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The Do's and Don'ts of Employee Acquisition and Termination for Charities and Not-for-Profit Organizations

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A. JOB ADVERTISEMENTS/ APPLICATIONS

- Job ads and applications cannot directly or indirectly ask about race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, gender identity, gender expression, family status or disability
- Such questions violate the right to equal treatment with respect to employment under the Ontario *Human Rights Code*
- An application form may ask whether a candidate is legally able to work in Canada or if they possess the necessary skills to perform the job
- Job requirements must be reasonable, genuine and directly related to the job

B. INTERVIEWS

- Employers must be careful not to ask questions which are prohibited by the *Human Rights Code*
- Examples of prohibited questions include:
  - Questions relating to physical characteristics
  - Questions regarding pregnancy or child-bearing plans
  - Questions about age, sexual orientation, marital status or religion

- The *Human Rights Code* sets out a number of special exceptions to the rule prohibiting discrimination in employment. Employers may ask questions relating to these exceptions
- These exceptions include:
  - special programs designed to relieve hardship or economic disadvantage or to assist disadvantaged groups to achieve equal opportunity;
  - Private medical/personal attendants;

- Canadian citizenship or permanent residency requirements in certain circumstances;
  - Canadian Citizenship may be a requirement imposed or authorized by law for a particular job (ex. RCMP officer)
  - Organizations may require that senior executives meet Canadian residency requirements
  - Canadian citizenship or permanent residency requirements may be adopted for the purpose of fostering and developing participation in cultural, educational, trade union or athletic activities by Canadians

- Special situations where age, sex, record of offences or marital status of the applicant is a reasonable and *bona fide* qualification because of the nature of the employment (for example: a gender requirement for employment at a shelter for battered women);
- Special interest organizations (for example: a denominational school may ask questions regarding religious membership if the job involves communicating religious values to students)

C. THE IMPORTANCE OF WRITTEN EMPLOYMENT CONTRACTS

- A written employment contract offers the benefit of clarity and certainty concerning the rights and obligations of the employer and employee at the outset of the employment relationship
- With a properly drafted written employment contract, the settlement of disputes in an employment situation becomes a much simpler and less expensive proposition for both the employer and the employee

- In the absence of a written employment contact, the employer and the employee may have very different recollections concerning what may have been agreed with respect to some of the basic conditions of employment
- The written contract removes the problems associated with faulty recollections of what the parties did in fact agree to at the outset of the employment relationship
- In drafting employment contracts, employers must ensure that the terms do not violate any of the minimum standards set out in their provincial labour legislation

- The key provisions of any employment contract should include:
  1. The position being offered and accepted, as well as a job description;
  2. The compensation that will be paid, including the right to receive any bonuses or commissions and the formula of determining these forms of compensation;
  3. Whether the employment is for a set length of time or is indefinite;
  4. Specifics regarding vacation time and sick leave and whether such time accrues from year to year;

5. Whether there will be a probationary period after hiring;
6. Possible changes in job or location;
7. Protection of the employer's intellectual property and confidential information and whether there will be any post-employment obligations (non-competition, non-solicitation clauses);
8. Pregnancy and Parental Leave policies;
9. Employment termination provisions

D. ONTARIO LEGAL FRAMEWORK

- Most federally and provincially incorporated charities and NFPs are governed by the Ontario *Employment Standards Act, 2000* (the "ESA")
  - ESA sets out the minimum employment standards
    - Standards cannot be lessened, even by an agreement between an employer and an employee
  - Minimum obligations touch on a number of issues:
    - Minimum wage, overtime pay, vacation entitlements, statutory holidays, job protected leaves of absence (such as pregnancy and parental leave) and termination obligations

- *Canada Labour Code* (the "*Code*")
  - Only certain types of federal incorporations are covered under the *Code*
    - i.e. Banks, airlines, television and radio stations, interprovincial shipping companies
    - *Code* does not apply to federally incorporated charities or NFPs, unless the organization falls under the list of enterprises listed in the *Code*
      - e.g. Christian radio stations

- ESA minimum termination notice or pay in lieu of notice requirements:

Length of Employment	Notice Required
Less than 3 months	None
3 months but less than 1 year	1 week
1 year but less than 3 years	2 weeks
3 years but less than 4 years	3 weeks
4 years but less than 5 years	4 weeks
5 years but less than 6 years	5 weeks
6 years but less than 7 years	6 weeks
7 years but less than 8 years	7 weeks
8 years or more	8 weeks

- Note: If the employee is covered by a group benefit plan, the employer must extend the former employee's benefits for the same number of weeks as the notice required

