

CSIL Online Workbook

A Guide to Applying for and Managing

Choice in Supports for Independent Living



Module 4

How to be a Lawful CSIL Employer

Module 1 | What is CSIL and is it for you?

Module 2 | How to Apply for CSIL

Module 3 | How to be a Successful CSIL Employer

Prepared by Spinal Cord Injury BC
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About This Online Workbook

Module 1

What is CSIL and is it for you?

Module 2

How to Apply for CSIL

Module 3

How to be a Successful CSIL Employer

Appendices

Documents, resources and glossary

Executive Summary

Forms Package

Word document with editable forms

This Workbook is a how-to resource for Choice in Supports for Independent Living (CSIL).

CSIL is a self-directed option for eligible home support clients in BC to receive their home support services. CSIL clients are people with disabilities who have high-intensity care needs who receive funds from their local health authority to purchase their own home support services. They become “employers” who manage all aspects of their home support from hiring and supervising staff to overseeing how CSIL funds are spent. People who cannot manage CSIL on their own are eligible through a Client Support Group or a representative.

Although the CSIL option may not suit everyone, people who receive home support services through CSIL enjoy the level of freedom and flexibility it provides. They have control over who they hire to provide personal assistance, when services are scheduled to fit with their lifestyle, and how tasks are carried out.

Through CSIL, funds for personal assistance come directly to the person for the personal assistance they need. The success of CSIL is a credit to how individualized funding supports independence and choice.

This Workbook is a guide for people who want to know more about CSIL: people who already receive home support services, those who intend to apply for home support services or current CSIL employers who want support to manage CSIL.

CSIL can change people’s lives, and this Workbook will educate people on both the responsibilities and benefits of the CSIL option.

Good luck in your exploration of CSIL.

How to Use this Workbook

The CSIL Online Workbook is over 200 pages in total, including appendices and resources, with over 130 pages in Module 3.

Please start with the topic that is most important to you. There are cross-references within the Workbook Modules to lead you toward related information that may be of interest.

Module 1 explains what CSIL is and who is eligible. **Module 2** gives step-by-step information on how to apply. **Module 3** takes you through the detailed process of setting up and maintaining all aspects of CSIL, including many self-help resources and forms you can use or adapt to your needs. **Module 4** provides an overview of how to meet your most important legal responsibilities as an employer.

Finding What you Need

- To move to and from the *Table of Contents* in a Workbook PDF:
 - Click on any topic in the *Table of Contents*
 - Click on the *Back to the Table of Contents* links at the bottom of each page
- Enter a search term in your PDF viewer, such as “severance” or “contract” to find content on those topics.
- Click on links to connect to listed websites and resources.



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Disclaimer: This publication is not meant to replace the expertise of a lawyer, or to provide specific advice or legal opinions. The information is for general information only and is meant to be used as a guide.

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Introduction

Welcome to Module 4 of the *CSIL Online Workbook, How to be a Lawful CSIL Employer*. Our intention with the Workbook as a whole is to educate and empower Choice in Supports for Independent Living (CSIL) employers, so you can enjoy the control and independence CSIL can provide. In this Module, we look at the key legal issues and responsibilities for CSIL employers as identified by the employers themselves. Understanding these issues will help you to prevent problems and to know the next steps if or when problems do develop in your workplace.

The CSIL program has been in operation in BC since 1994 and some employer questions have repeatedly emerged. Our intention is to address the most common of these questions in this Module. We have attempted to make this information as relevant and easy-to-use as possible for CSIL employers.

We begin the Module with an overview of laws and legal responsibilities, and follow with some scenarios and strategies that provide real-world examples of employment situations from CSIL employers.

The Importance of Module 3

This Module is built on the foundation of *Module 3 | How to be a Successful CSIL Employer*. Module 3 covers the procedures, resources and skills that will help you create a positive working environment and prevent employee problems from developing.

Throughout this Module, we suggest you review certain topics in Module 3 that will provide more background to the legal perspectives and topics we cover here. For example, some relevant Module 3 topics are creating clear job descriptions; developing strong communication skills; and, having regular performance reviews for staff.

What it Means to be a CSIL Employer

People who qualify for Community Support Services in British Columbia are entitled to participate in CSIL. The Agreement between the Health Authority and the CSIL employer sets out your responsibilities as a CSIL employer, including ensuring that people who are hired are competent and adequately trained to provide Home Support Services; negotiating terms and conditions of employment; paying salaries; keeping a variety of payroll records; and, making any required statutory deductions and remittances.

You are also expressly required to comply with all the provisions of the laws in the Province of British Columbia which are explained in detail in this Module.



Employers need to be aware that the Health Authority is not responsible for any consequences that arise out of your activities as a CSIL employer. These are strictly your responsibility.

It is important that you review and understand the Agreement between you and the Health Authority, and to seek clarification on any points you may not understand. One of the purposes of this Module is to assist you in becoming more aware of a key part of your responsibilities: managing a workforce.



CHAPTER 1

Overview of the Law

There are many different pieces of legislation, usually called Acts or Regulations, that set out your responsibilities as an employer. These laws concern many different matters, such as the minimum salary and vacation pay you must give employees; your responsibility to accommodate employees in the workplace; how to handle on-the-job injuries; and, what taxes and other remittances you must deduct from an employee's wages and remit to the Canada Revenue Agency (CRA).

Most of the laws that concern you as an employer are provincial and a few are federal. Examples of provincial legislation that will apply to your business include the *Employment Standards Act*, the *Human Rights Code* and the *Workers' Compensation Act*. An example of a federal law that applies to CSIL employers is the *Income Tax Act*.

Key Legislation for Employers

The *Employment Standards Act* and the *Employment Standards Regulation* govern most general conditions of employment, such as the minimum wage employees can be paid, when you must pay employees overtime, and the minimum notice or equivalent wages in lieu of notice you must provide employees upon terminating their employment.

