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Employment Notes

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"While employees in construction are generally covered, many individuals who work on construction sites and are exposed to the same risks of injury as anyone else who is there, have been excluded. This includes independent operators..."

MANDATORY WSIB COVERAGE IN THE CONSTRUCTION INDUSTRY

Jack B. Siegel

Conventional wisdom would lead most people in Ontario to assume that Workers' Compensation is something that applies to anybody who has a job, most particularly in an industry where they might be at risk of getting hurt. Conventional wisdom however, is wrong.

Since the dawn of workers' compensation legislation in Ontario almost 100 years ago, there have been many exemptions from mandatory workers' compensation coverage. For reasons best known to the people who invented the system all those years ago, some businesses such as photographers and funeral homes were expressly excluded from the start, while other businesses have simply been inexplicably left out, including undertakings such as golf courses and detective agencies. Most significantly perhaps, and most problematic, (given the risks of such work), are the omissions that have existed in the construction industry.

While employees in construction are generally covered, many individuals who work on construction sites and are exposed to the same risks of injury as anyone else who is there, have been excluded. This includes independent operators (commonly referred to as independent contractors) who work as subcontractors on a jobsite, and have no employees. Because they are not employees of the contractors to whom they provide service, they have not been required to have Workers' Compensation Board (WSIB) coverage. The same lack of coverage has applied to executive officers of companies in the construction industry and partners in a partnership working on site.

This has created a fundamental imbalance in the competitive marketplace in the industry, since these non-compulsory groups were able to operate outside of the workers' compensation system, and bid competitively for work while not being required to pay premiums that can hit levels as high as 17% of the cost of labour at current rates. This arguably unfair competitive edge, combined with the fact that when such individuals are injured they have no recourse to income protection (unless they have purchased private insurance), led the province to introduce legislation to bring all such people within the workers' compensation system. The province recently announced that the effective date for this change will be January 1, 2013.

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Under this new system of mandatory coverage in the construction industry there will be two primary changes. The first of these will be the requirement for independent operators, executive officers and partners in a partnership working in construction to secure and pay for WSIB coverage effective at the beginning of next year. The second change will require any person who directly retains a construction contractor or subcontractor to obtain a WSIB-issued certificate confirming that the contractor or subcontractor is registered with the WSIB and in compliance with its payment obligations under the Act.

It is to be noted that none of these changes apply to home renovators who are contracted directly by the occupier of the residence, provided that the renovator works exclusively in home renovation.

Implementation of Mandatory Coverage

In anticipation of the implementation of mandatory coverage in the construction industry, the WSIB has issued a number of notices on its website and has started a process of pre-registration for affected employers, so that all arrangements can be in place, to come into effect at the beginning of next year. Such registration will not create a liability to pay premiums or result in coverage during 2012.

The WSIB has **not**, to date, published the more detailed policies that will be necessary for new registrants and their legal advisors to fully understand the way in which the Board intends to manage this process.

Requirement for Clearance Certificates

At present, the issuance by the WSIB of "Clearance Certificates" is a common practice in construction. It serves to protect those who retain contractors and subcontractors in the field from the operation of section 141 of the *Workplace Safety and Insurance Act*, which would otherwise make those parties responsible, if their contractors fail to pay their premiums to the WSIB. The process has to date, however, been entirely optional, and certainly many people who retain contractors and subcontractors have taken the risk that no problems will result.

Under the mandatory coverage system, however, and in an effort to prevent anyone from "flying under the radar", the new provisions will require these clearance certificates (or their 2013 equivalents) to be provided **before** the person retaining these services permits the contractor or subcontractor to begin construction work. These certificates will expire from time to time, and people who hire such contractors will need to implement a system whereby new certificates are put on file by the time the older certificates expire. Moreover, a person who receives these certificates will be obliged to keep them on file for at least 3 years after the date on which they are obtained and to produce them for inspection as the Board or its representative may require.

