Breakfast for Business

Annual Employers' Conference:
Employment Law Update 2016

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Agenda

1) Legislative Update
   a) OHSA
   b) AODA
   c) ESA and LRA
2) Case Law Update
   a) Fixed Term Agreements
   b) Workplace Violence and Harassment
   c) With Cause Dismissals
   d) Restrictive Covenants

1)a) Legislative Update: OHSA

- Effective September 8, amendments to the Occupational Health and Safety Act ("OHSA") related to workplace harassment took effect
- The purpose of the amendments was to address workplace harassment more specifically, as well as to clarify that workplace harassment includes sexual harassment

1)a) Legislative Update: OHSA

- Accordingly, under the amendments, the definition of "workplace harassment" now explicitly includes "workplace sexual harassment"

1)a) Legislative Update: OHSA

- While employers remain required to have in place both workplace harassment and workplace violence policies and procedures, there are now more specific requirements for the workplace harassment procedures
- In particular, an employer's workplace harassment procedures must now specifically include the reporting procedure, the investigation procedure, and the response procedure
- Also, workplace harassment procedures must now be prepared in consultation with the Joint Health and Safety Committee or the Health and Safety Representative

1)a) Legislative Update: OHSA

- Further, under the amendments, if the Ministry of Labour believes there may have been an incident of workplace harassment, it can now order that a third party investigator conduct an investigation at the employer's expense

1)b) Legislative Update: AODA

- Since its enactment, the *Accessibility for Ontarians with Disabilities Act* (the "AODA") has established numerous obligations for all workplaces in order to improve access to goods and services
- These obligations are generally detailed in the Accessibility Standards for Customer Service (the "ASCS") and the Integrated Accessibility Standards (the "IAS")
- Under the AODA, the accessibility obligations are regularly increasing on a scheduled basis
- Many of the obligations have been in place since 2015, however, several new obligations came into effect on January 1, 2016

1)b) Legislative Update: AODA

- There are now six main obligations under the AODA:
  1. Policy Requirement
  2. Training Requirement
  3. Employer Practice Requirement
  4. Feedback Requirement
  5. Accessible Public Information
  6. Reporting Requirement

1)b) Legislative Update: AODA

- 1) Policy Requirement:
  - Since at least January 1, 2015, employers have had an obligation to develop, implement, and maintain a policy regarding providing goods/services to persons with disabilities and complying with the AODA and the ASCS
  - For most employers, this policy is a 3 – 8 page document, which addresses matters such as the use of guide dogs and support persons, interruptions to the office's elevators, and employee training

1)b) Legislative Update: AODA

- 2) Training Requirement:
  - Since January 1, 2015, certain training requirements have been in place under AODA
  - Effective January 1, 2016, the training requirements under AODA have been broadened to require further training
  - Currently, all employers must provide training to their employees on the IAS, the ASCS, the provisions of the Ontario Human Rights Code that pertain to individuals with disabilities, and the goals of the AODA
  - Most employers are able to train and test their employees within 1 hour

1)b) Legislative Update: AODA

- 3) Employer Practice Requirement:
  - Effective January 1, 2016, all employers with more than 50 employees must ensure that their hiring, workplace training and instruction, employee management, accommodations, and leaves are done in manner that complies with the IAS
  - For employers with less than 50 employees, this accessible employment practices requirement will come into place in a few months on January 1, 2017
  - These new accessible employment practices requirements are best address through the company's employee handbook

1)b) Legislative Update: AODA

- 4) Feedback Requirement:
  - Effective January 1, 2016, all employers must ensure that there is a process in place for receiving and responding to feedback regarding their accessibility

1)b) Legislative Update: AODA

- 5) Accessible Public Information:
  - Effective January 1, 2016, all employers with more than 50 employees must ensure that their publically available information is available in accessible format upon request and in a timely manner
  - For employers with less than 50 employees, the accessible format requirement will not be in place until January 1, 2017

