HANDLE WITH CARE

Volume 9, Issue 2 **Fall/Winter 2012**

A Risk Management Newsletter for the Health Care Protection Program's Members

In this Issue:

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Health Team Leader's Message

In this edition of Handle with Care we are featuring the expert advice of our guest contributor, Brad Buck from the BC Public Service Agency. ***WorkSafeBC Contractor Basics*** illustrates the risks to health care agencies when contractors are injured on the job, and the simple tools in place to transfer those risks back to the contractors.

Proceed with caution is the underlying message in our ***Hospital Corners*** article about the use of social media. Opportunities and risks need to be carefully considered, being always mindful there should be no expectation of privacy when making use of these technologies. Our ***Claims Abstract*** for this edition relates to an allegation of breach of human rights. An employer's duty to accommodate an employee with a disability is a high standard and there are some clear lessons to be learned from this case.

Risk Wise Answers contains some very practical advice about access and protection of personal information and records in the custody of contractors. These questions and answers demonstrate the HCAs obligations under the *Freedom of Information and Protection of Privacy Act*.

As always, we welcome any suggestions for future articles, risk tips you would like to share or initiatives you may like to showcase. Please do not hesitate to send your comments/suggestions to us at HCPP@gov.bc.ca.➤

Linda Irvine, Director—Client Services
Health Care Protection Program

WorksafeBC Contractor Basics

Employers will often use contractors to provide specialized services when they don't have the resources or expertise to do a job themselves. While the services may vary from small, short term IT tasks to larger projects such as ongoing field work or large construction projects, there are some key points that apply to all contracts from a WorkSafeBC standpoint. If contractors aren't properly managed, there can be an exposure for your organization.

WorkSafeBC Coverage

By law, all businesses in BC must register with WorkSafeBC (WSBC) if they hire full-time, part-time, casual or contract workers. The employer pays premiums to WSBC based on its risk level and number of workers, to insure its staff against injury on the job. The insurance is a no fault system that pays both wage loss for workers if they are injured and unable to attend work and any costs for medical treatment required. In the event that a worker is seriously injured and can't return to work, WSBC can provide long term medical care, and even retrain workers for a new career. By registering with WSBC an employer is protected against lawsuits from injured workers.

Self employed individuals/sole proprietors may also qualify for WSBC coverage through Personal Optional Protection (POP). In the same way larger companies insure their workers, POP also provides coverage for time loss and medical costs in the event of a workplace injury. As well, POP coverage removes the right of an injured worker to sue an employer.

Hiring a Contractor

When hiring a contractor it is imperative that the company or individual you hired has

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WorkSafeBC Contractor Basics *(continued from page 1)*

WSBC coverage, and continues to have coverage for the duration of the project. Check with your procurement department, in most cases contract templates for provision of services will have language compelling the contractor to have WSBC coverage, and language directing the contractor to comply with the *Workers Compensation Act* for safety standards. It is recommended that both issues are addressed: coverage and prevention with contract language similar to the following:

> *{Contractor name} agrees that it shall, at its own expense, procure and carry, or cause to be procured, carried and paid for, full Workers' Compensation Board of BC coverage for itself and all workers, employees, servants and others engaged in or upon any work or service which is the subject of this Agreement.*
>
> *The contractor shall observe and enforce all safety measures required by the Workers' Compensation act of British Columbia and attendant regulations, the safety requirements of the {Organization Name} (see attached or below) and all applicable statues. In the event of a discrepancy between such provisions the most stringent provision shall apply.*

Note: Further prevention language may be necessary for multiple employer worksites that will require a Prime Contractor.

If the contractor does not have WSBC coverage and the contractor sustains an injury, your organization may be responsible for the full cost of the accident (medical treatment, wages, etc.) and/or may be responsible for paying the premiums of the contractor for the duration of the project.

The best way to ensure a contractor has WSBC is by requesting an online clearance letter from WSBC before work begins. Clearance letters can be quickly and easily obtained by going to: http://www.worksafebc.com/insurance/managing_your_account/clearance_letters/default.asp . You can also subscribe to the service and it will alert you if the contractor allows their account to lapse.

While dealing with a contractor that employs workers is normally straight forward (they are usually already registered and may be routinely asked to provide WSBC proof of coverage), POP accounts can be tricky. Sometimes the sole proprietors don't even know that coverage exists or it may be the only hurdle to them getting a contract with you. If you have a contractor asking about obtaining POP coverage, they can be directed to the Employers Advisers Office: http://www.labour.gov.bc.ca/eao/contact/location.htm , a free service that will assist them with WSBC issues including registering for coverage.

