mathews dinsdale

EMPLOYERS' ADVISOR

A Newsletter from Mathews Dinsdale & Clark LLP September 2013

"Canadian" Experience

On July 29, 2013, the Ontario Human Rights Commission (OHRC) unveiled its new policy against employers requiring that job applicants have "Canadian experience." The OHRC's new policy acknowledges Canada's multicultural society which is home to immigrants from all over the world, and our society reflects the fact that as our population ages and the birth rate decreases, Canada is increasingly reliant on the contributions of immigrants for its economic sustainability.

Further, the OHRC designed the policy to address the fact that many newcomers to Canada are forced to turn to volunteer work, internships, or jobs that require low skill levels in order to gain the Canadian experience required by some employers for more desirable positions. In particular, the OHRC notes that many recent immigrants to Canada are either unemployed or underemployed. As such, this policy aims to address some of the key obstacles that immigrants face in securing employment, such as employers not recognizing foreign credentials and experience and other more arbitrary and discriminatory barriers that employers implement in their hiring processes.

Specifically, the new policy states that it is the OHRC's position that a strict requirement for Canadian experience in the hiring process is, on its face, discriminatory, and this requirement can only be used in very limited circumstances. Employers who use the "Canadian experience" requirement in their hiring practices will bear the burden of proving that prior work experience in Canada is a bona fide occupational requirement.

To determine whether your company's job postings satisfy the OHRC's new policy requirements and for assistance in developing best practices in hiring, please contact a Mathews Dinsdale lawyer.

INSIDE:

Changes Coming To Minimum Wage?

Minimum wage has been a hot topic of late, particularly with unions and labour groups arguing that minimum wage does not provide a living wage for workers. For the past three years, minimum wage in Ontario has been set at $10.25 per hour. The government of Ontario has responded to the debate with the creation of a minimum wage advisory panel. The panel has been tasked with determining how minimum wage rates should be determined in the province's future.

The panel comprises of six people from a varied group of individuals: those from business and organized labour, those from academia, as well as a university student. The chair of the panel is Anil Verma, a professor of human resource management at the University of Toronto's Rotman School of Management. The panel will make a recommendation on how minimum wage should be set in the future. The panel will look to needs in all areas of the province, and conduct many forms of research, including public consultations and using social media to canvass the thoughts of Ontarians. The panel will also examine methods used by other provinces and territories in determining minimum wage rates, such as a yearly hike.

Inflation, economic growth, and job productivity are all factors that may be examined by the panel. The panel's decisions will clearly be crucial to employers, and will affect the bottom line of every business. The panel will attempt to balance the needs of both businesses and low-income earners, ensuring that the outcome is fair to all competing interests.

The panel is expected to provide its recommendations to the government this upcoming winter.

Court Rules that General Motors is Not Permitted to Reduce Retirees' Benefits

In January 2009, in an effort to avoid insolvency and to lower its operating costs during the recent financial crisis, General Motors Canada ("GM" or "the Company") reduced the retirement benefits (such as extended health care and life insurance) that it provided to its current and former non-union salaried and executive employees.

The Company's actions gave rise to a class action lawsuit brought on behalf of more than 3,000 retirees, who asserted that GM was not entitled to reduce their retirement benefits after they had retired.

The lawsuit was largely successful. In a recent decision, the Ontario Superior Court of Justice ruled that GM violated its contractual obligations when it reduced the retirement benefits package that it had provided to retired salaried employees (who comprised approximately 98 percent of the class action lawsuit participants).

GM argued that it was entitled to reduce salaried retirees' benefits because of a "reservation of rights" clause contained in some of the benefit documents, which stated that GM had the right "to amend, modify, suspend or terminate any of its programs (including benefits)" at any time.

The court rejected the Company's position, finding that GM repeatedly promised in its benefit documents that its employees could rely on the level of retirement benefits set out in those documents. The court stated that "based on the numerous and repeated reassurances" provided by GM, the "salaried employees could reasonably expect that they could plan for and rely on a core of health care and life insurance benefits that would be provided to them in their retirement."

The court ruled that for the Company to reserve the right to cut benefits post-retirement, it would have to communicate this to its employees in clear and unambiguous language before the employees retired. The court stated that the contractual language relied upon by GM was not sufficiently clear and unambiguous to give it the right to reduce retirement benefits after an employee had retired.

In reaching this conclusion, the court confirmed that any such "reservation of rights" clause must be interpreted restrictively against the employer and, in the context of retirement benefits, must be explicit about how it will affect the benefits of retired employees. The court also stated that all clauses in employment-related contacts must be interpreted as protecting the interest of employees, unless there is clear language to the contrary.

