



Quarterly HR Law Update

IN THIS ISSUE:

Age Discrimination and Pension Benefits	2
Proposed Changes to Canada's Temporary Foreign Worker Program Become Law	3
Business Immigration Reminders	3
Last Chance Agreements: Getting Them Right From The Start	4
Upcoming Spectrum Seminars	5

Welcome Back!

Welcome to our fall newsletter as we bid farewell to summer (or, in Calgary, the "summer that wasn't!") and gear up for what promises to be a busy fall season.

Spectrum HR Law has been a bustling place since our last newsletter. Most importantly, we have welcomed four new lawyers to our firm. Our Calgary office welcomed Catherine McAteer (Business Immigration) at the end of April. Our Vancouver office saw the additions of Colin Galinski (Pensions, Benefits and Executive Compensation) in May, and Craig Natsuhara and Meika Lalonde (Business Immigration) in July.

As summer ended, we said good-bye (temporarily) to our firm's first ever summer law student, Shannon Houston. Fortunately, we are extremely pleased that Shannon has accepted our offer to return, and we will be counting down the days until next summer.

This fall, our Vancouver office will be hosting its inaugural seminar on a variety of topics of interest to our clients and industry colleagues. In Calgary, we will be preparing for our fall seminar series, each session of which will cover topics from one of our particular practice areas. As always we welcome your feedback and suggestions for format and future topics. More details on these seminars are provided on p.5 of this newsletter.

I would like to take this opportunity to thank you, our clients and other friends, for your support and encouragement over the past months as we launched and continue to grow our firm. We look forward to reconnecting with you now that the summer is over and we are all back to business.

Chris Brown,
Managing Partner

Contact Chris at:
T. 403.444.8104
E. cbrown@spectrumhrlaw.com

SPECTRUM HR HAPPENINGS

Spectrum HR Law LLP is sponsoring the Association of Canadian Pension Management (ACPM) conference in Whistler, British Columbia.

Chris Brown is speaking at the upcoming ACPM conference on the topic of Defined Contribution Pension Litigation.

Meika Lalonde is speaking at the Canadian Employee Relocation Council (CERC) Pacific Regional Seminar, addressing Canada's new immigration compliance measures.

Shana Wolch is speaking at Lorman's Workplace Accommodation Seminar.

Evelyn Ackah is speaking at the CBA's Employment and Immigration subsection meeting on September 15, 2010 - "A New Era for Employers: Managing Temporary Foreign Workers"

Catherine McAteer presented the topic, "Creating Buy In: Privacy Laws, Staff and Medical Professionals," at an Infonex conference in August.

Scott Sweatman was appointed to the Board of Directors of NAV CANADA.

Evelyn Ackah is being interviewed on September 21st on CBC Radio's Homestretch regarding recent changes to Canada's Immigration Regulations and the impact on Canadian employers.

Colin Galinski and Scott Sweatman co-authored an article on age discrimination and pension plans in the upcoming Federated Press Pension Planning publication.

Chris Brown and Catherine McAteer will be panellists at an upcoming workshop entitled "Practice and Parenthood" to be held on September 18, 2010.

Age Discrimination and Pension Benefits

Earlier this year, the Supreme Court of Canada heard the appeal of *Withler v. Canada (Attorney General)*, the B.C. Court of Appeal decision regarding age discrimination and pension benefits. The Supreme Court's decision, when released, will be of significance to the pension sector in Canada.

The appellants commenced class proceedings seeking remedies for *Charter* infringements caused by the *Public Service Superannuation Act* and the *Canadian Forces Superannuation Act*. The Acts provided a lump sum supplementary death benefit ("SDB") of twice the salary of the plan member; however, the SDB was reduced in accordance with the member's age at death.

The appellants argued the SDB discriminated on the basis of age, seeking a declaration of invalidity and a return of the amount by which the benefits were reduced.

While the majority at the B.C. Court of Appeal dismissed the appeal, the strongly-worded, detailed, and lengthy dissenting opinion provides much analysis for the Supreme Court to consider as it issues a decision.

The possibility of the Supreme Court overturning the decision has attracted media attention focusing on the significant financial impact of a successful claim. The cost of repaying the SDB reductions back to 1985 is, according to the Justice Department, approximately \$2 billion. Interestingly, a Treasury Board report identifies a \$2.5 billion surplus in the SDB as of the end of 2008.

The impact of a Supreme Court ruling that the SDB is discriminatory would very likely extend to other public sector plans that provide similar benefits determined on the basis of age.

