BIRD RICHARD
LAWYERS FOR EMPLOYERS

EMPLAWYERS' UPDATE

Fall 2009

A Quarterly Newsletter on Labour and Employment Law Issues

In this Issue

Bird Richard
130 Albert Street, Suite 508
Ottawa, Ontario K1P 5G4
T 613.238.3772
F 613.238.5955
www.LawyersForEmployers.ca

The *Accessibility for Ontarians with Disabilities Act*: What it Means for Employers

Background: The *Act*

The *Accessibility for Ontarians with Disabilities Act, 2005* (*AODA*) was enacted with the intention of making Ontario completely accessible to people with disabilities by the year 2025. The legislation seeks to attain this goal by establishing standards to regulate accessibility in the following areas: employment, the provision of goods and services, transportation, information and communications, and the built environment.

At this time, only one accessibility standard, the Accessibility Standards for Customer Service (see below), has been enacted as a Regulation. However, four other standards are in various stages of development, all of which will have an impact on employers when they are made law.

Initial Proposed Employment Accessibility Standard

The Employment Accessibility Standard will apply to all employers with paid employees, but not to those who only employ immediate family members or unpaid volunteers or interns.

Deadlines for compliance with the standard will be imposed based on the size of the employer's organization. The Committee has created the following six classes of employers:

- Class A: employers with 1 to 5 private sector employees
- Class B: employers with 6 to 49 private sector employees

- Class C: employers with 50 to 99 private sector employees
- Class D: employers with 100 to 200 private sector employees
- Class E: employers with more than 200 private sector employees
- Class F: Ontario's public sector organizations

While the proposed deadlines for each class of employer to achieve compliance vary based on the above classes, the general requirements under the Initial Proposed Standard relate to the following:

- the creation of accessible employment policies and the provision of training for employees on those policies;
- recruitment, assessment, selection and hiring (including the development of a procedure to accommodate disabled applicants, documenting essential job duties for each job description, and making employment-related information accessible); and
- retention (including the provision of an accommodation plan for individuals where applicable, the provision of accessible information regarding advancement opportunities, and the development of return-to-work procedures).

While the final Accessible Employment Standard has not yet been enacted, the public review period has ended and the standards development committee will soon reconvene to prepare the final standard.

The Impact of Other Accessibility Standards on Employers

The Employment Accessibility Standard is not the only aspect of the *AODA* that will have an affect on Ontario employers. Employers should be aware of their potential obligations under the following standards:

1. Accessibility Standards for Customer Service:

Already enacted in law, this Regulation requires businesses to ensure that the goods and services they sell are accessible to all members of the public.

Ontario public sector organizations and goods and services providers with 20 or more employees must meet the following requirements:

- Establish policies, practices and procedures to govern the provision of goods and services to persons with disabilities;
- Establish policies, practices and procedures to ensure that service animals and support persons are permitted to enter the premises, or alternative assistive measures are available;
- Give notice when there are temporary disruptions to facilities or services usually used by persons with disabilities; and
- Provide and keep records of training for employees about the provision of goods and services to people with disabilities.

Public sector organizations will have until **January 1, 2010** to bring themselves into compliance with the above requirements, while private sector businesses will have until **January 1, 2012**.

2. Proposed Transportation Accessibility Standard:

A Final Proposed Transportation Standard, which sets out accessibility requirements for businesses that provide passenger transportation services, has been submitted to the Minister and is awaiting enactment. The transportation standard aims to make passenger transportation services fully accessible to persons with disabilities.

The proposed standard lists a number of general requirements. Employers are obligated to establish and document accessibility training policies and procedures for their employees. In addition, transportation service providers will have one year from the time the standard is enacted to create and implement an emergency preparedness and response policy that takes into account the varying abilities of passengers. They must also establish policies and procedures to ensure that persons with disabilities are able to board, use, and de-board the conveyance safely. Most conveyance operators will be required to provide boarding and de-boarding assistance to passengers who require it, provide for the stowing of assistive devices, audibly and visually announce all stops, and maintain accessibility-related facilities and equipment in good working order.

The transportation standard also mandates that passengers with disabilities must not be charged a higher fare than passengers without a disability, and that they must not be charged a fee for the stowage of assistive devices. Further, a support person accompanying a passenger with a disability must not be charged a fare.

The Proposed Standard will also have an impact on the physical composition of conveyances used by the

passenger transportation services industry. There are specific design requirements applicable to ramps, stairs, handrails, flooring, aisles, stop request devices, and lighting- and colour-contrasting. Transportation service providers will have two years after the standard is enacted to develop a retrofitting plan to bring non-accessible conveyances into compliance. All conveyances are expected to be compliant within 14 years.

In addition to these general requirements, the Proposed Standard sets out requirements applicable to different classes of transit services, including municipal public transit, on-demand taxis, booked services, and school buses. Therefore, while not every requirement will apply to every employer, the enactment of the transportation standard will mean significant changes for all employers in the passenger transportation services industry.

3. Proposed Accessible Information and Communications Standard:

The Initial Proposed Employment Accessibility Standard requires employers who employ disabled persons to make employment-related information and emergency procedures available to those employees using formats that are compliant with the Accessible Information and Communications Standard.

The Proposed Standard for Accessible Information and Communications requires employers to provide training to any employees responsible for designing, providing or receiving information on how to provide information to persons with disabilities in an accessible format.

While it has not yet been enacted, the Final Proposed Accessible Information and Communications Standard has been submitted to the Minister for consideration as law.