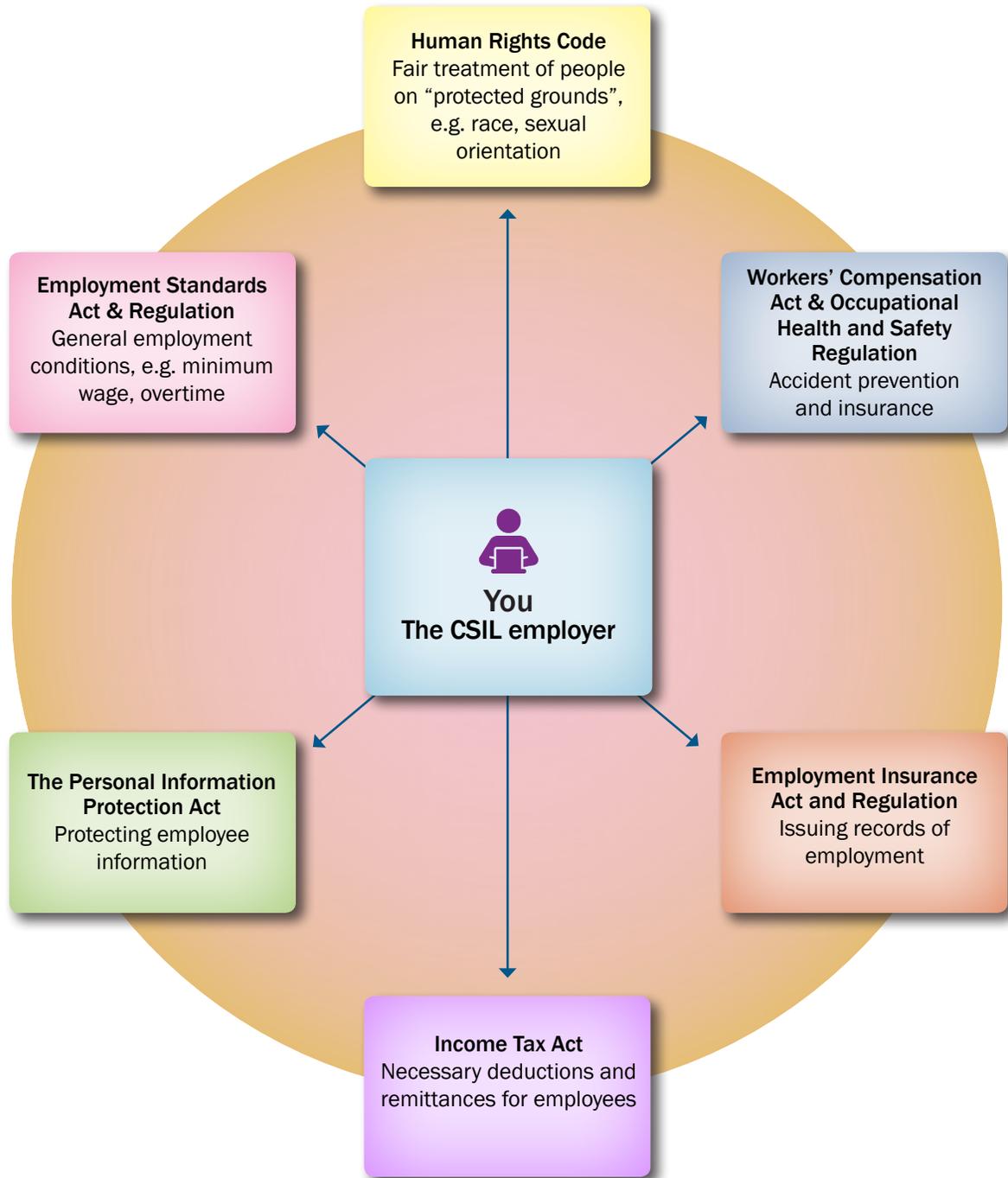
The *Human Rights Code* (HRC) dictates, among other things, how you are allowed to treat employees who fall into one of the protected grounds: race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, age or criminal conviction, if the conviction relates to a matter unrelated to the person's employment.

The *Workers Compensation Act* and *Occupational Health and Safety Regulation* are also important pieces of legislation. They require you to do such things as pay insurance premiums to cover your employees in the event of a workplace accident, and to report workplace accidents and injuries to WorkSafeBC.

The *Personal Information Protection Act* (PIPA) governs the information you are allowed to collect and distribute about your employees. Generally, PIPA allows you to collect information about an employee, with their consent, if the information is reasonable for the purpose of establishing, managing or terminating an employment relationship. This will include information such as the employee's Social Insurance Number (SIN) number, contact information and other personnel details. More importantly, PIPA generally requires you to keep your employees' personal information private.



See the Selected Legislation links in the Resources section.



As an employer, you need to ensure you are complying with the *Income Tax Act*, *Canada Pension Plan Act* and *Employment Insurance Act* which includes making necessary deductions from your employees' pay for income tax, Canada Pension Plan (CPP) and Employment Insurance (EI) premiums. These deductions also need to be remitted to the Canada Revenue Agency and a T4 slip must be provided to employees annually so they can file their income tax returns.



In Module 3, Chapter 2, we show you how to set up your CSIL business with Canada Revenue Agency, WorkSafeBC and Employment Standards Branch.

Enforcement Agencies

Most laws that apply to you as an employer will be enforced by various government agencies. For example, the Employment Standards Branch is mandated to enforce the minimum standards of employment contained in the *Employment Standards Act (ESA)* and *Employment Standards Regulation (ESR)*. If an employee believes that an employer has failed to provide them with certain wages or entitlements, they may file a complaint with the Director of Employment Standards through the Branch. The Branch is then empowered to investigate the complaint to determine if it has any merit.

WorkSafeBC is the agency that distributes information about and enforces the *Workers Compensation Act* and *Occupational Health and Safety Regulation*. CSIL employers' involvement with WorkSafeBC is generally limited to situations where an employee is injured while at work, although WorkSafeBC also has the jurisdiction to investigate workplaces to ensure safety standards are being met.

Certain employment matters can also be enforced through the court system. This may involve a law suit started by an employee or a review by the courts of a decision made by a government agency. There are two levels of court in British Columbia:

- Provincial court, also known as "Small Claims Court." This is where most matters are heard when the value of the alleged claim is \$25,000 or less.
- Supreme Court which is usually the choice of court where the amount pursued is more than \$25,000 or where a review of a decision by a government agency is requested. The processes in Supreme Court are more complicated than provincial court and in many cases the assistance of a lawyer may be required.

