

Emond Harnden Breakfast Seminar

Year End Wrap Up: A Review of Legislative and Employment Law Developments in 2009

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1

Session Overview

- Legislative Changes
 - Cell Phone Ban
 - *Accessibility for Ontarians with Disabilities Act, 2005*
 - Rules of Civil Procedure
 - Proposed Obligations for Workplace Violence and Harassment
 - Organ Donor Leave
 - *Apology Act*
 - Temporary Help Agencies
 - Elect-to-Work Employees

2

Session Overview

- Employment Law Update
 - *Human Rights Code* – Update on Damages
 - Update on *Wallace* Damages
 - Restrictive Covenants
 - Class Action Overtime Claims

Legislative Changes

Countering Distracted Driving and Promoting Green Transportation Act, 2009

- Effective October 26, 2009 with a 3 month education period (February 1, 2010)
- Restrictions on hand-held wireless communication devices (i.e. cell phones, blackberries) and electronic entertainment devices (i.e. iPods)
- Exemptions:
 - Hands free devices, GPS (if used for navigation purposes)
 - If vehicle is stopped, off the road and not obstructing traffic
 - Ontario Regulation 366/09 provides specific exemptions for persons and devices (i.e. enforcement officers, ambulance drivers, fire trucks etc.)
 - Time limited exemptions for taxis, tow trucks, couriers etc. until January 1, 2013

Countering Distracted Driving and Promoting Green Transportation Act, 2009

- Implications
 - Minimize liability, ensure compliance
 - Vicarious liability of employers
- Assess risk and develop policies
 - Conduct review of policies for all positions that involve vehicle use and develop protocol for receiving calls while driving
 - Develop policies and programs to address and prevent liability, including specific cell phone/blackberry use policies and general policies regarding operation of motor vehicles
 - Develop communications strategy
 - Provide proper training for employees

Accessibility Standards for Customer Service

O. Reg 429/07

- Regulation came into force on January 1, 2008
- Created pursuant to the *Accessibility for Ontarians with Disabilities Act, 2005* which was enacted with the goal of creating standards to improve accessibility across Ontario
- Regulation requires that all organizations which provide “goods or services” to the public must meet certain accessibility standards for customer service
- The deadline for compliance is January 1, 2010 for designated public sector organizations, and January 1, 2012 for other organizations (private and not-for-profit)

Accessibility Standards for Customer Service

O. Reg 429/07

- Regulation requires that all providers of goods or services do the following before the deadline:
 1. Establish policies, practices and procedures
 2. Use reasonable efforts to ensure policies etc. are consistent with the core principles of independence, dignity, integration and equality of opportunity
 3. Set policy to allow people to use their own personal assistive devices
 4. Communicate in a manner that takes disability into account
 5. Allow people to be accompanied by guide dog or service animal, unless animal is excluded by another law

Accessibility Standards for Customer Service

O. Reg 429/07

6. Permit use of a support person
7. Provide advanced notice of admission fees for support person
8. Provide notice when services relied on by people with disabilities are temporarily disrupted
9. Train people who interact with the public on topics outlined in customer service standard
10. Train people who are involved in developing policies on topics outlined in customer service standard
11. Establish process to provide feedback on services to people with disabilities and how you will respond

Accessibility Standards for Customer Service

O. Reg 429/07

- Additional requirements for designated public sector organizations and providers with 20 or more employees:
 1. Document in writing your policies for providing accessible customer service
 2. Notify customers that documents are available upon request
 3. When providing documents, provide the information in a format that takes into account the person's disability

Changes to the Rules of Civil Procedure

- Effective January 1, 2010
- No grandfathering provision for old rules

- Summary Judgment changes
- Discontinuing mandatory Case Management
- New Discovery and Expert Witness guidelines
- Increase in monetary cap for Simplified Procedure and Small Claims cases

Changes to the Rules of Civil Procedure Simplified Procedure & Small Claims

- Simplified Procedure cap increased from \$50,000 to \$100,000
 - Oral examinations now allowed in Simplified Procedure actions
 - Maximum 2 hour examination per party
- Small Claims cap increased from \$10,000 to \$25,000
- Amendments to be simplified and small claim actions will be allowed to increase claim or move to proper forum based on new caps

Changes to the Rules of Civil Procedure Small Claims

- What does this mean for you?
 - With an increase in maximum monetary jurisdiction there will likely be a significant influx of new, larger cases
 - Increases in wrongful dismissal claims
 - Also possible to see increases in contract cases and defamation suits
 - Be aware of the 2 year limitation period

Bill 168: OHS, Workplace Violence and Harassment

- Proposed legislation, public hearings held November 17, 23 & 24
- Would impose new obligations on employers
 - Need to assess the risk of workplace violence
 - Develop policies and programs to address and prevent workplace violence
 - Conduct reviews of policies
 - If employer is aware that domestic violence may occur, the employer must take every precaution reasonable in the circumstances for the protection of the worker
- Worker's right to refuse to work
 - Removes requirement for worker to remain near workstation until investigation is complete (remain in safe place)

Organ Donor Leave (ESA Amendment Act, 2009)

- Came into force on June 26, 2009
- Available to an employee undergoing surgery to donate an organ (kidney, liver, lung, pancreas and small bowel donations)
- Must be employed for 13 weeks before date of donation
- Lasts for 13 weeks, but may be extended
- Reinstatement obligations apply

