Breakfast for Business

Annual Employment Law Update 2017

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Introduction

- Each year there are developments in case law and amendments to legislation that impact your obligations, rights, and powers as an employer
- The purpose of today's seminar is to review a sampling of the key case law development and legislative amendments
- This seminar acts as a complimentary to the issue specific seminars and webinars that we hold throughout the year

Agenda

1. Legislative Update
   a) Bill 148
   b) AODA
   c) WSIA
2. Case Law Update
   a) Drug Testing
   b) Sexual Harassment
   c) OHSA
   d) Terminations

1)a) Legislative Update: Bill 148

- Bill 148 proposes substantial revisions to the *Employment Standards Act* ("ESA") and the *Labour Relations Act*, some of which will take effect on January 1, 2018
- Bill 148 is expected to pass its third reading in the next two weeks and receive royal assent shortly thereafter
- In July 2017, shortly after the Bill was introduced, we held a complimentary webinar on Bill 148 (available at: bit.ly/bill148wv)
- Upon the Bill passing, we will be holding a further complimentary webinar on the amendments and how to be ready and in compliance as an employer
- In addition, at our annual labour law update in March, we will review the amendments to the *Labour Relations Act*
- For today's purposes, we will provide a brief overview of the key proposed changes to the ESA

1)a) Legislative Update: Bill 148

- Under the amendments, there will be changes to the compensation entitlements of employees
- In particular, there will be additions to and amendments in regard to the following employee entitlements:
  a) minimum wage
  b) vacation pay
  c) holiday pay
  d) minimum pay
  e) overtime pay
  f) equal pay
  g) leaves

1)a) Legislative Update: Bill 148

- In addition, under Bill 148, employees will have a new entitlement, after three months of employment, to have a dialogue with their employer about their schedule or work location
- Further, under Bill 148, the Ministry of Labour will be able to prosecute any employer that mislabels employees as contractors
- Finally, Bill 148 will allow the Ministry of Labour to name and public shame employers who violate the ESA

1)b) Legislative Update: AODA

- The AODA is a law in Ontario that allows the government to develop specific standards of accessibility
- The Accessibility Standard for Customer Service ("SCS") requires businesses to identify, remove, and address barriers for people with disabilities in regard to employment, access to goods and services, etc.
- Under the Integrated Accessibility Standard ("IAS"), employers have duties in regard to potential and current employees with disabilities
- As of January 1, 2017, the AODA's standards apply to employers (even those with less than 50 employees)

1)b) Legislative Update: AODA

- Under the standards, employers have 5 main obligations:

1. **POLICY REQUIREMENT -** All employers must develop, implement, and maintain a policy regarding providing goods/services to persons with disabilities and complying with the AODA and the SCS
2. **TRAINING REQUIREMENT –** All employers must provide training to their employees on the IAS as well as the provisions of the Ontario *Human Rights Code* that pertain to individuals with disabilities
3. **FEEDBACK REQUIREMENT -** All employers must ensure that there is a process in place for receiving and responding to feedback regarding their accessibility
4. **ACCESSIBLE PUBLIC INFORMATION –** All employers must ensure that its publicly available information is available in accessible format upon request and in a timely manner
5. **ACCESSIBLE EMPLOYMENT PRACTICES –** All employers must ensure that its hiring, workplace training and instruction, employee management, accommodations, and leaves are done in a manner that complies with the IAS

- In addition, employers with more than 20 employees have had to file an accessibility report confirming their compliance with the AODA

1)c) Legislative Update: WSIA

- In May, Bill 127 passed, which amends the WSIA to extend workers compensation entitlement to include chronic mental stress effective January 1, 2018
- In October, the WSIB concluded its consultation and announced its policy position on the scope of the mental stress coverage
- Pursuant to the policy, the coverage will not include stress resulting from the exercise of proper managerial rights and duties (e.g. shift changes, disciplinary action, etc.)

