FALL 2015

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VOLUME #3 – ISSUE #5

LABOUR & EMPLOYMENT LAW NEWSLETTER

An Update for CEOs, HR Managers, Corporate Executives and In-House Counsel on the Latest Developments in HR and Employment Law

IN THIS ISSUE

ABOUT US

Soloway Wright LLP's Employment Law Group provides legal advice to employers on all issues of human rights, labour and employment law.

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DID YOU KNOW THAT…?

- Employees who work for small employers (less than 50 employees) are not entitled to personal emergency leave (for illness, injury, medical emergency, or other urgent matters);
- You can terminate the employment of a sick or disabled employee if his/her absence is still creating undue hardship for you, despite your attempts to accommodate him;
- When you dismiss an employee, and then terminate his/her disability coverage, you inadvertently assume full legal liability for his/her lost disability benefits for the rest of his working life in the event that he/she falls permanently disabled at any point during the subsequent common law notice period;
- Surreptitiously devoting many hours per day to social media or surfing the internet can amount to just cause for dismissal;
- As an employer, you may be liable to third parties if your staff upload illegal materials to a public website via your office internet account (even if done without your authorization or knowledge);
- Employees who work on a public holiday must be paid 2.5 times their regular pay for that work or be given another working day off for which he/she will be provided with public holiday pay;
- Employees who are away on pregnancy or parental leave must be paid any bonuses or salary increases which they would otherwise have been paid had they been working;
- If your manager or benefits administrator ever inadvertently misleads your employees into believing that insurance coverage is in place or that requirements of eligibility have been met, your organization may be held liable for those representations.

QUEEN'S PARK UPDATE:
Key New Regulatory Changes From The Past Few Months

1. Amendments to Minimum Wage in Ontario

The minimum wage rates under the *Employment Standards Act* will be changing on October 1, 2015. As of that date the following increased rates will apply:

- General Minimum Wage: $11.25 per hour;
- Student Minimum Wage: $10.55 per hour (This applies to students under the age of 18 who work 28 hours a week or less);
- Liquor Servers Minimum Wage: $9.80 per hour;
- Homeworkers Minimum Wage: $12.40 per hour (This applies to employees who do paid work out of their home for their employers).

If an employee's pay is based on commissions, it must amount to at least the minimum wage for each hour worked. Subject to certain exemptions, if the commission earned amounts to less than the minimum wage then the employer is responsible for paying the difference.

In the future, the minimum wage will be increased based on the rate of inflation. If the rate changes the new rate will be published by April 1 of each year with the new rate coming into effect on October 1 of that year.

2. Amendments to the *Employment Standards Act, 2000*

On November 20, 2015, changes will come into effect which will deem clients of temporary help agencies to be co-employers of the assignment employees whom the agencies have temporarily assigned to them. These clients will then be jointly liable, with the temporary help agencies, for an employee's unpaid wages.

The clients of temporary help agencies will also be required to abide by new record-keeping obligations with respect to the number of hours worked by each employee. All records of the client will have to be disclosed upon request by an Employment Standards Officer and will have to be retained for a period of three years.

3. Enactment of the *Ontario Retirement Pension Plan Act, 2015*

On May 5, 2015, the *Ontario Retirement Pension Plan Act, 2015* ("*ORPP*") received Royal Assent. This Bill sets out a number of the basic requirements of the *ORPP*.

Some of the key features of the *ORPP* are:

- It is mandatory for eligible employees and employers in Ontario;
- The maximum combined contribution rate is 3.8%, which will be shared equally between employees and employers; and
- The *ORPP* applies to eligible employees between 18 and 70 years of age who do not participate in a workplace pension plan that meets the "comparability threshold" and whose wages exceed a certain threshold.

The *ORPP* will be rolled out in four separate waves beginning on January 1, 2017. Employers will be grouped into one of the four waves based on the size of their workforce and whether or not their workplace had a registered pension plan as of August 11, 2015.

Federally regulated employers are exempted and their Ontario-based employees will not participate in the *ORPP*.

4. Coming into force of new regulations under the Temporary Foreign Worker Program

On July 6, 2015, the federal government introduced new rules to promote compliance with the program and to prevent the mistreatment of foreign workers. New consequences, including warnings, longer bans and greater financial consequences have now been enacted. Those changes come into force on December 1, 2015 and apply to any violations on or after that date. Some of the highlights of this new enactment include:

- Financial penalties of between $500 and $100,000 for employers who contravene the regulations (up to a maximum of $1 million per year per employer);
- Bans on further use of foreign workers of one, two, five or ten years (and permanent bans for serious violations); and
- Publication of the offending employer's name on a public list detailing the violation and sanction.

