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Blaney McMurtry
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Employment Notes

Labour and Employment Group

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"...where the termination payments are to be substantial, real cost savings can be attained by structuring termination payments in a manner designed to minimize WSIB liabilities."

WSIB PREMIUMS PAYABLE ON SEPARATION

Jack Siegel

Through the course of almost 25 years of dealing with the Workplace Safety and Insurance Board (formerly the Workers' Compensation Board) on issues ranging from employer classifications through benefit entitlement for alcoholism, I can safely say that I have seen my share of unusual, unexpected and outright bizarre decisions and policies implemented by this agency over the years.

Of recent note, I was asked to look into the treatment of termination payments made to a departing employee, and the extent to which such payments are to be treated as insurable earnings for the purposes of reporting to the Workplace Safety and Insurance Board ("WSIB"). Of course, if earnings are to be reported, the employer is required to pay an insurance premium on those earnings that can range anywhere from 0.18% to 15.86%, depending upon the employer's industry. While one might anticipate that such payments are either included or not, the answer, as expressed in WSIB Policy Document No. 14-02-08, is anything but straightforward. Particularly where the termination payments are to be substantial, real cost savings can be attained by structuring termination payments in a manner designed to minimize WSIB liabilities.

As most employers are aware, termination payments can be categorized in a number of ways. Under the *Employment Standards Act, 2000* (the "ESA"), Ontario employers can be required to give notice, or pay in lieu thereof, ranging from one to eight weeks. Over and above this, severance pay under the legislation (which cannot be provided as working notice) can reach a maximum of 26 weeks' pay. As well, common law obligations to give notice or pay in lieu of notice will frequently give rise to additional payments in lieu of notice, or arrangements whereby a departing employee's salary is continued for a period of time, even though the employee is no longer required to report to work or provide services.

Each of these types of payments are treated differently by the WSIB.

Pay in lieu of notice (termination pay) under the ESA will always be included as part of insurable wages, upon which WSIB premiums must be paid. But severance pay under the same

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"...although the difference between a retiring allowance paid in installments and a salary continuation is subtle indeed, a salary continuation can conceivably result in an added expense as high as 15% of the value of the arrangement..."

Jack Siegel's Labour and Employment practice focuses largely on workers' compensation, wrongful dismissal, occupational health and safety and human rights matters.

Jack is a former Chair of the Workers' Compensation Section of the Ontario Bar Association. Jack has been rated by LEXPERT, a Canadian legal directory, as one of the recommended legal practitioners in the Worker's Compensation Law Category, and most recently, was named as one of the best lawyers in Canada in that field, in the Best Lawyers in Canada list published by the Financial Post Business Magazine for 2006 - 2007.

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legislation does not constitute insurable earnings, and employers need not include such payments in the amounts that they report to the WSIB, and upon which premiums are calculated.

Similarly, "retiring allowances" are also excluded from insurable earnings. This includes payments that are made in a lump sum or in installments (over and above ESA termination pay as referred to above) and is seen to include any damages for wrongful dismissal, whether awarded by way of court decision or as a result of settlement, as well as payments in lieu of benefits or payments for unused sick pay credits, where employers provide for this.

What stands separate and apart, however, are salary continuation payments. These frequently arise as part of a termination package proposed at the time an employee is advised of termination or as a settlement structure when wrongful dismissal is claimed. Because a salary continuation represents a notional continuance of the employment relationship, the WSIB, with one notable exception, treats all such payments as regular salary, upon which premiums are payable. Accordingly, although the difference between a retiring allowance paid in installments and a salary continuation is subtle indeed, a salary continuation can conceivably result in an added expense as high as 15% of the value of the arrangement.

For reasons that are not explained in the policy, this rule only applies to salary continuation payments made during the same calendar year in which the person left active employment. Payments made in the following year, oddly, are not insurable. Accordingly, although there is some real benefit, from a Workplace Safety and Insurance Board premium perspective, in avoiding salary continuations where an employee is terminated early in the year, these considerations will diminish in importance when an employee is terminated towards the end of the calendar year, since salary continuation payments made after December 31st will not be subject to WSIB premiums.

We are always pleased to be able to assist our employer clients in the planning of employee terminations and the structuring of separation payments in the most economical manner possible. ■

ELECT TO WORK EXEMPTION REMOVED

Elizabeth Forster

Until recently, the *Employment Standards Act, 2000* contained certain exemptions which pertained to employees who were employed under an arrangement whereby they could elect to work or not, when requested to do so. Specifically, employers were not required to provide these employees with statutory holidays or statutory holiday pay. This exemption has been removed by a Regulation which came into force on January 2, 2009. Henceforth, these employees must be provided with statutory holidays with pay in the same manner as all other employees. ■

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"Until recently, the WEPP defined "wages" to include vacation pay, but severance and termination pay were not recoverable."

