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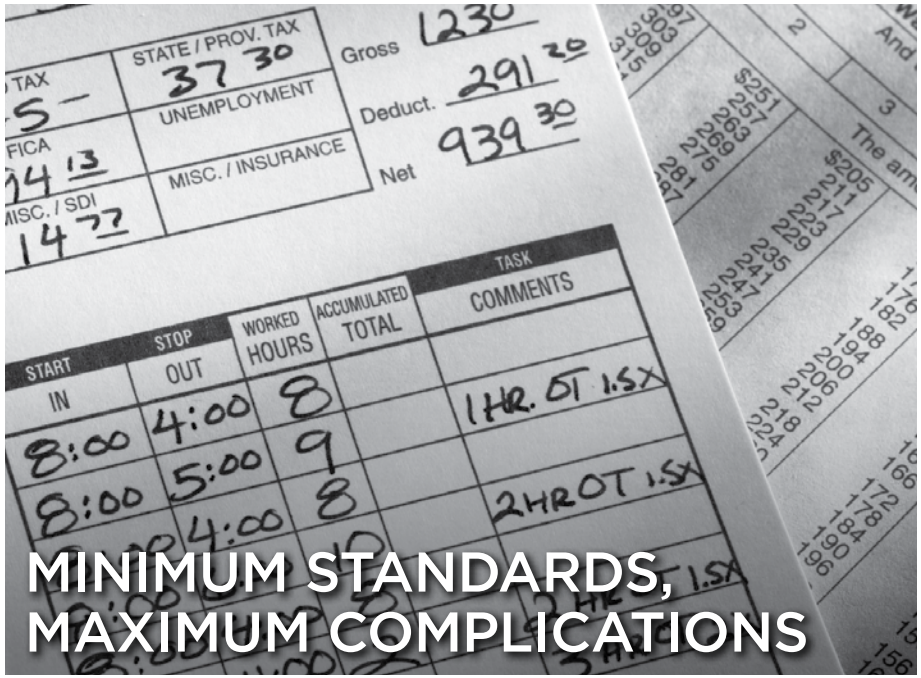

MINIMUM STANDARDS, MAXIMUM COMPLICATIONS

Of all employment-related compliance requirements, few sound as easy to address as "minimum standards" under provincial employment legislation or the federal *Canada Labour Code*. Just meet the minimum requirements on issues such as overtime pay, vacation and severance – and all will be well.

Easier said than done. What may seem on the surface like simple, straightforward standards are actually surprisingly complex in their application.

"Compliance requirements in areas such as hours of work and overtime are extensive," says Amanda Hunter, a Toronto office partner. "Knowing the records you need to keep and the agreements and approvals that you need to obtain, and properly determining who is exempt from the overtime requirements, are essential. It's not as easy as it may appear – I've literally helped hundreds of clients with issues like these."

BROAD SCOPE CREATES CHALLENGES

A key challenge for employers is that employment standards legislation is not just restricted to hours of work and overtime issues. It touches on many different aspects of the employment relationship – from vacation and statutory holiday pay, to termination provisions and leaves of absence.

Pregnancy and parental leave rules are good examples. Returning employees are entitled to reinstatement to the position they most recently held with their employer, or to a comparable position if the original position no longer exists. But the "comparable position" requirement is one that is frequently disputed.

"Comparability involves much more than just compensation," says Craig Lawrence, a Toronto office associate. "It also includes the level of responsibility associated with the role, the reporting structure, hours of work and location – it's very much a holistic view of comparability."

Kathryn Meehan, a Waterloo office associate, agrees.

"Disputes involving comparable jobs are both common and complex – and the consequences can be severe, including damages, back wages and reinstatement," says Meehan. "Results can vary depending on the circumstances. In some circumstances, we are able to lead evidence that demonstrates no breach has occurred. In others, if a breach is clear, we can assist in negotiating a favourable resolution."

TERMINATION BLUES

Another complex minimum standards area for employers to navigate relates to termination – and specifically to termination clauses in employment contracts.

"We see a lot of issues related to employment contracts where the contract states that the *Employment Standards Act* minimum be given upon termination," says Carolyn McKenna, an associate at the Hicks Morley Toronto office. "In light of recent case law, these clauses have come under immense scrutiny."

