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a new standard of accessibility in Ontario – is your company ready?

In 2005, the Ontario Government enacted the *Accessibility for Ontarians with Disabilities Act, 2005* ("AODA") to develop standards designed to eliminate barriers to accessibility for Ontarians with disabilities in the areas of customer service, employment, information and communication, transportation and the built environment. Collectively, the accessibility standards will have significant legal and financial implications on how organizations do business in Ontario.

The Customer Service Standard ("CSS") is the only accessibility standard in force, to date. However, the Integrated Accessibility Standards, which incorporate the employment, information and communication and transportation standards, will become law on July 1, 2011. Please find below a summary of the key requirements of the CSS with a similar summary of the Integrated Accessibility Standards to follow.

accessible customer service by January 1, 2012

The CSS requires organizations to accommodate the needs of disabled customers in the provision of goods and services.

application

Since the AODA is Ontario law, the CSS only applies to provincially-regulated employers in Ontario. With few exceptions, this standard applies to organizations that provide goods and services to the public or a third party business or organization and have at least one employee in Ontario ("Provider"). In addition, where a Provider contracts with another organization to provide goods and services on its behalf, the Provider must ensure that the third party organization also complies with the CSS.

By January 1, 2010, almost all public sector organizations in Ontario were required to comply with the CSS and by January 1, 2012, all private sector organizations in Ontario will have to do the same.

overview of obligations

The CSS imposes the following principal obligations upon Providers:

- *Policies and Procedure* – Establish policies and procedures regarding the provision of goods and services to people with disabilities, including in respect of:
  - use of assistive devices and services available to the public; and
  - support persons' and service animals' access to business premises.
- *Communication* – Develop alternate modes of communication with disabled individuals.
- *Notice of Disruption* – Develop a procedure to notify of a disruption to a facility or service and identify alternative facilities or services.
- *Training* – Provide training on the following issues to all individuals who may interact with the public or influence the development of

policies, practices and procedures related to customer service:

- the purpose of the AODA and the requirements of the CSS;
- policies and procedures;
- interacting and communicating with disabled people who have different restrictions, use assistive devices or have a service animal or support person;
- use of assistive devices available on the organization's premises; and
- what to do if a disabled person is having difficulty accessing the Provider's services, including advising of potential accommodations.

- *Feedback* – Develop a process for receiving and responding to feedback on the provision of goods and services to people with disabilities.
- *Documentation/Accessibility Report* – If the Provider is a private sector organization with 20 or more employees or a designated public sector organization, it must disclose additional documentation and file an accessibility report with the Ontario Government.

While the AODA is premised on a system of self-certification, due to significant financial penalties, non-compliance is not an option for most employers. Offences carry significant fines of up to $50,000 for a director or officer of a corporation and $100,000 for a corporation, for every day or part day that the offence occurs.

implications for employers

There is no single way to provide accessibility for all disabled persons and, as a result, compliance with the AODA, and accessibility more generally, is an ongoing process.

All Providers will have to comply with the CSS in less than one year. Considering the significant obligations prescribed in this standard, Ontario employers are well advised to contact their legal counsel now to assist with developing and implementing the preparation of policies, procedures and conducting a training program.

by Cheryl Armstrong and Darryl R. Hiscocks

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PRPPs are coming

Based on growing concern about the adequacy of employment-related retirement planning opportunities and the level of retirement savings among Canadians, in December 2010, the federal Department of Finance released its "Framework for Pooled Registered Pension Plans". Federal and provincial Finance Ministers chose to focus on developing a framework for pooled registered pension plan ("PRPPs") because PRPPs were seen as the best way to quickly provide an "accessible, straightforward and administratively low-cost retirement option". The Finance Ministers also agreed to continue considering other options including enhancing the Canada Pension Plan, tax incentives and registered pension plan reform.

Since the election of the majority government, the Department of Finance Canada has issued a consultation paper entitled "Tax Rules for Pooled Registered Pension Plans (PRPPs)" (the "Consultation Paper") requesting comments by August 12, 2011 from key stakeholders.

