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Employment Notes

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"Ontario stands at the threshold of major change to the structural processes in its Human Rights system."

LEGISLATION UPDATE

Minimum Wage Increase

Effective February 1, 2007 the minimum wage for students under 18 years of age employed for less than 28 hours per week has been increased from $7.25 an hour to $7.50 an hour. The minimum wage for liquor services has increased from $6.75 an hour to $6.95 an hour. The general minimum wage has been increased to $8.00 per hour.

Family Medical Leave

The *Employment Standards Act, 2000* (the "*Act*") provides that employees are entitled to a leave of absence without pay of up to 8 weeks to provide care or support to certain family members if a qualified health practitioner issues a certificate stating that the individual has a serious medical condition with a significant risk of death occurring within a period of 26 weeks.

The *Act* has been amended to expand the individuals whom family medical leave applies. The list has been expanded to include the employee's spouse, parent, step parent, foster parent, child, step child or foster child of the employee or the employee's spouse, siblings, grandparents and grandchildren of the employee or the employee's spouse, in-laws of the employee, aunts, uncles, nieces and nephews of the employee or the employee's spouse, spouse of the employee's grandchild, uncle, aunt, nephew or niece, and a person who considers the employee to be like a family member. ■

AT THE THRESHOLD OF CHANGE

Neal B. Sommer

Ontario stands at the threshold of major change to the structural processes in its Human Rights system. On December 5, 2006, the government passed major amendments to the *Human Rights Code* (the "*Code*"), though major portions of the law have yet to be proclaimed in force. Royal Assent came swiftly thereafter.

The current changes focus solely on *process* and the administrative structure of the human rights system. With the exception of some minor enhancement to individual remedies, there is no substantive change to the obligations which exist on employers, landlords, service providers and others who are required to comply with the prohibitions on discrimination found in the *Code*.

What has changed, and it is a big change, is the method by which complainants will seek to enforce their rights. At this point, only the statutory outline of the new system has been enacted. There are no Rules of Practice, no forms, and certainly no jurisprudence to flesh out the basics. Additionally, there is much groundwork to be done before the changeover can be accomplished. Accordingly, the actual implementation of the changes are still some months away.

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"Under the new system the Commission will continue to exist, however its role will be primarily educative and geared towards establishing policies under the Code."

Neal Sommer's practice includes all areas of management-side labour law, including negotiation of collective agreements, arbitrations, union-management relations, employment law, including litigation, employment standards, human rights and worker's compensation. He has contributed to several publications in the human resources field, and has lectured and spoken extensively on legal issues facing employers.

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In order to fully appreciate the changes to the system, it is necessary to briefly set out the features of the current system.

The Current System

There are two key administrative bodies in the current Ontario human rights system, the Ontario Human Rights Commission ("the Commission") and the Ontario Human Rights Tribunal ("the Tribunal"). Under the existing system, the Commission has a large role in facilitating complaints, investigating them, and in litigating complaints before the Tribunal. On the other hand, the Tribunal acts exclusively as a decision-making body – making final ruling on whether the *Code* has been contravened and, if so, what would be an appropriate remedy.

The Commission receives complaints from individuals (or can commence a 'complaint' itself), and often will provide assistance to complainants to draft and frame their complaint within the confines of the *Code*. Upon receipt of a complaint the Commission offers the parties a mediation process. If that is not successful, the Commission is responsible for conducting an investigation of the complaint and the defences to the complaint. Often the Commission is required to decide certain preliminary objections raised by Respondents. If the Commission feels that, after investigation, there is sufficient factual and legal merit to a complaint, it will refer the complaint to the Tribunal for decision. The Commission's decision to refer a complaint to the Tribunal (or its decision *not* to refer) are both subject to appeal and reconsideration by the Commission. Once the matter has been referred to the Tribunal, the Commission acts as a party to the complaint, arguing before the Tribunal on the issues of liability and appropriate remedy.

The Commission's large role means that complainants can access the human rights system at no cost and without the necessity of a lawyer. There are no cost consequences to a complainant if his or her complaint is ultimately dismissed.

The New System

Under the new system the Commission will continue to exist, however its role will be primarily educative and geared towards establishing policies under the *Code*. While the Commission will continue to have the power to initiate and pursue complaints before the Tribunal, this power will be greatly reduced.

