

Breakfast Seminar Series

Year End Wrap Up: An Employer's Guide to the Year's Most Compelling Legislative and Employment Law Developments

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Breakfast Seminar Series

- In one hour, you will receive an overview of the most important developments of 2010
- For each topic you will receive:
 - Highlights of the important features of the development
 - A "bottom line" analysis of the impact of the development on your workplace

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Employment Law Update

Social Media in the Workplace

- Facebook, Twitter, LinkedIn, YouTube, blogs, etc. ...
- Recruitment tool
- Cyber-venting
 - Online defamation, employer/co-workers
 - Protecting your organization's reputation and image
- Cyber-bullying
 - Hostile/discriminatory/harassing work environment
- Decreased productivity
 - Cyber-slacking
- Disclosure of confidential or proprietary business information

Social Media in the Workplace – Cases

- *West Coast Mazda and UFCW* [2010]
 - Facts:
 - 2 employees posted offensive, insulting and disrespectful comments about managers and supervisor on Facebook after hours and using home computers
 - Postings became increasingly angry and aggressive
 - 2 employees were key union organizers/supporters
 - Employees were dismissed
 - Decision:
 - B.C. Labour Relations Board upheld the terminations
 - Comments amounted to insubordination and a hostile work environment
 - No anti-union animus

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Social Media in the Workplace – Cases

- *Hydro One Networks Inc. and Society of Energy Professionals* [2010]
 - Facts:
 - Grievor “stood up” for a date by a summer student
 - Sent student a Facebook message expressing displeasure
 - Terminated for harassment, misrepresentation, interference with IT system
 - Decision:
 - Grievance allowed
 - Isolated incident arising out of friendship between employees
 - Took place outside of work hours and away from workplace
 - Did not compromise employer’s reputation or operations

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Social Media in the Workplace US Perspective

- November 2, 2010 NLRB filed complaint
 - Ambulance service illegally terminated employee over Facebook comments
 - Internet Policy prohibited depicting the company “in any way” on social media sites, including prohibiting disparaging remarks about company and supervisors
 - Employee posted negative comments about supervisor
 - Comments drew supportive remarks from co-workers
- NLRB investigation and position
 - Facebook postings are “protected activity”
 - Employer’s Facebook rule overly broad, limited employees’ rights to discuss working conditions
 - Case to be heard in January 2011

Implications – Social Media Policies in the Workplace

- Employers are disciplining employees for “cyber conduct”
- Need to revise existing Internet policies
- Compliance with pre-existing policies when using social media
 - Harassment and violence
 - Disclosure of confidential or proprietary business information
 - Use of company logo and other branding
- Consequences of breach
- Individual employee sign off

Accommodating Child Care Obligations: Two Approaches

Campbell River (2004 – B.C. Court of Appeal)

- a) A change in a term or condition of employment
- b) Resulting in a serious interference with
- c) A substantial parental or other family duty or obligation of the employee

Johnstone (CHRT – August 2010)

- a) Same test to be used as other prohibited grounds of discrimination
- b) Protections must be afforded to the parent/child relationship

An Analysis of the Two Approaches

▪ **Campbell River**

- Recognizes employees cannot expect accommodation for every family status situation
- Employers cannot create terms that do not conflict with every characteristic of family status
- Much more restrictive test than other grounds of discrimination

▪ **Johnstone**

- Employer action which negatively impacts family obligation – *prima facie* discrimination
- Often easier for an employer to facilitate accommodation

Policy in Ontario

- *Policy and Guidelines on Discrimination Because of Family Status*
 - Family status defined as being a “parent and child” or parent and child “type” relationship
 - Includes adoptive relationships, aging parents, no-blood relationships
- Middle-ground approach
 - Narrow position in *Campbell River*
 - Very wide approach adopted in Federal jurisdiction

Practical Implications

- **Foster an open environment**
 - Employees should be comfortable in disclosing special care obligations
 - Fewer surprises, more time to prepare
- **Have a financially quantifiable and documented accommodation program**
 - Provide flexible scheduling absences for special care situations
 - Employee Assistance Programs
 - Child care services
 - Telework
- **Accommodation must be justified**
 - Case-by-case investigation
 - Give only what the employee reasonably needs

Overtime Class Actions

- Ontario *Employment Standards Act, 2000*
 - 1.5 X in excess of 44 hours/week
 - Hours can be averaged
 - employee agreement and Director approval is required
- Some classes of employees are exempt from legislation or from specific provisions
 - Information Technology Professionals
 - Managerial or Supervisory Personnel
 - Sales Persons
 - Professionals (i.e. lawyers, doctors, professional engineers)

Avoiding Overtime Claims

- Know the *ESA / CLC* overtime requirements and exemptions
- Have a clear policy of pre-authorization, no exceptions
- Have clear employment contract language to limit exposure
- Maintain accurate records – ensure clear records of time worked or permitted to be worked
- Consider an averaging agreement

Incapacity and Frustration of Contract

- Occurs when one party becomes incapable of performing contract
 - Death, permanent incapacity, or long-term illness

- Generally, the employer must establish:
 - absent for an excessive period (2+ years);
 - poor prognosis for return to work; and,
 - attempts to accommodate reached undue hardship
 - "... The employer's duty to accommodate ends where the employee is no longer able to fulfill the basic obligations associated with the employment relationship for the foreseeable future."