Regardless of the forum, you will always have the opportunity to know why a dispute has arisen and to participate in the resolution process. More specific examples of potential disputes will be discussed later in this module. An important point to keep in mind is that most legal processes are initiated by the employee, as opposed to being the result of random or unexpected involvement by a government agency, such as an audit.



CHAPTER 2

Employers and Employees

As we discussed in the Introduction, participating in the CSIL program makes you an employer and with that designation comes a broad set of responsibilities. While you may have a common sense understanding of what it means to be an employer, the term also has a legal definition.

Definition of Employer and Employee

Generally, an employer is a person or organization that:

- has direction and control over a worker's activities in the workplace,
- provides the tools and equipment needed by the worker,
- pays workers a predetermined amount without requiring the worker to make their own investment, and
- hires the worker to make a lasting contribution to the workplace.

The employer-employee relationship is defined by statute. For example, the *Employment Standards Act* provides a definition of who is an "employee" and "employer" and the *Human Rights Code* provides a definition of "employment."

Workers who are in business for themselves provide services to a business as an "independent contractor." These workers will provide an invoice for their services and charge applicable taxes on the value of their services. These workers take responsibility for reporting their earnings and paying appropriate taxes to Revenue Canada.

Although it may seem much easier from an operational perspective to hire workers as independent contractors, it is a requirement for all CSIL participants to treat and pay their workers as employees, not as independent contractors.

The Contract of Employment

When an employee and employer make an agreement for the employee to provide services in exchange for money, a contract of employment is formed. This is true whether the agreement is verbal or in writing. Unwritten employment contracts are very common and generally key issues, such as the rate of pay and hours of work, will be agreed to before or at the time of hiring.

However, it is important to have your CSIL employee contracts in writing, along with any other employment-related policies or guidelines.



Any entitlements specified in the contract of employment must meet the minimum requirements of the *Employment Standards Act* and *Employment Standards Regulations*. Where a written contract does not address a particular area and the matter is not discussed between the parties, the minimum requirements of the *Employment Standards Act* and *Employment Standards Regulations* will apply.

A written contract will usually set out the basic terms of employment in detail and include the following:

- job descriptions and duties,
- workplace policies,
- wages and benefits,
- vacation and statutory holiday entitlements,
- entitlements to notice of dismissal, and
- sick leave entitlements.

Any entitlements specified in the contract of employment must meet the minimum requirements of the *Employment Standards Act* and *Employment Standards Regulations*. Where a written contract does not address a particular area and the matter is not discussed between the parties, the minimum requirements of the *Employment Standards Act* and *Employment Standards Regulations* will apply.

For example, the *Employment Standards Act* requires employers to provide employees with a minimum of two weeks' vacation with pay per year. If your contract does not cover vacation pay, this is the amount to which the employee will be entitled.

An important feature of most employment contracts concerns the amount of notice of termination employees are entitled to receive. In the absence of any other arrangement, employees are entitled to "common-law reasonable notice" of the termination of their employment. This is primarily determined through a consideration of the employee's age, length of service, the character of employment, such as whether the position is supervisory, and the availability of other work given the employee's experience, training and qualifications.

When terminating an employee who does not have termination provisions in writing, it is advisable to find peer or professional advice to determine how much notice the employee should receive and how this notice should be delivered.



Please see a sample employment contract in the Resources section. We also provide information on how to create a Job Description and Employee Guidelines in Module 3, Chapter 3.

Employees' Obligations

Employees also have certain obligations. For instance, it is implied in an employee's contract of employment that they will demonstrate a duty of loyalty, fidelity and good faith toward their employer, and will serve their employers faithfully and honestly. Employees are expected to be at work on time, follow lawful direction, not steal or be dishonest, and maintain confidentiality where appropriate.

It is a good idea to clearly explain to an employee all of their obligations, either within their contract of employment, through a written policy governing the workplace and/or during your hiring meeting.



CHAPTER 3

Core Legal Responsibilities

An employer has many different obligations that arise either from the contract of employment with their employees or from various government statutes that we introduced in Chapter 2. Some of the most important obligations are outlined in this Chapter.

Employment Standards Act

The *Employment Standards Act (ESA)* governs many aspects of the employer-employee relationship, including the following:

- the minimum hourly and daily wage to which employees are entitled,
- when overtime has to be paid to employees and at what rates,
- when employees must be paid their wages and what information must be provided on their wage statements,
- the records you are obliged to keep regarding your employees,
- when employees are entitled to statutory holiday pay and at what rates,
- how much vacation time and pay to which employees are entitled,
- when you are required to provide employees with time off for leaves of absence, such as maternity leave,
- the legal minimum amount of notice of termination, or pay in lieu, to which employees are entitled, and
- the definitions of various individuals exempt from certain provisions of the *Employment Standards Act*.

Included in this Module are links to key information provided by the Employment Standards Branch. We recommend that you familiarize yourself with them.

Human Rights Code

The *Human Rights Code (HRC)* is designed to prohibit discrimination, including discrimination in the area of employment. It also establishes the Human Rights Tribunal and sets up a process for making and resolving complaints of discrimination. Employees are able to file a complaint directly with the Tribunal which will attempt to resolve the complaint through a settlement conference without the need for a formal decision-making process. Ultimately, unresolved complaints will be decided by the Tribunal.

The *Human Rights Code* protects employees from being discriminated against in their employment because they fall into one of the protected groups. For example, this means you cannot refuse to hire someone because you have concerns they may be too old to perform their job or are worried that their young family may interfere with their ability to be as available as you would like them to be.

It also means that you must provide reasonable accommodation to employees who have some type of disability. For instance, if an employee needs an absence from work due to a serious injury or illness, you may not terminate their employment and hire a new employee.