Under the new system complainants will bring their complaints directly to the Ontario Human Rights Tribunal, which will decide the matter. Alternatively, a complainant may now sue in the courts for infringement of human rights, provided that claim is also coupled with another claim before the courts. Accordingly, we are likely to see claims under the *Code* included with claims for wrongful dismissal.

Other key changes include:

- Extending the limitation period for filing complaints from six months to one year;
- Permitting trade unions or other organizations to bring complaints on behalf of members (*with the members' consent*);
- Barring complaints from individuals who have commenced a court action in respect of the same alleged infringement (*unless the action is terminated before a final decision*);
- Limiting the grounds upon which the Tribunal may decline to hear a complaint. Only if the substance of the matter has been already dealt

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with may the Tribunal decline to adjudicate;

- Permitting the Tribunal to enforce compliance with written settlements;
- Permitting the Tribunal (or court) to award unlimited damages for injury to dignity, feelings and self-respect;
- Permitting the Tribunal broad discretion to answer questions of law and fact, and severely curtailing the ability to judicially review the decisions of the Tribunal (*only patently unreasonable decisions may be quashed by the Divisional Court*);
- Establishing the *Human Rights Legal Support Centre* (which will operate throughout the Province) to provide low or no-cost legal services to complainants (*not responding parties*).

Transition

Though there are several months yet before the new system is proclaimed effective, once that occurs, the following transitional system will be in place:

1. The Commission will have six months to finally dispose of complaints before it, or refer them on to the Tribunal;

2. If complaints are not finally disposed of within that initial six month period, complainants will have a further six months to initiate a new complaint before the Tribunal.

We will keep our clients updated on developments with the human rights system as they occur, and will report on the Tribunal rules and their impact, once those rules have been finalized. ■

RANDOM DRUG TESTING NOT PERMITTED IN ONTARIO WORKPLACES

Maria Kotsopoulos

A Board of Arbitration has again confirmed the general rule that random drug testing of employees is not permitted in Ontario workplaces, even where the employee is engaged in a safety sensitive position. In a 2-1 split decision, the majority of the Board concluded that barring reasonable cause, a specific rehabilitation program or other such exceptional circumstances, random drug testing is not to be tolerated in Ontario workplaces.

The leading case with respect to random drug testing to date is the 2000 decision of the Court of Appeal for Ontario in *Entrop v. Imperial Oil*. In that case, the Court of Appeal considered whether Imperial Oil's drug and alcohol policy violated the *Human Rights Code* (the "*Code*"). In ruling that the Company's random drug policy by urinalysis contravened the *Code*, the Court of Appeal acknowledged that while "freedom from impairment" constituted a *bona fide* occupational requirement, a drug test could not test current impairment. In other words, a drug test could not establish whether an individual was capable or incapable of performing the essential duties of the position. In addition, the Court held that drug testing policies have not been shown to effectively curtail drug use or reduce the incidence of workplace accidents. As a result, the Court of Appeal concluded that random drug testing, even in safety sensitive positions, was not reasonably necessary to achieve the Company's goal of ensuring a safe workplace, and the policy as it related to random drug testing was found to contravene the *Code*.

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"The Board of Arbitration did acknowledge, however, that the balancing of interests approach could allow for general random unannounced drug testing in certain extreme circumstances."

In July 2003, Imperial Oil reintroduced random drug testing at its Nanticoke Oil Refinery for employees in safety sensitive and other specified positions. In announcing the return of random drug testing, Imperial Oil advised employees that they would be subjected to oral fluid, buccal or saliva drug testing for marijuana use. The Company indicated that unlike random urinalysis drug testing, this new form of fluid drug testing would address the concern of the Court of Appeal regarding likely present impairment.

On the introduction of this revamped policy, the union filed a grievance. The major thrust of the grievance was whether the Company could reintroduce random drug testing in the context of this Collective Agreement.

