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Workplace Trends to Watch

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Agenda

1. Ontario's Changing Workplaces Review
2. The New *OHSA* Sexual Harassment Provisions
3. Marijuana in the Workplace
4. Contracts

ONTARIO GOVERNMENT'S CHANGING WORKPLACES REVIEW



Changing Workplaces Review

Government-initiated review of Ontario's workplace legislation to determine how these statutes can be revised to better reflect the changing nature of the workforce, workplace and economy

- *Employment Standards Act, 2000 (ESA)*
 - *Labour Relations Act, 1995 (LRA)*
- February 2015 - Special Advisors appointed to carry out public consultations and prepare a final report and recommendations to the Minister of Labour
 - C. Michael Mitchell
 - Hon John C. Murray
- May 2015 – Ministry of Labour released *Changing Workplaces Review: Guide to Consultations* inviting public stakeholders to comment on the effectiveness of *ESA* and *LRA*
- February 2016 – Interim Update by Mitchell and Murray: concerned not all interested parties are well informed about the scope of review and the issues and options for change (at that time, they had received over 200 presentations and over 300 written submissions). Thus, their issuing an Interim Report and will likely be requesting an extension for the Final Report.

Changing Workplaces Review

Part of the reason for the Review:

December 2012 – Law Commission of Ontario (LCO) report on “*Vulnerable Workers and Precarious Work*”

- “Precarious work” characterized by job instability, lack of benefits, low wages and degree of control over the process
- Report made 47 recommendations including that Ontario government update, in consultation with stakeholders:
 - Review and streamline the *ESA*
 - Develop principles with a view to reducing precarious work and providing basic minimum standards to broader sector of the working population

Changing Workplaces Review

Why is a review needed?

- Changing workplace demographics
- Globalization
- Technological innovation
- Growth in private service sectors
- Rise in non-standard employment
- Long-term decline in private sector unionization

Current Status

- Interim Report will be released shortly (maybe?)
- Employers in particular will be again invited to provide submissions on a range of issues flagged by unions and “progressives”
- Final Report will not address any of the *ESA* exemptions
- Final Report expected before year end

Changing Workplaces Review

Under Consideration:

Employment Standards Act, 2000

- Part-time, casual and temporary workers
- Complexity of current legislation
- Leaves of absence
- Application of the *ESA* to franchising, subcontracting and agencies
- Exclusions and exemptions

Labour Relations Act

- Application and scope of *LRA*
- How workers choose union representation
- Definition of bargaining units
- Ground rules for collective bargaining and unfair labour practices
- Scope of Ontario Labour Relations Board's remedial authority
- NOT provisions relating to Public Sector or Construction Industry

Changing Workplaces Review

Key Themes

- What does labour want?
 - Card-based certification
 - Expanded use of employee lists and easier access to arbitration when collective bargaining breaks down
 - *ESA*: Harmonization of wages/rights/benefits for different classes of workers
- What do employers want?
 - *LRA*: Maintain secret ballot; clamp down on employee list disclosure; take “ability to pay” into account in interest arbitration scenarios
 - *ESA*: No extra benefits, no stringent scheduling obligations, keep exemptions

Changing Workplaces Review

Submissions Overview

- *Public Sector*: Ontario Federation of Labour, Unifor, United Food and Commercial Workers, United Steelworkers, etc.
 - Card-based certification without a secret ballot vote
 - Early disclosure of employee lists in organizing drive triggered when only 20% of employees have signed union cards
 - Extend successor rights to workers in contract services sector
 - Anti-scab rules prohibiting use of replacement workers during strikes and lockouts

Changing Workplaces Review

Submissions Overview

- Ontario Chamber of Commerce
 - Maintain secret ballot certification
 - Prohibit unions from using list of employees provided in response to certification application for any other purpose than the present application
 - Maintain greater of contractual or statutory benefits
 - Reject proposals advocating for “reverse onus on employee status” where worker is presumed to be an employee unless the employer/payor demonstrates otherwise

