



The Institute  
of Law Clerks  
of Ontario

# LAW CLERKS, REVIEW



## ILCO CONFERENCE 2015 – THE POWER OF YOU

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This year marked the 25th anniversary of ILCO's annual conference - "The Power of You". It was, once again, another successful and unforgettable conference. The event was held at the Sheraton on The Falls in Niagara Falls, Ontario. We hope that all attendees enjoyed their special anniversary gift and we look forward to seeing you roll it out at next year's conference.

### Keynote Speakers

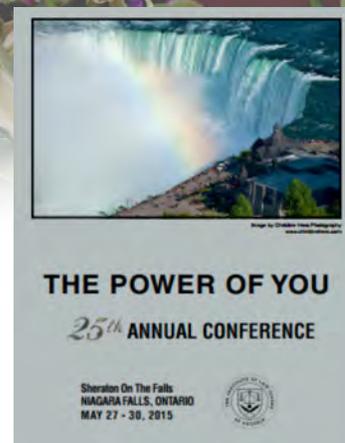
**David Chilton**, author of the personal finance book *The Wealthy Barber* and former cast member of CBC's *Dragons' Den*, kicked off the start of a busy conference with his humour and positive perspective on life.

**The Honourable David C. Onley** offered advice and encouragement on how to achieve success, speaking from his experience as the former Lieutenant Governor of Ontario.

Olympic champion **Mark Tewksbury** and Olympic coach **Debbie Muir**, shared some team building activities and practical tools to help you challenge yourself to do better. We collected some great words from the group and will be sharing them with you - Keep a look out!

### Speakers

This year's agenda included 28 different workshops which provided attendees with a variety of legal topics to choose from. As always, the speakers were exceptional and offered attendees the opportunity to expand their knowledge. We thank all the speakers for taking time from their busy schedules to present at, and attend, the conference.



### Golf

This year's golf tournament was held at Ussher's Creek, part of Legends on the Niagara. [See the separate article and photos inside the newsletter.](#)

### Summary

The annual ILCO Conference provides attendees with great learning and development opportunities and the chance to network with other professionals.

The success of the conference is not possible without the support of our sponsors, exhibitors and attendees. We thank all of you for your continued support. And a special thanks to our 2015 conference committee and the ILCO office staff.

We hope to see you at next year's conference in **Montréal, Québec**, to be held at **Fairmont The Queen Elizabeth**, from **May 11 to May 14, 2016**.

**Rose Kottis, Margaret Tsetsakos and Maddie Lepore**  
ILCO Conference Co-chairs, 2015



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Fax. 416.359.9500 | zaheeda@cartelinc.com



## PRESIDENT'S MESSAGE

If you attended ILCO's 25th annual conference in Niagara Falls, you attended some outstanding keynote sessions, along with those in the various areas of law which were informative and gave us all some good practice tips. Our attendees also had the opportunity to visit with various exhibitors during the conference to see what new programs and opportunities are available for law clerks.

Have you renewed your membership yet? By now, you should have received your renewal package. If you have not, please contact the membership coordinator at the ILCO office and a package will be sent to you.

I encourage you to spread the word about ILCO's upcoming certification program. It will raise the profiles of law clerks who are members of ILCO.

ILCO has a new general manager, **Kelly Logan**. Kelly brings a lot of experience in helping organizations to utilize technology efficiently and raise their profiles within their respective industry. Kelly has some great ideas for ILCO and the board of directors is excited to be working with her.

The board of directors and staff wish everyone a safe and happy summer!

**Lisa Matchim**  
President

## ILCO NEWSLETTER UPDATE – NEW ELECTRONIC FORMAT

The ILCO Newsletter Committee is pleased to announce a new electronic format for this current newsletter and future editions. As you can see, the format is interactive with hyperlinks to advertisers' websites and articles from

the index on the cover page. We hope you enjoy the new features.

Also, if you have written an interesting article or know of an article that would be of interest to law clerks which ILCO can

re-print with permission, please contact ILCO at [newsletter@ilco.on.ca](mailto:newsletter@ilco.on.ca).

