MANAGEMENT COUNSEL
Employment and Labour Law Update

SHERRARD KUZZ LLP
Employment & Labour Lawyers

The *Stronger Workplaces for a Stronger Economy Act* makes significant changes to a number of existing employment statues in Ontario... dramatically altering the business model for organizations using temporary workers, and increasing potential employment risks and responsibilities for all employers.

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Stronger Workplaces for a Stronger Economy Act

Bill 18 brings big changes for Ontario employers

The *Stronger Workplaces for a Stronger Economy Act, 2014* (the "Act"), enacted November 20, 2014, makes significant changes to a number of existing employment statutes in Ontario, including the *Employment Standards Act, Occupational Health and Safety Act* and *Labour Relations Act*, dramatically altering the business model for organizations using temporary workers, and increasing potential employment risks and responsibilities for all employers. Although some of the amendments are not yet in effect, employers should take steps now to plan for the changes. Here are some of the highlights:

Employment Standards Act

The Act amends the *Employment Standards Act* in a number of significant ways:

- **Minimum Wage Increase:** The minimum wage rate is now subject to annual increases to account for inflation, tied to the *Consumer Price Index*. Increases will be announced by April 1 and take effect on October 1 of each year.
- **No Cap and Extended Deadline for Wage Complaint:** A complaint made to the Employment Standards Branch of the Ministry of Labour for unpaid wages occurring after February 20, 2015, is no longer subject to a $10,000 cap, and the limitation period for making a claim (currently six months for most types of claims) is extended to two years.
- **Self-Audit:** Effective May 20, 2015, an Employment Standards Officer may direct an employer to conduct a 'self-audit', and to report the results of the audit, identifying any outstanding wages, to the officer. Thereafter the officer may make an order for payment, or conduct a further investigation or inspection. This has the potential to significantly increase the Ministry's audit activity, particularly if an officer finds a violation in the course of investigating an unpaid wage complaint.
- **Poster:** Effective May 20, 2015, an employer is required to provide to each employee a copy of the Ministry of Labour's most recent poster concerning *Employment Standards Act* rights and obligations. For an existing employee the poster must be provided within 30 days of May 20, 2015. For a new employee, it must be provided within 30 days of hire.

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- **Joint Responsibility for Temporary Worker:** Effective November 20, 2015, an organization using a temporary worker supplied by an agency must keep records of the worker's hours and will be held *jointly and severally liable* if the agency fails to pay a worker. This means a temporary worker may make a claim against the organization for unpaid wages, regardless of whether the organization has already paid the agency for the work performed.

Occupational Health and Safety Act

The Act amends the *Occupational Health and Safety Act* to expand the definition of 'worker' to include a co-op student, trainee and other unpaid learner. These individuals are now afforded the same rights and protections as 'workers', including for example, the right to receive "information, instruction and supervision …to protect [their] health and safety".

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Labour Relations Act

Effective May 20, 2015, the Act amends the *Labour Relations Act* to reduce the 'open period' in the construction industry from three months to two months. The 'open period' is the time during which an employee (or other union) may file an application to displace an existing bargaining agent or terminate existing bargaining rights.

Workplace Safety and Insurance Act

The Act amends the *Workplace Safety and Insurance Act* to permit regulations to be made to shift the costs resulting from a workplace injury of a temporary worker from the agency-employer to the organization for which the worker provided service at the time of the injury. Such a shift would affect the organization's experience rating and impact potential rebates or surcharges.

Employment Protection for Foreign Nationals Act

Effective November 20, 2015, the Act extends the protections currently available to a live-in-caregiver under the *Employment Protection for Foreign Nationals Act (Live-in Caregivers and Others), 2009*, to all foreign nationals working or looking for work in Ontario pursuant to an immigration or temporary foreign employee program. Additional changes also prohibit an employer from charging a foreign worker a fee for recruitment and/or placement.

