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# **Current Legal Issues for Owner-Managed Enterprise**

- Tim Kurbis  
Taylor McCaffrey LLP
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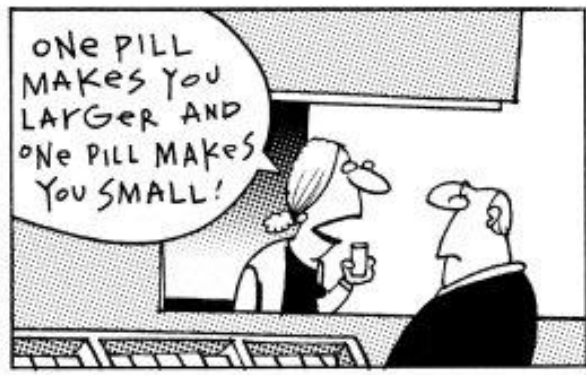
## OVERVIEW

- (I) Discrimination and the Employer's Duty to Accommodate – Recent Developments
- (II) Workplace Safety and Health – Is your business compliant?
- (III) Employee Monitoring and Surveillance – effective policies
- (IV) *The Personal Health Information Act* and Bill C-29 - *Safeguarding Canadians' Personal Information Act*
- (V) Q & A



## PHARMACIST'S DIARY

STAFF SHORTAGE AGAIN!  
MADE THE MISTAKE OF  
HIRING SOMEONE WHO DESCRIBES  
THEMSELVES AS 'AGING HIPPIE':



harrap

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## The Manitoba Human Rights Code (the "MHRC")

### REASONABLE ACCOMMODATION

- The obligation: Section 9(1)(d) – failure to make reasonable accommodation is discrimination.
- Reasonable accommodation – need to accommodate a person with respect to their human rights issue or protected characteristic
- Discrimination is actionable against employer by MHRC – employee does not have to incur cost to prosecute – you don't want to be in this regime!



## Protected Characteristics

- ancestry, including colour and perceived race;
- nationality or national origin;
- ethnic background or origin;
- religion;
- age;
- sex, including pregnancy, the possibility of pregnancy, or circumstances related to pregnancy;
- gender-determined characteristics



## Protected Characteristics (cont'd)

- sexual orientation;
- marital or family status - parental obligations;
- source of income;
- political belief, association or activity;
- physical or mental disability or related characteristics or circumstances, including reliance on a dog guide or other animal assistant, a wheelchair, or any other remedial appliance or device.



## What is reasonable accommodation?

- The amount of reasonable accommodation that an organization must make under the MHRC has consistently been interpreted by human rights commissions, tribunals and the courts to be “to the point of undue hardship”.
- What constitutes “undue hardship” will vary from case to case.



## Undue hardship – factors to consider

- financial costs to the business, impact of those costs
- effect accommodation has on employee morale, or other employees right to be free from effects of accommodation (interests of accommodatee may conflict with others in the workplace)
- business efficacy – e.g. you don't need to make two jobs out of one in order to accommodate
- safety – includes magnitude of risk and who bears risk
- THE LEGAL TEST – is a balancing of these factors with the employee's right to be free from discrimination.



## Other Key Points re Undue Hardship

- search for accommodation must be purposive, substantial, significant
  - ◆ meet with employee, undertake a full analysis of issue
  - ◆ gather info about restrictions – what can the employee do?
  - ◆ examine all aspects of workplace for accommodation options
- employer has to be aware of the need for accommodation
  - ◆ employer's knowledge is key to analysis of whether the duty has been met – that doesn't necessarily mean you have to be told, you may be deemed to know based on objective criteria
  - ◆ employer must have sufficient information to allow fulfillment of duty
  - ◆ absent appropriate info, there will be no duty to accommodate



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- employer must examine whether a “bundle” of duties will suffice to provide accommodation
  - ◆ bundling different tasks together to create a position out of things an employee can do may provide accommodation
  - ◆ this does not mean creating a redundant or useless position
  - ◆ it must contribute to productive operation of the business
- if there is no higher paying position available within the complainant’s abilities, it is appropriate to put complainant in lower paying position.
  - ◆ can lower wages of a disabled employee to correspond with value of work performed
  - ◆ cannot lower pay of a worker being accommodated due to pregnancy or because they are nursing.



