
Hello – Goodbye: Best Practices When Hiring and Managing Departures

This webinar will begin at 9:00 am EST



Shana French
sfrench@sherrardkuzz.com
416.603.6260

Jeffrey A. Stewart
jstewart@sherrardkuzz.com
416.217.2228



250 Yonge Street, Suite 3300
Toronto, Ontario, M5B 2L7
Tel 416.603.0700
Fax 416.603.6035
24 Hour 416.420.0738
www.sherrardkuzz.com

Agenda

■ Recruitment and Hiring

- ❑ Risks associated with ‘poaching’ an employee from an existing job.
- ❑ Can an employer consider a candidate’s social media profile in the hiring process?
- ❑ How to address COVID-19 vaccination.
- ❑ Considerations if hiring into a work-from-home (remote)/hybrid arrangement.
- ❑ Key employment terms to introduce at the hiring stage.



Agenda

■ Departing Employees

- ❑ Duties owed by a departing employee.
- ❑ Restrictive covenants and other key employment agreement terms.
- ❑ Ending employment during an employee's resignation notice period.
- ❑ COVID-19 related work requirements and constructive dismissal.



Recruitment and Hiring



Recruitment and Hiring - The Risk of Poaching

Extension of Notice Period

■ Inducement

- New employer entices employee to leave current employment
- Fact specific but is more than a simple “wooing” or normal courtship of employee
- Protect against inducement with:
 - Valid and enforceable termination provision
 - Inclusion of probationary period
 - Passage of time

Recruitment and Hiring - The Risk of Poaching

Extension of Notice Period

- *Younesi v. Kaz Minerals Projects B.V.*, 2021 BCSC 614
 - Younesi had been employed as a Project Manager for more than 1.5 years when he was headhunted through LinkedIn by a recruiter on behalf of Kaz Minerals
 - He went through several interviews and was ultimately offered the job
 - The offer letter included a schedule comparing Younesi's current compensation package with one proposed by Kaz Minerals and guaranteed Younesi to be in Vancouver for the first 22 months
 - Inducement = 2 month increase to notice period
 - Total of 6 months notice for a 2 month employee

Recruitment and Hiring - The Risk of Poaching

Breach of Restrictive Covenant

- If an employee is bound to a restrictive covenant, was a fiduciary or has access to confidential information, law suits can follow hiring
- Potential Damages
 - Accounting of all clients
 - Accounting and disgorgement of all profits made from use of confidential information
 - Interim and permanent injunction
 - Punitive and/or aggravated damages

Recruitment and Hiring - Use of Social Media

- In 2018, 7 out of 10 employers* used social media to screen candidates
- Potential Benefits:
 - Access information not usually found on a resume or discovered in an interview
 - Free to use



*Survey of US companies. Source: [businessnewsdaily.com/2377-social-media-hiring.html](https://www.businessnewsdaily.com/2377-social-media-hiring.html)

Recruitment and Hiring - Use of Social Media

- Is it worth it?
 - ❑ Human rights statutes apply to the hiring process
 - ❑ Cannot directly or indirectly consider discriminatory factor in hiring
 - ❑ Social media platforms can provide information about a person's protected characteristics, *e.g.*, family status, creed, place of origin, sexual orientation, race
- Build in protections:
 - ❑ Limit focus to information that can impact candidate's ability to perform the job
 - ❑ Social media searches – set up “screen”

Recruitment and Hiring - COVID-19 Vaccination

- Mandatory vaccination may be a condition of hire (subject to human rights considerations)
- If this requirement will be part of job ad, the ad should expressly recognize that the employer will accommodate as required by human rights legislation
- Candidate should not be asked during an interview about their COVID-19 vaccination status



Recruitment and Hiring - Remote/Hybrid Work

- Employment agreement should reference work location and set the terms of remote/hybrid arrangement

- Key considerations:
 - Jurisdiction: can employee work outside of the province/territory of employment?
 - Office attendance: minimum amount of office time, or as required?
 - Conditions for continued remote/hybrid work: e.g., must performance meet/exceed certain standards/expectations to continue?
 - Termination of arrangement: does employer have the right to unilaterally end remote work arrangement?

