DSF NEWS

DEVRY SMITH FRANK *LLP* NEWSLETTER **FALL 2013 ISSUE**

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Devry Smith Frank *LLP*
95 Barber Greene Road,
Toronto, Ontario
M3C 3E9

416-449-1400
www.devrylaw.ca

THE BLURRED LINES OF ACCOMMODATION: INSURANCE MEETS EMPLOYMENT LAW

BY MARTY RABINOVITCH, B.A.H., LL.B. | *OCTOBER 30, 2013*

For insurance carriers and employers, managing disability claims during and after an employee's employment presents many challenges. Issues may arise about the collection of medical information, accommodation of the disabled employee, coverage, set-offs for other disability benefits, and related claims.

One of the most problematic issues is who is responsible for determining when a disabled employee should be accommodated. Is an accommodation triggered when insurance benefits are denied? Is the employer off the hook for accommodating a disabled employee if the insurance carrier determines the employee is totally disabled?

More often than not, an employer contracts out all or part of its disability claims management to a third party. The disability insurance carrier determines if the employee is entitled to benefits under the employer's benefit plan and sometimes weighs in on whether the employee can return to work. The insurance carrier may deny benefits, but the employer is still required to accommodate employees if they are disabled. On the other hand, the insurance provider may find employees to be totally disabled from their own occupation (or current job) and the employer may still be required to accommodate them up to the point of undue hardship.

The line between the entitlement of benefits and the requirement to accommodate is often blurred. But what is clear from the case law is that an employer's obligation to accommodate an employee is triggered the moment the employer is aware of the employee's disability. Employers can be required to develop policies and procedures on accommodating disability in the workplace with their disability insurance carrier (See Puleio v. Moneris Solutions, 2011 HRTO 659).

Denying benefits or failing to accommodate could result in legal action by the employee against both the employer and the insurance carrier. At DSF, we have lawyers who are uniquely cross-trained in employment law and insurance defence to assist insurance carriers and employers with the challenges of managing disabled employees. For more information, contact Marty Rabinovitch at 416.446.5826.

Marty Rabinovitch
marty.rabinovitch@devrylaw.ca
(416) 446-5826

LOCUM TENENS AGREEMENTS: AN OUNCE OF PREVENTION IS WORTH A POUND OF CURE

BY ALLEEN SAKARIAN, B.A.(HONS.), LL.B. | *AUGUST 13, 2013*

Building a successful dental practice takes a lot of time and money. The slightest disruption can cause significant damage to a practice. Planning for the unexpected is the best way to minimize possible disruptions and to protect a practice that may have taken several years to build. Locum tenens agreements are perhaps the most useful tool when planning for unexpected events, such as injury, illness or death.

Consider what would happen to your practice if you were unexpectedly absent for a few weeks: patients might be frustrated by cancelled appointments and may look for another dentist; staff might feel insecure and possibly seek new job opportunities; the good reputation of your practice could suffer. What if life events necessitated your absence from the practice for a longer period, perhaps months or years?

In such cases, you would be best advised to find someone to "fill in" for you in order to preserve the goodwill of your patients and your staff. The locum tenens agreement is a planning tool to achieve just that. The benefit of planning for locum dentists is that, in the event of your extended absence, your practice suffers the minimum amount of disruption.

Agreements with locum dentists are also a useful estate planning tool. The locum dentist can help preserve the value of the practice during the administration of your estate. Active patient files are among the most valuable assets in a dental practice. Keeping those files active over the course of a year or more while the estate is being administered is crucial. A pre-planned locum agreement is invaluable in preserving a major asset for your beneficiaries.

Much like any other agreement, a locum tenens agreement is fully customizable and can be drafted to reflect the specifics to which the owner dentist and the locum dentist agree. The agreement will address several issues, including involvement in practice-building activities, remuneration, supervision, termination and non-competition, and non-solicitation provisions

Alleen Sakarian
alleen.sakarian@devrylaw.ca
(416) 446-3307

HUMAN RESOURCES INTERVIEW ON FAMILY STATUS

AN INTERVIEW WITH FLORA POON, B. COM., J.D., LL.B. | *SEPTEMBER 19, 2013*

Flora Poon, a fifth year commercial litigation lawyer with DSF who also practises employment law, took part in the Devry Smith Frank Exclusive Human Resources Seminar Series this fall to speak on accommodation of family status in the workplace. Afterwards, she took the time to answer questions about about how to effectively handle employment law cases in particular family status claims

WHAT IS YOUR PRIMARY FOCUS AS A COMMERCIAL LITIGATION LAWYER IN YOUR EMPLOYMENT LAW CASES?
My primary focus is to ascertain what the client needs. Clients come to me with specific questions about how to get from point A to point B, and I try to assess their individual needs and determine how to get them there in the most cost-effective manner.

