

MANAGEMENT COUNSEL

Employment and Labour Law Update



The Customer Service Standard has broad reach. It applies to every organization that has one or more employee and provides goods or services either directly or indirectly to the public or to other organizations in Ontario. Private sector and not for profit organizations are required to comply by January 1, 2012.

The AODA: Mandatory compliance less than one year away

In June 2005, the Ontario Government passed the *Accessibility for Ontarians with Disabilities Act* (the “AODA”). The goal of the AODA is to make Ontario fully accessible to people with disabilities (*i.e.*, physical, learning, visible and non-visible, *etc.*) by the year 2025. To accomplish this the AODA envisions the development of mandatory “Accessibility Standards” targeted at areas key to daily living including, customer service, transportation, employment, information, communication and the built environment. To date, the Customer Service Standard is the only Accessibility Standard in force.

The Customer Service Standard has broad reach. It applies to every organization that has one or more employee and provides goods or services either directly or indirectly to the public or to other organizations in Ontario. Designated public sector organizations were required to comply with the Customer Service Standard by January 1, 2010. Private sector and not for profit organizations are required to comply by January 1, 2012.

What does it take to comply?

The Customer Service Standard requires every organization to take the following steps:

1. Establish policies, practices and procedures governing the provision of the organization’s goods and services to people with disabilities. This includes reviewing existing policies, practices and procedures and amending them where possible to remove barriers faced by people with disabilities.
2. Ensure the organization, and individuals who interact with the public or other third parties on behalf of the organization, communicate with people with disabilities in a manner that takes into account their disability.
3. Establish a policy that addresses the use of *assistive devices* (*i.e.* wheelchairs, tele-typewriters, *etc.*) by people with disabilities to access the organization’s goods and services; and ensure the policy identifies measures the organization utilizes to enable people with disabilities to access its goods or services
4. Permit people with disabilities to bring service animals with them into those areas of the organization’s premises open to the public or to third parties, unless otherwise excluded by law.

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5. Permit people with disabilities to be accompanied by a support person in those areas of the organization's premises open to the public or third parties, while accessing the organization's goods and services.
6. Establish a method of notifying the public when facilities or services people with disabilities require to access the organization's goods and services are temporarily unavailable.
7. Provide training on the topics identified in the Customer Service Standard to all individuals who interact with the public or other third parties on behalf of the organization or who participate in the development of the organization's policies, practices and procedures.
8. Establish a process through which customers can provide feedback about the manner in which the organization provides goods or services to persons with disabilities; and identify how the organization will respond to complaints.

Organizations with twenty or more employees must also ensure all of the mandatory requirements of the Customer Service Standard (as described in points 1 – 8 above) are set out in writing, and advise the public the documents are available, in an accessible format, upon request. Finally, organizations with 20 or more employees must file annual "Accessibility Reports" with the Ministry of Community and Social Services (the "Ministry").

Why should an organization comply?

Organizations must comply with the AODA and the Customer Service Standard as a matter of law. Penalties for non-compliance have not yet been finalized. However, the Government's latest proposal suggests non-compliance may result in administrative fines ranging from \$200 to \$50,000 for every day the offence continues (for an individual) and \$500 to \$100,000 for every day the offence continues (for an organization).

The Provincial Government and National Quality Institute ("NQI") have also developed programs that recognize organizations that embrace the AODA, and its purposes and objectives. For example, the People Access division of the NQI has developed the Community Accessibility Awards Program to recognize organizations that go above and beyond basic AODA compliance and provide excellent customer service to persons with disabilities.

Victoria Gladwish, Managing Partner of ProAccess Advisors Group, worked closely with the NQI developing its accessibility tools, programs and services. She says "many of our clients are early

adopters looking to be leaders in their industry to attract and retain new customers. The notion of helping businesses grow through inclusivity is the fundamental objective of our firm".

How should an organization prepare?

Private sector and not for profit organizations are required to comply by January 1, 2012. However, there are a number of steps organizations will want to take prior to January 1, 2012 in order to be in compliance on that date. These include:

- Identify the individual(s) within the organization who will be responsible for developing the policies, practices and procedures required by the AODA and the Customer Service Standard (the "AODA Person(s)").
- Ensure the AODA Person(s) receive(s) training required under the Customer Service Standard before they begin developing the organization's policies, practices and procedures. Note: *advance training* is an express requirement of the legislation.
- The AODA Person(s) will prepare the organization's policies, practices and procedures and will identify who within the organization requires training. Note: every employee, volunteer, agent or other person who deals with the public or other third parties on behalf of the organization must receive training.
- The AODA Person(s) will develop and implement an on-going training program to ensure compliance by January 1, 2012.

What comes next?

In addition to the Customer Service Standard, the Ministry is in the process of finalizing the following additional Accessibility Standards under the AODA:

- The **Integrated Accessibility Regulation**, which will combine the Employment, Information and Communication, and Transportation standards into one comprehensive Standard.
- The **Accessible Built Environment Standard**, which will focus on removing barriers in buildings and outdoor spaces for people with disabilities and form part of the Ontario Building Code.

For many months Sherrard Kuzz LLP has been assisting clients to proactively prepare for and implement AODA compliance tools tailored to their specific workplaces. This includes educational seminars on AODA basics, preparation of policies and practices, training, implementation and compliance audits.

To learn more, and/or for assistance preparing for AODA compliance at your workplace, please contact a member of Sherrard Kuzz LLP.

DID YOU KNOW?

Under Ontario's *Occupational Health and Safety Act*, an employer is required to establish and maintain a joint health and safety committee at a workplace where there are 20 or more workers "regularly employed". The Ontario Court of Appeal recently held an employer must include independent contractors in its count when determining whether this threshold has been met.

