

Breakfast for Business

Employment Law Update 2011

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Legislative Changes:

Accessibility for Ontarians with Disabilities Act ("AODA")

- As of January 1, 2012, companies with at least one employee and that provide goods or services will have to comply with the Customer Service Standards ("CSS"), which has been enacted under the *Accessibility for Ontarians with Disabilities Act* ("AODA")

Legislative Changes:

Accessibility for Ontarians with Disabilities Act ("AODA")

- Under the CSS, companies will generally have to:
 - Establish policies, practices and procedures dealing with providing its goods/services to persons with disabilities
 - Provide training on serving persons with disabilities to all of its staff (i.e. employees, agents, volunteers, etc.) who deal with the public

Legislative Changes:

Accessibility for Ontarians with Disabilities Act ("AODA")

- Establish and make readily available a process for the public providing feedback on the manner in which it provides goods/services to persons with disabilities
- Permit access to the premises to any person with a disability's support person, guide dog or other service animals, if the company's premises are open to members of the public or third parties

Legislative Changes:

Accessibility for Ontarians with Disabilities Act ("AODA")

- Provide notice of any access/service disruptions, if the company's facilities are usually used by persons with disabilities

Legislative Changes:

Accessibility for Ontarians with Disabilities Act ("AODA")

- If a company has at least 20 employees in Ontario, the CSS policies, practices and procedures must be in writing and be made available to the public in an accessible format
- The company will also have to file an annual accessibility report with the provincial government

Legislative Changes:

Accessibility for Ontarians with Disabilities Act (“AODA“)

- Persons, corporations, officers, and directors who do not comply with their CSS and AODA obligations may face fines
- The fine for a person, director, or officer is a maximum of \$50,000.00 for each day the offence occurs
- The fine for a corporation is a maximum of \$100,000 for each day the offence occurs

Legislative Changes:

Occupational Health and Safety Act (“OHSA”)

- On June 1, 2011, Bill 160, an Act to amend the Occupational Health and Safety Act (“OHSA”) and the Workplace Safety and Insurance Act 1997 (“WSIA”) received royal assent
- Under Bill 160, the key amendments are:
 - A Chief Prevention Officer and a Prevention Council will be appointed/established by the Ministry of Labour, which will be responsible for establishing standards and approving training programs and training providers

Legislative Changes:

Occupational Health and Safety Act (“OHSA”)

- Constructors and employers will be specifically required to ensure that health and safety representatives receive training on exercising their powers and duties, and
- A Ministry of Labour Inspector may refer any allegation by a worker of reprisal, in contravention of the OHSA, directly to the Ontario Labour Relations Board

Legislative Changes:

Occupational Health and Safety Act (“OHSA”)

- As a result, when companies are providing OHSA training they must ensure the program and the trainer are approved by the Ministry of Labour
- The changes under Bill 160 will come into effect on April 1, 2012

Caselaw Update:

Occupational Health and Safety Act (“OHSA”)

- In the *Blue Mountain Resort* case, a guest of the resort drowned in an unsupervised swimming pool
- The Ministry of Labour was not notified of the death and Blue Mountain did not file a written occurrence report

Caselaw Update:

Occupational Health and Safety Act (“OHSA”)

- Under section 51(1) of the OHSA, the constructor and/or employer are required to notify the Ministry and file a written occurrence report within 48 hours when a person is killed or critically injured from any cause at a workplace
- A Ministry of Labour Inspector learned of the incident and issued an order requiring Blue Mountain to comply with the OHSA in regard to the drowning by formally notifying the Ministry and filing a written occurrence report

Case Law Update:

Occupational Health and Safety Act (“OHSA”)

- Blue Mountain appealed the order to the Ontario Labour Relations Board on the basis that s. 51(1) did not apply to guest injuries/fatalities
- The Board held that "any person" under the OHSA included guests. This decision was subsequently upheld on appeal to the Divisional Court
- As a result of the above, businesses should keep in mind that if a visitor is critically injured or killed at their workplace, they will need to report it to the Ministry of Labour

Case Law Update

- There have been a number of decisions in 2011 which will be of interest to employers and impact the day to day treatment of employees

Case Law Update: Common Law Notice Periods

Increased Notice Awards for Short Tenured Employees

- The trend of common law notice awards increasing for short tenured employees continues

Case Law Update: Common Law Notice Periods

- In a recent case a senior employee had been employed with the organization for 2.5 years
- The employee had not been solicited from employment elsewhere and there was no employment agreement in place which spoke to termination
- At trial the employee was awarded 5 months pay in lieu of notice at common law

Case Law Update: Common Law Notice Periods

- The employee appealed and, on appeal, the Ontario Court of Appeal increased the notice period to 9 months

