DSF NEWS

DEVRY SMITH FRANK *LLP* NEWSLETTER **SPRING/SUMMER 2014 ISSUE**

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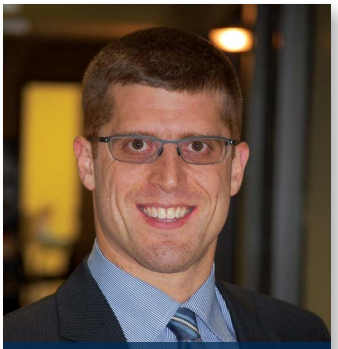
STAFF SICK ON STAT HOLIDAYS?

RULES FOR EMPLOYERS FIGHTING FAUX FATIGUE

PRESS RELEASE | *MAY 12, 2014*



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For Marty Rabinovitch, an employment lawyer with Devry Smith Frank *LLP*, the Victoria Day long weekend is the calm before the storm. Floods of calls come in on the first day back to business: employers calling to assess the legality of removing staff who suspiciously extend their long weekends, and employees calling, shocked they have been accused of feigning illness for an extra day off.

According to Rabinovitch, neither party has complete clarity on looming legal landmines.
"Employers can easily get frustrated with an employee they suspect of 'time theft' and ask questions that violate privacy rights," said Rabinovitch. "While employees feel pressured to answer personal questions, they may inadvertently give employers the grounds for a dismissal case. It's important that both parties know their rights and act to preserve them."

To keep things productive, Rabinovitch has compiled a quick reference for employers to keep their working relationships healthy:
Five Rules for Employers Fighting 'Faux Fatigue'

1) **Always call back.**
If an employee leaves a sick message or has someone else call in for them, always call back. This gives you an opportunity to ask key questions and document the conversation.

2) **Ask if you will be receiving a doctor's note.**
This is essential to know if there's a chance you may be getting duped. It's also important to ask if the employee has seen a doctor to gauge the potential severity of the illness.

3) **Be cautious with your questions.**
Employers have the right to ask questions when an employee calls in sick, but can't violate the employees' privacy. A quick rule is to ask questions that lead to 'a prognosis, not a diagnosis.' In other words, you have the right to know if the employee will be absent for several days but not to know if they have a serious illness like cancer or suffer from depression.

4) **Accommodate.**
Is there a way that the employee could come in for the day if you were able to offer them frequent breaks or an hour's sleep?

5) **Call their bluff.**
If an employee's excuse doesn't add up or is not sufficient to warrant a day off, call them in. "There's always the option of heading off lost productivity due to sick day sabotage before it starts," added Rabinovitch. "Employers can poll staff to see how many want the extra day off and set up a plan to work back the lost time. That way everyone can have a great Victoria Day weekend." Employers should also follow these rules when dealing with their employees who call in sick before or after other long weekends.

FATCA: A PRIMER

BY ELDAD GERB, B.B.A., J.D., AND IRA MARCOVITCH, SUMMER LAW STUDENT | *JULY 4, 2014*

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Close to one million American expatriates and dual citizens live in Canada, many of whom haven't worked, lived, or even stepped foot in the U.S. for years. Many of them don't report their income to the IRS, mistakenly believing that they don't have to because they don't owe the IRS any taxes. But as of July 1, 2014, the CRA will begin collecting and sharing with the IRS information on any "U.S. person" with accounts in a Canadian financial institution. While the responsibility for compliance falls mainly on financial institutions—with minimal requirements on individuals—it is nonetheless important that people who may be affected by FATCA know the terms of the law and what it means for them.

What exactly is FATCA?
In 2010, the U.S. Congress passed the Foreign Account Tax Compliance Act (FATCA) to ensure diligent reporting of overseas income by "U.S. persons." On February 5, 2014—and in response to growing concerns that allowing the IRS to directly collect personal information on persons in Canada would pose grave privacy and jurisdictional issues—the Canadian government entered into a bilateral agreement with the U.S. under the Canada-U.S. Tax Treaty to incorporate the provisions of FATCA into the Canadian Income Tax Act. Under FATCA, Canadian financial institutions will report relevant information on accounts of U.S. persons to the CRA, which will exchange the information with the IRS through the provisions of the Canada –U.S. Tax Treaty. Canadian authorities will in this way review and vet any information passed to the IRS to ensure that all Canadian privacy laws are respected.