Protected grounds in the *Human Rights Code*:

- race
 - colour
 - ancestry
 - place of origin
 - political belief
 - religion
 - marital status
 - family status
 - physical or mental disability,
 - sex
 - sexual orientation
 - age
 - criminal conviction, if the conviction relates to a matter unrelated to the person's employment
-

The *Human Rights Code* has limitations on your obligations and an employer is only required to accommodate an employee to the point of “undue hardship.” This means that, if accommodating an employee would unreasonably interfere with an employer’s operations, or the job candidate simply could not perform the duties of the position for which they have applied, you may be relieved of the need to accommodate. However, the standard of “undue hardship” is very hard to meet. We strongly recommend you seek professional advice (e.g. a lawyer) and/or a peer with successful experience before making any decisions that an employee may potentially view as a breach of the *Human Rights Code*.



Workers’ Compensation Act/Occupational Health and Safety Regulation

The *Workers’ Compensation Act (WCA)* and *Occupational Health and Safety Regulation (OHSR)* explain the rights and responsibilities of employers and workers around workplace safety. They also set out the administrative practices and regulation-making authority of the Workers’ Compensation Board (also called WorkSafeBC).

WorkSafeBC regulates workplace safety, investigates workplace safety issues and provides compensation to injured employees. They also provide penalties and other sanctions to employers who are not in compliance with the legislated requirements.

Through the Ministry of Labour, the Employers’ Advisers Office provides independent advice, assistance, representation and education to employers concerning workers’ compensation issues. Employees can access similar representation through the Workers’ Advisers Office.

Personal Information and Privacy Act

The requirements of the *Personal Information and Privacy Act (PIPA)* will be easy to meet as long as you collect only the information you need about employees, and ensure their information is kept in a private and safe place not accessible by third parties—including other employees. This may require special attention from CSIL employers who require physical assistance from workers to manage paperwork and files. If you hire someone to manage your payroll, for example, you are responsible for ensuring they protect the confidentiality of employee information.

Income Tax Act

The *Income Tax Act (ITA)* details the legal requirements for employers to make deductions from employees' wages for the purpose of Canada Pension Plan, Employment Insurance and income tax remittances. The Canada Revenue Agency oversees and enforces compliance with the *Income Tax Act*.

We recommend you seek the services of a qualified accountant or bookkeeper to manage employee payroll matters. If you choose to do this yourself, the resources in this Module and in Module 3, Chapter 2 will help ensure you are compliant with *Income Tax Act* requirements.

The *Employment Insurance Act* and *Regulation* require you to issue a Record of Employment (ROE) anytime there has been an interruption of an employee's earnings due to a leave and within 5 days after their employment is terminated. The Record of Employment can be filed online with Service Canada.



Record of Employment Guide: http://www.servicecanada.gc.ca/eng/ei/employers/roe_guide.shtml

How to fill out a T4 form: <http://www.cra-arc.gc.ca/E/pub/tg/rc4120/rc4120-12e.pdf>

Labour Relations Code

The *Labour Relations Code* governs matters pertaining to unionized workplaces, including union campaigns to represent employees in the worksite. This Code is not discussed by this manual.



CHAPTER 4

Common Legal Issues for CSIL Employers

In this Chapter, we move from general legal information to real-world examples from CSIL employers. Some examples are composites of more than one situation and all names have been changed.

These scenarios offer a look at some of the most common legal issues employers have faced: what the legal issues are, which laws apply and which suggested actions or procedures would prevent problems from developing or escalating.



Scenario 1 | Dismissing Employees with Notice or Pay

Chris, who is quadriplegic, has been a CSIL participant for about eight years. He employs four support workers who have been with him for various lengths of time.

Due to some life changes, Chris realizes that he is overstaffed and can let someone go. He decides to terminate the employment of Mark, a 50-year-old live-in caregiver, who has worked for Chris for the past six years. Chris is not sure if Mark is due any severance pay and, if so, how much.



As an employer, what are Chris' obligations to Mark?

You can generally dismiss an employee by simply providing them with adequate working notice; in other words, by advising the employee that they will continue working for a set period of time before their employment comes to an end. In certain cases, you may be able to dismiss the employee immediately and provide them with the equivalent pay they would have received had they been given working notice.

The amount of working notice an employee should receive depends on several factors. The *Employment Standards Act* sets out the minimum severance requirements each employee is entitled to receive. These requirements permit you to either provide a period of working notice or equivalent pay instead of working notice.

How much severance pay or working notice are workers entitled to?

- BC legislation sets out the minimum severance requirements
- employers can provide a period of working notice or equivalent pay instead of working notice
- the minimum amount of working notice or pay in lieu of notice depends on the length of employment

The minimum amount of working notice or pay in lieu of notice depends on the length of employment. This ranges from no notice or pay for employees with less than 3 months service, to 8 weeks' notice or pay in lieu for employees with 8 years' service or more.

For employees with no contractual terms that define the amount of notice or pay in lieu they will receive should the employer choose to terminate their employment, they are entitled to the minimum

standards of the *Employment Standards Act and Regulations* and potentially common-law reasonable notice as well. As explained in Chapter 2, common-law reasonable notice is typically based on the employee's age, length of service, the type of work they are performing and the availability of comparable work. In essence, the employee is entitled to receive working notice of the termination of their employment. Where employees are terminated without being provided with working notice, it is normal practice to negotiate an appropriate financial severance package with the employee.

In Mark's case, the period of reasonable notice would likely be in the range of 6 months, although the length of reasonable notice or pay in lieu you provide Mark could be less.

Key Issue

The lawful management of dismissing employees is crucial. If you have questions about following the legal requirements around notice and pay in lieu, contact a lawyer or human resources consultant familiar with employment standards.



Scenario 2 | Terminating Employees for Misconduct

Soon after dismissing Mark, Chris begins to regret his choice. One long-term employee of eight years, Patricia, has recently become a thorn in his side. She routinely arrives late which causes difficulties for the person on the previous shift, she ignores Chris while she does things she sees as more important, she forgets to do routine tasks, and she can display a poor attitude when confronted about her lack of interest in improving her performance.

Chris has told Patricia verbally, on at least a half dozen occasions, to arrive on time and attend to him in a timely manner when he directs her to do so, but these instructions were never put in writing. If asked, Chris probably could not recall the specific dates or times when most of these warnings were delivered, although he knows they happened.