In terms of private sector plans, while the *Charter* issues will not apply to the terms of the plans, a successful appeal of *Withler* may invite claims revisiting the judicial interpretation of "bona fide pension plan" in human rights legislation and decisions such as *Zurich Insurance Co. v. Ontario (Human Rights Commission)*. Should the Supreme Court allow the appeal, the path could be cleared for significant legal challenges to long-standing exemptions in human rights legislation that have justified early retirement reductions and other age-based distinctions within pension plan administration.

Due to the potential impact of this case on both public and private sector pension plans, it will be prudent for plan sponsors and administrators to review the Supreme Court's decision and related commentary once the decision is released.

Scott Sweatman and Colin Galinski

Contact Scott at:
T. 604.630.2080
E. ssweatman@spectrumhrlaw.com

Contact Colin at:
T. 604.630.2079
E. cgalinski@spectrumhrlaw.com

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Update: Proposed Changes to Canada's Temporary Foreign Worker Program Become Law

In our last newsletter, we discussed proposed changes to the *Immigration and Refugee Protection Regulations*, which would affect Temporary Foreign Workers ("TFW") and their employers. On August 18, 2010, these proposed amendments became law. Although, they do not take effect until April 1, 2011, employers should take steps now to ensure that they will not be negatively impacted by the new measures.

The amendments:

- establish specific factors by which officers will determine whether an offer of employment is genuine;
- introduce enforcement mechanisms for non-compliant employers including a two-year prohibition on securing work permits for TFWs and an employer "blacklist" on Citizenship and Immigration Canada's website;
- establish a four year cap (cumulative) on the time period that a TFW may work in Canada (with exceptions for work that has significant social, cultural or economic benefits, or that is performed pursuant to an international agreement (e.g. NAFTA));
- require TFWs to complete a 48 month "waiting period" before applying for another work permit after the cap has been reached.

The regulatory changes underscore the importance of having a clear immigration policy and procedure for your organization. An effective corporate immigration program will:

- consider immigration as a strategic human resources issue;
- include a communications protocol;
- include specifics on process, roles and responsibilities between the TFW, HR, managers, in-house and external counsel;
- discuss when and how a TFW will be supported for permanent residence (given the new four-year cap);
- include regular education and training for HR, managers, TFWs and in-house counsel;
- include a detailed plan for compliance issues, including how the organization will respond to governmental audits.

Catherine McAteer

Contact Catherine at 403.444.8110 or cmcateer@spectrumhrlaw.com

Business Immigration Reminders

A lot has changed since we last communicated. Please keep in mind the following changes, which may affect Temporary Foreign Workers in your organization:

Language Testing:

Permanent residence applicants in the Federal Skilled Worker and Canadian Experience classes are now required to undergo language testing to establish proficiency in English or French.

End of the Federal IT Worker Category

The end of this category is fast approaching for most provinces (except Quebec). IT workers who wish to apply for work permits or extensions without the need for labour market approval must submit their applications on or before October 1, 2010.

Last Chance Agreements: Getting Them Right From The Start

Last Chance Agreements (“LCAs”) can be useful tools for employers faced with the difficult decision of whether to terminate an employment relationship. Available in both unionized and non-unionized contexts, LCAs give employers flexibility in responding to misconduct that has continued notwithstanding previous disciplinary measures.

For instance, LCAs are effective for dealing with misconduct such as chronic absenteeism or for imposing discipline on employees with disabilities such as drug and alcohol dependencies. Additionally, LCAs can be effective in addressing situations where an otherwise dedicated and valued employee uncharacteristically engages in a form of more serious misconduct. The LCA allows the employer to give the employee one last chance to correct his/her behaviour and refrain from engaging in the behaviour again, while acknowledging and preserving the training and resources invested in the employee.

LCA Pitfalls: Fatal Flaws

While LCAs are an indication that an employer is making efforts to maintain and repair an employment relationship, courts and arbitrators have set aside or refused to recognize LCAs in certain circumstances, such as for being implemented too early or for having unreasonable terms. The consequences of an unenforceable LCA include reinstatement of the employee and/or damages for wrongful dismissal.

A vital aspect of the legality of a last chance agreement is when in the discipline process it was implemented. If the LCA has been introduced too early in the disciplinary process, an employer may be unable to rely

the disciplinary process, an employer may be unable to rely on the agreement to terminate with just cause should a further instance of misconduct occur. In *Scott v. Canada*, 2010 PSLRB 42, the employer imposed an LCA in response to an employee’s absenteeism. The arbitrator set aside the LCA, stating that the employer had not “carried out any disciplinary measures before the events that led to the last-chance agreement. The [employer] should not be allowed to use last-chance agreements instead of progressive discipline.” Employers should therefore consider the applicability of progressive discipline, particularly in the unionized context where such direction might itself come from a collective agreement, before automatically implementing an LCA.

