



Employment Notes

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Labour and Employment Group

William D. Anderson
Direct 416.593.3901
wanderson@blaney.com

Christopher J. Ellis
Direct 416.593.3954
cellis@blaney.com

Elizabeth J. Forster, Editor
Direct 416.593.3919
eforster@blaney.com

Mark E. Geiger, Chair
Direct 416.593.3926
mgeiger@blaney.com

Michael J. Penman
Direct 416.593.3966
mpenman@blaney.com

D. Barry Prentice
Direct 416.593.3953
bprentice@blaney.com

Kevin Robinson, Editor
Direct 416.593.3944
krobinson@blaney.com

Jack B. Siegel
Direct 416.593.2958
jsiegel@blaney.com

Robert C. Taylor
Direct 416.593.2957
rtaylor@blaney.com

David S. Wilson
Direct 416.593.3970
dwilson@blaney.com

DRUG AND ALCOHOL TESTING

Elizabeth J. Forster

The Canadian Human Rights Commission recently announced a revised Drug and Alcohol Testing Policy. The policy applies to federally regulated employers. It prohibits the following:

1. Pre-employment drug testing;
2. Pre-employment alcohol testing;
3. Random drug testing;
4. Random alcohol testing of employees in non-safety sensitive positions.

However, in its policy, the Commission did recognize that in some safety-sensitive workplaces a drug and alcohol testing program is a *bona fide* occupational requirement. In those situations, the following testing will be allowed:

1. Random testing of employees in safety sensitive positions;
2. Testing following disclosure of a current drug or alcohol dependency or abuse problem;
3. Mandatory disclosure of present or past drug or alcohol dependency or abuse by employees holding safety-sensitive positions.

When employees test positive for drugs or alcohol, the employer still has an obligation to accommodate them to the point of undue hardship. The accommodation may include supporting the employee while the employee undergoes treatment or rehabilitation.

However, accommodation is not required if:

1. The cost of accommodation would alter the nature or affect the viability of the enterprise; or
2. The health or safety risks to workers or members of the public are so serious that they outweigh the benefits of providing accommodation. ■

If you would like a copy of the policy, please call Elizabeth Forster at (416) 593-3919.

COURT OF APPEAL OVERTURNS OFFICE CHRISTMAS PARTY CASE

Elizabeth J. Forster

In a previous issue we reported to you on the decision of the Superior Court of Justice in *Hunt v. Sutton Group Incentive Realty Inc.* This case ordered an employer to pay damages of \$288,000 to a woman who was injured in a motor vehicle accident while driving home from an office Christmas party in an intoxicated state.

The Ontario Court of Appeal has allowed an appeal from that judgment and ordered a new trial on the issues of both liability and damages. The appeal was granted on the basis that the trial judge was wrong in deciding to discharge the jury. We will continue to follow this case. ■

EMPLOYMENT NOTES

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Elizabeth Forster can be reached at 416.593.3919 or eforster@blaney.com.

OWNERSHIP OF INVENTIONS: UPDATE

Robert C. Taylor

In the newsletter dated April 2000, I discussed the decision of the Ontario Superior Court of Justice in *Techform Products Ltd. v. Wolda* which dealt with the ownership of inventions by independent contractors. The Court of Appeal has now reversed that decision.

Wolda, under an agreement with Techform Products Ltd., was an independent contractor working for Techform. Wolda had signed an agreement with Techform titled “Employee Technology Agreement” (“ETA”) in which he agreed to assign to Techform his rights in any inventions he developed while working for Techform. The ETA was signed by Wolda after he had been working as an independent contractor for three years. When it was presented to him, Wolda did not agree with the terms of the agreement and did not want to sign it. Moreover, Techform gave Wolda no monetary consideration in exchange for his signature.

However, Techform testified at trial that if Wolda did not sign it, Techform would have given Wolda 60 days notice of the termination of his agreement. Subsequent to the signing of the ETA and while working for Techform, Wolda invented a revolutionary hinge which was useful for Techform’s business. Wolda sought additional compensation for this invention which Techform refused to provide and terminated Wolda as an independent contractor.

Robert Taylor can be reached at 416.593.2957 or rtaylor@blaney.com.

Wolda argued that the ETA was not binding on him because, among other reasons, he received no consideration at the time he signed it. While the ETA stated that the consideration was Wolda’s “continuing employment” with Techform, the Court of Appeal found that Wolda did receive consideration from the company’s forbearance in terminating Wolda.

The Court of Appeal indicated that employers are not free to simply say to an employee “sign or you will be fired” and expect that a binding agreement has been entered into. However, a prior intention to terminate and a promise to refrain from terminating if the agreement is signed may constitute valid consideration and an agreement may be enforceable in those circumstances. ■

NEW POLICY ON AGE DISCRIMINATION

Elizabeth J. Forster

The Ontario Human Rights Commission has recently published its “Policy on Discrimination Against Older Persons Because of Age”. The policy covers discrimination based upon age in employment, housing accommodation, goods, services and facilities. It also covers harassment and poisoned work environments.