One day, Patricia comes in ten minutes late for the start of her shift. When Chris confronts her, she rudely tells him to "keep it together" and tells him she'll be with him in a minute. This is the last straw for Chris. At the end of the day, Chris speaks to Patricia privately and tells her that she is terminated with "just cause" meaning her employment is ended immediately with no severance pay. She expresses her concern about finding a new job at 60 years of age, but Chris has reached his limit and stands by his decision.



Did Chris have the right to dismiss Patricia? If not, what are the potential consequences?

As an employer, you are generally relieved of the requirement to provide a dismissed employee with notice or pay in lieu of notice, where that employee is dismissed for misconduct serious enough to meet the legal standard of "just cause." Just cause can range from a persistent inability to meet the standards of the job to serious actions such as theft or dishonesty.

Where there are problems with an employee's performance, the employer must:

- advise the employee they are not meeting the reasonable standard of performance,
- ensure the employee has the opportunity to improve their performance, and
- advise the employee that failure to meet the stated standards may result in termination.



See Module 3, Chapter 5, Performance Evaluation.

When it comes to more serious misconduct, establishing just cause will depend on whether the employee has acted in such a way as to irreparably damage the employment relationship. This usually involves an extreme breach of trust caused by the employee's poor judgment. Keep in mind this is not assessed on the basis of whether you personally believe the relationship is damaged beyond repair; a judge may have a different view and you may therefore be liable for your decision.

In Patricia's case, Chris has a history of undocumented warnings regarding her performance. Further, while her communication with Chris was clearly inappropriate, it may not have been so inappropriate as to warrant immediate dismissal.

What is "Just Cause"?

Here are some examples of what may constitute just cause:

- theft
- fraud and dishonesty
- assault or harassment of co-workers
- breach of duty
- serious willful misconduct
- conflict of interest, especially if it involves provable loss to the employer
- serious breach of employer rules or practices
- serious undermining of the workplace culture
- chronic absenteeism or tardiness
- unsatisfactory performance

Key Issue

This example highlights the importance of documenting employee issues and doing appropriate research before making decisions. Had Chris followed these steps, he would have provided Patricia with clear guidance on his expectations, in a way that would increase the chance she would improve her performance. He would also have the documentation he needs to justify decisions about her employment, if she did not improve. Given Patricia's age and length of service, the alternative is a lawsuit with a potentially significant judgment in her favour.

If you are in doubt regarding just cause for dismissal, consult a human resources consultant or lawyer **before** acting on termination.



Scenario 3 | Accommodating Employees under the Human Rights Code

After getting legal advice on how to proceed with a termination process that respected Patricia's rights as an employee, Chris terminated her employment without incident. Patricia's replacement Gurjit, who has been employed for less than three months, has a skiing accident on the weekend and breaks her leg. Given the physical nature of her work, she is unlikely to be able to return for at least two months.

While Chris is able to make arrangements to replace her, the circumstances are more than a little inconvenient. He needs to find temporary staff and they will require orientation. If he can't find qualified people willing to accept temporary work, he will need to use a home support agency.



See [Module 2, Step 3, Making a Staff Back-Up Plan](#).

After some frustration, he decides that he needs to replace Gurjit immediately in order to restore some normalcy to his daily routine. Because of Chris' prior decision to get legal assistance drafting his employment contracts, he believes he can dismiss Gurjit immediately without providing her with any notice or severance pay because she is a probationary employee who has been employed for less than three months.



Can Chris dismiss Gurjit?

As we explained earlier in this Module, British Columbia provides employees protection under the *Human Rights Code*. Employers are not allowed to discriminate against employees or dismiss them based on their race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, age or criminal conviction unrelated to their employment.

Because of the nature and severity of her injury, Gurjit may have a physical disability, under the *Human Rights Code*, even though it is a temporary one. And as an employer, Chris has a duty to accommodate Gurjit to the point of "undue hardship." Generally, the threshold for undue hardship is quite high and may include such factors as the financial costs of accommodation, any health or safety risks involved, and the size and flexibility of the workplace. Given the present circumstances, the heavy nuisance caused by Gurjit's absence may not be enough to justify her dismissal. As such, dismissing her could be a breach of the *Human Rights Code*.

In British Columbia, the Human Rights Tribunal enforces the Code and they have the authority to adjudicate complaints of discrimination and order payment of lost wages, provide additional damages to compensate employees for the injury to their dignity, and even require that the employee be reinstated to their former position.

Key Issue

Gurjit's example again highlights the importance of obtaining sound advice before making major workplace decisions. It is important to do some research or seek advice before making decisions relating to an employee who requires accommodation because of disability.



Scenario 4 | Pregnancy/Parental Leave

After consulting professional human resources advice, Chris accommodates Gurjit's temporary disability and does not terminate her employment. More time passes and Gurjit tells Chris she is pregnant and would like to plan the date to begin her leave. However, Chris is unsure about how much time off she should receive. He also wonders if it might be easier to dismiss Gurjit and hire someone to permanently replace her.



What are Chris' obligations to Gurjit?

Employees who are pregnant are entitled to two different kinds of leave: pregnancy leave and maternity leave. Employees such as Gurjit may take up to 17 consecutive weeks of unpaid pregnancy leave which may start no earlier than 11 weeks before the expected birth date, and ending no earlier than 6 weeks after the birth date, unless the employee asks for a shorter period.

Employees are also entitled to a further 35 consecutive weeks of unpaid parental leave, commencing immediately after she gives birth. If the employee does not take a pregnancy leave, the parental leave

may be for a period of 37 consecutive weeks. It is typical for employees to start a pregnancy and parental leave with the expectation they will be absent 52 weeks.

Under the *Employment Standards Act*, Chris is required to hold Gurjit's job while she is absent from work. He may not, because of her pregnancy and related leaves, terminate her employment or change a condition of employment without her written consent. As soon as the leave is over, Chris must place Gurjit in the position she held prior to commencing her leave or in a comparable position.

The *Human Rights Code* also requires Chris to retain Gurjit's position and prohibits him from dismissing her due to her pregnancy, unless he can prove undue hardship.