In some cases it can be a challenge for a self employed or sole proprietor to obtain POP coverage. Technically POP coverage is usually only granted to a self employed individual/ sole proprietor with multiple contracts/revenue sources and the chance for profit or loss, not to someone with only one sole source contract who is not pursuing other work. WSBC does not always use the Canada Revenue Agency criteria for defining a contractor and they may find that a contractor is actually an employee of your organization for WSBC purposes, while CRA views them as a contractor.

What's the Danger?

As noted earlier, having a contractor with no WSBC Coverage can lead to:

- Paying a contractor's WSBC premiums
- Being held responsible for direct costs from a work related injury to a contractor or their employee(s)
- Being open to a lawsuit for a work related injury of a contractor or their employee(s).

While it may seem unlikely that a contractor would be injured because the risk of injury is low, all work related activities must be considered. In one recent case, a firm was held responsible for the medical payments, wage loss and permanent physical impairment of a contractor that may exceed $1 million dollars over the life of the claim.

In this case, normally the contractor was working on relatively low risk activities at various outdoor sites. The incident occurred when a contractor was involved in a motor vehicle accident driving from a training session to a work site. WSBC ruled

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WorkSafeBC Contractor Basics *(continued from page 2)*

that the travel between the sites was part of the job, and therefore the accident was an accepted claim. The firm did not ensure that the contractor had current POP coverage. The injured contractor was engaged seasonally and had carried POP coverage in the past but did not have coverage at the time of the accident, and WSBC assigned those claims costs to the firm that hired him.

Ensuring that a contractor has WSBC coverage is the first step in protecting your organization from unforeseen claims costs. Normally if a worker were injured, the claim will be assigned to the contractor's firm. If there is no coverage, WSBC must decide if the injured person was a contractor or a worker of the firm that engaged the contractor. WSBC can then either assign the claim to the firm that engaged the contractor, or force the firm to pay retroactive premiums of the contractor for the project. Ensuring WSBC coverage using clearance letters is vital!

One Last Duty

Under the *Workers' Compensation Act*, before work commences you must give your contractor(s) any known information that is necessary to identify and eliminate or control hazards at the workplace. This is interpreted as 'reasonably foreseeable hazards' that the contactor may face, not an exhaustive list of all possible hazards. You do not have to create the safety program for the contractor or supervise their work; that is up to the contractor. Your job is to give them the information so they can find ways to protect their workers. This may be very simple in low risk scenarios for jobs that are office based such as IT work. On larger projects with multiple contractors or higher risk tasks this process can be complicated, and we recommend consulting a Safety Advisor or someone with experience in this area prior to drafting language regarding hazards.➤

Brad Buck, CRSP
Manager, Safety Advisory Services
BC Public Service Agency

Claim Abstract—

Accommodating Clothing Styles in the Workplace

Background:

Mr. A was employed by a Health Authority as an engineer in a steam plant/boiler room. Prior to July, 2008, Mr. A wore short pants to work all year round. In July, 2008, Mr. A's supervisor issued a safety directive that all employees wear long pants. The safety directive was consistent with WorkSafeBC requirements.

Mr. A believed he should not be required to wear long pants because he has varicose veins and large calves and wearing long pants was uncomfortable because the pants would rub against his veins. Mr. A provided his supervisor with a physician's note explaining Mr. A's medical condition. On July 27, 2008, Mr. A's supervisor allowed Mr. A to continue to wear short pants. However, Mr. A and his supervisor again discussed appropriate work attire in early August and on August 21, 2008, Mr. A's supervisor advised him that the medical information submitted was insufficient and instructed Mr. A to wear long loose pants. Mr. A refused and was suspended from his regular duties, but continued to do office work.

On August 27, 2008, Mr. A was advised by a Heath Authority occupational health nurse that his wearing long pants was a non-negotiable WorkSafeBC requirement. In late September, it was decided between Mr. A and the employer to conduct a hazard assessment and Mr. A would see a medical specialist. In October, Mr. A attended a clinic where his medical concern was confirmed. Mr. A alleged his supervisor engaged in harassment and continued discrimination from November 2008 to August, 2009. The Health Authority provided Mr. A with loose long pants lined with silk. Mr. A's physician did not oppose this accommodation.