- Severance Pay
  - Regulated by ESA
    - Only applies to employees who have been employed with the same employer for 5 years or more; and
    - Employer has an Ontario payroll of at least $2.5 million per year
  - Based upon number of years of service
  - May substantially exceed termination pay
    - Maximum amount of severance pay is equal to 26 weeks of pay
      - Maximum amount of ESA termination pay is only 8 weeks

E. BE CAREFUL WITH PROBATIONARY CLAUSES

- For some employers, a probationary period is important, in that it provides a trial period for the employer to assess and evaluate the employee to determine if he or she is suitable for long term employment with the organization
- A probationary term is never implied in an employment contract
- Therefore, it is important that the employee's probationary status be set out either in the employment contract or the offer letter *prior* to the employee commencing work
- A properly worded probationary clause is also important

- The clause must clearly indicate that the employee is being hired on a probationary basis, as well as the length of the probationary term
- The termination rights of the employer during the probationary term must also be set out clearly
- It is important to determine whether the provincial labour code refers to or creates any probationary status for new employees
  - In Ontario, no status is referred to or created
  - However, the ESA does provide that no minimum pay in lieu of notice is required for employees with less than three months of service

  - After that three month period of service, the minimum notice requirements for termination of employment under s.57 of the ESA become operative
  - Therefore, if the employer's probationary period is more than three months, the employee's entitlement for ESA termination pay become operative
- The hiring of an employee on a probationary term does not absolve the employer from legal duties with respect to that employee
- Numerous judicial decisions in Ontario and other jurisdictions in Canada have found that an employer hiring an employee on a probationary status has the following duties:

1. Management must assess the employee in a manner that is not arbitrary, discriminatory or in bad faith
2. The employer must impose reasonable standards of conduct and the employee must be measured against the standards which are made known to the employee
3. The employee must be provided with a fair opportunity to demonstrate his or her ability to do the job
4. The employer must provide a fair, honest and valid assessment of the employee's competence and suitability for ongoing employment

- Should the employer fail to meet any of the above duties, it may be faced with a wrongful dismissal claim
- Absent a term in the employment contract stating otherwise, an employer cannot terminate a probationary employee without just cause
- While the test for just cause for probationary employees is lower than that of a regular employee, the employer bears the onus of proving that just cause existed for termination within the probationary period

F. THE IMPORTANCE OF CONTRACTUAL TERMINATION PROVISIONS

- Employers must provide reasonable notice, or pay in lieu of notice of termination in cases where termination of employment is without reasonable cause
- Employment contracts should have termination clauses that:
  - Set out termination notice or pay
    - Upon termination on without cause basis
  - Are clearly worded and enforceable
    - Best way to limit an organization's potential liability

- Contractual termination provisions are legally enforceable so long as they:
  - Meet the minimum statutory requirements of the provincial labour laws (i.e. Ontario *Employment Standards Act 2000*); and
  - Are not in violation of any other law (i.e. Ontario *Human Rights Code*)
- If unsure whether contracts are enforceable, have them reviewed by a lawyer
- If there is no written employment contract (or the contract does not have a termination clause), then the employee is entitled to **common law** "reasonable notice" (or compensation in lieu of that notice)

- If contract does not specify the notice to which the employee is entitled, then a court will determine how much is “reasonable” under the circumstances
- Court will look at the employee’s:
  - Age, education, skills, length of service and seniority of their position within the organization
- Court will estimate how long will it take the employee to find a comparable new job - the “reasonable notice period”

- Compensation is not limited to an employee's regular pay
  - Also includes anything of value the employee would have been entitled to receive during the reasonable notice period:
    - Cash bonuses/incentives/commissions;
    - Pension plan contributions;
    - Group RRSP contributions;
    - Group benefits;
    - Car allowances;
    - Tuition subsidises;
    - Club or membership dues; and
    - Any other items of value which the employee was receiving while employed

- These “Common law notice periods” are usually significantly greater than the minimum standards mandated by the provincial labour codes and as such, the lack of a written termination clause can expose the employer to significant liability in the event of a termination of an employee without cause
- Important to have the employee sign the employment contract *prior* to commencing his or her employment
- Recent case law in Ontario has held that a written contract signed by the employee after he commenced his new job did not supersede the oral contract that was agreed to during the course of a telephone conversation between the employer and the employee three days before he was to commence his employment

G. EMPLOYEE TERMINATION: ISSUES TO CONSIDER

- The decision to terminate an employee **for cause** should not be made lightly
- This is because terminating an employee with cause without legal justification to do so will expose the employer to potentially significant liability
- For an employer to dismiss an employee without any statutory or common law notice, the law requires that the employee must have done something contrary to the employment contract, which has had the effect of undermining the entire employment relationship, such that there has been a fundamental breach of the contract