In fact, if courts or other adjudicators determine that termination clauses don't comply with the *Employment Standards Act, 2000*, they will be held to be unenforceable.

"That's when employers can be in for a shock," says Joseph Cohen-Lyons, a Toronto office associate. "In those circumstances, the employer is liable for pay in lieu of reasonable notice at common law – and they assumed they had limited their liability in an employment contract. That's why legal advice on the contract up front is so important."

PLAN, PREPARE, COMPLY

It's not only the drafting of employment contracts that requires careful up-front work. Employers should undertake a review of all employment policies and practices to ensure compliance with employment standards legislation.

One of the key reasons for this is the potential costs of non-compliance. If, for example, an employer discovers that it has been calculating statutory holiday pay incorrectly for hundreds of employees over many years, the retroactive costs can be significant.

"Most of my work is policy development and up-front compliance," says Paul Broad, a partner in the firm's London office. "When the up-front work is done effectively, it really helps clients avoid litigation about employee entitlements. There will always be one-off challenges in specific situations, but well-designed policies can go a long way to reducing problems in the first place."

CHANGE IS A CONSTANT

One of the other key reasons for a regular review of policies and practices is that the rules relating to employment standards continually change, whether through evolving case law or legislation.

> "When the up-front work is done effectively, it really helps clients avoid litigation about employee entitlements."

An example is the recent changes to the *Canada Labour Code* that took effect April 1, 2014. The amendments provide a new framework for complaints relating to unpaid wages and other alleged violations. Even more significantly for employers, the framework imposes new time limits on the making of complaints – and new limitation periods for the payment of vacation owing and the recovery of unpaid wages through payment orders. This is welcome news in terms of greater cost certainty for employers in cases where an alleged breach occurs.

Of course, the evolution of the law is not always in the employer's favour. And with change a constant – and the stakes for non-compliance high – the work involved in reviewing your practices and policies is usually well worth it in the long term.

"An employment standards audit can be a time-consuming process – and yes, there are costs involved," says Hunter. "But there truly is no better way to reduce your risks and exposures in this very complex area."

MINIMIZE YOUR RISK: MENTAL STRESS AND THE WSIB

Mental health in the workplace has been the subject of both employer and legislative interest in recent years. As mental health issues in the workplace become more of a focus, it is important that employers understand how Ontario's workers' compensation regime addresses work-related mental health compensation.

BY: SAMANTHA C. SEABROOK AND JOSEPH COHEN-LYONS

Ontario's *Workplace Safety and Insurance Act* ("*WSIA*") and Workplace Safety and Insurance Board ("WSIB") policies currently allow for two areas of entitlement for work-related mental stress: psychotraumatic disability and traumatic mental stress. Each area of entitlement has specific eligibility criteria.

PSYCHOTRAUMATIC DISABILITY CLAIMS

"Psychotraumatic disability" refers to mental illness that is related to a workplace physical injury or illness. The WSIB Psychotraumatic Disability Policy (Document No. 15-04-02) provides for compensation where a worker has an emotional reaction to a workplace physical injury or illness, or the treatment or consequences of that injury or illness.

It is important to monitor the potential for psychotraumatic disability claims because they can contribute to longer lost time periods and corresponding increases in claims costs. Psychotraumatic disabilities may also play a significant role in the

return to work process, as employers will have to accommodate the compensable mental disorder.

TRAUMATIC MENTAL STRESS

Entitlement for traumatic mental stress is regulated by section 13(5) of the *WSIA*, which limits entitlement to situations where there is "an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of [a worker's] employment." Further, section 13(5) specifically prohibits entitlement resulting from mental stress arising from the management of the employment relationship by excluding mental stress that is caused by an "employer's decisions or actions relating to the worker's employment, including a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the employment."

The WSIB's approach to traumatic mental stress claims is set out in its Traumatic Mental Stress Policy (Document No. 15-03-02). This Policy implements section 13(5) of the *WSIA* by limiting entitlement to mental stress that arises from events that are clearly and precisely identifiable, objectively traumatic and unexpected in the normal or daily course of the worker's employment or work environment.