In February, 2009, Mr. A applied for a more senior position at a different facility. He had been acting in the senior position previously on a temporary basis. He alleged he was not considered for the position because of the issue of his wearing short pants was known through the industry and he was essentially 'blackballed'.

Mr. A says he was intimidated into complying

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Claims Abstract *(continued from page 3)*

with the policy against the wearing of short pants and having to wear long pants affected his gait and caused him hip pain. On August 19, 2009, Mr. A filed a complaint with the Human Rights Tribunal against, among others, the Health Authority and his supervisor, alleging discrimination in the area of employment based on physical disability, contrary to Section 13 of the BC Human Rights Code. Mr. A had also filed grievances through his union.

On October 4, 2009, Mr. A applied for a more senior position as assistant chief engineer in his home hospital. He was granted an interview, but at that interview was confronted by his supervisor about his human rights complaint to the Tribunal. The supervisor denied him the opportunity to interview for the position unless the human rights complaint was dropped. Mr. A took this as retaliation by his employer for filing a human rights claim and amended his complaint to allege retaliation pursuant to Section 43 of the BC Human Rights Code.

The Respondents filed an application to have Mr. A's complaint dismissed on the basis he filed his complaint outside the 6 month time limit. The Respondents conceded that Mr. A's allegation of retaliation was within the 6 months limit, but that the incident giving rise to his original complaint (not accommodating his physical disability by making him wear long pants), occurred in July, 2008, well beyond the 6 months limitation.

Law and Tribunal Decision:
In British Columbia, it is a breach of Section 13 of the *Human Rights Code* to discriminate against a person in employment on the basis of any of the following grounds: race, colour, ancestry, place of origin, political belief, marital status, family status, physical or mental disability, sex, sexual orientation or age of the person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to that person's employment. Section 43 of the Code in essence prohibits a person from retaliating against a person who files a complaint with the Human Rights Tribunal.

The Code also provides a time limit for filing a Complaint with the Human Rights Tribunal, which must be done within 6 months of the alleged breach of the Code (Section 22). It is possible that a contravention of the Code is considered a continuing breach, in which case the time limit for filing a complaint would start at the end of the alleged breach. If a complaint is filed outside the 6 months limitation date, the Tribunal can agree to hear the complaint if it is within the public interest to do so and no substantial prejudice will result to any person because of the delay.

The Tribunal determined that Mr. A's complaint coalesced on August 21, 2008, when he was suspended for wearing short pants, well outside the time limit. Mr. A argued that the discrimination was continuing and that he endured acts of discrimination related to his disability up until June, 2009, well within the 6 months time limit. The Tribunal reviewed the law and determined that a continuing contravention of the Code requires a succession of separate acts of discrimination : "... in order to establish a timely continuing contravention there must be allegations of discrimination of the same character, at least one of which must have occurred within six months of filing." A complainant cannot merely have one act of discrimination that has continuing consequences.

The Tribunal found that Mr. A's allegations did not amount to a continuing contravention of discrimination by the Respondents. It then considered whether to invoke its discretion to allow a late filed complaint to proceed. It looked at whether it was in the public interest and found it was not, and cited Mr. A's own submissions indicating his case did not have a public interest component.

Mr. A has filed an application to have the Tribunal's decision reviewed by the courts. That application has not yet been heard.

Mr. A and the Respondents did agree to settle Mr. A's outstanding allegation of retaliation.

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Claims Abstract *(continued from page 4)*

Claims made by employees alleging their employer did not accommodate a physical or mental disability is one of the more common bases for a human rights complaint.

Discussion and Lessons Learned:
Although the facts of this case are somewhat unique, claims made by employees alleging their employer did not accommodate a physical or mental disability is one of the more common bases for a human rights complaint. When an allegation is first made, an employee will most often try to resolve the problem directly with their supervisor, often with the assistance of human resource personnel or, if that does not work and the employee is in a union, a grievance can be filed. The grievance process can take more than 6 months to complete and as this case illustrates, the general rule is that human rights complaints need to be filed within 6 months of the incident which gave rise to the alleged discrimination. Waiting for the outcome of the grievance process before filing a human rights complaint is not an excuse for missing the 6 months limitation period. In most cases where an employee has filed both a grievance and human rights complaint, the Human Rights Tribunal will agree to place in abeyance the complaint until after the grievance process has completed.