Federal Minister of State (Finance), Ted Menzies has stated that "all provinces have agreed that the PRPP is the best way forward", although the Ontario government has stated that it still favours expanding the CPP. Following the responses to the Consultation Paper, the federal government expects to move forward with enabling legislation as soon as possible, although not likely before the 2012 budget.

The proposed PRPP structure would be similar to a large, pooled defined contribution ("DC") pension plan, administered by a qualified financial institution that would take on most of the responsibilities that employers would normally bear in administering a registered pension plan ("RPPs"). The large pool is expected to lower investment management costs for participants. The role of the third party administrator is expected to reduce complexity for employers. As for RPPs and registered retirement savings plans ("RRSPs"), contributions to PRPP and investment earnings in and individual's PRPP are tax deferred until withdrawn from the PRPP.

Overall, the PRPP concept is expected to succeed in increasing the level of retirement savings for those who have not saved enough for retirement by offering self-employed individual and employees of employers who do not provide a pension plan with a disciplined savings program and reasonable investment returns on savings.

As a general rule, PRPPs would be subject to similar tax rules that now apply to defined contribution registered pension plans (DC Plans). Not unlike with DC Plans and RRSPs, administrators of PRPPs would be limited to a restricted group of financial institutions who would be required to administer the plan in compliance with law and be responsible to various reporting and compliance requirements. The Consultation Paper seeks input on nine different technical design features including who can be an administrator, contribution limits and qualified investments for PRPPs.

While many details are yet to be finalized, an employer's responsibility is expected to be limited to choosing an appropriate PRPP for its employees; enrolling employees in the PRPP and remitting employee contributions (and employer contributions, if any) to the PRPP Administrator - a far cry from an employer's obligations in sponsoring and administering a defined benefit or DC RPP. Although whether or not regulations would require a PRPP to be voluntary or mandatory is within the jurisdiction of each province, the success of the concept appears to depend on requiring an employer that does not sponsor an RPP to at least provide its employees with access to a PRPP. Employer contributions would likely be voluntary. Employees, once enrolled, would be allowed to opt out of the PRPP.

Although the government anticipates that, once enrolled, individuals will not opt out of PRPPs, this presumes that lack of access to retirement savings opportunities or products kept individuals from saving for retirement prior to the advent of PRPPs. It remains to be seen whether or not the opt out rate will be minimal once employees are enrolled. That said, a PRPP does offer employers with the ability to offer employees a pension plan without the onerous employer administration issues that accompanied such an offer. Otherwise, we expect that the success of the PRPP concept in improving the adequacy of retirement savings for Canadians depends on whether the PRPP provides value in accordance with the needs and objectives of each of the key stakeholders.

by Mark Rowbotham & Karen Shaver

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social media policies in the workplace: what works best?

The use of social media in the workplace has exploded in recent years and employers are struggling to keep up. With easier accessibility to the internet, the popularity of smart phones and the introduction of new social media outlets, it is not surprising.

Conduct on social networking sites has recently been the subject of litigation in Ontario, British Columbia and Alberta. In *Lougheed Imports Ltd.*, two employees employed by West Coast Mazda, an automotive detailing and accessory shop in Pitt Meadows, B.C., were terminated as a result of a series of Facebook postings described as "offensive, insulting and disrespectful." Both employees were strong supporters of a union drive, and both were Facebook friends with a manager at the company. The manager was disturbed to find that the employees' Facebook postings targeted management, the business and the products sold by the business.

The employer conducted an investigation and met with each employee. In the meetings, the employees were provided copies of their Facebook postings. Both employees denied making the postings. Following the meetings, both employees were terminated. The union filed unfair labour practice complaints with the British Columbia Labour Relations Board, alleging the employer did not have just cause for the terminations. The Board dismissed the complaints, finding that "[t]he fact that the complainants had no previous discipline and the employer knew they were key supporters of the union does not outweigh the fact that the employer had never encountered similar conduct, and the work offence was serious insubordination and conduct damaging to the employer's reputation." The Vice-Chair relied on the Ontario decision in *Leduc v. Roman*, and determined that the employees could not have an expectation of privacy as Facebook postings were "akin to comments made on the shop floor."

