2014 YEAR IN REVIEW: ENSURE YOUR ORGANIZATION STAYS ON THE "NICE LIST" IN 2015

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Categories: Insights, Publications

In the spirit of the season, McMillan's Employment and Labour Relations Group is counting down the year's most noteworthy labour and employment law developments across the country and the implications of those developments for employers in 2015.**Top 5 Legislative Amendments in 2014**

5. Proposed Amendments to British Columbia *Human Rights Code: Gender Identity and Expression Human Rights Recognition Act*

On November 20, 2014, the *Gender Identity and Expression Human Rights Recognition Act*, a private member's Bill, was introduced by Spencer Chandra Herbert, the NDP MLA for Vancouver-West End, to the Legislative Assembly of British Columbia.

The Bill seeks to amend section 1 of the British Columbia *Human Rights Code* ("Code") by expanding the definition of sex to include both "gender identity" and "gender expression". As currently drafted, the Code provides protection against discrimination based on sex and sexual orientation but does not specifically provide protections for gender, gender identity or gender expression.

New Brunswick and British Columbia are the only Canadian provinces with human rights legislation that does not specifically reference gender or gender identity. Alberta, Saskatchewan, Manitoba, and Quebec all include gender as a general concept in their respective human rights legislation. Nova Scotia, Ontario, PEI, and Newfoundland and Labrador have specific provisions protecting both gender identity and gender expression.

We will keep an eye on this Bill and keep you appraised of its progression through the British Columbia Legislature in 2015.

4. New Leaves of Absence for Alberta and Ontario Employees

Ontario's *Employment Standards Act, 2000* was amended on April 29, 2014 to add three new leaves of absence effective October 29, 2014: family caregiver leave, critically ill child care leave, and crime-related child death or disappearance leave.

- **Family Caregiver Leave**. Ontario employees who provide their employer with a certificate signed by an attending physician can take up to eight weeks of unpaid, job-protected leave from work to care for a family member who has a serious medical condition. There is no minimum service requirement to be eligible for this leave.
- *Critically Ill Child Care Leave*. Ontario employees who have worked at least six consecutive months for their employer and who provide their employer with a certificate signed by an attending physician can take up to 37 weeks of unpaid, job-protected leave from work to care for a critically ill child. As with family caregiver leave, the weeks taken for critically ill child care leave need not be taken consecutively.
- *Crime-Related Child Death or Disappearance Leave*. Ontario employees who are parents of a child that has disappeared as the probable result of a crime are eligible for up to 52 weeks of unpaid, job-protected leave from work. Parents of a child that has died as the probable result of a crime are eligible for up to 104 weeks of unpaid, job-protected leave from work. Unlike the other two new leaves, employees will generally be required to take crime-related child death or disappearance leave in a single period.

On February 1, 2014, Alberta's Employment *Standards Code* was amended to add compassionate care leave with immediate effect.

- **Compassionate Care Leave**. Alberta employees who have worked at least 52 weeks for their employer and who provide their employer with a certificate signed by an attending physician can take up to eight weeks of unpaid, job-protected leave from work to care for a gravely ill family member. The eight week leave my be divided into two parts to be taken within a 26 week period. Six weeks of Employment Insurance benefits are available to some employees for compassionate care.

Implications for Employers

Alberta is the most recent province to enact compassionate care leave legislation, following in the footsteps of Manitoba, New Brunswick, Nova Scotia, Ontario, Prince Edward Island, Quebec, Saskatchewan, and Nunavut. Accordingly, employers in all provinces and territories should ensure they are familiar with all new and existing laws entitling employees to protected leaves of absence.

Alberta and Ontario employers should review their leave and attendance policies to determine whether changes need to be made as a result of the new statutory leave provisions. Employers should also consider how (or if) the new leave provisions need to be integrated into employment contracts and/or collective agreements.

For a more in-depth analysis, please see our bulletin.

3. Alberta Amends *Personal Information Protection Act* Following Supreme Court of Canada's

Declaration of Invalidity

On December 17, 2014, the *Personal Information Protection Amendment Act, 2014* ("Bill 3") received Royal Assent and became law. Bill 3 amends the *Personal Information Protection Act* ("PIPA"), which was declared constitutionally invalid in its entirety by the Supreme Court of Canada ("SCC") in *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62.

