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Seasonal Employees – Risks and Best Practices

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Spring is here which means golf courses, landscaping companies, summer camps, and other cyclical facilities are hiring seasonal employees. Despite short, seasonal employment, a seasonal employee has the same employment-related rights as any other employee. From hiring, to layoff or termination, to workplace safety, and everything in between, now is a great time to review a few common risks and best practices.

Risk: **Assuming you have an inherent right to temporarily lay off an employee at the end of the season, or not recall them the following year, inadvertently exposing your organization to liability.**

Even experienced employers often use the terms "termination" and "layoff" interchangeably as if they mean the same thing. They don't. When an employee's employment is terminated, the relationship between the 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 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.

Even 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

[1] With excellent assistance from Anne Price.

the layoff). In Ontario and British Columbia, the period can be as short as 13 weeks in any period of 20 consecutive weeks. In Saskatchewan, the period can be as short as seven days.

Best practice: **Ensure an employee – including a seasonal employee – signs an enforceable employment contract that (1) includes an express right to lay off, and (2) limits termination entitlements to the statutory minimum or some other appropriate amount.**

Without an enforceable employment contract, an employee is presumed to be owed common law notice on termination of their employment (assuming there is no cause or wilful misconduct). Common law notice can amount to more than one month per year of service. For a long-standing employee, this notice can quickly add up.

In *Smith v Lyndebrook*,[2] the Ontario Small Claims Court awarded five months in common law notice to a seasonal employee who worked only one month and had his employment terminated mid-season. Among other things, the notice period was based on the absence of an enforceable contract limiting termination pay to minimum statutory entitlements, and the unique nature of the seasonal work which made it difficult for the employee to find other work in the middle of the summer season.[3]

One way to limit common law entitlement is to contractually agree with the employee to provide something less, so long as that 'something' is not below the minimum statutory entitlement. Statutory notice varies by province but is typically one week per year of completed service to a maximum of 8 or 10 weeks. While it is best to have an employee sign an employment contract before they begin work, it is possible to have them do so during the employment relationship, provided it is done correctly.

Finally, in recent years courts have increasingly found reasons to side with employees and strike down contractual termination provisions. So, it is important to regularly review termination clauses with legal counsel.

Risk: **Violating human rights legislation in the hiring and firing process.**

Canadian human rights legislation prohibits discrimination in employment based on various grounds. Those grounds vary across Canada but typically include race/ancestry/place of origin, citizenship, religion/creed, sex/gender/gender identity, sexual orientation, age, record of offences, marital/family status, and disability ("Protected Ground"). Although age is a Protected Ground, human rights legislation in many jurisdictions does not protect against age-related discrimination for those under a prescribed age (usually 18). Some provinces also allow a lower minimum wage for a student under the age of 18.

Remember, even inadvertent or accidental discrimination is discrimination, so stay alert to these issues and proactively avoid them.

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[2] *Smith v Lyndebrook Golf Inc.*, 2024 CanLII 103671 (ON SCSM) (Jose, DJ) [*Smith v Lyndebrook*].
[3] See also: Daniel Averbach, "Employee Works for One Month – Receives Five Months Common Law Notice" (6 January 2025).

In *Galoglu v A Wesley Paving*,[4] the Human Rights Tribunal of Ontario found an employer discriminated against a seasonal employee on the basis of disability by laying off the employee after they sustained an injury on the worksite and before the expected end of the season. The employer was unable to prove the early layoff was in line with the employer's typical layoff timeline or due to a reduction in work. The employer had also made no effort to accommodate the employee. The employer was ordered to pay $10,000 for injury to the employee's dignity, feelings, and self-respect caused by the discriminatory acts.

Best practice: **Apply standard procedures to seasonal employees and document valid business needs and decisions.**

An employer can defend against alleged discrimination if it can establish a job requirement or standard is a *bona fide* occupational requirement ("BFOR") and the individual cannot be accommodated without undue hardship. To establish a BFOR, ensure requirements and standards are reasonably necessary for the job and adopted in good faith.

At the hiring stage, ensure a job description does not directly or indirectly discriminate based on a Protected Ground. For example, an ad seeking a "strong man able to lift 100-pounds" may discriminate based on sex/gender, or even disability. Instead, 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.

Even if a decision not to hire a candidate is entirely unrelated to a Protected Ground, the fact the employer gathered this type of information may expose it to a claim. So, while you may be genuinely interested to learn about your potential new colleague, avoid questions like "where were you born" or "do you have kids," etc. 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.

At the termination stage, treat a seasonal employee as any other. That includes providing accommodation, if applicable. *Galoglu v A Wesley Paving* suggests a seasonal employee is entitled to the same accommodations, procedures, and rights as a full-time permanent employee.[5] If an employee has a disability (whether an existing one or a new one caused by an injury or illness), an employer should allocate time and resources to finding an appropriate accommodation, up to the point of undue hardship to the employer.

Risk: **Not appreciating that an injury to a seasonal employee may have workers' compensation cost consequences for an employer.**

An injury to a seasonal employee may have long-term cost consequences for an employer, even if the employee was only intended to work with the employer for a short time.

In *Decision No. 1668/13*,[6] the Workplace Safety and Insurance Appeals Tribunal ("WSIAT") found an injury sustained by a seasonal employee only weeks before the employee's anticipated seasonal layoff

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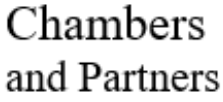
[4] *Galoglu v A Wesley Paving Ltd.*, 2016 HRTO 1525 (Letheren) [*Galoglu v A Wesley Paving*].
[5] See also: Zack Lebane, "Accommodation is a Two-Way Street" (5 November 2024).
[6] *Decision No. 1667/13*, 2017 ONWSIAT 3322 (Doherty).

had both temporarily and permanently impaired the employee. The employee was therefore entitled to (1) loss of earnings benefits for four months following the layoff and (2) an assessment to determine the employee's non-economic loss due to the permanent injury. Notably, the employer did not meaningfully participate in the worker's compensation application or return to work processes, nor in the WSIAT appeal, whatsoever. Earlier employer intervention may have improved the worker's ability to return to work, potentially mitigating some of the cost consequences to the employer, including higher claims costs or costs to retrain an employee who can no longer perform their original job due to injury.[7]

Best practice: **Ensure seasonal employees receive appropriate health and safety training, and if an injury occurs, actively engage in the workers' compensation process to mitigate losses and facilitate appropriate return to work options.**

Final word: From the job posting, to the employment contract, to the end of the relationship, taking the time to do it right will go a long way to protect your organization. **To learn more and for assistance, contact your Sherrard Kuzz LLP lawyer or info@sherrardkuzz.com.**



[7] See also: Angela Powell, "Employers Must Act to Reduce Workers' Compensation Costs" (27 January 2025).