

CRAWFORD CHONDON & ANDREE LLP

Management Labour &
Employment Lawyers

2 County Court Blvd.
Suite 430
Brampton, ON
L6W 3W8

Tel: (905) 874-9343
Fax: (905) 874-1384
Toll Free:
1-877-874-9343

www.ccaemployerlaw.com

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The Employers' *Edge*

SUMMER / FALL 2004

Personal Health Information Protection Act is Now Law

Our last newsletter alerted employers to the Ontario government's introduction of privacy legislation that would apply to health care sector organizations. Since that time, the government has passed legislation to enact the *Personal Health Information Protection Act, 2004* ("PHIPA"), a law that will come into force on November 1, 2004.

The collection, use and disclosure of personal information by private organizations in the commercial sector is currently regulated by the federal *Personal Information Protection and Electronic Documents Act* ("PIPEDA"). PIPEDA regulates "personal health information", but does so in the context of an Act that was designed to regulate the collection, use and disclosure of personal information in the course of commercial activities, including direct marketing, electronic commerce, and other analogous activities. It was believed by some that PIPEDA did not adequately cover the unique circumstances encountered within the health care system. In an attempt to remedy these perceived shortcomings, the provincial government passed PHIPA.

PHIPA will govern the manner in which "personal health information" may be collected, used and disclosed within the health-care system. "Personal health information" is defined broadly to include information that relates to the physical or mental health of identifiable individuals and health history of their families, and information that relates to identifiable individuals' health care and health numbers.

PHIPA imposes a number of responsibilities on "health information custodians" the definition of which includes various health care practitioners and providers.

These responsibilities include:

- Obtaining patient consent for the collection, use and disclosure of personal health information;
- Collecting personal health information appropriately;
- Taking reasonable precautions to safeguard personal health information;
- Ensuring health care records are as accurate, up-to-date and complete as is necessary for the purposes for which they use or disclose personal health information;
- Designating a privacy compliance contact person who is responsible for certain enumerated tasks; and
- Providing a written statement that describes the custodian's health information handling practices, and ensuring that the statement is readily available to the public.

PHIPA will also impact employers in Ontario in certain circumstances. To explain, most employers collect, use and disclose "personal health information" with respect to employees who are in attendance management programs, or employees who are away from work on short-term disability, long-term disability, or in receipt of benefits under the *Workplace Safety and Insurance Act, 1997*. If an employer receives "personal health information" directly from its employees, PHIPA will not apply. However, if an employer receives such information directly from a "health information custodian", PHIPA will apply.

Crawford Chondon & Andree LLP would be pleased to assist employers in reviewing their policies and practices to ensure compliance with this new privacy regime.

What's New in Occupational Health & Safety

Amendments to the Criminal Code

The *Criminal Code* has now been amended to incorporate Bill C-45. These amendments became effective March 31, 2004. What should your "organization" be doing to protect itself?

1. Review policies

- Now include public
- Look at potential hazards where public has access
- Protection of public should become part of safety training

2. Train wider than your supervisors

- Does person have authority to direct work?
- Needs to be broader

3. Steps to take – include senior officers

- Education on obligations, requirements and due diligence

Consider the following:

- Regular reports to senior officers on health and safety in the workplace
- Updates on equipment
- Training
- Supervisor monitoring
- Work refusals
- Joint health and safety recommendations
- MOL orders – compliance, appeals
- Near misses
- Allocate resources for health and safety
- Emergency procedures
- Hiring safe sub-contractors and monitoring of same
- Update health and safety programs
- Keep records of action taken – document, document, document

New Inspectors

As many of you know the Ministry of Labour has hired 25 new Health & Safety Inspectors. They have now completed their training and are in the workforce enforcing the *Occupational Health & Safety Act*. The Ministry of Labour has announced that over the next two years 200 more Health & Safety enforcement staff will be recruited.

It is anticipated that there will be 100 new inspectors being hired this year with the recruitment beginning in July of 2004. The Ministry hopes to have the inspectors hired by November 2004 and trained by February 2005. In 2005 the Government states that it plans to have 100 more enforcement staff added to its ranks.

Is your company a "bad performer"?

