

Fall Employment and Labour Law Update Seminar

AODA update: What employers should know about the *Accessibility for Ontarians with Disabilities Act, 2005*

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9 October 2013

Goal of AODA

- Recognizes past history of discrimination against those with disabilities in Ontario
- As of 2006, approximately 15½ per cent of Ontarians had a disability (Statistics Canada), and their rate of employment was only 51.8%
- Goal to make Ontario accessible to people with disabilities by January 1, 2025
- Goods, services, facilities, accommodation, employment, buildings, structures, premises

General accessibility standards

- Policies
- Statement of organizational commitment
- Public Sector January 1, 2012 to January 1, 2014
- Large employers
(50+ employees in Ontario) January 1, 2014
- Small employers
(1 to 49 employees in Ontario) January 1, 2015

Multi-year accessibility plans

- Only for public sector and large employers
- Outline for strategy to prevent and remove barriers and meet the requirements of the various regulations
- Post on website
- Update every five years
- Public sector January 1, 2012 to January 1, 2014
- Large employers January 1, 2014

Training

- Training on the Accessibility Standards and the Human Rights Code requirements on disability discrimination
- Employees
- Volunteers
- People who participate in developing the company's policies
- Everyone who provides goods, services or facilities on behalf of the company
- Public service January 1, 2013 to January 1, 2015
- Large employers January 1, 2015
- Small employers January 1, 2016

Customer Service

Communications

Employment

Transportation

Customer service standards - Recap

- Applies to organizations that provide goods or services to members of the public or other business
- Policies and practices on how to provide goods/services to people with disabilities
- Allow use of personal assistive devices, guide dogs or service animals
- Communicate with people with disabilities in a manner that takes into account the disability
- Train staff, volunteers and contractors who interact with the public or other businesses on your behalf

Customer service standards timetable

- Public Sector January 1, 2010
- Private Sector January 1, 2012

- Compliance report due December 31, 2012
(Small employers exempt from reporting requirement)

Penalties for non-compliance (including failure to file an accessibility report)

- Inspections
- Order to comply
- Failure to comply → administrative penalties \$500 - \$15,000
- Criminal prosecution

Employment standards

- Full inclusion of people with disabilities in the workplace to allow full participation
- Create accessible and inclusive work environments for those with disabilities
- Addresses the stages of the employment relationship from recruiting to performance management
- This is in addition to the Ontario Human Rights Code

Stages of the employment relationship

- Recruitment
- Hiring
- Supports for employees
- Individual accommodation plan
- Return to work process
- Performance management
- Career development and advancement
- Redeployment (reassignment to avoid layoff)

Employment standards

- **Time Frames**

- Public sector January 1, 2013 to January 1, 2015
- Large employers January 1, 2016
- Small employers January 1, 2017

Employment

- **Recruitment**

- Notify public of accommodation for applicants with disabilities
- If select an applicant to participate in an assessment or selection process, inform applicants that accommodations are available upon request in relation to the materials or the processes
- If an accommodation request is received, consult with the applicant about suitable accommodation and take into account accessibility needs

Employment

- Recruitment (contd.)
 - Offers of employment
 - Include notice of your policies for accommodating employees with disabilities

Employment supports

- Inform employees of your policies used to support employees with disabilities including a policy on providing job accommodations that take into account an employee's accessibility needs
- Inform new hires
- Inform employees when job accommodation policies are changed
- Upon request:
 - Consult with the employee
 - Accessible format
 - Communication supports

Individual accommodation plans (small employers are exempt)

Establish a process for developing individual accommodation plans for employees with disabilities

Contents –

- How the employee can participate in developing the plan
- How the employee will be assessed
- How outside medical and other experts will be involved
- How the employee can ask for union participation
- How the privacy of the employee's personal information will be protected
- If the plan is denied, how reasons for denial will be forwarded to the employee

Return to work (small employers exempt)

- Return to work process for employees who are off due to disability and require disability related accommodation to return to work
- Outline the steps
- Use individual accommodation plans as part of the process
- Accommodations may be temporary or permanent
- Often appropriate to work with the employee's doctor on consent

Performance management

- If you use performance management
- Take accessibility needs of employees with disabilities into account
- Take accommodation plans into account

Career development

- If you provide career development and advancement ...
- Take accessibility needs of employees with disabilities into account
- Take individual accommodation plans into account

Returning sick and disabled employees to work

Jeff Mitchell

09 October 2013

Returning sick/disabled employees to work

- **Before considering how or whether to accommodate, ensure you have a complete understanding of what you are accommodating. Ensure you are satisfied as to the need for accommodation:**
 - Is it a prohibited ground?
 - Do you have sufficient information to justify the accommodation claimed?
 - If someone has been absent for a lengthy period, do not rely on old medical reports.
 - Request a medical report, if appropriate, to ensure you are satisfied as to the nature of the restriction and what the specific nature of that person's needs are.
 - Ask for the prognosis and restrictions/limitations, NOT the diagnosis.
 - Consider including a Job Description/Requirements Summary.
 - After all that, consider independent medical examination.

