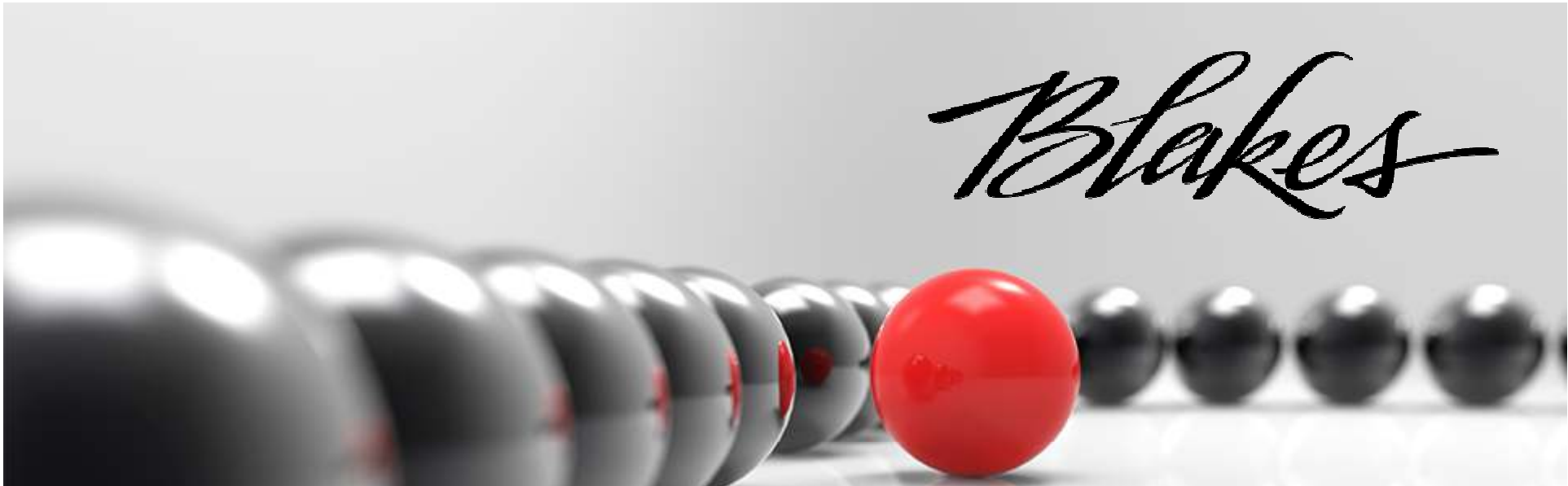




*Blakes*



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**Hot Topics:**

**EMPLOYMENT &**

**WORKPLACE PRIVACY LAW**

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# On the Agenda

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- ① The “Top Five”
  - Harassment Claims
  - Workplace Monitoring
  - Employee Data Breaches
  - Pay Transparency Legislation
  - Accommodation
- ② Fact Patterns and Discussion

# Harassment Claims

- #YouToo?
- Sexual harassment and “bullying”
- Systemic discrimination
- Workplace investigation requirements
- Increased damage awards and class actions
- Training

# Employee Privacy & Workplace Monitoring

- Privacy law framework differs depending on jurisdiction
- Scope and kinds of monitoring matter
- What do your policies say?
- Consequences for getting it wrong

# Employee Data Breaches

- Honest mistakes vs. “rogue” employee
- How should employers respond?
  - Containment and investigation
  - Breach notification
- Who is liable?

# Accommodation

- HRC and AODA requirements
- Increased number of requests and level of complexity
- Mental health accommodation
- Medicinal use of cannabis
- Family status

# Ontario Pay Transparency Act

- Status of legislation
- Prohibition against seeking compensation history from job applicants
- Public job advertisements to include compensation information
- Reporting obligations
- Prohibition against reprisal and enforcement

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# Fact Scenarios



# Something about Mary

Bob is 55 years old and has been employed by ABC Inc. for 22 years. He has risen through the ranks to a mid-level manager position. While not known as a particularly stellar performer, his performance appraisals have generally been good, and he has never been subject to discipline. Senior management worries that he may be a bit too “chummy” with some of his male subordinates of the same age. The General Counsel noticed that Bob made a few sarcastic remarks and rolled his eyes during her recent “respect in the workplace” training session.