How does FATCA work?
With the adoption of the terms of FATCA into the Income Tax Act, all Canadian financial institutions must review new or existing client and account information to determine if any of their clientele are U.S. persons and remit the necessary information to the CRA.

Even if you aren't a U.S. citizen or resident, you can be caught by the provisions of FATCA. Someone is considered a U.S person if they are:

- a U.S. citizen living in Canada or anywhere outside the United States;
- a lawful resident of the United States (e.g. Green Card Holder);
- a person residing in the United States; or
- a person holding certain U.S. investments.

However, someone may be considered a U.S. person if they spend a considerable time in the U.S. on a recurring yearly basis—regardless of whether they fit into one of the above categories.

How will FATCA impact individuals?
For those who are not U.S. persons, business will continue as usual. FATCA will also have little impact on those who are U.S. persons—provided they are already compliant with U.S. tax laws. The actual reporting requirements under FATCA and its Canadian counterpart fall on the financial institutions and should only be cause for concern if something is not already properly disclosed. Otherwise, a U.S. person need only alert their financial institution that they are such, if the institution does not already possess that information.

What financial accounts are subject to FATCA?
Under FATCA, Canadian financial institutions will have to report information relating to most types of financial accounts, such as bank, mutual fund, and brokerage accounts, and some insurance policies that have an investment or savings component. While certain registered plans—such as Tax Free Savings Accounts (TFSAs), Registered Retirement Savings Plans (RRSPs), and Registered Pension Plans (RPPs)—are exempt from the reporting requirements, U.S. persons must still report these accounts if they hold more than $50,000. U.S. persons must also still report any income earned from these instruments on their Canadian and American tax returns.

What information is actually being exchanged?
Under FATCA, financial institutions will have to report and CRA will submit the following information to the IRS:

- Identifying information of the account holder (name, address, birth date);
- Account number and balance as of the end of the year;

- Amounts paid or credited to the account.

Non-U.S. persons with U.S. spouses will also have to report any joint accounts. According to the CRA, if any account has been associated with a U.S. person, information regarding the account will be forwarded to the IRS. However, none of the personal information of the non-U.S. persons associated with the account will be released to the IRS.

Under the law as it stands, financial institutions are not obliged to alert customers when they share their information, although those identified as U.S. persons should assume that their information has been shared. However, financial institutions are legally obliged to allow account holders to access the personal information that has been exchanged with the IRS if they request it.

The final word

FATCA, although originally viewed as a gross intrusion into the information and finances of Americans living abroad, in fact has minimal implications for individuals. For most, it will be business as usual—they will simply have to alert their financial institution that they may qualify as a U.S. person. For more information about FATCA and its ramifications for those in Canada, please see the CRA's information guide at http://www.cra-arc.gc.ca/tx/nnrsdnts/nhncdrprtng/menu-eng.html

IMMIGRATION UPDATE - SUMMER 2014

BY ASHER I. FRANKEL, B.A., M.S., J.D. | *JULY 7, 2014*

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Citizenship and Immigration Canada (CIC) and Employment & Social Development Canada (ESDC) have been extremely active over the past year, and this summer will continue to see the implementation of new policies relating to the Temporary Foreign Worker Program (TFWP) and other programs. The following is a chronological summary of selected recent and forthcoming changes.

June 9 – Intracompany Transferees

Since changes to Canada's TFWP were announced last summer, employers must pay close attention to the categories of foreign workers who may be brought to Canada.

One example is the Intracompany Transferee category, which allows multinational companies to bring to Canada foreign employees from a related company abroad who are managers or executives, or who possess specialized knowledge.

On June 9, CIC released new rigorous guidelines, effective immediately, making it more difficult to demonstrate specialized knowledge. For example:

- Workers with specialized knowledge must now demonstrate a "high degree of both proprietary knowledge and advanced expertise";
- Proprietary knowledge means company-specific information that has not been divulged to the public;
- The skill or knowledge should be "highly unusual" in the industry and the company attempting to transfer the employee;
- The employee's work should be critical to the company;
- The employee should be considered "key personnel" and not just highly skilled;
- The employee should receive an above-average wage that is consistent with his or her level of expertise, compared to a comparable Canadian wage. This salary requirement does not apply where the transfer is pursuant to any current or future free trade agreement with Canada.