PIPA limited the collection, use and disclosure of personal information other than with consent, irrespective of the nature of the information, the purpose for which it was collected, used or disclosed, and its situational context. The SCC concluded that, in so doing, PIPA imposed unconstitutional restrictions on a union's ability to communicate and persuade the public of its cause during a lawful strike. Bill 3 amends PIPA such that, during lawful labour disputes, a trade union is no longer required to obtain consent in order to collect, use, or disclose personal information, so long as the following conditions are met:

- Collecting, using, or disclosing the personal information is for the purpose of informing or persuading the public about a matter of significant public interest or importance relating to a labour relations dispute;
- Collecting, using, or disclosing the personal information is reasonably necessary for that purpose; and
- The collection, use, or disclosure of the personal information without consent is reasonable in its situation context, taking into consideration all relevant considerations, including the nature and sensitivity of the personal information.

Implications for Employers

Now that Bill 3 is law, employers and trade unions in Alberta should pay particular attention to the interpretation and application of the amended provisions in the context of future labour disputes. Further, employers should keep in mind that broader changes to PIPA may be ahead given that PIPA requires a comprehensive review of its provisions starting no later than July 1, 2015. We will keep you informed about any such changes in 2015.

2. Major Changes to Five Ontario Employment-Related Statutes

On November 20, 2014, significant amendments made under the *Stronger Workplaces for a Stronger Economy Act, 2014* ("Bill 18") to five Ontario employment-related statutes became law. Some of the major changes include:

- reducing the "open period" for displacement applications under the *Labour Relations Act*, 1995 from three months to two months;
- redefining "worker" in the *Occupational Health and Safety Act* to include persons who perform work for no compensation, including students, interns and trainees;

- calculating minimum wage increases under the *Employment Standards Act* ("ESA") in accordance with the Consumer Price Index;
- eliminating the maximum entitlement for recovery of unpaid wages under the ESA and extending the recovery period for such claims from six months to two years;
- requiring employers to provide the Ministry of Labour's ESA poster to all employees;
- empowering the Ministry of Labour to order employers to engage in self audits to determine ESA compliance; and
- making temporary help agencies and their clients jointly and severally liable for unpaid wages to the employees of the agency who provide services to the client.

Implications for Employers

Although all of the amendments introduced by Bill 18 do not come into effect in 2015, the changes introduced by Bill 18 significantly impact all employers with operations in Ontario. Accordingly, employers should familiarize themselves with the new laws and prepare to adjust their workplace policies and practices.

For a more in-depth analysis, please see our bulletin.

1. New Retirement Savings Plan in Quebec: Voluntary Retirement Savings Plan ("VRSP")

On July 1 2014, Quebec's *Voluntary Retirement Savings Plan Act* ("Bill 39") came into force. The VRSP is a group retirement savings plan which allows participating employees to contribute to the plan through payroll deductions. Employee contributions to the plan are the same as for an RRSP (18% of annual income, up to $24,270 in 2014 and $24,930 in 2015). Employees who are age 18 and over with one year or more of continuous employment will automatically be subscribed to the VRSP by their employer. However, these employees will be able to waive their right to participate and to unsubscribe from the plan. Employers may but are not required to contribute to the plan. For tax purposes, employee contributions to the plan will be deducted from earned income and will grow tax-free.

Implications for Employers

Quebec employers with 5 or more employees that do not currently offer their employees a group retirement savings plan have an obligation to offer the VRSP to employees. Employers covered by Bill 39 must offer the VRSP at the latest by the following dates:

- Employers with 20 eligible employees or more on June 30, 2016 : December 31, 2016
- Employers with 10 to 19 eligible employees on June 30, 2017: December 31, 2017
- Employer with 5 to 9 eligible employees: at a date set by the Government that may not be prior to January 1, 2018.