Key Issue

Employees who become pregnant are legally entitled to both pregnancy and parental leave. The best practice is to ask employees to request their leave in writing and provide them with further written confirmation of when their leave will end and when they will return to employment. If you need to hire someone to cover for a worker on maternity leave, be sure the temporary nature of the employment is clear and have a clear end date for the contract.



More Common Questions from Employers

Do I have to pay an employee severance, if I dismiss them?

As the above scenarios explain, employees will be entitled to reasonable notice of their dismissal or pay in lieu, unless certain specific circumstances apply, such as just cause for the employee's dismissal or a clear term in the employment contract expressing how much notice or pay in lieu the employee will receive. You should have clear written contracts in place that specify exactly how much notice of dismissal, or pay in lieu of notice, you will provide employees.

How much vacation pay are employees entitled to?

Employees with less than five years' service are entitled to a minimum of two weeks' vacation time with pay per year. After five years, employees become entitled to a minimum of three weeks' vacation time with pay. You are entitled to require an employee to work for 12 months prior to permitting them to take vacation time.

Do I have any say over when employees take their vacation?

While an employee will generally need your consent to schedule time off, it is a good idea for both parties to be cooperative and flexible. You are required to allow your employees to take time off in at least one week increments.

Am I allowed to lay an employee off for a temporary period of time?

A layoff generally refers to a period of time that an employee will not be at work and providing services. Unless there is an agreement that says otherwise, employers will typically not have a right to lay off employees for any period of time. If you do lay off an employee, they may be able to claim they have been "constructively dismissed," either in court or pursuant to the *Employment Standards Act*. This could result in you having to pay them severance. A lay-off also becomes a permanent termination, under the

Employment Standards Act, if the employee earns less than half their normal wages for 13 weeks in any 20 week period. If you want the right to temporarily lay-off employees this should be clearly stated in their contract of employment.

One of my employees injured themselves on the job. What do I need to do?

Have a process in place to ensure the employee documents their injury and reports it to WorkSafeBC. If either you or the employee is unsure if they are fit to work, the employee should be directed to leave the worksite and obtain medical assistance.

My employees have no written contract. Can I just make one and ask them to sign it?

It is a basic principle of contract law that there must be “consideration” going to each party to an agreement, which means each party to the contract must be receiving something of value. If an employee signs a contract that provides a benefit to the employer, such as a clause limiting the amount of severance pay you are required to pay them, then the employee will typically need to receive something of value for those changes to be enforceable. Such changes need to be carefully and fairly presented to the employee to prevent them from arguing they were coerced into signing the contract or did not otherwise understand the significance of the changes to which they agreed. You may want to seek some legal advice on this issue.



CHAPTER 5

How to Prevent Legal Problems

Understanding Liability

Liability simply means you have legal responsibility for something. As an employer, this means you are liable for ensuring you meet all of your obligations to your employees. In situations where you have not met those obligations, whether deliberately or accidentally, it can also mean that you are responsible for any consequences.

Much of the liability we have discussed throughout this Module so far arises through specific laws which are enforced by specific government agencies. For instance, the Employment Standards Branch enforces the *Employment Standards Act*, while the WorkSafeBC will enforce the *Workers' Compensation Act*.



You should educate yourself, not just to keep yourself in compliance with relevant laws, but also to keep your employees' morale high and be an employer that people want to work for.

Liability can also be enforced through the courts. Orders from government agencies that direct employers to pay sums of money, such as compensation to employees, as well as orders directing employers to undertake certain steps such as reinstating employees or paying a fine, can be enforced through the courts.

Employees may also pursue their rights through the courts by seeking legal judgments directing payment of wages or other damages.

Financial orders can be enforced through collections proceedings in court, resulting in seizure and sale of goods and freezing of bank accounts.



See Module 3, Chapter 5, Take Care of Your Employees, including the Employer Golden Rules.

Helpful Strategies

It is important to understand your obligations to your employees. You should educate yourself, not just to keep yourself in compliance with relevant laws, but also to keep your employees' morale high and be an employer that people want to work for.

Here are some strategies we recommend:

- Create contracts of employment that clearly set out employees' terms and conditions of employment.
- Create standard forms for use in employment, including schedules, wage statements and discipline notices.
- Contact other CSIL employers to see if they have validated contracts and forms you can use
- Make sure the content of your agreements comply with the *Employment Standards Act* and *Employment Standards Regulations*. Variances are sometimes permitted, but they must be approved (see the **Variances and Averaging Agreements** section below)

- Make sure staff are aware of their employment obligations and that you enforce them consistently. Always communicate with staff in a respectful manner, even if they are being disciplined. Many disputes can be resolved by simply listening to your employees and investigating complaints in a way that allows both you and your employee to learn something and, where appropriate, compromise on a solution.
 - » If you are approached by an employee about a workplace problem, listen to them carefully and ensure you ask them for all available information. If you do not think that you are in the wrong, explain this to the employee as clearly and non-confrontationally as possible. Do not merely tell them they are wrong, help them to understand why.
 - » It may be that the employee is right, and you have done something that requires correction. Propose a solution to the problem that satisfies the employee's concerns. This may also be a good time to seek peer or professional advice from a lawyer or human resources consultant, so you can appreciate the scope of your liability and ensure you are protected from future consequences.



See **Module 3, Chapter 5, Communication is Key.**

Variations and Averaging Agreements

The *Employment Standards Act* permits an employer to request the permission of the Director of Employment Standards to vary certain portions of the *Act*. For instance, the Director may agree to vary the rules that apply to the minimum daily hours of work, the timing of paydays and the minimum hours an employee is allowed to have free from work between shifts.

Some CSIL employers have requested and been granted variations to accommodate the longer work shifts sometimes needed for home care staff.

The most common use of a variance is to relieve an employer from having to pay overtime in cases where an employee works a compressed work week or has a schedule where their hours of work are performed within a short span of time. For example, an employer may request a variance when an employee works four ten-hour shifts each week, as opposed to a more traditional schedule of five eight-hour shifts. By obtaining a variance from the Director, the employer would be exempted from paying the employee at the overtime rate of pay for the last two hours of each work day. The Director requires the majority of the employees to approve of the variance.

