MANAGEMENT COUNSEL
Employment and Labour Law Update

SHERRARD KUZZ LLP
Employment & Labour Lawyers

Stay Out of My Genes!

Bill S-201 Seeks to Prohibit Genetic Discrimination

Disability management is among the most challenging employer responsibilities. Many questions must be answered including: *Does the employee have a disability? To what extent? How does the disability impact the employee's ability to do his or her job? What, if any, are the restrictions? What is the prospect for recovery – in whole or in part?* Then, of course, there is the issue of obtaining useful and timely information from the employee's medical practitioner. Sometimes, this is straight-forward. Other times, it's anything but.

What if there was a way to achieve certainty about the existence of a medical condition? Even plan ahead to accommodate an employee's *future* medical restrictions? Advances in genetic testing mean this may be a possibility. But at what cost? Genetic information, while it may be interesting or even beneficial to an individual curious about his or her genetic makeup, if accessed by a third party can have unintended and potentially negative consequences.

Genetic Information - A Window Into The Future

We've seen the television ads: pay a fee, mail a saliva sample to a private laboratory and receive a detailed report about inherited conditions, health risks, drug responsiveness and other genetic characteristics.

What if this sensitive, personal information could be accessed by an insurance company to assess the risk associated with extending or denying coverage to an individual and their relatives who may be impacted? Similarly, what if this same information could be accessed by a potential employer to make employment-related decisions based on the risk of a future disability claim or workplace restriction?

Bill S-201 *An Act to Prohibit and Prevent Genetic Discrimination*

Every Canadian jurisdiction has human rights laws prohibiting discrimination on the basis of an actual or perceived disability. A number of provinces also have privacy legislation restricting the type of information an employer may collect from an existing or prospective employee.

The federal government is now debating Bill S-201, *An Act to Prohibit and Prevent Genetic Discrimination*. If passed, Bill S-201 will become the *Genetic Non-Discrimination Act* ("*Act*"), and expressly

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prohibit discrimination based on genetic information. The *Act* would make it an offence to:

- Require an individual to undergo genetic testing as a condition of: (a) providing a good or service, (b) entering into or continuing a contract, or (c) offering or continuing specific terms or conditions in a contract with the individual.
- Refuse to: (a) provide a good or service, (b) enter into or continue a contract, or (c) offer or continue specific terms and conditions in a contract to an individual on the grounds the individual refused to undergo a genetic test or disclose genetic test results.
- Collect, use or disclose a genetic test result for the reasons noted above without the individual's consent.

Bill S-201 also proposes to amend the *Canada Labour Code* to:

- Grant every employee the right to not undergo, or be required to undergo, a genetic test.
- Grant every employee the right to not disclose, or be required to disclose, the results of a genetic test.
- Prohibit an employer from taking adverse action against an employee (*i.e.*, dismiss, suspend, lay off or demote, or impose any other penalty): (a) for refusing to undergo a genetic test, (b) for refusing to disclose genetic test results, or (c) based on the results of any genetic test undertaken by the employee.
- Prohibit a third party from disclosing to an employer that an employee had a genetic test or the results of a genetic test without the employee's written consent.
- Grant an adjudicator appointed under the *Canada Labour Code* a wide range of remedies in the event of a breach of these prohibitions, including to return an employee to his or her former duties, reinstate an employee, order back pay, rescind disciplinary action, or any other remedy necessary to counteract the consequences of the contravention.

Finally, Bill S-201 would amend the *Canadian Human Rights Act* to include "genetic characteristics" as a prohibited ground of discrimination.

The U.S. Experience

Canada is not the first jurisdiction to introduce legislation prohibiting genetic discrimination. In 2008, the United States enacted *The Genetic Information Nondiscrimination Act* ("*GINA*") to address genetic discrimination in the context of health insurance and employment. Much like Bill S-201, *GINA* prohibits an employer from requiring, or asking for, genetic tests or test results, or from making decisions based on genetic information (including family medical history).

In 2013, the U.S. Equal Employment Opportunity Commission ("EEOC") filed the first *GINA* lawsuit in *EEOC v. Fabricut, Inc.*, Case No. 13-Civ. 248 (CVE) (PJC) (N.D. Okla. May 7, 2013). A temporary employee, Rhonda Jones, applied for a full time clerk position with Fabricut, Inc. ("Fabricut"). After Fabricut offered her the job, she was sent for a pre-employment drug test and physical examination. After completing the examination, she was advised she needed to undergo further testing to identify whether, based on her family medical history, she had carpal tunnel syndrome. Ms. Jones complied and, despite confirmation from her own physician indicating she did not have this diagnosis, the job offer was rescinded based on family medical information collected during the initial screening.

The EEOC alleged Fabricut contravened *GINA* when it made a decision not to hire Ms. Jones based on her family medical history and also the *Americans with Disabilities Act* which prohibits discrimination on the basis of perceived disability.

The parties settled for a $50,000 payment to Ms. Jones, and a commitment from Fabricut to post anti-discrimination notices, establish anti-discrimination policies, and provide anti-discrimination training to those involved in hiring.

Next Steps

The Standing Committee on Justice and Human Rights adopted Bill S-201 and it is now before the House of Commons for further study before third reading.

Until Bill S-201 or an equivalent law is enacted, Canadian human rights laws do not expressly prohibit the collection and use of genetic information. However, privacy laws and the law against discrimination on the basis of perceived disability may be sufficient to capture that kind of activity, exposing an employer to potential liability should it use or disclose genetic testing when making a decision affecting employees.