Changing Workplaces Review

Submissions Overview

- Human Resources Professional Association
 - Better definitions in *ESA* (manager/supervisor, contractor, temporary workers)
 - Accessible online portal for employers and employees to use to ask questions about the *ESA* and understand their rights
 - No proactive enforcement; more educational outreach by Ministry of Labour
 - Determine overtime eligibility by a salary threshold
 - Three weeks' minimum vacation
 - Arbitrators appointed under the *LRA* should have to consider an employer's ability to pay

Changing Workplaces Review

Submissions Overview

- Women's Legal Education and Action Fund
 - Reduce the negative impact of scheduling on precariously employed workers (i.e. workers with job instability, lack of benefits, low wages, etc.)
 - Recognize disproportionate burden carried by women engaged in caregiving and accommodate women who have such caregiving responsibilities

Changing Workplaces Review

Submissions Overview

OPSEU – Young Workers Committee

- No differential pay, benefits or working conditions for part-time / casual / fixed term workers doing the same work as full-time workers
- Prohibit long-term temporary agency assignments
 - Agency workers to become directly-hired employees after working cumulative total 6 months for the client company
 - Temporary staffing limited to 20% of company's workforce
- Provisions concerning hours
 - Make work available to existing part-time employees before hiring new workers
 - Post schedules two weeks in advance

Changing Workplaces Review

Submissions Overview

- Uber

Appears to have used the opportunity to tout its business model:

- Independent contractors are the future of the “sharing economy”
- Flexible part-time work (including by workers like students and the elderly) is part of an expanding contingent labour market

Changing Workplaces Review

What can we expect?

- Interim Report “shortly”
- Focus on encouraging compliance with statutory obligations
 - Respect for employment and labour laws
 - Recommendations and rules to promote the consistent enforcement of a level playing field for employers, unions and employees
 - More effective enforcement mechanisms to deter and address commonplace violations, with clear adverse consequences for offenders
- Address concerns about the recent rise of “precarious work”
 - An amorphous concept that has been defined as non-standard employment that is poorly paid, insecure and relatively unprotected
- Give individual employees a better “voice” in the workplace
- Create an environment supportive of business in the changing economy
 - Mindful of the rise of “sharing economy”

THE NEW *O*HSA “SEXUAL HARASSMENT” PROVISIONS (BILL 132)

SEX + WORKPLACE = BAD IDEA



Sexual Harassment – New Obligations in Ontario

- Arises out of the Government’s action plan. “It’s Never Okay: An Action Plan to Stop Sexual Violence and Harassment”
- This legislation amends six statutes, including the Ontario *Occupational Health and Safety Act* (“OHSA”)
- It comes into force on September 8, 2016
- So what are these **new OHSA obligations on employers?**

Old Definition

What is existing definition?

- “workplace harassment” means engaging in 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.

New Definition

A new definition – in addition to “workplace harassment”, *OHS*A to now also include definition of “sexual harassment”:

- Engaging in a course of vexatious comment or conduct against a worker in a workplace **because of sex, sexual orientation, gender identity or gender expression**, where the course of comment or conduct is known or ought reasonably to be known to be unwelcome, or
- Making a **sexual** solicitation or advance where the person making the solicitation or advance is in a position to confer, grant or deny a benefit or advancement to the worker and the person knows or ought reasonably to know that the solicitation or advance is unwelcome.

What is NOT Harassment?

- Definition of what is **NOT** workplace harassment:
 - “a reasonable action taken by an employer or supervisor relating to the management and direction of workers or the workplace”
- Examples:
 - Legitimate management intervention
 - Performance evaluations
 - Corrective action
 - General unfairness
 - Consensual banter

Scope Creep: What is NOT Harassment?

London Health Sciences Center and ONA [2015] 261 LAC (4th)

Arbitrator McNamee:

“Workplaces, however, are not churches, and no employer can or should police employees so closely as to try to ensure that every utterance is politically correct. Off colour humour, in its place and depending on the subject matter, frequency and context, may not be so objectionable that is necessary or desirable to stamp out.”