In examining the issue of discrimination against “older” people in employment (which the Commission says is a relative term) the Commission examines such topics as when differential treatment becomes discriminatory,

EMPLOYMENT NOTES

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Kevin Robinson can be reached at 416.593.3944 or krobinson@blaney.com.

special programs for persons age 65 and over, and situations where rules that discriminate on the basis of age are justifiable. It also examines discrimination based upon age in hiring, treatment on the job, early retirement programs and pension and benefits. ■

If you wish a copy of the policy it is available on the Commission's website at www.ohrc.on.ca.

DRAFT OF NEW PROVINCIAL PRIVACY ACT

Kevin Robinson

On January 1, 2001, the federal *Personal Information Protection and Electronic Documents Act* (“PIPEDA”) came into force. That legislation set out requirements for the collection, use, disclosure, storage and access of personal information held by federally-regulated organizations. Of key importance in that legislation were the provisions that described the types and forms of consent required to collect and disclose certain personal information. PIPEDA also set out new requirements for federal employers and how those employers could store and use the personal information of their employees.

Although PIPEDA applied only to federal organizations as of January 1, 2001, it indicated that that Act would apply to all organizations (including provincially-regulated organizations) as of January 1, 2004, unless the province with jurisdictional responsibility enacted “substantially similar” legislation prior to that time.

In response, the Ontario government released a draft *Privacy of Personal Information Act, 2002* in February of this year. The Act was subject to a formal public review process until the end of March and the provincial government has continued to meet with interested parties since that time. The government has indicated that it expects to release a redrafted form of the Act and introduce it to the Legislature this fall.

The impact of the Act is likely to be significant. The draft Act applies both to employers and trade unions and the definition of “personal information” includes “information that relates or may relate to the work performance of the individual or professional wrongdoing, misconduct or disciplinary matters involving the individual.” Although there is a specific exclusion relating to the identity and contact information of individuals in their employment capacity, the Act, in its current form, will certainly have significant impact on how employers, trade unions and employees can use and store personal information.

If you wish to review the draft Act or monitor the progress of the legislation, please access the Ministry of Consumer and Business Service's website at <http://www.cbs.gov.on.ca/mcbs/english/welcome.htm>. We will report further when the redrafted Act is introduced and, ultimately, passed. The government has expressed its intention to have new legislation in place well before the federal government's January 1, 2004 deadline. ■

EMPLOYMENT NOTES

“The goal of the Ontarians With Disabilities Act, 2001 is to identify and remove barriers to access and opportunities within the public sector for persons with disabilities.”

Christopher Ellis can be reached at 416.593.3954 or cellis@blaney.com.

ONTARIANS WITH DISABILITIES ACT, 2001

Christopher J. Ellis

The goal of the *Ontarians With Disabilities Act, 2001* (“ODA”) is to identify and remove barriers to access and opportunities within the public sector for persons with disabilities. Both “barrier” and “disability” are given broad definitions in the Act. Agencies called the Accessibility Advisory Council (AAC) and the Accessibility Directorate of Ontario (ADO) will monitor the compliance of public bodies in providing barrier-free buildings, education, employment, supplies, publications and other services. It will also evaluate the yearly accessibility plans which must be prepared by each ministry and organization listed in a schedule to the Act.

In February, 2002 the first sections of the ODA came into force and established the AAC and the ADO. Additional sections regarding the specific accessibility obligations of the Ontario government, municipalities, and other public bodies such as mass transit, school boards, hospitals, agencies, colleges and universities are to be proclaimed on September 30, 2002. No implementation date has yet been announced for the sections which impose fines for failing to comply with the ODA. ■

WE ARE PLEASED TO ANNOUNCE

Jack B. Siegel, B.Sc., LL.B., has joined the firm’s Labour and Employment Group where he will continue his practice in Workplace Safety and Insurance (Workers’ Compensation), Labour, Wrongful Dismissal, Human Rights, Occupational Health and Safety and Election Law.

Jack was called to the Bar in 1985 and is the current Vice-Chair of the Workers’ Compensation Section, Ontario Bar Association.

He is a member of the Political Parties’ Advisory Committees to the Chief Election Officers of Canada and Ontario, Chair, Board of Review, Canada Post Corporation Act and is a member of the Board of Directors of Scadding Court Community Centre.

Jack can be contacted by telephone at 416.593.2958 or by e-mail to jsiegel@blaney.com.

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**Blaney
McMurtry**
BARRISTERS & SOLICITORS LLP

20 Queen St. West, Suite 1400
Toronto, Canada M5H 2V3
416.593.1221 TEL
416.593.5437 FAX
www.blaney.com

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.