Christopher Poirier and Anna Traer (Co-chairs) and Shaneen Laity and Clint Savary, **Newsletter Committee**

## MENTORSHIP PROGRAM AT ILCO

**Help Shape Our Future Law Clerks** – ILCO is considering a Mentorship Program and needs your input. We are looking for experienced law clerks to work with students and junior law clerks for a rewarding experience. If you are interested in being a mentor or wish to contribute to this program, please contact [info@ilco.on.ca](mailto:info@ilco.on.ca)

## ILCO'S 26<sup>th</sup> ANNUAL CONFERENCE – MAY 11-14, 2016

We hope to see you at next year's conference in Montréal, Québec, to be held at *Fairmont The Queen Elizabeth* from May 11 to May 14, 2016.

# ILCO PRE-CONFERENCE RECEPTION – MAY 27, 2015



## CONFERENCE – SPEAKERS & EXHIBITORS



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## 25 years and counting ...

### A perspective from a law clerk who attended all 25 conferences!

ILCO recently celebrated the 25th anniversary of their annual conference and I am very proud to say that I have attended every single one. WOW, where did 25 years go!!! We've come a long way from a one day event, with just a few exhibitors to a two and ½ day event with over 30 exhibitors.

I remember the first conference held in Toronto at Osgoode Hall. Three other law clerks and I travelled from Ottawa to Toronto for the one day event not really knowing what to expect. I can't really remember how many law clerks attended but my recollection is that the lecture hall was full of participants eager to learn, share information and network. The conference certainly fit the bill and upon leaving I was anxiously awaiting the next conference.

The early years of conference were held at educational facilities, alternating between Osgoode Hall one year and another university city the next; like Western University in London, Carleton University in Ottawa and Queen's University in Kingston. The conference quickly grew from a one day event to two days and then to the current format of 2-1/2 days. ILCO realized that with the number of attendees and

the number of exhibitors growing, it was time to move to conference facilities, so off to Kempenfelt Conference Centre in Barrie we went. As attendees arrived at Kempenfelt we certainly knew that we had outgrown staying in the University residences and sharing a bathroom and shower and embraced the luxury of a conference centre. There was no looking back and onward and upward we went from there with conferences held over the years numerous times and at various venues throughout the greater Toronto area, three times in Ottawa, three times in London, twice at each of Blue Mountain, Niagara-on-the-Lake and Deerhurst Resort, in Kingston, in Barrie, in Quebec City and who could forget, Halifax.

As the venues got better, so did the caliber of speakers over the years. Each year the ILCO conference has offered interesting topics in specific areas of law as well as outstanding keynote speakers for personal development.

When the golf tournament was added 16 years ago it was just another added bonus to the conference experience. I wasn't a golfer back then but have since picked up the game and have enjoyed the camaraderie on the course for many years now.

We owe so much gratitude to **Sylvia Morris**, a past President of ILCO

who had the vision and spearheaded the idea of conference so many years ago. Also thanks to the many sponsors and exhibitors who continue to support ILCO and our profession by participating at conference each year.

I've had the pleasure of serving on the conference committee numerous times and although it was hard work, it was always a rewarding experience to see it all come together.

When I look back over the last 25 years we have seen a lot of changes in our profession. Attending conference has always aided in keeping us up-to-date on changes to legislation and technology and promoting ourselves and our profession. When I return from conference I'm always energized from attending and not just because I've come home with another great prize !!!

To the Board and Conference Committee at ILCO, keep up the good work and I look forward to the next conference in Montreal in 2016.

**Sue Kavanagh**,  
Law Clerk, Manager  
Corporate Services,  
Perley-Robertson,  
Hill & McDougall LLP,  
Ottawa, ON



# ILCO Pre-Conference Golf Tournament – May 27th, 2015

Ian Curry, Chris Poirier and Anna Traer

Sponsored By **RICOH**



This year's 16th annual golf tournament was held at Ussher's Creek Golf Course, part of Legends on the Niagara in Niagara Falls. 36 golfers at all levels enjoyed this fun event. Ricoh, the title sponsor put on another great tournament with a post-game reception on the patio of the clubhouse where golfers enjoyed cool drinks and delicious hors d'oeuvres. A good time was had by all – a great way to relax and mingle among colleagues, exhibitors and friends.