The VRSP is a simple and flexible solution both for employers and employees alike. Since the VRSP will be managed by a third party administrator, employers administrative costs will be significantly reduced as most of the administrative tasks that are usually required by a retirement plan will be carried out by the administrator. Employees will benefit from significant economy of scale on administration fees since all the savings from all the contributors will be grouped.

Top 5 Labour and Employment Decisions in 2014

5. Ontario Decision Expands Application of Severance Pay under the *Employment Standards Act*

In *Paquette c. Quadraspec Inc.*, 2014 ONSC 2431, the Ontario Superior Court of Justice considered section 64 of the Ontario *Employment Standards Act* ("ESA"), which requires employers with a payroll of $2.5 million or more to pay severance to employees who have five or more years of service. To determine an employer's payroll, courts typically only take into account the employer's payroll in Ontario. In this case, evidence showed that the employer's payroll in Ontario was less than the ESA threshold; however, including the employer's payroll for its operations in Quebec, the employer's payroll exceeded the ESA threshold. Noting that the explicit language found in other Ontario statutes limiting payroll calculations to an employer's payroll in Ontario is absent from the ESA, the court held that an employer's entire payroll should be considered for the purposes determining an employer's severance pay obligations under section 64 of the ESA.

Implications for Employers

Unless this decision is overturned, it may have significant financial implications for employers with operations in Ontario and other provincial or territorial jurisdictions. Employers with payrolls in Ontario below the ESA threshold but with national payrolls above the ESA threshold may now have an obligation to pay severance to employees with five or more years of service.

4. BC Court of Appeal Approves Novel Approach to Restrictive Covenants

In *Rhebergen v. Creston Veterinary Clinic Ltd.*, 2014 BCCA 97, the British Columbia Court of Appeal ("BCCA") upheld as enforceable a novel restrictive covenant that required a former employee to pay its former employer a sum of money in the event that the employee competed with the employer within a certain period after the employment relationship ended.

The restrictive covenant in question characterized the sum of money to be paid as reasonable compensation of costs related to mentoring and training, and projected losses to goodwill and revenue. The clause covered a period of three years, whereby in each year, the amount to be paid would reduce, representing the amount of value received by the employer from the employee's services.

The BCCA unanimously held that the payment was not a penalty but in fact, compensation for the costs incurred by the employer to train the employee; costs which, on the evidence, the employee acknowledged were reasonable. This finding is significant since Canadian courts generally consider non-competition restrictive covenants in employment contracts to be "in restraint of trade" and therefore unenforceable and are also reluctant to enforce restrictive covenants that are unreasonable or, in effect, penalty clauses.

Implications for Employers

This decision suggests that courts will afford employers with reasonable creative licence in drafting restrictive covenants, while continuing to grant employees protection against ambiguous and unreasonable restrictions.

While clauses that do not prohibit but inhibit post-employment competition will still likely be held to be in restraint of trade and subject to the standard reasonableness analysis, as a result of this decision, courts may be more amenable to enforcing clauses which put a price on competition rather than barring it outright.

A key take-away from this decision for employers is that, when contemplating the inclusion of a compensation clause in an employment contract, the employer ought to base the amount on a best efforts calculation of the anticipated loss connected with an employee leaving and competing with the employer.

For a more in-depth analysis, please see our bulletin.

3. Supreme Court Limits Employers' Right to Close Business During Statutory Freeze

In *United Food and Commercial Workers, Local 503 v. Wal-Mart Canada Corporation*, 2014 SCC 45, the Supreme Court of Canada ("SCC") considered section 59 of Quebec's *Labour Code* ("*Code*"), which provides that no employer may change the conditions of employment of its employees during the period spanning from the moment a petition for certification of a union is filed to the moment a collective agreement is concluded or until a strike or lockout is exercised (i.e. the statutory freeze). The SCC confirmed that the purpose of section 59 is to enable employees to exercise their constitutional right of association and to uphold good faith in the negotiation of a collective agreement. The SCC also confirmed that the maintenance of the employment relationship is a condition of employment that is implicitly incorporated into employment contracts, Therefore, unless there is a legitimate cause for the extinction of contractual obligations, the proper role of a contract is to require the parties to carry out their obligations.