The Ministry of Labour has stated that it will target 6000 companies that they have identified as "Employers at High Risk". The data has been gleaned from the Workplace Safety & Insurance Board and based upon the cost of lost time injuries since January 1, 2000, those companies that fall within that 6000 firms will be targeted by the Ministry of Labour's Health & Safety Inspectors.

What's coming?

The Ministry of Labour is anticipating moving ahead with changes to the Regulations under the *Occupational Health & Safety Act* and in particular with changes to the *Mining Regulations, Standards for Training of Commercial Divers and New Exposure Limits to Chemicals in the Workplace*. Also extensive changes have been made to the Construction Regulations and those are now in force.

Announcements

It is with regret that we announce that Ms. Allison Smith has left the firm to pursue other opportunities. Allison was an asset to the firm and will be greatly missed. We know that you will join us in wishing Allison all the best in her future endeavors.

We are pleased to announce that Mr. Rishi Bandhu has joined the firm effective August 23, 2004. Rishi's experience includes a specialized education in the area of management side labour and employment law. After his call to the Bar in October, he will practice with us as our newest associate.

Upcoming Events

October 2004

20th Laura K. Williams
*Meeting Your
Privacy Compliance
Responsibilities*
Chamber of
Commerce, Caledon

20th Karen L. Fields
*What's New in
Health & Safety*
Chamber of
Commerce, Caledon

November 2004

10th David M. Chondon
Jayson A. Rider
Justin K. Diggle
*Overview and
Update on the
Employment
Standards Act, 2000*
Lorman Education
Services
Sudbury, Ontario

*Please contact us
should you wish further
details about any of the
above-listed events.*

DID YOU KNOW THAT ...

New Legislation Implements New Tax

On June 21, 2004, the Ontario government introduced new legislation to implement the "Ontario Health Premium" ("OHP"), a new tax that was announced in this spring's provincial budget.

Effective July 1, 2004, employers must deduct OHP premiums from their employees' taxable income and pension payments. The OHP is a graduated tax that increases in proportion with employee's income level. The OHP premiums for each taxable income bracket are as follows:

Taxable Income	2004 Taxation Year Premium	2005 Taxation Year Premium
up to \$20,000	\$0	\$0
\$20,001 - \$36,000	\$150	\$300
\$36,001 - \$48,000	\$225	\$450
\$48,001 - \$72,000	\$300	\$600
\$72,001 - \$200,000	\$375	\$750
more than \$200,000	\$450	\$900

Besides requiring all employers to modify their payroll deductions systems, the OHP may have particular implications for unionized employers. For instance, certain collective agreements require employers to pay OHIP premiums on behalf of their bargaining unit employees. Unions may argue that these provisions require employers to assume liability for paying OHP premiums as well. Tax implications may arise if employers assume this liability. For instance, such payments will become taxable ben-

efits for employees. However, because the OHP is structured as a tax the actual OHP owing by individual employees will not be known until the employee files his or her income tax return.

Given the various implications, employers are advised to ensure that they fully understand their obligations that result from this new tax. Any of our lawyers would be happy to assist with any questions you may have in this regard.

Cannot Contract out of Employment Standards Act

The Ontario Court of Appeal has recently reaffirmed the supremacy of the provisions of the *Employment Standards Act, 2000* (“ESA”) over an agreement between an employer and an employee which has the effect of breaching the ESA provisions.

Mr. Houston was hired by Advantage Car & Truck Rentals (“Advantage”). One of the terms of his hiring was that Advantage could deduct from his wages any cash shortages it suffered during his shifts. Mr. Houston signed a written agreement to this effect. The Regulations to the ESA clearly indicate that an employer is not allowed to deduct cash shortages from an employee’s wages if the employee does not have sole control over the cash during his or her shift. Shortly after being hired, Mr. Houston advised Advantage that he was not prepared to continue his employment under the terms of the agreement.

Upon being advised of his position, Mr. Houston’s supervisor indicated that he accepted Mr. Houston’s resignation and his employment ended. Mr. Houston sued for wrongful dismissal.

