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Seasonal Risks and Best

Golf courses have a high number of seasonal employees due to the nature of their business. In most cases, a seasonal employee has the same employment-related rights as any other employee. However, in some ways, they can be treated differently. As the golf season gets into full swing, here are a few common risks and best practices to keep in mind.

RISK: VIOLATING HUMAN RIGHTS LEGISLATION

Human rights legislation prohibits discrimination in employment on the basis of several grounds which vary across Canada, but typically include race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status, gender identity, gender expression and disability (referred to as "protected grounds"). Keep in mind that inadvertent or accidental discrimination is discrimination, so stay alert to these issues and proactively avoid them.

There are two basic exceptions which allow for discrimination based on an otherwise protected ground: (1) If a job requirement is a bona fide occupational requirement (e.g., an ability to lift fifty pounds) and the individual's protected characteristic cannot be accommodated without imposing undue hardship on the employer; and (2) If the employee is under a certain age, as human rights legislation in many jurisdictions does not protect against age-related discrimination for those under a prescribed age (usually 18). Minimum wage also differs in most provinces, if the employee is under a certain age.

BEST PRACTICE: BE MINDFUL ABOUT THE LANGUAGE YOU USE

Ensure the job description does not directly or indirectly discriminate based on a protected ground. An ad

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that seeks a "young, energetic female" may discriminate based on age, sex and gender. Similarly, an ad seeking a "strong man able to lift 100-pounds" may discriminate based on sex, gender, or even disability if heavy lifting is rarely required. The examples are endless.

When posting the position, and throughout the selection process, keep language neutral and tied directly to the bona fide requirements of the job. If lifting heavy weight is a bona fide requirement, say that, but without the extra narrative about "strong man", etc.

It is also important to keep in mind that while you may be genuinely interested to learn about your potential new colleague, avoid questions like, "where's your accent from", "in your spare time, what do you do with your family", or even more direct, "are you married" or "do you have kids?".

Even if a decision not to hire a candidate is entirely unrelated to a protected ground, the fact the employer gathered this information may expose it to a claim. The most effective way to mitigate this risk at the hiring stage is to ask all candidates the same standardized questions, tied directly to the job requirements.

RISK: ASSUMING YOU HAVE AN INHERENT RIGHT TO TEMPORARILY LAYOFF OR NOT RECALL AN EMPLOYEE

Even experienced employers often use the terms "termination" and "layoff" interchangeably as if they mean the same thing. They don't. When an employee is terminated, the relationship between employee and employer ends. When an employee is laid off, the employer-employee relationship is suspended because there exists the possibility of a return to work.

Contrary to popular belief, in many provinces an employer does not have an inherent right to temporarily lay off an employee at the end of a season without triggering termination entitlements. The fact that the business is closed for the season may not matter.

For example, in Ontario, an employment contract must include an express or implied right to temporarily lay off an employee, failing which an employer has no automatic right to do so. Without this right, a layoff may amount to a without cause termination, entitling the employee to notice or pay in lieu of notice, and possibly severance pay. An implied right to lay off may exist for some seasonal employers in certain provinces, but this is not guaranteed and the cost to fight that battle (should you need to) could be high.

In situations when an employer is permitted to temporarily lay off an employee, that layoff is deemed to be a termination once a certain period passes. The period varies from province to province and even within some provinces based on certain factors (e.g., whether the employer continues benefits coverage during the layoff). In Ontario and British Columbia, the period can be as short as 13 weeks in any period of 20 consecutive weeks; and in Saskatchewan, the period can be as short as 7 days.

BEST PRACTICE: ENSURE ALL EMPLOYEES SIGN A PROPERLY WORDED, ENFORCEABLE EMPLOYMENT CONTRACT

Without an enforceable employment contract, that includes a lay off provision, an employee is presumed to be owed "common law notice" on termination (regardless of whether the termination occurs immediately, at the end of a temporary layoff, or

because the employee is not recalled the following season). Common law notice can amount to more than one month of notice or pay in lieu per year of service. For a long-standing employee, this can quickly add up to five or six-figures.

The only way to avoid common law entitlement is to agree with the employee to provide something less, so long as that something is not below the minimum statutory entitlement, which itself varies by province, but is typically one week per year of completed service to a maximum of 8 or 10 weeks. The difference between common law notice and the statutory minimum can therefore be considerable. A 15-year employee might be owed 15 months pay under the common law but only two months under statute.

While it is best if an employee signs the employment contract before beginning work, with proper planning it is possible to do so during the employment relationship.

FINAL WORD: TAKE THE TIME TO DO IT RIGHT

From the initial job posting, to the employment contract, to the end of the relationship (short or long-term), taking the time to do it right from the start will go a long way to protect your organization. A template contract can often be used for multiple employees provided it is kept up-to-date with changes in the law. Making this small investment at the outset of the employment relationship will more than pay-for itself in the long run. ***GM***

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