BIRD RICHARD
LAWYERS FOR EMPLOYERS

EMPLAWYERS' UPDATE

Winter 2010

A Quarterly Newsletter on Labour and Employment Law Issues

In this Issue

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Child Pornography Reporting Soon to be Mandatory for Employers

Bill 37, the *Child Pornography Reporting Act, 2008*, received Royal Assent on December 10th, 2008. The Bill places potentially onerous reporting obligations on employers.

The new legislation will add a definition of "child pornography" to Ontario's *Child and Family Service Act* ("the *Act*"). The definition is parallel (though not identical) to the definition found in the *Criminal Code*. While the *Act* already requires certain persons who come across this type of pornography to report it to the prescribed authorities, Bill 37 amends the *Act* to place strict reporting obligations on *anyone* who has reasonable grounds to suspect that a representation or other material is or might be child pornography.

Failure to report information on child pornography is an offence, and a conviction will lead to a fine of up to $50,000 and/or imprisonment for not more than two years. In order to encourage reporting and to safeguard those who are obliged to report suspected child pornography, the amendments to the *Act* provide that an action cannot be brought against a person who, in good faith, provides information to the authorities. The *Act* also makes it an offence to disclose the identity of, or retaliate against, an informant.

Bill 37 will therefore have a significant impact on employers, and especially those whose employees use computers with Internet access. Employers will be responsible for reporting any child pornography they may come across, as well as instructing employees on how to report any suspected child pornography that they may encounter in the course of their employment. However, there is no obligation for the employer or its employees to actively seek out child pornography.

While the date on which Bill 37 comes into force has yet to be determined, it will likely become effective in the near future. Employers should therefore familiarize themselves and their employees with the new child pornography reporting provisions of the *Act* by creating a comprehensive workplace policy which deals with these obligations. The policy should also address the actions that the employer may take in the event that child pornography is found on an employee's computer. Taking action now will ensure that employers are compliant with the new reporting obligations whenever they come into effect.

Preparing Your Workplace for Ontario's Cell Phone Ban

Amendments to the *Highway Traffic Act* ("the *Act*") that ban the use of cellular phones and other electronic devices while operating a motor vehicle came into effect on October 26th, 2009. Below is a summary of the amendments, and methods by which employers can prepare their workplaces for compliance with the new legislation.

The Ban

Bill 118, which received Royal Assent in April 2009, amends the *Act* to make it an offence to drive a motor vehicle while holding or using a hand-held wireless communication device (e.g., a cell phone) or an electronic entertainment device (e.g., an mp3 player), or while a display screen (e.g., of a television or a computer) is visible to the driver.

There are many exceptions to this general prohibition. The screen of a global positioning system (GPS), a collision avoidance system, a commercially-used transportation tracking system, or a system that provides information regarding the status of systems in the motor vehicle may be visible to the driver without contravening the ban. The use of electronic communication devices in hands-free mode is also allowed, as is the use of an electronic device when the motor vehicle is off the road, not in motion, and not impeding traffic. Finally, the use of a hand-held device to contact emergency services, and the use of hand-held devices by the driver of an ambulance, fire truck or police vehicle, is permitted.

The Penalty

Drivers who operate a motor vehicle while using a hand-held device in contravention of the ban will be subject to a fine of $60 to $500. If the driver's violation results in a careless driving conviction, the driver may have his or her licence suspended and receive up to six demerit points, a fine of $200 to $1,000, and/or six months' imprisonment.

Although the Ontario Government has stated that the ban will not be enforced until February 1st, 2010, employers should require its employees to comply with these amendments immediately.

The Impact of the Ban on Employers

The cell phone ban is of concern to employers whose employees use electronic devices in the course of their employment (e.g., cell phones to take calls from clients), and whose employees drive motor vehicles as part of their job duties.

If an employee commits an offence under the *Act*, the fine imposed will be levied against the employee, and not vicariously against the employer, even if the employee was performing job duties at the time of the offence. However, an employer may be found civilly liable for damages arising from a motor vehicle accident caused by an employee's use of a hand-held device while driving. The likelihood of a finding of vicarious liability against an employer is greater if a hand-held device was being used by an employee for a work-related purpose at the time of the accident, or if the employee was driving the motor vehicle as part of his or her work-related duties. If the employer owns or provides the hand-held device, or if the employee was driving a company vehicle at the time of the accident, direct liability may result.

In order to limit potential civil liability and to ensure compliance with the duty under the *Occupational Health and Safety Act* to take every reasonable precaution to protect employees, employers should consider taking the following preventative measures:

- create a workplace policy on the use of electronic devices that states that a failure to comply with the Act while in the course of employment will not be tolerated, and that breaches of the electronic devices policy may result in discipline, up to and including termination;
- educate and train employees regarding the cell phone ban and your workplace policy; and
- if it is necessary that your employees use electronic devices while driving, provide them with hands-free devices and any related training.

Supreme Court Issues Decision in Wal-Mart Closure Case

In *Plourde v. Wal-Mart Canada Corp.* (released November 27th, 2009), the Supreme Court of Canada found for Wal-Mart and confirmed that a recently certified employer has no legal obligation under labour legislation to stay in business, and that a closure of one of its locations can constitute sufficient reason for the termination of the employees at that location.

In August 2004, the United Food and Commercial Workers, Local 503 was certified to represent employees at a Wal-Mart in Jonquière, Québec. The Jonquière store thus became the first Wal-Mart in North America to be unionized. In February 2005, on the same day that the Minister of Labour referred the parties to arbitration in order to assist them in establishing the terms of their first collective agreement, Wal-Mart informed its employees that it had decided to close the the Jonquière store. In April 2005, Plourde's employment, along with that of approximately 190 other employees, was terminated.