If the contractor or subcontractor goes into default with respect to payments to the Board, the Board may revoke a certificate at any time, and the contractor or subcontractor will be prohibited from doing further construction work until the situation is resolved. Those who hire contractors and subcontractors will be prohibit-

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ed from permitting them to do construction work, if they become aware of the revocation.

Non-compliance with any of these obligations will constitute an offence, with fines of up to $25,000 for individuals and of up to $100,000 for corporations. Individuals are also exposed to the risk of up to 6 months of imprisonment.

Again the exemption described above with respect to home renovation will apply.

Conclusion

Plainly, we are early in this process, and a lot of the details have yet to be provided by the WSIB. At the present time, construction businesses that may be affected by the new requirements may wish to consider pre-registration, and start to consider changes they may need to make with respect to costing future work in light of the forthcoming obligation to pay WSIB premiums.

At the same time, all participants in the construction industry would be well-advised to start to plan for the process of obtaining and retaining current clearance certificates (or whatever the new terminology be) from everyone who will be providing construction services to them on or after January 1, 2013.

We will, of course, be providing further updates as information becomes available, and can provide more specific and direct assistance to any construction business that may require it. ■

WHEN FORMER EMPLOYEES COMPETE - PROTECTING YOUR CONFIDENTIAL INFORMATION

Bruno Soucy

The departure of a key employee, or an employee who has had access to sensitive information, can create legitimate concerns for an employer, especially when such employee directly competes with his/her former employer or is employed or otherwise engaged by a competitor of his/her former employer. The law provides certain protection for employers, but the limits of such protection are sometimes difficult to draw. The recent events surrounding CN Rail and its former CEO, Mr. Hunter Harrison, are a great example of some of these challenges.

CP Rail is involved in a proxy battle with Bill Ackman and his hedge fund, Pershing Square Capital Management, who question the efficacy of CP Rail's current management. Pershing began promoting the replacement of CP's current CEO, Fred Green, with Mr. Harrison who had retired from CN's top role at the end of 2009. Mr. Harrison publicly expressed interest in the opportunity and described his vision for CP and supposedly provided consulting services to Pershing in conjunction with its proxy battle against CP.

As a result, CN's board of directors decided to cancel Mr. Harrison's future pension payments, restricted share units and other benefits which, in total, were valued at approximately US$40M. This occurred prior to Mr. Harrison assuming the role of CEO at CP and even predated the CP shareholders' approval of the proposal. CN

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commenced legal proceedings before the Illinois Northern District Court on January 23, 2012 seeking a declaratory judgment confirming its right to suspend pension payments to its former CEO. At the time of publication, CN had not sought injunctive relief against Mr. Harrison.

In its case, CN took the position that Mr. Harrison was "intimately involved in every detail of CN's business" and that using such knowledge to assist one of CN's main competitors was a breach of his continuing obligations to CN. More specifically, CN alleged that Mr. Harrison was in breach of both a non-competition provision tied to his pension arrangements as well as confidentiality obligations.

Although this matter is being litigated in the State of Illinois, it is an interesting case study of the application of the laws that relate to confidentiality, non-competition and non-solicitation. The focus of this article will be on the laws of Ontario.

All employees have a general duty of loyalty to their employers which prevents them from competing with their employer while employed. This duty does not extend beyond the period of employment. Moreover, although employers can rely on confidentiality obligations owed by former employees that extend beyond the period of employment, monitoring and enforcing compliance with such confidentiality obligations is elusive. In the employment context, such obligations usually do not extend to general "know-how" gained by an employee in the course of his or her employment.

Employers, therefore, often rely upon non-solicitation and non-competition obligations in their employment contracts or collateral agreements with their employees. The duration of the protection provided in Canada to trade secrets and confidential information is indefinite. However, the same cannot be said with respect to non-competition contractual obligations.