The claim was dismissed at trial. However, the trial judge’s decision was overturned by the Court of Appeal which indicated that an agreement between the parties that is contrary to the ESA provisions cannot form the basis upon which to purportedly accept an employee’s resignation as a result of his or her refusal to work under the terms of the agreement. Advantage was found to have dismissed Mr. Houston as a result of its purported acceptance of his resignation.

Accordingly, employers are reminded that a similar result could occur where employees are asked or expected to agree to effectively breach the provi-

sions of the ESA in respect of matters such as hours of work, overtime, vacation pay, public (statutory) holiday pay, withholding of wages for amounts owed by the employee, eating periods, leaves of absence, termination pay and severance pay.

While the case dealt only with deducting for cash shortages, employers must be mindful of section 5 (1) of the ESA which states that no employer, employee, or their agent may contract out of or waive an employment standard, and that any attempt to do so is void.

We again stress the importance of compliance with the ESA. Agreements to do otherwise will not provide employers with a good defence to a claim by the employee or the Ministry in the event non-compliance is challenged.

Tickets For Employment Standards Violations

A new form of ammunition was recently added to the Ministry of Labour’s enforcement arsenal. In July 2004 the Ontario government announced that it has authorized employment standards officers to issue tickets to employers that fail to comply with the *Employment Standards Act, 2000* (“ESA, 2000”).

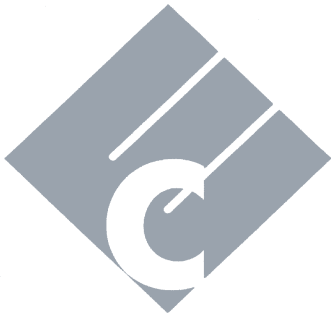
The ESA, 2000 outlines the minimum terms and conditions of employment that must exist in workplaces that are subject to provincial employment law. Regulations under the *Provincial Offences Act* were amended to allow employment standards officers who have been appointed as provincial offences officers, to issue tick-

ets for violations of the ESA, 2000. Such offences include administrative and enforcement offences (i.e. failure to retain various records, failure to post required notices, etc.), contraventions of wage-based employment standards (i.e. failure to pay overtime pay, failure to pay minimum wage, etc.), and contraventions of non wage-based employment standards (i.e. requiring employees to work hours in excess of weekly limits, failure to give eating period, etc.).

The tickets carry set fines of \$300.00 in addition to a victim surcharge. An employer that has been issued a ticket has three options. The employer may plead guilty and pay the set fine. Alternatively, the employer may plead guilty and at-

tend court to request a reduction in the fine. Finally, the employer may plead not guilty and request a trial.

The implementation of this new enforcement tool is another example of the increased attention the Ontario government is giving to employment in the province. The government has announced its intention to increase the enforcement of the ESA, 2000 as well as the *Occupational Health and Safety Act*. Accordingly, employers are well advised to review with their labour and employment law counsel strategies to ensure compliance with all applicable employment laws.



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Up and Coming Leaders – The Succession Plan

As an organization, what would you do if all the senior managers of your organization departed suddenly? Would the up and coming leaders be ready to lead the organization into the future?

Companies with effective succession plans are the minority in today's workplace. According to a study by the Massachusetts Life Insurance Co. and the Raymond Institute, 42% of the CEOs who expect to retire in the next five years have not chosen a successor. The strength of the up and coming leaders is quite substantial and employers are starting to realize their importance in their Company's success.

What is Succession Planning?

Succession planning is a process which is part of workforce planning. It defines the organization's priority requirements and its approaches to measuring and selecting candidates, as well as recruiting and developing its human resources. Succession planning is more than planning for replacements or filling openings as they occur. The primary objective of succession planning is to provide competent resources on a timely basis to meet human resources requirements due to departures and a company's growth over a given period. Thorough succession plans integrate talent management with organizational strategic planning. Succession planning allows companies to be proactive versus being reactive to changes.

Why Develop a Formalized Succession Plan?

Formal succession plans are vital to organizations. The absence of formal succession planning does not allow employ-

ees to proactively develop the skills they would need to assume senior leadership roles in an organization. Additionally, without formalized planning, employees do not know what type of role the company would consider them for in the future.