# Something About Mary (cont'd)

ABC has a “hotline” that employees can call if they have workplace concerns. Through that hotline, ABC receives an anonymous complaint that Bob has been sending “inappropriate” emails to some of his co-workers. While the caller indicates that he has “let it go” in the past, Bob had recently went too far with “something he said about Mary”. Mary is a recent hire who works outside of Bob’s group and holds a Team Lead position. Two years prior to her hiring as a Team Lead, Mary was a co-op student at ABC through a university program, and reported to Bob.

## Something About Mary

- Does ABC have an obligation to investigate?
- What should the first step in the investigation be?
- Should ABC review Bob's email history?
- Should ABC monitor Bob's computer use going forward?

## Something About Mary (cont'd)

In the course of the investigation, ABC discovers that some inappropriate messages of a sexually explicit nature are being sent through Bob's personal gmail account. Based on the name of the gmail address, it looks like the account may be one he shares with his wife. Because Bob appears to regularly access his gmail account from work and has saved his password on the system, ABC can obtain access to the gmail account. ABC also discovers Bob has accessed pornographic sites from his work laptop, including sites that seems to feature teenage girls.

## Something About Mary

- Should ABC access Bob's gmail account?
- Should ABC call the police regarding Bob's access of what may be child pornography from his work laptop?
- What steps may/should be taken to mitigate ABC's legal risks associated with Bob's conduct?

## Something About Mary (cont'd)

When the ABC investigators meet with Bob regarding the allegations against him, he discloses that he had a consensual affair “gone bad” with Mary when she was a co-op student, which ultimately led to his divorce. Since his divorce, he has suffered from severe depression and has been drinking regularly. Bob’s grown children have been urging him to seek inpatient treatment for alcoholism as well as mental health issues, although Bob feels that this is a bit extreme, as he can “cut back on the beer” on his own.

## Something About Mary

- How do Bob's disclosures impact the investigation?
- Should ABC terminate Bob's employment and, if so, with or without cause?
- Assuming that the investigation determined that Bob sent sexually explicit emails to co-workers about his affair with Mary, what should ABC tell Mary?

# Clara's Very Bad Day

Clara is a Human Resources Manager at an Ontario-based financial institution, MoneyCo. She receives an email indicating that she is required by regulation to send the Employment Compliance Board certain personal information of employees to confirm the MoneyCo's compliance with diversity and related laws. Clara immediately sends the information via reply email. The information includes employees' names, dates of birth, compensation and their voluntary disclosure to MoneyCo regarding their identification as LGBTQ or members of a racialized community.



## Clara's Very Bad Day (cont'd)

After sending the employee data to the Employment Compliance Board, Clara mentions it in passing to Abdul, MoneyCo's VP, Human Resources. Abdul asks to see the emails immediately. After confirming that there is no such thing as the Employment Compliance Board, he forwards the emails to MoneyCo's VP, Legal asking him to figure out how to deal with this, and stating that Clara clearly "has to go" as this is not the first time errors have been made.

## Clara's Very Bad Day

- Does MoneyCo have an obligation to disclose to employees that their personal information has been provided to individuals outside of the organization?
- What else should MoneyCo do to mitigate its potential liabilities?

## Clara's Very Bad Day (cont'd)

Suppose that immediately following his discovery of the employee data breach, Abdul calls Clara into his office. Without closing the door, Abdul rips into her calling her “a complete and utter moron for doing something so stupid” and that while he “knew when he hired her she wasn’t the sharpest knife in the drawer” her behaviour indicated her “complete incompetence”. Slamming down some files, he tells Clara that this is “on her” and he won’t “take the blame for it”. Clara calls in sick the next day.

## Clara's very bad day

- Has Abdul engaged in workplace harassment?
- What should MoneyCo do about Abdul's interactions with Clara?
- How should MoneyCo address Clara's sick leave?

# PTA - What would you do?

- ABC Co.'s recruiters regularly ask potential applicants about their current compensation and pay expectations and only quote a salary range after considering this information
- Offer letters and compensation policies at DEF Inc. include language indicating that individual compensation data must be treated as confidential
- Melanie has read about the PTA on-line and starts asking all her co-workers about their compensation, which results in complaints
- Felicity approaches GHI Ltd. to determine why she is making less than Stan

Questions?