The method for assessing violations will be based on a points system and will consider the type of violation, the employer's compliance history, the severity of the employer's non-compliance and the size of the employer's business.

There will also be an option to voluntarily disclose violations in order to receive reduced sanctions.

EMPLOYERS BEWARE:
You Can Be Sued For Improperly Investigating Complaints of Workplace Harassment

When tales of Jian Ghomeshi's predatory sexual proclivities first hit the media a year ago, public interest initially focussed on whether his employers at the CBC had overreacted in terminating his employment. With the release of the report into the CBC's handling of the situation this past April, the question has shifted to what consequences the CBC may now face for failing to immediately investigate complaints about Ghomeshi's sexual harassment of his colleagues as soon as they were first brought to its attention. The report concluded that the CBC had condoned Ghomeshi's behaviour by failing to discharge its legal duty, as an employer, to take adequate and timely steps to investigate and prevent the harassment of other CBC employees.

In contrast, the opposite problem arose this past year when the Liberal Party immediately suspended two MPs accused of sexual harassment as soon as the accusations came to light, without investigating or offering them an opportunity to defend themselves. At the time, the Liberal Party was severely criticized in some quarters for this quick trigger approach. Employers who use such an approach when responding to sexual harassment complaints can face equally grave consequences as employers who, like the CBC, acted too slowly. Those who use the quick trigger approach, employed by the Liberal Party, risk being successfully sued by the accused employee. Those who delay for too long, like the CBC, risk being successfully sued by the accused's alleged victims.

In these circumstances, all employers must act carefully to ensure that they do not run afoul of the rights of either party. HR managers must be sure that they take the proper steps to investigate allegations of harassment so as to prevent the workplace environment from being poisoned and to protect themselves from lawsuits from both the victims of harassment, who claim that the employer failed to do enough, and from the alleged harassers, who claim that they were unjustifiably sanctioned. A failure to navigate properly between these competing concerns could lead to very costly consequences for your organization.

What is harassment and sexual harassment?

Many employees do not fully understand what acts constitute harassment. Others may be too apprehensive about using such a strong term. As an employer, you must be able to recognize when one of your employees is being harassed, even if they themselves do not. You must also differentiate between *workplace* harassment and *sexual* harassment.

Workplace harassment does not involve a sexual component and often occurs between persons of the

same gender. It is defined in both the *Occupational Health and Safety Act* ("*OHSA*") and the *Human Rights Code* as "*a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome.*" To constitute workplace harassment the vexatious comment or conduct must: (i) typically be repetitive (unless it is very serious); and (ii) be known to be unwelcome. Some examples of conduct that amounts to harassment are threats, bullying, intimidation, offensive comments, and belittling behaviour.

Currently, no statute in Ontario provides a formal definition of *sexual* harassment. However, that could soon change. In March, the Ontario Government announced its intention to amend the *OHSA* to include a specific definition of sexual harassment.

Until that happens, sexual harassment will continue to be loosely defined by the Common Law. In *Janzen v Platy Enterprises Ltd.,* the Supreme Court of Canada has stated that sexual harassment in the workplace may be broadly defined as *"unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment.*"

Consequences to your organization for failing to properly deal with a harassment complaint

Employers have a legal obligation to provide employees with a harassment free workplace. Any time an employer is faced with a complaint it must investigate and determine the best course of action based on the merits of that complaint. As the Court stated in *Gonsalves v. Catholic Church Extension Society of Canada*, "*the employer has a duty to all the employees both to end the abuse and to alleviate its impact upon the employment environment."*

Failing to properly investigate, and deal with, a harassment complaint could result in a costly lawsuit against you. In such circumstances, your organization may be ordered to pay the victims of harassment damages for constructive dismissal, mental distress, and for the violation of the victim's human rights.

In *Piresferreira v. Ayotte* the employer never investigated the merits of the victim's complaints, and never spoke to her to get her side of the story. As a result, the court awarded her a year's salary for constructive dismissal, in addition to $60,000 in damages for physical and mental suffering.

Consequences to your organization for over-reacting to the harassment complaint

On the other hand, an employer who acts too swiftly in the face of harassment, without providing an accused with due process in investigating the complaint, can also expose itself to significant and costly consequences.

