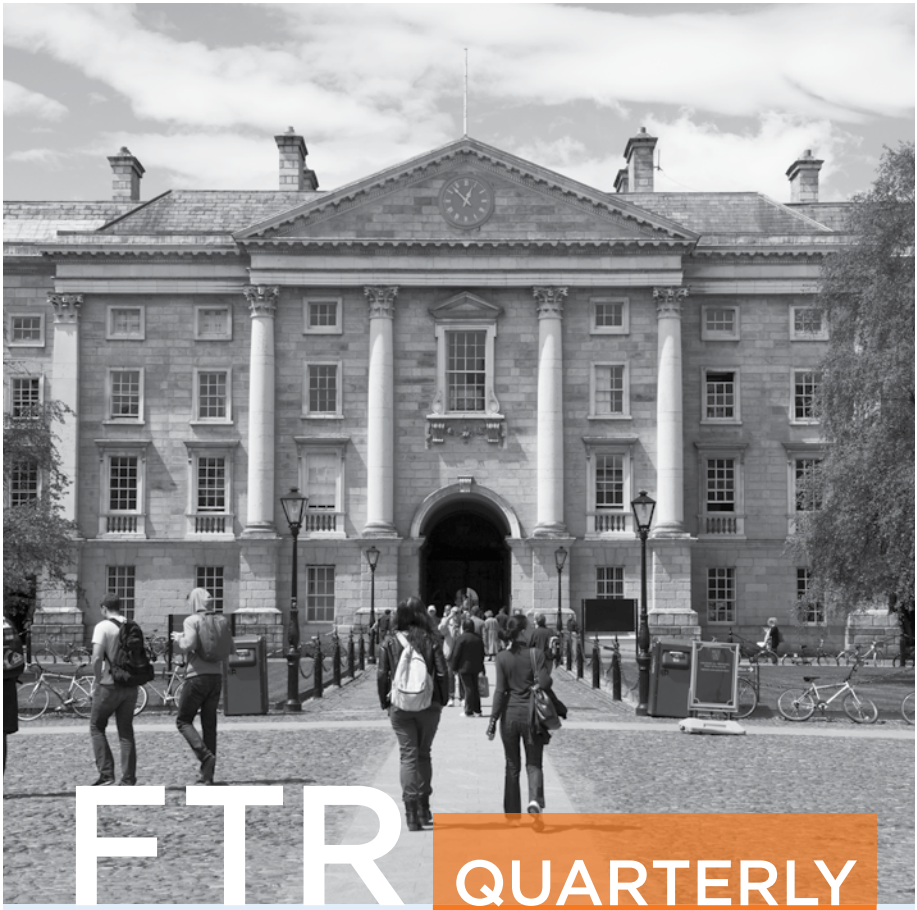

FTR QUARTERLY

FALL 2014

Hicks Morley

HUMAN RESOURCES
LAW AND ADVOCACY

In this issue:

UNIVERSITIES – HIGHER LEARNING IN THE HR WORLD

While large organizations by their nature can be complex operations, few can match the multi-faceted mandates and management needs of universities.

Serving thousands of students still in their formative (and vulnerable) years of life, addressing the research and academic needs of faculty, managing a wide range of staff, facilities and funding arrangements, it is a wonder these institutions manage to navigate challenges time and time again.

Yet they do, and our university system ranks among the best in the world.

“Universities are very decentralized, consensus-driven institutions, and while decisions can take time, they are usually well thought out,” says Michael Kennedy, chair of the Hicks Morley Universities practice group. “And the HR issues they manage cross the entire spectrum from bargaining, arbitrations, and student/faculty and human rights tribunals, to pensions.”

They must also manage these issues – and honour their education and research mandates – with reduced levels of funding.

“The ongoing trend – and one that has continued for some time – is the diminution of government funding as a total of university

budgets," says John Brooks, a partner in the Hicks Morley Toronto office. "That leaves only two other sources of funds for universities – tuition revenue from students and endowments. There are limits to what you can get from each, so these organizations are continually challenged to try to do more with less."

SECURING THE PENSION PROMISE – AFFORDABLY

One area in which some universities have sought to manage costs is with the funding of their defined benefit pension plans. The pension funding issues that arose out of the financial crisis in 2008 changed the focus of discussions between universities and their plan members to include member contribution increases and other funding issues.