In contrast to the court's conclusion regarding salaried employees, the court found that GM's contractual language relating to executive employees was sufficiently clear in stating that their retirement benefits were not guaranteed and could be reduced or eliminated even after retirement. As such, the court upheld the Company's decision to cut the retirement benefits provided to executive retirees (this was only a small victory for GM, because executive employees comprised merely about 2 percent of the class action lawsuit participants).

Finally, the court confirmed that GM was entitled to reduce the retirement benefits package that would be provided to employees who were still actively working (including employees who were eligible to retire but still working when the benefit reductions were announced).

The court's decision illustrates that in order to have the right to reduce retirement benefits after an employee has retired, there must be clear and unambiguous contractual language that allows the employer to do so.

For example, any such "reservation of rights" clause should be drafted with the following in mind:

- The clause should explicitly convey that the employer has the right to reduce benefits after an employee's retirement;
- The clause should specifically refer to the possibility of reduction of benefits after an employee's retirement;
- The clause should include wording that makes explicit reference to "retirees," not just "employees"; and
- The clause should expressly confirm that post-retirement benefits are "not guaranteed."

Other important considerations are:

- An employee should be required to sign a document confirming that they have read and understand the clauses contained in the benefits documents, including any "reservation of rights" clauses; and
- If the retirement benefits package is set out in multiple documents, the various documents should be consistent and should all contain or make reference to a "reservation of rights" clause.

The issue of management's right to make unilateral changes that affect retirees has also arisen in the unionized context. In particular, in the 2010 decision of *St. Marys Cement*, Mathews Dinsdale's Stephen Bernardo successfully argued that the employer had the right to unilaterally change its pension plan from a "defined benefit" plan to a "defined contribution" plan due to a provision in the pension plan document, which formed a part of the collective agreement. The provision stated that the Company "reserves the right to amend the Plan or discontinue the Plan either in whole or in part at any time."

Employers who are considering making changes to their employees' and/or retirees' benefits packages, or who wish to reserve their right to make such changes in the future, are encouraged to seek legal advice to ensure that their benefits documents, employment contracts, and/or collective agreements contain language that is sufficiently clear to permit such changes to be implemented.

MATHEWS DINSDALE & CLARK LLP
BARRISTERS AND SOLICITORS

mathewsdinsdale.com
1.800.411.2900

TORONTO
T. 416.862.8280
F. 416.862.8247

VANCOUVER
T. 604.638.2050
F. 604.638.2049

SARNIA
T. 519.336.5447
F. 519.336.9181

SAULT STE. MARIE
T. 705.253.3711
F. 705.253.1102

Drug and Alcohol Testing: An Update

On June 19, 2013, Mathews Dinsdale published an In A Flash article on the Supreme Court of Canada's recent ruling with respect to random alcohol testing. The article can be found in the News & Events tab on our website. We highly recommend that you review and update your drug and alcohol testing policies in light of this recent decision.

Seminars and Presentations

June

June 16, 2013: **Laura Russell** spoke to the Hospitality Human Resource Professionals Association on *What Employers Need to Know About the WSIB.*

June 18, 2013: **Debbie Martin** facilitated a WSIB Work Reintegration and Claims Cost Management Webinar.

August

August 14, 2013: **Stephen Bernardo** conducted a seminar for construction contractors on behalf of the Merit Open-Shop Contractors Association of Ontario on the topic of *The law of union certification in the construction industry in Ontario and current union organizing tactics.*

October

October 3 to 5, 2013: **Paul McLean** will be speaking at the Canadian Association of Counsel to Employers 10th Anniversary Conference in Banff, Alberta.

October 23, 2013: **Joe Liberman** will join a panel of presenters at the Construction Industry Labour Law Conference 2013 on *New Trends in Decision-Making Procedures: A critical look at changes affecting certification, arbitration, and jurisdictional disputes.*

November

November 20, 2013: **Ryan Anderson** will join a panel of presenters at the Labour Arbitration Conference in Vancouver, and will speak on *Expert Medical Evidence at Arbitration: Hired Guns or Impartial Guides?*

November 22, 2013: **Mark Contini** will be presenting at the Centre for Law in the Contemporary Workplace, Faculty of Law, Queen's University on *Privacy, Law, and the Contemporary Workplace: New Challenges and Directions.*

November 27, 2013: **Keith Murray, Ryan Anderson** and **Grady Tyler** will present a *Labour Relations 101* seminar to members of the B.C. Human Resources Management Association in Vancouver.