The updated specialized knowledge guidelines may present a challenge for companies seeking to transfer employees to Canada. Employers and foreign nationals must be prepared to provide evidence that they meet the new eligibility standards.

June 20 – Overhaul of the TFWP

On June 20, Employment Minister Jason Kenney and Immigration Minister Chris Alexander announced significant reforms to the TFWP. The reforms, which took effect immediately, are primarily focused on low-skilled, low-wage occupations, but they also increase the government's investigative and enforcement powers.

The current Foreign Worker Program is now reorganized and split into two groups: the new Temporary Foreign Worker Program (new TFWP), previously known as the Labor Market Opinion (LMO) process,

will be administered by ESDC, and the International Mobility Program will be administered by CIC.

The new TFWP will be subject to stringent requirements to ensure employers give Canadian workers preference, with foreign workers considered a last and limited resort to fill vacant positions. Wage levels are replacing the National Occupation Classification as the main criterion for administering the new TFWP by distinguishing between "high-" and "low-" wage workers.

The LMO is being replaced by a new Labor Market Impact Assessment (LMIA) as the screening mechanism for employers seeking to hire temporary foreign workers. The LMIA will require that employers provide information on the number of Canadians who applied for the position, the number of Canadians interviewed, and an explanation as to why each was not hired. The LMIA fee is C$1,000, a considerable increase from the LMO fee of C$275.

With limited exceptions, employers seeking to hire high-wage temporary foreign workers will now be required to submit transition plans to demonstrate how they will increase efforts to hire Canadians.

The International Mobility Program includes the Intra-company Transferee category, referred to above, and entry processes under free trade agreements, as well as others exempt from the LMIA requirement, based on the competitive advantages and reciprocal benefits that Canadians are afforded in other countries.

Under this program, employers must include job offers in their applications. The program will be subject to a new compliance monitoring program, which will be funded by the addition of a $230 work permit fee. "Open" work permits will be subject to an extra $100 in fees.

Both ESDC and CIC will be empowered to ensure employers comply with rules under both new temporary work programs. One out of four businesses will be inspected each year for immigration program compliance. The government will have expanded authority to blacklist employers who have been suspended and are under investigation. Monetary fines will be increased to up to C$100,000 or five years' imprisonment.

August 1 – Age of Dependency

Effective August 1, 2014, children aged 19 and over will no longer qualify for immigration benefits as dependents under any Canadian immigration program. Once the new rule is implemented, children aged 19 and older will be able to qualify for benefits as dependents only if they are financially dependent on their parents due to mental or physical disabilities. There will be no exceptions to the maximum age for full-time students.

Currently, Canadian citizens and permanent residents can sponsor a dependent child for permanent residence up to the age of 22 and temporary foreign workers may be accompanied or later joined by a child under the age of 22. CIC will continue to consider children aged 19 to 21 as dependents for applications submitted before August 1, 2014.

The new policy may complicate upcoming relocations to Canada for foreign workers who wish to travel with young adult children. After August 1, children over the age of 19 will be regarded as independent applicants and will have to qualify for status and apply separately to join their parents in Canada. For example, if such individuals intend to study in Canada, they must be able to evidence enrolment in an approved program and financial means to support their tuition. For permanent residence applications, children 19 years old and older will be excluded.

Long Range Planning

Commencing April 1, 2015, some foreign nationals working temporarily in Canada will be required to cease working and depart the country and may not be able to work in Canada again for up to four years. These limits on work duration apply to non-exempt foreign nationals who were approved for temporary work permits on or after April 1, 2011, and who have worked in Canada for a cumulative period of four years since the work permit was issued. Not included in the cumulative four-year limitation are any periods of more than one month spent overseas or on an authorized work break such as parental leave and extended unpaid leave.

The immigration law group at Devry Smith Frank *LLP* can assist employers now to develop strategies to meet future staffing needs in light of the current and upcoming changes. We can provide advice and support on compliance and record keeping obligations as well as preparation of applications which meet the new specialized knowledge guidelines and new LMIA requirements.