Therefore, if an employer closes its business during the statutory freeze, the employer must be able to demonstrate that it would have made the same decision to close its establishment in the absence of a petition for certification. Accordingly, the employer's decision must be either (a) consistent with past management practices, or (b) consistent with the decision that a reasonable employer would have made in the same circumstances.

Implications for Employers

The SCC specifically notes that there is the equivalent of section 59 of the *Code* in every province in Canada and in the federal sphere. Accordingly, employers in all provinces and territories should tread carefully if considering the closure of their businesses during the statutory freeze. Employer should ensure they have strong objective evidence to establish that the decision to close was made in the ordinary course of business.

For a more in-depth analysis, please see our bulletin.

2. Federal Court of Appeal Confirms Family Status Accommodation Encompasses Parental Childcare Obligations

On May 2, 2014, the Federal Court of Appeal ("FCA") released the much anticipated decision of *Johnstone v. Canada Border Services Agency*, 2014 CHRT 28. Unanimously upholding the findings of the Federal Court, the FCA affirmed that parental childcare obligations are included under the protected ground of family status under the *Canadian Human Rights Act* ("Act").

Making clear that protection against family status discrimination does not extend to personal family choices, like trips and extra-curricular activities, the FCA affirmed that the childcare obligations that fall within the protection of Act are "those that form an integral component of the legal relationship between a parent and child...the childcare obligations at issue are those which a parent cannot neglect without engaging his or her legal liability".

Confirming that the threshold to show *prima facie* discrimination for family status is no higher than that for all other grounds of discrimination, the FCA set out the following four-part test to establish discrimination on the basis of family status relating to childcare accommodation, which requires a claimant to demonstrate that:

- a child is under his or her care and supervision;
- the he childcare obligation at issue engaged the claimant's legal responsibility for that child, as opposed to a personal choice;
- the parent made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible; and
- the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation.

Implications for Employers

Given the similarities between federal and provincial human rights legislation, we expect that the test articulated by the FCA in this decision will be adopted by provincial human rights tribunals confronted with

claims of discrimination of the basis of family status relating to childcare obligations. In light of this decision, when confronted with a request for accommodation on the basis of an employee's childcare obligations, all employers should carefully consider whether the employee's parental obligation amounts to a parent's legal obligation to a child. If the obligation could fall within the scope of family status, employers should then consider whether accommodation of the employee will amount to undue hardship for the employer.

1. Supreme Court of Canada Confirms Quebec Employers Cannot Waive Employee's Notice of Resignation

In *Quebec (Commission des normes du travail) v. Asphalte Desjardins Inc.*, 2014 SCC 51, a decision released on July 25, 2014, the Supreme Court of Canada ("SCC") affirmed that Quebec employers cannot waive employee's notice of resignation. In this case, the SCC was asked to determine whether an employer could waive the notice of resignation and ask an employee to cease working immediately without providing any notice or indemnity in lieu. The SCC established that a Quebec employer who asks an employee to cease work prior to the end of the employee's notice of resignation is deemed to have terminated the employee without cause. Accordingly, the employer must pay the employee's salary until the end of the notice period or provide a minimum compensatory indemnity in accordance with the *Act respecting labour standards*. Effectively, the SCC concluded that an employer's decision to waive the employee's notice of resignation constitutes a termination without cause.

Implications for Employers

While this case applies principally to Quebec employers, the SCC's reasoning is in line with the traditional approach of the courts in the common law provinces. In most Canadian jurisdictions, the law requires that employers provide reasonable notice or an indemnity in lieu of notice when terminating an employee without cause. Therefore, employers in all jurisdictions should be aware that terminating an employee prior to the end of the employee's notice of resignation period may give rise to a claim for termination pay or an indemnity in lieu of notice. However, in the common law jurisdictions, an employment agreement could stipulate the employer's right to waive the resignation notice period. Such a provision would not be enforceable in Quebec. Therefore, all employers contemplating terminating an employee prior to the end of the employee's notice of resignation should contact legal counsel for advice.

For a more in-depth analysis, please see our bulletin.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against

making any decisions based on this material alone. Rather, specific legal advice should be obtained.