In the know

WILLIAMS HR LAW

LEGAL EXPERTISE AT WORK

Issue No. 2 – *May 2011*

What's New ...

This issue of IN THE KNOW features an overview of Bill 160, which proposes legislative amendments that will impact the occupational health and workplace safety requirements imposed on employers.

We also review a recent case that is important to any employer which issues electronic equipment and devices for use by its employees.

You will also find Part 2 of the Effective Attendance Management Strategies Series, which discusses how employers can respond to suspicious employee absences.

Finally, we have included a new interesting case which suggest that an employee can sue an employer claiming constructive dismissal while continuing to work for that same employer.

As always, please feel free to contact us regarding any of the content set out in this issue.

In this issue

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Proposed Amendments To The *Occupational Health and Safety Act*

Background

Workplace injuries and fatalities have become a growing concern in Ontario in recent years. The Minister of Labour ("Minister") responded to this issue by forming an Expert Advisory Panel ("Panel") to review Ontario's current health and safety regulations and make suggestions for statutory and policy improvements. After concluding its review, the Panel provided its report to the Minister setting out 46 recommended changes to how Ontario currently regulates occupational health and workplace safety. It is expected that over the next few years most of these recommendations will be implemented by the government as occupational health and workplace safety undergoes a relatively comprehensive overhaul.

Bill 160, the Occupational Health and Safety Statute Law Amendment Act, 2011 is the first major step towards this reform. Bill 160, which passed second reading on March 29, 2011, proposes to establish a new procedural framework for Occupational Health and Workplace Safety which includes greater regulation of training standards and establishing enforcement mechanisms to encourage compliance.

Key Proposed Amendments Under Bill 160:

The Minister will be authorized to establish standards for training programs and standards that must be met for an individual to be recognized as an approved training provider.

- The Minister will be authorized to collect information about workers' successful completion of approved training programs.
- The Minister will be authorized to establish standards that must be met in order to become a certified member of a joint health and safety committee.
- A constructor or an employer will be required to provide training to health and safety representatives.
- Where a joint health and safety committee fails to reach a consensus, co-chairs will be allowed to make written recommendations to a constructor or an employer.
- A Prevention Council ("Council") will be created and will be comprised of workers, employers, and occupational health and safety experts. The Council will provide advice to the Minister on the appointment of a Chief Prevention Officer ("CPO"). Additionally, the Council will also be responsible for providing advice to the CPO on occupational health and safety matters.

The CPO will develop a provincial health and safety strategy, write an annual report, and provide advice to the Minister.

- Where an employer has commits a reprisal against a worker, an inspector can refer the matter to the Ontario Labour Relations Board ("Board") for arbitration in circumstances where it is warranted and where certain conditions have been met.

Bill 160 will likely undergo further changes as it progresses though the legislative process. We will continue to monitor this development and will keep you up-to-date on what employers will need to know to ensure compliance should Bill 160 pass into law.

5 Effective Attendance Management Strategies

Part 2 Investigating Suspicious Absences

Karen has used up all her vacation entitlement very early on in the year. She has requested a two week advance of vacation from her future entitlement to attend a wedding in the Caribbean in the fall. You deny the request for two weeks but begrudgingly allow her to take one week on an unpaid basis. She is unhappy with the compromise. The Sunday evening before she is due back at work from her week off, she leaves you a message very late in the evening stating that she is too sick to fly back. She advises that she needs another week off to recover and that she will return to work the following Monday.

Suspicious circumstances around an employee's reasons for not attending work are not uncommon. However, many employers believe that they cannot request proof that an explanation provided to justify an absence from work is legitimate. Alternatively, employers may react inappropriately to suspicious absences, which could lead to exposures to liability, such as in cases where the absence is related to illness and the employee alleges that the employer's reaction is in violation of the Human Rights Code.

Part two of the Effective Attendance Management Strategies series focuses on why employers should enquire into employee absences, that appear suspicious or illegitimate, and will suggest a best practice approach to ensure that requests for proof of absence are conducted properly.

Employers are well within their rights to request employees to justify absences from work, and it is best practice to request proof in support of the reason given for the absence in all circumstances. The request for proof communicates the importance of attendance and the employer's right to make the request should be set out in workplace policies. Further, where employers regularly employ more than 50 employees, and employees take unpaid time off as Emergency Leave, section 50(7) of the Employment Standards Act, 2000 ("ESA") gives employers the right to request "evidence reasonable in the circumstances that the employee is entitled to the leave".