We don't know how this case would have turned out had Mr. A filed his complaint in time, but it is interesting to consider the law that applies to situations like these. The Complainant is required to show they have a disability that the Tribunal and the courts have determined falls within the scope of those types of disabilities the Code was intended to protect. The Complainant must also show that he or she has suffered some adverse treatment. If the Complainant is able to do that, he or she must show there is a connection between the disability and the discriminatory incident. For example, an employee with a disability may apply for a job and not be successful. The employee may not have been the best candidate for the job because of their previous work experience. This would not be a breach of the Code.

Where an employee is not able to fulfill a function or requirement of their job due to a disability, the employer is under a duty to accommodate that employee to the point where the accommodation would cause the employer undue hardship. Undue hardship is difficult to define precisely, but it sets a high standard for the employer to meet. Where there is a requirement of a job, such as the WorkSafe requirement to wear long pants, and an employee says they cannot meet the requirement because, as in this case, they have a physical disability, the question is whether the requirement is a bona fide requirement and not just a requirement designed to discriminate against a particular group. For example, it used to be a requirement that to be employed as a firefighter, a candidate had to pass certain physical tests. The tests were such that most women could not pass and so could not become firefighters. Human Rights Tribunals have found these requirements not to be a bona fide requirement needed to do the job, but merely barriers to prevent women from becoming firefighters. Although there are still physical standards for becoming a firefighter, they are now more consistent with the actual requirements of the work firefighters do.

There are several clear lessons that can be taken from this case. First, managers should be familiar with the WorkSafeBC policies for their units. Where such policies are mandatory, managers should ensure that employees comply and where an employee indicates they have a reason for not complying or would like some modification to the policy, managers should consult their human resource manager at an early stage. Secondly, it is a person's right to file a human rights complaint without the fear of reprisal by their employer. An employee who has filed a human rights complaint should be treated with complete disregard for the fact they filed a complaint. Lastly, where, as in the firefighter cases, there is a standard or policy that prevents an employee with a disability from carrying out a work function, consideration should be given to whether the standard is actually necessary for the employer's purpose or if it is merely a rule dissociated from the real needs of the business. Inflexible standards that do not take into account the individual circumstances of employees and their abilities will often be found to be not bona fide. Individualized assessment of an employee against a standard is the best practice and the best method of avoiding human rights complaints.➤

Kevin Kitson, BA, LLB
Senior Claims Examiner/Legal Counsel

Hospital Corners— Quick Risk Tip

What risks might be associated with the use of social media by health care workers?

... one of my homecare clients has invited me to be a "friend" on Facebook... I have a private practice in addition to the work I do for Health Authorities and have been thinking of developing a Facebook page to promote it... I've been monitoring a health information blog and would like to comment or offer advice from my perspective as a health care professional...

As technology and access to the internet grows, social media and networking websites create opportunities for health care workers to stay connected with their professional communities or promote their practices. However, these opportunities do not come without risk and health care workers considering the use of social media should proceed with caution. Health care workers need to be mindful of their professional and ethical obligations with respect to privacy and professional working relationships when making decisions about their online presence. The same guidelines and principles that apply to "in person" relationships also apply to the "virtual" relationships created online.

Health care workers should treat any online social media or networking sites as public spaces where information can be viewed and further disseminated by others without permission of the original poster. Even if the individual thinks information is being housed in a secure environment, there should be no expectation of privacy as it can be copied and reposted, sometimes even within a very different context than what was intended. Health care workers should be wary of posting even de-identified stories of their experiences with clients online since this could be a breach of confidentiality if the client or family recognize themselves in the story.

Participation in professional forums or blogs may also appeal to many health care workers. The opportunity to apply their expertise in discussions with peers or other interested parties may be very tempting. Again, health care workers need to be mindful of their confidentiality obligations if drawing on real life experiences with clients. Health care professionals should also consider the extent to which others may rely on the information and advice they post in forums or blogs and whether it could be seen as having established a professional relationship with such individuals.

The sharing of personal information via sites like Facebook, even after the health care relationship has ended, can blur the boundaries of a professional working relationship. Health care workers need to be careful not only about what type of information they post about themselves and their clients, but also the extent of client-posted information they access. It is not usually beneficial to professional relationships for health care workers to make detailed personal information about themselves available to clients. Similarly, clients may post far more personal information on their websites than health care workers need to know in order to provide care. Individuals must bear in mind that anything posted online is publicly accessible and should be comfortable that it could be read by past and current clients, potential clients, employers and review boards. ➤

Sharon White, CIP, CRM
Senior Risk Management Consultant

Links of Interest and Dates to Remember

- Volunteer Canada has an excellent article related to volunteer screening posted on their website http://volunteer.ca/screening. This organization has also recently released a Volunteer Handbook prepared for Public Safety Canada which can be found at http://volunteer.ca/files/pol-screening-handbook-2012-en.pdf. These documents provide valuable information for both the organizations that engage volunteers and the individuals acting in a volunteer capacity.

