Five Tips for Avoiding Employment Law Pitfalls

At each stage of the employment relationship—from advertising to managing to firing—there are pitfalls in employment law that can trap an unsuspecting employer. Here are five tips to help you avoid some common ones:

1. **Avoid a human rights complaint based on your advertising.**

   One of the big employment law areas that can affect employers is human rights law. An important point to realize is that human rights law governs your conduct before an employment relationship is started.

   Let’s say you need to hire a new receptionist and decide to place an advertisement in your local paper. Having considered the qualifications you are looking for, you write in your advertisement: “The successful applicant must have unaccented English.” Should you publish this ad?

   No. Asking for unaccented English is discriminatory according to the Ontario Human Rights Commission. However, it is acceptable to require “the ability to speak clearly in English”. The Commission’s position is that the requirements or duties of a position must be “reasonable, genuine and directly related to the job”.

2. **Avoid getting discriminatory information through your applications.**

   If a person who unsuccessfully applied for a position in your office goes on to file a complaint against you with the Human Rights Commission, you will need to have evidence that your decision not to hire him or her was not based on discriminatory grounds. If you have information about the complainant that identifies them as being part of a protected group under the Human Rights Code, you will have a problem even if you didn’t ask for that information.

   Many people are surprised to discover, for example, that asking for names of schools on an application is considered discriminatory because it can identify the applicant’s religious or ethnic background. For this and many other reasons, it is preferable to avoid using résumés and instead to rely on a standard application form that every applicant completes and that is carefully drafted to avoid any human rights problems. For a complimentary, sample application form, [click here](#).

3. **Ensure new hires sign written employment agreements before they start or work with an employment lawyer to transition existing staff.**

   It’s hard to think of a good reason not to use a written contract. After all, if you do not expressly address an issue in a written agreement, the law will imply it for you. And it will usually be less favourable to your interests as an employer than what you would have agreed to voluntarily. So, using a written contract is a great idea.

   The problem is that employers often only get an employee to sign a contract the day the employee starts, or worse, even later. It’s too late then. Once the employee has started to work, the contract between you is fixed—such as it is—by law. Your putting forth at that point a written agreement for the employee to sign will usually be seen by the Courts as a unilateral attempt to change the existing (though unwritten) contract, and it will therefore likely not be binding on the employee. One way to make it binding at this point is to give the employees reasonable notice of the new contracts. This is best done with the help of an employment lawyer to ensure it is perfectly enforceable. So, yes, a written contract with all staff is a no-brainer. But ensure it's done properly or your effort may be all for nothing.

4. **Disciplining an employee without a discipline policy in place may constitute constructive dismissal.**
Imagine you have an employee working for you—let’s call her Kim. One day, Kim is insolent to you. In front of all of your staff, she tells you not to “*****” with her. When you follow her into an adjacent room, she says “up yours”. You send Kim home and suspend her for three days without pay. Kim asks that the suspension be converted to three fewer vacation days. You refuse. Kim quits and sues you for constructive dismissal. What do you think will legally result?

In a similar case, a Court awarded the employee damages for constructive dismissal. While it may seem unfair to the employer, the important point to realize is that if you make a significant enough change to your employee’s contract, you may trigger a constructive dismissal lawsuit. A key factor in this case was that the Court found the employer did not have a discipline policy in place. Suspending the employee was therefore considered by the Court to be a fundamental change to her contract resulting in a constructive dismissal.

Courts are increasingly looking for employers to be flexible with employees and for any discipline imposed to be reasonable and balanced.

5. Be a kinder, gentler employer.

The Supreme Court of Canada has said the following:

Work is one of the most fundamental aspects in a person’s life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person’s employment is an essential component of his or her sense of identity, self-worth and emotional well-being.

The Courts expect employers to be fair. They expect employers to treat employees with dignity and respect. They expect employers to be knowledgeable about their considerable obligations as employers.