The following is a best practice approach to investigating circumstances surrounding an employee's absence:

- provide the employee with a written request for proof justifying the need for time taken off work. In our scenario above, an employer could request that the employee provide proof that Karen sought medical treatment when away and/or a copy of the airline ticket to verify whether the trip was originally booked for a one week return;
- if applicable, refer to the workplace policy or legislation provision (e.g. section 50(7) of the ESA) as the basis for the request;
- review the submitted proof with the employee during a meeting and ensure that the employee is provided with an opportunity to explain the circumstances;
- after the initial meeting with the employee, consider whether further information is required or whether there is enough information to make a decision;
- once all information has been considered, meet with the employee to communicate the findings based on the information provided along with any decisions made in response to the circumstances (e.g. whether there will be discipline imposed).

The pitfalls of condoning attendance issues, particularly where employees are being untruthful about the reasons for absence, are many. An employer's policies can be undermined, workplace morale and productivity may decline, other employees may believe they can get away with similar misconduct, and an employer can lose an opportunity to correct an otherwise high performing employee. Attending work regularly and on-time is a fundamental condition of work. Employers should ensure that:

- they have policies that clearly communicate attendance expectations;
- employees are aware of polices and sign off on their commitment to comply; and
- policies are consistently applied in the workplace and discipline for non-compliance is imposed as appropriate.

What's Mine is Yours: The Expanding Expectation of Employee Privacy

Jaime from Finance has taken her company issued laptop with her on her vacation. Brandon from Sales stores personal appointments and banking information on his employer-owned Blackberry. Chances are your employees use their employer-issued electronic devices for more than just crunching quarterly numbers and setting lunch appointments with potential clients. According to the recently issued decision of the Ontario Court of Appeal in the case of R. v. Cole, your employees may have the right to expect some privacy in the personal use of those devices.

Cole was a high-school teacher in Sudbury who was issued a laptop by the school board which he used to teach a communications technology course and to supervise and monitor a laptop program for students. A computer technician employed by the board noticed that there was a large amount of activity between Cole's laptop and the school server. In an attempt to identify the issue the technician discovered nude, sexually explicit images of an underage student that Cole had copied to his computer from an email account of another student.

School administration was notified and they promptly seized and searched Cole's laptop. The school board provided the police with the computer along with copies of the images and the teacher's internet browsing history. The police conducted an additional search of the laptop without a warrant on the basis that they had received consent from the board to search its contents.

Although the laptop was the property of the school board, and traditionally the view has been that ownership means control of privacy, the court held that Cole had a limited reasonable expectation of privacy under the circumstances. According to the court, this expectation was derived from a number of factors. These include the fact that teachers at the school were provided with exclusive possession of the laptops and were allowed to take the laptops home on evenings, weekends and vacations; that teachers set passwords on their computers and stored information on the hard drive; and that there was no clear policy governing the use of the laptops or the right of the school board to search or monitor the computers.

In this particular case, this expectation of privacy was limited only to the extent that Mr. Cole knew, or ought to have known, that the computer technician was implicitly authorized to access the laptops for the purpose of maintaining the technical integrity of the schools network. The Court held that there was no breach of Cole's section 8 rights against unlawful search and seizure under the Canadian Charter of Rights and Freedoms because the technician stumbled upon the images while accessing the laptop for these implicitly authorized purposes. However, a violation of Cole's section 8 rights was found to have occurred when the images and data were provided to the police and when the police conducted the warrantless search of the laptop.

While most employers will not be subject to a Charter analysis regarding the search of company issued equipment (the Charter only applies to governmental authorities, public sector employees and the police), this is an important result for employers as this decision can be expected to have broader implications on the evolving issue of privacy in the modern workplace and the growing recognition of employee privacy.

Employers should take the appropriate steps to limit the expectation of privacy that employees may have in relation to any electronic devices provided for work-related purposes. This is particularly important for employers who engage in any kind of monitoring of employee computers.