HOW WOULD YOU DESCRIBE YOUR STRATEGIC THINKING WHEN IT COMES TO EMPLOYMENT LAW ?
The employment relationship is an important one. Most of our lives revolve around our family, friends and our jobs. We spend half of our time in our working environments. Commercial litigation is a very personal area of law because, whether we are

acting for the employer or an employee, from their perspective, it is not just a job but is part of their lives. My strategy is to try and understand where each party is coming from, where they are trying to go, and how I can best facilitate that as counsel.

WHAT IS THE BIGGEST FACTOR IN UNDERSTANDING YOUR CLIENTS' EMPLOYMENT LAW NEEDS?
The mainf thing is to listen. Whether I act for an employer or an employee, I am dealing with individuals on all fronts. Employer representatives make decisions to allow/refuse accommodation and/or terminate an employment relationship. Employees push to alter their terms of employment to best accommodate their needs in other parts of their lives.

WHAT WERE THE MOST COMMON QUESTIONS THAT YOU WERE ASKED ABOUT FAMILY STATUS AT TODAY'S SEMINAR?
The most common questions concerned the extent to which an employer needs to accommodate, and whether accommodation must be given beyond what would be deemed reasonable. In my presentation, I focused on communicating to employers that the duty to accommodate with respect to family status exists. The trends as set out in the courts are leaning towards greater accommodation. This is increasingly important as caregiving continues to expand beyond normal childcare duties to include eldercare. Employers need to address issues when they are raised and preferably have a procedural mechanism in place. If they ignore an employee's request, they expose themselves to a claim for discrimination and/or constructive dismissal. That being said, there is no case law out there that requires an employer to pay employees if they don't provide services. Both sides need to understand that the goal is to have open communication and to work together to establish a mutually beneficial employment relationship.

Flora Poon
flora.poon@devrylaw.ca
(416) 446-5081

HELPING FAMILIES IN NEED ACT (BILL C-44)

BY MARC G. SPIVAK, B.COM., B.C.L., LL.B | *OCTOBER 10, 2013*

If you are a parent of a critically ill or injured child, you may be eligible for new benefits under the recently enacted federal *Helping Families in Need Act* (Bill C-44).

This legislation has expanded the availability of EI benefits to allow eligible parents to take an unpaid leave of absence to care for a child for up to 35 weeks in a 52-week period. The Canada Labour Code was amended to provide unpaid leave to eligible employees. The Ontario government also introduced the *Employment Standards Amendment Act* (Leaves to Help Families) in 2013, which would provide similar job-protected leave; however, legislation has not yet been made law. Parents who are self-employed are also eligible for EI benefits.

To qualify, a parent must have had six consecutive months of employment, and a medical specialist has to issue a certificate confirming the child is critically ill and needs one or both parents to care for them. The child must be under 18 at the time the care is provided.

For parents of children injured in motor vehicle accidents, this Act may provide some financial relief, as parents who must take time off work to care for their injured children may be eligible to receive benefits.

For parents of children who have died or who are missing as a result of a crime, this Act provides further relief in the form of up to 104 weeks of unpaid leave, and up to $350 per week for 35 weeks. If a child has died as a result of a motor vehicle accident where the at-fault driver has been criminally charged, the parent of the deceased child may be eligible for these benefits.

Dealing with the injuries—or worse, the death—of a child is something that in an ideal world no parent would have to endure. The personal injury lawyers at Devry Smith Frank *LLP* can help you cope with such a situation by assisting you in accessing these and other benefits.

Marc G. Spivak
marc.spivak@devrylaw.ca
(416) 446-5855

CUSTODY, ACCESS, PARENTING AND SEPARATION

BY RACHEL HEALEY, B.A., J.D. LL.B | OCTOBER 10, 2013

Family lawyers are often asked, "If my Ex has sole custody of our children, does that mean that I am not allowed to see them?"