The Policy also requires that the traumatic event result in an "acute reaction," which is defined as a "significant or severe reaction by the worker to the work-related traumatic event that results in a psychiatric or psychological response." To be compensable, the psychiatric or psychological response must result in an Axis I Diagnosis under the DSM-IV, including anxiety disorders like post-traumatic stress disorder, mood disorders, dissociative disorders and sleep disorders.

The Policy lists examples of "traumatic events," like witnessing a fatality or a horrific accident, or being the object of physical violence. The examples in the Policy illustrate situations that present real or implied threats to physical well-being. However, in *Decision 483/11*, the Workplace Safety and Insurance Appeals Tribunal ("WSIAT") expanded the scope of the definition of "traumatic event," finding that section 13(5) of the *WSIA* did not require a real or implied threat to physical well-being for entitlement to benefits for traumatic mental stress.

More recent WSIAT decisions have pushed back on the broadened definition of "traumatic event" in *Decision No. 483/11*. In *Decision No. 1791/12*, the WSIAT found that the list of examples in this Policy was not exhaustive, however, the list provides a useful guide of what will be a "traumatic event."

The competing lines of case law at the WSIAT leave employers with an unclear definition of "traumatic event." This definition is further clouded when we consider that the Policy excludes entitlement for chronic mental stress, or mental stress that develops "gradually over time due to general workplace conditions." For example, in *Decision No. 61/13*, a worker was sexually harassed by a co-worker over a number of years. The Vice Chair found that the co-worker's conduct was inappropriate, but it was condoned in this particular workplace. Further, the Vice Chair found that the worker participated in these activities. The Vice Chair concluded that these events were chronically stressful rather than acute and traumatic. Entitlement was denied.

Despite some inconsistencies in the WSIAT case law, there are some common elements which provide guidance on handling mental stress claims:

- First, while a real or implied threat of physical harm may not be required, there still must be a traumatic event that is objectively traumatic and identifiable before entitlement will be granted.
- Second, the cumulative effects of an employment relationship or hazardous workplace do not warrant entitlement for traumatic mental stress. These situations will generally be considered to manifest chronic stress, and not an "acute reaction" to a sudden and unexpected traumatic event as required by section 13(5).
- Finally, the nature of the workplace and the worker's position will be important in determining entitlement. In this regard, adjudicators at the WSIB and WSIAT will look at what the worker should have expected to occur in the normal course of his or her employment to ensure the claim meets the requirements of section 13(5) for a "sudden and unexpected" traumatic event.

ADDRESSING MENTAL HEALTH IN THE WORKPLACE

Prudent employers will implement an overall strategy for addressing mental health in the workplace. The Canadian Standards Association's *Psychological Health and Safety in the Workplace* standard (the "CSA Standard") is a useful resource for implementing strategies to address workplace mental health issues. The Canadian Mental Health Commission has also released "Psychological Health and Safety: An Action Guide For Employers," a companion guide to the CSA Standard. Both documents have detailed information on steps employers can take to assess mental health in the workplace and put in place systems to improve and monitor psychological health and safety programs.

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MINIMUM STANDARDS CHANGES – AN UPDATE FOR FEDERAL AND PROVINCIAL EMPLOYERS

Recent developments relating to minimum employment standard requirements impact both federal and provincial employers. Here's an update on the changes – along with some "best practices" and tips for compliance.

BY: JODI GALLAGHER HEALY AND LAUREN I. COWL

NEW REGIME FOR COMPLAINTS UNDER THE *CANADA LABOUR CODE* (PART III)

On April 1, 2014, amendments to the *Canada Labour Code (Part III)* (the "*Code*") took effect to create a statutory framework for complaints relating to unpaid wages and other alleged violations of the minimum labour standards identified in Part III of the *Code*. Previously, the *Code* provided a framework for wrongful dismissal complaints only. Complaints regarding all other Part III matters were handled under an internal directive of Employment and Social Development Canada.

The amendments provide several welcome changes for federal employers:

- **Limitation periods:** Earlier case law suggested that inspectors could not limit the period addressed by a payment order (regarding, for example, overtime or vacation pay owed to an employee). As a result, payment orders could potentially span years, creating an administrative nightmare for employers and leaving them open to substantial liability. With these amendments, there is now a 12-month limit on the period that may be covered by a payment order (24 months in the case of vacation pay). The change provides employers with a better sense of the scope of their potential liability should a breach of Part III be proven.