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- employee must be reasonable and cooperative; must make efforts to facilitate the implementation
  - ◆ e.g. providing accurate medical info when requested, so the employer can understand and accommodate restrictions
  - ◆ employee cannot expect perfect accommodation, only what is reasonable
  - ◆ organization does not necessarily have to offer an employee the precise accommodation assignment he or she might demand
  - ◆ if the complainant hinders the employer in finding accommodation, or refuses an opportunity that would otherwise fulfill the duty to accommodate, a complaint may be dismissed



- sometimes the duty to accommodate might mean that you have to appear to condone inappropriate behaviour
  - ◆ e.g. alcoholism or drug addiction (a recognized “disability”)
  - ◆ excessive absenteeism may be a symptom of the disease
  - ◆ must try to accommodate to the point of undue hardship – what that means depends on the job and the circumstances
  - ◆ employer may be deemed to know of the need for accommodation – individuals suffering from addictions often do not want to admit that help is needed
  - ◆ The point – if you rush in and fire Jane because she’s late or smells like she’s been at a booze can all night, you could be at risk - Be aware and consider circumstances prior to undertaking termination or discipline



## Workplace Safety and Health





## Workplace Safety and Health - Overview

- Legislation
  - ◆ Manitoba - *Workplace Safety and Health Act* and Regulations
  - ◆ Criminal Code and Canada Labour Code
- Prosecutions
- Due Diligence
- Do you have a Workplace Safety and Health Policy?
- Personal Harassment – Your obligations as employer



## Workplace Safety and Health Act (MB)

- Sets out general duty of employer to ensure safety of workers at work
- Also duties on employee, supervisors, joint health and safety committees, powers and duties of safety and health inspectors
- Prohibits discriminatory action against employees who may raise safety issues
- Addresses right to refuse unsafe work



## Workplace Safety and Health Act (MB)

- Failure to comply = summary conviction offence
- First offence = max. \$250,000 fine
- Second offence + = max. \$500,000 fine
- Potential for up to 6 months imprisonment for individuals
- Supervisors could also be prohibited from acting in a supervisory capacity for 6 months
- Crown has 2 years to charge
- Defence is due diligence



## Criminal Code – “Bill C-45”

- Bill C-45 aka the “Westray Bill” came into force March 31, 2004
- Amended the Criminal Code to theoretically make it easier to impose criminal liability on corporations and organizations that fail to take reasonable measures to protect employees and public safety.
- Sentencing – max. on summary conviction = \$100,000 (prior to amendment, max. was \$25,000)
- Crown can also elect to pursue the offence as indictable



## Criminal Code

- Actual offence is set out in section 219(1)
  - ◆ Everyone is criminally negligent who
    - (a) in doing anything, or
    - (b) in omitting to do anything that is his duty to do, shows wanton and reckless disregard for the lives or safety of other persons.
- Duty applies to “representatives” & “senior officers”
  - ◆ “representatives” = a director, partner, employee, member, agent or contractor of the organization.
  - ◆ “senior officers” = a representative who plays an important role in the establishment of the organization’s activities and, in the case of a body corporate, includes a director, its chief executive officer and its chief financial officer.



## Prosecution and Defences

- WS&H offences are “Strict Liability”
  - i.e. different from normal criminal or regulatory prosecutions where some component of intention is required to be proved by prosecution
  - Crown’s job is to prove *actus reus*, beyond reasonable doubt
  - Once proved, onus shifts to the defence
  - Due diligence is the most common defence (and one of the few available)
  - Defence must prove due diligence on a balance of probabilities



## Due Diligence

- Defence of due diligence is set out and defined in the legislation
  - “everything reasonably practicable in the circumstances” to prevent the incident
  - What constitutes due diligence will depend on the nature of the offence and the circumstances of any given case
- Ask:
  - What was reasonably foreseeable?
  - What steps were taken to prevent what was reasonably foreseeable?
  - Was everything reasonably practicable done in the circumstances to prevent what was reasonably foreseeable?



