

Employment Law 101 – What Every Employer Should Know...and Do



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Navigating employment law issues can be daunting. To employers (and even employment lawyers) the law appears to shift daily, whether at the hands of provincial and territorial governments or courts and tribunals. Human rights, health and safety, privacy, employment standards, accessibility, and so much more. This article highlights key employment law basics every employer should know to minimize risk and maximize opportunity.

Recruitment – Watch your language!

The job advertisement

Even before you've met a prospective employee, be vigilant. When drafting a job posting critically assess the experience and qualifications required and avoid possible discrimination under human rights law. For example, an advertisement seeking "a young, energetic apprentice" may be seen as discriminating against older candidates. In Ontario, an employer is also required to include in the job posting a statement that accommodation is available to persons with disabilities during the recruiting process (see *Accessibility for Ontarians With Disabilities Act*).

The interview

Unless for a bona fide occupational requirement¹, avoid asking questions that could elicit information about a characteristic protected under human rights law; for example, about a candidate's race, ancestry, place of origin, ethnic origin, citizenship, sexual orientation, age, marital status, family status, disability, creed, gender identity, gender expression, sex, or record of offences. Even if that information is not used in evaluating the candidate, the fact the employer gathered the information may expose the employer to a discrimination claim if the candidate is not hired (or is hired and later fired).

Best practice: Whenever possible use standardized questions prepared in advance of the interview, and a written scoring system based on bona fide evaluation criteria.

The Employment Contract – An Employer's Best Friend

Why is an Employment Contract So Important?

It's simple. A written employment contract (well drafted, of course) crystallizes the parties' expectations by setting out fundamental terms including duration, salary, benefits, hours of work, bonus, incentive plans, compliance with employer policies, and entitlement upon termination. Without a written agreement it is easier for the parties to disagree on what was intended at the time the deal was struck.

For an employment contract to be enforceable, the employee must receive consideration **and** the terms and conditions must

comply with minimum statutory employment standards. For a new employee, consideration is typically the job itself. For an existing employee consideration can take the form of a promotion, raise, bonus, or other benefit to which the employee would not otherwise be entitled. But beware: inserting a written employment contract into an existing employment relationship has its risks. When in doubt, consult with experienced employment counsel.

A common mistake many employers make is failing to have the employee sign the employment contract before starting work. A contract signed after work begins, even later that same day, may not be enforceable without fresh consideration. To avoid this risk, give the candidate sufficient time to review the contract (3-5 days is often fair) and ensure he/she returns it signed in advance of the start date.

Termination Entitlement

Any employer terminating an employee should understand the potential costs and how to reduce, and even eliminate, certain costly liabilities. For instance, while a construction employee is not entitled to notice and/or severance under the Employment Standards Act ("ESA"), that does not stop a terminated employee from seeking damages from the courts. These damages, referred to as 'common law' damages, represent the amount of notice (or pay instead of notice) the courts say the employer ought to have provided the terminated employee. However, where an employer has in place a properly drafted and implemented employment agreement, that employer is able to limit an employee's entitlement to notice of termination to the ESA minimum which, for most construction employees, means no entitlement at all. To minimize potentially costly exposure, and increase your flexibility to make workforce decisions without having to factor in termination costs, implement a written employment contract for every employee limiting the amount of notice to which the employee will be entitled upon termination. Have the contract prepared and/or vetted by legal counsel to ensure it will be valid and binding.

Workplace Obligations, Polices and Record Keeping – Creating a Strong Foundation...

Employment Standards

In every Canadian jurisdiction, employment standards legislation governs key aspects of the employment relationship including overtime, hours of work, breaks, leaves of absence, vacation, public holidays, etc. Failure to comply with these standards can have serious financial and reputational consequences for an employer. It may also result in fines or other penalties in the event of prosecution. Compliant policies and procedures, together with good record keeping, are an inexpensive and easy way to minimize the risk of liability.

Health and Safety

Every employer must develop and implement a written health and

safety policy including steps to prevent and respond to workplace violence and harassment. Some jurisdictions, such as Ontario and British Columbia, also have a specific requirement to investigate an incident or complaint of workplace violence and harassment, including sexual harassment. Policies should be reviewed annually to ensure they remain current and complete, and employees receive appropriate training.

Termination – Ending the Relationship

With or Without Cause

Generally speaking, in a non-unionized workplace a provincially regulated employer can dismiss an employee provided appropriate notice of termination is given. This is termination *without cause* and it can help an employer respond to changing business circumstances such as shortage of work, restructuring, closure, etc. or address employee issues that fall short of cause.

Termination with cause occurs when an employer alleges the employee breached an essential term and condition of employment (e.g., theft, fraud, workplace violence). In that case the employee is not entitled to receive notice of termination, or pay in lieu of notice.

However, even if employee misconduct is egregious and would ordinarily justify dismissal for cause, human rights considerations can alter the analysis and create unexpected results for the employer.

Best practice: Before proceeding to terminate employment, consider all relevant factors including: the seriousness of the offence, the employer's past practice, whether the incident was isolated, premeditated or previously condoned, the employee's length of service, and whether issues of disability contributed to or caused the conduct.

Full and Final Release

A comprehensive settlement document, including a release and indemnity, provides an employer the comfort of knowing issues are resolved relating to the departure of an employee. However, a release will not provide the security an employer seeks if it can later be attacked. To ensure your organization receives the full and intended value of a release, remember to follow these guidelines:

- **Exceed minimum statutory requirements:** Where terminating without cause, ensure the payment provided exceeds the minimum requirement under the applicable employment legislation.
- **Time to review:** Provide the departing employee time to review the settlement documentation and seek legal advice if they elect to do so. If the employee wants to sign the release during the termination meeting, advise them you cannot accept it and they need to take it away with them to review.
- **Do not provide legal advice:** Be careful not to make any representation to the employee about his or her legal rights under the release. If he or she has questions, encourage them to seek their own legal advice.
- **Do not withhold minimum entitlements:** When terminating without cause, do not threaten to withhold minimum statutory entitlements (such as any accrued vacation pay, termination and/or severance pay) unless the employee signs a release. Not only is it unlawful to do so, this may create an opening for a court or tribunal to conclude the release was signed under economic duress or that the employer acted in bad faith.

Conclusion

Regardless of the size of your organization or its experience handling employment law issues, developing compliant workplace policies, implementing enforceable employment contracts, and managing the termination process can substantially minimize the risk of employment-related liability and related legal costs. The time to start planning is now.

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