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' Choice"

The Employers' Edge

WINTER 2004

New Criminal Liability for Workplace Accidents

On November 7, 2003 amendments to the Criminal Code establishing corporate criminal liability for workplace health and safety accidents received Royal Assent. The amendments will have far-reaching implications for anyone who directs workplace operations in the event of a health and safety accident or injury.

Bill C-45 imposes a legal duty on "**everyone who undertakes, or has the authority, to direct how another person does work or performs a task…to take reasonable steps to prevent bodily harm to that person… arising from that work or task."** Unlike other provincial and federal health and safety legislation, this new criminal liability will extend to anyone who directs how another person does work, and could include on-site contractors, foremen, lead hands and even co-workers who provide direction to other workers. Depending on the degree of disregard for the safety of a worker or workers in question, individuals and corporations could be charged with criminal negligence. However, like most current health and safety legislation, the concept of "due diligence" is a defence to charges laid under the *Criminal Code*.

The new legislation also expands the definition of "representatives" of organizations to include directors, partners, senior officers, employees, members, agents or contractors of the organization. "Senior officer" is now defined in the *Criminal Code* as **"a representative who plays an important role in the establishment of an organization's policies or is responsible for managing an important aspect of the organization's activities".** This definition is much broader than the officer and director liability found in many provincial health and safety legislation. Accordingly, the "net of liability" will likely be cast much wider in the case of workplace accidents in the future and could include human resource managers, health and safety co-ordinators and other positions that had previously enjoyed relative immunity from health and safety charges.

Individuals convicted under these new provisions could face significant fines and/or imprisonment, depending upon whether the Crown elects to proceed summarily or by

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SPOTLIGHT ON OUR HEALTH AND SAFETY SERVICES

Crawford Chondon & Andree LLP

provides a full range of services in the area of health and safety, including policy implementation and review of existing policies, health and safety training, conducting workplace accident investigations and defending individuals and corporations charged under the *Occupational Health and Safety Act* or the *Criminal Code.*

New Criminal Liability for Workplace Accidents

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way of indictment. Of course, a conviction also carries with it the added stigma of having a criminal record. New sentencing provisions direct judges to consider a number of criteria in setting an appropriate punishment for those individuals and corporations found guilty under these new provisions, including whether the individual or corporation has committed similar offences in the past, and the steps the individual or corporation has taken to reduce the likelihood of another accident or injury from occurring. As well, the courts will now have the discretion to order "optional conditions" in sentencing which can include making restitution, establishing and communicating (both internally and to the public) policies and procedures to reduce the likelihood of another accident in the future, and "any other reasonable conditions that the court considers desirable" in the circumstances.

This new corporate criminal liability means that directors, senior officers and managers must be even more vigilant in establishing and maintaining a solid health and safety program, including implementing policies, and providing training and ongoing supervision of workers. No organization in Canada can justify substandard health and safety initiatives in the face of this new legal duty of care and corresponding liability.

Upcoming Speaking Engagements

February 2004

19th **Laura Williams**
PIPEDA Compliance and Employment Law Update
Mississauga Board of Trade

25th **Laura Williams**
Workplace Privacy; The Future is Upon Us
Lancaster House Workshop

27th **David Chondon**
Reconciling Attendance Management and the Duty to Accommodate
Lancaster House 2004 Conference
Human Rights: The Duty to Accommodate

27th **Laura Williams**
Are You Ready To Meet Your Privacy Compliance Responsibilities?
Brampton Board of Trade

March 2004

3rd **Christopher Andree**
Legal Issues Regarding the Use of Driver Services
Private Motor Truck Council

3rd **Laura Williams**
PIPEDA's Impact on the Trucking Industry
Private Motor Truck Council

11th **Laura Williams**
The Impact of Privacy Legislation on Business
The Peel Business Growth Forum

If you wish to attend any of these events, please visit our website for further details.

References: A Double Edged Sword?

References benefit both parties in the employment relationship. Reference checks allow employers to reduce the risks of hiring employees who may expose them to future liability. Reference letters, on the other hand, enhance employees' mobility.

Notwithstanding these benefits, references may create different forms of liability for unsuspecting employers. In this two part series, Crawford Chondon & Andree LLP discusses some of the risks and benefits of references. In this edition, we discuss why employers should conduct proper reference checks prior to hiring all employees. In our next newsletter, we will explore the legal issues surrounding reference letters. It is hoped that this information will assist employers in maximizing the benefits and minimizing the risks associated with references.

Part 1: Why Do Reference Checks?

Issues such as employee theft/fraud, sexual harassment and workplace violence are high profile issues today. With the number of such incidents appearing to be on the rise, employers are justifiably concerned about protecting themselves from liability for the unlawful acts of their employees.

Unfortunately for employers, a number of legal concepts may hold employers liable for their employees' unlawful acts. Two particularly important concepts are vicarious liability and the tort of negligent hiring.

In general, under vicarious liability, employers will be held liable for the wrongful acts their employees commit while acting within their scope of their employment. These acts are usually unintentional wrongs committed within the scope of the employer's authorization. Vicarious liability covers most of the situations contemplated by employers, such as an employee being at fault in an automobile accident while driving a company vehicle, or a nurse giving the wrong medication to a patient.