In its decision, the Board of Arbitration summarized the essential elements of the "Canadian model" in respect of alcohol and drug testing in safety sensitive workplaces, the basic precepts of which are that:

- No employee can be subjected to random drug or alcohol testing unless it is part of an agreed rehabilitative program.
- An employer may require drug or alcohol testing of an individual where the facts provide the employer with reasonable cause to do so.
- Where it is important to identify the root cause of an occurrence, drug or alcohol testing following a significant incident, accident or near miss is within the prerogative of management's rights under a Collective Agreement.
- In exceptional circumstances, drug and alcohol testing may be part of a continuing contract of employment for an employee found to have a problem with drug or alcohol use. In these cases, an employee's rehabilitation program may properly involve random or alcohol testing for a limited period of time.
- An employee's refusal or failure to undergo drug or alcohol testing in the circumstances described above may be viewed as a serious violation of the employer's drug and alcohol policy and may be grounds for serious discipline. The failure or refusal to take a drug or alcohol test, like the registering of a positive test, does not necessarily justify automatic termination.

In balancing the interests of employee dignity and privacy and deterrence, the Board of Arbitration concluded that "to subject employees to an alcohol or drug test where there is no reasonable cause to do so, falls beyond the balancing of any legitimate employer interest, including deterrence and the enforcement of safe practices." In this regard, the Board noted that its review of reported Canadian jurisprudence did not reveal a great number of serious incidents or accidents attributed to workplace drug use. As such, the Board of Arbitration stated that in the balancing of interests between employee privacy and an employer's safety concerns "an appropriate, measured and ultimately effective response" had been struck by arbitrators to date.

The Board of Arbitration did acknowledge, however, that the balancing of interests approach could allow for general random unannounced drug testing in certain extreme circumstances. For example, if there was evidence of an out of control drug culture in a safety sensitive workplace, it might be permissible to allow tests on the basis of reasonable cause. However, the Board noted that in this instance, the Nanticoke Refinery had no such culture and that the evi-

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"Last year the Ontario government made some significant changes to the law concerning the liability of leasing and rental companies for accidents involving their vehicles."

Stephen Moore, a partner with Blaneys since 1988, practices mainly in the insurance field. His main areas of interest are automobile accident related personal injury defence, automobile coverage and insurance claims and he is recognized inside and outside the profession as an expert on Bills 59 and 198, the parts of the Insurance Act that deal with Ontario's Motor Vehicle Tort Compensation system.

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dence demonstrated that the reality was "manifestly to the contrary."

In arriving at its ultimate conclusion, the Board distinguished the Court of Appeal's decision in *Entrop*, stating that that decision was not relevant to the case at hand because it dealt with what was permissible in the context of an accommodation issue under the *Code* and not whether a policy contravened expressed or implied terms of a Collective Agreement.

Notwithstanding that the Board of Arbitration determined that the Court of Appeal decision was not determinative, it nonetheless held that while the oral fluid swab test could effectively determine whether an employee was impaired at the time of the test, it did not meet the standard enunciated by the Court of Appeal in that it was not a ready indicator of impairment. Specifically, the Board held that the evidence demonstrated that the result of the buccal tests was only revealed after a number of days of laboratory processing in Houston.

Finally, the Board of Arbitration canvassed other contexts in which an individual might be subjected to random drug testing and noted that in Canada, both federally and provincially, governments had not enacted legislation or regulations authorizing employers to institute alcohol or drug testing of their employees. Furthermore, the Board focused on the fact that even police could not force breathalyser tests on citizens without reasonable grounds to do so. As such, the Board of Arbitration affirmed that an employer should not be in a position to demand these types of samples from its employees when such samples could only be obtained upon judicial warrant in the context of a criminal investigation. The Board of Arbitration stated that "absent reasonable cause, no employee in Canada should be subjected to that scenario without clear contractual consent or the extraordinary and constitutionally justified provision of a statute or regulation."

In conclusion, this decision again confirms the general view that random drug testing will not be tolerated in Ontario workplaces barring reasonable cause or as part of a specific rehabilitation program. The balancing of interests continues to be cast in favour of the employees' privacy and dignity interests even where the employee is engaged in a safety sensitive position. ■

CRASH! AN EMPLOYER'S LIABILITY FOR AN EMPLOYEE'S CAR CRASH

Stephen R. Moore

Every employer is familiar with the concept of vicarious liability. Put simply, it makes employers legally responsible for the negligence of their employees while they are working. In the past, this liability has been of minimal concern to most employers in the context of automobile crashes. This is due to the fact that the primary responsibility for paying for car crash claims lies with the vehicle's owner. Due to mandatory automobile insurance in Ontario, most claims were paid for by the insurer of the owner of the car. If the owner was someone other than the employer, such as the employee or a rental company, then only on relatively rare occasions has the employer of the negligent driver been called upon to respond to such claims. When this did occur such liability was almost always covered by the employer's Non-Owned Automobile coverage. Because these policies were required to respond to such claims infrequently, traditionally the cost of Non-Owned Automobile coverage has been relatively low.