"Transparency in the operation and governance of pension plans with unions, faculty associations and other employee groups is critical in terms of gaining trust and, where changes are necessary, reaching an agreement at the bargaining table."

"Benefit security has become a big issue – especially with recent high-profile insolvencies – and we're seeing more involvement from unions and faculty associations in terms of pension plan design, funding and governance," says Lisa Mills, a Hicks Morley partner in Ottawa.

One plan design option that certain universities are exploring is the implementation of jointly sponsored pension plans, where plan members and the employer share the funding risks.

"We've provided a lot of advice around the jointly sponsored pension plan model recently," says Mills. "This ranges from meetings with the Ministry of Finance to engaging in JSPP negotiations."

Mills believes that one of the most important goals universities should pursue with their plan members is transparency.

"No matter what type of pension plan is provided – DB, DC, target benefit, or JSPP – transparency in the operation and governance of pension plans with unions, faculty associations and other employee groups is critical in terms of gaining trust and, where changes are necessary, reaching an agreement at the bargaining table."

THE HR CHALLENGE

Regardless of funding cuts or shortfalls, human resources issues continue to emerge and challenge universities, many in the human rights area.

"The impact of the *Human Rights Code* on issues that were once relatively well-settled – such as mandatory retirement – has been significant," says Jonathan Maier, a Toronto office partner. "It requires you to deal with aging workforce issues in a whole new way. And there are similar challenges with disability accommodation and its impact on processes, such as tenure and promotion reviews."

While universities have considerable sophistication in dealing with human rights issues – and manage many issues internally – there has been a significant increase in both the volume and the complexity of the human rights challenges they face.

"The issues in which they ask for our assistance tend to be the most complex cases where some strategic guidance is needed to find a solution that avoids the need for litigation," says Catherine Peters, a Toronto-based partner and chair of the firm's Human Rights practice group.

Mental health is one such area. In addition to accommodating employee mental health issues, universities are expected to play a much more active role in managing issues around students who pose a risk of harm to themselves or others, and to have sophisticated strategies in place for supporting employees and students who may be experiencing mental health issues.

"We've helped our clients develop very successful awareness campaigns," says Peters. "And more importantly, put in place a wide variety of supports and accommodations to assist employees and students who are grappling with mental health issues."

A MANDATE TO LISTEN – THEN RESPOND

While there are many common challenges faced by universities across the country, they cannot be painted with the same brush when it comes to human resources issues.

"There are very distinct differences between institutions – we can never stress that enough," says Jason Green, a partner in the firm's Toronto office.

"One of the most important parts of our job is to listen – to sit down with our clients each year and ask what their challenges are, what their goals are, and then help them develop a plan. In this sector, there's no such thing as a blanket solution."

PILLARS OF SUCCESS: A "BEST PRACTICES" APPROACH TO POST-SECONDARY ACCOMMODATION ISSUES

Requests for accommodation and human rights-related complaints regarding the provision of education are on the rise. Now more than ever, post-secondary institutions must ensure they have a well-defined process for responding to requests and assisting students with disabilities. A "best practices" approach to this process should be framed around four key pillars: identification, communication, cooperation and implementation.

BY: KATHRYN J. BIRD

IDENTIFICATION

Early identification of students who may be facing learning challenges will assist in ensuring that each student's needs are supported before their education is negatively impacted. Students should be encouraged during the application process, following acceptance and throughout the first weeks of school, to communicate with the disability services office if they believe they may require support. Instructors and other staff members may also be encouraged to refer students to the disability services office if they believe a student may require accommodation.

Unfortunately, some students do not identify potential disability issues until they have experienced a negative outcome in their student experience (such as a failing grade in a class).

Despite the delayed identification, institutions should respond to these requests for accommodation in a manner consistent with their general practice.

COMMUNICATION

Once a student has been identified as potentially requiring accommodation, the institution should immediately begin communicating with the student regarding the student's educational needs and the institution's available supports. Proactive communication about the information required to assess the accommodation request will assist the institution in determining whether a student has a medical need for the requested accommodation. It is important to note that accommodations previously provided at the secondary education level may no longer be appropriate or reasonable in light of the student's actual needs when assessed by the institution, and considered in its own unique educational context.

Students should be encouraged to work with their physicians or other experts to provide information to the institution regarding the nature of the students' disability and the supports needed.

