FTR QUARTERLY

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In this issue:

Hicks Morley

HUMAN RESOURCES LAW AND ADVOCACY

FOCUS ON WORKPLACE HEALTH AND SAFETY

Actively managing workplace safety policies and issues can do more than just reduce accidents and absences – it can save your organization thousands of dollars each year in WSIB premiums.

The Workplace Safety and Insurance Board (WSIB) administers several experience rating programs based on an organization's size, industry and the premium amount it pays. Under these programs, employers with better-than-average safety records and return-to-work programs can receive substantial rebates on their WSIB premiums. Conversely, poor performance in these areas can require employers to pay WSIB surcharges.

"The problem is that many employers don't take full advantage of their ability to lower WSIB premium costs by managing the factors that affect their experience rating," says Will LeMay, Chair of the Hicks Morley Workplace Health, Safety, and Attendance Management Practice Group. "And in some industries, a poor rating can actually result in lost business as some contract bids require a minimum rating."

WSIB program management can also yield many other benefits that go beyond the purely financial.

"Fewer accidents and claims can mean reduced disruption to operations, increased productivity and higher staff retention levels," says LeMay. "Those types of intangibles can add substantial value to an organization."

NEER PROGRAM CROSSES WIDE SPECTRUM

The broadest experience-rating program used by the WSIB is the NEER (New Experimental Experience Rating) program. Non-construction industry Ontario employers who pay WSIB premiums of $25,000 per year and more are all assigned to NEER.

The main goal of NEER is to encourage employers to invest time and money in

workplace safety and reduce accident frequency. But this isn't the only goal.

"NEER contains other incentives for employers as well, like developing early and safe return-to-work programs that help workers get back to work as soon as possible after an accident," says Liz Kosmidis, a Group member in the Toronto office.

With the relatively low premium threshold, the NEER program covers a broad number of Ontario employers. But many employers who participate in NEER don't take full advantage of the incentives that the program offers. And this creates opportunities for employers who do.

"NEER compares your organization to other companies doing similar work, so if you manufacture auto parts, your company will be compared to other auto parts manufacturers," says Kosmidis. "This means that your premium is based in part on how well you stack up against your competitors. Since many companies don't actively manage their WSIB program, companies that do can enjoy a big advantage in terms of their premium refund assessments."

SAVINGS CAN BE SIGNIFICANT

The NEER methodology allows employers to calculate the costs they will be charged for their claims, and the premium rebates provide financial incentives to develop claims management and return-to-work programs.

The savings can be significant. Employers in NEER have the opportunity to receive 5% to 40% of their annual premiums back in the form of an end-of-year rebate. Conversely, employers with poor safety and return-to-work results may be assessed a surcharge.

"We've worked with a number of clients who've been able to save substantial sums through WSIB program management changes," says Jason Mandlowitz, Vice President of Hicks Morley Consulting Services. "We recently worked with an Ontario school board that had received a $750,000 NEER surcharge. Within two years they had reversed this trend and were awarded a $290,000 rebate. It's important to remember that these benefits can also continue year over year. Provided that training levels are maintained and procedures are regularly reviewed, premium rebates can become an annual occurrence."

It's important to remember that these benefits can also continue year over year.

One other incentive for managing a WSIB program is that the Ministry of Labour and the WSIB view your experience rating as an occupational health and safety program report card. When maximum surcharges are levied, Ministry of Labour and WSIB audits are usually not far behind.

"We have worked with employers to avoid candidacy for these audits," says Mandlowitz. "And if the Ministry of Labour or the WSIB does decide to investigate, we've also been able to successfully work with clients to prepare for and pass these audits."

PUBLIC IMAGE CAN IMPACT YOUR RATE GROUP

One other key part of managing WSIB premiums relates to the rate group classification system, as different rate groups pay different rate premiums. Where there are grey areas in the classification system, the public or "advertised" face of your company can play a key factor in the rate group you are ultimately classified under.

"In some cases, the NEER system does not always deal with risks as an insurance arrangement should," says David Brady, a partner in the Hicks Morley Toronto office. "There can be some fundamental flaws in the system."