- The Supreme Court of Canada in *McKinley v. BC Tel* [2001] 2 S.C.R. 161 has stated that just cause will exist where the employee violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or whose conduct is fundamentally inconsistent with the employee's obligations to his or her employer
- In court, the onus (or responsibility) of proving cause for dismissal of an employee lies with the employer

- If the employer cannot prove just cause on the balance of probabilities, the employee will be deemed to be “wrongfully dismissed” and the employer will be responsible to pay monetary damages arising from the dismissal
- Since dismissal with cause is such a severe punishment, it can be justified only by the most serious forms of employee misconduct
- There are certain categories of conduct which have been recognized by courts to constitute cause for an employee’s dismissal without notice

- These categories include:
  1. Dishonesty (fraud and theft being examples)
  2. Insolence and insubordination
  3. Breach of trust and/or the duty of fidelity
  4. Conflict of interest
  5. Chronic absenteeism or lateness
  6. Sexual harassment
  7. Serious incompetence (after warnings)
  8. Intoxication at the workplace
  9. Fraudulent misrepresentation as to qualifications/credentials

- In each case where dismissal with cause is being considered, the employer needs to assess:
  1. Whether the employee misconduct can be proven
  2. Whether the nature and degree of misconduct is of sufficient severity to cause an irreparable breakdown in the employment relationship, either by violating an essential condition of the employment contract, or destroying the employer's inherent faith in the employee

- Having termination rights set out in the employment contract is particularly important when the employer is considering dismissal
- In order to avoid wrongful dismissal litigation, it is sometimes better simply to dismiss without cause and pay the relatively small amounts pursuant to the terms of the employment contract, rather than to face defending a much larger wrongful dismissal claim
- Unless the employer has specific insurance coverage for wrongful dismissal claims, which is not common, such claims would not be covered by liability insurance

H. CONSTRUCTIVE DISMISSAL

- When employers seek to impose unilateral and fundamental changes to the conditions of employment, without the consent of the employee, this may give rise to a claim for “Constructive Dismissal”
- The risk for employers is that the affected employee will sue the employer for compensation, seeking damages on the basis that he or she had been wrongfully dismissed
- There is no precise formula as to when a change is substantial or fundamental which may give rise to a constructive dismissal claim, but generally speaking, the greater the percentage of the employee’s compensation is affected by the change, the greater the chances of a claim

- To reduce the risk of a constructive dismissal, it is best to obtain the employee's consent to the change in writing
- An employee's consent to the change may also be implied if he or she continues to work and does not indicate any objection within a "reasonable period"
- The "reasonable period" requirement is set out in section 56(1) of the ESA
- More information on constructive dismissal is provided in article "Constructive Dismissal: Implications for Charities and Not-For-Profits", *Charity Law Bulletin* No.233, November 29, 2010, online at: http://www.carters.ca/pub/bulletin/charity/2010/chylb233.pdf

I. OBTAINING FULL AND FINAL RELEASE FROM THE TERMINATED EMPLOYEE

- An employer which pays a terminated employee an amount in excess of what is required under the ESA should require that the employee sign a Full and Final Release of any and all claims relating to his or her employment
- Such a release will protect the employer from the employee coming back at a later date with additional claims

- Without the release in hand, the employee would be within his or her legal rights to do so
- A release should also include any potential claims pursuant to the Ontario *Human Rights Code*, so that the former employee may not commence any claim or complaint alleging a human rights violation

J. THE DON'TS OF THE TERMINATION PROCESS

1. Be Careful in Alleging Just Cause

- "Capital punishment" of employment law
  - Only allege if you are certain you will be able to prove in a court of law
- Employer has the burden of proof that just cause existed and will need to prove that:
  - Reasonable grounds existed (with evidence); and,
  - A process of progressive discipline was followed:
    - Employee was provided with verbal and/or written warnings on at least one or more occasions; and
    - Employee was notified that any further improper conduct would lead to a with cause termination

- "Border-line" cases
  - Harder cases to decide on what to do
  - Prior to alleging cause, manager/board needs to assess whether they want to take on the battle or not
    - If they terminate for cause, the likelihood of litigation rises substantially

2. ESA Entitlements Do Not Require Signed Release

- Termination pay and severance pay are statutory obligations on an employer
- Not appropriate to require an employee (being dismissed without cause) to sign a full and final release as a condition of being paid the **minimum ESA entitlements**
  - If offering more to the employee than the minimum ESA entitlements, then the signing of a release is justified
    - But only for those amounts in excess of the ESA minimums