Congratulations to 2 winning teams with a score of 72 net (par) - Team 1: **Patti Ground** of McCarthy Tetrault, **Lisa Huestis** and **Jean Marques** of Magna International and **Craig Fisk** of Ricoh; and Team 2: **Nancy Johnson** of Dickson MacGregor Appell, **Darren Cooper** of Emergent and **Ryan Allott** and **Lou Bertoli** of Newell Rubbermaid. Also congratulations to the contest winners: Penny Lindsay of Lerner for Straightest Drive; **Jean Marques** for Closest to the Pin; **Annette Fournier** of Thornton

**Grout Finnigan** for Ladies Longest Drive; and **Adam Sampson** of First Base Solutions for Men's Longest Drive.

Again, ILCO gratefully thanks the title sponsor **RICOH** for making the tournament a great success.

Please join us next year for this fun event!

**Ian Curry, Chris Poirier and Anna Traer**  
Directors, ILCO Golf Tournament



Dillon Craig, Chris Poirier, Ian Curry, Danielle Walker



Penny Lindsay, Debbie Miller, Anna Traer, Roger Shoreman



Susan Weichert, Sue Kavanagh, Liz McHugh, Steven Spagnolo



Natalie Wilson, Brent Tamane, Kurt Steinfort, Gene Roberts



Ryan Allott, Lou Bertoli, Darren Cooper, Nancy Johnstone,



Cirlene Pessoa, Charmain Menage, Brian Menage, Melanie Steele



Adam Sampson, Salena Visser, Annette Fournier, Tim Somerville



Katalin Imbert, Clint Savary, Helga Morales, Ryan MacDonald



Craig Fisk, Patti Ground, Lisa Huestis, Jean Marques



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# New “Start-up” Crowdfunding Exemptions Adopted in Some Canadian Jurisdictions

Paul Hayward  
AUM Law

This is the second of our nutshell series on regulatory developments affecting crowdfunding and other online financing portals.

On May 14, 2015, the securities regulatory authorities of British Columbia, Saskatchewan, Manitoba, Québec, New Brunswick and Nova Scotia (the participating jurisdictions) announced that they were adopting substantially harmonized registration and prospectus exemptions (the start-up crowdfunding exemptions) to allow start-up and early-stage companies in these jurisdictions to raise up to \$500,000 per calendar year through online funding portals.

As explained in the related notice, Multilateral CSA Notice 45-316 Start-up Crowdfunding Registration and Prospectus Exemptions, the exemptions are being implemented by way of local blanket orders on or shortly after the publication of the CSA notice, and will be in effect until May 13, 2020.

The start-up crowdfunding exemptions consist of an exemption from the prospectus requirement (the start-up prospectus exemption) and an exemption from the dealer registration requirement (the start-up registration exemption).

## Start-Up Prospectus Exemption

The start-up prospectus exemption allows non-reporting issuers (but not reporting issuers) to issue eligible securities, subject to a number of conditions, including the following:

- The head office of the issuer must be located in a participating jurisdiction.
- The issuer must distribute its securities through an online funding portal that is either relying on the start-up registration exemption (discussed below) or is operated by a registered dealer. Registered dealers that operate funding portals must meet their existing registration obligations under securities legislation and also confirm that they will comply with certain conditions of the start-up registration exemption.
- The issuer must distribute its securities using a prescribed form of offering document that includes basic information about the issuer, its management and the distribution, including intended use of funds raised and the minimum offering amount.
- The issuer (and any other issuer in the “issuer group”) cannot raise more than \$250,000 per distribution and is limited to two start-up crowdfunding distributions per calendar year (but is able to make other distributions in reliance on other prospectus exemptions). No person may invest more than \$1,500 per start-up crowdfunding distribution (but with no limit on the number of distributions in which the investor may participate).
- The distribution cannot remain open for more than 90 days.
- The issuer must provide each investor with a contractual right to withdraw their offer to purchase securities within 48 hours of the purchaser’s subscription or notification to the purchaser that the offering document has been amended.
- None of the promoters, directors, officers and control persons (collectively, the principals) of the issuer group is a principal of the funding portal.

The eligible securities are subject to an indefinite hold period and can only be resold under another prospectus exemption, under a prospectus or four months after the issuer becomes a reporting issuer.

## Start-Up Registration Exemption

The conditions to the start-up registration exemption include the following:

- The funding portal must deliver a funding portal information form and individual information forms for each of its principals to a participating jurisdiction at least 30 days before facilitating its first start-up crowdfunding distribution in the jurisdiction.
- A participating regulator may extend the initial 30-day review period and may remove the registration exemption (at any time) by notifying the funding portal that it has determined that the business of the funding portal is prejudicial to the public interest because the principals or their past conduct demonstrate a lack of
  - integrity,
  - financial responsibility, or
  - relevant knowledge or expertise.