In one case, a company had a small office staff that provided general contractor services along with engineering and architectural expertise. All actual construction work was outsourced to a number of arms-length subcontractors.

Even after an appeals tribunal hearing, they were classified in the highest risk construction rate group, despite the fact that this was an office-based operation with absolutely no construction risk at all. The reason? They advertised themselves as a construction company.

"It's why employers should be aware of the dangers of how they portray themselves to the public on their websites and in advertising," says Brady. "They should describe their businesses based on how they make their money – and make a clear distinction between the activities they do and those that they don't. Employers might also look at the contractual relationships they have with subcontractors to ensure that subcontractors have some form of direct contract with the end user."

ACTIVE MANAGEMENT IS KEY

For employers who are subject to WSIB premiums, an ongoing awareness of the types of factors that affect their experience rating – and a plan to manage those factors to their advantage – can pay significant dividends for years to come.

While it often requires an investment of time and money upfront, the future benefits of an action plan can outweigh these upfront costs by a substantial margin.

Hicks Morley can help with your WSIB program management in a number of ways. We provide comprehensive consulting and legal advice on WSIB claims management programs. We can also provide advice and legal representation on employer registration, classification, and penalty assessment matters.

For more information on how your organization can benefit from a review of its WSIB program, please contact any member of our Workplace Health, Safety, and Attendance Management Practice Group.

FIVE STEPS TO MANAGING YOUR WSIB PROGRAM EFFECTIVELY

ONE: Ensure your organization understands the principles and technical issues of your experience rating program and that staff who are responsible for WSIB and OHS are trained.

TWO: Review your experience rating and other WSIB cost statements to ensure they accurately reflect your claims and costs.

THREE: If you currently pay a premium surcharge, identify and develop a strategic approach to address your cost drivers.

FOUR: Review whether you have repeat WSIB claimants as you may be eligible for second injury cost relief.

FIVE: Review, develop or revise your absence management programs and policies – including return to work and attendance management – to ensure claims are rendered inactive as soon as possible.

INVESTIGATIONS IN THE WORKPLACE: PROCEED, BUT WITH CARE

Investigations are an established part of good human resources practice, and failure to conduct an investigation can in many cases lead to liability. But can the manner in which an investigation is undertaken give rise to liability? In some cases, the answer may be "yes."

BY: PAMELA HILLEN

Workplace investigations are an important and necessary part of an employer's responsibilities. Whether a complaint involves sexual harassment, discrimination, bullying, reprisal, theft or fraud, you must act promptly to investigate the complaint and respond appropriately based on what the investigation reveals. For example, a failure to investigate a harassment complaint could be a breach of your statutory duty to provide a workplace free from harassment.

Consequently, a prudent employer will undertake a workplace investigation in good faith and in a fair and unbiased manner. In some cases, it will retain a third party to conduct the investigation and the same considerations apply.

But no matter who carries out the investigation, a few recent cases illustrate that it's more important than ever to ensure that the investigation is carried out properly, as courts are signalling that there may be increased liability for a negligent investigation.

THE TORT OF "NEGLIGENT INVESTIGATION"

The Supreme Court of Canada recognized the tort of "negligent investigation" in the 2007 case of *Hill v. Hamilton-Wentworth Regional Police Services Board*. The Court found that police officers owed a duty of care to suspects being investigated for a crime, and could be liable for negligent investigations.

Hill was limited to a very specific situation of police officers investigating specific suspects. However, it begged the question as to whether the new tort of "negligent investigation" could apply in other contexts. Could it, for example, apply to an employer's investigations of employees? What about private investigators?

The Ontario and British Columbia Courts of Appeal have each recently considered these questions in the context of employment-related investigations. In one case, the Ontario Court of Appeal allowed an assertion of "negligent investigation" against an external investigator hired by the employer (though not against the employer itself), while the B.C. Court of Appeal allowed an assertion of gross negligence to be made against an employee (and vicariously, against his employer).

THE ONTARIO APPROACH

In *Correia v. Canac Kitchens,* the Ontario Court of Appeal considered a botched investigation of theft and drug dealing in the workplace, conducted by a private investigation firm. Mr. Correia was mistakenly confused with another employee (Correiro) under investigation. His employment was terminated, and he was arrested and charged criminally (charges that were later dropped when the mix-up in identities was discovered).

