

Employment Law: The Essentials Made Simple!

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What we will cover

- Risk management in:
 - Hiring
 - Terminations
 - Legislative Compliance



HIRING

PART I



Preliminary Decisions

- Job description and job requirements
- Compensation
- Hours of work
- F/T v. P/T
- Vacation pay and other benefits



Employee v. Contractor


“The Signs”

Employee:

- On payroll
- Use your office, equipment and supplies
- Usually does not work elsewhere
- You control

Independent Contractor:

- Free to accept or refuse work at will
- Not on payroll--no deductions
- Should be permitted to work for others
- Have free rein



Employee v. Independent Contractor

“The Legal Test”

- 4-fold test considers the following factors:
 - (1) control
 - (2) ownership of tools
 - (3) chance of profit
 - (4) risk of loss
- Court looks at the totality of the relationship as a whole



Employee v. Independent Contractor

Do not get it wrong

- Risks
 - Tax liability
 - Wrongful dismissal
 - Liability for withholdings required by law
 - Violation of ESA, OHSA and other statutory liabilities



How to Fill Temporary Needs

- Clarity
- Written agreement
- Be up front
- Be strategic

- This includes maternity leave contracts and to fill in for those on sick leave



Human Rights in the Workplace - Hiring

- The right to equal treatment with respect to employees applies to different stages and aspects of employment:
 - Application, recruitment, training, transfers, promotions, terms of apprenticeship, dismissal and layoffs
 - Pay, overtime, hours of work, holidays, benefits, shift work, discipline and performance evaluations

Job Advertisements

- Cannot directly or indirectly ask about information related to a prohibited ground





Job Interviews

- Not acceptable to ask questions that relate directly or indirectly to the prohibited grounds, e.g.
 - “do you have young children at home?”
 - “are you of Indian background?”
 - “do you have a criminal record?”
- It is acceptable, however, to ask questions about job qualifications, e.g.
 - “are you legally able to work in Canada?”
 - “are you fluent in English?” (where this is required by the job)



Employment and Religion

- Employees have a right to employment that respects their sincerely held beliefs
- This includes accommodation for religious needs such as prayer breaks, religious days off, and dress requirements
- Where asked, these accommodations must be made, unless the employer can show that it would be too costly, or create a health and safety risk, to the point of undue hardship



Employment and Disability

- Employer is under a duty to accommodate an employee's disability to the point of undue hardship
- Disability can include any degree of physical disability or infirmity caused by injury, birth defect or illness, and includes permanent, temporary, past or perceived disabilities
- Undue hardship is assessed by three criteria:
 - financial costs
 - outside sources of funding, if needed
 - health and safety requirements, if any



Pitfalls in Hiring

- Before the Offer
 - Reference checks
 - Defined position and expectations
- The Offer
 - Written
 - Contract
- Why a Contract?
 - Clarity
 - Consistency
 - Risk management
- What Risk?
 - Cost of termination
 - Right of layoff
 - Protection of confidential information
 - Probationary periods

Terminations

Part II





Wrongful Dismissal means:

- The termination of employment of staff without the proper amount of working notice or payment in lieu



Notice Entitlements


3 sources of entitlements:

- Minimum ESA
- Contract
- Common law



Tip 1: Do not get Advice from the Ministry of Labour

- The Ministry of Labour cannot offer you legal advice
- It will simply advise you of minimum employment standards (statute)
- No information is provided as to common law or contractual entitlements or obligations
- You will not know what your potential liability is



Tip 2: Employment Contracts will Minimize your Liabilities

But they must be:

- Well drafted
- Executed under appropriate circumstances
- Examples:
 - Short term employee - 3 months' notice
 - Long term employee – up to 24 months' notice



Tip 3: Cause Almost Never Exists

- Cause = termination without notice
- If you are wondering if you have cause, you almost certainly do not
- Test – is contextual



Tip 4: Get a Legal Opinion Before You Terminate

- Termination is a business decision
 - you need to know the potential cost
 - consider all your options
 - plan for the business as a whole
- You need to consider other exposures under legislation based on issues which may have arisen and manage the risk



Tip 5: Cover all your Bases

- You need a Release
- Opportunity for a Non-solicitation Agreement
- Benefits can be tricky

Tip 6: Have an Attendance Management Policy and Attendance Records





Tip 7: Conduct Annual Performance Reviews

- Anecdotally less difficult or resistance from the staff if legitimate performance issues have been raised
- Disincentive to civil action
- May assist to show “cause” for termination
- Do not wait for the annual review for issues which are “cause” – engage in performance management



Tip 8: Be Careful about Ending Group Benefit Coverage

The horror!

- You could be the insurer if the employee becomes disabled!
- This is a tricky area particularly if you have long term disability coverage



Tip 9: Never Terminate a Sick or Pregnant Employee without Legal Advice

- You cannot terminate someone for illness or pregnancy
- You are exposing yourself not only to a wrongful dismissal claim but a Human Rights claim as well
- You also cannot terminate someone returning from maternity leave because the replacement is superior without significant exposure (ESA and HR)



Tip 10: Pay at Least Statutory Minimums

- Statutory Minimums (ESA in Ontario)
 - any employee terminated without cause
 - including those on LTD
 - termination pay (up to 8 weeks)
 - severance pay (up to an additional 26 weeks)



LEGISLATIVE COMPLIANCE

PART III



The Legislation – it Matters

- Employment Standards Act, 2000
 - Minimum rights and entitlements of employees
 - Poster required
- Occupational Health and Safety Act
 - Joint Health and Safety Committee
 - Policies – Health and Safety and Workplace Violence and Harassment
 - Inspections, risk assessments
 - WHMIS
- Human Rights Code
 - Protection for employees against discrimination in employment
 - Increasing source of litigation and complaint
- Workplace Safety and Insurance Act
 - May be mandatory or optional depending on your industry
- Accessibility for Ontarians with Disabilities Act
 - Customer Service Standard and employee training was required by Jan 1, 2012
 - Employment Standard compliance by Jan 1, 2017 (sooner for some)



Final Tips

- Visit the Ministry of Labour website
- Read up on the legislation and be aware of your obligations as an employer
- Ensure you are ready for inspections
- Contact a lawyer should you have questions concerning obligations, compliance and risk management

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