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AREAS OF POTENTIAL LEGAL LIABILITY FOR EMPLOYERS

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Introduction

Employers have exposure to a number of different areas of liability in the course of the employer/employee relationship. The areas of liability fall into four different categories:

1. Statutory Liability
2. Contractual Liability
3. Tort
4. Vicarious Liability

1. Statutory Liability

- (a) ***Canada Pension Plan***, R.S. 1985, c. C-8.

This *Act* requires employers to make a contribution in respect of each employee employed in pensionable employment. It also requires employers to deduct the employee's share of the premium from the wages owed to them and remit it to the Receiver General.

Sec. 21(1) of the Act requires amounts deducted for pension to be remitted to the Receiver General within the time limits prescribed by the Act.

Sec. 21(6) requires an employer who has failed to remit, to pay interest on the amount that was not remitted. Sec. 21(7) provides the penalties for employers who fail as required that vary from 3 - 10% of the amount owing depending on the length of the delay. Finally, if the failure to pay the remittance by the employer was made knowingly or with gross negligence, the penalty is 20%.

Where a failure to deduct or remit is made by a corporation, the directors of the corporation at the time the failure was made are jointly and severally or solidarily liable for the amounts owing including interest and penalties.

Sec. 23(3) states that an employer is to hold in trust for payment to Her Majesty, any amount deducted but not remitted separately and apart from any property held by a secured creditor.

Sec. 41 deals with offences. Every employer who fails to comply with s.21(1) or s.23(3) is liable on summary conviction, to a fine of up to \$5,000.00 and/or imprisonment of not more than six months.

Any person who knowingly evades payment or makes or contributes to the making of false statements on a return, certificate, or statement is guilty of an offence and is liable on summary conviction to a fine of up to \$5000 and/or up to six months imprisonment.

Sec. 103(2) also states that when a corporation commits an offence under the Act, every officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is a party to and guilty of the offence and is liable on conviction whether or not the corporation has been prosecuted and/or convicted.

(b) *Employment Insurance Act*, 1996 c. 23

The *Employment Insurance Act* also requires employers to remit premiums to the Receiver General, and to deduct the employee's share of the premium from the wages owed to them and remit it to the Receiver General.

Sec. 39(1) and (2) of this Act provide penalties for employers, any person acting for an employer, or any person pretending to be or act for any employer. The maximum penalty is not more than nine times the maximum rate of weekly benefits in effect when the penalty is imposed if the employer or other person has:

(a) made, in relation to any matter arising under this Act, a representation that the employer or other person knew was false or misleading;

(b) being required under this Act or the regulations to provide information, provided information or made a representation that the employer or other person knew was false or misleading;

(c) in relation to any matter arising under this Act, made a declaration that the employer or other person knew was false or misleading because of the non-disclosure of facts;

(d) imported or exported a document issued by the Employment Insurance Commission, or had it imported or exported, for the purpose of defrauding or deceiving the Commission; or

(e) participated in, assented to or acquiesced in an act mentioned in paragraphs (a) to (d).

Sec. 39(3) provides that where a corporation commits an offence and the directors, officers, or agents of a corporation have directed, authorized, assented to, acquiesced in or participated in the act, that a penalty may also be issued against that person.

Finally, 46.1(3) provides a due diligence defence for directors to excuse them from liability where they used the degree of care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances to prevent the act or omission for which the penalty is imposed.

The penalties for failure to remit premiums are exactly the same as those identified above under the *Canada Pension Plan*. Once again, directors of corporations may be held jointly and severally, or solidarily, liable with the corporation. Sec. 86(2) also includes the same provisions as the Canada Pension Plan requiring employers to hold deductions in trust for Her Majesty.

Similarly, sec. 106 deals with offences and provides that every employer who contravenes 82(1) or 86(2) is guilty of a summary conviction offence and is liable for a fine of up to \$5, 000 and/or up to six months imprisonment.

Finally, 106(4) also provides provisions identical to those in the *Canada Pension Plan* regarding offences by “any person.” It provides the same penalties, namely

a fine of up to \$5, 000 and/or up to six months imprisonment. Sec. 108 also provides the same provisions as the *Canada Pension Plan* for the involvement of directors, officers, or agents of a corporation.

(c) **Occupational Health and Safety Legislation:**

Each province has its own occupational health and safety legislation which imposes obligations on employer to provide a healthy and safe working environment for employees.

The legislation imposes criminal sanctions on employers who are in violation of its provisions including fines. Liability may also be imposed upon officers, directors and managers.

(d) **Pay Equity Legislation**

Pay equity legislation requires employers to establish and maintain equitable compensation practices. Pay equity tribunals generally have authority to impose pay equity plans on employers who do not comply with the legislation.

(e) ***Employment Equity Act*, 1995 c.44**

Sec. 5 of this Act places a duty on employers to eliminate barriers in the workplace to identified groups that result from the employer's employment systems, policies and practices that are not authorized by law. To address these barriers, employers must implement positive policies and procedures and make reasonable accommodations. Sec. 6 places some restrictions on these duties. Employers need not take measures that

will cause them undue hardship, hire unqualified persons, or create new positions in their workforces.

