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Responding to Disclosure Demands at the Bargaining Table: Employer Rights and Obligations

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As we enter 2009, many Social Services organizations are looking ahead to upcoming negotiations with unions for the renewal of their collective agreements. Some of our clients have already reported an increasing trend among unions to initiate broad disclosure requests well in advance of actual bargaining. However, employers in Ontario are not necessarily obliged to disclose all information requested by a union, nor disclose information before the parties have commenced bargaining. Effectively dealing with these types of wide-ranging demands is essential to protect the employer's rights both at the bargaining table, and beyond.

Disclosure obligations are part of the statutory duty to bargain in good faith and to "make every reasonable effort" to make a collective agreement. In dealing with the duty to disclose information specifically, the Ontario Labour Relations Board has identified two obligations within that duty. First, on its own initiative, an employer must reveal to a trade union any actual (including *de facto*) decision which is likely to have a significant impact on the bargaining unit. A *de facto* decision is one which has effectively been made, even if some formalities of the decision-making process have not yet been complied with, or if the details are not finalized. It is important to remember that whether a *de facto* decision has actually been made, in any given case, will depend on all the facts and circumstances.

The second aspect of the duty to disclose is that, when asked by the union in bargaining whether it is seriously contemplating initiatives which are likely to have a significant impact on the bargaining unit, an employer must answer "honestly". As before, what constitutes an "honest" answer will depend upon a variety of circumstances: when was the question asked? What is the actual question? At what stage are the employer's plans? However, what is clear in the case law is that the answer should be one that does not mislead the union as to the actual state of affairs.

In addition, unions may request information related to a proposal or position placed on the table by either party. Disclosure obligations are more limited here. The Board has stated that there is an obligation to disclose enough information so that a party can understand the position being taken by the other party, as well as the rationale for that position. There is no obligation to automatically disclose every piece of information in all cases. The obligation arises as a result of the positions and issues at the bargaining table.

Recently, unions have adopted a pre-bargaining strategy of initiating broad requests for information from social services employers. Requests received to date have related to such things as:

- full financial disclosure with respect to the employer's entire operations (presumably including operations outside the bargaining unit), including Ministerial letters;
- identification of all initiatives currently undertaken or to be undertaken, including ones which may not impact bargaining unit members at all or may not have a "significant" impact on them;
- specific disclosure of provincial government initiatives and all related documentation, correspondence and submissions to Ministries, whether such initiatives are being "seriously contemplated" or not;
- a complete organization chart listing all positions, including those outside the bargaining unit; and
- census and financial information relating to benefits for all eligible members.

Requests have further included demands which would require some employers to prepare additional documentation that is not readily accessible and which may not be relevant to issues on the bargaining table. A union's right to receive information from employers is not absolute. It will depend upon the particular circumstances of the request, including such factors as the

content of the bargaining proposals, the stage of negotiations, collective agreement obligations, and the relationship between the parties. Employers are entitled to refuse inappropriate requests in certain cases. Your Hicks Morley lawyer would be pleased to review any disclosure requests that your organization receives to assist you in developing a pro-active strategy.

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