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Employment Update

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"The Occupational Health and Safety Statute Law Amendment Act, 2011 *is now law and it is clear from these amendments that the government wanted to make a significant 'statement' concerning the safety of Ontario workplaces."*

BILL 160: YET MORE AMENDMENTS TO THE OHSA AND WSIA

Mark Geiger

In the last days of this session of the Legislature prior to this Fall's election, the Legislature has passed significant amendments to both the *Occupational Health and Safety Act* (the "OHSA") and the *Workplace Safety and Insurance Act* (the "WSIA"). The *Occupational Health and Safety Statute Law Amendment Act*, 2011 is now law and it is clear from these amendments that the government wanted to make a significant 'statement' concerning the safety of Ontario workplaces.

The Changes

The amendments make two major changes to existing legislation.

First, they establish a new position, the "Chief Prevention Officer" (the "CPO"). This person takes on considerable responsibility under both statutes. The CPO can establish standards for any training required under the OHSA, as well as establish standards that a person must meet in order to provide such training. He/she may collect information about workers who have completed approved training and maintain records of such training, which can be provided to employers with the workers' consent. In addition, the CPO can establish training requirements for members of Joint Health and Safety Committees and the qualifications for certification of members of such committees. The amendments require constructors and employers to ensure that members of such committees have the required training, and that the time for any such necessary training is considered work time (i.e. paid time). The amendments also create a "Prevention Council" to advise the Minister of Labour on the appointment of the CPO. The Prevention Council will also provide advice to the CPO with respect to steps to be taken to prevent workplace injury and disease, proposed changes to funding and the delivery of services relating to such injury or disease, and on any other matter specified.

The second major change relates to complaints of reprisal. Currently, a worker continues to be able to bring such a complaint him or herself. As a result of the amendments, however, an OHSA inspector now also has the right to 'refer' a reprisal issue to the Ontario Labour Relations Board (the "OLRB") under s. 50 of the OHSA. It is clear that the Ministry is of the view that some workers do not bring such applications when they have suffered reprisal or do not refer unsafe working conditions for fear of reprisal if they do. This amendment now gives an OHSA officer the power to refer such matters to the OLRB, but gives no detail as to how the OLRB is to deal with the matter once referred. Currently the OLRB does not itself 'investigate' complaints or applications, and leaves it to the parties to bring whatever salient facts are important to the Board's attention at a hearing. In the past, Board officers were given investigative roles, but that practice is really no

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longer followed. OLRB officers act much more in the capacity of mediators than investigators and currently merely report on the status of disputes, and the positions taken by the parties in certain applications. Although representations were made by the Ontario Bar Association (the "OBA") that the legislation be amended to provide assistance to any worker whose alleged reprisal had been referred to the OLRB, the Act remains silent. It remains to be seen how the OLRB will deal with any such referrals.

The amendments also deal with the Offices of both the Worker and Employer Advisor, and now provide that such persons employed in either of those offices are not compellable witnesses.

What are the Implications?

We highlight two main effects of this legislation on employers and workers.

First, the training which was given to or undertaken by workers in the past and which was completely acceptable in the past may no longer be so. The CPO is empowered to establish standards for training courses and for those who teach them. As such, **any new standards that are developed could have the affect of requiring all workers who require such training to be retrained.** Although this possibility was raised by the OBA in its submissions, the Act was only amended to allow retroactive approval of courses given in the past. However, there is no guarantee that certificates granted to workers in the past in areas such as fall arrest, confined spaces, WHMIS, fork lift truck operation, etc. will continue to be valid. If a standard is created for specific training, and past training is not retroactively approved, any worker requiring that training would need to be retrained before they could continue to perform any function requiring the training. In many industries, especially construction, the cost and time commitment required for any such retraining could be considerable.

Second, the Ministry appears to be convinced that employers are using reprisal as a tool to prevent workers from enforcing their rights under the OHSA or otherwise reporting unsafe conditions. As mentioned above, OHSA inspectors may now refer these cases to the OLRB, albeit with the consent of any workers involved. They have not however provided any procedure or personnel to take carriage of these cases. The mediation function of OLRB officers is considered by many, including this author, to be vital to their role. To force them to 'investigate' a complaint referred by an OHSA officer and report their findings to the OLRB, could put in jeopardy their role as 'honest brokers' in all other cases where their mediation function is paramount. The OLRB will need to be very careful in establishing the processes to deal with these new referrals in order to avoid damaging the excellent work currently being done by its officers in settling applications and complaints referred to the OLRB by the parties themselves.

If you have any questions about the implications of these amendments on your business or workplace, please contact me. Otherwise, stay tuned as these changes are implemented! ■

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