3. Do Not Require Employee to Sign a Release for Termination Package on the Same Day Being Terminated

- A terminated employee should be allowed at least a full week to consider a termination package
  - Gives the employee an opportunity to review the package with their lawyer and/or financial advisor
  - Also, court could rule that the employer put undue and improper pressure on the employee to sign a release
    - Could hold that the release is consequently not binding on the employee

4. Do Not Misinform Employees About Their Termination Entitlements

- Need to make sure that information provided (i.e. group benefit extension or conversion, pension options, accrued but unused vacation) is accurate
- If not court could set aside the agreement on the basis of misrepresentation
  - i.e. If the employee signed off on a termination package and was misinformed

5. Do Not Discuss Matters Regarding the Former Employee

- If a troublesome employee is terminated there may be the temptation to engage in gossip (i.e. internally or externally and verbally or online)
  - Matters discussed could imply dishonesty, incompetence or otherwise harmful allegations
- If it comes to the former employee's attention, the organization may be faced with defamation claims as well as a wrongful dismissal suit
  - Need to control the flow of information regarding the departed employee
  - The less said the better

6. Do Not Refuse to Give the Employee a Positive Reference

- Positive (but accurate) references are better than neutral references, which
  - Confirm dates of employment, position, title and duties without further comment
- A reference may help the employee find a new position more quickly, which
  - Limits the organization's legal obligation if a settlement cannot be reached with respect to a termination package

K. THE DO'S OF THE TERMINATION PROCESS

1. Do Terminate as Kindly and Respectfully as Possible

- Need to avoid saying or doing anything that would give the employee any ammunition in any future legal dispute

2. Do Consider Giving Working Notice

- Not always necessary (or desirable) to terminate an employee immediately and give pay-in-lieu of notice
- Working notice may be a preferable option
  - This is when the employer tells the employee that their employment will end at some future date
  - Benefit to employer as they have an employee actively working for the duration of the notice period

- Employers need to consider whether working notice will work, on a case by case basis
  - An employee who is on working notice may not put forth the expected effort
    - He/she may be more concerned with finding a new job than carrying out duties
- Also, employers may want the process to end quickly
  - Do not want an employee negatively affecting the morale of the workplace

3. Do Consider "Salary Continuation"

- Employee does not come to work, but he/she is paid his/her regular salary and benefits for the duration of the reasonable notice period

- Benefit to employer as the cost of termination is spread over several weeks or months
  - No upfront cost involved (i.e. lump sum payment)
- Salary continuation terminations are quite common
  - Especially with longer term employees with long notice periods
    - Long serving employees could have a salary continuance period of a year or more

4. Do Have All the Paperwork Ready

- Have all termination paperwork ready for the meeting with the employee
- Include:
  - Termination letter (which will set out the package to be offered); and
  - Full and final release

5. Do Keep the News Confidential Between Only Those Who "Need to Know"

- Do not want news of an impending termination to be leaked to the affected employee or other employees in the organization

6. Do Select the Right People to Meet with the Employee

- Always preferable to have two people
  - Should include the immediate supervisor
  - If serious conflict between the employee and the immediate supervisor
    - Then someone else should attend on behalf of the employer

7. Do Hold the Meeting in Private

- Boardroom or manager's office

8. Do Be Professional

- Be direct and to the point
- Do not exchange excessive small talk
- Rehearse the meeting in advance
- The termination meeting should be short, focused and calm
  - Employee may react negatively and wish to argue his or her case
  - If the employee does get very agitated, end the termination meeting gently but firmly

9. Do Consider Security Issues

- Make advance arrangements where necessary
- Should avoid the “security march to the door” scenario
  - Unless there are serious trust issues with the employee
- Is reasonable to ask for a return of all keys and pass cards
- Also reasonable to cancel access to all building facilities and equipment (i.e. computer, phone, email)

10. Do Allow Employee to Pack Up Belongings in Privacy

- Arrange for a trusted manager or human resources staff person to meet the employee after hours
- Do not force the employee to pack up his or her belongings in front of other staff members

11. Do Exercise Judgment on Whether Employee may Say Goodbye to Co-Workers

- Each termination different
  - Base decision on the situation and the personalities involved

12. Do Create a Communications Plan in Advance for Terminations of High Profile Employees

- Need to cover off how the termination will be announced internally, externally and (if applicable) in the media
- Do not announce the departure internally or externally until after the employee has been informed

13. Do Be Conscientious and Responsible About Follow-up Items

- Need to ensure that any promised payments and termination related documents (i.e. Records of Employment) are issued on time
- Have payroll double check its calculations for accuracy

L. CONCLUSION

- Minimizing the risks of liability to employees is part of an organization's overall risk management strategy
- With proper foresight and planning, beginning at the commencement of the employment relationship, the pitfalls that often lead to liability can be avoided

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