- Note that longer term employees will enjoy more of a benefit of the doubt in terms of their ability to return to work

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Naccarato v. Costco (2010 – Ont. S.C.J.)

- Facts
 - Off 4 years; employer could not predict a return date
- Findings:
 - Lack of medical prognosis/employee was still in treatment, possibility Mr. Naccarato could RTW
 - Costco could have followed up with Doctor to get a more precise prognosis
 - Mr. Naccarato's lesser role – longer absence could occur before frustration of contract
 - No evidence absence was causing Costco undue hardship
- Awarded 10 months pay in lieu of notice plus costs of \$12,600

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Duong v. Linamar (2010 – Ont. S.C.J.)

- **Facts**
 - Mr. Duong employed with Linamar for 11 years
 - Employee had been off work for 3 years
 - Medical documentation indicated that there was no foreseeable date for employee to RTW
 - Linamar terminated Mr. Duong
- **Findings**
 - Court considered the length of time off
 - No evidence that Mr. Duong had any prospect of returning to work in the near future
- Dismissed the action and found in favour of the employer

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Practical Implications

- Ensure a clear prognosis before considering termination
- If medical evidence is vague, obtain more conclusive reports
- Prognosis seems to be more determinative than how long an employee has been absent
- Examine details of the employment contract and its elements to see if it has been frustrated

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Legislative Update

Bill 168 Update: Violence and Harassment – 8 Key Points

- Risk assessments
- Policies – violence, harassment
- Violence program
- Harassment program
- Domestic violence
- Training
- Personal information re persons with history of violent behaviour
- Work refusals

Bill 168 Update: Workplace Violence and Harassment

- The Ministry of Labour (MOL) is enforcing Bill 168
- MOL Inspectors are determining if policies meet standards
- MOL Inspectors are taking a collaborative approach
 - If issues to address, Inspectors will assist with formulating policies
- Employers facing orders under s. 55.1 to comply

Bill 168 Update: Workplace Violence and Harassment

- *Bell Mobility* (2010 – Ont. C.A.)
 - Employee experienced verbal and physical harassment by supervisor
 - Lower court found intentional infliction of mental suffering, battery, negligent infliction of emotional distress
- Court of Appeal
- No tort of negligent infliction of mental suffering available
 - Policy considerations negate finding a duty of care
- Bill 168 may create the previously missing basis for duty of care

For more information regarding this case please visit:

<http://www.emondharnden.com/whatsnew/1006/Focus10062.shtml>

Bill 168 – Practical Implications

- Employers must ensure compliance with Bill 168
- The MOL is reviewing workplace policies
- Bill 168 is being used to justify discipline, but relatively untested to date
- Bill 168 may impose new duty of care on employers

Bill 68 – *Open for Business Act, 2010*

- Omnibus bill
- Amends *Employment Standards Act*
- Attempt to streamline complaint resolution system and reduce *ESA* complaints backlog
- Royal Assent received October 25, 2010
- Employment Standards Task Force
 - Created in August, 2010

Bill 68 – Open for Business Act, 2010

- Director can require:
 - claimant to provide specific information
 - claimant to inform employer of complaint prior to being assigned to an ESO
- Authorize ESOs to attempt to settle complaints
- ESOs to decide claims where parties do not attend settlement meeting
- ESO to decide claims where evidence not provided on time

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Bill 68 – Practical Implications

- Employers will have more timely notice of a possible *ESA* complaint
- Focus will be placed on early settlements
- Employers must provide requested evidence on time and attend decision making meetings or a decision could be made in their absence
- Although employers may feel an increase of complaints while the backlog is cleared, *ESA* complaints may be resolved more expeditiously as focus will be placed on early settlements

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Proposed Integrated Accessibility Regulation under the AODA

- AODA's goal of creating standards to improve accessibility
- Provides for development of "Accessibility Standards" in 5 key areas:
 - Customer Service – Standard enacted January 1, 2008
 - Compliance – Public Sector – January 1, 2010; Private Sector January 1, 2012
 - Information and Communications
 - Employment
 - Transportation
 - Built Environment

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Proposed Integrated Accessibility Regulation under the AODA

- Consolidates accessibility requirements in 3 areas:
 - Information and communications
 - Employment
 - Transportation
- Classification of organizations by sector and size
 - Government of Ontario
 - Broader public sector – 50+ employees; 1-49 employees
 - Private and not-for-profit sectors – 50+ employees; 1-49 employees

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Proposed Regulation – Accessible Employment Requirements

- Provide accessibility through employment life-cycle (i.e. recruiting, hiring, retaining)
- Develop documented individual accommodation plans upon request
- Have documented procedure for return-to work
 - Only applicable where no legislated RTW procedure (WSIB)
- Consider accommodation needs and/or individual accommodation plans in performance management, career development and redeployment

For more information regarding the proposed regulation please visit:

<http://emondharnden.com/whatsnew/1010/Focus10101.shtml>

Bill 110 – Good Government Act, 2010

- Most of the amendments to the *ESA* are technical
- Overtime in section 22(1) of the *ESA* based on excess hours in each “work week”
- Amends *WSIA* regarding disclosure obligations
- Amends *WSIA* regarding when certain payments are to be made by lump sum or periodic payments
- Bill referred to Standing Committee
 - Referred on November 4, 2010

Questions?