## Workplace Safety and Health Policies

- Statutory requirement for written WS&H Policy if employee count is 20 or more
- Failure to create written policy will result in liability for fine, whether or not there is fault for an incident – “I didn’t know” won’t cut it
- Also, random audits are a mandate of the current government
- Even where head count is under 20, a written policy can be valuable – it’s evidence of employer due diligence
- The message – be aware of the risk!
- Ensure your workplace safety and health committee meets regularly to address safety concerns, and that the committee is effective in its role
- Policy should be audited regularly and reviewed with employees



## Written Harassment Policy Required

- The Manitoba Safety and Health Division has identified workplace harassment and violence as workplace “hazards”
- To avoid liability, every employer must:
  - a) develop & implement a written policy to prevent harassment in the workplace; and
  - b) ensure that workers comply with the harassment prevention policy
- Definition: *“Any objectionable conduct, comment or display, directed at a worker, made on the basis of race, creed, religion, colour, sex, sexual orientation, marital status, family status, disability, physical size or weight, age, nationality, ancestry or place or origin, and creates a risk to the health of the worker”*



- Policy must include the following statements:
  - ◆ Every worker is entitled to work free of harassment
  - ◆ The employer must ensure, so far as is reasonably practicable, that no worker is subjected to harassment in the workplace
  - ◆ The employer will take corrective action respecting any person under the employer's direction who subjects a worker to harassment
  - ◆ The employer will not disclose the name of a complainant or an alleged harasser or the circumstances related to the complaint to any person except where disclosure is
    - ☞ Necessary to investigate the complaint or take corrective action with respect to the complaint, or
    - ☞ Required by law
  - ◆ A worker has the right to file a complaint with the Manitoba Human Rights Commission
  - ◆ The employer's harassment policy is not intended to discourage or prevent the complainant from exercising any other legal rights pursuant to any other law



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## Employee Monitoring and Surveillance

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## Employee Monitoring and Surveillance

- Many employers faced with questions as to their right to monitor where doubts as to employee fidelity, workplace habits or malingering arise
- First question: do your employer policies (or collective bargaining agreement) outline and allow for surveillance?
- Second question: Have they been adequately communicated to employees (i.e. notice)?
- Even with policy/CBA right to surveillance communicated, employees still have a right to some privacy – key is “reasonableness”



## Reasonableness of Surveillance

- For an employer to establish that its interests outweighed an employee's right to privacy, it must demonstrate:
  - ◆ it was reasonable to resort to surveillance, and
  - ◆ the surveillance was conducted in a reasonable manner (*New Flyer*, 1999)



## Is Surveillance Reasonable to Undertake?

- Employer considerations include:
  - ◆ Understanding or review of applicable legislation (e.g. *PIPEDA, The Privacy Act*)
  - ◆ Were less drastic alternatives available (e.g. confronting employee, requesting medical info)?
    - ☞ if employer does not consider alternatives, evidence obtained from surveillance is unlikely to be admissible



## Is Surveillance Reasonable to Undertake (cont'd)?

- Whether employee has been involved in deceitful behaviour (and recently, not 20 years ago)
- Whether the circumstances surrounding the employee's absence are suspicious (e.g. leave request rejected for that day)
- The employee's disciplinary record



## Was Surveillance Performed in Reasonable Manner?

- Little jurisprudence on this topic
- Common sense – it will be more reasonable to perform surveillance in public than in a private place
  - ◆ *Milner*: insurer did not violate privacy rights when taping insured's son's soccer game as it was played in public—no expectation of privacy when playing in the street



## Was Surveillance Performed in Reasonable Manner?

- How active a role did the investigators take in obtaining the evidence?
- *Pacific Press* (1997, B.C.): grievor on workers' compensation for a shoulder and elbow injury; ran a hang gliding business out of his home; private investigators had "set up" the grievor by paying for a hang gliding lesson therefore inadmissible