1)c) Legislative Update: WSIA

- The WSIB remains in consultation in regard to the changes to the calculation of employer rates
- Recently, the WSIB announced that the new system would be called the “rate framework” and would classify Ontario’s businesses based on the North American Industry Classification Structure system (NAICS), which is already used by Statistics Canada and the CRA
- Under the rate framework, employers would be assigned a predominant class, based on the majority of their insurable earnings, and then given a premium rate and projected premium rates
- The rate framework is expected to come into place on January 1, 2020

2)a) Case Law Update: Drug Testing

- With the increase in the use of medical marijuana and the forthcoming legalization of marijuana, many employers are concerned about how they address the potential of marijuana in the workplace
- As with any other drug, as an employer you have the right to require that employees not use any marijuana contrary to the law at the workplace
- Further, you have the right to ensure that no employee has created an unsafe situation as a result of the use of marijuana (legally or illegally)
- In order to enforce your rights and to protect the health and safety of your workers, all companies should have in place:
  1) a safe work policy that addresses drug and alcohol use;
  2) an accommodation policy that addresses how prescribed drug use will be accommodated (e.g. no operating heaving equipment, shift change, etc.)

2)a) Case Law Update: Drug Testing

- For certain workplaces, an employer may be able to require random drug testing and targeted drug testing
- There is no specific legislation addressing drug and alcohol testing in Canada
- However, employers can be liable if the testing amounts to a violation of the employee's privacy rights and human rights
- Previously the Supreme Court of Canada held in *Irving Pulp* that the employer was precluded from testing employers in safety sensitive positions
- However, recent case law suggests that the law is developing to allow drug testing in certain limited circumstances

2)a) Case Law Update: Drug Testing

- For example, in a recent Ontario Superior Court decision, the Court held that the TTC was allowed to do drug testing
- The drug testing policy provided that it would be implemented in a respectful manner in regard to employees in safety sensitive or other managerial/executive designated positions
- The Court held that as the employees are responsible for the safety of the public, a diminished expectation of privacy is expected on the part of the employees

2)a) Case Law Update: Drug Testing

- In the recent Alberta Court of Appeal decision of *Suncor*, the Court upheld that, in light of the more than 2,200 incidents involving drugs or alcohol in the workplace and the importance of safety at the Fort McMurray oil sands site, random drug testing was warranted
- Unifor has stated that it will be appealing the decision to the Supreme Court of Canada

2)a) Case Law Update: Drug Testing

- If a company has a proper drug policy in place and an employee violates the policy, then the company may be in a position to dismiss the employee for cause
- While some employee-side lawyers believed that such a dismissal would undeniably be discriminatory, the Supreme Court of Canada recently held otherwise
- In the decision of *Stewart v. Elk Valley*, an employee of 9 years drove a loader at a mine operated by the Elk Valley Coal Corp.
- After Stewart's loader collided with another truck, he was tested for drug use, and the test came back positive
- When questioned, Stewart admitted that he used cocaine on his days off and was likely addicted to cocaine
- Elk Valley dismissed Stewart and he sued on the basis that the dismissal was discriminatory and based on his drug addiction
- The Supreme Court of Canada held that, although the employee could have not taken drugs or asked to be accommodated based on his substance abuse, he chose to violate the company's policy and thus was properly dismissed

2)b) Case Law Update: Sexual Harassment

- A recent decision reinforces the need for employers to properly investigate claims of workplace harassment. It also highlights the liabilities an employer can incur when it does not
- In this case, the plaintiff had 9 years of service, had been a Supervisor, and had been the Company's only female employee
- It was found that during the course of her employment the Company's Plant Maintenance Manager had regularly sexually harassed the plaintiff, making frequent inappropriate and belittling comments

2)b) Case Law Update: Sexual Harassment

- Prior to a meeting which had been scheduled between the plaintiff, the Plant Maintenance Manager and another worker, the Plant Maintenance Manager and the co-worker had been informed that the plaintiff's employment was about to be terminated
- During the meeting the plaintiff raised work safety concerns which were ignored by the Plant Maintenance Manager who, in the meeting, again demeaned and belittled the plaintiff

2)b) Case Law Update: Sexual Harassment

- The plaintiff then made a formal sexual harassment complaint of which the Company conducted, at best, a cursory investigation
- Also, the Company did not advise the employee of the results of the investigation
- 5 days later the plaintiff was terminated on a without cause basis

2)b) Case Law Update: Sexual Harassment

- In her claim, in addition to a claim for pay in lieu of notice, the plaintiff claimed both moral damages and for damages under the *Human Rights Code*
- The Trial Judge's decision, which was upheld by the Ontario Court of Appeal, awarded $60,000 in moral damages and $25,000 for damages under the *Human Rights Code*
- These amounts were in addition to the 10 months pay in lieu of notice of termination awarded
- This decision highlights the need for employers to have in place a process by which employees can bring workplace harassment complaints and should ensure that all complaints brought are dealt with in a thorough and comprehensive manner

