THE EMPLOYERS' CHOICE

Summer 2002

CRAWFORD CHONDON & ANDREE LLP
Barristers & Solicitors

197 County Court Blvd., Suite 304
Brampton, Ontario L6W 4P6
Phone: 905-874-9343
Fax: 905-874-1384
info@ccaemployerlaw.com
www.ccaemployerlaw.com

ONTARIO'S PROPOSED PRIVATE SECTOR PRIVACY LEGISLATION

On February 4, 2002, the Ontario Government released its "consultation draft" of the proposed privacy legislation entitled the *Privacy of Personal Information Act* (the "PPIA" or the "Act"). If enacted as proposed, the PPIA will significantly impact provincially regulated employers in the private, health and not-for-profit sectors, as well as all non-governmental organizations that are not covered by the provincial or municipal public sector privacy acts, such as hospitals, schools, universities, charities, professional associations and religious groups.

The PPIA defines personal information to include information "in any form or manner" that identifies an individual. Personal information also includes "personal health information" which has been defined to include information that identifies an individual and that relates to an individual's physical or mental health, provision of health care, payments or eligibility for health care, health card number and health care provider. The principle objective of the Act is to protect the privacy of personal information by requiring organizations to obtain the consent of individuals to collect, use and/or disclose their personal information, unless consent can be reasonably implied in the circumstances, or one of the limited exceptions or exemptions apply. To achieve this objective, the Act sets out a complex scheme of rules to regulate the handling of personal information and personal health information by organizations generally, and by organizations which operate within the health care sector.

PPIA in the Workplace

Employers should be advised that the PPIA specifically addresses the collection, use and disclosure of personal information in the workplace context. For example, personal information includes information that relates to an individual's work performance, professional wrongdoing, misconduct or disciplinary matters. However, personal information specifically excludes the names, title and contact information when used for the purpose of identifying an individual in an employment, business, professional or other capacity.

The Act provides a number of limited exceptions and exemptions to the requirement to obtain consent of the individual before handling his or her personal information. For example, the Act allows employer organizations to collect personal information about an employee for the purpose of determining whether to investigate or actually investigating a breach of an agreement, legislation, or a workplace policy or rule, and where obtaining the consent of the individual would compromise the investigation. The exemptions also allow employers to collect personal information, excluding personal health information, where it is relevant to litigation in a court proceeding or before a tribunal. Finally, an employer is not required to obtain consent before collecting or using personal health information when it is collected or created for the purposes of a labour relations hearing or employment relations negotiations.

ALSO IN THIS ISSUE

Employer Obligations under the PPIA

The PPIA will impose specific duties and obligations on employers with respect to their personal information handling practices. For example, the Act will require employers to do as follows:

- take all reasonable steps to ensure the accuracy of records containing personal information of individuals;
- implement security measures appropriate to the level of sensitivity of the personal information to ensure that all personal information is secured against unauthorized use, disclosure, copying, modification or destruction;
- keep track of the uses and disclosures that employers make of personal information about an individual;
- destroy a record of personal information after the purpose for which the organization collected the information has been fulfilled (unless otherwise required by law);
- designate a contact person to facilitate compliance with the Act;
- establish and implement a personal information access procedure which will provide individuals access to review their personal information upon request; and,
- make available to the public a general description of safeguards used to protect personal information.

Enforcement of the PPIA

Employers should note that the draft legislation confers broad powers upon the Ontario Information and Privacy Commissioner (the "Commissioner") to enforce the Act. Contraventions of the Act could result in investigations, audits, recommendations or compliance orders issued by the Commissioner, or fines to a maximum of $50,000.00 for individuals and $250,000.00 for organizations.

It is anticipated that the PPIA will be proclaimed into force by the end of 2002, and that there will be a transition period to allow Ontario organizations to "get their houses in order" to ensure their information practices are compliant with the Act by January 2004, when it is projected that the Act will require full compliance. Part of the Government's motivation to proclaim and enact the legislation on this timeline is fueled by the fact that the federal private sector privacy legislation will apply to Ontario organizations in January 2004 unless the province passes its own privacy legislation which is "substantially similar" to the federal legislation.

We recommend that, during the time period leading up to the enactment of the PPIA, employers should take the following steps:

- familiarize themselves with the rules and obligations imposed by the Act;
- conduct an internal audit of all personal information in their custody and control;
- review how personal information is collected, used, disclosed, retained and disposed of by the organization;
- identify an individual within the organization who will handle PPIA-related issues; and,
- develop the privacy policies and procedures required by the Act, including an access procedure for individuals, and information handling practices guidelines which must be available to the public upon request.

Please feel free to contact us if you require further information or assistance in complying with the proposed Act. We also invite you to visit our website www.ccaemployerlaw.com to obtain details regarding the privacy seminars which our firm will be delivering to employers this Fall.

COURTS AND TRIBUNALS REVISIT "WHO IS AN EMPLOYEE"

In a number of recent decisions, courts and tribunals have revisited the test to be applied when determining whether an individual is engaged in a contract for services (independent contractor) or a contract of service (employee status). These decisions are of interest to any corporation that currently engages workers as "independent contractors". Many companies characterize workers as "independent contractors" in order to avoid the liabilities typically associated with a traditional employee/employer relationship such as employer health tax, CPP and EI contributions, WSIB premiums, Employment Standards obligations and wrongful dismissal damages. Unfortunately, in many cases either a court or tribunal will determine that the individual is in fact an employee, and the employer potentially faces greater liability than had the individual been treated as an employee at the outset. These recent decisions highlight the tests to be applied when determining employee status.

