In the know

WILLIAMS HR LAW
LEGAL EXPERTISE AT WORK

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Introducing Our New Monthly Newsletter

IN THE KNOW. The focus of this publication is to keep you up-to-date on what's new in HR law. IN THE KNOW will provide you with practical information on common issues that employers experience when managing workplace issues.

The informal tone of the newsletter is intentional. In our experience (and we've been guilty ourselves) lawyers tend to write in a way that makes our newsletters good bedtime reading. Our goal with this publication is to provide readable and relatable insights that you can apply to minimize risks and make your workplace more productive.

On Page 4 you'll find part 1 of our 5-part series on Effective Attendance Management Strategies. Each article in this series will review the law and provide best practices on different topics related to managing employee absences and return to work issues.

Page 5 sets out how Williams HR Law will keep you informed about labour and employment law updates and effective workplace strategies. We welcome your feedback. We don't want IN THE KNOW to be just another thing to read; we really want it to be of value to you. Enjoy!

In this issue

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Independent Contractors Can Trigger JHSC Requirement

Subsection 9(2)(a) of the Occupational Health and Safety Act ("OHSA") requires a joint health and safety committee ("JHSC") at a workplace in which 20 or more workers are regularly employed. In a recent decision issued on January 18, 2011, the Ontario Court of Appeal considered, for the first time, whether independent contractors should be counted when determining whether a JHSC must be established and maintained.

United Independent Operators Ltd. ("UIOL"), a load broker, contracts with its customers to transport construction aggregate (sand, gravel and crushed stone). UIOL subcontracts with truck drivers to pick up and deliver the loads. At the time of the incident giving rise to this case, UIOL employed eleven individuals at its sole location in Woodbridge, Ontario. The number of truck drivers working for UIOL ranged anywhere from 30 to 140 depending on the time of the year. These drivers were not in an employment relationship with UIOL and had been found to be independent contractors by the WSIB, Revenue Canada and the Ministry of Labour, Employment Standards Branch.

While investigating an accident that led to the injury of a driver in July of 2004, the Ministry of Labour was of the view that UIOL had contravened the OHSA by failing to establish and maintain a JHSC pursuant to s.9(2)(a). The Ministry laid charges against UIOL but was unsuccessful at both the trial level and on appeal before Ontario Court of Justice before finally having the decision overturned by the Ontario Court of Appeal where a stay of proceedings was ordered.

The Ontario Court of Appeal found, among other things, that in excluding the truck drivers because they were technically independent contractors, the words "regularly employed" had been interpreted too narrowly given the legislative purpose of the OHSA. The Court held that because the OHSA is a remedial public welfare statute that is intended to guarantee a minimum level of protection for the health and safety of workers, it should be interpreted generously.

The Court emphasized the importance of JHSCs and their central role in achieving the objective of safe and healthy workplaces in Ontario. With this in mind, in considering whether s.9(2)(a) intended to capture only those workers employed in a traditional employment relationship, the court held that such an interpretation would "seriously curtail" the scope of s.9(2)(a) and run contrary to the legislative purpose of the OHSA.

In conclusion, the Court held that the truck drivers, despite being independent contractors, are to be counted when determining the threshold requirement for JHSCs set out in s.9(2)(a).

This decision has significant implications for those employers who utilize the services of independent contractors. In addition to triggering s.9(2)(a) for those employers such as UIOL who are pushed over the 20 worker threshold, the section has implications for just how large a JHSC needs to be. For example, the OHSA requires a workplace with fewer than 50 workers to have a minimum of 2 members on the JHSC, whereas a workplace with more than 50 workers must have a minimum of 4 members.

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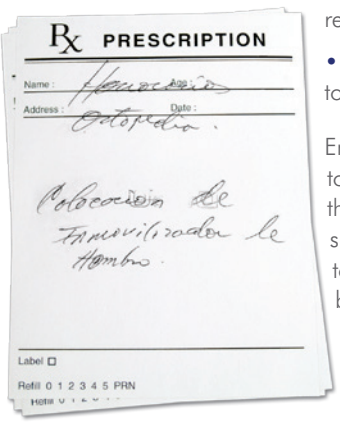
5 Effective Attendance Management Strategies

Part 1 Avoiding Meaningless Medical Notes

An employee provides you with a doctor's note which advises that he will be away from work for six weeks. It's that one-liner doctor's prescription pad note that reads "Jim will be absent from work for six weeks due to illness ", or so you believe it reads because you can barely make out the illegible handwriting. In the past, Jim has taken numerous leaves that he has excused using similar notes but you are concerned about this absence given its intended length.

The one-liner doctor's prescription pad note is a common frustration for employers. These situations get particularly challenging when employers receive serial unhelpful notes from the employee's physician, which appear to extend the absence on an indefinite basis. Because the notes come from a physician, many employers believe there is not much that they can do except wait out the period of absence and hope that the employee returns to work…someday. However, employers should be aware that you have obligations under legislation that entitle you to request that the employee provide more detailed medical information. This means not only medical opinion that excuses the absence, but which also provides prognosis information indicating when the employer can expect a return to work on a full or modified basis, if possible.