CANADA'S TRADE-MARKS ACT GOES INTERNATIONAL: CAUSES CONCERNS AT HOME

BY CORY SCHNEIDER, B.ENG., M.A. SC., P. ENG., LL.B. AND IVAN MERROW, SUMMER LAW STUDENT | *JULY 3, 2014*

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The federal government changed Canada's intellectual property landscape by giving royal assent to Bill C-31 this past June 19, 2014. The bill creates major changes to the Canadian Trade-marks Act, the least of which is likely the removal of the statute's hyphen to shorten its name to the Trademarks Act (the "Act").

The Act ratifies three international intellectual property treaties (the Madrid Protocol, the Singapore Treaty, and Nice Agreement) and dramatically changes the way trademarks are registered and protected in Canada. Most of the Act's provisions are expected to come into force in 2015, following the government's drafting of suitable regulations.

How has the Trademarks Act changed?

1. *Prior use of a trademark is no longer required for registration.* Perhaps the most significant of the changes, the Act will allow applicants to register trademarks without ever having used them. In addition, registered marks can apply to an entire list of goods and services without prior use. This may prove costly for new applicants, as business owners will have to incur greater expense investigating the marketplace for potential trademark use conflicts if prior use information is no longer part of the register.

2. *Expect a landslide of application approvals.* Transition provisions in the Act will also allow any applications that are granted pending a declaration of use (at the "allowed" stage) to be registered after a fee payment. Considering the tens of thousands of applications currently at this stage, this could create a flood of trademark registrations in late 2014 or early 2015 that could impact trademark owners and courts for years to come.

3. *Canada will adopt the Nice Classification system.* Trademark applicants will soon be required to identify their goods and services with a commercial class number listed in the Nice Classification system. Approximately 84 countries are signatories to the system. It is offered in multiple languages and may reduce the translation expense for applicants who wish to register in multiple countries. This requirement will apply to any application that has been filed (not registered) by the date the Act comes into force.

4. *The renewal period is being shortened from 15 years to 10 years.* Currently in Canada trademark registrations need to be renewed every 15 years, but this period will be shortened to 10. Business owners may want to contact trademark lawyers like those at Devry Smith Frank *LLP* to renew their trademarks to lengthen their renewal period.

The Act also has many technical provisions that relate to the application process. The proposed regulations and fees to implement the changes are undergoing public consultation, so the final product of the Act is yet to be seen.

HOW TO REGISTER YOUR LIEN

BY MARK R. MANCINI, B. COMM., MBA, LL.B. | *MAY 20, 2014*

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Leaning towards liening? Don't wait until the last minute to register your lien.

In my nine years of practicing law, I think I can count on one hand the number of times my clients have given me more than three days to register their liens. It seems that most clients hold out hope until the absolute last minute that they are going to get paid, and then scramble to protect their interests when it becomes clear that payment is not coming.

If you suspect you are not going to get paid anytime soon for the hard work and materials you supplied to a construction project, you should consult a lawyer at least seven business days before your 45-day period expires. Here's why.

Most of the properties in Ontario are now registered in the Land Titles system, which is an electronic registry system. There are still some properties registered in the Land Registry system, which remains paper-based. The following scenarios will help demonstrate why you should consult us earlier in the process:

Scenario #1 – The Cottage Property

You have built a beautiful deck on a cottage property somewhere in Muskoka. The owner keeps stringing you along, promising payment but never delivering. This particular property has not been converted to Land Titles. You need to register a lien. How do you do this in the old paper-based system? First of all, you need to find the property identification number and legal description. On the rare occasion we can find these using a web-based service called Teraview. However, Teraview is mostly devoted to Land Titles, and you can't register a registry lien using Teraview. In these cases, we need to hire a conveyancer to attend the registry office in Muskoka to manually search the paper records for the parcel register. This takes time, and you can't guarantee that the conveyancer can do the search on a rush basis. Once they have found the parcel register, we have to draft a claim for lien and a document general in paper form, have you review and sign it, and then courier the hard copy to the conveyancer to register in person. This process could take days and likely more than a week to complete. If you wait too long, you may not be able to register in time, resulting in a permanent loss of your lien rights.