## Was Surveillance Performed in Reasonable Manner?

- *Eastmond v. Canadian Pacific Railway* (2004, Federal Court): Employer installed six digital video surveillance cameras in its Toronto rail yard to reduce vandalism and minimize threats to employee safety
- Employees were informed of the system, its purpose and the camera locations
- Complaint filed with Federal Privacy Commissioner



## Was Surveillance Performed in Reasonable Manner?

- Commissioner considered several factors, including:
  - 1. Was the measure intruding on privacy demonstrably necessary to meet a specific need?
  - 2. Was it likely to be effective in meeting that need?
  - 3. Did a less intrusive method of achieving the same benefit exist?
- Determined that the cameras were reasonably justified, alternatives were not viable



## Potential Consequences of Offside Surveillance

- Unreasonable surveillance may lead to a constructive dismissal
- *Colwell v. Cornerstone Properties Inc.* (2008, Ontario): employee a trusted manager; employer had theft problem, set up camera in employee's office to catch theft even though no money in the office
- Employer said employee not a suspect, but did not tell employee about the camera, employer felt it had a right to install cameras wherever it wanted; employee claimed poisoned work environment and quit
- Court upheld constructive dismissal--camera not justified



## The Personal Health Information Act

- Pharmacists are “Trustees” of personal health information under The Personal Health Information Act (“PHIA”)
- Trustee obligations include:
  - collect limited amount of PHI - only that which is necessary for the purpose of providing health care (“health care” includes filling prescriptions)
  - collect directly from source individual, if possible (with exceptions)



## Trustee Obligations (continued)

- notify individual of the purpose for collecting the PHI
- take reasonable steps to ensure PHI is accurate, up to date, complete and not misleading
- establish and comply with written policy regarding retention and destruction of PHI
- protect PHI by adopting reasonable administrative, technical and physical safeguards to ensure the confidentiality, security, accuracy, integrity of the PHI



- additional safeguards required for protecting PHI in electronic form
- of course, there are also restrictions on the use and disclosure of the PHI, with consents required in certain instances.
- Key is putting written policies and procedures in place and sticking to them – goes a long way to showing due diligence in the event of, for example, a security breach



## Bill C-29 – Safeguarding Canadians' Personal Information Act

- proposed amendments to PIPEDA
- second reading was October 26, 2010
- includes “data breach notification” provisions
- if passed into law, Bill C-29 would apply, as PIPEDA by and large does, to every organization that collects, uses or discloses personal information in the course of commercial activities



- “personal information” means information about an identifiable individual
- would create reporting requirements when organizations that store personal information have a physical or electronic security breach
- any “material breach” would have to be reported to the Privacy Commissioner
- factors in determining whether a breach is “material” are:
  - ◆ sensitivity of the personal information;
  - ◆ number of individuals whose personal info was involved; and
  - ◆ organization assesses whether the cause or pattern of breach(es) indicates a systemic problem



## Reporting (continued)

- organizations would have to report breaches to the individuals whose personal information was involved if it is “reasonable in the circumstances to believe that the breach creates a real risk of significant harm to the individual”.
- if required to notify individuals, further requirement exists to report to other organizations, government institutions, etc. if the other organization may be able to reduce the risk of harm or mitigate the harm to the individual.
- “significant harm” is defined as including “bodily harm, humiliation, damage to reputation or relationships, loss of employment, business or professional opportunities, financial loss, identity theft, negative effects on the credit record and damage to or loss of property”.



