Move comes after whistleblowing program launch

Public companies must update confidentiality clauses

BY MICHAEL MCKIERNAN
For Law Times

Employment lawyers say public companies in Ontario will need to update their confidentiality clauses after the Ontario Securities Commission launched its first ever whistleblowing program.

Under the program, which went live last summer after years in the works, whistleblowers can claim up to $5 million for tips that lead to successful enforcement proceedings against companies or individuals for securities law violations.

Amendments to the province's Securities Act made as part of the program's implementation also prohibit companies from retaliating against employees who come forward to the OSC with information or co-operate with the regulator's investigations and void agreements that would prevent employees from doing so.

Rebecca Wise, a Torys LLP civil litigator with an employment and securities law practice, says the amendments pose a problem for Canadian companies, since many employ blanket clauses in termination agreements, employment contracts and codes of conduct that prevent the disclosure of confidential information. Even a common exemption covering disclosures "required by law" would not be sufficient, says Wise, who is based at the firm's Toronto office.

"Participation in the whistleblowing program is not required by law," Wise says, noting that a simple change to account for disclosures "required or permitted by law" would bring confidentiality clauses more in line with the spirit of the law.

Discipline policies should also be reviewed to "make sure it's clear that employees won't be disciplined for exercising their rights at law," Wise adds.

The changes became even more urgent after a series of enforcement actions brought by the U.S. Securities and Exchange Commission against companies for their overly restrictive severance agreements.

In early August, Georgia-based building material distributor BlueLinx Holdings Inc. agreed to pay a $265,000 penalty for forcing outgoing employees to waive their rights to whistleblowing bounties under the SEC's own program, which came into effect in 2010 and was one of the inspirations for the Ontario version.

Days later, California health insurance provider Health Net Inc. agreed its own $340,000 penalty for similar violations. Both companies were required to amend their severance agreements to explicitly acknowledge whistleblower awards in order to receive their severance payments," she said.

Rebecca Wise says amendments to Ontario's Securities Act pose a problem for Canadian companies.

"We're continuing to stand up for whistleblowers and clear away impediments that may chill them from coming forward with information about potential securities law violations," added Stephanie Avakian, the commission's deputy director of enforcement.

If the OSC follows the SEC's lead by adopting an approach that punishes impediments to participation in the program, rather than simply nullifying provisions that fail to comply, employers may want to consider explicitly exempting the OSC whistleblowing program from their confidentiality clauses, according to Shana French, a lawyer with Toronto employment law boutique Sherrard Kuzz LLP.

"When the OSC launched its office, it was very much influenced by what's happening in the U.S., so I don't see why they wouldn't go in the same direction and sanction people impeding the scope of an inquiry," French says.

> You don't want to be perceived as hampering or interfering with the regulator's processes.
> Shana French

She says other than companies with U.S. affiliates, few Ontario businesses have experience dealing with anti-reprisal legislation for whistleblowers, and that the response to the OSC's new program has been slow.

"The SEC decisions were a real wake-up call. Prudent employers are looking at their policies and making sure that they are aligned with what the OSC requires," French says.

"You don't want to be perceived as hampering or interfering with the regulator's processes."

Jessica Bullock, a partner in the labour and employment law practice group at Davies Ward Phillips & Vineberg LLP in Toronto, says that while Ontario employers can look south of the border for lessons about complying with whistleblowing legislation, she is less convinced that the OSC will mirror the SEC's strict approach to enforcement.

"In Ontario, you couldn't have an action based on a confi-

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Consider steering clear of fixed-term contracts: lawyer

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forceable contractual provision stipulating a fixed term of notice, or any other provision to the contrary, a fixed term employment contract obligates an employer to pay an employee to the end of the term, and that obligation will not be subject to mitigation."

The appeal court decision means the employee will get around $200,000 to compensate for the unpaid salary and benefits from the remaining three years of his contract.

Fainzilberg relied on the *Howard* decision as counsel to the plaintiff in *Ballim*.

His client Samina Ballim took up a position in the sales department at a pharmaceutical company in November 2015, covering another employee's maternity leave.

Although the contract made no mention of an expiry date, an email to Ballim attaching the contract offer stated that "it is a one year contract."

Titus Totan says many employers don't realize the consequences of faulty or missing termination clauses until they end up in litigation.

Two months into the job, Ballim took an approved month-long unpaid leave of absence to visit South Africa for family reasons.

However, after she returned four days later than agreed, the company terminated her employment without cause in February 2016.

Ballim had a new job by May 2016, earning $72,000, or $14,000 per year more than her previous salary.

The employer argued in court that the agreement was for an indefinite term, and that Ballim should only be entitled to common law damages, which would be subject to the duty to mitigate.

However, in a decision granting summary judgment in favour of Ballim, Ontario Superior Court Justice Sidney Lederman ruled that the email sent to Ballim formed part of the terms of the contract.

Taken together with a stipulation in the attached agreement that Ballim would be paid in 26 bi-weekly installments, he found the contract had a fixed term.

"In this contract, there is a start date, November 18, 2015. The plaintiff is to be paid every two weeks in 26 installments consistent with the accompanying email that expressly provides for a one year duration," Miller wrote in his Oct. 13 judgment.

"Although no precise end date is specified, one can readily infer the exact end date as being one year from November 18, 2015."

"My client is obviously thrilled," says Fainzilberg.

Although no appeal was lodged, he says the parties are yet to agree on the issues of costs and the precise damages due to Ballim for the 38.5 weeks of pay and benefits she missed out on after her termination. LT

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dentiality clause alone, without some positive attempt to dissuade whistleblowers. You just wouldn't be able to rely on that part of an agreement," she says. "I think that's the more reasonable approach where there is truly no intent to circumvent any laws."

The OSC formally launched its whistleblower program in July 2016, but it had been fielding requests to formulate one for at least five years before that in the wake of the SEC's trailblazing scheme.

After several rounds of consultation, the final version of the OSC's program provides for a reward of between five and 15 per cent of monetary sanctions imposed on securities law violators worth more than $1 million, up to a maximum of $5 million. To qualify, whistleblowers must provide original information voluntarily to the commission. Complicity in violations is not a bar to the reward, although the OSC warns it may reduce the whistleblower's cut, and it will not immunize them from enforcement proceedings.

Although the commission encourages potential whistleblowers to take their concerns to the company's internal compliance mechanisms, the program does not require participants to do so.

However, Wise says employers would be well advised to set up their own whistleblowing procedures to maximize the chance that employees will come to them first.

"It allows the employer time to investigate and potentially remediate the issue before it goes to the OSC," she says.

If things have already gone too far to fix, Wise says companies may receive some credit for self-reporting once potential securities law violations have been identified in-house.

Wise says the anti-reprisal provisions in the Securities Act mean employers will have to tread particularly carefully where they have other reasons to discipline employees who end up covered by the whistleblower program.

"I've heard concerns from employers who fear that an employee on the verge of termination will use the program to effectively avoid termination," she says. LT