2)b) Case Law Update: Sexual Harassment

- In May 2017 the Federal Court approved the negotiated settlement of two sexual harassment class actions which had been commenced against the Royal Canadian Mounted Police in 2012 and 2015 respectively
- This was the first settlement of a workplace gender based harassment class action
- The settlement, which applies to women who have worked at the RCMP over the past 40 years, will pay a minimum of $10,000 and as much as $220,000 to each class member

2)b) Case Law Update: Sexual Harassment

- The settlement also requires the RCMP to issue a public apology and to implement an "institutional change initiative" to eliminate gender based harassment in the workplace

2)c) Case Law Update: OHSA

- As the Ministry of Labour continues to increase its enforcement efforts, employers must be ready to greet an OHSA inspector at any time
- For example, during 2 months over the summer, the MOL conducted almost 4,000 workplace inspections and issued over 10,000 orders in regard to fall hazards
- Of the places visited, roughly half were construction and the other half were industrial
- Currently, the MOL is doing a safety blitz in regard to slip and trip hazards in industrial and health care settings

2)c) Case Law Update: OHSA

- Employers should be mindful that substantial fines are not only imposed when a worker is injured
- The Court has been imposing hefty fines for no-accident violations of the OHSA
- For example, recently a Toronto company was fined $60,000 , plus the 25% VFS, when it failed to comply with orders issued to provide machine guarding
- No worker had been hurt
- If you are subject to an OHSA inspection or are issued an order, you should take the time assess whether an appeal is appropriate and, if not, ensure that you comply

2)c) Case Law Update: OHSA

- Employers should also ensure OHSA compliance in regards to their mobile and tele-commuting employees
- OHSA obligations extend beyond the four walls of the workplace
- In a decision this past spring, a Canadian company was fined $60,000, plus the 25% VFS, after an employee, who was driving back from a customer, was injured in a traffic accident
- The company was fined as it had failed to ensure that the employee who was trying to direct traffic for the company truck was properly provided with high visibility safety apparel

2)d) Case Law Update: Terminations

Termination Clauses

- We commonly stress to employers the importance of using written employment agreements which clearly outline the employers' obligations in the event of a without cause termination of employment
- When doing so, however, the clauses must be drafted carefully as any drafting errors can lead to a clause being found unenforceable
- The Ontario Court of Appeal in a recent decision, examined one such termination clause

2)d) Case Law Update: Terminations

Employee Terminations

Termination Clauses

- In particular, the termination clause included, in part the following language:

"9. Termination of Employment

(c) Without Cause – The Company may terminate your employment at any time in its sole discretion for any reason, without cause, upon by [sic] providing you with notice and severance, if applicable, in accordance with the provisions of the Ontario Employment Standards Act (the "Act"). In addition, the Company will continue to pay its share all [sic] of your employee benefits, if any, and only for that period required by the Act.

In the event of the termination of your employment, any payments owing to you shall be based on your Base Salary, as defined in the Agreement."

2)d) Case Law Update: Terminations

Termination Clauses

- The Court of Appeal held that the termination clause was unenforceable as it violated the ESA
- It is important to note that the Court held that because **part** of the clause violated the ESA, the **entire** clause was void
- This was notwithstanding the fact that the agreement had a severability clause
- This decision shows that a Court is unlikely to take steps to try to read down or “fix” a termination clause which violates the ESA

2)d) Case Law Update: Terminations

Just Cause Terminations – Do Not Cry Wolf

- Recent decisions demonstrate that Courts are willing to award punitive damages against employers who either at the time of termination or afterwards make improper or strategic just cause allegations
- In one decision the employer alleged the plaintiff had been terminated for cause as a result of dishonesty, incompetence and habitual neglect of duty

2)d) Case Law Update: Terminations

Just Cause Terminations – Do Not Cry Wolf

- At trial, it was held that the employer had been aware of the matters which it subsequently alleged gave it just cause to terminate but took no issue with these matters at the time they occurred
- The Court also found that these allegations were only made by the employer subsequent to the issuance of the plaintiff's Claim
- As a result, the Trial Judge concluded the allegations were concocted by the employer after the fact and, as a result, the Trial Judge awarded $5,000 in punitive damages