Wrongful discipline damage award – Divisional Court orders employer to pay unionized employee *future economic loss*

Traditionally, in a unionized setting, an arbitrator's finding that an employee has been unjustly terminated results in reinstatement of the employee with back-pay. However, a recent arbitral decision, upheld by the Ontario Divisional Court, confirmed the availability of a rare type of award against the employer – *future economic loss*. In addition to back-pay, but in *lieu* of reinstatement, an employee was awarded compensation for future lost income stretching from the date of the arbitrator's decision until the employee reached the age of 55 (when she would become eligible for early retirement under the employer's pension plan).

What Happened?

The employer, GTAA, had been having problems with excessive absenteeism and sick leave abuse. As a result, it instituted a surveillance strategy to monitor employees on sick leave. When the employee in question went off work to recover from arthroscopic knee surgery, the employer did not order surveillance. However, the employer soon learned the employee was living with another employee who the employer already had under video surveillance. As a result, the employer decided to institute surveillance of the employee in question as well.

In addition to back-pay, but in lieu of reinstatement, an employee was awarded compensation for future lost income stretching from the date of the arbitrator's decision until the employee reached the age of 55.

Following a period of surveillance, the employer reached the conclusion the employee could handle the physical aspects of her job and requested she return to work. Soon after her return, the employee was interviewed and asked questions about the activities she performed while on sick leave. The employer found her responses to be evasive and false. The employer terminated her employment 'for cause'. The employee grieved.

The Arbitrator's Decision

The arbitrator rejected the employer's allegation of 'cause' as completely devoid of merit. He found the employer did not have reasonable grounds to believe the employee had misused her sick leave; as such, the video surveillance was unwarranted. He further found the conclusions drawn from the videotape surveillance evidence were improper assessments made without appropriate medical knowledge.

To make matters worse, as a result of the employer's conduct, the arbitrator found the employee had developed anxiety and depression and an earlier unrelated condition of Post-Traumatic Stress Disorder had been revived. This caused the employee to have a strong aversion to returning to this employer. In the circumstances, the arbitrator held reinstatement would be inappropriate. In all, he awarded damages under four separate heads:

1. Back-pay: The employee was awarded compensation from the date of her termination (March, 2004) to the date of the arbitrator's decision (February 2010), less amounts earned in other employment.
2. Future Economic Loss: The employee was awarded compensation from the date of the arbitrator's decision until age 55 when she became eligible for early retirement under the employer's pension plan (two years).
3. Mental Distress: In the amount of \$50,000.00
4. Punitive Damages: In the amount of \$50,000.00

The Divisional Court

In January 2011, the Divisional Court upheld the award of back-pay and of future economic loss (the awards for mental distress and punitive damages were not upheld).

Lessons Learned for Employers

A future economic loss award is an uncommon but costly remedy. Let's take a closer look at the findings that led to this rare award:

1. The employer's conduct was "high handed, arbitrary and capricious".

Video surveillance is considered an intrusive investigative method. Before engaging in video surveillance, consider whether less intrusive methods of investigation may suffice (*i.e.*, a request for further medical or independent medical examination, etc.). As well, an employer should take care in reaching conclusions based on video evidence. Before video evidence is used to challenge a physician's recommendation or diagnosis, the employer's own physician should be asked to review the evidence and provide an expert medical opinion as to whether the evidence supports the employer's conclusions.

2. The employer "ignored its obligation to deal with the employee in a reasonable manner".

In a case where discipline is being considered, an employer should ensure it has taken into consideration the employee's record of service, seniority and performance history. If an employee has a long, unblemished record of service with an employer, termination is not likely to be upheld unless the misconduct is serious (*i.e.*, violence, threat of violence, serious fraud or theft).

3. Wrongful discipline may poison the employment relationship.

Where an arbitrator finds there was no basis to issue discipline, the employee's experience of having been unjustly disciplined may render the employment relationship unsalvageable. In the GTAA decision, the arbitrator found "*there is no more basis for reinstating her to her employment relationship as there is to reinstating her to a traumatic and abusive marital relationship*". As a result, damages for future economic loss were substituted for reinstatement.

To learn more and/or for assistance proactively managing workplace investigations and discipline, contact a member of Sherrard Kuzz LLP.

HReview Seminar Series

Please join us at our next HReview Breakfast Seminar:

Social Media in the Workplace - Uncharted Territory for Employers

The growing popularity of social media raises a number of workplace issues for employers. For example; when, if at all, is it appropriate for an employer to monitor employee use of social media; are there privacy considerations; what about freedom of expression and can an employer face liability for improper use by employees?

At this HReview Seminar we will tackle these issues and more, including:

1. Monitoring employee and applicant use of social media

- Why would an employer want to do this?
- Are there limitations on the use of information gathered?
- Are there privacy considerations?

2. Labour Law Implications

- The use of social media to solicit support for unionization.
- The use of social media to build public support during a work stoppage.
- How might an employer respond?

3. Employees who 'bad mouth' their employers on-line

- Ex: Domino's Pizza YouTube; Virgin Atlantic Airlines Facebook.
- Does an employee have a duty of loyalty to his/her employer?
- What about 'freedom of expression'?
- Does the employee have a reasonable expectation of privacy?
- How might an employer respond?

4. Social Media Policies and Practices

- Tips, traps and best practices.

DATE: Tuesday May 31, 2011; 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, Mississauga, Ontario, L5W 1G3

COST: Please be our guest

RSVP: By Friday May 20, 2011 to 416.603.0700 or register on-line at www.sherrardkuzz.com/seminars.php

Law Society of Upper Canada CPD Credits: This seminar may be applied toward general CPD credits.

HRPAO CHRP designated members should inquire at www.hrpa.org for certification eligibility guidelines regarding this HReview Seminar.

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