1)b) Legislative Update: AODA

- 6) Reporting Requirement:
  - Since January 1, 2015, all employers with more than 20 employees have had to file an accessibility report confirming their compliance with the AODA
  - In order to submit a report, you need the following:
    a) a ServiceOntario account
    b) your 9-digit Business Number, which can be found on your federal and provincial tax returns
    c) the information regarding how you are complying with the AODA
  - Once you log-in to your ServiceOntario account, you can then select to add the Access ACR app from "Add a service" and then sign into the Access ACR app
  - The most recent filing deadlines were January 1, 2015 for employers with more than 50 employees and January 1, 2016 for employers with less than 50 employees
  - The next filing deadline is December 31, 2017, and every three years thereafter

1)c) Legislative Update: ESA and LRA

- The Ontario Ministry of Labour is currently considering options to amend the Employment Standards Act ("ESA") and the Labour Relations Act ("LRA")
- The intent is to modernize the ESA and the LRA, in order to better protect vulnerable workers while still being mindful of the interests of employers
- It is expected that this review will result in major changes to both the ESA and the LRA
- On July 27th, a three hundred page Interim Report was issued, which discussed the history of employment and labour law and identified numerous options for amendments
- The next consultation period closes on October 14, 2016

1)c) Legislative Update: ESA and LRA

- The areas currently being reviewed under the ESA include:
  i. the definition of "employee" (e.g. amend the definition to ensure dependent contractors are treated as employees)
  ii. the leaves provided (e.g. allow personal emergency leave for all employees, not just those employed by a company with 50+ employees)
  iii. the exemptions to employee standards (e.g. further limit the information technology professional exemption regarding hours of work restrictions and overtime pay entitlements)
  iv. the ability of written agreements to alter employee standards (e.g. amend the ability to use hours of work agreements)
  v. enforcement of the ESA (e.g. creating a better way to educate employers and employees about the ESA)

1)c) Legislative Update: ESA and LRA

- The areas currently being reviewed under the LRA include:
  i. the definition of related and joint employers
  ii. the certification process (e.g. allowing the union access to employee lists)
  iii. the remedial powers of the Ontario Labour Relations Board
  iv. the ability of the employees to participate in decision-making in order to address any representation gap (e.g. allowing non-union organizations or associations)

2)a) Caselaw: Fixed Term Agreements

- In order to avoid unnecessary disputes and to best manage/limit employers' liabilities, employers should use written employment agreements
- One matter to be considered is whether the agreement will be for a fixed term or an indefinite term
- It is generally preferable to have an indefinite term

2)a) Caselaw: Fixed Term Agreements

- Where the agreement is for a fixed term, it is very important that it contains an enforceable termination provision which provides the employer with the ability to terminate the employment agreement prior to the end of the term
- If there is no enforceable termination provision, then the employee will be entitled to payment of the balance of the contract's term and mitigation will not be considered

2)a) Caselaw: Fixed Term Agreements

- In the April decision of *Howard v. Benson Group*, the Court of Appeal confirmed that a dismissed fixed term employee was entitled to the balance of the 5 year fixed term agreement as notice of termination, with no duty to mitigate
- In this case, after almost 2 years of employment, the business dismissed the employee
- The Court held that, as the agreement did not have an enforceable termination provision, the employer was obligated to pay out the employee the balance of the term, being 37 months

2)b) Caselaw: Workplace Violence

- The Minister of Labour has recently begun prosecuting employers for failing to comply with the OHSA workplace violence provisions

2)b) Caselaw: Workplace Violence

- For instance, this summer two companies were fined $80,000 and $125,000, respectively, following workplace violence incidents where staff members were physically assaulted by clients
- The first company was convicted for failing to have sufficient procedures in place in order to protect its workers from workplace violence
- The second company was convicted for failing to properly instruct its workers in regards to workplace violence