The answer is no. While the term "custody" is used colloquially to refer to the living arrangements for a child with their parents, that is not the legal definition. Generally speaking, the custody arrangement for a child should not affect the "access," or parenting, schedule. Understanding this important distinction can greatly diminish conflict between parents in the early days of separation.

The term "custody," in a family law context, refers to the right to make important decisions about a child's lIife—specifically with respect to what are termed the "incidents" of custody: medical care, education and religious upbringing. As a parent, you should be aware that when two parents separate, and the child is living with the other parent with your consent or acquiescence, then the right to exercise your rights to custody are suspended. The parent with whom the child lives is deemed to have what is known as *de facto* custody. However, despite this, a court can also make an order for "joint custody" in which the parents continue to make decisions about their children together. There is also a spectrum of orders that can be made between the two extremes.

As custody relates only to decision making, it should be clear that not having custody of your child does not mean that you do not have the right to see, know, and be involved in your child's life. In family law disputes, it would extremely rare that a parent would have no access at all to their child. Your right to access cannot be suspended by the other parent, although they can make co-parenting more difficult. Only a court, or temporarily the Children's Aid Society, can suspend or terminate a parent's right to access.

"Access" refers to a parenting schedule that is either ordered by the court or to which the parents agree. It is time that each parent is allowed to see and spend with their children. Both parents should encourage their children to see and have a good relationship with the other parent. A right to access also includes the right to be kept informed of what is happening in the child's life, and includes the right to receive report cards, information about medical and dental appointments, and important milestones in the child's life, even if the access parent is not necessarily making the decisions.

The most important thing to remember when dealing with custody and access is what is in each child's best interest (the test for which is set out in case law and section 24 of the *Children's Law Reform Act*). If both parents remain reasonable and respectful of each other, then it is very possible to see and parent children equally.

Rachel Healey
rachel.healey@devrylaw.ca
(416) 446-5866

UPCOMING DSF SEMINAR!

Join us for an exclusive

Human Resources/Employment Law Seminar*

coming up on January 30, 2014, at the Toronto Don Valley Hotel & Suites.

Topics will include

- Employment Standards Update 2014
- Sex, Drugs & Employment Law
- Restrictive Covenants
- Top 10 Pitfalls of HR Investigations
- Looking Forward to HR in 2014
- Ask the Lawyers: Handling For-Cause Terminations

Breakfast/ Registration: 7:30 a.m. Speaker presentations: 8:00 - 10:00 a.m.

*Please visit our registration page at **www.devrylaw.ca/HR-Employment-Seminar** for more information.*

**Accreditation pending*

CAN A COMPANY BUY AND SELL EMPLOYEES IN A SALE?

BY MEGHAN FERGUSON, B.A., LL.B. | OCTOBER 22, 2013

Often in a sale of a business, questions arise about whether the purchaser is obligated to employ the sellers' employees and whether an employee must accept employment with the purchaser.

The simple (but not so simple) answer is that it depends on how the transaction is structured. How the sale is structured can sometimes create complex and costly employment issues, which I discuss below.

Is the purchaser required to offer employment to the sellers' employees?

The purchaser is not obligated to employ the sellers' employees. In a non-unionized workplace, a purchaser can choose to purchase parts of a business or assets like property, leases, or equipment, but the purchaser does not have to take on the sellers' employees. The purchaser may want to select its own employees or only hire key employees to transition the business. If the purchaser does not want to employ the sellers' employees, then the purchase and sale agreement should address who will be responsible for terminating employees and who will be responsible for severance.

If the sale of a business is an asset only (i.e., property, equipment) purchase, then the seller will be directly liable to its employees for termination, severance, or other pay. If the sale of a business is a share purchase and the legal entity that employs the sellers' employees does not change, then the purchaser would be liable for any termination on the date purchaser takes ownership.

Does an employee have to continue employment with the purchaser?

In an asset purchase or when the legal entity changes, a purchaser or new entity can offer the sellers' employees a job, but the employee does not have to accept the offer of employment.

