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LABOUR & EMPLOYMENT LAW NEWSLETTER



Did you know...

Off-limit interview questions: It’s illegal and discriminatory to specifically ask job applicants about their marital status, age, race, religion or any other prohibited ground under the Ontario Human Rights Code.

Vacation Pay: With a written agreement, employees can give up their vacation as time off. They must, however, be paid for the time worked and also receive their vacation pay.

Parental Leave: Employees are entitled to parental leave if they are: the birth parents; adoptive parents – even if the adoption is not finalized - or are in a permanent relationship and treat their partners’ children like their own.

Termination Notice: Employees who work less than three months are not entitled to notice of termination.

Construction: Most construction workers are entitled to overtime only if they work more than 55 hours in a week.

Misconduct and computers: Employees can’t be disciplined for violating the rules or policies governing the use of computers, Internet or email if employers have failed to explain or vigorously enforce those policies.

Alternative job offer: Employees can be dismissed without notice or termination pay if they refuse a reasonable, alternative job offer with the same employer.

Severance Pay: Employees are only entitled to severance pay if they’ve worked for more than five years and their employer has a payroll of \$2.5 million or more.

Bad Faith: Employers could be liable for ‘moral damages’ if they show ‘bad faith’ conduct when dismissing employees. These damages can cover the humiliation, damaged reputation, anxiety or mental distress suffered by employees because of the way they were terminated.

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THE DO'S AND DON'TS OF RELEASING PROBATIONARY EMPLOYEES

Many employers and HR managers think they can dismiss probationary employees without paying them, but this employer-employee relationship is widely misunderstood. Many employers assume that they have the discretion to hire and fire probationary employees as they wish. This can be a costly misconception.

DANGEROUS MISCONCEPTIONS:

MYTH # 1 - As long as employers tell employees that they are on probation, they can later be dismissed without notice or termination pay for poor performance. Right or wrong?

Wrong. Probationary employees have no special legal status that sets them apart from other employees – except as defined in their employment contracts. In fact, the term “probationary employee” isn’t even in the Employment Standards Act (ESA), the law that governs most employer-employee relationships in Ontario.

Since probationary status is created by the employment contract, it’s up to employers to define the terms and conditions of employment for these workers. Simply writing in the contract that an employee is on probation is largely meaningless.

MYTH # 2 - Employers can dismiss probationary employees at any time without termination pay, notice, or pay in lieu of notice. Right or wrong?

Wrong. Probationary employees generally enjoy the same rights in law as permanent employees unless otherwise stated in the employment contract. This means that they are entitled to termination pay or pay in lieu of notice when dismissed.

MYTH # 3. Employers can dismiss employees for any reason while they are on probation. Right or Wrong?

Wrong. Probationary workers can only be dismissed subject to these rules:

- a) Dismissals are done in ‘good faith’. This means, for example, that employers have a genuine concern about an employee’s ability to fit in.
- b) Employers don’t violate the Canadian Human Rights Act (or the Ontario Human Rights Code) and dismiss employees – even partly or indirectly – because of their race, gender, age, sexual orientation and religion.
- c) Employers must give employees a full and proper opportunity to prove themselves on the job.

The courts can rule dismissals illegal and award significant damages to aggrieved employees if these rules and procedures aren’t followed.

MYTH # 4 - Employers can put workers back on probation at any time. Right or wrong?

Wrong. Unless they consent, employees can’t be put back on probation after becoming regular employees. An employer who does this could be accused of constructive dismissal and face significant claims for termination pay or pay in lieu-of-notice.

In Conclusion....

Employment contracts with probationary and termination clauses are critical to protecting employers from future claims from dismissed employees. Employers should review their contracts periodically with employment lawyers to ensure that they comply with any developments or changes in the law.

“In managing Human Resources, as much as in other areas,
an ounce of prevention is worth a pound of cure”

MY WORKERS: EMPLOYEES OR INDEPENDENT CONTRACTORS?

It's critical that employers know the difference between these two because the financial and legal obligations owed to each one are poles apart. If the workers are employees, employers must give them reasonable notice, pay-in-lieu of notice and severance when their work is terminated. Employers also have to collect payroll deductions for taxes and make contributions for CPP and EI.

Employers, however, have none of these obligations, if their workers are independent contractors.

A common misconception is that workers are independent contractors as long as they sign contracts saying that they are incorporated and work as independent contractors. For the courts, however, it's the nature of the working relationship with the employer, not the contract, that matters.

The courts have repeatedly ruled that a worker may be an employee even though both the worker and the employer honestly believed that the worker was an independent contractor.