- **Broader powers for inspectors:** Under the new framework, inspectors have the power to reject complaints on a number of bases. These include determining that:
  - the complaint does not fall under the *Code* (e.g. it is a provincial matter);
  - the complaint is frivolous, vexatious or not made in good faith; or
  - a collective agreement governing the employee covers the subject matter of the complaint.

  We anticipate that employers may be able to dispose of these kinds of complaints at an earlier stage and with less expense than under the previous regime.
- **Limited appeals:** Both the time for and scope of appeals of inspectors' decisions are now more limited. Employees who wish to have an inspector's decision reviewed must do so within 15 days of receiving the inspector's rejection of their complaint. The amendments therefore provide finality in complaints within a short period of time following an inspector's decision. On the other hand, appeals of review decisions can be made on a question of law or jurisdiction only. With this limited scope of review, employers should aim to ensure that the inspector "gets it right" the first time by providing adequate documentation and records in support of their position.

EMPLOYMENT STANDARDS ACT, 2000 – RECENT DEVELOPMENTS AND COMMON PITFALLS

Provincial employment standards have also been the subject of noteworthy activity in recent months. Here are some recent developments and compliance tips relating to the *Employment Standards Act, 2000* ("*ESA*").

Minimum Wage

Effective June 1, 2014, Ontario's general minimum wage will increase to $11.00 from $10.25 per hour.

Averaging Agreements

According to the Ministry of Labour's Investigations and Inspections Statistics, overtime pay fell within the top five complaints by employees and within the top five employment standards violations discovered in targeted Ministry investigations during 2012-2013. A common pitfall for employers is improperly implementing agreements to average working hours over multiple weeks when calculating overtime pay.

For an employer to average an employee's hours of work over a period of two or more weeks for overtime pay purposes under the *ESA*, agreements must:

- be in writing and given to the employee;
- have the approval of the Director of Employment Standards; and
- be administered in accordance with the terms agreed upon by the Director. Employers should be vigilant about reapplying for approval before the expiry of their averaging agreements.

As reflected in recent case law, it does not matter whether an employer and its employees have a longstanding practice regarding the averaging of overtime. Failure to meet the statutory requirements could result in an enforceable claim for overtime pay and, therefore, significant cost consequences for an employer.

Wage Deductions

Ministry of Labour inspections frequently identify employer wage deduction practices that do not comply with the *ESA*. In the absence of a statutory obligation or court order, the *ESA* states that deductions from any employee's paycheque require the employee's written authorization. An employer policy stating that the employee is liable for certain amounts or a blanket authorization signed in advance is insufficient.

To be enforceable, the employee's written authorization must refer to a specific amount or the signed authorization must set out a formula from which a specific amount may be calculated. However, deductions from an employee's wages are not permitted for faulty work or in the event of cash shortages or property loss where a person other than the employee had access to the cash or property.

Incarceration

It is an offence to fail to pay a Ministry Order to Pay. The consequence of a conviction can include a fine, imprisonment and a 25% victim surcharge, in addition to continuing liability for the original Order to Pay.

The Crown has recently sought monetary penalties in conjunction with a prison term for directors who repeatedly flouted multiple *ESA* Orders to Pay and imposed significant hardship on a number of people through their illegal acts. While a custodial sentence must be proportionate to the seriousness and gravity of the offences committed, it may become a more frequently used penalty in situations where the imposition of a fine merely constitutes a "licence fee" for violations of the *ESA*.

Jodi Gallagher Healy *is an associate at Hicks Morley's Toronto office, providing advice and representation to employers on a wide range of labour and employment issues, with a focus on minimum standards compliance and litigation, human rights and accommodation, workers' compensation appeals and labour arbitration.*

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FROM THE LAB TO LABOUR LAW

Jodi Gallagher Healy earned two degrees in the fields of microbiology and immunology before leaving science for a law career – and leaving her east coast roots to do it.

All of that change has yielded impressive results as she opens a new chapter in her career with Hicks Morley. We talked to Jodi in April about her early years – and the key drivers of her practice today.