Deborah Grieve has been certified by the Law Society of Upper Canada as a Specialist in Bankruptcy and Insolvency Law since 1996. She advises a broad range of stakeholders (including creditor representatives, receivers, trustees, monitors, insurers, debtors and others) in complex corporate restructurings, international insolvencies, secured transactions and all types of insolvency including bankruptcy and receiverships.

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WAGE EARNER PROTECTION PROGRAM EXPANDED

Deborah Grieve

As reported in our October 2008 newsletter, effective July 7, 2008 the Wage Earner Protection Program ("**WEPP**") was proclaimed in force.

The federal WEPP provides a source of payment to eligible employees for **wages** earned during the six months immediately prior to the date of bankruptcy or receivership which are owed when the employer becomes bankrupt or subject to receivership, up to a maximum amount of four times insurable earnings under the *Employment Insurance Act*.

Until recently, the WEPP defined "wages" to include vacation pay, but severance and termination pay were not recoverable.

However, the Federal Budget released January 27, 2009 introduced an allocation of $50 million over the next two years for the WEPP to be extended to cover **severance and termination pay** to eligible workers as well. Though details of the plan have not yet been released, the recoverable amount will still be subject to the existing maximum amount, which is currently $3,254.

As there was no announcement with respect to the priority of the expanded claim as against assets of the employer, we assume that this has not changed.

Stay tuned for our next update, or call us if you have any specific inquires. ■

COMMONLY ASKED QUESTIONS ABOUT REFERENCE LETTERS

Elizabeth Forster

Clients often ask us about reference letters and their legal obligations with respect to them. The following is a list of some of the most frequent questions we are asked:

Do I have to give an employee a reference letter?

Answer: Technically, no. However, there may be good reasons to do so as described below.

If I don't have to give an employee a reference letter, why would I?

Answer: There are a number of reasons to give an employee a reference letter**.**

Most employees are terminated without just cause. In these cases employees are entitled to reasonable notice, or pay in lieu of reasonable notice. Frequently, there are negotiations between the employer and the employee as to what constitutes reasonable notice. In some cases, the employee sues for damages for wrongful dismissal. The measure of damages is the lost remuneration during the reasonable notice period, less what the employee earns through alternative employment.

The faster an employee gets a job, the less damages they will recover. Therefore, it is in the employer's best interest to assist an employee in finding alternative employment as quickly as possible.

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"...an employee suing for wrongful dismissal may be awarded damages for a longer notice period if he is unable to find employment because of the lack of a reference letter."

Elizabeth Forster represents employers, trade unions and employees. She has been involved in hearings before the Ontario Labour Relations Board, grievance arbitrations, collective agreement negotiations, Human Rights cases, and prosecutions under Occupational Health and Safety Act.

Her work also includes wrongful dismissal actions, actions for breach of fiduciary duties and other employment and employee issues as well as labour-related actions. She advises clients on employment contracts, employment policies, non-competition and confidentiality agreements and employee pension and benefit-related issues.

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Can an employer be sued if an employee is hired based on its letter of reference?

Answer: This would only happen in the rarest of cases based upon negligent misrepresentation. If a prospective employer relies upon a favourable letter of reference that was inaccurate and negligently made, the prospective employer may recover its damages arising out of the misrepresentation. However, provided the letter of reference is accurate, an employer would not be liable in damages

Employers should not provide a reference letter to an employee who has been terminated for just cause.

Can an employee sue his former employer based on his reference letter?

Answer: If the employer deliberately and knowingly makes false comments about an employee which affect the employee's reputation or ability to find a job, the employer could be liable to the employee for damages for defamation.

In addition, an employee suing for wrongful dismissal may be awarded damages for a longer notice period if he is unable to find employment because of the lack of a reference letter.

However, if the employer is honest in drafting the reference letter and does not act with malice or with the intent of interfering with the employee's ability to find a job, the employer will be protected from a damages claim. ■

THE RISK OF TOO MUCH RESTRICTION

D. Barry Prentice

We have previously written on the merits of having restrictive covenants in your employment agreements to prevent unfair competition by former employees. One thing we have stressed is the importance of balancing the Employer's right to protection against the Employee's right to pursue a livelihood. Too often we see covenants which go well beyond any legitimate right to protection, the apparent thinking being that a Court would "read it down" to what it views is reasonable. A recent decision of the Supreme Court of Canada, however, ruled that it is not appropriate for a judge to modify or read-down a covenant to render an unreasonable restriction reasonable or to remove an ambiguity. As a result, the entire restrictive covenant was struck down. The lesson from this case is that the use of an overly restrictive covenant may result in no protection at all. ■

EXPECT THE BEST

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