This can be costly, especially when employers try to terminate the workers' employment. Employers, who mistakenly believed that they hired independent contractors who could be terminated without financial consequences under their contracts, can suddenly find themselves with 'employees' and liable for severance and termination pay.

These employers would also owe money to Workers' Compensation and Employment Insurance for payments which they didn't make due to the mistaken belief that they employed independent contractors rather than employees. Employers are also responsible for any income tax owed by workers who are deemed to be employees.

The Working Relationship...

The courts have said that it is the working relationship itself, rather than the wording of employment contracts which is key to determining whether workers are employees. That relationship can be determined by the following questions.

1. Who controls the way the work is done? Workers who decide when they start and end work; where they work and how they work, are more likely to be considered independent contractors than employees.
2. Who owns the tools or equipment to do the work? If these are owned by the workers, the courts are likely to consider them independent contractors.
3. Profit or Loss? Workers who run the risk of loss or chance of profit in carrying out their work responsibilities are more likely to be deemed to be independent contractors.
4. Part of the workforce? The more the worker is integrated into an organization's workforce, such as having an office or being listed in the phone directory, the more likely the courts are to find them to be employees and not independent contractors.

There is No magic formula. There is no precise rule for determining what makes workers independent contractors or employees. The court will consider all of the above variables and weigh them differently depending on the situation. The courts could decide that someone was an independent contractor even if they met three of the four variables that suggested that they were employees or vice versa. It depends on the importance which the court puts on the variables that shape the relationship with the employer.

“...There is NO magic formula to determine whether your workers are employees or independent contractors...”

DEPENDENT CONTRACTORS

The courts also recently recognized a middle ground that falls between employees and independent contractors, called ‘dependent contractors’. This means employers must now provide some degree of reasonable notice to dependent contractors prior to terminating their employment..

In the case of *McKee v. Reid’s Heritage Homes Ltd.*, the Ontario Court of Appeal found that workers in certain contractual relationships who have a ‘complete or near exclusive’ economic dependence on an employer are entitled to the same reasonable notice or pay in lieu of notice given to regular employees.

In the 2010 case of *Colliers Macanley Nicolls (Ontario) Inc. and EMS Technologies Canada, Ltd.*, an Ottawa area commercial real estate broker sued his former client for terminating his mandate prior to the end of a building project without giving notice.

Colliers tried to argue that the broker was a dependent contractor. The court rejected the claim, saying the broker didn’t have ‘complete or near-exclusive’ economic dependency on EMS because it also had other clients at the same time.

Employers must understand the nature of the overall relationship with their workers to determine whether they’re employees, independent contractors or dependent contractors. Employers who harbour any doubts about the relationship with their workers should consult an employment lawyer to clarify what could otherwise be a costly misperception of the law.



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Employment Law Statutory and Regulatory Update

Workplace Violence and Harassment.

The Ontario government recently introduced new violence and harassment prevention requirements in the Occupational Health Safety Act (Bill 168) that all workplaces had to comply with, effective June 15, 2010. Notable changes include:

- Employers with more than five employees must create workplace violence and harassment prevention policies; develop programs to implement those policies and conduct assessments and recurrent reassessments to determine the risk of workplace violence.
- The definition of “workplace violence” has been expanded from actual and attempted physical violence to include threats of physical violence.
- Workers may refuse to work if they have reason to believe they could be in danger of becoming a victim of workplace violence.
- In certain circumstances, employers and supervisors must provide information to a worker about another person, such as a colleague or client, with a history of violent behaviour.
- Employers and supervisors must take reasonable precautions to protect workers from domestic violence.

Employers who don't comply with these changes can face penalties, including fines and imprisonment (for non-corporate employers). They also risk lawsuits related to any incidents of violence or harassment in the workplace.

Open for Business Act (Bill 68)

Last month, Ontario passed the Open for Business Act and made significant changes to the province's ESA.

These changes are aimed at making the employment standards system more efficient, cheaper and faster. They require employees to file notices of alleged claims earlier and offer more opportunities for parties to settle. It's hoped the new law will help reduce a backlog of 14,000 workers' claims filed with the Ministry of Labour.

Key changes include:

- A mandatory 'self-enforcement' step, requiring workers to first confront employers before filing a complaint with the Ministry of Labour about disputes over working conditions, owed wages, wrongful dismissal, vacation and overtime pay.
- A requirement that workers must provide arguments and evidence to support their cases before the Ministry will accept claims.
- A requirement that Employment Standards Officers will now be allowed to facilitate settlements. This used to be the exclusive responsibility of Ontario Labour Relations Board adjudicators.

British Columbia introduced a similar 'self-help' regime in 2002 and soon after the number of labour claims dropped by close to half.

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Questions and comments concerning materials in this newsletter are welcomed and encouraged.