Scope Creep and “THE WORKPLACE”

What is THE WORKPLACE?

- Not only the physical location of where you work
- Protection against acts of harassment extend to incidents occurring at or away from the workplace, outside normal working hours
- Provided such acts are committed within the “course of employment”

Scope Creep and “THE WORKPLACE”

1) Social Media and the Workplace

- Off-duty conduct

2) Example:

- After-hours text messages

New Obligations in Ontario: Programs

Workplace Harassment Programs **must** include and specify:

- Measures for workers to report incidents of workplace harassment to a person other than the employer or supervisor where the employer or supervisor is the alleged harasser.
- How incidents or complaints of workplace harassment will be investigated and addressed.
- How information obtained about an incident or complaint, including identifying information about individuals involved, will not be disclosed unless necessary.
- How the results of the investigation and any corrective action will be communicated to the complainant and the alleged harasser.

The Take-Aways

1) Update harassment policies and programs by September 8, 2016

- Revise definitions
- Reporting mechanisms must be in place
- Investigations are critical (and reporting on them)
- Obligation now is to advise complainant of corrective action

2) Humans rights obligations not altered or superseded

- “sexual harassment” both a human rights and workplace safety issue

MEDICAL MARIJUANA (THE HIGH POINTS)



Where Are We Now?

- 40,000 active medical marijuana prescriptions in Canada in 2014
- Projected to increase to 500,000 by 2024

Source: *Health Canada, 2014*

Why the Projected Increase?

- Factors likely to lead to increase:
 - “Gate Keeping”
 - Private Benefit Plans
 - Broader societal acceptance
 - Proliferation of “Pot Shops”, and easy access to “prescriptions”
- Decision No. 1330/14 WSIB:
 - Medical Marijuana is the exception rather than the rule...
 - But: ought to be permitted when evidence establishes it improves the quality of life of the injured worker
 - NS WCAT #2015-104-AD:
 - Not covered in NS; insufficient evidence that worker’s use consistent with standards of healthcare in Canada
 - NB WCAT Re 20167846
 - WCB was directed to cover the cost of the worker’s prescription medical marijuana

Marijuana and Human Rights – Some of the Issues

- Direct Discrimination
 - “Medical marijuana users need not apply”
- Adverse Effect Discrimination
 - Assumptions about abilities or suitability premised on medical marijuana use
 - Stigmatizing employees who use medical marijuana
- Accommodation and Willful Blindness
 - The lawful entitlement to use medical marijuana suggests an inference of underlying “disability”

Using Medical Marijuana at the Workplace

- *Calgary v. CUPE Local 37 (2015)*

Heavy equipment operator is not disqualified from his position simply because he has a medical marijuana prescription

- *French v. Selkin Logging (2015)*

However, the employee needs to be able to demonstrate that they actually have a legitimate medical marijuana license...

Sample Medical Document for the *Marihuana for Medical Purposes Regulations*

This document may be completed by the applicant's authorized health care practitioner as defined in the Marihuana for Medical Purposes Regulations. An authorized health care practitioner includes physicians in all provinces and territories, and nurse practitioners in provinces and territories where prescribing dried marihuana for medical purposes is permitted under their scope of practice. If another document is used, it must contain all of the information below.

Patient's Given Name and Surname _____

Patient's Date of Birth (DD/MM/YYYY) _____

Daily quantity of dried marihuana to be used by the patient: _____ g/day

The period of use is ____ day(s) ____ week(s) ____ month(s).

NOTE: The period of use cannot exceed one year

Health care practitioner's given name and surname: _____

Profession: _____

Health care practitioner's business address: _____

Full business address of the location at which the patient consulted the health care practitioner (if different than above): _____

Phone Number: _____

Fax Number (if applicable): _____

Email Address (if applicable): _____

Province(s) Authorized to Practice in: _____

Health Care Practitioner's Licence number: _____

By signing this document, the health care practitioner is attesting that the information contained in this document is correct and complete.