The alleged perpetrator in a harassment complaint is entitled to know the case against him and to have an opportunity to defend himself against the allegations before the employer takes definitive action affecting his job. If the employer either summarily dismissed the employee or placed him on an unwarranted leave of absence without due process, then the employer can be successfully sued.

In *Emergis Inc. v Doyle* an employer suspended the employee without conducting a proper investigation, without interviewing two important witnesses and without providing him with timely disclosure of all relevant particulars of the allegations against him. Ultimately, the court found that the employee was wrongfully dismissed and ordered the employer to pay the alleged harasser an additional 2 months' salary as a result of its flawed investigation into the accusations.

Similarly, in *Elgert v Home Hardware Stores Limited* the alleged harasser was awarded $75,000 in punitive damages due to the flaws in the employer's investigation into the complaint. Amongst the many flaws identified by the court were the failure to interview all relevant witnesses, the inexperience of the individual whom the employer appointed to conduct the investigation and its failure to provide the employee with particulars of the allegations against him.

By acting prematurely in their treatment of an alleged harasser and in conducting an unfair and/or biased investigation, employers' expose themselves to the possibility of very significant financial consequences.

Common mistakes made by employers which can expose your organization to liability

Employers need to guard against certain common errors when faced with workplace harassment complaints. The following is a list of some of the mistakes that courts have commonly found in workplace investigations into harassment complaints:

- Failing to immediately investigate when first made aware of an alleged incident of harassment;
- Excessive haste in suspending or terminating the alleged harasser;
- Failing to provide the alleged harasser with a meaningful opportunity to respond to the allegations against him;
- Failing to provide the alleged harasser with sufficient particulars, including the name(s) of the complainant(s) and the dates of the alleged incidents;
- Using an investigator who is insufficiently trained and/or lacks objectivity;
- Failing to properly document the investigation, and to keep records of who was interviewed and what they said; and
- Failing to complete the investigation in a timely manner and failing to advise the complainant of the outcome.

Tips for conducting an effective and balanced investigation

In addition to avoiding the common mistakes above, employers should observe the following guidelines when investigating allegations of harassment:

- Draft a zero tolerance workplace harassment policy with sanctions that are regularly enforced;
- Reduce allegations of harassment to writing;
- Show empathy and concern for the victim but do not prematurely admit that the alleged behaviour amounts to sexual harassment – wait for the investigation to be completed;
- Segregate the alleged perpetrator from the victim;
- Maintain strict confidentiality over the process and ensure that the process is discussed only with the individuals who are directly involved or affected;
- Ensure that the latter do not discuss the accusations with others;
- Ideally, ensure that parties are given the opportunity to consult with legal counsel; and
- Ensure that the result of the investigation is shared with the complainant in a timely fashion.

Workplace investigations can be complicated and must be approached delicately, with a view to minimizing the risk of future liability for the employer. Before starting such an investigation, employers should consult with an experienced employment law lawyer to ensure that their plan of action fully complies with all legal requirements.

TIPS FROM THE TRENCHES:
How To Avoid Inadvertently Triggering Expensive Claims When Terminating Your Employees

Before terminating an employee, a wise employer should *always* diligently prepare the groundwork for that termination, with a view to ensuring that the termination is executed in such a way as to minimize the money that the employer must pay and the risk that the dismissed employee may initiate an expensive lawsuit.

A hasty and poorly executed termination can ultimately prove very costly for your organization. Cleaning up the mess created by a botched termination will invariably cost your organization dearly both in unwanted legal fees and in the additional settlement money which it may eventually be forced to pay the dismissed employee to settle the lawsuit itself.

Moreover, badly executed terminations can diminish your organization's standing with its remaining employees, damage their morale, and even – if the claim actually reaches the court system – harm your organization's public reputation in the community at large.

To avoid these multiple nasty outcomes, a prudent employer should follow 5 basic steps before actually dismissing anyone:

STEP #1: Check the employee's employment agreement to ensure that it contains a termination clause which is still legally valid

As a result of recent developments in Ontario law, many termination clauses which used to be legally valid are now unenforceable (see our Spring 2015 Newsletter). Before terminating any employee, you should arrange for the termination clause in his or her employment agreement to be reviewed by an employment law specialist to ensure that it still complies with current legal requirements.