At the outset, institutions should identify the information they require to review the accommodation request and implement the accommodation plan (if necessary). Students should be encouraged to work with their physicians or other experts to provide information to the institution regarding the nature of the students' disability and the supports needed. Requests for additional information should identify the purpose of the additional information and the impact a failure to provide the information may have on the process.

COOPERATION

The accommodation process is a cooperative process. The student, the institution, medical providers or other experts, and other stakeholders should work together to determine the appropriate accommodation plan. Neither the institution, nor the student, should unilaterally define the accommodation plan. Wherever possible, all parties must work collaboratively to develop an accommodation plan that is mutually agreeable.

As part of the student's obligations to cooperate with the accommodation process, he or she must be prepared to comply with reasonable requests for medical or other expert evidence that delineates the student's accommodation needs. Institutions are not required to accept a student's self-report of what his or her accommodation needs are, nor are they required to implement requested accommodations – including plans developed at a secondary education level – without sufficient, current validation from medical professionals or other experts.

Institutions are entitled to information from the student that allows them to determine what accommodations are required to meet the student's needs. Depending on the extent of the accommodations sought, the information required to validate the request may be quite detailed.

When assessing possible accommodations, institutions should consider all available options for accommodating a student's disability-related needs – and students

should be encouraged to propose accommodation options. The institution should maintain records of the review of the accommodation options and the reason why options were selected or rejected.

In the event the student is not working in a cooperative and collaborative fashion, the student should be clearly informed of the institution's expectations regarding his or her participation in the accommodation process. Further, the consequences of a student's failure to participate should be identified and explained in detail, so it may be relied upon in the event of a complaint from the student.

IMPLEMENTATION

Once the accommodation plan has been finalized, the institution should implement the accommodations as soon as it is practical to do so. Institutions should ensure that the academic staff involved in the student's education are aware of the accommodations so they may be implemented promptly.

If a student refuses to accept a reasonable accommodation plan, the institution should request that student reconsider his or her position. The student ought to be encouraged to clearly identify his or her concerns with the accommodation plan and the institution should outline its response to those concerns in detail. If a student continues to refuse a reasonable accommodation plan, the institution should maintain a record of its proposals and the student's refusal to cooperate with the proposed accommodation plan.

> Institutions are entitled to information from the student that allows them to determine what accommodations are required to meet the student's needs.

The finalization and implementation of an accommodation plan does not end the accommodation process. Once the accommodation plan has been implemented, it should be reviewed on a regular basis. Institutions should communicate regularly with the student about the sufficiency of the accommodation measures in place, any changes that may be required to the accommodation plan, and any issues identified by the student or academic staff members. The accommodation plan should be revised as necessary on an ongoing basis to meet the needs of the student.

Kathryn Bird *regularly advises employers, school boards and post-secondary institutions on human rights and accommodation, litigation, and employment matters. Kathryn regularly advises educational institutions on human rights issues raised in the provision of educational services to students. In addition, she appears before the Human Rights Tribunal of Ontario and Superior and appellate courts regarding issues related to human rights, litigation and employment matters.*

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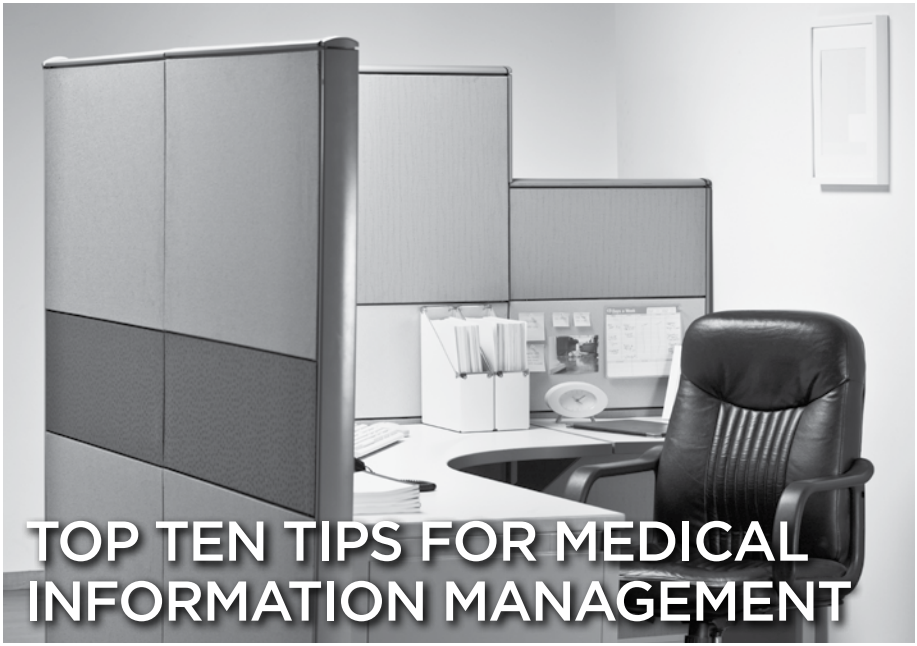