The same issues were also dealt with in *Alberta v. Alberta Union of Provincial Employees*, where an administrative employee in the Alberta Pubic Service

was dismissed after her employer had become aware of the contents of her personal blog. The blog contained unflattering comments about a number of her co-workers and management. The union, in challenging the dismissal, argued that the discipline was excessive and that the employment relationship could be restored. The arbitration board ruled that the conduct of the grievor was serious enough to undermine the employment relationship beyond repair, justifying discharge. The grievor had been unapologetic and defiant about her blog, demonstrating little awareness of the hurt that she had caused. She also defended her freedom of expression, refused to remove the blogs, and threatened more postings after she was told that she had been terminated.

The union applied for judicial review of the arbitration board's decision and the Alberta Court of Queen's Bench quashed the award on the ground that the arbitration board erred in finding that the employer had complied with the disciplinary process set out in the collective agreement. The Court did not, however, address whether the dismissal was just in the circumstances. The judicial review and a subsequent appeal to the Alberta Court of Appeal were both dismissed. The reasoning in the initial arbitration appears to continue to be good law in Canada as it has been followed in later cases.

In a different B.C. case, *EV Logistics*, the employee had been discharged because of the contents of his blog which contained violent fantasies and racist comments. The blog also identified the company as the blogger's employer. The employer argued that discharge was justified because of the offensive, racist and hateful entries in the blog and because of the harm to the employer's legitimate business interests and its reputation. The union argued that the postings on the blog occurred entirely off-duty and that there was no connection between the business interests of the employer and the employee's conduct. The arbitrator held that there was a connection between the blogging and the business interests of the company; however, there were sufficient mitigating factors to justify a reduction in the disciplinary penalty of discharge and the grievor was reinstated without compensation.

In *Chatham-Kent*, an Ontario employee was dismissed for breach of the confidentiality agreement, insubordination and conduct unbefitting a personal care giver because of the contents of her blog. The employee posted comments about her employer and the conditions in the retirement home as well as personal information about the residents in the retirement home without their consent. The union argued that the discipline was excessive. In dismissing the grievance, the arbitrator held that the blog comments were insolent, disrespectful, and contemptuous of management and were an attempt to undermine management's reputation and authority. The grievor also breached the employer's confidentiality agreement by disclosing personal information of residents on a website she had created which was accessible by the general public.

The emerging framework from recent cases was confirmed by the decision in *Wasaya Airways LP.* An airline pilot with a company owned by a number of First Nations was discharged after posting "extremely serious, offensive and derogatory comments regarding the Company's owners and customers" (i.e. aboriginal people) on Facebook. The pilots union argued that the discipline was excessive. The arbitrator cited *Alberta* and *Chatham-Kent* for the proposition that "where the internet is used to display commentary or opinion, the individual doing so must be assumed to have known that there is potential for virtually world-wide access to those statements." The arbitrator concluded that while the grievor's misconduct was deserving of some penalty, the postings were intended to be humorous and there were several mitigating factors. The arbitrator further noted that the grievor would be unable to work effectively as a pilot with either the owners of the airline or its customers given the nature of the posting and

ordered that a four-month suspension with compensation be substituted for the discharge but on condition that the grievor resign.

Various workplace issues arising from the recent riot in downtown Vancouver following Game 7 of the Stanley Cup final are yet another testament to the power of social media. A number of people were terminated from their employment after social networking websites revealed pictures of their participation in the riot or their pro-rioting declarations were discovered. According to CBC News, more than one million photos and 1,000 hours of video were submitted as evidence following the riot. These photos and videos have spread across social media websites in an effort to label and shame those responsible. Facebook groups such as "identify the rioters" have proven to be very helpful in aiding the police. Furthermore, there is now a permanent and publicly-available record which may impact both continued employment and turn up on future online background checks.

