

LABOUR AND EMPLOYMENT NEWSLETTER



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LEGISLATIVE UPDATES

DISABLED EMPLOYEES IN ONTARIO ENTITLED TO STATUTORY NOTICE OF TERMINATION AND SEVERANCE PAY

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It is official. An employee in Ontario whose employment contract is frustrated because of injury or illness is now entitled to statutory notice of termination and severance pay under the *Employment Standards Act, 2000* ("ESA, 2000").

Regulation 288/01 sets out those circumstances in which an employee is not entitled to statutory notice of termination or severance pay. Until recently, there were provisions in the Regulation that denied these entitlements to employees whose contract had been frustrated due to illness or injury, subject to any obligations of an employer under the *Human Rights Code*. However, the Government of Ontario recently amended the Regulation by eliminating those provisions that disentitled a disabled employee from statutory notice of termination and severance pay. (See Ontario Regulation 549/05.)

The changes codify the decision of the Ontario Court of Appeal in the *Mt. Sinai* decision (summarized in the Labour & Employment Communiqué dated March 31, 2004). The Court held that the former provision in the old *ESA* that denied severance pay to someone whose contract was frustrated due to disability was unconstitutional. However, the decision did not address the new language in the *ESA, 2000* that had come in to force after the *Mt. Sinai* case had commenced. Thus, it was open to interpretation whether the *Mt. Sinai* decision applied to the language in Regulation 288/01 of the *ESA, 2000* that disentitled disabled employees to statutory severance pay.

That debate is now over with the recent amendments to Regulation 288/01. Now, even though the contract of an employee has become frustrated due to illness or injury, the employee is entitled to statutory notice of termination and severance pay under the *ESA, 2000* if the employer chooses to terminate the employment relationship.

MANDATORY RETIREMENT: UPDATE

EMPLOYERS NOT REQUIRED TO EXTEND BENEFIT PLANS TO EMPLOYEES 65 AND OLDER

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Legislation which will abolish mandatory retirement in Ontario will explicitly provide that employers will not be required to extend benefit plans to employees 65 years of age and older.

Bill 211, *An Act to amend the Human Rights Code and certain other Acts to end mandatory retirement*, received second reading on November 17, 2005. Amendments were made to the Bill in order to explicitly provide that benefit, pension, superannuation or group insurance plans or funds which make distinctions on the basis of age and made pursuant to the *Employment Standards Act, 2000*, will remain permissible. This will apply, according to Bill 211, whether or not a plan or fund is the subject of a contract of insurance between an insurer and an employer.

The change will codify the law as it existed prior to Bill 211. Essentially, the provision of benefits to employees 65 years of age and older will continue to be in the employer's discretion.

The Bill also provides that distinctions based on age pursuant to the *Workplace Safety and Insurance Act, 1997* will continue to apply.

Miller Thomson will continue to monitor and notify you of any developments regarding this issue. For a history of the mandatory retirement legislation, please refer to our May 6 and June 3, 2003 and our June 8, 2005 Labour & Employment Communiqués.

WAGES AND VACATION PAY TO BE GIVEN GREATER PRIORITY IN THE EVENT OF BANKRUPTCY: BILL C-55 BECOMES LAW

Changes to Canada's *Bankruptcy and Insolvency Act* will ensure that in the event of an employer's bankruptcy, unpaid employee wages and vacation pay up to a maximum of \$2,000 owing in the six months prior to the bankruptcy, will rank in priority to the claims of all creditors. These claims, however, will be subject to the rights of unpaid suppliers and statutorily deemed trusts which do not expire in bankruptcy. Severance and termination pay will not be protected by these changes.

Unpaid wages and vacation pay claims will attach to all of the bankrupt employer's "current assets", which means that realizing on the employee remuneration charge will be subject to the ability of the trustee or receiver to realize on these "current assets". Where the remuneration is repayable, the trustee or receiver becomes personally liable to all employees with claims.

Corresponding changes to the *Companies Creditors' Arrangements Act* will provide that all plans made pursuant to that Act provide that all employee claims which would arise on bankruptcy for remuneration be paid in full immediately.

Bill C-55 received Royal Assent on November 25, 2005. However, given the extraordinary circumstances that existed with the dissolution of Parliament, the Standing Senate Committee on Banking, Trade and Commerce requested and received the Government's assurance that Bill C-55 would not be proclaimed in force prior to June 30, 2006, at the earliest.

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Our Labour and Employment Practice Group is dedicated to providing comprehensive and integrated legal services, and advises management in all aspects of labour relations and employment law. For more information about our Group, visit our website at www.millerthomson.com or contact:

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