The Court held that a proceeding based on an alleged "negligent investigation" could proceed against the private investigation firm, as it performed an analogous function to the police and ought to be subject to similar liability.

However, an action for negligent investigation could not proceed against the employer, for two reasons. First, it would have a "chilling effect" on the willingness of honest citizens to report criminal behaviour to the police. Second, in *Wallace v. United Grain Growers*, the Supreme Court of Canada had "refused to recognize an action in tort for breach of a good faith and fair dealing obligation," and it would be inconsistent with that ruling to recognize a tort of negligent investigation against an employer.

The Court did allow an action for alleged "intentional infliction of mental distress" to proceed against the employer's Head of Human Resources, on the basis that she was responsible for the error that caused blame to be falsely cast. That error involved the misspelling of the suspect Correiro's name, a mistake made on the basis of variations of the spelling of the suspect's name by the private investigation firm. In so finding, the Court held that an employee who is acting in the course of his or her employment can be personally responsible for his or her own personal, tortious conduct.

THE B.C. APPROACH

In *Hildebrand v. Fox*, the principal of a school brought an action against her superintendent for "gross negligence" arising from the superintendent's actions surrounding an investigation into alleged misconduct (the principal was alleged to have physically grabbed a teacher's aide). The principal alleged that the superintendent failed to properly instruct the investigator to ensure fair process and also failed to provide the

principal with an opportunity to respond to the investigation report before issuing a disciplinary letter and sending the disciplinary letter to the college of teachers.

The British Columbia Court of Appeal found that the action could proceed. The Court found that the two principles relied on by the Ontario Court of Appeal in *Canac* did not apply to the superintendent, who was a fellow employee and not the employer. Since the allegations involved the superintendent's own personal, tortious conduct, he could be held liable directly for that conduct (though the employer school board might also be vicariously liable).

LESSONS FOR EMPLOYERS

The decisions in *Correia* and *Hildebrand* were made in the context of motions to strike the claims, and only deal with the right of the parties to proceed with the actions claimed. No decisions have yet been made on the merits of the actual cases.

However, these cases highlight the risks associated with undertaking workplace investigations and serve as a reminder to proceed cautiously and in good faith with investigations, whether you conduct the investigation internally or retain a third party to do it on your behalf. Your investigations should be thorough, unbiased, and conducted by staff who are properly trained in their responsibilities. It is important to give the individual against whom an allegation is made a chance to properly respond.

In light of these recent court decisions, you may want to consider reviewing any policies or procedures governing the conduct of your investigations – and getting specific legal advice when allegations or proposed disciplinary actions are of a serious nature. Your Hicks Morley lawyer would be pleased to assist you with any of these matters.

***Pamela Hillen** is a lawyer in the firm's Knowledge Management Group. In that capacity, she provides a variety of research and support services to other members of the firm.*

HR QUICK HIT

WWW.HICKSMORLEY.COM — YOUR GATEWAY TO HR INFORMATION AND SUPPORT

We invite you to visit our website at www.hicksmorley.com. There, you will find a wealth of information and news all designed to assist you with meeting your HR challenges. On our Resource Centre page, you will find news items on a variety of topics, archived issues of *FTR Quarterly*, *FTR Now* and more. Many pages on our website are now RSS-enabled, allowing you to stay current with new material as it is posted.

RESPONDING TO DIFFICULT ECONOMIC TIMES

The recent economic downturn has left a number of organizations exploring ways to achieve cost savings – and human resources departments have not been immune to these cost-containment pressures.

BY: RACHEL ARBOUR

As restructurings, lay-offs, benefit reductions, the cessation of pension contributions, four-day work weeks and even bankruptcy are being considered by employers, advance planning is critical in identifying options that achieve true cost savings while minimizing your risks of legal liability. In each case, employers must be aware of any limitations and risks associated with any of the following:

- the terms of any collective agreements that apply to the employees;
- the terms of any common law employment contracts, and the extent to which the proposed change might

be "fundamental" and expose the employer to the risk of constructive dismissal claims; and
- the provisions of any governing legislation.

