FTR Now

Transforming Human Resources Practices Under The Proposed AODA "Employment Accessibility Standard"

Date: March 19, 2009

Employers in Ontario should pay careful attention to the proposed Employment Accessibility Standard (the "Standard") under the *Accessibility for Ontarians with Disabilities Act, 2005* (the "*AODA*") released for public comment in February 2009. If approved in its present form, the proposed Standard will transform how employers deal with employees and potential employees in all phases of the employment cycle, and would require considerable changes in the human resources practices of many employers.

The Standard sets out specific requirements for recruitment, assessment, selection, hiring, retention, and separation and termination from employment. It reaches beyond the *Human Rights Code*'s duty to accommodate individuals with disabilities, and will have a broad impact on how organizations interact with and accommodate persons with disabilities.

Given the potential impact of the Standard, and the importance of accessible workplaces for persons with disabilities, we strongly encourage employers to take time to review the Standard and consider making submissions on it during the public consultation period, which ends on May 22nd.

BRIEF OVERVIEW OF THE *AODA*

The fundamental purpose of the *AODA* is to make Ontario fully accessible for persons with disabilities by 2025, which is to be accomplished by the gradual establishment and implementation of accessibility standards for the following areas: customer service; transportation; information and communications; the built environment; and employment. These standards are being given the force of law by being adopted as binding regulations. While voluntary compliance is a goal of the legislation, in time the *AODA* envisions a "multi-stage" enforcement process involving compliance reporting, inspectors, director's orders, and the oversight of a tribunal.

Once this multi-stage enforcement process is engaged, employers who continue to fail to comply with the standards established under the *AODA* could be subject to administrative penalties and be found guilty of an offence with fines of up to $100,000 for each day or part of a day that the offence continues to occur. Similarly, a person who is found guilty of an offence could face a fine of up to $50,000 per day.

The proposed Employment Accessibility Standard is the fourth of five standards under the *AODA*. The other accessibility standards cover the following areas:

- **Customer Service –** This standard has been passed as a regulation and is now the law. We discussed it in some detail in our Fall 2007 issue of FTR Quarterly.
- **Transportation –** A final proposed standard was submitted to the Minister of Community and Social Services for final approval, and so a regulation is expected to be issued in the near future.
- **Information and Communication –** This proposed standard was released in November 2008 for public comment until February 2009. We reviewed it in a January 2009 *FTR Now* entitled, "Proposed 'Accessible Information and Communications Standard' Under the *AODA*". This standard was notable for its breadth of coverage, short timelines, and for the potential commitment in terms of time, money and other resources for employers and other organizations.
- **Built Environment –** A draft proposed standard is expected to be released in June 2009.

THE PROPOSED EMPLOYMENT ACCESSIBILITY STANDARD

SCOPE AND APPLICATION

The Employment Accessibility Standard has been developed to apply to all employers in the province of Ontario, provided that they employ at least one paid employee. Furthermore, the Committee has proposed that the Standard would only apply where the employees are engaged in paid employment. Thus, the Standard is not intended to apply to volunteer relationships, nor to internships. Even where an organization engages the services of paid employees, if all employees were members of the immediate family of the employer, the Standard would also not apply.

Within the vast category of organizations with at least one paid employee, the Standard would establish six classes:

- Class A – private sector, 1-5 employees
- Class B – private sector, 6-49 employees
- Class C – private sector, 50-99 employees
- Class D – private sector, 100-200 employees
- Class E – private sector, > 200 employees
- Class F – designated public sector organizations (a broad category covering virtually the entire public sector)

The Standard specifies that “private sector” would include both for-profit and not-for-profit organizations.

ACCESSIBLE EMPLOYMENT POLICIES AND TRAINING REQUIREMENTS

The first set of proposed obligations relates to the development of employment policies and the provision of training.

All classes of employers would be given one year to develop an organizational accessible employment policy statement that would contain the following commitments:

- prevention, identification and removal of barriers throughout the entire employment cycle;
- inclusive design of employment systems and processes;
- support of persons with disabilities from recruitment through hiring;
- individual accommodation plans;
- respect for privacy of information related to accommodation;
- provision of information in accessible formats and methods; and
- provision of disability awareness training to employees.

In addition to adopting an organizational accessible employment policy statement, employers would be required to develop, adopt, document and maintain policies that support the implementation of the commitments in the policy statement. Organizations also are required to assign and document responsibility to someone in management for adhering to the Standard. Class A organizations (private sector, 1-5 employees) would be exempt from this aspect of the standard, while all other organizations would have 1-2 years to comply.

The Standard would establish fairly significant training requirements, as well. First, employers would be required to provide the disability awareness training, as specified in the Customer Service standard, to their employees. This training would include, for example, training on communicating with persons with a variety of specific disabilities, and was canvassed more fully in our FTR Quarterly article, cited above.

In addition to providing this training, employers would have to review their organizations and provide training in the following areas to the appropriate staff:

- accessible employment policies and procedures;
- what accommodations can be made;
- how to support disability disclosure;
- how to identify accommodations; and
- how to develop an individual accommodation plan (see discussion below).

Once again, Class A organizations would be exempt from this aspect of the Standard, and all other organizations would have from 3-5 years to comply.

RECRUITMENT, ASSESSMENT, SELECTION AND HIRING

Perhaps one of the more notable aspects of the proposed Standard is the obligation on employers to focus on disability-related issues at the recruitment through hiring stages of the employment relationship.

The Standard would reinforce the obligation to provide accommodation to potential employees, and would require larger employers to develop, adopt, document and maintain a procedure to ensure that accommodation is provided to job applicants ("larger employers" means all public sector employers, and private sector employers with at least 50 employees).