Continued on Page 10

# New “Start-up” Crowdfunding Exemptions Adopted in Some Canadian Jurisdictions

Paul Hayward  
AUM Law

.....Continued from Page 9

- The head office of the funding portal must be located in Canada (but, unlike the case for issuers, may be located in a non-participating jurisdiction, such as Ontario or Alberta).
- The majority of the funding portal’s directors must be Canadian residents.
- The funding portal cannot provide advice to a purchaser or otherwise recommend or represent that an eligible security is suitable, or comment on the merits of the investment.
- The funding portal cannot receive a commission, fee or any other amount from a purchaser of securities.
- The funding portal must make the offering document and the risk warnings available online to purchasers, and must not allow a subscription until the purchaser has confirmed that he or she has read and understood these documents.
- The funding portal must receive payment for securities electronically through the funding portal’s website.
- The funding portal must hold the purchasers’ assets separate and apart from its own property, in trust for the purchasers and, in the case of cash, at a Canadian financial institution.
- The funding portal must maintain books and records at its head office to accurately record its financial affairs and client transactions, and to demonstrate the extent of the funding portal’s compliance with the start-up crowdfunding exemption orders for a period of eight years from the date a record is created.
- The funding portal must either
  - release funds to the issuer after the minimum offering amount has been reached and the 48-hour right of withdrawal has elapsed, or
  - return the funds to purchasers if the minimum offering amount is not reached or if the start-up crowdfunding distribution is withdrawn by the issuer.

Although it may seem unusual to provide an exemption from the registration requirement, but then reimpose many registration-like requirements as conditions of the exemption, this approach arguably reduces the registration requirement to a very “light touch” regime and allows the portal to avoid many additional obligations that ordinarily apply to registered firms. On the other hand, this approach may also result in some uncertainty, such as whether a regulator’s decision to remove the registration exemption is subject to the same “fitness for registration” criteria and protections as a decision to refuse, suspend or revoke a registration, and may result in some additional risks to investors, such as in relation to the portal’s ability to handle investor funds.

Nevertheless, on balance, the approach reflected in the start-up crowdfunding exemptions represents an attempt to tailor a regulatory regime that is sensitive to concerns about regulatory burden and principles of proportionate regulation, and allows issuers and portals a measure of choice over the regulatory regime under which they wish to operate.

As explained in our first nutshell of this series, [Equity Crowdfunding Portals](#), we may soon see a number of different crowdfunding models operating in Canada, including the following:

- the start-up crowdfunding exemption model for relatively small offerings of up to \$500,000 per year (with an investor limit of \$1500 per investment)
- the 45-108 crowdfunding model as described in proposed Multilateral Instrument 45-108 Crowdfunding (MI 45-108) for offerings of up to \$1.5 million per year (with an investor limit of \$2,500 per investment)
- broader crowdfunding based on other prospectus exemptions, such as the offering memorandum exemption or the accredited investor exemption (with generally no issuer or investor limits)

In this regard, it is particularly welcome that the start-up crowdfunding exemption has been amended from the original March 2014 proposal to allow offerings to be made through portals operated by registered dealers. In view of this change, registered dealers that are subject to higher regulatory requirements may also add start-up crowdfunding offerings to their activities. This may make it easier for the remaining jurisdictions, such as Ontario and Alberta, to introduce a similar start-up prospectus exemption in the future.

At a time when there appears to be little apparent movement south of the border on the crowdfunding proposals published by the SEC in October 2013, the choice of models being made available to Canadian issuers and investors is very welcome.

ILCO wishes to thank **Paul Hayward**, Senior Legal Counsel of AUM Law for permitting ILCO to reprint the article published June 4, 2015



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# Are Employees Ever Really “Off the Clock”?

Meaghan S. Hughes  
Cox and Palmer

Off-duty conduct of employees has been a hot topic in the news recently. In the age of round-the-clock social media, inappropriate employee conduct can have far-reaching effects on an employer's brand and reputation. Employers often face significant public pressure to terminate an employee based on off-duty conduct, but concerns arise when terminations are unwarranted and may result in grievances (in unionized environments) or wrongful termination lawsuits (in non-unionized environments).

The recent case of *Union of Public Employees, Local 4400 v. Toronto District School Board*, 2015 CarswellOnt 6561 provides an example of off-duty conduct which resulted in dismissal.