Sec. 10 requires the employer to prepare an employment equity plan detailing its policies and procedures. Sec. 17 requires employers to establish and maintain employment equity records in for the workforce, employment equity plan, and the implementation of employment equity.

Sec. 35 sets out the conduct that constitutes a violation of the Act:

- 35.** (1) Every private sector employer commits a violation of this Act who
- (a) without reasonable excuse, fails to file an employment equity report as required by section 18;
 - (b) without reasonable excuse, fails to include in the employment equity report any information that is required, by section 18 and the regulations, to be included; or
 - (c) provides any information in the employment equity report that the employer knows to be false or misleading.

Continuing violations

- (2) A violation that is committed or continued on more than one day constitutes a separate violation for each day on which it is committed or continued.

The penalties for violation are fines of \$10, 000 for a single violation and up to \$50, 000 for repeated or continuous violations.

(f) **Workers' Compensation Legislation:**

Provincial workers' compensation legislation is designed to provide an insurance plan for workers injured in the course of their employment.

Employers are required to fund the plan through premiums. The legislation may also contain requirements that employers cooperate in the early and safe return to work of an injured worker and to re-employ an injured worker. Most legislation provides for both financial and criminal penalties for infractions.

(g) **Pension Benefits Legislation:**

Provincial and federal pension benefits legislation provides for the administration and funding of pension plans.

Employer obligations include a duty of care in administering the plan, and in investing plan funds, regular filings, statements to employees, and payment of contributions as required under the plan.

In addition, the legislation provides for criminal sanctions if it is breached, and often imposes criminal liability on the officers and directors of the company.

(h) ***Criminal Code of Canada*, R.S. 1985, c.C-46**

The definition of “every one” and “person” in the *Criminal Code* include “organizations.” This means that employers, officers, directors, agents, etc. can all potentially have liability under the criminal negligence provisions found in sections 219-221 of the *Code*.

The *Code* also provides for criminal liability on employers for workplace injuries or fatalities. Sec. 217.1 states:

Duty of persons directing work

217.1 Every one who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.

Sec. 735 provides that organizations may be fined up to \$100,000 for a summary conviction offence.

Finally, sec. 435 prohibits an employer or a person acting on behalf of an employer from taking disciplinary measures against an employee, for the purpose of compelling that employee to abstain from providing information about wrongdoing pursuant to any federal or provincial law or regulation. The Crown may pursue a violation of this provision by way of indictable offence or summary conviction. If a charge proceeds by way of indictable offence, the penalty is up to five years imprisonment.

(i) Whistleblower Legislation:

Increasingly legislators are enacting legislation to protect employees who report the wrongdoings of their employer. Many environmental statutes prohibit employers from dismissing, disciplining, threatening or intimidating an employee for reporting his/her employer.

(j) Employment Standards

Every province and the federal government have enacted employment standards legislation which sets out minimum standards of employment applicable to all

employees. Most employment standards legislation includes provisions regarding minimum wages, maximum hours of work, overtime, leaves of absence and the rights of employees during these leaves, public holidays and vacations, and minimum notice of termination. In Quebec, the legislation also includes a protection from psychological harassment.

Usually the applicable Ministry of Labour is charged with the authority to enforce the legislation. Enforcement may include ordering an employer to pay any amounts found owing to an employee, ordering an employer to pay damages, or ordering an employer to pay fines. Some employment standards legislation imposes personal liability on an employer's officers and/or directors.

(k) **Human Rights**

Each province and the federal government have enacted human rights legislation prohibiting discrimination based upon enumerated grounds. The legislation provides for a human rights tribunal to adjudicate any complaints that the legislation has been violated. These tribunals are given broad power to remedy any claims of discrimination including the power to order an employer to comply with the legislation or to pay damages to the employee, or to take other courses of action in the public interest.

2. **Contractual Liability**

(a) **On Termination of Employment**

(i) **Contractual Notice Period**

The relationship between an employer and an employee is a contractual one. While most contracts of employment are still verbal, employers are increasingly setting out the terms of employment in writing. If an employer agrees to a specific notice period and termination of employment in the contract, the employer must comply with that contractual term upon termination.

(ii) **Implied Term of Reasonable Notice**

Absent an express term to the contrary, most contracts of employment contain an implied provision that they can only be terminated for just cause or, in the absence of just cause, upon reasonable notice. The amount of reasonable notice that must be given varies from employee to employee based upon factors which affect the employee's ability to find comparable employment, such as the employee's age, length of service, level of responsibility, salary and the availability of compensable employment.

If an employer fails to provide reasonable notice of termination, it is liable to an employee for all damages suffered as a result of that failure. Normally these damages are the value of the employee's lost salary, and other forms of remuneration and benefits during the notice period, less the amount that the employee earns through alternative employment.

Employment standards legislation also provides for minimum notice (and in some cases severance pay) which must be provided to employees who are terminated without just cause.

(b) **Benefits/Pension Coverage**

It is usually a term of an employment contract that employees participate in some form of group benefit plan and pension arrangement. Employers are required to comply with these plans as part of their obligations under the contract. An employer's obligation may simply be to pay insurance premiums but may also extend to administering the benefit and/or pension plans.