Non-competition obligations are unenforceable unless they can be shown to be reasonable in terms of geographic scope, activity that is restricted and the time period of the restriction. The courts will refuse to enforce any clause that comprises an unreasonable restraint of trade. Courts recognize every individual's right to make a living in his or her chosen profession. By extension, a non-competition provision will usually be held as being unenforceable if a less onerous non-solicitation provision would have been adequate to protect the former employer's legitimate interests.

A court's assessment of the reasonableness of non-competition and non-solicitation provisions is stricter where such provisions apply to a former employee as opposed to an owner-manager who sells his/her business and received some benefit in conjunction with such sale. Irrespective, the concept of reasonableness in interpreting non-solicitation and non-competition provisions remains elusive.

What further complicates matters for employers is that in many Canadian jurisdictions, a non-competition provision that is determined to be unreasonable will not be amended by Courts. It will simply be struck in its entirety leaving the

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employer without recourse if the employee competes.

CN's situation is somewhat different than what is typically seen with Canadian employers and their former employees. CN continued to pay Mr. Harrison benefits relating to his former employment. CN is taking the position that in consideration for receipt of such continued benefits there is an express (possibly buttressed by an implied) obligation for Mr. Harrison not to compete with CN. For former employees who do not have any continuing tie with their former employer, the former employer's rights are a little less clear.

In certain Canadian jurisdictions, Courts have recognized the enforceability of continuing benefits that are conditional upon and tied to continued compliance with non-competition obligations where the inclusion of such clause is reasonable in the circumstances. One should distinguish the foregoing with the enforcement of a perpetual non-competition obligation; in the absence of a stipulated non-competition period (which is reasonable in the circumstances), former employees are free to renounce continued receipt of such benefits and compete with their former employer.

CN's situation is also interesting insofar as it relates to its former CEO; a person who was intimately involved in CN's strategic management and planning. The measure of reasonableness in such circumstances is particularly unique and distinguishable from most other positions. One could argue that a CEO's role makes it difficult for him or her to dissociate himself or herself from confidential information gained in the course of his or her employment and that confidential information would necessarily come into play if exercising the same role at a direct competitor of his or her former employer.

Although some employers such as Apple have instituted corporate policies which create firewalls between employees in different environments, perhaps in the hope of containing "natural" seepage of its confidential information through employee turnover, this tactic becomes less effective as one ascends the organizational chart and hierarchy.

To the extent such vulnerability does in fact exist, other than at a purely theoretical level, protection might be available in the form of fiduciary obligations. The concept of fiduciary duties has most often been applied with respect to assets and/or business or investment opportunities, but they have also found an application in conjunction with the employment relationship. It has been held that some employees, because of their key role within an organization and specific knowledge of its strategies, operations and opportunities, may be considered fiduciaries of their employer and prevented from competing or otherwise acting against the interests of their employer following the termination of their employment.

Notwithstanding, employee turnover at the CEO level is also a common reality in most industries. CN is not alone in taking legal action against its former CEO. Hewlett-Packard commenced legal proceedings against its former CEO who was hired by Oracle following termination of his

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"The challenge identified for the Government is to work cooperatively with the BPS [broader public sector] to restrain expenditures, particularly with respect to wages."

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employment by HP. That case was recently settled. Close on CN's heels, Acer also commenced legal proceedings against its former CEO when he began working for competitor Lenovo as chief of European, African and Middle East operations. In both cases, the former employer claimed breach of non-competition obligations based on a complex set of circumstances and legal arrangements.