Many companies decide not to have formalized plans due to the scrupulous implementation required, and most succession plans fail due to execution errors. In any organization, it is essential to have the basic steps in place for the plan to be successful. Over-designed processes that incorporate a lot of forms, too many criteria for evaluating potential, extensive training and high time demand on managers are common pitfalls for many companies.

To assure the success of the succession planning process, senior management must be the driver of the process. Succession plans that are effective integrate the yearly performance review process so that managers are evaluating current year performance and future years' potential at the same time.

Advanced companies who believe in succession planning are confident that they have accurately assessed the potential for prospective leaders. The leaders of these companies know that succession planning is a process that needs continuous work to be successful. Solid succession plans can enable the company to see results in the first year of the program.

New Member of The Employers' Choice

We are pleased to announce that we have been joined by a new consultant, Jodi Zigelstein, CHRP. Jodi comes to TEC with several years of progressive human resources experience. Over the years, she has developed a proficiency in designing and implementing HR programs and training. Jodi can be reached at (905) 874-1035 ext. 433.

Upcoming Workshops and Events

September 16th

Bonni Titgemeyer

Variable Compensation,
Chamber of Commerce,
Burlington

The Employers' Choice Inc. is a full-service human resources management company providing solutions, systems and training in a broad range of human resources areas. For more information about our services, please contact us at (905) 874-1035 or visit our website at www.theemployerschoice.com.

Our Lawyers

DAVID M. CHONDON
dchondon@ccaemployerlaw.com

KAREN L. FIELDS
kfields@ccaemployerlaw.com

SUSAN L. CRAWFORD
crawford@ccaemployerlaw.com

CHRISTOPHER M. ANDREE
candree@ccaemployerlaw.com

JAYSON A. RIDER
jrider@ccaemployerlaw.com

LAURA K. WILLIAMS
llwilliams@ccaemployerlaw.com

JUSTIN K. DIGGLE
jdiggle@ccaemployerlaw.com

RISHI BANDHU
rbandhu@ccaemployerlaw.com

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Employment Agreements For Existing Employees

In previous editions of this newsletter, we have discussed the value to employers of written employment agreements which provide additional rights and protections for employees, and limit the rights of employees to notice or pay in lieu of notice upon termination of employment. **The question that is often raised by employers is whether existing employees can be required to sign written employment agreements.** The answer is **"Yes"**! The key is to follow a proper process of implementation to ensure the written employment agreements are enforceable against the existing employee.

The biggest hurdle in this process is ensuring that the employee receives adequate consideration (value) for the written agreement. Most often the employer is attempting to gain additional rights through the execution of the written agreement. Those rights may include confidentiality obligations, non-solicitation provisions, or a limitation on the amount of notice that employees receive upon termination of their employment without cause. Accordingly, the employer is receiving "value" for the execution of the written agreement. The question is what value the employee is receiving. The challenge for employers is to create consideration to support the written agreement. There are at least 3 possible forms of consideration:

- (1) A promotion or increased employment benefits;
- (2) A sum of money; and
- (3) Continued employment.

The first two are relatively simple but may be difficult to implement and can be very costly depending upon the number of employees involved. The third form of consideration is the least costly in dollar terms and the most certain. However, the employer must be willing to advise all employees that it will terminate, without cause, those who refuse to sign the written agreement by providing reasonable notice or pay in lieu. It must also be willing to carry through with termination in the event that an employee refuses to sign the proposed agreement. In this circumstance the forbearance from the right to terminate the employee with notice and to maintain employment for a "reasonable period" following the execution of the agreement create the consideration to support the written agreement. This method of implementing written employment agreements for existing employees has been approved by the Ontario Court of Appeal and the Supreme Court of Canada. We are confident it can be successfully implemented for your organization.

While an approach to this issue which is grounded in a "threat" of termination may be distasteful upon first glance, the long term value to the employer may outweigh any concerns raised by this approach. The implementation of written employment agreements for existing employees will also benefit them by clarifying their rights and detailing the employer's expectations and obligations which will allow them to better achieve success.

To learn more about implementing written employment agreements for existing employees, please contact any of our lawyers.