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"...the employer, as owner of the car, is responsible for the driver's negligence even if the driver is not an employee and is not on work-related business at the time of the crash."

Last year the Ontario government made some significant changes to the law concerning the liability of leasing and rental companies for accidents involving their vehicles. Additionally, the awards being made by the Ontario courts over the last two to three years for catastrophically injured victims have risen sharply. As a result, we believe that employers need to reassess their potential liability for their employees' negligent driving.

In the vast majority of cases, where an employee's job obliges him or her to drive, that employee will be driving a vehicle owned by the employer, by the employee (or a close relative) or by a leasing or rental company. The potential liability of the employer for the negligent driving of its employees now differs in each of these situations. However, before discussing these differences, I would like to comment briefly on the recent steep rise in the amounts being awarded to crash victims by Ontario courts.

As little as five years ago it was exceedingly rare for even the most seriously injured victim to recover more than $5 million in any personal injury lawsuit. The numbers tended to be lower in automobile negligence claims due to the fact that injured party was usually entitled to recover significant accident benefits from his or her own automobile insurer. These benefits were deductible from the damages awarded by the courts due to the driver's negligence. A little over two years ago I was involved in a case, which may have been the first in Canada, in which the damages awarded to the injured party exceeded $10 million. In the last two months I am aware of three cases where the injured plaintiff has had his damages assessed between $12 and $15 million. Two of the claims were tried by a judge alone and the highest assessment was in a case tried by a jury.

Many companies carry between $1-5 million of third party liability coverage on the vehicles that they own and a similar amount under their Non-Owned Automobile Endorsement. Other companies have assumed that they have sufficient insurance if they are carrying limits of $10 million per accident. In light of these most recent cases, I would suggest that anyone carrying less than $15 million consider increasing their limits, if possible. Frankly, $20 or $25 million is probably a more realistic limit if one can purchase it. Some smaller companies or companies with poor claims records may have difficulty purchasing such limits. Of course, a limit of $25 million will still be inadequate if the accident results in serious injuries to a number of people. Fortunately, such accidents, while not unheard of, are rare.

I now return to the question of the differing liabilities of employers depending on who owns the car. If the employer owns the car, then the employer is responsible for insuring the vehicle. In these circumstances, the employer, as owner of the car, is responsible for the driver's negligence even if the driver is not an employee and is not on work-related business at the time of the crash. The employer must purchase sufficient insurance to cover any claim that is made failing which the employer faces the prospect of bankruptcy.

I want to make one additional comment regarding the use of company vehicles by employees. One of the exclusions in the standard automobile policy will result in a denial of coverage to the employer if the driver involved in the crash was not properly licensed and the employer did not take adequate steps to ensure that the driver was properly licensed. Businesses should have in place policies that prohibit the use of company vehicles by non-employees. Alternatively, such

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policies should place specific obligations upon the employee to ensure that any person using the vehicle is properly licensed. At a minimum, employees should be asked for a photocopy of their license annually and these photocopies should be kept on file. The employee should also fill in a form indicating that he or she continues to hold a valid driver's license.

If the vehicle is owned by the employee or a relative, then the employee or relative is obliged at law to insure the vehicle. Most employees will likely carry third party liability limits of between $200,000 and $1 million. If the employee's negligence results in a catastrophic injury, then the victim's lawyer will likely sue the employer as well. The employer will be insured for such a claim provided that the employer has Non-Owned Automobile coverage endorsed on its Commercial General Liability or Business Liability policy. Every employer should ensure that it does have such coverage and that it is comfortable with the coverage limits. This coverage will respond as excess to the automobile coverage available under the policy of the owner of the vehicle. In situations where the damages are less than the limits of the owner's policy, the employer's policy will not be called upon to contribute to the claim.