TOP TEN TIPS FOR MEDICAL INFORMATION MANAGEMENT

A request for medical information can be an important tool for managing employee attendance. However, many employers are uncertain about when (or even whether) they can request medical information from their employees and what medical information they can receive. Here are our top ten tips on requesting, receiving and relying upon medical information.

BY: LISA M. KWASEK

1. REVIEW YOUR COLLECTIVE AGREEMENT

In a unionized environment, employers and unions may bargain specific restrictions with respect to requesting medical information (for example, permitting the employer to request a medical note for absences greater than a certain number of consecutive days). Make sure you are familiar with the terms of your agreement. However, there may be cases where you can request information outside of these terms, as arbitrators have held that employers retain the right to make "reasonable requests" for medical information beyond the scope of the collective agreement.

2. KNOW YOUR RIGHTS TO INFORMATION, ABSENT A COLLECTIVE AGREEMENT

In the absence of a collective agreement, you are generally entitled to obtain medical information to:

- determine whether an illness/disability is *bona fide*;
- assess the impact of an illness/disability on the attendance of the employee; and
- ensure that the employee is fit to return to work.

However, you are not entitled to disclosure of the employee's specific diagnosis or treatment plan.

3. UNDERSTAND WHEN IT IS REASONABLE TO REQUEST MEDICAL INFORMATION

Arbitrators are unlikely to uphold a mechanistic approach to the request for medical information. The reasonableness of a request for medical information will turn on the facts of each individual case, so make sure any request for medical information is properly considered and reasonable in the circumstances.

4. USE MEDICAL INFORMATION TO CONFIRM FITNESS TO RETURN TO WORK

If you are concerned about an employee who is exhibiting bizarre or erratic behaviour, you have the right to remove the employee from the workplace. In such a situation, you may want to request that the employee provide medical information to support that he or she is healthy enough to function safely in the workplace. However, as mental health disabilities have attracted heightened focus in the workplace, ensure that you are taking such action based on objective evidence and not on assumptions or stereotypes of persons with mental health disabilities.

5. CHALLENGE THE *BONA FIDES* OF AN ILLNESS/DISABILITY THROUGH REQUESTS FOR A PHYSICIAN VISIT

If you have objective reasons to suspect that an absence was due to reasons other than illness or disability – or can establish a pattern of suspicious absenteeism – you may be able to implement a requirement that an employee visit a physician on any future date of absence to support his or her claim of illness or disability.

6. COMMUNICATE WITH MEDICAL PROFESSIONALS EFFECTIVELY – AND APPROPRIATELY

Although it may seem easier to speak with a medical professional directly to obtain the information you require, medical professionals are strictly obligated to protect patient confidentiality, and are not entitled to disclose a patient's medical information without his or her consent. In fact, most arbitrators would consider an attempt to speak with medical professionals or your company health centre without the employee's consent to be a breach of privacy.

If the employee is not providing the medical information you require, request that the employee execute a consent allowing you to speak with his or her medical practitioner directly. If the employee refuses, consider preparing a letter outlining the precise medical information you require and request that the employee present the letter to his or her medical professional.

The reasonableness of a request for medical information will turn on the facts of each individual case, so make sure any request for medical information is properly considered and reasonable in the circumstances.

7. CLARIFY MEDICAL OPINIONS RELATING TO RESTRICTIONS AND LIMITATIONS

Physicians and medical professionals are not experts on your workplace or the accommodations that can be made for an employee. Before embarking on the development of an accommodation plan, have a clear understanding of the precise nature of the employee's restrictions and limitations, even if that means getting

the consent of the employee to seek clarification directly from the employee's physician.