To obtain a variance, a written request must be made to the Director and sent to an office of the Employment Standards Branch. An Officer of the Branch will review the application and, if approved, provide you with a written notice designating the terms of the variance. A variance request should take the form of a letter including the following information:

- The employer's name, address and telephone number;
- The sections of the *Act* the Director is being asked to vary;
- A detailed description of the variance being requested;
- How long the variance will be in place;
- The reason for requesting the variance;
- The name and home telephone number of each employee who signs the application;
- The name of each employee who will be affected by the variance.

It is important to understand that the Director will not simply relieve an employer from the requirements of the *Act*. For a variance to be granted, there must be some advantage or benefit to the employee, such as having more days free from work due to the nature of the compressed work week. Also, there must be some certainty to an employee's schedule under a variance. For example, an employer's request to direct employees to work overtime as needed, without paying the overtime rate of pay, will not be granted.

The *Act* also allows for the creation of averaging agreements which allow an employer and employee to agree to average an employee's hours across multiple weeks, without paying overtime. For example, a typical averaging agreement may have an employee working six eight-hour shifts one week and four eight-hour shifts the next week. As is the case with variances, there must be regularity to the employee's schedule and the employee must agree to the arrangement.

The rules for creating an averaging agreement are strict and a failure to abide by one of them can invalidate the entire agreement, so review the requirements of an averaging agreement carefully and seek legal advice.



The Branch has a thorough explanation of variances and averaging agreements available on the website for the Ministry of Labour:

<http://www.labour.gov.bc.ca/esb/facshts/variances.htm>

<http://www.labour.gov.bc.ca/esb/facshts/averaging.htm>

When to Consider Settling a Complaint

In situations where you have clearly done something wrong, and the employee is planning to pursue the matter through the courts or a complaint to a government agency, resolve the issue as soon as possible. This can be as simple as paying any wages not paid through error or as complicated as agreeing to a list of terms in exchange for the employee signing a waiver from any future legal action. Even if the employee is unaware that you have erred, you are still obligated to be in compliance with relevant legislation.

It may not always be obvious how a court or government agency will decide a matter. Even if you are confident that you are "in the right," there may still be a chance that the government agent or court who decides this issue sees the matter differently. In these circumstances, the wiser business decision may be to come to an agreement to settle the claim before the courts or complaint system makes a ruling, usually through payment of a sum of money.



Engaging Legal Assistance

As the saying goes, "an ounce of prevention is worth a pound of cure." There will be times you are unsure of the answer to an important question, even after reading this Workbook, talking to other CSIL employers or doing your own research.

For instance, you may be unsure if an employee who has been away from work for two years with a medical problem can safely be dismissed from employment. The cost of a brief consultation with legal counsel can be much less than the cost of hiring a lawyer to represent you through legal proceedings or paying wages or a fine because you made the wrong decision. Obtaining legal advice can also make you a better employer by informing you of your responsibilities.

If a dispute with an employee escalates to the stage where demands are being made, court actions are being filed, or complaints are being made with government agencies, this is the time that you will want to contact qualified legal counsel. An overview of the law and the strength of your case may be all that is needed. It is possible the lawyer will have a view of the issue or solutions you did not consider.

There may also be credibility issues with the employee's claims which are best addressed through trained legal counsel. It is also a reality that lawyers will often be speaking "the same language" as the person mediating or adjudicating the employee's claim which will help make your position better understood.

Even if you feel confident enough to represent yourself, a brief consultation with a lawyer is always advisable. Through the BC Branch of the Canadian Bar Association, you can consult with a lawyer from any discipline for 30 minutes, for a fee of \$25. To make the best use of this excellent resource, go to your meeting prepared with a five-minute outline of the problem and what you need to know. You can also receive free legal advice through the Law Students' Legal Advice Program.

And, remember that CSIL employers can be a good resource to find a knowledgeable lawyer.



[See Resources for the websites of these two legal advice programs.](#)



Conclusion

After reading this Module, we hope you have a much clearer understanding of:

- key legislation relevant to you as a CSIL employer,
- the areas of responsibility these laws cover,
- what you need to do to meet these responsibilities, and
- how to avoid the most common problems encountered by CSIL employers.

The Scenarios in Chapter 3 offer real-life examples of how some of the legal principles we have outlined might look in a CSIL workplace. We hope they provide insight into what you are doing well as an employer and where you might be able to improve.

Know your own strengths and weaknesses as an employer. Use resources like this Workbook, and seek support and advice from the new Individualized Funding Resource Centre Society. The Society offers information, resources and services to CSIL employers (please see the **Resources** section).

Working behind the scenes is the Association of CSIL Employers (ACE) which represents employers around the province. Through collaboration with government and stakeholders, ACE's focus is policy and legislation that effect CSIL.

Prevention is by far your most powerful tool. Do your best to set up your CSIL workplace to avoid potential problems by using the strategies we suggest. We also highly recommend reading any sections of Module 3 that relate to areas important to you, such as developing strong communication skills, keeping employees happy or establishing work routines.



Resources

Links

Key Resources

Individualized Funding Resource Centre Society
<http://www.ifrcsociety.org>

Canadian Bar Association, BC Branch, Lawyer Referral Service
<http://cbabc.org/For-the-Public/Lawyer-Referral-Service>

Law Society of BC, Finding a Lawyer
<http://www.lawsociety.bc.ca/page.cfm?cid=8>

Law Students Legal Advice Program
<http://www.lslap.bc.ca/main/>

Spinal Cord Injury BC Resource Centre
<http://sci-bc.ca/resource-centre/>
SCI BC InfoLine: 1 800 689 2477

Association of CSIL Employers
<http://www.csilbc.com>

BC Ministry of Health | CSIL General Information
<http://www2.gov.bc.ca/gov/topic.page?id=14655A297B1A477F9A8468E6C6EC3436>

Selected Legislation

Employment Standards Act, R.S.B.C. 1996, c. 113
http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96113_01

A Guide to the Employment Standards Act (BC)
<http://www.labour.gov.bc.ca/esb/esaguide/guide.pdf>

Employment Standards Regulation (B.C. Reg. 396/95)
http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/396_95

Employment Standards Self-Help Kit
<http://www.labour.gov.bc.ca/esb/facshts/pdfs/SHK-employer-factsheet.pdf>