The various Canadian decisions and recent events demonstrate the need for both employees and employers to understand how social networking fits into traditional employment and labour concepts. Social media policies need to be integrated into companies' existing policies on protection of privacy and confidential information, workplace safety, conduct in the workplace and discipline. When creating a social media policy, there is no one-size-fits-all plan. Regardless of the type of policy implemented, it is essential that the policy be well understood by employers and employees alike. We offer the following advice on how to create an efficient and effective social media policy:

- When drafting a social media policy, it is important to involve all departments. Information technology, human resources, public relations/marketing and corporate managers and executives should all work together to create a policy that works for everyone.
- Social media policies should be broad enough to cover social media technology that will be introduced in the future. Furthermore, the policy should not only cover the material on the company blog, or company Facebook or Twitter account, but should cover the appropriate use of one's personal blog, Facebook page, or Twitter account. It must also be clear that the policy is not restricted to use from work computers and applies to use of social media on employee time.
- Employers should implement a positive social media policy. Recognizing the pervasiveness of new technologies, allowing access to social media in moderation could be the answer so long as it does not affect productivity and the company is protected.
- Employees should be kept informed about the legal and security risks involved in social networking and what they can do to protect themselves and the company. Emphasize the need to use caution and good judgment as comments posted on social networking sites can spread despite the original posting being removed. It is important to encourage employees, if mentioning the company name, to use a disclaimer that the opinions expressed are not those of the company.
- The organization should define what is and is not considered "acceptable use" both on the company's network and outside of it. It should be clear that company systems may not be used for illegal activity such as copyright/plagiarism and downloading pirated software.
- The policy and its enforcement should be clear to all employees. It is important to clarify what disciplinary action will be taken, up to and including termination, if policies are not followed.
- A social media policy should be written and it is a good idea to have employees sign off on it or track acceptance or receipt to ensure they have read its contents.

- The policy should be simple and accessible. Employees will not be inclined to read through an overwhelming manual. Circulating the policy regularly and having the policy readily available both electronically and in hard copy are also encouraged.

by George Waggott and Jennifer Bond

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employees requesting to return to work after a disability leave? employers, make appropriate inquiries!

The British Columbia Court of Appeal recently confirmed the legal test for *prima facie* discrimination in the context of an employee's request to return to work after being on disability leave. In a unanimous decision from the BC Court of Appeal, the Honourable Madam Justice Kirkpatrick, writing for the Court, held that there remains an obligation on an employer to make inquiries of an employee's condition before they can simply deny an employee's request to return to work from a disability leave.

In *Boehringer Ingelheim (Canada) Ltd./Ltée. v. Lynda Kerr* 2011 BCCA 266, the Court dismissed the employer's appeal of a decision from the Supreme Court that had similarly dismissed the employer's judicial review of a decision from the British Columbia Human Rights Tribunal ("HRT"). The HRT held that the employer had discriminated against their employee, Lynda Kerr.

Ms. Kerr was hired by Boehringer Ingelheim (Canada) Ltd./Ltée ("BICL") in 1996 as a pharmaceutical sales representative. As part of her job, she was required to drive a vehicle and use a computer. In 1999, after being diagnosed with cataracts, she was informed by her doctors that she would likely lose her sight within two years. Ms. Kerr indicated to her employer that she would resign, however, BICL recommended that she apply for disability leave. Ms. Kerr did just that.

Fortunately for Ms. Kerr, the diagnosis she received from her doctors which predicted that she would completely lose her sight did not materialize.

In 2002, Ms. Kerr was informed by her insurer, Canada Life, that her long-term disability benefits would cease because pursuant to the policy, she was capable of working at some occupation. BICL became aware that Ms. Kerr wanted to go back to work and by as early as 2004, BICL was informed by Ms. Kerr's family doctor that she may be capable to return to work.

Despite this knowledge, BICL did not make further inquiries with Ms. Kerr or anyone else about their employee's capability to return to work. As a result, since she was not receiving disability benefits and was not working at BICL, Ms. Kerr was without income. In the meantime, she filed a complaint with the HRT alleging that she was discriminated against based on her disability and contrary to s. 13 of the

Human Rights Code, R.S.B.C. 1996, c. 210, which provides in part:

(1) a person must not

> refuse to employ or refuse to continue to employ a person, or
>
> discriminate against a person regarding employment or any term or condition of employment
>
> because of the…physical disability…of that person.

In 2006, BICL gave Ms. Kerr a return-to-work plan (the "Plan"), however, the Plan was set to commence during her scheduled hearing before the Human Rights Tribunal, and as a result, Ms. Kerr refused to accept it.