Here are some of the measures that you might consider implementing in tough times, and some of the important legal considerations that can help you assess the viability of each option.

LAY-OFFS AND WAGE REDUCTION MEASURES

Lay-offs and temporary shutdowns are often the first options considered by employers seeking effective cost-cutting measures. But understanding the legal requirements that apply to lay-offs is essential to determining their real cost effectiveness.

For example, depending on the nature and duration of the lay-off, employment standards legislation in Ontario may require notice to employees and the Director of Employment Standards, or the payment of termination and severance pay to employees. If you operate under a collective agreement, the agreement may include provisions requiring additional notice or benefits to be paid on a lay-off, and it may trigger bumping rights that require advance planning.

In a non-unionized environment, an intended temporary lay-off of a non-unionized employee could result in a constructive dismissal, as few employment contracts explicitly permit lay-offs. Where lay-offs of non-union employees are necessary, employers should consider steps to reduce the risk involved, such as keeping the lay-off as short as possible or specifying a recall date.

Similar concerns apply to across-the-board wage reductions. Employers may find more success in reducing costs through measures intended to reduce overtime costs or the hiring of replacement or temporary employees.

Reducing wages through the move to a reduced work week – sometimes offset by the voluntary or required use of vacation time – also raises concerns about the findings of a lay-off or constructive dismissal. The availability of this option depends again on the terms of the employment contract or collective agreement, any vacation policy and any restrictions imposed by employment standards legislation.

PENSION AND BENEFITS CHANGES

Pension and benefits programs are often a high-cost area for employers, and benefit reductions (including the elimination of benefit programs) and changes to pension provisions are

often considered during periods of fiscal restraint. Collective agreement restrictions and constructive dismissal risks remain a primary concern, while the terms of governing legislation should also play a key role in any program decisions.

Where changes to pensions are considered – such as an elimination or reduction in employer contributions or in pension benefits payable on retirement – pension legislation restricts, and may impose notice requirements on, the employer's right to make these changes. Ontario pension legislation also prohibits a plan sponsor from reducing accrued pension benefits.

Defined benefit pension plans must be funded in accordance with an actuarial valuation, and employers are unable to adopt a different funding method. Ceasing contributions altogether results in a wind up of a pension plan, and a wind up increases the requirement to address any deficits in the pension plan. Several provinces, including Ontario, are currently considering, or have announced, solvency funding relief to employers with defined benefit pension plans. Qualifying employers may be able to significantly reduce current pension funding obligations as a result.

For defined contribution plans, income tax rules prevent an employer from reducing contributions below 1% of earnings. However, employers who sponsor group registered retirement savings plans and deferred profit sharing plans have had some success in reducing contributions to those plans.

Another option is to implement a lower-cost plan on a go-forward basis for new employees only. While this doesn't result in immediate cost savings for the current workforce, it can help with future cost containment.

In terms of your retired employees, changing, reducing or eliminating retiree benefits requires a very careful examination of the nature of the retiree benefit promise, as retirees may claim that their entitlement to these benefits has vested, meaning that the employer may not unilaterally make the proposed changes.

PLANT CLOSURES, RESTRUCTURINGS AND BANKRUPTCIES

If financial pressures on your operations become severe, a plant closure, reorganization under the *Companies Creditors Arrangement Act* or a bankruptcy may be the only viable alternatives.

Needless to say, the employment, labour, pension and benefits implications and expenses can be considerable. Careful planning and professional advice can help to reduce the expense to your organization, the labour discord that is inherent in the situation, and the overall impact of any closure on your labour relations at other operations you may have.

Whatever expense reduction strategies you're considering, Hicks Morley can help you assess the implications and potential liabilities that can arise from an employment, labour, pension and benefits perspective – and provide practical advice on managing any employment relations concerns that result.