In the absence of a legally enforceable termination clause, dismissed employees are entitled to Common Law notice or pay in lieu of notice. That Common Law pay in lieu of notice can often exceed the amount that was originally stipulated in the termination clause by 300% to 400% - or sometimes even more!

If the termination clause in the employee's employment agreement is no longer valid, or if the agreement contains no termination clause at all, then you may wish to rectify the agreement prior to proceeding with the planned termination. Doing so can be complicated, and requires both delicacy and skill; you should consult an employment lawyer before trying to do so.

STEP #2: Assess whether the employee's termination might contravene applicable labour legislation

In Ontario, the three most important labour statutes applicable to provincially regulated employers are the Ontario *Human Rights Code (the "Code"),* the *Employment Standards Act (the "ESA")* and the *Occupational Health and Safety Act (the "OHSA").* When terminating employees, employers can easily contravene any one of these statutes without realizing that they are doing so. For example, an employer can be found to have unwittingly breached the *Code* if it dismisses an employee for performance-related problems which later prove to have been partly caused by some latent medical condition which it unreasonably overlooked at the time of the termination.

In Canadian law, *ignorance by an employer of its legal obligations to its employees, even if well-intentioned, is no excuse* and will prove to be no defence to subsequent legal claims. If the termination of an employee inadvertently contravenes certain provisions of the *Code,* the *ESA* or of the *OHSA,* the law empowers a court or tribunal to set aside that termination and issue an Order forcing the employer to reinstate the dismissed employee and pay him backpay as well as any other damages he may have suffered. Such reinstatement orders, countermanding management's decisions, invariably attract attention, both publicly and within your organization. The publicity surrounding such orders, revealing that your organization unwittingly contravened its statutory obligations, can prove to be humiliating and harmful to your organization's standing in the local community, and may damage your own image with others in your own organization.

STEP #3: Determine whether there is just cause to terminate the employee

If the employee's misbehavior is so extreme that you have just cause to terminate his employment, then the law permits you to dismiss the employee without notice or pay in lieu of notice. Otherwise, the law requires that you provide him with actual working notice of termination, or a sum of money equal to the salary and benefits which he would have been paid during that notice period.

In recent decades, courts and tribunals have become increasingly reluctant to find that employee misbehavior amounts to just cause for termination. The gravity of such misbehavior must now be great for it to be recognized as just cause. Nowadays, poor work performance rarely amounts to just cause for termination unless the employer can prove that the poor performance was mostly due to factors within the employee's personal control – such as his lack of effort or skill – *and* that he was given multiple prior warnings and opportunities to improve. Even unexplained absenteeism, repeated lateness or outright insubordination will rarely amount to just cause unless accompanied by multiple prior warnings to the offending employee, explicitly putting him on notice that further occurrences would result in immediate dismissal.

It is dangerous for employers to allege just cause for termination where the employee's misbehavior clearly falls well below the high bar which the courts now set for just cause. In *Wallace v. United Graingrowers Ltd.,* the Supreme Court of Canada ruled that where an employer improperly alleges just cause for termination, it may be punished by being ordered to pay the employee significantly more in damages. The Ontario Superior Court has frequently made substantial awards against employers which recklessly asserted just cause for dismissal where the employee's misconduct did not come close to justifying that assertion.

For this reason, a prudent employer should reflect carefully before deciding to assert just cause for its termination of any employee.

STEP #4: Carefully assess how much money a court would likely award the employee if he were to sue

To dissuade the terminated employee from retaining a litigation lawyer and starting a claim against you for pay in lieu of notice, it is in your organization's best interests to offer him a package which is at least within the general range of what a court would likely award him. That package need not be overly generous but if your organization is to avoid litigation, the package must be significant enough that his lawyer recommends its acceptance.

If the employee's employment agreement contains a termination clause that is still legally valid and enforceable, then the amount of money which a court will award is the amount stated in that termination clause. If there is no termination clause, or if that clause has recently become legally unenforceable, then the amount of money which a court will award will depend principally on 5 factors:

(i) *The age of the employee* (the older he is, the more pay in lieu of notice the court will award);
(ii) *The seniority of the employee within your organization's hierarchy* (the more senior he is, the more pay in lieu of notice the court will award);
(iii) *The number of years of service with your organization* (the longer he has been employed with you, the more pay in lieu of notice the court will award);
(iv) *Whether your organization, when it first hired the employee, induced him to leave secure prior employment, or caused him to relocate from another country, province or even city* (if the employee was induced or relocated into the job, then he will often be awarded significantly more pay in lieu of notice); and
(v) Above all, *what income the employee has earned in the aftermath of his termination* (the pay in lieu of notice awarded to an employee will be reduced by any income earned during the notice period).