Companies are perpetually trying to craft new ways of discouraging its former senior executives from jumping ship. It will be interesting to see whether traditional factors are applied to senior executives or whether they are varied or replaced by different factors altogether. ■

DRUMMOND REPORT RECOMMENDS CHANGES TO INTEREST ARBITRATION AND ESTABLISHMENT OF LABOUR RELATIONS INFORMATION BUREAU

Melanie I. Francis

On February 15, 2012, the Ontario Government released the report of the Commission on the Reform of Ontario's Public Services (the "Report"). The Report, titled *Public Services for Ontarians: A Path to Sustainability and Excellence*, and often referred to as the "Drummond Report" spans well over 500 pages and details recommendations for sweeping changes across the broader public sector ("BPS"). *[The Report can be read in its entirety at http://www.fin.gov.on.ca/en/reformcommission/chapters/report.pdf. A somewhat less daunting 140 page Executive Summary can be found at http://www.fin.gov.on.ca/en/reformcommission/chapters/executive-summary.pdf.]*

Of specific interest to those of us in the labour and employment community is chapter 15 of the Report which deals with labour relations and compensation. This chapter sets out the importance of effective labour relations in a BPS that includes over one million employees, 70 per cent of whom are unionized (by striking comparison, only 15 per cent of the workforce in the private sector are unionized). The challenge identified for the Government is to work cooperatively with the BPS to restrain expenditures, particularly with respect to wages. Interestingly, there is no recommendation for a wage reduction or freeze across the BPS, but rather increased productivity, efficiency and improved service delivery is promoted.

The Report goes well beyond issues regarding wages. Four key principles are identified as integral to ensuring governments, employers, employees and employee representatives are able to work together to effectively deliver public services. These principles are:

1. A balanced, effective and transparent system;
2. Preference for negotiated collective agreements over settlements or outcomes that are legislated or arbitrated;
3. Accountability and responsibility for labour relations and service delivery outcomes distributed across governments, employers, employees and bargaining agents; and
4. Recognition that system changes are part of a larger vision, in which labour relations play a part, but are not an end in themselves.

Keeping these guiding principles in mind, 15 specific recommendations related to labour relations

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are made. It is, of course, impossible to fully describe each recommendation in detail here. Instead, the recommendations are grouped together in order to highlight key areas of focus and to give a sense of where we can expect reforms.

Recommendation 15-1: Designating Essential Services

Ontario has the highest percentage of BPS employees in Canada designated as "essential". There is recognition in the Report of the difficulties inherent in attempting to determine which services really are "essential". Accordingly, the creation of an independent working group is suggested. This group would consider and determine which BPS occupations and industries should be placed in this category.

Recommendations 15-2 through 15-4: Reforms to Interest Arbitration

A great deal of focus in the chapter is placed on reforms to interest arbitration. While the notion that the system is "broken" is rejected, there is an acknowledgment that significant changes do need to be made to improve timeliness, efficiency and transparency. Changes to how cases are assigned and monitored, and emphasis on mediation ahead of arbitration are included in the Report. Further suggested changes include: establishing a tribunal or commission to manage a roster of independent arbitrators; setting time limits so that decisions are not out of sync with the current environment; developing well-defined, objective criteria for arbitrators to use in their decision making; requiring written, electronically published decisions; requiring arbitrators to focus only on the issues presented to them by the parties; providing centralized support for arbitrators; and implementing measures to enhance the quality of arbitration services being provided.

Recommendations 15-5 through 15-10: Increased Effectiveness in the BPS

The mechanisms to measure productivity within the BPS are identified as lacking. As noted, wage freezes are not a focus of the Report. Instead, a zero budget increase for wages costs is recommended, with increases in individual wages tied more directly to productivity and offset by efficiencies that can be found. The option of exploring modifications to the "bumping" provisions in collective agreements is suggested, as such provisions are identified as a potential roadblock for progress in improved service delivery and efficiency. Increased authority for the Ontario Labour Relations Board with respect to merging and combining bargaining units is also suggested, as is a move towards more centralized or consolidated bargaining. There is also a caution in the Report against dismissing privatization and amalgamations out of hand, as such options can be critical to successful reforms.