Recruitment and Hiring - Key Employment Terms

- An enforceable employment contract is the single most important tool an employer has to minimize potential employment liability
 - ❑ Sets out expectations and obligations
 - ❑ Can specify entitlement on termination (amount of notice, or pay in *lieu*, benefit continuation, etc.)
 - ❑ Without a valid employment contract, the common law applies

Bottom line: The modest cost of an employment agreement can offer a very high return on investment

Recruitment and Hiring - Key Employment Terms

- All employment contracts should include:
 - Start date
 - Salary/wage
 - Enforceable** termination provision
 - Lay off
 - Restrictive covenants (if appropriate)

- Requirements for a *valid* employment agreement
 - Valuable consideration
 - Enforceable terms



Recruitment and Hiring - Key Employment Terms

Enforceable Termination Provision: Why it Matters

- Amount of time reasonably needed to find new employment
- Entitlement will vary considerably based on individual circumstances
 - ❑ Age and length of service
 - ❑ Character of employment
 - ❑ Compensation
 - ❑ Induced to leave secure employment
 - ❑ Economic circumstances (COVID-19)
- Very rough ‘general rule’ of one month of notice/year of service with an ‘upper limit’ of 24 months, except in extraordinary circumstances

Recruitment and Hiring - Key Employment Terms

Enforceable Termination Provision: Components

- Clear and unambiguous language
- Can be more generous than employment standards minimum, but not less (at any point)
- *Waksdale v. Swegon North America*, 2020 ONCA 391
 - Employee terminated without cause per employment contract
 - ‘Without cause’ termination clause was enforceable
 - ‘With cause’ termination clause not enforceable because did not account for ESA’s higher standard of ‘wilful misconduct/neglect of duty’
 - Court struck down **entire** termination provision and employee awarded common law notice

Departing Employees



Departing Employees - Duties Owed By Employee

- Regardless of any written covenant, there are some restrictions on an employee's ability to use information or work from a prior employer:
 - Duty of confidentiality
 - Duty of loyalty and good faith (fidelity)
 - Fiduciary duty

Departing Employees - Restrictive Covenants

- Contractual term designed to limit acts of a former employee
- Courts are reluctant to enforce; viewed as a restraint of trade
 - Employee should not be prevented from using skills acquired in former employment
- Only enforceable if reasonably necessary to protect a legitimate business interest
- Precise drafting is critical

Departing Employees - Restrictive Covenants

Non-Solicitation

- Focus is on relationships
 - Customer and/or suppliers
 - Employees (often not central issue)
- What is solicitation?
 - Solicitation is not necessarily the same as mere communication
- Beware of a non-competition clause “dressed up” as a non-solicitation clause

Departing Employees - Restrictive Covenants

Non-Competition

- About the departing employee, not just the relationships
- Use if a non-solicit will not be enough to protect a legitimate business interest of the (former) employer
- Enforceability:
 - Considered a restraint of trade that is not enforced lightly
 - Must be precise and reasonably necessary to protect legitimate proprietary interest of employer

Departing Employees - Restrictive Covenants

Non-Competition

- *Bill 27, Working for Workers Act, 2021* (Ontario)
 - Introduced on October 25, 2021
 - Royal Assent on December 2, 2021
- Amended *Employment Standards Act, 2000* (Ontario) to prohibit a “non-compete agreement”

67.2 (1) No employer shall enter into an employment contract or other agreement with an employee that is, or that includes, a non-compete agreement.

Departing Employees - Restrictive Covenants

Restrictive Covenants

- A “non-compete agreement” means:

an agreement, or any part of an agreement, between an employer and an employee that prohibits the employee from engaging in any business, work, occupation, profession, project or other activity that is in competition with the employer’s business after the employment relationship between the employee and the employer ends.

- Exceptions:

- Sale of a business or part of a business (including a lease)

- “Executives”

- Impact on existing employment agreements?