All of your post-secondary education was at Dalhousie. What's your link to the east coast?

I grew up in Halifax so Dalhousie was a natural choice for university. I did all three of my degrees there.

Law wasn't your first academic calling?

No, I started on a science path. I have a Bachelor's degree and a Master's degree in microbiology and immunology. The focus of my graduate research was the immune response to cancer. Then I made a major shift and went to law school.

Why the switch?

One of the main career paths after grad school is to stay in academia and become a researcher. But the more you advance, the narrower your focus becomes and I saw that it could get very isolating. Law offered a different way to participate in the world – with a much broader focus.

I'm at a firm where 100% of the resources support my practice area – and I have more than 115 colleagues with deep expertise in every area of HR law. I feel very lucky to be practising at Hicks Morley.

I actually thought I would end up as an IP lawyer given my science background, but I was bitten by the labour and employment bug at law school. Professor Innis Christie – who was a well-known arbitrator and former dean of the law school – was a huge mentor and influence on me.

When did you make the move to Toronto?

After my second year of law school, I worked for a summer at a national full-service firm in Toronto. I gravitated towards the labour and employment work. After clerking at the Federal Court in Ottawa during my articling year, I went back to the same firm as an associate and built my labour and employment practice there for more than eight years.

And you were one of a group of lawyers to move from that firm to Hicks Morley in 2013?

Yes, there were three partners and two associates who made the change around the same time and since we made the move, two more of our former colleagues have joined us. I have really enjoyed the shift from practising in a full-service firm to a boutique practice. In my former firm, only a small portion of the firm's resources were devoted to my practice area. Now I'm at a firm where 100% of the resources support my practice area – and I have more than 115 colleagues with deep expertise in every area of HR law. I feel very lucky to be practising at Hicks Morley.

Has your practice changed since the move?

In many ways, my practice has remained the same but I now have a more focused platform from which to market and build my practice. I continue to represent mostly private sector employers on a broad spectrum of labour, employment,

human rights and workers' compensation issues. I continue to do client training and a lot of work related to minimum employment standards under the *Employment Standards Act* and the *Canada Labour Code*. There have been some interesting developments in that area recently. The *Code*

> I continue to represent mostly private sector employers on a broad spectrum of labour, employment, human rights and workers' compensation issues.

was just amended to formalize the complaints process and limit some of the open-ended liability that employers have faced, while the provincial legislation may soon be amended to expand employer liability.

Any emerging challenges for clients from an HR law perspective?

I think that there are two issues that will continue to grow in prominence. One is the issue of workplace violence and harassment. Ever since the Bill 168 amendments came in, we've seen a much greater awareness of these issues in the workplace – along with more complaints. It's a tough challenge for employers to effectively address this issue.

The second issue that I think will continue to have high profile is family status accommodation under human rights legislation. There isn't a lot of higher court guidance at this point, but it's likely coming soon. There is a lot of uncertainty around how far accommodation obligations go. It's a key area we can help with.

How about your life outside of law – what are your main interests?

When I first moved to Toronto, I joined an Ultimate Frisbee league, which helped me make a lot of great friends and see the city's fabulous parks. Those friends really helped me adapt to the city and they remain some of my key social connections, along with my husband of course. And Ultimate is still my main athletic outlet – I currently play three times a week. I'm also an art junkie and love going to the AGO. Lately I have also been reading up on the science of positive psychology, much of it based on the work of Shawn Achor. Add in a full-time law career and there's a lot to keep me busy!

HICKS MORLEY WELCOMES TWO NEW LAWYERS

We are pleased to announce that Heather Ritchie and Samantha Seabrook have joined Hicks Morley in our Toronto office.

HEATHER J. RITCHIE

Heather Ritchie is the firm's Chief Knowledge Officer, responsible for the development and implementation of the firm's knowledge management strategy and initiatives. In that capacity, she works with the lawyers and the knowledge management team to leverage the firm's knowledge and work product and identify process and workflow improvements to generate efficiencies for the firm and its clients.

Heather is a former practising lawyer, who has worked in the knowledge management field for many years. In addition to her law degree, Heather has a Master of Information Studies.

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