After a lengthy hearing before the HRT, the Tribunal held that Ms. Kerr demonstrated on a balance of probabilities a *prima facie* case of discrimination as the employer's refusal to allow Ms. Kerr to return to work after she was on medical leave was discriminatory and contrary to Section 13 of the *Human Rights Code*. At paragraph 559, the Tribunal cited *McLellan v. MacTara Ltd. (No. 2)* (2004), 51 C.H.R.R. D/103 (N.S. Bd. Inq.) for authority that:

> an employer has an obligation to patiently and carefully assess a disabled employee's condition and to assess her ability, which necessarily involves a dialogue with the employee, including being aware of the dynamic nature of an employee's medical condition which may change.

The Tribunal ordered BICL to pay Ms. Kerr compensation for lost wages (subject to certain deductions), compensation for lost bonuses, compensation for loss to her pension, and $30,000 as compensation for injury to her dignity, feelings, and self-respect, plus applicable interest.

As a result, the employer sought a judicial review of the HRT decision on the basis, among other things, that the HRT applied the incorrect *prima facie* legal test for discrimination. Both the Supreme Court and the Court of Appeal held that the HRT had appropriately applied the proper three-part test for determining whether there is *prima facie* discrimination as enunciated in *Communications, Energy & Paperworkers' Union of Canada (CEP) v. Domitar Inc.*, 2009 BCCA 52 at para. 36 which sets out that the complainant must prove that:

- he or she had (or was perceived to have) a disability;
- he or she received adverse treatment; and
- his or her disability was a factor in the adverse treatment.

In conclusion, employers must conduct their own thorough assessments of all employees requesting to return to work from a disability leave before simply denying a return to work. The current case law establishes that an employer is entitled to carefully evaluate an employee's capabilities before accommodating an employee, however, the onus falls on the employer to independently make their own inquiries.

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enforceability of non-competition and non-solicitation covenants in British Columbia

The enforceability of non-competition and non-solicitation covenants in employment agreements often arises as an issue for employers following the departure of an employee who engages in a competitive business enterprise.

A series of recent British Columbia court decisions serve as an important reminder to employers that following the departure of an employee, a non-competition covenant is likely to be upheld only in very limited circumstances. The decisions also confirm that although non-solicitation covenants are more likely to be enforced by a court, this may not be the case if the provision goes beyond what is strictly necessary to protect the legitimate business interests of the former employer.

These recent BC court decisions follow the lead of the British Columbia Court of Appeal in an earlier decision *Valley First Financial Services Ltd. v. Trach.* The court in *Valley First* considered the duties and obligations of former employees of a general insurance agency who left their employment to establish a competing business. Each of the employees had signed a non-competition and non-solicitation covenant.

In holding that both the non-competition and non-solicitation covenants were unenforceable, the court in *Valley First* emphasized that following the end of an employment relationship, a non-competition covenant will be upheld only where the employer can show the existence of a proprietary interest which is entitled to protection and where the restrictions in the covenant are no wider than is necessary to protect that interest. The Court also stated that a non-competition covenant will generally not be enforced in circumstances where a non-solicitation covenant will adequately protect the employer, or in circumstances where the restriction would be against the public interest. Finally the court stated that non-competition covenants are more likely to be upheld following the sale of a business than in an employment relationship.

The court in *Valley First* also held that the non-solicitation covenant was overly broad and hence unenforceable, since it prohibited the solicitation of *any* customers of the former employer. The court observed that if the non-solicitation covenant had been restricted to customers with whom the departing employees had business dealings, the covenant would likely have been found to be reasonable and thus upheld.

The legal principles which were set out in *Valley First* have subsequently been first followed and applied by British Columbia courts in a number of recent decisions.

In *MacMillan Tucker MacKay v. Pyper* (2009) the BC Supreme Court considered a non-competition provision which restricted an employed lawyer from competing in the practice of law for a period of three years within a five-mile radius of the office of his employer. The court held that this restriction, which completely prohibited the employee from engaging in the practice of law within a specific locale, was unreasonable since it went beyond what was necessary to protect the legitimate interests of the employer in its own client relationships. The court suggested that a more limited covenant which restricted the employee from soliciting clients of the law firm may have been considered reasonable.