Case Law Update: No Hard Cap on Notice Periods

Increased Notice Periods For Non Senior Employees

- Historically, there was a 12 month hard cap for common law notice period for unskilled or non managerial employees
- This appeared to be rejected in a Court of Appeal decision approximately 12 years ago which awarded an unskilled employee 18 months notice of termination at common law
- Notwithstanding this, there had been some uncertainty in intervening years whether or not a cap continued to exist

Case Law Update: No Hard Cap on Notice Periods

- The Court of Appeal in 2011 revisited this and in addition to confirming there was no 12 month cap, also held that they did not feel it was appropriate to establish any upper limit of notice for any particular category of terminated employees
- As a result, a 62 year old mechanic with 33 years of employment was awarded 22 months pay in lieu of notice at common law

Case Law Update: No Hard Cap on Notice Periods

- These decisions reinforce the increasing contingent liability employers have with respect to common law notice of termination
- They also reinforce the importance of having employment agreements which address termination

Case Law Update

Restrictive Covenant Update

- In 2010 a Judge, when hearing a Notice of Application, upheld a non-competition covenant which had no geographic scope
- This was a surprising result
- This decision was appealed to the Ontario Court of Appeal

Case Law Update: Restricted Covenant Update

- On appeal, the Court of Appeal overturned the Judge's decision and held that given its unlimited geographic scope then the covenant was unreasonable and therefore not enforceable
- This decision again reinforces the view with respect to restrictive covenants that "less is more"

Case Law Update

Use of Employer's Computers and the Impact of Social Media

- Not surprisingly, with the development of social media, the question of what an employee can and more importantly CANNOT do when using an employer's property, as well as what an employee can and, more particularly, CANNOT say about an employer have become the subject of litigation and arbitration decisions

Case Law Update: The Impact of Social Media

- In a recent decision an employee, a high school teacher, was provided with a laptop computer by his employer
- The employee had exclusive use and possession of the laptop
- The employee was able to use a password which was unknown to the employer

Case Law Update: The Impact of Social Media

- The employee was allowed to use the laptop for personal matters
- The employee was also allowed to take the laptop home during non-work hours
- The employer did have a written computer use policy
- The question arose as to whether the employee had a right to privacy with respect to the employer's laptop

Case Law Update: The Impact of Social Media

- In a decision, the Court of Appeal found the employee did have a right to privacy even when using the employer's computer
- In so doing, the Court of Appeal relied on the following facts:
 - The fact the employee was provided with exclusive possession of the laptop and was able to use a personal password to limit access

Case Law Update: The Impact of Social Media

- The employee was permitted to use the laptop for personal matters and to take the laptop home during non-work hours
- The written policy failed to warn the employees that the computers were subject to search

Case Law Update: The Impact of Social Media

- While the policy stated there was no expectation of privacy with respect to email, the policy did not warn that there was no expectation of privacy with respect to other data stored on the computer or with respect to other computer uses

Case Law Update: The Impact of Social Media

- In another recent decision, the termination of two employees who criticized a supervisor and the employer on Facebook was upheld
- The employees made statements on Facebook calling the employer a crook and urged people not to spend their money at the establishment

Case Law Update: The Impact of Social Media

- They also made inappropriate comments about their supervisor
- In this case the terminations were upheld
- In particular, the British Columbia Labour Relations Board held that the employees could have no reasonable expectation of privacy when publishing comments on Facebook

Case Law Update: The Impact of Social Media

- Also, the comments were seen as damaging to the employer's business
- Moreover, the comments about the supervisor were found to amount to insubordination

Case Law Update: The Impact of Social Media

- A key fact relied on by the Labour Board when upholding the terminations was that the employer, as part of its investigation process, gave the employees the opportunity to explain their actions before deciding to terminate

Case Law Update: The Impact of Social Media

Summary

- These decisions reinforce the need for employers to have computer and social media policies
- When drafting policies, the following should be considered:
 - Explain who the policy will apply to and in particular when it will apply

Case Law Update: The Impact of Social Media

- Consider what email social media employees will be permitted to access in the workplace
- Make it clear that computer, email and social media use may be monitored and that there is no expectation of privacy
- Clearly outline prohibited conduct
- Make it clear that there is no distinction between work use and personal use
- Clearly outline consequences when failing to comply with policy

Case Law Update: The Impact of Social Media

- These decisions also demonstrate that the normal processes relating to employee discipline will apply to computer and social media use
- As such, when deciding to discipline an employee or terminate an employee, the employer should approach the matter in the same manner as it would any other possible employee misconduct

QUESTIONS?

Wilson Vukelich LLP can help ensure that your employment law matters are handled effectively and efficiently, and in manner that is reflective of new legal developments and obligations. If you have any questions or require further information, please contact:

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