Departing Employees – Ending Employment Post Resignation

- Avoid knee-jerk reaction
- Check employment agreement before acting
- If ending early, must comply with statutory and contractual entitlements
- Protect confidential information



Departing Employees - COVID-19 and Constructive Dismissal

Constructive Dismissal

- Arises if employer makes a unilateral and substantial change to an essential term of the employment contract
- Analysis frequently focuses on whether change is substantial and if employee condoned/consented to the change
- Can you obtain consent to the change(s)?
- Does the reason for the change(s) matter?

Departing Employees - COVID-19 and Constructive Dismissal

Reduction in Compensation

- *Kosteckyj v. Paramount Resources*, 2021 ABQB 225
 - ❑ Employer reduced compensation due to the COVID-19 pandemic
 - ❑ Overall reduction of 16-20% of total compensation package
 - ❑ Terminated three weeks later
 - ❑ Court held change to compensation constituted a constructive dismissal
 - ❑ No comment on impact of extraordinary economic impact of circumstances caused by COVID-19 pandemic

Departing Employees - COVID-19 and Constructive Dismissal

Temporary Layoff

- Absent a contractual entitlement to layoff, courts have generally held a layoff (even if permitted by employment standards legislation) amounts to a constructive dismissal
- Case law on how this will apply in the context of COVID-19 is evolving
- Some case law to support position that a layoff for COVID-19 related reasons still constitutes a constructive dismissal at common law
 - *Hogan v. 1187938 B.C. Ltd.*, 2021 BCSC 1021
 - *Coutinho v. Ocular Health Centre Ltd.*, 2021 ONSC 3076

Departing Employees - COVID-19 and Constructive Dismissal

Temporary Layoff

- Other case law from Ontario supports position that if employee on a temporary layoff is deemed to be on a COVID-19 leave under employment standards legislation, no constructive dismissal claim
 - *Taylor v. Hanley Hospitality Inc.*, 2021 ONSC 3135

- Expect to see more decisions on this in the future

Departing Employees - COVID-19 and Constructive Dismissal

Permanent Work from Home

- On its own, unlikely to support successful claim of constructive dismissal
- However, if work from home is coupled with unilateral salary reduction, could increase risk of a constructive dismissal

Return to Office

- On its own, unlikely to support successful claim of constructive dismissal
- Reduce risk with properly drafted work-from-home agreement
- Remember human rights considerations

Departing Employees - COVID-19 and Constructive Dismissal

Mandatory COVID-19 Vaccination

- Employer can mandate vaccination, **but** comes with some legal risk and potential liability
- Many risk factors can be mitigated through proper planning and a clearly drafted policy
- Regarding non-unionized employees, it has been argued that implementation of a vaccination requirement may constitute a constructive dismissal
 - No case law on this point yet, but expect to see it evolve in the future

Departing Employees - COVID-19 and Constructive Dismissal

Other COVID-19 Precautions

- Even if no mandatory vaccination policy, employer may impose additional obligations on an employee who is not vaccinated/refuses to disclose vaccination status
 - Continued use of PPE (even if no longer required by law), attendance at educational sessions on vaccination, limits on employee movement in the office environment (eating areas, social areas, *etc.*), rapid testing
 - Unlikely to support a claim of constructive dismissal on their own
 - However, if humiliate or harass unvaccinated, could potentially increase risk



250 Yonge Street, Suite 3300
Toronto, Ontario, Canada M5B 2L7

416.603.0700 Phone

416.420.0738 24 Hour

416.603.6035 Fax

www.sherrardkuzz.com



-
- *The information contained in this presentation/article is provided for general information purposes only and does not constitute legal or other professional advice, nor does accessing this information create a lawyer-client relationship. This presentation/article is current as of **December 8, 2021** and applies only to Ontario, Canada, or such other laws of Canada as expressly indicated. Information about the law is checked for legal accuracy as at the date the presentation/article is prepared, but may become outdated as laws or policies change. For clarification or for legal or other professional assistance please contact Sherrard Kuzz LLP (or other counsel).*