Negligent hiring is a relatively new addition to the negligence doctrines and has the potential to more seriously expose the employer to liability. The tort of negligent hiring is well established in the United States and Great Britain, but has only recently begun to receive serious attention in Canada.

In a case of negligent hiring, an employer may be liable for the wrongs (criminal or civil) of an employee if the employer breaches a duty to use reasonable care in hiring and retaining only competent and suitable employees. The analysis examines the steps the employer took and what the employer should have known in the process of hiring the employee. If the employer fails to exercise the requisite care in the hiring process, the employer may be held liable for the employee's acts, even if they occur *outside* the scope of his or her employment.

This tort raises serious concerns for employers because employers may be found liable for monetary damages well outside of the employers' risk expectations, not to mention the potential public relations harm from being sued for negligent hiring. For example, a court in the United States held a building management company liable when an off duty maintenance man entered an apartment with his key and assaulted a tenant. Even though the maintenance man was off duty and did not have permission to be in the apartment, the fact that the employer, without properly screening his background, had given the employee a key to the apartment was enough to render the employer liable.

What should an employer do to decrease or remove its liability in these instances? The answer is to do thorough background checks, in particular reference checks, on all of its applicants, and make hiring decisions based on the job relatedness of anything the employer finds.

Employers have a duty to take reasonable care to ensure that they *know their employees*. Reference checks are a component of that duty and a potentially important form of protection against many negligence claims. Therefore, employers are well advised to take care in how they screen and select candidates for employment, particularly where the candidate is to be employed in a position of trust or responsibility.

At the end of the day, it is impossible to predict if an employee will commit a crime or other wrongful act in the future, and no court will expect an employer to be able to foresee all risks. What is important, however, is that employers use all resources available, and make informed hiring decisions based upon available information concerning an individual's past conduct. Employers are entitled, indeed even entrusted, to judge an individual by his or her actions. You cannot know what those actions have been if you do not take the time to check.

Arbitrators Can Decide Human Rights Violations

On September 18, 2003, the Supreme Court of Canada in Parry Sound District Social Services Administration Board v. OPSEU, Local 324 ("Parry Sound"), handed down an important ruling relating to grievance rights of probationary employees employed in unionized workplaces.

The facts of this case involved a probationary employee who was dismissed shortly after returning from pregnancy leave. She filed a grievance alleging that her dismissal was "arbitrary, discriminatory, in bad faith and unfair", and that the employer had violated the Ontario *Human Rights Code* provision prohibiting discrimination based on family status. At the arbitration, the employer argued that the Board of Arbitration was without jurisdiction to hear the grievance.

The applicable collective agreement contained two notable provisions. First, that the discharge of a probationary employee was at the sole discretion of the employer and not subject to the normal grievance procedure. Second, that all differences between the parties were arbitrable. There was no provision that limited the employer's right to discharge a probationary employee.

Based on the first clause, the employer's counsel argued that the discharge of this probationary employee was not a "difference between the parties" that was subject to the grievance procedure and, therefore, the arbitrator did not have jurisdiction to hear the matter. While the Board of Arbitration agreed with the employer that, based on the collective agreement language, it had unfettered discretion to dismiss probationary employees, the Board nevertheless took jurisdiction over the matter based upon both the *Human Rights Code* ("*Code*") and the *Labour Relations Act* ("*LRA*").

The arbitration decision was appealed all the way to the Supreme Court of Canada. The Supreme Court held that a discharge of a probationary employee that violates the employee's human rights *will* violate a collective agreement. Based on the incorporation of the *Code* into collective agreements, a violation renders the discharge arbitrable and grants an arbitrator jurisdiction to hear the grievance.

The Supreme Court advised all employers that the right to manage operations does not include the right to violate applicable employment-related statutes not referred to in the collective agreement. Specifically, the Court noted the following:

"The absence of an express provision that prohibits the violation of a public statutory right is insufficient to conclude that a violation of that right does not constitute a violation of the collective agreement. Rather, human rights and other employment-related statutes establish a floor beneath which an employer and union cannot contract."

What Does This Case Mean For Unionized Workplaces?

Based on the Supreme Court decision, all employers should now be aware that a grievance arbitrator has the power and responsibility to enforce rights and obligations provided under human rights and other employment-related statutes, as if they were part of the collective agreement.

However, the Court has also indicated that while a discharge of a probationary employee that is based on discriminatory grounds *will* violate a collective agreement, a discharge of a probationary employee that *is not* based on discriminatory grounds and that is permitted by the particular collective agreement language *will not* violate the collective agreement and will, therefore, not be arbitrable.

The Supreme Court did not comment on discipline other than termination. However, we expect that discipline short of termination occurring during the probationary period would also be considered illegal *if such discipline was predicated on discriminatory grounds*.