The doctrine of privity of contract applies in the employment law context with some exceptions (see *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299). As an established principle of contract law, the common law doctrine of privity of contract stands for the proposition that "no one but the parties to a contract can be bound by it or entitled under it": *Brown v. Belleville (City)*, 2013 ONCA 148.

Therefore, an employee would not be obligated to accept employment with a purchaser and a new entity. Absent an agreement with the employee to assign or transfer their employment contract, an employee is not bound to accept employment with a new entity. Employees, however, should be cautious in turning down a reasonable offer of employment, as it may limit any notice or pay-in-lieu of notice from the seller.

For a share purchase, employees would continue on with the new owners because usually the legal entity (employer) under their employment contract has not changed. Employees who do not want to want to work for new management should consider a change of control clause in their employment contract.

Does a purchaser have to recognize a union?

The purchaser can choose to recognize the union. If the purchaser does not want to voluntarily recognize the union, then the union can bring an application to the provincial labour relations board.

In Ontario and most provinces, the union can apply to the labour board to have the purchaser declared a "successor employer." What that means is if a business or part of a business continues on with the purchaser and the sellers' workforce is unionized, the union that represents the affected employees can apply to the labour board for a declaration that the purchaser is the new employer. In determining whether there is a sale of all or part of a business, most labour boards consider whether there is a continuity of all or part of the business to a new entity.

In a recent case involving *Zellers and the United Food and Commercial Workers International Union, Local 1518, 2012 CanLII 68305*, the British Columbia Labour Relations Board found that a lease transfer and right to certain records and brands did not trigger a sale of business and the union's application to declare Target a successor employer was dismissed.

What are the practical considerations in a sale of business?

In any sale of a business, the parties should consider the structure, the business needs, and the employment issues.

Here are a few practical employment considerations:

- Will the structure of the transaction meet business, employment and labour relations needs?
- Consider non-competition and non-solicitation clauses for employees that could significantly affect the business and/or influence customers.
- Will key employees be retained for transition and how?
- Consider what poaching or soliciting the purchaser may engage in to hire the sellers' employees.
- Who will be responsible for notice and pay for severance if some or all employees are terminated?
- What, if any, representations will be made about unionization?

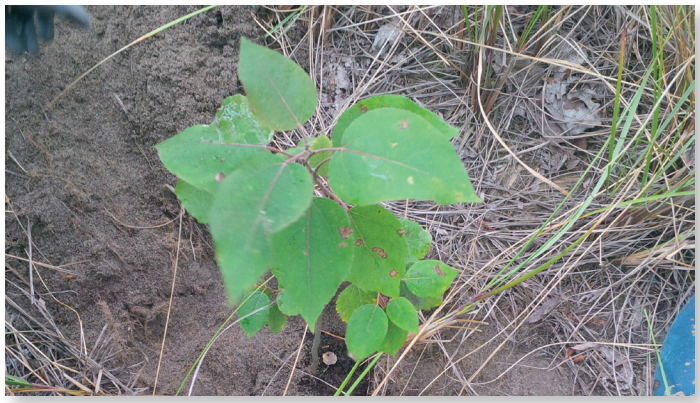
It is well worth getting a lawyer involved to discuss the employment and labour issues that arise in a sale of a business. Failing to properly consider the employment and labour issues could result in costly litigation and ultimately harm to the business.

Meghan Ferguson
meghan.ferguson@devrylaw.ca
(416) 446-3343

DSF IN THE COMMUNITY

TD TREE EVENT

Riva Minhas volunteered for the TD Tree Days event on Saturday, September 7, helping to plant over 500 trees in Confederation Park in Hamilton. This event was one of several TD Tree Day plantings being hosted across North America this September. So far, over 85,000 trees have been planted, and, this year, volunteers all across the nation will help to plant 45,000 more! DSF — Doing our part to help the environment.



CIBC — RUN FOR THE CURE

On October 6, Team DSF participated in the Run for the Cure! CIBC, a client of the firm, annually sponsors the race and this was an excellent opportunity to support a great cause. Together we raised over $1400 for this valuable cause and we are still receiving donations! Thank you to all who participated and donated. Together, with your support, we are one step closer in our fight against breast cancer!

DSF PRESENTS AT HEALTH AND WELLNESS FAIR

Robert Adourian participated in a Health and Wellness fair for seniors sponsored by Parkway Bible Church and the Maryvale Community Association. His presentation on Powers of Attorney was well attended, and was followed by a lively Q and A session.