8. DO NOT ALWAYS INSIST UPON AN INDEPENDENT MEDICAL EVALUATION

If you have conflicting medical opinions or uncertainty about an employee's restrictions or limitations, requesting an independent medical evaluation can be a sound strategy to consider when developing an accommodation plan or determining an employee's ability to return to work. However, there are two things to keep in mind:

- absent clear language in a collective agreement permitting an independent medical evaluation, an employee is entitled to refuse such an evaluation; and
- independent evaluations can be difficult to challenge if the results are not in your favour. Be sure to weigh the pros and cons carefully before making the request.

9. USE CAUTION WHEN CONSIDERING DISCIPLINE

So long as a request for medical information is reasonable (or authorized by the collective agreement), an employee can be disciplined for failing to provide medical information to substantiate an absence. In addition, an employee can be disciplined if he or she has been cleared to return to work and refuses, or he or she has been provided with appropriate accommodation and does not accept it.

However, use both discretion and caution when imposing discipline in these circumstances as an arbitrator (or other decision-maker) may subsequently:

- determine the employee was not given sufficient time to obtain the medical information – or was not warned about the consequences; or
- decide that the accommodation was not appropriate, or that the employee was not cleared to return to work.

10. GUARD THE CONFIDENTIALITY OF MEDICAL INFORMATION

Privacy legislation protects the confidentiality of personal medical information against unauthorized disclosure. Medical information that is provided to an occupational health department cannot be disclosed without the consent of the employee, even internally within the business. If medical information is being directed to the human resources department, care should be taken to ensure that these documents are kept in a safe and secure location.

Lisa Kwasek *is an associate in the firm's London office. She practises in all areas of labour and employment law, with a particular emphasis on wrongful dismissal and employment matters, human rights, collective bargaining and grievance arbitration. She speaks regularly on matters relating to medical information management.*

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PROFESSIONAL DEVELOPMENT SESSIONS AND WORKSHOPS

This professional development program for in-house counsel and human resources professionals is designed to keep you informed about the latest legal developments and best practices.

November 6	WSIB Winning the Uphill Battle Conference
November 19	Ex-pats and Imports – International Employment Law 101 Breakfast CPD Session
November 25	Workplace Investigation Training
November 26	Human Rights Update 2014: Accommodation and the Diverse Workforce Breakfast CPD Session
December 3	Human Rights in the School Board Sector
December 8	Special Education Webinar: After *Keewatin*: The Use of Exclusions
January 21	Pension Benefits and Executive Compensation Update CPD Session

HR QUICK HITS

Hicks Morley values your input – participate in our client communications survey

As a valued subscriber to *FTR Quarterly*, your opinion counts!

To best ensure that our publications and other communications meet your needs, please complete our online survey at http://www.hicksmorley.com/survey by December 15, 2014. We estimate that it will take no more than 5 to 10 minutes of your time. Your responses will be kept strictly confidential.

We very much appreciate your participation. Your feedback will help us continuously improve our communications with you and enhance the quality of our service.

If you have any questions about the survey, please do not hesitate to contact Susan Carnevale at susan-carnevale@hicksmorley.com.

IT'S ACADEMIC

Michael Kennedy has practised at Hicks Morley since his articling year in 1991. His practice ranges across the private and public sector, with extensive experience in bargaining with trade unions such as the CAW, Firefighters' Associations, CUPE and Steelworkers. In addition, he devotes a significant portion of his practice to the university and municipal sectors, and currently chairs the Hicks Morley Universities practice group.

Michael spoke with *FTR Quarterly* about his life and career path – and the evolving challenges that clients face today.

It seems that your interest in the university sector was bred in the bone?

It was indeed. I was born and raised in London, Ontario – and my dad was a professor at the Ivey School of Business at Western University. I always lived with academics at home – so it's a good fit for my university practice.

Where did you go to school?

I did my undergrad degree at Queen's in Political Studies. I was always attracted to law, but I wanted some life experience first. I worked for the Ontario Ministry of Community and Social Services after graduation. Following that, I worked for a small charitable organization.

And then law school beckoned?

I found the unpredictability of law very attractive – a career where every day was a different challenge. And it could marry elements of politics and advocacy – two things that I was very interested in.