In addition to the above-noted points, the Supreme Court decision suggests that grievance arbitrators and the Human Rights Commission will now consider similar issues. Consequently, there is the potential that they will arrive at drastically different outcomes, resulting in confusion for employers, unions and employees. In addition, the Supreme Court made no comment on whether the jurisdiction of the Human Rights Commission would be ousted by a grievance arbitration. These and other considerations flowing from the *Parry Sound* decision, should encourage unionized employers to approach the discipline or discharge of probationary employees with care.

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Effective Performance Management

Designing an effective performance management system is challenging for many businesses today. Rapid changes in the economy, evolving work environments, and an increased number of options to review performance have all played a role in making performance management more complicated than it has been in the past.

In its most basic form, performance management is a process in which discussions occur among managers and employees regarding performance issues such as goal setting, the achievement of objectives and feedback regarding performance.

Businesses that are effective with their performance management process work to strategically link the process to identified results.

Some approaches directly link performance to pay, while others do not. However, there is a distinct trend toward systems which recognize and motivate teams.

With this in mind, there are a few principles that we recommend employers to consider when designing a performance management system:

Start with an understanding of the outcome. What in the operation needs to change? Why? Do employees need an incentive to make those changes? If incentives are required, at what level; i.e. individual, group, team, or organizational?

Assess the needs of the individuals performing the reviews. Do they really know how to coach employees? The ability to coach others is not a natural skill for most people—it must be developed.

Communicate. Everyone involved in the performance management process needs to understand the approach, how it works, what is expected, the timeline and how problems are resolved.

Don't generalize. Although an effective performance management system should be simple, it should not be simplistic. Approaches that rely too heavily on a few words and check boxes lose a great opportunity to create open dialogue about needs.

Link to incentives, not base pay. Unless increases are substantial, changes to base pay do not motivate an individual to change.

Consider the costs. There is an administrative cost associated with establishing performance indicators. Be sure to weigh the cost of obtaining the information against the value the information provides. Effectively, a cost benefit analysis should be performed for each design aspect of the system.

Link rewards to your business cycle. Rewarding employees at the right time, when the results are fresh and can be linked to the activities they undertook, is a powerful motivator.

Limit "navel gazing". Too often a performance assessment tool and the process merely provide a review of how the individual performed over a prior review period.

Get beyond the forms. The review forms themselves are a very small part of how you manage performance. The review forms are the means to the end, not the end themselves.

Link together the results of the performance reviews. During the process, it is important to look at the results of the individual reviews in the context of the results of the reviews of all employees. This may assist you in understanding your employees' real development needs, areas of duplication, and areas of potential.

Let the performance management system evolve. Unfortunately, the process of development is not a one-time event. The approach should be updated as business needs change.

Designing an effective performance management system takes time and energy. It should not be a project left in the hands of an individual who does not possess a good understanding of the pulse of the business. Ultimately, the art of designing a good performance assessment process is ensuring that it fulfills its purpose.

Bonni Titgemeyer is the Managing Director of The Employers' Choice Inc. which is a full-service human resources management company providing solutions, systems and training in a broad range of human resources areas.

Our Lawyers

DAVID M. CHONDON
dchondon@ccaemployerlaw.com

SUSAN L. CRAWFORD
crawford@ccaemployerlaw.com

CHRISTOPHER M. ANDREE
candree@ccaemployerlaw.com

JAYSON A. RIDER
jrider@ccaemployerlaw.com

LAURA K. WILLIAMS
lwilliams@ccaemployerlaw.com

JUSTIN K. DIGGLE
jdiggle@ccaemployerlaw.com

ALLISON SMITH
asmith@ccaemployerlaw.com

The lawyers and staff at Crawford Chondon & Andree LLP wish you all the best for 2004

Compassionate Care Benefits

Did you know that effective January 5, 2004 employees are eligible for new leave entitlements called compassionate care benefits?

Compassionate care benefits will be paid to all workers to provide care or support to a member of their family. If a worker is entitled to Employment Insurance ("EI") benefits, they will be able to receive up to a maximum of 6 weeks during the benefit period. Workers will be able to share the 6 weeks of compassionate care benefits with other members of their family, provided that those family members are also entitled to EI benefits. The two week waiting period applies whether the leave is taken by one person or shared with other family members, but only one individual will have to serve the waiting period.

The worker requesting compassionate care leave must produce a medical certificate indicating that a family member is gravely ill with a significant risk of death within 26 weeks (6 months). The certificate must also indicate that the patient requires a family member to provide for psychological comfort or emotional support, arrange for care by a third party care provider (example: a health care professional), or directly provide or participate in the care.

Compassionate care benefits can be paid regardless of where the family member lives. However, the worker will need to meet the same conditions that would apply if that ill person were in Canada.

The program commenced on January 5, 2004 and will be fully implemented when the Federal government makes the necessary changes to the *Employment Insurance Act* and Regulations. Human Resources Development Canada must also put in place the necessary mechanisms to ensure a smooth implementation.

If you have any questions about compassionate care leave as it relates to your employees' entitlement, completing records of employment, providing adequate medical documentation, or any other related issue, please do not hesitate to contact any of the lawyers at Crawford, Chondon & Andree LLP.