

BREAKFAST FOR BUSINESS

Employment Law Update 2009

October 7, 2009

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Legislative Changes

Employment Standards Act

- two amendments have been made to the Ontario *Employment Standards Act* 2000 (“ESA”) in the past year
- these relate to temporary help agencies and organ donations

Temporary Help Agencies

- on May 6, 2009 the legislature passed the *Employment Standards Amendment Act* (Temporary Help Agencies 2009)
- this amends the ESA to include provisions relating specifically to workers who provide services through temporary help agencies

Temporary Help Agencies

- these provisions establish that individuals who provide work on a temporary basis for clients of a temporary help agency will most times be considered to be employed by the temporary agency
- the amendments outline certain information which agencies must provide to the workers as well as address the workers' entitlements to statutory termination severance pay obligations

Temporary Help Agencies

- the amendments (subject to limited exceptions) also prohibit the temporary help agencies from restricting employees from entering into employment relationships with clients of the agencies
- therefore, if a company on occasion uses temporary workers the temporary help agency will not be able to prevent the company from subsequently hiring the workers directly
- these amendments are scheduled to come into force on November 6, 2009

Organ Donation Leave

- ESA has also been amended to provide for an unpaid leave of absence for employees who undergo surgery for the purpose of organ donation
- the employee has to have been employed by his or her employer for at least 13 weeks
- the employee is entitled initially to take a leave of up to 13 weeks

Organ Donation Leave

- the leave may be extended more than once but the total extension period cannot exceed more than 13 additional weeks

Occupational Health and Safety Act

- Bill 168, an Act to amend the *Occupational Health and Safety Act* with respect to workplace violence and harassment, passed first reading on April 20, 2009
- it is yet to be proclaimed into law

Occupational Health and Safety Act

- if Bill 168 is passed it will come into effect 6 months after it receives Royal Assent
- if passed it will place significant increased obligations on employees
- as currently drafted, it imposes specific mandates on employers to address “workplace harassment” and “workplace violence”

Occupational Health and Safety Act

- “workplace harassment” is defined as “engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought to be reasonably known to be unwelcome”
- “workplace violence” is defined as (a) “the exercise of physical force by a person against a worker in a workplace that causes or could cause physical injury to the worker; or (b) an attempt to exercise physical force against a worker in a workplace that could cause physical injury to the worker”

Occupational Health and Safety Act

- specific obligations will be placed on employers under this legislation if passed
- employers will be required to:
 - prepare workplace violence and harassment policies
 - review them a minimum of once a year
 - the workplace violence and workplace harassment policies will be required to be posted in a conspicuous place at the workplace (unless the number of employees regularly employed at the workplace is 5 or fewer)

Occupational Health and Safety Act

- employers will be required to develop and maintain a program to implement the policies which must include measures and procedures to control the risks identified in the assessments
- in order to prepare the policy, employers will be required to both assess the risk of violence in the workplace and develop and maintain a program to implement the policies with respect to workplace violence

Occupational Health and Safety Act

- the legislation also proposes that if an employer becomes aware (or ought reasonably to be aware) that domestic violence would likely expose a worker to physical injury and that the injury might occur in the workplace, the employer then must take every precaution reasonable in the circumstance for the protection of the worker

Occupational Health and Safety Act

- under the proposed Bill, employers and supervisors will also have the duty to provide information to workers, including personal information, about a person with a history of violent behaviour
- this obligation arises when a worker can expect to encounter the person in the course of his or her employment

Occupational Health and Safety Act

- there is however no express definition of “history of violent behaviour” in the proposed legislation
- Bill 168 also includes provisions by which a worker can refuse to work where he or she is likely to be in danger by “workplace violence” (but not “workplace harassment”)

Case Law Update

- in the past year there have been significant decisions which employers need to be aware of regarding:
 - constructive dismissal
 - restrictive covenants
 - the termination of independent contractors

Case Law Update

Constructive Dismissal

- a constructive dismissal occurs when an employer makes a unilateral change to a fundamental term or condition of a person's employment
- examples of this can include demotions, reduction in pay, elimination of benefits, geographic transfer, etc.