Recommendations 15-11 through 15-15: Improved Transparency & Accountability

To improve transparency, it is recommended that a Labour Relations Information Bureau be established. This Bureau would collect and disseminate data, useful for negotiations and for measuring productivity. A comprehensive benchmarking system is also suggested for compensation, benefits and pension tracking. Greater accountability for leaders within the Ontario Public Service ("OPS") is suggested, but the importance of appropriate compensation and encouragement

"The Canadian Human Rights Act is amended to repeal certain provisions that permit an employer to impose mandatory retirement."

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Maria advocates on behalf of employers, not for profit organizations, trade unions, and employees, and has been involved in matters before the Superior Court of Justice, the Federal Court, the Labour Board, the Human Rights Tribunal, the Workplace Safety and Insurance Appeals Tribunal, and other tribunals.

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for these leaders is also highlighted. It is emphasized that leaders throughout the OPS, and the BPS, must have the tools and ability to put the right people in the right place, and this includes being able to dismiss those who fail to meet job requirements.

Conclusion

How far the Government will go in terms of implementing the recommendations in the Report will be the source of much speculation and media attention over the coming months. In the covering letter to the Report, the Chair calls on the Government to engage in broad consultations related to the fiscal and economic challenges identified. No doubt input from the legal community, employers, employees and bargaining units will be essential to effective labour relation changes. If you have any questions arising from the labour relations issues raised in the Report, please contact the author or one of the members of our Labour and Employment group. ■

LEGISLATION UPDATE

Maria Kotsopoulos

On December 15, 2011, the federal *Keeping Canada's Economy and Jobs Growing Act* received Royal Assent. The Act implements certain provisions of the 2011 federal budget. Included in the Act are the following:

- The *Employment Insurance Act* is amended to provide a temporary measure to refund a portion of employer premiums for small businesses. Employers whose premiums were $10,000 or less in 2010 will be refunded the increase in 2011 premiums over those paid in 2010 to a maximum of $1,000.
- The *Wage Earner Protection Program Act* is amended to extend in certain circumstances the period during which wages earned by individuals but not paid to them by their employers who are bankrupt or subject to receivership may be the subject of the payment under the Act.
- The *Canadian Human Rights Act* is amended to repeal certain provisions that permit an employer to impose mandatory retirement. The *Canada Labour Code* provision that denies employees the right to severance pay for involuntary termination if they are entitled to a pension is also repealed. ■

CASE UPDATE: MASON V. CHEM-TREND

David Greenwood

In our last *Employment Notes*, we told you about a decision of the Ontario Court of Appeal in *Mason v. Chem-Trend Limited Partnership*. This case dealt with the enforceability of a non-competition clause in the employment context. Mr. Mason sought the court's guidance on whether and to what extent he was free to compete with his former employer. The non-competition clause at issue was for a period of one year following the end of Mr. Mason's employment and prevented him from engaging in "…any business or activity in competition with the Company by providing services or products to, or soliciting business from, any business entity which was a customer of the Company during the period in which I [Mr. Mason] was an employee…".

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The Ontario Court of Appeal ruled that the clause was not reasonable and that there were other less restrictive ways in which the employer could (and in fact did) protect itself. The company sought leave to appeal the Court of Appeal's decision to the Supreme Court of Canada.

On January 12, 2012, the Supreme Court of Canada denied Chem-Trend's request for leave. As a result, the decision of the Ontario Court of Appeal is the final substantive decision. As we noted in the last edition, restrictive covenants should be drafted with care and should not be treated as boilerplate documents as they are scrutinized closely by courts and can often be hard to enforce. If the interests of an employer are vital enough to warrant the use of restrictive covenants, it makes sense to put in the effort and draft a clause that has a chance of withstanding the scrutiny of the Court. ■

David Greenwood has represented clients in files involving wrongful dismissals, constructive dismissals, human rights complaints, pension issues, disability claims, allegations of employee fraud, theft of confidential and proprietary information, breach of fiduciary duties and misappropriation of corporate opportunities. Additionally, David is frequently consulted in respect of reorganizations and mass terminations and is routinely retained to draft or to negotiate employment agreements, employee policy manuals and other employment related contracts.

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