Rachel Arbour *practises in our Pension and Benefits Group. In addition to advising on plan interpretation and drafting or reviewing plan documents and communications, Rachel assists employers in pension and benefits-related litigation in a variety of contexts.*

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HR QUICK HIT

Arbitrator rules that religious leave need not be paid

In the Fall 2008 issue of *FTR Quarterly*, Catherine Peters reported on developments in religious accommodation case law, including a decision of the Human Rights Tribunal of Ontario in which it was found that there is no blanket requirement under the *Human Rights Code* to provide paid religious leave.

That article noted that Brenda Bowlby, a partner in our Toronto office, was awaiting an arbitration decision on the same issue. That decision has since been issued (*Re TDSB and CUPE, Local 4400, Unit B*, 10 December 2008), and Arbitrator Whitaker reached the same conclusion:

> The employer's obligation is not to pay for unearned wages, but rather to reconfigure the work and/or its assignment, to the point of undue hardship. ...[T]he goal of accommodation in employment is to permit the employee to work and to obtain the benefit of compensation for work.

The grievor (a supply ESL teacher) was not entitled to three days off with pay where it was not possible to reconfigure his work to allow him to make up the three days he required for religious observance.

SAFETY FIRST

Robert Little joined Hicks Morley in 1986 soon after his call to the bar. In addition to his extensive involvement in labour relations and collective bargaining over the past 23 years, he has been at the forefront of the occupational health and safety field – a specialty area that has grown significantly in scope as legislation and enforcement standards have evolved. Robert spoke with *FTR Quarterly* in December about his career and the changes he's seen in the occupational health and safety area.

We've heard you had a bit of an unusual start to life – at least in terms of where you were born.

Well, it was unusual for someone born in the Toronto area. My grandparents had a summer place – a log cabin – on the banks of the Humber River in Woodbridge. My parents moved into it and I was born and raised in a log cabin for the first two years of my life. Obviously this was before the housing boom up there. I don't think you'll find many log cabins left in Woodbridge today.

When did you start to think about law as a career?

I actually thought business would be my calling and I was in the commerce program at Queen's for my first two years of university. But at some point during those two years I figured law would be a better fit. I ended up staying at Queen's, but switching to law.

How did you make your way to Hicks Morley?

I spent the first two years of practice in the labour department of a full-service firm, which is where I first became interested in the area. But one of the realizations I had early in my career was that I liked the advocacy part of practice. The labour work in a full-service firm was often related to the corporate deals the firm was working on and there wasn't a lot of advocacy work for junior lawyers.

At about the two-year mark, I ran into Fred Hamilton, who was one of the founding partners here. I had rowed and shared a house with his son at Queen's, so we knew each other through that connection. We started talking and he asked whether I'd be interested in moving to Hicks Morley. That was 23 years ago and I haven't looked back.

Was occupational health and safety a large part of your practice then?

It wasn't at first – that area of law was a bit under the radar in those days. Before 1990, the maximum fine for a violation under the Act was $25,000. So while health and safety principles were always important, the financial consequences of a violation often weren't significant enough for clients to involve us in a major way.

What changed?

A couple of things really fuelled the growth in the area. First, in 1990, the maximum fine increased to $500,000 per offence from $25,000. It took a few years for that change to have a big impact, but by the mid-1990s we were seeing substantial fines – $250,000 or more in cases involving serious accidents instead of $15,000 to $20,000 previously.

The second change was in the approach that the Ministry of Labour took to occupational health and safety. Before 1990, prosecutions didn't play as central a role in the enforcement process. The focus was much more on inspections, education, advice and administrative orders to make any safety changes needed.

But that changed in the late 90s. The Ministry began to focus on prosecutions. It hired more inspectors and hired more prosecutors, so the number of prosecutions went up dramatically – and from a legal perspective the area began to explode.

How did it become part of your practice?

It really grew as client demand grew. It started as an offshoot of my general labour work and then kept growing as the prosecutions and potential fines increased. And once you gain expertise in an area, more of that work comes your way so there's a real momentum to it all. I still do a lot of general employment work, but occupational health and safety represents about 40% of my practice. It's certainly busy enough that it could be 100%, so we have developed a team of lawyers with a lot of depth and experience in the area, which allows us to meet the needs of any client.

We have developed a team of lawyers with a lot of depth and experience in the area, which allows us to meet the needs of any client.