Reasonable accommodation

- THEN: Review what accommodation would/could be appropriate:
 - Ask yourself whether the person can/should return at this point
 - Sometimes its better to delay the return than to have a failed/unduly onerous return
- “Reasonable”, not “perfect”, accommodation must be provided where possible, which meets both the individual’s and the organization’s needs.
- All alternative means of accommodation should be reviewed
- If the appropriate position is a lower paying one, it is acceptable to pay the lower rate, **if** there are no suitable positions at the person’s regular rate (subject to any collective agreement provisions)

Reasonable accommodation

- Obligation on the person seeking accommodation to co-operate, and accept reasonable accommodation
- If an offer of reasonable work is made and the person refuses without reasonable basis, employer's duty to accommodate may be satisfied

Dealing with the “revolving door”

- Where you have an employee who routinely takes short periods off, start with active management, distinguishing between “innocent absenteeism” and disciplinary absenteeism:
 - Coaching and counseling vs. discipline – get to the underlying root of the issue
 - Making expectations clear: requesting medical notes
 - Pointing out the “Monday and Friday” disability
 - Manage the disability, deal with the poor performance

Accommodation of disabilities

Hydro-Quebec v. Syndicat des employées de techniques professionnelles et de bureau d'Hydro-Quebec, section locale 2000, 2008 SCC 43

- “The employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee’s workplace or duties to enable the employee to do his or her work.”

Accommodation of disabilities

- **Disability and Performance Standards**

- *CAW-Canada, Local 1524 and Zettel Manufacturing Ltd.* [2006] OLAA No. 333 (F. Reilly)
- Employee was unable meet minimum production standards due to limited mental capacity
- Received progressive discipline
- Employer not made aware of employee's condition, and terminated employee, based on progressive discipline
- Tribunal ordered reinstatement; dismissal was discriminatory

Innocent absenteeism

Schulz v. Lethbridge Industries Ltd., 2012 AHRC 3

- Mr. Schulz was employed as a sprocket manager.
 - He was absent from work approximately 25% of the time.
 - He suffered from chronic depression, debilitating migraine headaches and a recurring hernia problem.
 - He was terminated in late March 2006 for excessive innocent absenteeism.
-
- Tribunal: employer failed to establish a “bona fide occupational requirement” for the discrimination since it had not disclosed or previously enforced attendance standards and essentially withdrew accommodations without any examination of alternative methods of accommodation or inquiry about the employee’s health issues.

Innocent absenteeism

Re Sault Area Hospital and CAW-Canada, Local 1120 (Thompson Grievance), 2010 CanLII 15871

- Ms. Thompson was employed as a records technician.
- During April 2003-March 2008, she missed an average of 63 days per year (24% of the time).
- Her absences were caused by a variety of health problems and she was terminated in June 2008 because of her excessive absenteeism.

Innocent absenteeism

- Arbitrator ruled that the employer justifiably terminated Ms. Thompson for innocent absenteeism:
 - Excessive absenteeism
 - Future attendance not likely to improve
 - Employee warned her continued employment in peril
 - Suitably accommodated position to point of undue hardship
 - Relationship undermined: any further toleration of such absenteeism would have been an undue hardship

Bundling job duties

- ***Bowater Canadian Forest Products (October 23, 2003)***
 - Chip hauling truck driver was required to work three week, 12 hour shifts.
 - March 1999, grievor was diagnosed with sleep apnea and sleep disorder.
 - Three month disability leave.

Bundling job duties

- Employer tried to accommodate employee by rescheduling shifts.
- Employer offered employee welding work on day shift.
- Employee no longer responded to offers.
- Company assumed employee had quit.
- Employee then complained that there had been a failure to accommodate.

Tribunal found:

- Employer had considered alternative positions within the Company.
- Adding another day-shift would amount to undue hardship.
- Displacing another employee would amount to undue hardship.
- Would disrupt collective agreement and cause morale problems.
- **There is no general obligation for an employer to “cobble together” parts of other jobs to create a position for disabled employee.**

Duty to accommodate

Bundling Job Duties

- *Vanegas v. Liverton Hotels International Inc.*, 2011 HRTO 715
 - Tribunal held that the duty to accommodate may, in appropriate circumstances, require an employer to “bundle” and in essence create a new position for a disabled employee, unless to do so would create undue hardship for the employer.
 - In this case, duty to accommodate did not require employer to create a permanent job comprised of a limited number of duties within his restrictions since this would not result in the former employee performing a useful or productive job.

