KOSKIE MINSKY LLP
BARRISTERS & SOLICITORS

EMPLOYMENT NEWS

This is a Summary of Employment Matters of Interest to the Business community, from a litigator's point of view

Winter 2012

EDITORS:

Arleen Huggins, ahuggins@kmlaw.ca
Phone: (416) 595-2115

Nancy Shapiro, nshapiro@kmlaw.ca
Phone: (416) 595-2108

Clio Godkewitsch cgodkewitsch@kmlaw.ca
Phone: (416) 595-2120

David Rosenfeld, drosenfeld@kmlaw.ca*
Phone: (416) 595-2700

Ernie Schirru, eschirru@kmlaw.ca
Phone: (416) 595-2142

Christine Westlake, cwestlake@kmlaw.ca
Phone: (416) 595-2123

* this edition's editor

Accessibility For Ontarians With Disabilities Act – What You Need To Know!

January 1, 2012 was the compliance date for the 'Customer Service Standard' of the *Accessibility for Ontarians with Disabilities Act*, S.O. 2001, Chapter 32 (the "*AODA*").

The *AODA* came into force in 2005 with the goal of gradually making Ontario accessible for persons with disabilities by January 2025. The *AODA* seeks to remove and prevent barriers to accessibility through the development and implementation of accessibility standards in five general areas: Customer Service, Transportation, Employment, Information and Communication and Built Environment. These accessibility standards will be enacted as regulations applicable to organizations throughout Ontario.

The Customer Service Standard ("CSS") is the first accessibility standard under the *AODA* and came into force on January 1, 2008. By January 1, 2012, all organizations in Ontario with at least one employee that provide goods and services to the public and other third parties, were to be in compliance.

The CSS is not about physical changes to premises. It concerns providing accessible customer service to people with disabilities. The CSS requires organizations to establish policies, practices and procedures with respect to providing goods and services to people with disabilities. It also requires the training of staff, volunteers, contractors, and any other persons who interact with the public or third parties on behalf of the organization, in various areas, including how to interact with persons with various types of disabilities; how to interact with persons who use assisted devices; how to use equipment or devices that may help provide goods and services to individuals with disabilities; and what to do if a person with a disability is having difficulty accessing an organization's goods or services.

Organizations with 20 or more employees, which include full-time, part-time, seasonal and contract employees (but not volunteers or independent contractors), must also document the policies, practices and procedures for providing accessible customer service and make such documentation

available to the public in accessible format, document the training provided to staff and file accessibility reports with the Ministry on an annual basis.

The *AODA* provides for penalties for non-compliance which range between $200 and $100,000 daily, depending upon the severity of the breach. However, it is likely that enforcement will not involve fines at the outset.

New Health and Safety Updates – What You Need To Know!

More changes are on the way for the *Occupational Health and Safety Act* ("OHSA"). Employers in Ontario have just finished adjusting to the Bill 168 changes to add workplace harassment and violence to their "watch list", just finished policy implementation and training and should by now have completed the one year review of their workplace harassment and violence policies and risks. Now, effective April 1, 2012 more changes to the OHSA are on the horizon in the form of Bill 160. The following are some highlights of those changes:

1. The responsibility for health and safety prevention is now with the Ministry of Labour ("MOL") and not, as previously, with the Workplace Safety and Insurance Board ("WSIB"). The MOL will have a prevention arm in addition to its current enforcement arm. This may mean greater scrutiny for non-WSIB employers and may also lead to the MOL prevention arm communicating information to the MOL enforcement arm which may result in more charges being laid.

2. The MOL shall have the power to establish training standards under OHSA and to approve training providers for the various training requirements established under the Act.

3. A Chief Prevention Office position has been created to be advised by a newly created Prevention Council. The Prevention Council will be comprised of 1/3 trade union representation, signifying that labour may play a greater role than ever before in the evolution of the prevention landscape.

4. The Co-Chair of the Joint Health and Safety Committee required by the OHSA will be able to make recommendations directly to management. This effectively means the employee representative can make recommendations without the support of the management members of the committee. The employee representative will now be required to respond to those recommendations. This places greater power in the hands of the employees with respect to prevention in the workplace.

5. A MOL inspector will be able to refer a reprisal complaint (alleging discipline was imposed as a reprisal for raising health and safety issues) directly to the Ontario Labour Relations Board whereas the current system requires only the employee representative to advance the reprisal complaint.

6. Increased resources will potentially be available. The MOL has been granted authority to assign to the Office of Worker Advisor and Office of the Employer Advisor authority to advise in respect of workplaces with under 100 employees on health and safety matters. The MOL will also be given authority over all health and safety associations.

There are other changes potentially in the works for future roll-out too, including requirements to post a health and safety poster in all workplaces, and mandatory training for all supervisory employees in the area of health and safety.

One thing is for certain, the stakes are increasing.