This right to request more detailed prognosis information arises largely from the employer's obligation to accommodate as required by the Human Rights Code. A one-liner medical note, particularly when attempting to justify a long-term absence, does not provide enough information for an employer to assess whether it can accommodate an employee's return to work. To fulfill its accommodation obligation, an employer needs, and is entitled to, medical opinion from the employee's treating physician that adequately sets out prognosis information including:

- the limitations that the employee is experiencing (e.g. lifting, walking, sitting restrictions);
- how long the employee is expected to experience any identified limitations;
- an assessment of what duties he or she is capable of performing;
- whether the employee is receiving treatment for his or her medical condition;
- if the employee is capable of returning to work on a modified basis to perform duties within his or her restrictions; and
- when the employee can be expected to return to work to perform his or her full duties.

Employers should note that they are not entitled to information about the employee's diagnosis; the focus is on prognosis information and, specifically, when the employee can be expected to make a return to work on a full or modified basis.

Insisting on sufficient medical information is a key first step to effectively managing attendance in the workplace. Ensuring that you have adequate medical information from the outset is the best way to set employee and doctor expectations that unhelpful prescription pad notes will not be acceptable. Employers should include in their company policies the specific scope of medical information that will be required to justify an absence and to determine accommodation possibilities. Clearly establishing this expectation from the outset of the employment relationship is an effective strategy to ensure compliance.

Stay tuned for Part 2 of the Effective Attendance Management Series: The Importance of Workplace Investigations.

New ESA Amendments Should Prove Favourable For Employers

The Open for Business Act, 2010 amendments should result in a more efficient complaints process that will ultimately save both time and money for employers when defending ESA claims filed by employees. Employers will receive direct notification about the complaint from the employee before the complaint is filed allowing for the possibility of an early settlement, and additional time for the employer to conduct a internal investigation and thorough response. With additional powers granted to Officers, there is also an opportunity to have an Officer-assisted settlement and to avoid any further costs associated with the complaint process.

On January 19, 2011, Bill 68 the Open for Business Act, 2010 came into force. Schedule 9 of this Act amends certain sections of the Employment Standards Act, 2000 to grant additional powers to the Director of Employment Standards ("Director") and Employment Standards Officers ("Officers") to facilitate timely resolution of complaints both before and after they are assigned to an Officer for investigation. According to the Ontario government, the purpose of the amendments is to improve efficiency of the employment standards complaints process, and to help reduce the significant backlog of complaints currently on file with the Ministry of Labour (estimated at over 14,000).

The three key amendments are as follows:

Specific steps must be satisfied before a complaint will be assigned to an Officer

Prior to the amendments, complaints were immediately assigned to an Officer for investigation and, ultimately, for determination of whether the employer violated the terms of the ESA. Now, before a complaint will be assigned to an Employment Standards Officer, the following steps must be satisfied:

- The employee must inform the employer of why they believe their rights under the ESA have been violated. Employees who file claims for unpaid wages must specify the amount they believe is owed to them;
- The employee must inform the Director of what information was provided to the employer, how it was provided and what, if any, response was received from the employer; and
- The employee must provide to the Director any evidence or other information that the Director deems necessary.

The employee is required to take these steps within six months of filing the complaint and, if the steps are not taken, the Officer is deemed to have refused to issue an order. However, the Director does have the discretion to assign a complaint to an Officer for investigation even where the employee has not fulfilled these obligations.

Officers may attempt to settle complaints

Under the amendments, the Officer may now assist the parties in attempting to reach a settlement. If a settlement is reached and the parties fulfill their respective obligations then the complaint is deemed to have been withdrawn. Once a complaint is withdrawn, the Officers investigation is terminated as well as any other proceeding respecting the complaint other than a prosecution.

Officers may decide a claim where a party fails to attend a decision-making meeting or fails to provide records or other documents as required

Under the new amendments, an Officer may now require the parties to provide evidence or submissions within a specified timeline set out in the notice. If a party fails to attend the meetings or fails to provide the specified documents within the required timeline, the Officer may rule on the complaint in the absence of the party and/or the submissions or evidence requested.

It is always the best course to avoid unnecessary ESA complaints whenever possible. Taking the time to prepare contracts and policies that are in compliance with the ESA and consistently applied within the workplace can reduce an employer's exposure to successful complaints. Also, employers should investigate and carefully respond, in writing, when employees raise concerns that could give rise to an ESA complaint. This written response could be favourable for the employer if it is included in the information reviewed by the Director prior to assigning a complaint to an Officer.

Williams HR Law Brings A New Approach To Human Resources Law.

We are focused on practical, customized legal solutions that are sustainable and in touch with your business realities.

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.

With Williams HR Law, You're In The Know:

Knowledge is power. As a Williams HR Law client you can expect to be kept up to date on all the recent developments in labour relations and employment law.

Through Williams HR Law You Will Receive:

- monthly newsletters
- video podcast series on topical HR law issues
- bulletins on latest developments
- live seminars and interactive workshops, including sessions held at your worksite

You can rest assured that with us you will have your finger on the pulse of HR law so that you can make important decisions with confidence.

We Listen Before We Speak:

No two clients are the same. Effective legal service means addressing the uniqueness of your business. We will always take the time to listen to what your needs and priorities are. In this way, we can provide you with a tailored solution that hits the mark every time.

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:

Passion breeds success. We practice HR law because it's what we want to do. We enjoy servicing our clients and delivering the results they rely on to successfully meet business objectives.

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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