This fifth factor is by far the most important. For that reason, before deciding on how much pay in lieu of notice to offer to an employee, the very first thing that an astute employer must do is to carefully assess how long the terminated employee will likely take to secure a comparable job, earning a comparable salary.

STEP #5: Determine how the termination package should best be structured

To further dissuade the terminated employee from hiring a lawyer and starting a claim for further pay in lieu of notice, your organization should give careful thought to

how it can structure the termination package so as to reduce the cost to your organization, while at the same time maximizing its attractiveness to the employee, and the chances of it being accepted in place of litigation.

Termination packages can be structured in 3 ways:

(i) Payment by way of a single lump sum payment;
(ii) Payment by way of salary continuation over a period of weeks or months; and
(iii) Some hybrid of the above.

The lump sum payment method has the advantage of providing immediate finality to the relations with the terminated employee, but comes at a significant price – namely the risk that the employee will be significantly overpaid in the event that he quickly secures new employment after being terminated. The lump sum payment method is generally most suitable for short serving employees (to whom little pay in lieu of notice is owing) and for sexagenarian employees who are not easily re-employable (and who are very unlikely to earn replacement income during their notice period).

The salary continuation method of payment is usually far more cost-effective for employers. It permits the employer to realize significant financial savings if and when the employee secures new paid employment during the notice period. The salary continuation method is therefore the most economical method to use when terminating long serving employees who are still relatively young and re-employable (and who are likely to earn replacement income during their notice period).

Carefully thinking through each of these 5 steps prior to terminating an employee will help ensure that the termination goes relatively smoothly and will reduce the likelihood of litigation, thereby causing your organization to pay less money to its own lawyers, and subsequently to the terminated employee, than would otherwise be the case.

QUIZ: 'JUST HOW SAVVY ARE YOU AT HR?'

(Can you score 5 out of 5?)

IS IT TRUE THAT……

1. When a consultant or contractor signs an agreement confirming to you that he is not an employee, this does not preclude him from subsequently claiming termination pay or severance pay from you. True / False

2. A probationary employee does not become permanent, and does not cease being on probation, until you say so. True / False

3. If you demote a recently hired employee to a slightly lower position within the company, without reducing his remuneration, or causing significant humiliation, he must generally either accept the demotion, or resign from the company without pay in lieu of notice. True / False

4. You must always pay overtime for each overtime hour which an employee actually works. True / False

5. Employees can agree to have paid time off instead of overtime pay. True / False

(Answers on the back page of this Newsletter)

ANSWERS TO QUIZ:
'JUST HOW SAVVY ARE YOU AT HR?'

1. **TRUE**: In determining whether or not a consultant or contractor is an employee, both the Ministry of Labour and the courts look at the reality of your work relationship with that individual, and not just at the title which you and he have agreed upon. Accordingly, if he signs an agreement confirming to you that he is not an employee, this does *not* necessarily preclude him/her from later successfully claiming termination pay or severance pay from you.

2. **FALSE**: A probationary employee automatically becomes a permanent employee when he completes the last day of his probationary period, as set out in the employment contract, unless you both agree otherwise. Your failure to communicate to him your decision to dismiss him, prior to the end of the probationary period, signifies that he has successfully completed his probationary period and has therefore become permanent.

3. **FALSE**: If you demote a recently hired employee to a lesser position, that usually amounts to constructive dismissal even if his remuneration and hours of work remain the same, and even if the new work is not objectively demeaning. In such cases, a court will often rule that the recently hired employee's duty to mitigate his damages does not require him to continue working in the demoted position in the same way as if he was a longstanding employee.

4. **FALSE**: Employers can avoid paying overtime for each overtime hour that an employee works by entering into a written 'averaging agreement', averaging their hours over separate, non-overlapping contiguous periods of 2 or more consecutive weeks. However, there are a number of statutory conditions the employer must meet in order for the averaging agreement to be legally valid.

5. **TRUE**: The *ESA* explicitly stipulates that if the employer and the employee agree in writing, an employee can receive paid time off instead of overtime pay, in the form of 1.5 hours of paid time off for each hour of overtime worked. This must be taken within 3 months of the week in which it was earned or, if the employee agrees in writing, within 12 months.

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