2)b) Caselaw: Workplace Violence

- The Ministry has also issued Orders, Tickets, and secured convictions against employers who failed to have a workplace violence policy in place
- Given the above, all companies should ensure that they have satisfied their OHSA obligations in regards to workplace violence (e.g. a workplace violence risk assessment, a workplace violence policy, precautions against workplace violence, workplace violence procedures, and workplace violence training for workers)

2)b) Caselaw: Workplace Harassment

- In addition to developments in regards to workplace violence, there have also been developments in regards to workplace harassment
- This year, a union brought a grievance that the TTC had violated the OHSA by allowing employees to be abused on its social media accounts
- Of particular issue was the TTC's twitter account - @TTChelps – which allowed TTC users to voice to the TTC any concerns or complaints

2)b) Caselaw: Workplace Harassment

- The arbitrator ruled that, as a result of its social media accounts, the TTC had failed to protect its employees from harassment, as was required by its own workplace harassment policy
- Accordingly, the arbitrator issued an award which addressed these failings
- For example, the TTC is now required to indicate on its social media accounts that abusive, profane, derogatory or offensive tweets/posts and tweets/posts with employee photos will be deleted

2)b) Caselaw: Workplace Harassment

- This reinforces the fact that, employers should be mindful to ensure that their social media accounts comply with their workplace harassment policies and programs
- Of particular concern is any social media account which promotes customer/client feedback

2)c) Caselaw: With Cause Dismissals

- Leaving aside human rights and certain employee protections, an employer can generally dismiss an employee with cause or without case
- Where an employee is dismissed with cause, the employee is generally not entitled to any notice or pay in lieu of notice at common law or under the ESA

2)c) Caselaw: With Cause Dismissals

- Although dismissing for cause can be economically beneficial for the employer, employers should be careful to ensure that they have cause
- If an employer is later held to be without cause, the employee can successful obtain her notice entitlements and potentially additional damages

2)c) Caselaw: With Cause Dismissals

- It is important to obtain legal advice when seeking to dismiss an employee, as it may not be obvious when cause does and does not exist
- For example, in a recent decision, a company had dismissed an employee for cause who was arrested at work and charged with sexual assault against minors
- The employee had refused to discuss the charges with the employer, but advised that the alleged events did not occur in the workplace and did not involve any of his coworkers

2)c) Caselaw: With Cause Dismissals

- The Court confirmed that criminal charges for off-duty conduct do not alone constitute just cause for dismissal
- In order to amount to just cause, there must be a connection between the off-duty conduct and the employer or the nature of the employment
- For example, it may amount to just cause where the employer can show that it would suffer reputational harm

2)c) Caselaw: With Cause Dismissals

- While employers generally may dismiss an employee without cause, currently federally regulated employers cannot
- In particular, in a landmark decision in July, the Supreme Court of Canada held that the Canada Labour Code provides that all federally regulated employees (unionized and non-unionized) can only be dismissed for just cause

2)d) Caselaw: Restrictive Covenants

- Employers often rely on restrictive covenants in order to prevent current and former employees from soliciting their clients and competing against their business
- In order to be enforceable, non-competition and non-solicitation provisions must be carefully drafted
- If the provisions fail to satisfy the Court's scrutiny, the provisions will be void, as the Court will not revise a provision based on the parties' intention

2)d) Caselaw: Restrictive Covenants

- For a non-competition provision to be enforceable, it must be:
  1) limited in time and in geographic scope
  2) reasonable in its limitations
  3) accepted with consideration
- In contrast, for a non-solicitation provision to be enforceable, it only needs to be limited in time
- A non-solicitation provision does not need a geographic scope

2)d) Caselaw: Restrictive Covenants

- In August, the Court of Appeal upheld an earlier decision where a non-solicitation provision was deemed unenforceable
- The non-solicitation provision provided that the employee could not "solicit or accept business" from its clients
- As the provision precluded accepting business, it was in fact a non-competition provision and was unenforceable

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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