Apology Act, 2009

- Came into force on April 23, 2009
- Purpose is to ensure that an apology made by or on behalf of any person in relation to any matter would not be considered an admission of liability or fault
- Evidence of an apology is not admissible in any civil or administrative proceeding or arbitration as evidence of fault or liability
 - Exception: apology made while testifying

Temporary Help Agencies

- Effective November 6, 2009
- Temporary Agency is the employer
- Temporary workers have increased rights:
 - Notice of termination and severance pay
 - Guaranteeing provision of job descriptions, pay schedules, information on assignments
 - Entitled to public holiday pay

Temporary Help Agencies

- Temporary Agencies no longer permitted to:
 - Restrict a client from providing permanent position to assignment employee
 - Charging client a temporary to permanent fee after 6 months
- Bill 212 – *Good Government Act, 2009*
 - Currently at Standing Committee on Finance and Economic Affairs
 - Restricts the mass termination provisions of the *ESA* for temporary help agencies

Elect-to-Work Employees

- Any elect-to-work employee must now be provided with:
 - Public Holiday pay (January 2, 2009)
 - Notice of termination and severance pay (November 6, 2009)

Employment Law Update

Reforms under the *Human Rights Code Amendment Act*

- Amended in 2006 and came into force on June 30, 2008
- Limitation period:
 - Every claimant has a period of 1 year to file a complaint with the Tribunal
- The Commission's role:
 - The Commission has the mandate to develop and promote human rights policies
- Process after a complaint is filed:
 - All complaints go directly to the Tribunal

Reforms under the *Human Rights Code Amendment Act*

- Representation before the Tribunal:
 - Claimants can appoint their own representative
- The Tribunal's increased authority:
 - Greater flexibility of remedial orders
- Damages:
 - No limit for "injury to dignity, feelings and self-esteem"
 - Prior to that, there was a \$10,000 limit

Human Rights Tribunal Decisions Post June 2008

- The Tribunal has exercised its new power in awarding higher damages:
 - The highest award: \$40,000 from a decision in May 2009
 - At least 10 other decisions have awarded damages that exceed \$10,000

Wallace Damages – Post *Keays v. Honda*

- *Keays v. Honda* removed the arbitrary extension, “bump” in the notice period
- Compensatory damages
 - Now proof of “actual damages” is required
- However in practice, some judges are still awarding a *Wallace* bump

McNevan v. AmeriCredit Corp.
(2008 – Ont. C.A.)

- Employer's conduct
 - Failed to warn of unsatisfactory performance, provide a letter of reference, or assist in finding new employment
 - Requested a release be signed before granting severance package
 - Delayed delivery of personal property (left in office), T4, ROE, and refund of certain paycheque deductions

McNevan v. AmeriCredit Corp.
(2008 – Ont. C.A.)

- Court of Appeal set aside *Wallace* Damages
 - Warning employee of unsatisfactory performance not required when terminating on without cause basis, unless specified by contract
 - Employer under no obligation to provide reference letter
 - Employee did not request assistance in finding alternative employment
 - Not bad faith to request that employee sign a release before severance package provided
 - Delays in delivering personal property, T4, ROE and paycheque deductions did not constitute bad faith at the level contemplated by *Wallace*

Slepenkova v. Ivanov **(2009 – Ont. C.A.)**

- Employer sent a pager message to all agents saying:
“We are sorry to inform you that Ilona has been terminated from our team for non-production and refusal to accept the new contract terms.”
- Court of Appeal awarded \$10,000 in *Wallace Damages*
 - Message sent to all employees was unfair and in bad faith
 - It was also unfounded and damaging to her reputation

The Employment Contract **Restrictive Covenants**

“You can’t take my business!”

- Limits the right of former employees to:
 - Compete with the employer (non-compete);
 - Solicit its employees or clients (non-solicit); or
 - Disclose confidential business information (non-disclosure)
 - Limited geographic area
 - Limited period of time
 - Cannot eliminate competition in general

Non-Competition

Shafron v. KRG Insurance (2009 – S.C.C.)

Supreme Court Ruling

- Restrictive covenants must be reasonable in their geographic and temporal scope as well as the extent of the activity sought to be prohibited
- The geographic scope of the restrictive covenant could not be determined and could not be found to be reasonable and was therefore unenforceable

Non-Competition

Shafron v. KRG Insurance

Lessons Learned

- These types of clauses will only be enforceable where they are very carefully tailored to the needs of the employer and do not attempt to extend past the protection reasonably required by the employer
- Employers can not expect a court to assist them by fixing any defects that might reside in such clauses

The Employment Contract Creating an Enforceable Restrictive Covenant

- Be reasonable
- Be clear
- Personalize – no “standard” clause, no “boiler plate”
- Legitimate need for scope of protection
 - Scope of business
 - Temporal scope
 - Geographic scope

The Employment Contract Creating an Enforceable Restrictive Covenant

- Demonstrate danger from unfair competition by former employee
- Do not go further than necessary
- Do not use “cascading” or “in the alternative” clauses
- Acknowledge that the employee had the opportunity to obtain legal advice
- Indicate manner of dismissal does not affect operation of restrictive covenant

Overtime Class Action Update

- *Fulawka v. Bank of Nova Scotia*
 - Currently in court seeking class action certification
- *Fresco v. Canadian Imperial Bank of Commerce*
 - Dismissed in June 2009 for failing to meet test of class action
 - Decision is being appealed
- *KPMG*
 - Settled
- *CN*
 - Class action certification hearing is scheduled for 2010

Questions?