In September 2012, the grievor attended a Toronto District School Board (TDSB) school – off duty - to pick up her 13 year-old daughter. When she arrived, the grievor thought that a 14 year-old male student had been bullying her daughter. An altercation ensued, which was recorded by student bystanders and

was subsequently uploaded to YouTube. The video shows the grievor insisting the male student apologize to her daughter, yelling inappropriate comments and obscenities at him, and telling him she works for the TDSB and can find out anything she wants to find out about him.

The employer dismissed the grievor on the basis that she had breached its employment policies, one of which specifically provided that it is unacceptable for an employee to insult, degrade or direct demeaning comments to a child. The union grieved the dismissal, arguing that the altercation occurred when the grievor was off duty and that the employer has no jurisdiction or authority over what employees do in their private lives.

The onus was on the employer to demonstrate that discipline for off-duty conduct was warranted. On the facts of the case, the arbitrator accepted the employer's position that the grievor's conduct clearly harmed the TDSB's reputation and as such discipline was appropriate (*Millhaven Fibres Ltd. Millhaven Works, and Oil, Chemical and Atomic Workers Int'l Union, Local 9-670 (1967)*). As to whether dismissal was the

appropriate form of discipline, the arbitrator considered the fact that the grievor had identified herself as a TDSB employee and directed vulgar and profane language at a TDSB student on TDSB property. Clearly, the grievor's conduct was substantially connected to her employment and impacted the TDSB's reputation for those who saw or heard about the incident.

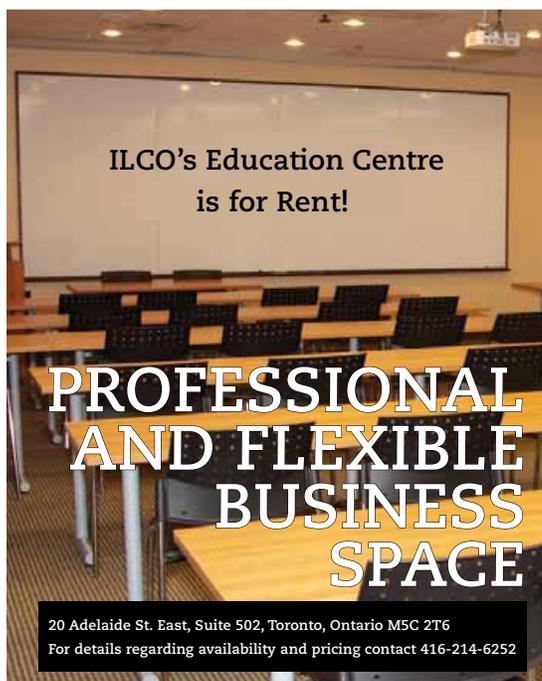
## Lessons for Employers:

The test for determining whether termination is justified varies slightly depending on whether or not the workplace is unionized; however, the overall factors to be considered are similar. Generally, employers must show a link between the off-duty conduct and the workplace. For example, that the off-duty conduct has significantly affected employer's ability to manage the operation or workforce, or that it has harmed the general reputation of the business.

In an effort to prevent such situations, expectations for off-duty conduct should be clearly set out in employment policies, along with

consequences for conduct that is potentially damaging to the employer's brand and reputation. Employers should incorporate such policies into employment agreements, or have the employee sign off on the policies or codes of conduct. Policies should also address and describe the limitations for use of social media for both personal and professional accounts.

ILCO wishes to thank [Meaghan S. Hughes of Cox & Palmer](#) for permitting ILCO to reprint the article published June 8, 2015.



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# You're Hired! Oops, Take That Back, You're Fired!

Lisa Gallivan and Alison Strachan

Stewart McKelvey

This proceeding arises from a dispute regarding the dismissal of the plaintiff ..., as the Chief Administrative Officer (“CAO”) for the defendant, the City of Williams Lake (the “City”). Pursuant to the agreement reached by the parties, the commencement date of his employment was to be March 1, 2013. An unusual aspect of this case is that on February 27, 2013, prior to the commencement of Mr. DeGagne’s employment, the City terminated his contract of employment. (Emphasis added)