Case Law Update

- if a constructive dismissal takes place, an employee can quit but still bring a claim for wrongful dismissal against the employer
- traditionally it had been felt that an employer could avoid the impact of a constructive dismissal by providing sufficient advance notice of the change

Case Law Update

- if the advance notice provided to the employee equaled the notice the employee would be entitled to receive had their employment been terminated it was felt an employer could avoid a possible constructive dismissal claim
- a recent Ontario Court of Appeal decision brings this into question

Case Law Update

- in this case an employee was promoted to a Vice-President position in 2000
- as part of the promotion he signed an employment agreement which provided him 24 months notice in the event of a without cause termination of employment
- in 2002 the company's new President felt that this was too generous a severance package and provided the employee with a new contract which reduced the employee's notice entitlement to 30 weeks

Case Law Update

- the employee refused to sign it
- the company replied by telling the employee that the new contract would come into effect in 24 months
- after the 24 months had passed, the employer attempted to have the employee sign an agreement indicating his acceptance of the new terms
- the employee refused and ultimately advanced a claim for constructive dismissal

Case Law Update

- at trial the claim was dismissed given the fact the company had provided sufficient notice of the change
- the Court of Appeal overturned the trial judgment and awarded the employee the 24 months pay in lieu of notice of termination as provided for in the original employment agreement

Case Law Update

- in so doing, the Court relied on the fact that the employee at no time during the 24 months indicated that he was accepting the change to his notice entitlement
- this means that when a change being imposed by the employer does not have immediate impact, providing advance notice of the change may only be effective if it can be shown that the employee has accepted the change

Case Law Update

- if the employee does not indicate their acceptance of the change employers will have to consider terminating the employment relationship and possibly formally offering re-employment under new terms and conditions

Restrictive Covenants

- a recent Supreme Court of Canada decision has reinforced the fact that employers must tread cautiously when drafting restrictive covenants
- these are non-competition and non-solicitation covenants

Restrictive Covenants

- in order to be enforceable, a non-competition covenant has to be reasonable and unambiguous with respect to both duration and geographic scope
- traditionally it was held that if the covenant was not reasonable or ambiguous with respect to either duration or geographic scope, the covenant was unenforceable
- Courts would not write down or re-draft a covenant to make it enforceable

Restrictive Covenants

- two British Columbia decisions recently allowed restrictive covenants to be written down or redrafted in a way which made otherwise unenforceable covenants enforceable
- one decision was appealed to the Supreme Court of Canada

Restrictive Covenants

- in this case the geographic scope of a non-competition covenant referred to the “Metropolitan City of Vancouver”
- this was problematic given the fact that the “Metropolitan City of Vancouver” was not a known or defined term

Restrictive Covenants

- the British Columbia Court of Appeal redrafted the phrase in a way to make it understood and enforceable
- the Supreme Court of Canada overturned this decision holding it was not appropriate for a Court to re-write covenants to remove ambiguities or to make it reasonable
- this reinforces the fact that employers must draft restrictive covenants carefully
- too much protection may mean no protection at all

Independent Contractors and Termination

- given the uncertain economic times currently being experienced, many companies are relying more on independent contractors
- it is felt that using contractors can provide a company with greater flexibility and fewer responsibilities

Independent Contractors and Termination

- regarding less responsibility, it was traditionally felt that if a worker was an independent contractor they had no automatic entitlement to receive notice of termination of the relationship
- over time, however, case law has evolved so that in certain circumstances workers will be entitled to notice of termination notwithstanding the fact they are independent contractors

Independent Contractors and Termination

- to that end, over time there has developed the concept of a “dependent” contractor
- a recent Ontario decision has again affirmed this principle
- in this case the Court held that the relationship between the parties was a “hybrid” relationship
- as a result, the worker was entitled to notice of termination
- as the agreement between the contractor and the company was silent on termination, the Court then awarded what it felt was reasonable notice of termination to the worker

Independent Contractors and Termination

- this reinforces the fact that addressing termination in an independent contractor agreement can be as important as doing so in an employment agreement

QUESTIONS?

If you have any questions or require additional information feel free to contact:

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