- What constitutes “real risk”?
  - Bill C-29 also lists several factors relevant to determining if there is a real risk of significant harm:
    - ◆ sensitivity of personal information involved; and
    - ◆ the probability that the personal information has been, is being or will be misused.
  - Bill does not necessarily codify however - Courts will have to be involved to build framework



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- Bill C-29 is not yet law – but safe bet that some sort of legislation of similar effect is on its way.
  - As of November, 2010, 46 states in the U.S. have passed data breach legislation
  - Bill 201 – MB “Personal Information and Identity Theft Prevention Act” was reintroduced at the Legislature November 22
- Many businesses have already instituted sophisticated security systems and policies in relation to customer data in particular.
- As Trustees under PHIA, you will no doubt already have significant safeguards in place in order to meet your requirements under that Act
- Be aware of what’s coming down the pike - as technology evolves, systems and policies may need to be modified, upgraded, overhauled, etc. to remain compliant



## Practical Advice for Retailers from Public Safety Canada and the Office of the Privacy Commissioner

- store customer data in secure location
  - ◆ simple enough for physical data, but an ever-evolving challenge with respect to electronic data
  - ◆ If you carry a laptop, don't leave it in your car!
- shred, shred, shred...
- regular security audits to ensure there are no security "holes" that might allow improper access to customer (or other) data
- implement a fraud prevention and detection program in consultation with your financial institutions and payment-card associations



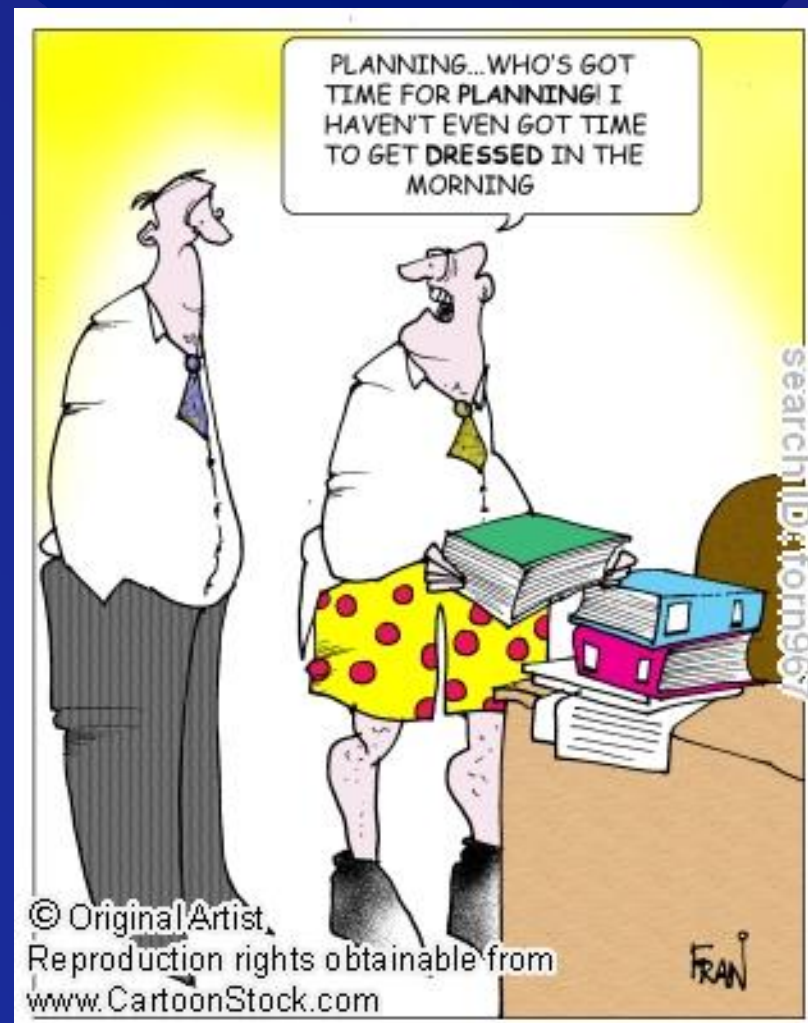
## Practical Advice for Retailers (cont'd)

- consider requiring further identification when accepting payment by cheque or visa in person
- if you encounter a fraudulent transaction and determine that a client's bank or financial account has been compromised, consider notifying the individual as well as the financial institution (and be aware of your legal responsibility to do so under legislation).



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Questions?



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Thank You!