Does it differ from other forms of advocacy?

It does in a couple of ways. First, it's a very public process. All occupational health and safety convictions are reported on the Ministry of Labour website, so there's a public relations concern that isn't always there with other forms of litigation.

Second, these can be difficult prosecutions to defend, with the Ministry claiming an 85% conviction rate. The Act sets out strict standards for protecting worker safety – and with prosecutions benefiting from 20-20 hindsight in looking back at an accident after it has occurred, it's not surprising that the conviction rate is so high.

The Ministry is very procedure-focussed, which means that if an employer can't document a procedure for a particular incident that resulted in an accident, they could be held liable, even if employee negligence is likely the cause.

It's a tough standard for an employer to meet. And it means that success in many cases is focussed less on guilt or innocence and more on minimizing an employer's exposure, both financially and from a public and media standpoint.

Having said that, many cases are defendable. The Ministry often overlooks, or is not aware of, facts that provide a sound defence. The challenge is to pull those facts together in a persuasive way even in the face of a serious accident.

Any emerging issues your clients should be aware of?

In terms of health and safety, I think a real hot spot for clients is the issue of workplace violence. Incidents of violence – or the threat of violence – can occur in any workplace, but those in healthcare, education and elder care need to be especially diligent in ensuring that workplace violence policies are in place. These policies are quickly becoming a "need to have" from a risk management standpoint and a "must have" from a legal standpoint.

What keeps you busy outside of the office?

We have three kids in their teen years, and they're all active in hockey and other sports, so that keeps us pretty busy. I've coached all of them at different points, so the coaching was a focus for a long time. Our daughter is also a keen field hockey player at the provincial level, so that's a big commitment. And for good or for bad, I still play hockey, so that keeps me in shape – although it's a lot tougher keeping up with the twenty-somethings that play. But it's still great fun – I hope to keep it going for many more years.

HR QUICK HIT

Speed-limiting devices now mandatory for commercial vehicles

As of January 1st of this year, commercial vehicles in Ontario are required to have speed-limiting devices installed, subject to various exemptions. The following information is from the Ministry of Transportation website:

> Speed limiter regulation is in force effective January 1, 2009. There will be an educational enforcement period of six months to allow carriers to have the vehicle speed limiter set during the normal course of maintenance avoiding unnecessary additional costs to comply with the legislated requirement. Traditional enforcement will commence once the educational enforcement period is complete.

For more information, go to: http://www.mto.gov.on.ca/english/trucks/trucklimits.shtml

NEW ASSOCIATES

Hicks Morley is pleased to announce that two new associates have joined the firm.

MARIE-FRANCE CHARTRAND

Marie-France joined Hicks Morley's Ottawa office in December 2008. Prior to joining the firm, Marie-France practised in the Litigation Group of a national firm in Ottawa where she was involved in a number of high-profile cases, including a six-week defamation jury trial. She was also at the Department of Justice. In addition to her litigation skills, Marie-France is fluently bilingual and is able to serve the needs of our French language clients. Marie-France works in all areas of the Ottawa office's labour and employment practice.

Marie-France s'est jointe au bureau d'Ottawa de Hicks Morley en décembre 2008. Auparavant, elle pratiquait au sein du groupe de litige civil dans un cabinet national à Ottawa où elle a été impliquée dans plusieurs dossiers d'envergure, incluant un procès en diffamation devant jury d'une durée de six semaines. Elle était également au Département de justice. En sus de ses habiletés en litige, elle est parfaitement bilingue et est en mesure de desservir les besoins de notre clientèle francophone. Marie-France travaille dans tous les aspects au sein du groupe du droit du travail et du droit de l'emploi de notre bureau d'Ottawa.

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JOHN K. DONKOR

John joined Hicks Morley's Toronto office in January 2009. Prior to joining Hicks Morley, John practised in the Labour and Employment Law Group of a national law firm in their Vancouver office. In that position, John advised employers in all aspects of labour and employment law. Prior to entering private practice, John worked for a multinational consulting and outsourcing firm, providing advice to senior management and human resources personnel. John is called to the Bars in both Ontario and British Columbia.

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