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A more active enforcement of employment standards is underway

By Andrew B. Lister

Until recently, the worst consequence most employers could expect for breaching employment standards laws was the inconvenience of an investigation. Traditionally, employment standards offence and prosecution provisions have seldom been used and regulators have relied on complaint-driven systems to enforce the rules. Accordingly, there was little disincentive for employers who breached employment standards laws when the only penalty normally imposed would be an order to pay what the employer was obligated to pay the employee in the first place plus minor administrative fees.

A comparison of approaches in Nova Scotia, Ontario, Alberta and British Columbia shows that a shift is underway toward more active enforcement and a more concerted use of penalties for breaches of employment standards laws. British Columbia and Ontario both recently made significant amendments to penalty and enforcement provisions, adopting different solutions to deal with employers who do not fear consequences of breaching employment standards laws.

In British Columbia, mandatory escalating monetary penalties prevent the need to prosecute employers through the civil courts. Conversely, Ontario now prosecutes offences through the civil courts in order to achieve serious monetary penalties. Alberta is in the process of reviewing its Employment Standards Code and will likely propose modifications to its enforcement provisions and associated sanctions. Nova Scotia remains an example of the traditional reactive approach to enforcement.

When Ontario dramatically overhauled its employment standards laws in 2000, maximum penalties for contraventions of the Employment Standards Act, 2000 by corporate employers were increased from \$50,000 to \$100,000 for first offences, \$250,000 for second offences and up to \$500,000 for third and subsequent offences. The new Act also doubled the maximum prison term for individuals from six months to twelve. This muscle-flexing was without effect, however, as Ontario only prosecuted six employment standards offences in the two years following the amendments, as opposed to twelve prosecutions initiated in the two years prior to the amendments.

In 2004, the Ontario government signaled its intention to utilize the Act's enforcement sections which it called "very powerful tools." Then Minister of Labour, Chris Bentley stated, "we have remedies that simply have not been used. We're changing that ... enforcement is back in style." In 2004, Ontario initiated 256 prosecutions under the Act and in 2005, Ontario has initiated another 125 prosecutions to date.

Ontario's Act also authorizes employment standards officers to issue Notices of Contravention to employers with prescribed penalties, including automatically escalating fines from \$250 for first offences to \$1,000 for third and subsequent offences. The prescribed fines are multiplied for contraventions involving multiple employees. A key change in Ontario's enforcement scheme includes issuing tickets for employment standards violations under the Provincial Offences Act. Each ticket comes with a fine of \$295.00 per offence and is entered in the provincial court. The Act also authorizes publication of the names and offences of employers convicted under the Act.

Since November 2002 amendments to the British Columbia Employment Standards Act, in addition to orders to compensate employees, employers who contravene the Act are automatically subject to set monetary penalties. The fines range from \$500 for first time offenders to \$10,000 for employers who contravene the same provision more than twice in the same three-year period.

Employment standards officers have no discretion regarding the penalties that must be levied against employers. Employers may also be required to pay administrative expenses incurred in investigating a complaint. Like Ontario, the Director is authorized to publish information identifying employers found guilty of contravening the Act.

Since late 2002, only a handful of employers in British Columbia have had to pay the \$5,000 and \$10,000 monetary penalties for repeated violations of the Act. British Columbia rarely takes the added step of prosecuting employers in court for breaches of the Act.

In Alberta, employers found guilty of offences under the Employment Standards Code may be subject to penalties including fines of up to \$50,000 for individuals and \$100,000 for corporations. Since 1998, Alberta has been successful in ten of only eleven prosecutions against employers. The maximum combined fines in one of those cases totalled \$39,000.00. Alberta is in the process of a holistic review of its Employment Standards Code and is likely to increase the monetary penalty for offences for which the Director initiates prosecutions.

Nova Scotia's Labour Standards Code also provides penalties for employers who contravene the Act. However, the Ministry of Labour has not sought to prosecute any employers for many years. Maximum fines for individual employers of \$5,000 and for corporate employers of \$25,000 as well as the possibility of imprisonment remain unutilized deterrents.

There is a current trend towards strengthening enforcement provisions by increasing the penalties associated with breaches of employment standards laws. While it is too early to tell what effect these amendments will have on compliance with employment standards laws, it is clear that employers who disregard employment standards laws risk negative publicity and more severe monetary and imprisonment penalties than ever before.

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