That takes us to leased or rented vehicles. Prior to March 1, 2006, Ontario law only obliged the owner of a vehicle to insure it. Persons renting or leasing vehicles were not obliged to insure them (except possibly in a leasing contract). The policy arranged by the owner provided primary coverage and any other insurance available to the driver or the employer was excess coverage only. Therefore, for most personal injury claims, the owner's policy responded and the employer's insurance was only called upon to respond where the claim exceeded the limit under the owner's policy.

As of March 1, 2006, this has all changed. Now the lessee or renter of the vehicle is also liable for the negligent operation of the vehicle. More importantly, the lessee's or renter's policy is primary in most cases. If the lessee's or renter's insurance has limits of at least $1 million, then the lessor or rental company and its insurers have no liability whatsoever to the crash victim.

Where an employee is driving a car leased or rented in the employer's name, then the employer's insurance is obliged to respond first. This, of course, means that the employer's Non-Owned Automobile coverage will be obliged to respond more often than in the past. This has begun to and will continue to drive up the cost of Non-Owned Automobile coverage. Employers should also be aware that if a car is rented by an employee in the employer's name, then the employer's Non-Owned Automobile coverage will be obliged to respond even if the employee is on personal business at the time of the crash or if the car is being driven by someone other than the employee. This would include situations where the employee's drunken child wraps the car around a telephone pole and injures a passenger.

Where the vehicle is leased or rented in the employee's name, rather than the employer's, then the employer's policy will only be obliged to respond if the employee is in the course of his or her employment at the time of the crash. Although the law is not entirely clear, where an employee is in the course of his or her employment, it would appear that the employer's policy will be obliged to respond only after the limits of the employee's own automobile insurance, if any, are exhausted.

As a result of these changes, we would recommend that every employer review the limits of

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coverage they are carrying on their automobile policies and Non-Owned Automobile coverages. We would also recommend that employers consider carefully whether they want to permit employees to rent vehicles in the employer's name. If they do permit this, then they could be exposed to potentially serious claims which may involve the use of vehicles in non-employment related situations. Employers should also ensure that for vehicles owned, leased or rented in the employer's name that they have in place internal policies designed to ensure that such vehicles are only driven by licensed individuals.

Finally, some insurers are now requesting additional and detailed information about the use of both company owned and non-owned vehicles by employees for company business. These requests should be treated seriously and responded to carefully. If the information supplied is inaccurate, then the employer runs the risk of a coverage denial for misrepresentation if a claim is submitted. At a minimum every employer needs to be able to track the usage of company vehicles by its employees, the total usage of rental vehicles by its employees and may need to request information from each employee regarding the use of employee owned vehicles for company business. ■

Blaney McMurtry LLP is pleased to announce

Attila Ataner, B.A., J.D.,

a member of Blaneys' Insurance Litigation and Immigration teams, has also joined the Labour and Employment Group where he will continue his practice.

Attila attended the University of Toronto and was called to the Bar of Ontario in 2006. His publications include "How Strict is Vicarious Liability? Reassessing the Enterprise Risk Theory" in the University of Toronto Faculty of Law Review (2006) Vol. 64(2), which was awarded a J.S.D. Tory Fellowship for legal writing. In addition to English, Attila is fluent in Turkish and Bulgarian, and hopes to improve his German and French in the near future.

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Bradley Phillips, B.A., LL.B.,

a member of Blaneys' Litigation team, focusing principally on commercial and professional liability litigation, has joined the Labour and Employment Group.

Brad attended Osgoode Hall Law School and was called to the Bar in 2000. Brad has recently become a partner at Blaney's where, in addition to Labour and Employment Group work he will continue his diverse litigation practice including commercial landlord and tenant litigation, products liability litigation and professional negligence litigation. Brad has appeared before all levels of court in Ontario, including acting as lead counsel at trials, and on appeals before the Ontario Court of Appeal.

Brad is a member of the Canadian Bar Association and the Advocate's Society.

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Employment Notes is a publication of the Labour and Employment Law Group of Blaney McMurtry LLP. The information contained in this newsletter is intended to provide information and comment, in a general fashion, about recent cases and related practice points of interest. The information and views expressed are not intended to provide legal advice. For specific advice, please contact us.

We welcome your comments. Address changes, mailing instructions or requests for additional copies should be directed to Chris Jones at 416 593.7221 ext. 3030 or by email to cjones@blaney.com. Legal questions should be addressed to the specified author.

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