- 2013 Patient Safety Quality Forum, Vancouver, BC —February 27—March 1, 2013 http://qualityforum.ca/

Risk Wise Answers

When a health authority or hospital hires a contractor to perform services, what are the potential freedom of information (FOI) and privacy repercussions?

Health authorities and hospitals in B.C. are 'public bodies' under this province's *Freedom of Information and Protection of Privacy Act* (FOIPP Act). Central to this legislation are the principles of privacy protection and public body accountability. The FOIPP Act (i) provides the public with a right of access to public body records, and (ii) contains rules that a public body must follow when it collects, uses, or discloses personal information.

The above also generally applies to contractors retained by a public body to perform services; public bodies cannot generally shirk their obligations under the FOIPP Act by contracting services out. The FOIPP Act applies to all records in the 'custody' or under the 'control' of a public body. This means that records can be subject to the FOIPP Act even when they are not directly held by a public body. When a contractor performs services for a public body, the contractor's records regarding those services will generally be subject to the FOIPP Act because, although the records may not be in the public body's custody, they are under the public body's control.

What does it mean to say a contractor's records are subject to the FOIPP Act? It means those records are subject to the FOI and privacy provisions of the legislation. A member of the public would have the right to make an FOI request for the contractor's records regarding the services provided to the public body. Those records would have to be released to the FOI applicant, subject only to a limited number of exceptions to disclosure. Public bodies often specify by contract that a contractor must promptly make them aware of any FOI request.

Saying a contractor's records are subject to the FOIPP Act also means the contractor must protect the personal information in those records in accordance with the FOIPP Act, for example by having reasonable security arrangements in place. This is important as the provisions of the FOIPP Act may be more strict than the legislation which would otherwise govern the contractor. For example, privacy legislation which generally applies to B.C. businesses does not specifically restrict storage of personal information outside Canada, whereas the FOIPP Act permits storage of personal information outside Canada only in specified circumstances.

To help ensure a contractor maintains the FOIPP Act's high standards for the protection of privacy, a public body should consider attaching a Privacy Protection Schedule to any contract for services involving personal information. The B.C. Government has developed a sample Privacy Protection Schedule for use by the broader public sector, and it can be found at the following link: http://www.cio.gov.bc.ca/cio/priv_leg/foippa/contracting/ppsindex.page. A public body's privacy staff may also be able to provide assistance in this area. Full text of the FOIPP Act is available at www.bclaws.ca.➤

Kash Basi, BA, JD
Senior Claims Examiner/Legal Counsel

Guidelines for Risk Management in Construction

Similar to the Health Care Protection Program, the Provincial Construction Program is also housed within the Risk Management Branch of the Ministry of Finance. The Provincial Construction Program provides owner-controlled course of construction and wrap-up liability coverage. All Health Care Agencies (HCAs) are required to place their construction insurance through the program on all projects valued at $1,000,000.00 or greater.

Have you ever thought about what risks there are if you didn't place your project insurance through the program? Do you have questions about how to determine your project limit? Or did you ever wonder how to insure a parking lot or medical equipment? You can find the answers to all these questions and more in our new publication, Guidelines for Risk Management in Construction.

These guidelines are now available on our website, www.hcpp.org or by contacting HCPP directly for a copy.➤

About Our Organization...

We are the Client Services Team for the Health Care Protection Program (HCPP). HCPP is a self-insurance program which is funded by the Health Authorities of BC. The program is housed within the offices of the Risk Management Branch of the Ministry of Finance which also has responsibility for similar programs such as the Schools Protection Program, and the University, College & Institute Protection Program. As part of the services of our program, we provide risk management services including risk mitigation, risk financing and claims and litigation management to HCPP member entities including all the Health Authorities and various other stand-alone health care agencies in the Province of BC.➤

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We Need Your Feedback!

What do you think about "Handle With Care"? We always love to hear your comments. Please send us your feedback!

Are there any topics you would like us to cover? Email us at HCPP@gov.bc.ca

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