The implementation of a clear and unambiguous policy regarding the use of any employer computers and/or issued electronic devices is the best course for employers in establishing parameters on employee privacy. Such a policy should include statements regarding employer ownership; proper and improper uses; employer's right and intention to monitor use; and the fact that no policy of information stored on the equipment should be expected.

Please feel free to contact any of our lawyers should you have any questions on this issue.

Constructive Dismissal Ruling Not So Sweet For Candy Manufacturer

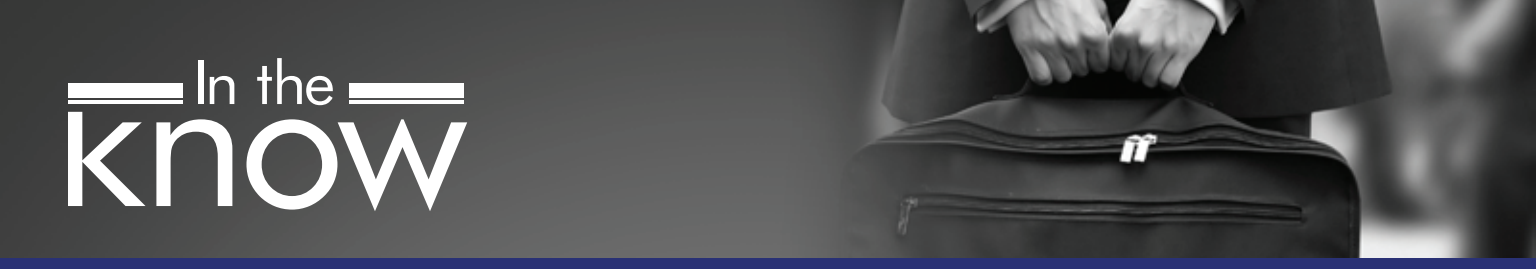
In a recently released decision, Russo v. Kerr Bros. Ltd., Lorenzo Russo, a 53-year-old warehouse manager at Kerr Bros. Toronto based candy manufacturer, successfully sued his employer for constructive dismissal after having his salary reduced from $114,000 to $60,000. What makes this successful claim so unique is that Mr. Russo continued to show up at work to perform his regular duties following the reduction to his pay, all while bringing the law suit against his employer.

Traditionally, where an employee feels they have been constructively dismissed, they will immediately stop working as not to be seen as acquiescing to the new terms of employment introduced by the employer. Rather than taking this approach, Mr. Russo notified his employer through a letter from his counsel that the new terms offered constituted a constructive dismissal; that he objected to the terms and was not consenting to the change to his employment contract. Mr. Russo continued to perform his work duties on the basis that he was mitigating his damages.

Mr. Russo's employer acknowledged that a constructive dismissal had occurred, but argued that he should be deemed to have accepted the new terms because he continued to show up for work. The employer argued it should be concluded that a new contract of employment had been entered into pursuant to the new terms.

The court disagreed with the employer's position. In the opinion of the court, Mr. Russo had been very clear that he did not consent to the changes to his terms and conditions of employment. The Court found that the letter from Mr. Russo's counsel to his employer clearly provided notice of this position. As such, in the Court's view, when Mr. Russo remained in the workplace, the employer had no right to assume that he was doing so under the new contract terms. The Court accepted that the only basis for Mr. Russo remaining in the workplace was to mitigate his damages, and that there was no reason to hold otherwise.

Employee consent, express or implied, is required for any fundamental change to the employment contract. The decision in Mr. Russo's case suggests that an employer may not assume that an employee who continues to work after unilaterally-imposed changes to his or her employment contract has consented to those new terms where that employee has appropriately notified the employer to the contrary.



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What You Can Expect From Williams HR Law:

A Proactive Approach Defines Us:

Client-service is paramount. We are always available to our clients to provide timely advice. As our client you can trust that we will deliver service that not only resolves the legal issues you face today but anticipates where improvements can be made to avoid legal trouble tomorrow.

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We Listen Before We Speak:

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We Are Practical:

An ounce of prevention is worth a ton of litigation. We offer cost-effective legal services that are focused on diffusing workplace issues before they escalate. We will work with you to bring about the best resolution possible using all available avenues.

Our Team Loves What We Do:

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We value your input. If you have any suggestions on how we can improve our service, we are always happy to hear from you. Please visit our website to subscribe to our newsletter and podcast series.

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