Practical Tips for Employers

To minimize potential liability resulting from these amendments, employers should consider the following tips:

- **Maintain records:** Ensure records are kept of the daily and weekly hours worked by a temporary worker, including overtime and work performed on public holidays.
- ***Employment Standards Act* practice audit:** Before the Ministry of Labour requests a self-audit proactively conduct a practice audit for compliance under the *Employment Standards Act*. Address any potential areas of non-compliance, especially undocumented overtime.
- **Strengthen any contractual indemnity clause with a temporary staffing agency:** Review and update any temporary agency agreement to include an indemnity for unpaid amounts arising out of the agency's failure to pay its workers.
- **Update hiring protocols:** Update hiring protocols to ensure a new employee is provided with a copy of the Ministry of Labour's most recent poster. Keep records to demonstrate compliance.
- **Review and update health and safety policies, procedures and training:** Ensure students, trainees and other unpaid learners are informed of workplace hazards and receive appropriate health and safety training. Be sure to keep records to demonstrate compliance.

To learn more and for assistance preparing for, and ensuring compliance with, these important legislative changes, please contact a member of Sherrard Kuzz LLP.

DID YOU KNOW?

This spring, Ontario will launch public consultations on how the *Labour Relations Act, 1995* and *Employment Standards Act, 2000* could be amended to *"best protect workers while supporting businesses in our changing economy."* A report to the Minister of Labour is expected in 18 months. The process will not consider the construction industry provisions of the *Labour Relations Act, 1995*, the minimum wage, and policy discussions for which other independent processes have been initiated.

As consultation details and opportunities are released, Sherrard Kuzz LLP will keep readers informed and engaged.

Guidance from the Court of Appeal on working with expert witnesses

Concern about the impartiality of expert evidence grabbed the spotlight when a trial decision issued last year in *Moore v. Getahun*[1] criticized legal counsel for getting too involved in the preparation of an expert's written report. The trial judge concluded that the need for an expert witness to be impartial meant legal counsel could not participate in the drafting of an expert report, and furthermore drafts, notes and communications created by an expert while forming his or her opinion must be provided to the opposing party and court.

The decision sent shockwaves through the legal community and among those who provide expert testimony. Fortunately, the Court of Appeal for Ontario[2] has restored calm in a decision released this Winter.

The Trial Decision in *Moore v. Getahun*

Expert evidence is routinely required to assist decision-makers with specialized issues. The case in question involved allegations of medical malpractice resulting in permanent injury to the plaintiff. Both plaintiff and defendant proffered expert evidence (from physicians) as to whether the defendant physician had met the required standard of care.

In trying to determine which opinion was more helpful, the trial judge grew concerned when it came to light, through cross-examination, that the defendant's expert had spent approximately an hour and a half on the phone with legal counsel reviewing his draft report. The trial judge noted:

> …the purpose of Rule 53.03 is to ensure the expert witness' independence and integrity. The expert's primary duty is to assist the court. In light of this change in the role of the expert witness, I conclude that counsel's prior practice of reviewing draft reports should stop. Discussions or meetings between counsel and an expert to review and shape a draft expert report are no longer acceptable.

The trial judge then ordered the expert to produce all of his drafts, notes and communications with legal counsel. Ultimately, the judge preferred the evidence of the plaintiff's expert and the defendant lost the trial.

The Appeal

The case drew widespread attention in legal circles due to the comments of the trial judge regarding counsel's involvement in the preparation of the expert report. It had been generally understood that such assistance was not improper so long as the opinion was truly held by the expert.