DSF IN THE COMMUNITY

WILD BUCK STREET FESTIVAL

On Saturday, August 31, DSF co-sponsored the annual Wild Buck street festival in Vaughan to help raise funds for SOS Children's Villages. SOS is an international charity working to provide orphaned and abandoned children with a safe, loving home and to help strengthen vulnerable families.

AUDI'S BEST BUDDIES CHALLENGE

Meghan Ferguson raised $950 for the Audi Best Buddies Challenge in Washington, DC, on October 19, 2013. The Challenge is in support of Best Buddies International, a non-profit organization founded by Anthony K. Shriver, which is dedicated to enhancing the lives of people with intellectual and developmental disabilities. On hand for the event were members of the Shriver family and actor Kevin Spacey.

DSF RIDES FOR HEART & STROKE

On July 3, Devry Smith Frank participated in the Heart & Stroke Foundation's Big Bike Ride at the Shops at Don Mills. It was the 20th year of the ride, and the 4th time DSF has participated.

Twenty-nine staff members rode the Big Bike and the firm raised over $3,900, all proceeds of which go to the Heart & Stroke Foundation.

WELCOME TO DSF!

KELLI PRESTON
LL.B.

We are pleased to announce that **Kelli Preston** has joined our firm. Kelli's practice focuses on commercial litigation, collections & recovery, bankruptcy, fraud litigation, estates litigation, professional negligence claims, real estate and mortgage litigation, as well as securities litigation. Kelli has worked on cases in all levels of court in Canada and since her call to the bar in 2003.

MEGHAN FERGUSON
B.A., LL.B.

Devry Smith Fank is pleased to announce that **Meghan Ferguson** has joined our Employment and Labour Law group. Meghan practised at a leading employment law firm and in-house with one of Canada's oldest retailers. She has appeared before the courts, human rights tribunals, privacy commissions and provincial labour boards.

NIKKI ALTEEN
Law Clerk / Paralegal

Nikki Alteen joins our collections department. Nikki brings over fifteen years of experience in debt collections and unsecured debt recovery and three years of experience in commercial litigation and small claims court. We wish to extend our warmest welcome to Nikki!

SARAH FALZON
Articling Student

Sarah Falzon is a graduate of McMaster University (Hons. BSc in Mathematics & Statistics), and Osgoode Hall Law School (JD). She summered at DSF after her second year of law school, gaining a range of experience in real estate, insurance defence, personal injury, and corporate matters. Sarah is looking forward to continuing to develop her legal knowledge base during her articles.

JENNIFER ROSSER
Articling Student

Jennifer Rosser is a two-time graduate of Queen's University. She first earned her BAH majoring in History, followed by her Juris Doctor from Queen's Law. After completing her second year at Queen's Law, Jennifer worked as a summer student at DSF. She worked primarily in the commercial litigation group while also gaining experience in corporate law and insurance defence

LIANNE SHARVIT
Articling Student

Lianne Sharvit is a graduate of McMaster University (B.A. in Political Science) and received her Juris Doctor from Osgoode Hall Law School in 2013. Lianne joins us as a Student at Law after having summered at DSF following her second year of law school. Lianne's trial experience strongly piqued her interest in litigation, especially in the personal injury and commercial law practices.

CARMEN YUEN
Legal Assistant

Carmen Yuen joins DSF as a legal assistant in our commercial litigation group. Prior joining DSF, Carmen worked at a downtown boutique litigation law firm, where she gained experience in estate and commercial litigation. Welcome aboard Carmen!

NICOLE SGRO
Paralegal

Nicole Sgro joins DSF after spending several years representing major financial institutions working for a small GTA-based firm. She is licensed by the Law Society of Upper Canada and is certified in Alternate Dispute Resolution. Nicole exercises independent judgment and decision-making abilities at a high level of confidentiality.

DAN STONE
I.T. SUPPORT

Dan Stone joins DSF as our latest addition to the IT team. He brings five years of experience working in various roles in the computer industry. Welcome aboard Dan!

DSF
DEVRY SMITH FRANK *LLP*
95 Barber Greene Road, Suite 100
Toronto, Ontario M3C 3E9

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