Discrimination - No Evidence that Pregnancy is a Safety Issue for Security Guard

The Ontario Human Rights Tribunal considered a case where, within five minutes of an employee advising her employer that she was pregnant, she was told that she would be removed from the work schedule and forced to go on short-term disability.

The employee, Holly Graham ("Graham"), worked as security for Response Safety Security & Investigations ("Response Security"). Graham's job involved regularly patrolling client sites and responding to alarms. On May 6, 2009 Graham learned that she was pregnant and shortly thereafter, advised her employer. Response Security immediately told her that she would be taken off the work schedule and given a letter so that she could apply for short-term disability benefits, despite the fact that she did not consider herself to be under disability. In fact, Graham did not qualify for short-term disability benefits and furthermore, was advised by staff at Human Resources and Development Canada that her maternity leave benefits would be impacted not working in the months leading up to the birth of her child. Accordingly, Graham had to look for alternate work in order to support herself. Graham was successful in obtaining work both in retail and working in an administrative position for another security company. However, after learning that Graham was working for another security company, Response Security terminated her employment entirely.

Graham brought an Application under the *Human Rights Code* (the "*Code*") arguing that she was discriminated against contrary to the provisions of the *Code*. The Human Rights Tribunal found that Graham was discriminated against on the basis of sex (pregnancy) contrary to the *Code*. Response Security's allegation that a pregnant woman in Graham's position could not perform the tasks required of her was found to be unsupported by the evidence. Furthermore, Response Security's assertion that Graham's presence in the patrol car or field would cause her colleagues to take unnecessary risks was found not to be supported and instead based on stereotypes.

In addition to compensation for lost wages, Graham was awarded $20,000 for injury to her dignity, feelings and self-respect.

This case reinforces the importance of employers to be aware of their legal obligations and respond to employees accordingly. The quick answer is not always the right answer and employers should carefully consider the best options for their business along with the responsibilities they have as an employer. This case also clearly marks the financial risks to businesses that violate the *Code* as $20,000 for injury to her dignity, feelings and self-respect, in addition to lost wages, is significant.

Graham v. 3022366 Canada Inc. (c.o.b. Response Safety Security & Investigations) [2011] O.H.R.T.D. No. 1472

Entire Agreement Clause in Contract Prevails

McNeely worked as a senior executive at Herbal Magic and was actively involved in the negotiations for a buyout of the company by the corporate defendants. According to McNeely, he was promised by the purchasing company's principal, Brent Belzberg, that he would become the president and chief executive officer of the new company following the acquisition and would not be terminated after the transaction. McNeely also claimed that he was induced to invest $2.5 million in the capital stock of the new company.

Within seven months of the buyout, McNeely was terminated and removed from the Board of Directors. Although he was paid everything he was entitled to under his employment agreement, McNeely claimed that he suffered damages because he remained a shareholder of the company and was not permitted to sell his shares except in very limited circumstances. McNeely also alleged that the statements made by Belzberg constituted a "collateral agreement" and a negligent misrepresentation to him.

The defendants did not dispute that the statements were made to McNeely, but relied on the "entire agreement" clauses in McNeely's employment agreement and security holder's agreement. These are common contractual provisions which state that a written agreement supersedes all other agreements, including any discussions or representations, whether oral or written. McNeely argued that Belzberg could not rely on the entire agreement clause, because he was not a party to either the shareholder agreement or employment contract in his personal capacity.

The court rejected McNeely's claim finding that there were no facts to suggest that Belzberg exhibited a separate identity or interest from that of the company which would permit the court to "pierce the corporate veil" and find any liability against Belzberg in his personal capacity. The court described the entire agreement clauses as "fatal" to McNeely's claims for damages for breach of a collateral agreement and for negligent misrepresentation, and granted the defendants' motion for summary judgment.

Clauses in employment contracts are not just for show. One should read the entire employment agreement carefully and ensure that all the terms and conditions agreed to orally are set out in writing in the agreement.

McNeely v. Herbal Magic Inc., 2011 ONSC 4237 (CanLII)

This edition of Employment News has been sent to you either via ordinary mail or email. Should you at any time wish to change your preferred method of receipt of this Newsletter, please take the time to either reply to this email or return this page to us indicating your selected method of delivery. Please also provide us with any change to your contact information to ensure continued receipt.

I prefer to receive Employment News by mail at: ______________________________

I prefer to receive Employment News by email at: ______________________________

Name: ______________________ **Firm/Company:** ______________________

Please return to Uma Ratnam by fax: (416) 204-2897, or mail to Koskie Minsky LLP, 20 Queen St. W., Suite 900, Toronto, Ontario, M5H 3R3

Further please note, profiles of this newsletter's editors, past issues of Employment News, as well as our other firm newsletters, including Commercial Counsel, Practice Tips, and Talking Union may be viewed on our website at **www.kmlaw.ca**