Complaint Resolution and the B.C. Employment Standards Act Factsheet
http://www.labour.gov.bc.ca/esb/facshts/complaint_resolution.htm

Compassionate Care Leave Regulation (B.C. Reg. 281/2006)
http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/281_2006

Human Rights Code, R.S.B.C. 1996, c. 210

http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96210_01

Workers Compensation Act, R.S.B.C. 1996, c. 492

http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/96492_00

Personal Information Protection Act

http://www.bclaws.ca/Recon/document/ID/freeside/00_03063_01

Ministry of Jobs, Tourism and Skills Training

Employment Standards Branch

<http://www.labour.gov.bc.ca/esb/>

Employment Standards Fact Sheets

<http://www.labour.gov.bc.ca/esb/facshts/>

Employers' Advisers Office

<http://www.labour.gov.bc.ca/eao/>

BC Human Rights Tribunal

BC Human Rights Tribunal

<http://www.bchrt.bc.ca>

Human Rights in BC: Information for Employers

<http://www.ag.gov.bc.ca/human-rights-protection/pdfs/EmployerInfo.pdf>

Work BC

Work BC: Understand Workplace Rights

<http://www.workbc.ca/Workplace-Resources/Rights-Regulations/Pages/Understand-Workplace-Rights.aspx>

WorkSafeBC

<http://www.worksafebc.com/>

WorkSafeBC: Rights And Responsibilities

<http://www2.worksafebc.com/publications/ohsregulation/Part3.asp>

Articles and Other Resources

eText on Wrongful Dismissal and Employment Law (1st edition)(Last update: 2012-11-16)

Peter Neumann, B.A.Sc., LL.B. and Jeffrey Sack, Q.C.

<http://www.canlii.org/en/commentary/wrongfuldismissal/>

Termination Under the BC *Employment Standards Act* http://www.cba.org/bc/public_media/employment/280.aspx

What is sufficient to warrant dismissal for incompetence without prior warning?

By Katrina Edgerton-McGhan, lawyer and Christie Lee, student-at-law, Scott Hall LLP

CBA National Labour and Employment Law Section Newsletter (January 2011)

http://www.cba.org/cba/newsletters-sections/pdf/lbr_emp_11-2011_Edgerton-McGhan.pdf

Just cause and conflict of interest: Applying the test from McKinley (May 2012)

By Andrew Zabrovsky

Sample Employment Contract

This is a sample agreement you can use to develop your own employment contract. In the italic bracketed sections *[sample]*, you can add the details relevant to the position you are offering, your job description and so on.

Date

Name

Address

We are pleased to offer you the position of *[Job Position]* with *[Employer's Name]*, commencing *[start date]*. Please see below for details related to the employment contract.

Work Hours

You regular work schedule will be *[insert hours, days of work]*. Your regular place of work will be *[insert worksite address]*.

You may on occasion be required to work overtime hours. Any overtime will be paid in accordance with the provisions of the British Columbia *Employment Standards Act*.

Duties and Responsibilities

The roles and responsibilities of your position will include the following:

[list of duties/job description]

We may make reasonable changes to your job responsibilities from time to time to accommodate the specific needs relevant to your position.

Probationary Period

You acknowledge that *[Employer's Name]* must be at liberty during your initial period of employment to assess your ability to perform duties, to assess your ability to comply with the organizational requirements of *[Employer's Name]* generally, and to assess your character and general ability to work in harmony within the household. Accordingly, you understand and agree that the first three (3) months of employment shall constitute a probationary period during which period *[Employer's Name]* may, in its absolute discretion, terminate your employment without notice and without reason if we determine you are unsuitable for the position on a permanent basis. In the event *[Employer's Name]* terminates your employment within the first three months of your employment, you will not be entitled to any severance, compensation for length of service under the *Employment Standards Act* or notice of said dismissal.

Remuneration and Benefits

You will be paid at an hourly rate of *[\$x]* per hour. Payments will be made to you *[enter form of payment, i.e. every two weeks or the 15th and last day of each month]*.

You will receive the following benefits:

[insert any employment-related benefits]

Annual Vacation

Upon completing one year of employment you will be entitled to take two weeks' paid vacation per year. Vacation pay shall be calculated in accordance with the provisions of the *Employment Standards Act*. Upon the completion of your fifth consecutive year of employment, you will be entitled to three weeks' paid vacation per year.

Termination of Employment

[Employer's Name] may terminate your employment at any time without cause by giving you written notice of termination in accordance with the provisions in the *Employment Standards Act* of British Columbia (the "Act"), or by paying you an amount in lieu of such notice in accordance with the provisions of the Act. Provided *[Employer's Name]* gives you such notice, or severance pay in lieu of notice, you agree that will constitute full and final settlement of any and all claims you have against *[Employer's Name]* arising from the termination of your employment. The payment or notice provided under this paragraph is the maximum compensation you will receive in the event you are dismissed without cause.

[Employer's Name] may terminate your employment at any time for cause, in which case you will not be entitled to any severance, compensation for length of service under the Act or notice of said dismissal.

Policies and Expectations

You agree to comply with *[Company's]* policies and procedures as set out in the Policy Manual* and to familiarize yourself with these policies and procedures at regular times during your employment.

A breach of any of these policies may be grounds for disciplinary action. *[Company's]* policies are separate from the terms and conditions of your employment. *[Employer's Name]* may amend, revoke or suspend any of its policies or procedures at any time and you must comply with any amended or new policies or procedures.

Signing this Employment Contract

[Employee], we are delighted to welcome you to *[Employer's Name]*, and look forward to working with you. Assuming you agree with the terms set out above being part of your employment contract with *[Employer's Name]*, please sign below where indicated, and return a signed copy of this letter to me. By signing this agreement you agree that the terms contained herein are applicable to your employment.

Sincerely,

[Employer's Name or representative]

I hereby agree to accept the terms of employment set out above.

[employee]

Date Signed

* You would include this reference only if you have a policy manual, job description or other documents that outline job expectations and duties.



CSIL Online Workbook

A Guide to Applying for and Managing

Choice in Supports for Independent Living

Module 4 | How to be a Lawful CSIL Employer

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