(c) **Collective Agreements**

A collective agreement is a contract between the employer on one hand, and a union as bargaining agent for a group of employees on the other. Employers are bound to the terms of the collective agreement. Any violation of the collective agreement can be enforced through a grievance and arbitration procedure.

(d) **Vested Rights**

The theory of liability for employee vested rights is still in its infancy. The leading case on this issue is *Re: Dayco (Canada) Ltd. v. CAW Canada* (1993), 102 D.L.R. (4th) 609. In this case, the Supreme Court of Canada held that retirement benefits offered under a collective agreement vested in the employee at the time of retirement such that an employer could not cancel these benefits at a subsequent time. The Supreme Court of Canada held that this was the case even though there was no longer a collective agreement in effect which provided for these rights. Hence, even though current employees may not have any rights to certain pension or benefits upon retirement, an

employer may still find itself liable to retired employees if that obligation existed at the time of retirement.

(e) **Fiduciary Obligations**

Employers have been found to have fiduciary obligations to their employees. Cases involving this area of liability usually involve benefit or pension plans. The duty usually extends to requiring employers to provide accurate and timely advice about their pension and benefit entitlements and assisting them in obtaining those benefits. For example, an employer was held liable after dismissing an employee who suffered from a mental illness. The court found the employer had grounds to terminate the employee who was incapable of performing his job. However, the court found that the employer had a duty to the employee to assist him in completing forms for LTD benefits. As a result, both the employer and the LTD insurance carrier were held liable for the disability benefits the employee would have received but for the breach of duty.

3. **Tort**

A tort is simply a breach of duty or negligence. Employers have been found liable to employees for a number of different torts. The following is a brief summary of the most common areas of liability:

(a) **Misrepresentation**

Most cases of misrepresentation involve situations where an employer has incorrectly described the terms of employment or benefit coverage. In the case of benefit coverage, employer liability can occur both in situations where the benefit summary

booklet inaccurately describes the terms of the benefit policies from the insurance company, and where an employer misrepresents the nature of benefits in an offer of employment or a contract of employment.

An employee has a claim for the benefit coverage stated in the contract regardless of the terms of the actual policy. If the terms of the policy are not the same as those represented by the employer, the employer may face liability for the coverage described in the contract of employment

(b) Assault/Battery

Employers can be liable for threatening or assaulting their employees. In a recent case, an employer was found liable for damages in excess of \$500,000.00 for assault, battery and infliction of emotional distress after a manager assaulted an employee and then placed her on a performance improvement plan in an effort to deflect his own bad behaviour.

(c) Intentional Infliction of Emotional Suffering

Employers may be liable for damages for emotional suffering. Cases usually involve allegations of harassment or conduct so extreme and insensitive that it constituted a reckless and wanton disregard for the health of the employee. The most common cases are claims against supervisors for harassment, threatening or insulting behaviour.

(d) **Intimidation**

Intimidation occurs when an employer coerces or threatens an employee into doing or refraining from doing something he would otherwise have every right to do.

(e) **Conspiracy**

Conspiracies occur when two or more people set about to injure an employee by coercing a third party through illegal means.

(f) **Defamation**

Defamation involves making untrue statements about an employee which would damage the employee's reputation. For example, making a false reference, giving a negative description of the employee could constitute defamation.

(g) **Inducing Breach of Contract**

Inducing breach of contract occurs when somebody persuades or interferes with the performance of another's contract. For example, refusing to do business with a company who hires a company's former employee may constitute inducing breach of contract.

4. **Breach of Confidentiality**

Employees are required not to disclose confidential information belonging to their employer. Similarly, employers may possess confidential information belonging to an employee, disclosure of which could lead to a claim for damages.

5. **Harassment**

Employers have a duty to ensure that their supervisors do not subject their subordinates to harassment. Most cases of sexual harassment are dealt with under human rights legislation. However, civil actions against employers for other forms of harassment are on the rise.

6. **Additional Damages**

(a) Aggravated Damages

Aggravated damages usually fall under the category of damages for mental distress. The Supreme Court of Canada in the case of *Vorvis v. Insurance Corp of British Columbia*, [1989] 1 S.C.R.1085 held that aggravated damages will be awarded to compensate for intangible injuries only where there is an independent “actionable wrong”. Aggravated damages was not awarded in a general wrongful dismissal action (which is simply an action for breach of contract). Rather, there must be some independent tort such as the ones described above which would give rise to aggravated damages.

(b) Punitive Damages

Punitive damages are designed to punish the wrongdoer in situations where the wrongdoer’s conduct is extreme. The Supreme Court of Canada has held that punitive damages are reserved for cases involving wrongful acts that are so “malicious and outrageous” that they are deserving of punishment on their own.

7. Vicarious Liability

An employer is liable for the negligence and/or wrongful acts of its employees if, the acts are committed in the course of employment. It is a doctrine of strict liability for which there is no defence. An employer has a right of indemnification against an employee, but only if the act is not committed in the course of employment.