The Court of Appeal considered the issue and disagreed with the trial judge on two major conclusions:

i. Communication during the formation of the opinion

While careful not to diminish the fundamental importance of an expert's duty "to provide opinion evidence that is fair, objective and non-partisan"[3] the appeal court recognized the benefit in having counsel participate in the preparation of an expert report by ensuring the report is responsive to the legal issues, understandable, and does not contain extraneous or irrelevant information. Said Sharpe J.A., writing for the court (Laskin and Simmons JJ.A.):

> … it would be bad policy to disturb the well-established practice of counsel meeting with expert witnesses to review draft reports. Just as lawyers and judges need the input of experts, so too do expert witnesses need the assistance of lawyers in framing their reports in a way that is comprehensible and responsive to the pertinent legal issues in a case. ... Counsel play a crucial mediating role by explaining the legal issues to the expert witness and then by presenting complex expert evidence to the court. It is difficult to see how counsel could perform this role without engaging in communication with the expert as the report is being prepared.[4]

ii. Disclosure of drafts, notes and communications

The second significant area where the Court of Appeal disagreed with the trial judge was with respect to the disclosure of draft reports. Reiterating the importance of litigation privilege, the court disagreed that consultations between counsel and an expert witness must be documented and disclosed to an opposing party.

> *Where there is a factual foundation to support a reasonable suspicion counsel has improperly influenced an expert, the court may order disclosure of consultations between them.*

There is, however, an important *caveat*. Where there is a factual foundation to support a reasonable suspicion counsel has improperly influenced an expert, the court may order disclosure of consultations between them. Said the court:

> In my view, the ends of justice do not permit litigation privilege to be used to shield improper conduct. … Where the party seeking production of draft reports or notes of discussions between counsel and an expert can show reasonable grounds to suspect that counsel communicated with an expert witness in a manner likely to interfere with the expert witness's duties of independence and objectivity, the court can order disclosure of such discussions….
>
> … Evidence of an hour and a half conference call plainly does not meet the threshold of constituting a factual foundation for an allegation of improper influence. In my view, the trial judge erred in law by stating that all changes in the reports of expert witnesses should be routinely documented and disclosed.

Lessons Learned

The decision in *Moore v. Getahun* will be studied for years to come in both the courtroom and classroom. Although the trial decision appeared to have gone too far, and was the source of strong reaction and condemnation by the legal and expert communities, the decision and appeal that followed have served as an important reminder of the appropriate relationship between counsel and an expert witness. For that we should all be grateful.

To learn more, or for assistance, contact a member of Sherrard Kuzz LLP.

[1] 2014 ONSC 237 (Wilson J.)
[2] 2015 ONCA 55
[3] ibid at para 52
[4] ibid at paras 62-64

MANAGEMENT COUNSEL

HReview Seminar Series

Please join us at our next HReview Breakfast Seminar:

Here For a Good Time - Not a Long Time

Navigating the Risks of Interns, Volunteers, Temps and Student Employees

As we approach the summer of 2015, many organizations will look to beef up staff on short-term or experience-based engagements. However, as a result of increased scrutiny and legislative change, some traditional staffing solutions may attract new and potentially harmful risks.

Join us as we discuss how your organization can strategically prepare for the upcoming summer:

1) **The "Unpaid Intern" Story**
   - When is it lawful to hire an unpaid intern?
   - Co-op students *vs* volunteers *vs* interns: What's the difference and why does it matter?
   - What are the risks?
   - How to use a contract or engagement letter to minimize risk.

2) **Temporary Employees and Summer Students**
   - ESA? WSIB? OHSA? What applies and what doesn't?
   - Legislative changes to "minimum wage" (ESA) and the definition of "worker" (OHSA).
   - Setting expectations at the time of the engagement.
   - How to transition to full-time employment – or end the relationship early.

DATE: **Thursday May 28, 2015; 7:30 – 9:30 a.m.** (breakfast at 7:30 a.m.; program at 8:00 a.m.)

VENUE: **Mississauga Convention Centre**, 75 Derry Road West, Mississauga, L5W 1G3

COST: Complimentary

RSVP: **By Friday May 15, 2015 at www.sherrardkuzz.com/seminars.php**

Law Society of Upper Canada CPD Hours: This seminar may be applied toward general CPD hours.

HRPA CHRP designated members should inquire at www.hrpa.ca for eligibility guidelines regarding this *HReview Seminar*.

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Jean Cumming Lexpert® Editor-in-Chief

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