Health Care Practitioner's Signature: _____

Date Signed (DD/MM/YYYY): _____

Marijuana and Human Rights

- Marijuana in the workplace will push the outer limits of Human Rights legislation
- Best Guess: Going to be much like the early days of religious accommodation
- More sophisticated human resource functioning likely to abate most severe cases

Basic Accommodation

- Dependent on the nature of employment
 - Human rights concerns and *OHSA* concerns are obvious
 - Consider: *Smoke Free Ontario Act*
 - “Smoke Breaks”
 - Designated Marijuana smoking area (second hand smoke)

“Reasonable Accommodation”

Duty to Cooperate:

- Employees who push the limits can be reminded of the duty to cooperate
- Medical marijuana at work may result in:
 - Changes to duties
 - Reassignments
 - Changes to hours of work

The Take-Aways

- Manage like any other disability situation
- Clarify expectations around use of prescription drugs at work
- Be alert for signs of mixing medical marijuana with other prohibited substances, but don't assume the employee is mixing other prohibited substances

Occupational Health and Safety Act

- If a valid prescription and working in compliance with the prescription there can be no cause for discipline
- But: discipline may occur, where:
 - Failure to report use of marijuana at work
 - Failure to provide the employer an opportunity to review and assess circumstance to ensure “every reasonable precaution” is being taken
- Analogous to prescription drug use at work

EMPLOYMENT CONTRACTS (A REMINDER)



Employment Contracts

Get the contract signed before employment starts

- *Holland v Hostopia.com Inc*
 - Offer letter had no termination provision but required that employee subsequently sign an employment contract
 - Employment contract eventually signed which contained a provision limiting termination pay to statutory entitlements
 - Court: Employee entitled to reasonable notice at common law
 - Fresh consideration required when contract signed after employment begins

Employment Contracts

Make sure there is a termination clause in fixed-term contracts

- *Howard v. Benson Group Inc.*
 - Howard employed as a Manager with an automotive repair centre
 - Employed pursuant to a 5-year fixed-term contract
 - Terminated without cause 23 months into 5-year term
 - Howard sought payment for remainder of term; employer argued *ESA* notice, or alternatively, common law
 - Court: fixed-term contract with no termination clause – no duty to mitigate; to be treated as liquidated damages. Employee received 27 months!
 - Review, and revise if necessary, your fixed-term contract precedents to include an enforceable termination clause

Employment Contracts

Independent/dependent contractor is a question of substance over form

- *Keenan v Canac Kitchens Ltd.*
 - Husband and wife worked pursuant to independent contractor agreement
 - Supervised installation of kitchens
 - Contract terminated without termination pay, relying on independent contractor status
 - Court: They are dependent contractors, even though they did not work exclusively for Canac
 - Considerations:
 - Exclusivity
 - Control of the principal (as to how, when, where and how product is sold)
 - Ownership of tools
 - Chance of profit, risk of loss
 - Is the activity of the agent part of the principal's business – whose business is it?

Employment Contracts

Termination provisions that purport to oust reasonable notice at common law (probably) shouldn't run afoul of the *ESA*

- *Wright v Young & Rubicam Group of Cos vs. John A. Ford & Associates Inc. v Keegan*
 - Termination provisions should satisfy the employer's statutory notice obligations for an employee of the longest conceivable years of service
 - For example, provision of a fixed four-week notice-period would violate the *ESA* as it would not be sufficient notice for an employee with eight years' service
 - Such a provision may be struck by a court even if the employee was dismissed after only two years (*i.e.* the employee received more than his or her statutory notice)

Employment Contracts

If contracting out of common law, include the continuation of benefits during (at least) the statutory notice period

- *Stevens v. Sifton Properties Limited*
 - Employment agreement provided for, upon termination of employment without cause, notice or pay in lieu, and severance (if applicable), in accordance with the *ESA*
 - Did not mention benefit continuation, which is required by the *ESA*
 - Court: termination provision unenforceable because violates *ESA*, and Stevens is entitled to common law notice
 - Review and revise your precedents as necessary

The logo consists of a stylized, upward-pointing chevron shape in a gold color, positioned above the first letter of the text.

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