For the purposes of recruitment, most employers would be required to document the essential duties of vacant jobs, and all employers would be required to provide this information upon request. Furthermore, most employers would be required to provide information about job openings to organizations that provide employment services to persons with disabilities, and would be required to advertise that individual accommodation will be provided to applicants who meet the required qualifications.

With respect to assessing and selecting job applicants, larger employers would be required to tell applicants that all job assessment and selection materials and procedures, including application forms, testing materials and interviews, are available in accessible formats and methods. These same employers have the obligation reinforced that accommodations must allow for an individual to be assessed against the essential duties of the job.

When an organization is making a job offer, it must inform the individual being hired of the organization's individual accommodation procedure.

With respect to information and communications, the Standard is proposing that certain materials and processes be offered in an accessible format and method:

- essential duties of vacant jobs;
- employment opportunity information;
- job advertisements and postings;
- application forms;
- job testing materials; and
- job interviews.

At this stage, the Standard simply refers to the proposed Accessible Information and Communications Standard for compliance purposes. However, this does not give much guidance as to what, precisely, would be required, and, given the potential far-reaching impact of this aspect of the Standard, this is a section that will need to be carefully reviewed when it is finalized.

RETENTION REQUIREMENTS

Retention requirements cover a variety of aspects of the ongoing employment relationship, and deserve careful review.

The first key obligation relates to the requirement for individual accommodation plans for employees. The Standard would require larger employers to develop formal procedures aimed at the establishment of individual accommodation plans, including information on how to request accommodation, who is to be consulted, how privacy will be protected and how the plans will be reviewed and modified.

At this time, the Standard proposes several general elements of a plan:

- assessment and accommodation of employees on an individual basis;
- the requirement to consider input from workplace, medical and other experts;
- details of the accommodation being provided;
- details of the timing of accommodations;
- individualized emergency evacuation procedures, if required; and
- details of the decision-making process used to develop the plan.

In its consultation document, the Committee specifically asked if the Standard should detail the components of an accommodation procedure or plan, though it is not clear how this could be meaningfully done given the individualized nature of the accommodation process.

The Standard would also require that workplace orientation activities take into account the accommodation needs of employees, including providing information to employees about the employer's policies and procedures to support employees with disabilities and information on how to request an accommodation.

Other aspects of this part of the Standard include performance management requirements and career development and advancement requirements. The Standard would also require employers to formalize a Return to Work procedure for non-WSIB related injuries or illnesses. Furthermore, redeployment policies would need to more formally address accommodation issues.

Information on separation and termination would need to be provided in accessible formats and methods.

Employers would also need to initially explain to employees, and later to provide accessible materials to employees related to, the organization's emergency and safety-related processes and procedures, including WHMIS, health and safety procedures and systems, and emergency evacuation procedures.

Finally, this section of the Standard reiterates that certain materials must be made available using formats or methods compliant with the Accessible Information Communications Standard:

- individual accommodation plans;
- employee orientation materials;
- performance management processes (if used);
- career development and advancement opportunities (if provided);
- return to work procedure;
- redeployment procedure (if one exists);
- separation and termination information; and
- emergency and public safety information.

INDICATORS OF PROGRESS

The proposed Standard also contains a very general requirement for employers to identify indicators of progress towards accessible employment and to collect data that measures performance against the indicators.

CONCLUDING THOUGHTS

As can likely be appreciated from this review, the proposed Standard is very administratively intensive, and will be costly to implement, particularly for those organizations with less well-developed human resources services. Regardless of the state of an organization's accommodation policies and procedures, all employers will need to spend a fair amount of time and effort to review existing policies, and to develop and formalize policies and procedures to comply with the Standard.

A February 2009 Costing Report prepared by Deloitte estimated that the overall cost of implementing the Employment Accessibility Standard by itself was over $650,000,000.00 (or approximately $5800 to $6300 for each Ontario employer with over 50 employees). However, the costing analysis assumed, for example, that employers would be able to use existing human resources personnel to implement the changes, and that training materials will be made available by the government at no cost to employers. We believe that there is a real risk that the actual cost of compliance will exceed these estimates.

It has been an interesting process to compare the implementation time frames contemplated in the text of the *AODA*, and the rather aggressive time frames being adopted and proposed by the various committees. This was perhaps most apparent in the proposed Accessible Information and Communications Standard, which is proposed to set timelines that few, if any, organizations in the province could realistically meet. While the time frames of the Employment Accessibility Standard are not as overly optimistic as those ones, it should be remembered that the compliance time frames for all standards overlap. Thus, organizations will have their hands full as the various standards are approved and come into force.

We recommend that all employers and organizations review the proposed Standard in detail, and consider making submissions to the Committee. Some aspects of the Standard that could use clarification are, for example:

- How do the recruitment requirements fit in with the strict requirements of the *Human Rights Code*?
- How does the requirement to post job notices with external organizations that serve the disabled communities fit in with internal job posting and recruitment requirements of collective agreements?
- Will the recruitment requirements affect extra-provincial or international recruitment?
- Given that the *Human Rights Code* applies to all employers, why are some employers exempted from some basic requirements of the Standard?
- How will the *Code*'s concepts of undue hardship and reasonable accommodation be considered under the *AODA*?
- What will be the specific requirements for employment-related information and communications?

The deadline for submissions to the Committee is May 22, 2009. You may find copies of the proposed Standard, along with additional resources and contact information, at:

http://www.mcss.gov.on.ca/mcss/english/pillars/accessibilityOntario/accesson/business/employment/

If you have any questions, please do not hesitate to contact your regular Hicks Morley lawyer.

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