for the time taken to attend a medical appointment, so that there is no reduction in her hours, or pay.

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[1] ATA Economics and Industry Data, Bob Costello, Chief Economist for American Trucking Associations, https://www.trucking.org/economics-and-industry-data#:~:text=8.4%20million%20people%20employed%20throughout,of%201.5%25%20from%202021).

[2] Canadian Trucking Industry Statistics, Jannik Lindner, Gitnux Market Data Report 2024, https://gitnux.org/canadian-trucking-industry-statistics/#:~:text=The%20Canadian%20trucking%20industry%20employs,staff%2C%20and%20other%20related%20roles .

[3] See n 1.

[4] Statista, Martin Placek, https://gitnux.org/canadian-trucking-industry-statistics/#:~:text=The%20Canadian%20trucking%20industry%20employs,staff%2C%20and%20other%20related%20roles.

[5] See n 1.

[6] See n. 2.

[7] Applying Performance and Conduct Standards to Employes with Disabilities, https://www.eeoc.gov/laws/guidance/applying-performance-and-conduct-standards-employees-disabilities#fn32

[8] *Traylor v. Horinko*, EEOC Appeal No. 01A14117 (November 6, 2003) (employee failed to request reasonable accommodation for a disability with respect to any aspect of the PIP and instead waited until after he had failed the PIP and received notice of termination).

[9] 15 U.S.C. §1681 *et seq.*

[10] 15 U.S.C. §1681n

[11] 15 U.S.C. §1681b(b)(2)

[12] 15 U.S.C. §1681b(b)(3)

[13] WebRecon, LLC, WebRecon Jan 2024 Stats: 2024 Starts with a Roar, https://webrecon.com/webrecon-jan-2024-stats-2024-starts-with-a-roar/
[14] CA Code of Regulations §11017
[15] Department of Employment Security Law of the Civil Administrative code of Illinois, SB1488.
[16] The Philadelphia Code Chapter §9-3500.
[17] See n. 9.
[18] 29 U.S.C. § 2601.
[19] These states are: the District of Columbia (D.C. Code § 32-516(2)), Maine (26 Me. Rev. Stat. Ann. Tit 26 § 843 (3)(A)), Maryland , Minnesota (Minn. Stat. § 181.940 (Subd. 3)), Oregon (Or. Rev. Stat. §659A.153(1)), Rhode Island (R.I. Pub. Laws § 28-48-1(3)(i)), Vermont (23 VSA § 471(3)), and Washington (RCW § 49.86.010(6)(a)).
[20] These states are: California (Cal. Fam. Code §297.5), Connecticut (Conn. Gen. Stat. § 31-51kk(7)), the District of Columbia (D.C. Code 32-501(A), (B), (C))), Hawaii (Haw. Rev. Stat § 398.1), Maine (26 ME. Rev. Stat. Ann. § 843 (4)(D)) , Maryland (Sen. Bill 562), New Jersey (N.J. Stat Ann. § 34-11B(3)(h)), Oregon (OR. Rev. Stat. § 659A.150(4)), Rhode Island (R.I. Pub. Laws § 24-48-1(5)), Vermont (23 VSA § 471(3)(B)), and Wisconsin (Wis. Stat. §103.10(1)(f)).
[21] *Richmond v. Oneok, Inc*., 120 F.3d 205 (10th Cir. 1997).
[22] 42 U.S.C. §12102.
[23] 42 U.S.C. § 12114(b)(1) & (2).
[24] EEOC Technical Assistance Manual on the Employment Provisions (Title I) of The Americans With Disabilities Act §8.4 (1992).
[25] Handy Reference Guide to the Fair Labor Standards Act, https://www.dol.gov/agencies/whd/compliance-assistance/handy-reference-guide-flsa
[26] Court Rules Freight Brokers are Non-Exempt, David D. Robinson, https://scopelitis.com/the-transportation-brief/court-rules-freight-brokers-are-non-exempt/ (January 4, 2024)
[27] FLSA Overtime Security Advisor, U.S. Department of Labor, https://webapps.dol.gov/elaws/whd/flsa/overtime/glossary.htm
[28] *Wysong v. Dow Chem. Co.* 503 F.3d 441 (6th Cir. 2007).
[29] *Walker v. Trinity Marine Prod., Inc.*, 721 F.3d 542 (8th Cir. 2013).
[30] See eeoc.gov/prohibited-employment-policiespractices.