Scenario #2 – Imperfect Conversion to Land Titles

You have installed flooring in an office building that was once an old warehouse in Toronto's Liberty Village. The general contractor has failed to pay you. You have only dealt with the general contractor and have no idea who the owner is. Your contract references the municipal address for the building. You need to register a lien. How do you do this in the Land Titles system? Again, step one is finding the parcel register for the property. As this property is in Toronto, it is in Land Titles and should be easily found using Teraview, right? Wrong! Your lawyer searched the municipal address in Teraview with no hits. You don't know who owns the building, so your lawyer can't search by owner in Teraview. What now? Enter the trusty conveyancer again. We would need to send a conveyancer to the Land Titles office to search the records manually. Once they provide us with the correct parcel register, we can meet with you to review and sign the claim for lien and electronically register it using Teraview. This process could take few days. Again, waiting to the last minute could be fatal to your lien.

If you are contemplating a lien, please contact the Construction Law Group at Devry Smith Frank *LLP* as early as possible in the process. A couple of hundred dollars spent early on for searches and conveyancer's fees could be the difference between getting paid and losing thousands of dollars or more.

COMMON-LAW BREAKUP: "DO I OWN HALF THE HOUSE IF I PAID HALF THE BILLS?"

BY JOHN P. SCHUMAN C.S., B.A. (HONS.), LL.B., LL.M. | *JUNE 18, 2014*

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Under Ontario law, only married couples have property division on separation. Common-law couples do not. So, if you split from your common-law partner, what happens if you paid half the bills but are not on title? Do you own half the house? As separating Ontario common-law couples do not have legal property division, usually you would not.

However, if you have contributed to the property more than you would have paid for rent to live there, it may be possible for you to make a claim that you own part of the property. A person who is not on title can get a court to say that he or she has partial ownership of a property if that person contributed something of value to that property (money or work) without being compensated in some way—either by way of pay, free rent, or similar arrangements.

This claim, based on a principal of "equity," is a complicated one to make, and you really need a lawyer to do it. It applies to any two people who have contributed to an asset, not just common-law couples. If you can't make that claim but have suffered a financial hardship as a result of the breakdown of the relationship, you may be able to make a claim for spousal support. But be aware that you may only have two years to make these claims, so don't wait to see a lawyer.

Explanations of these principles and the law that applies to common-law couples on the breakdown of their relationship, as well as of family court and the alternatives to court, can be found in DSF's publication on family law: *The Devry Smith Frank LLP Guide to the Basics of Ontario Family Law, 3rd Edition,* available through Amazon.com.

DSF IN THE COMMUNITY

RBC BREAKFAST

On March 27th DSF lawyers attended a breakfast featuring RBC's Chief Executive Officer, Gordon Nixon, at the Arcadian Court in Toronto. Gord shared his thoughts and perspective on the value of a diverse workforce and the important role immigration plays in developing an innovative Canadian economy.

DURHAM GALA

Hearts of Durham — Rock The Kasbha! The 9th Annual Hearts of Durham Gala was held at Deer Creek Golf and Banquet Facility on Saturday May 10th. Thanks to an outstanding $70,000 raised, many happy children and youth in Durham Region will be able to experience camp this summer.

GOLF FOR AUTISM

Some of our lawyer's took part in the 5th Annual Dogs FORE! Autism Charity Golf Tournament on May 31st at Oakridge Golf Club. Thank you to all who attended to support this great cause.

UPCOMING EVENTS

*THE ONTARIO DENTAL PROFESSIONALS ALLIANCE EVENT
AUGUST 26, 2014 – FABBRICA RESTAURANT

*MEDIATION OPEN HOUSE
SEPTEMBER 11, 2014 – BYMARK RESTAURANT

*FAMILY LAW SEMINAR
SEPTEMBER 15, 2014 – INTERCONTINENTAL TORONTO YORKVILLE

*HR/EMPLOYMENT SEMINAR
OCTOBER 10, 2014 – INTERCONTINENTAL TORONTO YORKVILLE

To register for these events and for more information, please contact Joanna Esposito at *416-446-5819* or *joanna.esposito@devrylaw.ca

MORE JOIN THE TEAM!

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MARIA MALAFEEVA
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Maria graduated from Ryerson University in 2013 with a Bachelor of Commerce in Business Management-Human Resources. Prior to joining DSF, Maria worked at a medium-sized non-profit healthcare organization (OACCAC), where she gained most of her HR skills.

JENNIFER OLIVEIRA
Law Clerk

Jennifer has over seven years of Personal Injury experience following her graduation from the Law Clerk Program at Centennial College, where she also received an office administration certificate. She brings excellent skills in a wide range of office administrative duties.