In a recent Supreme Court of Canada decision, *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, the court had occasion to review the test to be

used to determine independent contractor status. The issue in this case was whether a corporation could be vicariously liable for the actions of a consultant retained by the corporation to assist in securing business for the corporation. Employers can be held vicariously liable for the acts of their employees in circumstances where an employee is acting within the scope of his or her employment duties. However, vicarious liability will not likely be found if an independent contractor relationship exists. In considering independent contractor status, the court stated that the central question to be determined is whether the person who has been engaged to perform the services is performing them as a person in business on his or her own account. The court further found that although non-exhaustive, the following factors should be considered in making this determination:

- the level of control the employer has over the individual's activities;
- whether the individual provides his or her own equipment;
- whether the individual hires his or her own helpers;
- the degree of financial risk taken by the individual;
- the degree of responsibility for investment and management held by the individual; and,
- the individual's opportunity for profit in the performance of his or her tasks.

The consulting company was found to be an independent contractor in the circumstances of this case.

The Ontario Pay Equity Hearings Tribunal (the "Tribunal") also had occasion to define "independent contractor" status in the context of employer obligations under the *Pay Equity Act*. In *Wellington (County) v. Butler*, the Tribunal was asked to determine if women who provided day care in their homes as part of the private home day care program operated by Wellington County were employees of the County and entitled to pay equity adjustments. After reviewing a number of court and labour board decisions, the tribunal determined that the following factors should be considered:

- the structure of the relationship (including the selection process, duration of relationship, written agreement, income tax characterization and insurance coverage);
- the degree of control exercised by the corporation;
- ownership of equipment;
- capacity to hire helpers;
- financial risk;
- responsibility for investment and management;
- profiting from sound management;
- the County's relationship to others; and,
- the degree that the homecare workers were integrated into the County's operations.

Based on the above considerations, the Tribunal found that the homecare workers were employees for the purposes of the *Pay Equity Act*. Although the Tribunal's decision was overturned by the Divisional Court on judicial review because the Court determined that the tribunal had misapplied the facts, the Court did not overturn the test used by the Tribunal. This case was ultimately settled by the parties and was not heard by the Ontario Court of Appeal.

Finally, the Canada Industrial Relations Board (the "Board") has recently determined that independent owner-operators or brokers providing trucking services to a transportation company fell within the definition of "dependent contractor" in the *Canada Labour Code* and were employees for the purposes of a union organizing drive and certification application before the Board. In *Mackie Moving Systems Corporation*, the Board determined that the level of control exercised by the transportation company, in addition to the fact that the owner-operators were "economically dependant" on the transportation company led to the conclusion that the owner-operators were "employees" and were appropriately included in the bargaining unit the Union was seeking to certify.

What these decisions mean is that courts and tribunals will not hesitate to go beyond the written agreement of the parties in an effort to determine the true nature of the relationship between the company and the individual. In other words, saying that an individual is an independent contractor is not enough if the factors referred to above indicate that the true relationship is one of employee/employer. Although not an exhaustive list, parties should consider the following issues when determining whether an individual is truly independent, or merely an employee under the guise of a contractor:

- Is the work being performed by the contractor supervised by the company?
- Are the contractors required to attend at the company to get work assignments?
- Are the hours of work set by the company?
- Does the company train the contractors?
- Are the contractors evaluated by the company?
- Are the contractors disciplined by the company?
- Are the contractors free to perform services for other companies?
- Are the contractors free to decline work from the company without losing their contracts?
- Do the contractors invoice for their services or are they automatically paid by the company after submitting time records? Who is responsible for recording the hours worked?
- Are statutory deductions withheld by the company?
- Do the contractors charge GST?
- Do the contractors have a WSIB Clearance Certificate?
- Has Canada Customs and Revenue confirmed the contractor's independent status?
- Do the contractors have incorporated businesses?
- Do the contractors have the ability to negotiate prices for projects?
- Do the contractors own their own tools and equipment necessary to perform the services for the company?
- Can the contractor profit by sound management and is there financial risk assumed by the contractor?
- Can the contractor use other people to perform the services in question, and is the company's consent or approval required?

We also note that courts have been willing to extend some measure of protection to independent contractors at the point of termination by awarding damages for the failure to provide reasonable notice.

Before a company enters into an independent contractor relationship, we recommend that legal advice be obtained on the nature and structure of the relationship. A finding that an independent contractor is really an employee can create far-reaching liability for an employer, including retroactive tax and WSIB premiums, retroactive pay equity adjustments, wrongful dismissal damages and retroactive overtime payments.

DECERTIFICATION INFORMATION PACKAGES RELEASED

For those readers working for companies with provincially-regulated unionized operations, we can advise that the Ministry of Labour (the "Ministry") has released the decertification information packages mandated in the most recent amendments to the Ontario *Labour Relations Act, 1995* (the "Act").

The decertification information packages consist of a poster to be posted in the workplace and brochures for distribution. The legislation requires that the poster remain posted in a visible spot in the workplace. The brochures are to be distributed to all unionized staff on an annual basis.

The decertification information packages were sent by the Ministry to employers in January and February of this year, but we understand that many affected employers have been missed. If you are a unionized employer subject to the Act and have not yet received your decertification information package, please contact our office and we will forward a package to you.

For detailed information concerning the decertification process, and the rights and restrictions on management participation, we invite you to consult with our lawyers.