2)d) Case Law Update: Terminations

Just Cause Terminations – Do Not Cry Wolf

- Other recent decisions have seen punitive damage awards of as much as $50,000 when employers have been found to have improperly or strategically made just cause allegations
- These decisions show that Courts will be willing to award punitive damages against employers if it is determined that:
  - the employer fabricates allegations of serious misconduct to support the dismissal and maintains these allegations either up to or during the trial
  - the employer terminates an employee for cause alleging serious misconduct (i.e. criminal or quasi-criminal conduct) without conducting a reasonably fair and unbiased investigation

2)d) Case Law Update: Terminations

I Quit! (but do I really mean it?)

- In order for an employer to rely on an employee resignation, the resignation must be clear, unequivocal and voluntary
- In a recent case an employee with 27 years of service was called into a meeting on a Wednesday where she was told that she was effectively being demoted
- The next morning the employee removed her personal belongings from the office, handed in her security pass and left the office
- She did not return to work on Friday or the following Monday

2)d) Case Law Update: Terminations

I Quit! (but do I really mean it?)

- On the Monday the employer mailed a letter to the employee advising that it had accepted her resignation and that the resignation was effective as of 5:00 p.m. that day
- The next day the employee wrote an email to the employer asking to withdraw her resignation
- The employer refused to allow the resignation to be withdrawn for, amongst other reasons, it had already advised staff and customers of the resignation and it believed that allowing the employee to rescind the resignation would encourage other employees to resign without notice

2)d) Case Law Update: Terminations

I Quit! (but do I really mean it?)

- Ultimately, the Court concluded the employee had not voluntarily resigned but instead required some time to consider the changes she was advised of in the meeting
- The Court relied on various facts when concluding the employee had not given a voluntary resignation. These included:
  - The employee was 62 years old with 27 years tenure
  - The employee had not threatened to resign previously
  - No written notice of resignation was provided

2)d) Case Law Update: Terminations

I Quit! (but do I really mean it?)

- The employee did not state verbally that she was quitting or resigning
- The resignation was out of character
- The employer did not attempt to discuss the matter with the employee at any time after the initial meeting
- No one attempted to contact the employee following her departure

2)d) Case Law Update: Terminations

I Quit! (but do I really mean it?)

- As a result, the Court concluded the employer in this case was required to take additional steps to confirm the employee's intention
- Accordingly, the Court found the employee had been wrongfully dismissed and was entitled to pay in lieu of notice of termination
- The decision demonstrates that attempting to rely on "resignations" given in the heat of the moment can prove costly to employers

2)d) Case Law Update: Terminations

Restrictive Covenants - Pay If You Play Clauses

- Recent decisions demonstrate an apparent growing willingness for Courts to enforce clauses which rather prohibiting a former employee from competing, instead require the former employee to make a payment in order to compete post termination
- In a recent Ontario case a former employer successfully brought an injunction application relating to a non-solicitation covenant contained in an employment agreement
- The covenant had standard 24 month non-solicitation language

2)d) Case Law Update: Terminations

Restrictive Covenants - Pay If You Play Clauses

- The non-solicitation covenant, however, also provided the following:
  - "If, for whatever reason (regardless of whether solicited or not) a current or prior client of Stoneridge should follow the Employee to her new place of business and obtain services similar to those offered by Stoneridge, then the Employee shall pay Stoneridge two (2) times the annual commission of said client forthwith upon request from Stoneridge."

2)d) Case Law Update: Terminations

Restrictive Covenants - Pay If You Play Clauses

- The former employee attempted to argue that the non-solicitation covenant was, in fact, a non-competition covenant given the payment requirement and therefore as the covenant had no geographic scope, it was unenforceable
- The Court did not accept this argument finding instead that the clause did not prohibit the former employee from competing; rather, it just prohibited its solicitation of former clients

2)d) Case Law Update: Terminations

Restrictive Covenants - Pay If You Play Clauses

- It remains to be seen whether these lines of decisions will be generally embraced by the judiciary
- At present it appears a greater likelihood for courts to do so when dealing with employees such as Insurance Agents, Dentists and Veterinarians who have very easily identified books of business/client bases

QUESTIONS?

Wilson Vukelich LLP can help ensure that your employment law matters are handled effectively and efficiently, and in a 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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