Madam Justice Dardi in *DeGagne v. City of Williams Lake* 2015 BCSC 816

## What happened?

In this case, the employee was hired as a CAO of the City of Williams Lake and scheduled to start work on March 1, 2013. On February 27, 2013, the employer terminated his contract. In other words, the employee was fired before he ever started employment. Why? The termination letter said that the decision was a result of communications from the employee regarding a labour dispute that left council lacking “confidence that you will be able to exercise the sound judgment Council is looking for in its CAO”. What was the concerning communication? The employee had suggested a private meeting with the union president to establish trust and determine what it might take to resolve some outstanding issues between the City and the union. The Human Resource Manager, who received this email, was “concerned” about the proposed meeting and brought it to the attention of the Acting CAO who viewed this approach as “potentially very damaging to the ongoing negotiations” and felt that a one-on-one meeting with the union president could undermine the negotiation team. That said, the court concluded that the City’s decision resulted, at least in part, from the contents of an unsigned “anonymous letter” that the Mayor received after he issued a press release announcing the employee’s hire. That letter was “highly critical of Mr. DeGagne’s performance” as the CAO of another town.

At trial, the issue was whether the employee was entitled to damages for termination during the first year of employment under the Letter Agreement (six months), or, as the City argued, entitled to damages based on the termination during the probationary period language of the Letter Agreement (one month).

## What did the Court do?

The court found that the employee was entitled to six months’ notice and rejected the City’s argument to pay based on the lower probationary clause saying:

I reject the City’s submission that because Mr. DeGagne had agreed to a one-month notice period during the probationary period he could not reasonably have anticipated that he would be entitled to a greater severance payment if the employment contract was terminated before he commenced employment. During any probationary period the employer is obliged to act in good faith in the assessment of a probationary employee’s suitability for the permanent position ... I note that paragraph 3 of the Letter Agreement itself contemplates an informal review at three months, followed by a formal review in six months. In my view, it would be most unjust to impose a reduced obligation for severance without any corresponding obligation of the employer to assess in good faith Mr. DeGagne’s suitability for the position during an actual probationary period of employment.

What was the rationale for relying on the six months’ notice during the first year of the Letter Agreement? The court said:

In any case, I have concluded that on a plain and ordinary reading of Clause 8(C)(2) of the Letter Agreement, Mr. DeGagne is entitled to six months’ notice of termination, his employment having been terminated “during the first year of the Agreement”. (emphasis added) There is no ambiguity in the Clause. While it is unusual to be dismissed prior to having commenced work, in this case the specific term for six months’ notice applied during the first year of the agreement. I am satisfied, on reading the whole of the Letter Agreement, that Mr. DeGagne was entitled to six months’ notice, or pay in lieu, if his employment contract was terminated outside of the probationary period, and within one year from the date of the Letter Agreement, January 31, 2013.

The court went on to say that even if the Letter Agreement did not apply, the employee was entitled to reasonable notice of

Continued on Page 15

# You're Hired! Oops, Take That Back, You're Fired!

Lisa Gallivan and Alison Strachan  
Stewart McKelvey

.....Continued from Page 14

termination. The court noted that the employee was 57 years old, held a senior administrative position with a starting salary of \$130,500, had more than 25 years of experience in similar positions, and that he and his partner had relocated to Williams Lake in anticipation of his new position. In those circumstances, the court found, he was entitled to reasonable notice of six months.

## What does this mean for employers?

This is an unusual case. Rarely does an employer issue a contract of employment and terminate before the employee actually starts work. So, what should an employer do in such a situation? For starters, decisions to terminate before or after an employee commences work should not be made without full investigation of all circumstances.

How can liability be minimized in such situations? The first year of employment is typically the "testing" period of a new hire notwithstanding what is set forth in the probationary period. In some cases, issues may surface only after the probationary period ends.

Carefully consider whether the notice period you are offering in the first year of employment is a good business decision and one that you are willing to accept and pay should you need to terminate for any reason

ILCO wishes to thank **Lisa Gallivan** and **Allison Strachan** for permitting ILCO to reprint this article.

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## CALENDAR OF EVENTS

| DATE       | EVENT  |
|------------|--|
| 2015-07-29 | Review for the Estates Examination of June 2, 2015 |
| 2015-10-09 | Estates Alternate Exam Registration Deadline       |
| 2015-10-31 | Estates Alternate Exam                             |
| 2015-10-16 | Corporate Alternate Exam Registration Deadline     |
| 2015-11-07 | Corporate Alternate Exam                           |

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