ISSUE 25 - DECEMBER 2012

WL UPDATE

WHITTEN & LUBLIN
Employment Lawyers

Whitten & Lublin is a team of legal experts who provide practical advice and advocacy for workplace issues.

THE 2012 YEAR-END EMPLOYER CHECKLIST

As the year draws to a close, we would encourage you to take a few minutes to consider the following checklist to ensure that your company's policies, procedures, and contracts reflect the substantive changes in Ontario's employment laws in 2012:

1. Do your termination clauses refer to benefits?

Employers should revisit their employment contracts in light of a 2012 Ontario Superior Court of Justice decision which rendered a termination clause unenforceable. The contract in question determined how much notice an employee would receive in the event of a without cause termination, but it did not mention benefits.

Pursuant to the Employment Standards Act, 2000 (the "ESA"), an employee's benefits must continue during the statutory notice period.

Because the contract did not expressly refer to benefits, the court determined it did not meet the minimum requirements of the ESA and was, therefore, unenforceable. Instead, the employee got a 12-month common law notice period. *

To avoid this result, employers should review their employment contracts to ensure that they address the continuation of benefits during the statutory notice period.

2. Do your employment contracts refer to mitigation?

In general, an employer must give an employee reasonable notice of termination, or pay in lieu thereof, and, as part of the bargain, the employee must make efforts to reduce or "mitigate" those losses by securing alternative employment.

However, in 2012, the Ontario Court of Appeal heard a case where an employee was entitled to 6 months' notice in the event of a without cause termination. The contract did not say that the employee had an obligation to try to find another job in the 6 month period (i.e. mitigate their damages).

As a result, the Court decided that the employee was entitled to 6 months' pay with no obligation to try to find alternative employment.

The takeaway message for employers is clear – when employment or executive contracts dictate a fixed amount of notice, those contracts must contain a provision requiring the departing employee to secure alternative work. If not, the employer will be responsible for paying the whole amount, and the employee will be on a paid vacation.**

3. Do you have a Pay Equity Plan?

Ontario employers with more than 10 employees are required to have a Pay Equity Plan. Additionally, employers must be able to substantiate that the company has established, and maintained, compensation practices providing for pay equity. To comply with the Pay Equity Act, employers must identify job classes, determine the value of job classes based on skill, effort, responsibility and working conditions, conduct comparisons for female job classes and adjust wages of underpaid female job classes.

continued on next page...

Wishing you Happy Holidays and a New Year filled with prosperity and success!

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Failure to do so leaves employers vulnerable to a complaint from both current and former employees.

4. Have you filed a Customer Service Accessibility Compliance Report with the Ministry of Community and Social Services?

You should do so by December 31, 2012. The Accessibility for Ontarians with Disabilities Act, 2005 applies to employers who provide goods or services either directly to the public, or to other Ontario organizations, and who have more than one employee. Employers with fewer than 20 employees are required to create a plan and train staff on the plan.

Employers with 20 or more employees in Ontario are required to make a plan, train staff, keep records of the plan and training, and file a Customer Service Accessibility Compliance Report with the Ministry of Community and Social Services by December 31, 2012. Failure to do so may result in monetary penalties, inspection and possible prosecution through the courts.

5. Does your Information Technology Policy prohibit personal use?

In light of a recent Supreme Court of Canada decision, employers may wish to re-visit their Information Technology policies. The Supreme Court decision determined that an employee may reasonably expect privacy on work computers where personal use is permitted or expected.

As such, employers should revise policies to ensure that there is no ambiguity with respect to the purpose for which the technology is being assigned, the intended purposes of the technology, and uses which the employer deems inappropriate. Then, once the policy has been revised and the employees reminded, employers must take steps to ensure compliance with the 'no-personal-use' policy. ***

6. Have you posted Occupational Health & Safety Posters?

The Ministry of Labour has created a poster explaining worker health and safety rights and responsibilities. Employers must post the poster, as well as a copy of the legislation, in the workplace in English as well as in the language of the majority of workers.

Ministry of Labour inspectors expected compliance by October 1, 2012 so if you haven't already done so, ensure these free posters are put up soon.

We know it's a busy time of year, so if we can help, please do not hesitate to contact us. We would be more than happy to review your individual needs, perform a year-end assessment, and help to ensure you are well prepared for 2013.

* Wright v. The Young and Rubicam Group of Companies (Wunderman), 2011 ONSC 4720.
** Bowes v. Goss Power Products Ltd., 2012 ONCA 425.
*** R. v. Cole, 2012 SCC 53.

CONSULTATIONS

For a consultation
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