Accordingly, as tempting as it may be to inquire into or rely on an existing or prospective employee's genetic history, until the law is clarified Canadian employers should avoid doing so.

To learn more about human rights and privacy in the workplace, including the appropriate use of medical information and testing, contact the employment law experts at Sherrard Kuzz LLP.

DID YOU KNOW?

Effective January 1, 2017, the waiting period for Employment Insurance Benefits decreased from 2 weeks to 1 week.

Full and Final Release *Tips and Traps*

A comprehensive settlement document, including a release and indemnity, can provide an employer the comfort of knowing issues relating to the departure of an employee are fully and finally resolved. However, even a well-drafted settlement document won't be worth the paper it's written on if the employer does not comply with basic legal principles concerning releases. Consider the recent case of *Nicastro v. Tenaris Algoma Tubes Inc.* 2016 HRTO 1128.

What happened?

When Ontario employer, Tenaris Algoma Tubes Inc. ("Tenaris"), terminated employee, Jacqueline Nicastro ("Nicastro"), it offered her a termination package equivalent to twelve (12) months' salary and pay in *lieu* of benefits, pension and bonus. In exchange, it requested she sign a full and final release of all claims or potential claims against Tenaris, including under the Ontario *Human Rights Code*. Among other things, the release expressly stated the employee understood its contents and had the opportunity to seek legal advice.

There are circumstances in which a release signed under duress, including economic duress, could result in a finding the release is not enforceable.

Nicastro was provided a week to review the termination offer and release, and to return the release signed. Not only did she not request an extension of this time, Nicastro returned the signed release prior to the one week deadline.

Application to the Human Rights Tribunal of Ontario

Almost a year later, Nicastro filed an Application to the Human Rights Tribunal of Ontario ("HRTO"), alleging the termination of her employment was motivated, at least in part, by her age and history of medical issues. She asserted the release was signed as a result of 'economic duress'; her children's tuition payments were due and she did not have the resources to consult a lawyer. She said she was a 'mess' as a result of the termination and believed if she did not sign the release any payment she may ultimately receive would be delayed. She also argued she was not provided sufficient time to review the release before signing.

Asking the HRTO to dismiss the Application without a hearing on the merits, Tenaris relied on the signed release, including that Nicastro had signed and returned it prior to the requested date.

The Tribunal's Analysis

The HRTO acknowledged there are circumstances in which a release signed under duress, including economic duress, could result in a finding the release is not enforceable. Economic duress is defined as "…an unlawful coercion to perform by threatening financial injury at a time when one cannot exercise free will". The test to establish economic duress is difficult to pass, and financial pressure alone will not be enough to set aside a release otherwise signed freely and voluntarily. The HRTO concluded Ms. Nicastro was not able to pass the test.

Reminders for Employers

A release can be an employer's best friend, but only if drafted and enforced properly and in accordance with the law. A release will not provide the security an employer is seeking if it can later be attacked by a departing employee.

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To ensure your organization receives the full and intended value of a release, remember to follow these guidelines:

- **Exceed minimum statutory requirements:** When terminating without cause, ensure the payment exceeds the minimum requirement under applicable employment legislation. If an existing employment agreement specifies the amount of termination pay to which an employee is entitled, but does not already require a release in exchange for payment, ensure the payment exceeds the amount set out in the agreement. This extra amount is "consideration" for the release.
- **Time to review:** Provide the departing employee at least 3-5 business days to review the settlement documentation and seek legal advice if he or she elects to do so. If the employee wants to sign the release during the termination meeting, advise him or her you cannot accept it and they need to take it away to review. If a reasonable extension is requested, provide it; an employer would be hard pressed to justify not doing so.
- **Do not provide legal advice:** Be careful not to make any representation to the employee about his or her legal rights under the release. If there are questions, encourage the employee to seek his or her own legal advice. You may even consider offering to the employee a reasonable amount to offset the cost of consulting a lawyer.
- **Do not withhold minimum entitlements:** When terminating without cause, do not threaten to withhold minimum statutory entitlements (such as termination and/or severance pay) unless and until the employee signs the release. Not only is it unlawful to do so, this may create an opening for a court or tribunal to conclude the release was signed under economic duress.

For tips on how to strategically structure a termination package, including how to protect your organization through the use of a comprehensive release, contact the employment law experts at Sherrard Kuzz LLP.

MANAGEMENT COUNSEL

Please join us at our next HReview Breakfast Seminar:

HReview Seminar Series

MISSING IN ACTION:

Managing Planned and Unplanned Workplace Absenteeism

Each year, the average full-time employee in Canada is absent from work approximately nine days. Some absences are for a day or two, while others last considerably longer. Left unmanaged, absenteeism can significantly and negatively impact the culture, morale and productivity of a workplace.

What are an employer's legal obligations in connection with workplace absence and what can be done to minimize unplanned time away from work?

Legal Entitlements

- Protected leaves of absence under the *Employment Standards Act, 2000*.
- Human rights considerations when addressing absenteeism.
- Are there special rules in a unionized environment?

Addressing Absenteeism

- Culpable vs. non-culpable absences – are they treated differently?
- Communicating with an absent employee, including obtaining appropriate medical information.
- When may an employer discipline or terminate for absenteeism?

Tips to Reduce Absenteeism

- Attendance management policies – what to consider when preparing your own.
- Changes to schedules and work locations.
- Attendance awards and other incentives.

DATE: **Tuesday, May 30, 2017, 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**

COST: Complimentary

RSVP: **By Monday, May 15, 2017 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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