In a 2010 decision, *Phoenix Restoration Ltd. v. Brownlee,* the BC Supreme Court considered non-competition and non-solicitation provisions signed by a project manager employed by an insurance property restoration business. The court held that the non-competition provision was

overly broad and hence unenforceable since it prevented the employee from working in the insurance property restoration business generally, even though his employer was involved only in a specific niche market of that business. The court also held that the non-solicitation provision was unenforceable since it prohibited the employee from soliciting any customers or prospective customers of his former employer, including those with whom the employee had no business dealings at all during the course of his employment. The court stated that if the non-solicitation clause had been restricted only to the customers with whom the employee had dealt during the course of employment, that such a clause would have likely been enforceable.

In a 2011 BC Supreme Court decision, *Edward Jones v. Mirminachi*, in issue was the enforceability of a non-solicitation clause which prohibited the employee, who was a financial advisor employed by a brokerage firm, from soliciting any client of the firm for a period of one year following termination "…who you served or whose name became known to you during your employment…". The court held that since the prohibition against solicitation did not apply to all clients or perspective clients of the brokerage firm, but only to those clients whom the employee had served or whose names became known to the employee, that the non-solicitation clause was not unreasonable, and hence was enforceable.

What lessons should be learned by employers from these cases? First, the use of "boilerplate" language which seeks to cast as wide a net as possible should be avoided. Instead when negotiating either a non-competition or a non-solicitation covenant, employers should take a more targeted approach to specifically identify the proprietary or business information which must be protected. Second, since a non-competition covenant may be held to be unenforceable by a court no matter how narrowly worded, employers should consider whether a well drafted non-solicitation covenant will be a better solution. Finally, employers should take care to ensure that any non-competition or non-solicitation covenant is clear and unambiguous; otherwise the agreement will almost certainly be determined unenforceable by a court.

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recent notice period cases in eastern Canada

Case Name	Age	Position	Salary	Length of service	Notice Period	Other factors
Love v *Acuity Investment Management Inc.*, 2011 ONCA 130	50	vice-president at an investment management firm	average of $633,548/ year	2.53 years	9 months	
Harvey v. *Shoeless Joe's*, 2011 ONSC 3242	41	vice- president operations for a restaurant chain	proposed salary of $130,000/ year plus benefits and 15% bonus	5.5 months	2.5 months (11 weeks)	
Roberts v *St. Joseph's Healthcare Hamilton*, 2011 ONSC 3885	48	project manager for a hospital	$87,000/year plus benefits and pension; $1690/ week plus $303/ week pension and benefits	25 months	4 months (17 weeks)	
Di Tomaso v *Crown Metal Packaging Canada LP*, 2011 ONCA 469	62	mechanic and press maintainer for a manufacturer of metal packaging	unavailable	33 years	22 months	
Strizzi v *Curzons Management Associates Inc.*, 2011 ONSC 4292	34	manager of a health and fitness centre	$5000/month	6 years	7 months	constructive dismissal
Jensen v *Schaeffler*, 2011 ONSC 1342	48	assembly operator then worked in purchasing department for an automotive parts supplier	$22.40 / hour	28 years	18 months	physical limitations due to workplace injury

recent notice period cases in British Columbia and Alberta

Name	Position	Salary	Age	Service	Notice
Beggs v. Westport Foods Ltd., 2010 BCSC 833	Meat and deli department clerk	$19,981.87	52	7 years	11 months
Haddock v. Thrifty Foods (2003) Ltd., 2011 BCSC 922	Manager of Grocery Store (supervised 3-4 employees)	$19.95 per hour	39	6 years	12 months
Rachert v. Teligence (Canada) Ltd., 2011 BCPC 8	Senior manager of promotions and brand public relations	$93,600	46	9 years	9 months
Whiting v. Boys and Girls Club Services of Greater Victoria, 2011 BCSC 681	Supervisory position (oversaw 20 frontline programs)	$52,000	57	13 years	18 months
Elgert v. Home Hardware Stores Ltd., 2011 ABCA 112	Supervisor at Home Hardware Stories Ltd.	$60,000	48	17 years	24 months
Lavallee v. Siksika Nation, 2011 ABQB 49	Medical doctor	$92,449.23	60	10 years	12 months

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