So I went back to my roots – to Western – and completed my law degree there. My interest in labour law and Hicks Morley was sparked during a lecture led by a senior member of the labour bar whose enthusiasm for the practice was encouraging for a prospective lawyer. I also happened to be sitting beside the younger sister of our current managing partner, Steve Shamie, and she said if you're interested in labour law, the place to be is Hicks Morley. I did check it out – and I articled here and haven't looked back.

As a young lawyer, were you drawn to any particular areas?

I developed a bargaining-based practice through a lot of firefighter interest arbitration work – which is really an extension of the bargaining process. And I developed a number of client relationships through that process. It really expanded my practice.

But the greatest influence for me was doing work as a junior lawyer with Christopher Riggs, who was a phenomenal litigator and the dean of university lawyers in Ontario. I think he acted for more universities in Ontario than any other practitioner, and my work with him was my introduction to the university sector.

You're head of the Universities practice group. What does that entail?

The university work is about half of my practice, so I spend a lot of my work time in that sector. They are complex decentralized organizations – so the work crosses many of our practice areas.

My colleague John Brooks has 25 years' experience in the area, and I work with him to connect with as many related organizations as possible within the sector. The challenge is making sure that our university clients know about our expertise across the spectrum, from pensions to human rights.

A key role I play these days is helping clients develop strategic solutions to long-term challenges.

Since you started your practice 20 years ago, how has it changed for clients in dealing with HR issues?

There's been a lot of change. Twenty years ago, the typical HR director had to be an expert on labour relations. Today, that expectation is far broader – and there's a need for greater depth and vision in an organization from an HR perspective.

A key role I play these days is helping clients develop strategic solutions to long-term challenges. Quite rightly, they're not interested in litigating unless absolutely necessary. They want to solve problems in the most-cost effective way possible.

What do you enjoy doing outside of work?

My wife Christol and I have three active kids, ages 14, 11 and 7, so much of my time outside of work involves transport and involvement in various sporting activities, from swimming to running to soccer. We as a family also love to travel – a highlight was a family trip to Capetown, South Africa two years ago to see the sights and visit with my in-laws, who live there. It was an amazing experience for all of us.

NEW ASSOCIATES

Hicks Morley is pleased to welcome back three new associates to the Toronto office, following the successful completion of their articles and call to the Bar in 2014.

TATYANA LUNEYKO

Tatyana Luneyko practises in all areas of labour and employment law, with a particular interest in litigation. She attended law school at the University of Windsor and the University of Toronto and received her Juris Doctor in 2013. She articled with the Attorney General of Ontario before joining the firm in 2014 as an associate.

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EDWARD O'DWYER

Edward O'Dwyer provides advice and representation to employers and management in both the public and private sectors on a wide range of labour and employment issues. Edward received his Juris Doctor degree from the University of Western Ontario, where he was a Hicks Cup champion. Edward also received the Justice C.D. Stewart Award in Appellate Advocacy during his time at Western. Edward articled at the firm before returning in 2014 as an associate.

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SEAN PORTER

Sean Porter provides advice and representation to employers and management in both the public and private sectors on a wide range of labour and employment issues including labour disputes, grievance arbitrations, wrongful dismissals, employment standards, employment contracts, human rights and accommodation and related court litigation. Sean received his Juris Doctor from Queen's University. Sean summered and articled at the firm before returning in 2014 as an associate.

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NEW PARTNER

Hicks Morley is pleased to welcome David Bannon to the partnership. He joins the Toronto office.

DAVID BANNON

David Bannon was called to the Bar in 1994. He represents management in all areas of employment and labour law, and is certified by the Law Society of Upper Canada as a Specialist in Labour Law.

David advocates on behalf of clients in labour board proceedings, grievance arbitrations, construction labour law proceedings, occupational health and safety matters, human rights issues, WSIB, injunction proceedings and wrongful dismissal claims. He advises employers with respect to union certification drives. He frequently acts as a spokesperson in collective bargaining and provides strategic advice to assist bargaining teams when he is not at the bargaining table. He also advises employers on employment and labour issues arising in corporate transactions.

David regularly appears before courts and tribunals, including boards of arbitration, provincial and federal labour boards, the Human Rights Tribunal of Ontario, employment standards referees, occupational health and safety adjudicators, the Ontario Court of Appeal, the Divisional Court and the Ontario Court of Justice.

Prior to joining Hicks Morley, David was a labour and employment law partner at a full-service international law firm.

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