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THIS IS A SUMMARY OF EMPLOYMENT MATTERS OF INTEREST TO THE  
BUSINESS COMMUNITY, FROM A LITIGATOR'S POINT OF VIEW

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## **REPORT ON EMPLOYMENT RELEASES FROM HUMAN RIGHTS COMMISSION**

On May 30, 2006 the Ontario Human Rights Commission released a report entitled "Guide to Releases with Respect to Human Rights Complaints". It should be required reading for lawyers in practice in the area of employment law or related areas as well as employer and employees alike.

It is not uncommon for a human rights issue to be interwoven into another employment related issue such as the termination of an employee. The Commission reports that it deals with many cases in which employees file complaints after having already signed a release of their employer. The releases typically purport to amount to a waiver of all claims of the employee including those under the *Human Rights Code*. The Commission has now developed a guide to assist employers and employees in structuring termination agreements and releases which reflect appropriate human rights principles. Further, the report provides suggested wording for the standard release.

The Commission warns in its report that the signing of a release by an employee will not necessarily be enough to bar a future claim of the employee on the ground that it is being advanced in "bad faith". "To meet the test of bad faith, the Commission must find that the evidence reveals, not an honest or negligent mistake on the complainant's part, but an intention to mislead – the conscious doing of a wrong because of 'dishonest purpose' or 'ill will'."

In order to contractually agree not to file a human rights complaint, an enforceable contract must exist. This includes a requirement that there be a settlement of whatever the complaint may be which is enforceable, and will therefore require some consideration for that settlement in order to be enforceable. The report states: "If there was no knowledge at all of the presence of a human rights issue between the parties, it cannot be said that a human rights complaint was settled. One cannot settle an issue of which one is not even aware."

In order for an employer to rely upon a release as an estoppel to the claim, the employer must be able to illustrate that the release was not a contracting out of the *Human Rights Code* (which is not permitted) but is a settlement of the claim itself.

The recommended language of the release includes an acknowledgement that no human rights issue exists. The report indicates that in the face of such a representation to make a claim thereafter would be a deliberate act of dishonesty which ordinarily would constitute bad faith.

In order to ensure that an employee understands the release, the report recommends that, among other things, the employee always be given a reasonable time to instruct and retain counsel; reasonable requests for extensions of time should be granted; releases not be accepted on the same day as the termination. Employees should always seek independent legal advice and should canvass the full spectrum of remedies that may be available through discussions with counsel.

The commission further advises that it will not enforce releases where an employer requires a release be signed as a precondition to making payment to which the employee is already entitled either under the *Employment Standards Act* or existing contract. Such conduct constitutes economic duress.

The report, including the recommended release language and a comprehensive list of tips for parties to a release (both employers and employees) can be accessed on the Ontario Human Rights Commission website at: [www.ohrc.on.ca](http://www.ohrc.on.ca).

**SEXUAL RELATIONSHIP WITH SUBORDINATE CAUSE FOR DISMISSAL**

The B.C. Supreme Court in a decision released in early summer has held that an employer had cause to terminate the employment of a managerial employee who had concealed a sexual relationship with a subordinate who reported him.

The Court found that the employee had been in a conflict of interest position (i.e. recommendations of salary increases) such that the employer would have wanted to know about the relationship so it could take measures to avoid the conflict of interest. In fact, when the employer learned of the relationship, it offered a transfer to the employee which was refused.

The Court held that the deliberate and repeated deceit, including outright denial of the relationship was sufficiently egregious to violate or undermine obligations and faith inherent to the employment relationship such as to entitle the employer to treat that relationship as being at an end.

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