Plourde filed a complaint under section 15 of Québec's *Labour Code*, alleging that his employment had been terminated as a result of his union activities. Section 17 of the *Code* provides that, where an employer dismisses an employee after the employee has exercised his rights under the *Code*, there is a presumption that the employee was dismissed *because* he exercised his rights. This presumption is only overcome if the employer can demonstrate that the employee was terminated for "good and sufficient reason".

In this case, Wal-Mart alleged that Plourde had been dismissed, not because of his union activity, but simply because the store had closed and his job was no longer available. Wal-Mart further argued that the permanent store closure constituted "good and sufficient reason" for termination of employment within the meaning of section 17. The Commission des relations du travail ("CRT") agreed with the employer and dismissed Plourde's complaint.

The Superior Court dismissed Plourde's application for judicial review, finding that the CRT was correct in accepting the store closure as the reason for Plourde's dismissal, and not requiring Wal-Mart to explain its reasons for closing the store. The Court of Appeal similarly dismissed Plourde's motion for leave to appeal.

Plourde then appealed to the Supreme Court of Canada, which rejected his appeal. The Supreme Court's decision also resolved the issues, arising from the same factual scenario, that was before it in *Desbiens v. Wal-Mart Canada Corp.*

The decision of the Supreme Court deals with the narrow issue of whether a permanent store closure constitutes a good and sufficient reason for terminating employment for the purposes of section 17 of the *Code*.

In a 6-3 decision, the Supreme Court stated that an employer has no legal obligation to stay in business. Writing for the majority, and relying on the Québec Labour Court's earlier decision in *City Buick*, Justice Binnie found that a business is permitted to close a location even as the result of "socially reprehensible considerations".

The Court went on to find that the case law establishes that the closure of a store or plant constitutes "good and sufficient reason" to terminate an employee within the meaning of section 17. In other words, the closure of a business ends the inquiry into the reasons for the employee's dismissal – the termination is sufficiently explained by the closure. Thus, a remedy under section 15 of the *Code* is not available when there has been a store closure and the employee's workplace no longer exists.

However, the Majority avoided making sweeping pronouncements about the *Charter* and freedom of association, and instead decided the case on the relatively technical and narrow issue of the meaning of section 17 of Québec's *Labour Code*. Thus, while it remains to be seen how Ontario courts will interpret the Supreme Court's decision, the impact of the case on employers located outside of Québec may be limited.

Further, while it is encouraging for employers that the Supreme Court of Canada confirmed that a store closure will not automatically result in a finding that employees were terminated without good and sufficient reason, the Court did indicate that a union could be successful in bringing a complaint on the basis that the store closure itself constituted an unfair labour practice. As stated by Justice Binnie, a closure will not immunize the employer from all potential negative financial consequences. A finding of an unfair labour practice and an award of damages remain a possibility.

Legislative Update:

Bill 139

In the Spring 2009 issue, we reported on changes to the *Employment Standards Act, 2000* that provides increased protection for temporary workers. Bill 139 came into force on November 6th, 2009.

Bill 168

In the Summer issue, we reported on proposed changes to the *Occupational Health and Safety Act* that would create onerous obligations for employers relating to the prevention of workplace violence. Bill 168, which was introduced in April 2009, was carried on division after its third reading on December 9th, 2009. It will come into force six months after it receives Royal Assent.

Outlined below are the significant changes that have been made to the final version of Bill 168.

Definition of Workplace Violence

The original version of the Bill defined workplace violence narrowly as actual and attempted uses of physical force in the workplace. The amendments as passed expand this definition to include "a statement or behavior that it is reasonable for a worker to interpret as a threat to exercise physical force against the worker, in the workplace, that could cause physical injury to the worker". However, the amendments continue to apply only to actual or threatened physical violence, and not to psychological or emotional harm caused in the workplace.

Program to Implement the Workplace Violence Policy

Bill 168 originally required employers to create a workplace violence policy and an implementation program for that policy that contained measures and procedures for dealing with both actual incidents of workplace violence, and mere threats of violence. The final version of the Bill, however, only requires employers to develop procedures for dealing with actual occurrences of workplace violence.

Inspectors' Authority

The final version of Bill 168 adds sections 55.1 and 55.2 to the *Act*. These provisions give inspectors the authority to make orders requiring that an employer's workplace violence and harassment policies, as well as any assessments and re-assessments that they make regarding the risks of violence, be put in writing and/or posted in the workplace.

With the exception of the change to the requirements for creating a workplace violence policy implementation program, the final version of Bill 168 adds to the significant workplace violence prevention obligations.

What's New at Bird Richard

We are pleased to announce that Caroline Richard was admitted to the Bar of Nunavut on December 9, 2009.

Upcoming Seminars

Attendance Management and Innocent Absenteeism:

Stephen Bird will discuss the mechanisms of applying an attendance management program and the complexities of dealing with absences related to disabilities. He will review recent developments and jurisprudence from the Supreme Court of Canada, and how this has changed the landscape for employers in successfully dealing with employees who have excessive innocent absenteeism.

Time and Location:
Wednesday, January 20th, 2010, 8:00 a.m. - 9:30 a.m.
Ottawa Police Association – 141 Catherine Street, Ottawa

Termination of Employment – Avoiding the Minefields:

In this practical and interactive session, Caroline Richard will discuss the basics of terminations. How to navigate the potential minefield of termination for just cause versus termination without cause, followed by practical tips on how to conduct a termination meeting, including best practices on what to do before and after the termination.

Time and Location:
Tuesday, April 20th, 2010, 8:00 a.m. - 9:30 a.m.
Ottawa Police Association – 141 Catherine Street, Ottawa

These are complimentary presentations, but pre-registration is required. To register, please visit the Seminars page of our website.