Employers considering whether to enter into an LCA with an employee should review the employee’s disciplinary record, focusing on prior attempts by the employer to bring workplace issues to the employee’s attention and to modify his/her behaviour. The determination to be made is whether the employer has made reasonable attempts to correct the problem before implementing an LCA.

Additionally, employers need to consider whether the LCA contains terms that an arbitrator or court would consider reasonable. For example, if an employee is required by the LCA to meet standards higher than those to

which other employees are held, such terms of the LCA may be regarded as unreasonable. The employer will be held to a standard of deciding upon reasonable terms that are appropriate in the specific circumstances.

Finally, the LCA must contain a period of time during which the employee must meet its terms; and, indefinite LCAs will not meet the reasonableness test in the face of a legal challenge. LCAs spanning one or two years are common. Notably, the period of time an LCA is in place can exclude time during which the employee is absent from work on an approved leave. In *Kingston General Hospital v. O.N.A.*, 2010 CarswellOnt 4066, the employer extended the term of the LCA due to the employee’s one-year absence on maternity leave, to give the employer a reasonable opportunity to assess compliance with the terms of the LCA. In that case, the union agreed to the extension, and the arbitrator did not interfere with the agreement.

Ultimately, the LCA can be a useful way for employers to ensure compliance with workplace rules or meet the duty to accommodate in cases of disability and still effectively impose discipline, while retaining valuable employees. When deciding whether to enter into an LCA with an employee who has engaged in misconduct, it is critical for employers to pay particular attention to the reasonableness of the timing, duration and terms of the LCA.

Colin Galinski and Shana Wolch

Contact Colin at:
T. 604.630.2079
E. cgalinski@spectrumhrlaw.com

Contact Shana at:
T. 403.444.8106
E. swolch@spectrumhrlaw.com

SPECTRUM FALL SEMINAR SERIES:

CALGARY

Spectrum HR Law LLP
Suite 1950, 639 5th Ave. SW
Calgary, AB
T2P 0M9

T. 403.444.8100
F. 403.444.8101

VANCOUVER

Spectrum HR Law LLP
Suite 500, 666 Burrard St.
Vancouver, BC
V6C 3P6

T. 604.630.2077
F. 604.630.2078

TOLL FREE 1.888.444.9145

www.spectrumhrlaw.com

CALGARY: Ensuring Immigration Compliance:
A New Era in Managing Temporary Foreign Workers
September 22, 2010

Pension & Benefits Seminar
October 20, 2010

Employment Law Seminar
November 17, 2010

VANCOUVER: Inaugural Spectrum HR Law Breakfast Seminar:
An Integrated Approach to HR Law
October 14, 2010

***For more information or to RSVP for a Spectrum Seminar,
please contact the Calgary or Vancouver office***

Our People

CALGARY

Evelyn L. Ackah
Business Immigration
T. 403.444.8109
E. eackah@spectrumhrlaw.com

Christopher A. Brown
Pensions, Benefits and Executive
Compensation
T. 403.444.8104
E. cbrown@spectrumhrlaw.com

Will Cascadden
Employment and Labour
T. 403.444.8107
E. wcascadden@spectrumhrlaw.com

Catherine McAteer
Business Immigration
T. 403.444.8110
E. cmcateer@spectrumhrlaw.com

Janet Nystedt
Employment and Labour
T. 403.444.8109
E. jnystedt@spectrumhrlaw.com

Kristin Smith
Pensions, Benefits and Executive
Compensation
T. 403.444.8105
E. ksmith@spectrumhrlaw.com

Shana Wolch
Employment and Labour
T. 403.444.8106
E. swolch@spectrumhrlaw.com

Michael Wolpert
Pensions and Benefits
T. 403.444.8103
E. mwolpert@spectrumhrlaw.com

VANCOUVER

Colin Galinski
Pensions, Benefits and Executive
Compensation
T. 604.630.2079
E. cgalinski@spectrumhrlaw.com

Meika Lalonde
Business Immigration
T. 604.630.2083
E. mlalonde@spectrumhrlaw.com

Craig Natsuhara
Business Immigration
T: 604.630.2082
E. cnatsuhara@spectrumhrlaw.com

Scott Sweatman
Pensions, Benefits and Executive
Compensation
T. 604.630.2080
E. ssweatman@spectrumhrlaw.com