Duty to accommodate: Best practices

- **Actively investigate the issue of accommodation:**
 1. Clarify ambiguous aspects of employee's condition.
 2. Consider whether it is possible to reconfigure jobs.
 3. Consider whether to offer other jobs.

Duty to accommodate: Best practices

- **Engage the employee in discussions – he/she has an obligation to facilitate accommodation by:**
 - Providing information and documentation so that the need for accommodation is clearly justified, and the restrictions clearly outlined
 - Making suggestions as to accommodation that he/she thinks are suitable
 - Accepting “reasonable” (even if not perfect) accommodation
 - If an offer of reasonable work is made and the employee refuses without reasonable basis, employer’s duty to accommodate may be satisfied

Duty to accommodate: Best practices

- **Keep Records of every step in the process:**
 - Validate the need to accommodate, if necessary through use of an independent medical examination
 - List of options considered
 - Why the options were not viable, either from the employee's perspective or your perspective:
 - Cost
 - Disruption to organization
 - Disruption to other employees
- **The Tribunal will not accept “impressionistic” responses; it looks for hard facts**

Non-solicitation and non-competition covenants: Making them enforceable

Andy Pushalik

9 October 2013

Agenda

- Legal Protections Even Without a Written Agreement
- Pre-Drafting Considerations
- The Four Commandments of Drafting Restrictive Covenants
- How to Make Your Restrictive Covenants Enforceable

Legal protections even without a written agreement

- The Ordinary Employee
 - General duty of good faith and fidelity
 - Employees cannot compete against their employer during the employment relationship
 - Confidential Information

Legal protections even without a written agreement

- Fiduciary Employees
 - Confidential Information
 - Non-Solicitation of employees
 - Non-Solicitation of clients
 - Seizing a corporate opportunity
- Riding the coat-tails of the fiduciary

Pre-drafting considerations

- Do you need a non-competition or non-solicitation covenant?
- When to enter into a non-competition or non-solicitation agreement

The four commandments of drafting restrictive covenants

- The clause must be reasonable
- The clause must not go further than necessary
- The clause must protect a legitimate proprietary interest
- The clause must be clear

Commandment #1: The clause must be reasonable

- “...the word one finds repeated throughout the cases is the word ‘reasonable’”
 - *J.G. Collins Insurance Agencies v. Elsley*, [1978] 2 S.C.R. 916
- Geographic Scope
 - Non-Competition Covenants vs. Non-Solicitation Covenants
- Temporal Scope
- Business Scope

Commandment #2: The clause must not go further than necessary

- What do you need to protect?
 - Nature of the business to be protected
- Where do you actually do business?
- Sale of Business vs. Employment Context
 - *Guay inc. v. Payette*, 2013 SCC 45

Commandment #3: The clause must protect a legitimate proprietary interest

- No property in potential customers
- Client relationships
- Client preferences

Commandment #4: The clause must be clear

- Clear Definitions
 - “Business”
 - “Activities”
- “No Deal Clauses”
- “Blue-Pencil” and Notional Severance
 - *KRG Insurance Brokers (Western) Inc. v. Shafron*, 2009 SCC 6

Enforceable or not?

“Adam Paton agrees that in event of the termination of this agreement by either party and after the term hereof has expired that he will not engage in tattooing for gain nor will he be a proprietor of, nor employee, servant or contractor of any person or corporation engaged in the operation of a tattooing business within a 200 mile (320 km) radius of the City of Yorkton for a period of 3 years commencing the final date at Drillers Tattoos.”

Enforceable or not?

“The Employee shall not, without the prior written consent of the Employer directly or indirectly, solicit [...], any person, firm, company, entity or other party soliciting, serving or catering to any of the customers of the Employer or its affiliates who dealt with Employee during the term of his employment, if such soliciting, serving or catering to is in any way directly or indirectly related to the business of the Employer or its affiliates while the Employee is in the employ of the Employer and for a period of two (2) years from the date that the Employee ceases to be employed by the Employer or its affiliates in and throughout the territory of Canada and the United States of America.”

Enforceable or not?

“I agree that if my employment is terminated for any reason by me or by the Company, I will not, for a period of one year following the termination, directly or indirectly, for my own account or as an employee or agent of any business entity, engage 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 was an employee of the Company, or take any action that will cause the termination of the business relationship between the Company and any customer, or solicit for employment any person employed by the Company.”

Making your covenant enforceable

- Set out the reasons for the non-competition/non-solicitation covenant
- Don't speculate – “businesses which may compete”; “potential customers”
- Define Terms
 - Business
 - Solicitation

Making your covenant enforceable

- Narrow the scope
 - Clients that the employee dealt with during the last two years of his employment
 - The shorter the better
- Pay the employee during the non-competition or non-solicitation period

Thank you

The logo for Dentons, featuring the word "DENTONS" in white, uppercase letters inside a purple arrow-shaped box pointing to the right.

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