4. Built Environment:

The Initial Proposed Accessible Built Environment Standard, released on July 14th, 2009, identifies 11 types of building elements that must be modified to be accessible to persons with disabilities. Where applicable to their workplaces, employers will be required to make the changes in the following areas:

- common access and circulation (e.g., entrances, doors, ramps and stairs);
- interior accessible routes (create a barrier-free path, which may include ramps and/or elevators);
- exterior spaces (e.g., ramps, outdoor furniture);
- communication elements and facilities (e.g., signage, telephones);
- plumbing elements and facilities (e.g., washrooms, shower areas, saunas and steam rooms);
- building performance and maintenance (e.g., property maintenance, acoustics, lighting);
- special rooms and spaces (e.g., meeting rooms, locker rooms, kitchens, offices, restaurants, parking lots and patios);
- transient residential buildings (e.g., hotels);
- recreational elements and facilities;
- transportation elements (e.g., bus shelters); and
- housing.

Deadlines for compliance vary. If the business is constructing a new building, the building must be compliant with the Proposed Standard within 12 months of the Standard becoming law. Businesses whose buildings are under extensive renovations will have one to three years, and employers operating out of existing buildings will have five to 13 years to comply, depending upon the type of business.

Interested stakeholders have until October 16th, 2009 to submit feedback on the Initial Proposed Accessible Built Environment Standard to the Minister. Comments may be submitted via e-mail to: publicreview@ontario.ca.

Summary: Effect of the *AODA* on Ontario Employers

The Initial Proposed Employment Accessibility Standard or a variation thereof will soon become law and, when it does, accommodation duties will no longer arise only when an employer has run afoul of human rights legislation. The introduction of an employment accessibility standard means that accommodation obligations will exist throughout the recruitment, hiring, retention and termination phases of the employment relationship, even where a *prima facie* case of discrimination has not been made out.

Legislative Update

In the Spring issue, we reported on changes to the *Employment Standards Act* affecting organ donor leave. Bill 154, which was introduced in March of 2009 to provide employees who donate organs with up to 13 weeks of unpaid leave, came into force on June 5th, 2009.

Supreme Court Issues Precedent-Setting Pension Decision

In *Nolan v. Kerry (Canada) Inc.*, the Supreme Court of Canada confirmed that employers may charge the administrative expenses of a pension plan to the pension fund itself, and that a surplus in one component of the plan may be used to fund a "contribution holiday" for the employer in respect of another component of the plan.

The employer administered a pension plan using a trust. At one time, the employer had paid for the plan's administrative expenses, but the plan was later amended such that the trust fund itself would be used to pay those expenses. While the pension plan was originally a defined benefit ("DB") plan, eventually a defined contribution ("DC") component was introduced, and the DB plan was closed to new employees. Since the DB plan had an actuarial surplus, the employer decided to take a break from making contributions into the DC component, and use the DB surplus to subsidize that portion of the plan instead.

The plaintiffs, a committee of former employees, took issue with the company's use of the trust fund to pay for the pension plan's administrative expenses, and the company's use of the DB surplus to subsidize the DC portion of the plan. The Financial Services Tribunal found that the employer was permitted to use the plan to pay for administrative expenses, and that it could retroactively amend the plan to designate the DC members as beneficiaries of the trust fund, thereby allowing the employer to fund its DC contributions from the DB surplus. While the Divisional Court disagreed, the Ontario Court of Appeal allowed the employer's appeal and restored the Tribunal's findings.

In a 5-2 decision, the Supreme Court of Canada upheld the Ontario Court of Appeal's decision and found that the employer had not violated its obligations as administrator of the pension plan.

On the issue of the payment of administrative expenses, both the majority and the dissenting judges found that the text of the plan, which stated that the trust fund was to be used only for the "exclusive benefit" of the employees, did not prevent the employer from using the fund to pay for the plan's administrative expenses. As Justice Rothstein stated for the majority:

> Here the existence of the Plan is a benefit to the employees. The payment of Plan expenses is necessary to ensure the Plan's continued integrity and existence. It is therefore to the exclusive benefit of the employees, within the meaning of [the Plan], that expenses for the continued existence of the Plan are paid out of the Fund.

On the issue of using DB surplus funds to make contributions to the DC portion of the plan, the majority of the Court found that the DB and DC arrangements were merely two components of a single plan, and that use of one to fund the other therefore did not run afoul of the employer's obligation to ensure that plan funds were used for the "exclusive benefit" of plan members. The majority also found that there was no legislation prohibiting the retroactive creation of a single fund and, further, that "it is not the role of the courts to find the appropriate balance between the interest of employers and employees. That is a task for the legislature."

Also of interest was the Supreme Court's decision to award costs against the plaintiffs. While courts have been hesitant to hold employees responsible for costs in the past, the Court in *Nolan* stated:

> Where litigation involves issues…of a dispute between a settlor of a trust fund and some or all of its beneficiaries, the ordering of costs payable from the fund to the unsuccessful party may ultimately have to be paid by the successful party [in this case, the employer]. In these types of cases, a court will be more likely to approach costs as in an ordinary lawsuit, i.e., payable by the unsuccessful party to the successful party.

The *Nolan* decision is the final word from the Supreme Court of Canada on the issue of whether employers may use pension funds to subsidize both the payment of the administrative costs of a pension plan, and the contribution requirements in respect of other components of the same plan. While the decision is a positive one for employers, it is important to note that the Court found that the uses to which pension plan funds may be put will always depend upon the particular wording and context of the plan at issue.