

February 2011

**AN OVERVIEW
OF EMPLOYMENT AND
LABOUR LAW**

**FEBRUARY 22, 2011
CE402 ENGINEERING AND THE LAW
UNIVERSITY OF BRITISH COLUMBIA
BY
VANESSA L. REAKES
OF
SHAPIRO HANKINSON & KNUTSON LAW CORPORATION**

Vanessa L. Reakes
Shapiro Hankinson & Knutson Law
Corporation
Law Corporation
700 – 555 Burrard Street
Vancouver, BC V7X 1M8
604.408-2044
vlr@shk.ca

AN OVERVIEW OF EMPLOYMENT AND LABOUR LAW ISSUES

a presentation by Vanessa Reakes of
Shapiro Hankinson & Knutson Law Corporation
700 – 555 Burrard Street, Vancouver, BC V7X 1M8
604.408-2044
vlr@shk.ca

1. **INTRODUCTION:** This presentation will briefly review:
 - (a) **“employees” v. “independent contractors”:** the legal test and the major financial implications
 - (b) complying with the *Employment Standards Act*: issues for engineers
 - (c) issues arising on termination of employment
 - (d) restrictive covenants
 - (e) human rights legislation
 - (f) introduction to labour law

Although designed primarily from the perspective of employers and managers, this information will also be relevant to you as an employee/contractor.

2. **INDEPENDENT CONTRACTORS:** When planning to hire someone as an independent contractor, ensure that you can prove that the person is, in fact, an independent contractor.
- (a) all providers of personal services fall into two legal categories, regardless of the “labels” used by the parties:
- employees: including parttime and fixed term hires. Tax, EI and CPP is deducted from pay.
 - “independent contractors”: all others whether called “consultants,” “freelancers” or “contractors” and whether or not incorporated. No tax, etc., deducted from payments
- (b) government agencies (Canada Revenue Agency (“CRA”), Employment Standards (“EI”)) can challenge your agreement on contractor status.
- (c) if the “client” (i.e., the party that retains a person as an individual contractor) is deemed an employer, this can lead to possible exposure for retroactive liabilities for income taxes, EI, CPP and overtime, statutory holiday and vacation pay, i.e., if the “client” is deemed to be an employer, that person/company may be liable for amounts owed by the “contractor,” who is deemed to be an employee, in relation to unpaid income taxes, EI, CPP and other statutorily required payments.

THE TEST

- (d) the test for distinguishing an employee from an independent contractor is multi-factored and complex but based on the following realities of the relationship:
- the degree of control over how the work is done
 - who owns or supplies the “tools” of production
 - the chance of profit or risk of loss for the worker in the compensation arrangements, e.g., flat project fee vs. hourly
 - how “integral” the worker is to the business
 - other factors also considered:
 - (A) is the “contractor” really “in business?” i.e., marketing to or servicing multiple clients?
 - (B) can the “contractor” subcontract work?
 - (C) written agreements are relevant but not determinative.
 - (D) other practices, e.g., is the worker on the employee benefit plan?

3. EMPLOYMENT STANDARDS COMPLIANCE

- (a) The *Employment Standards Act* (“ESA”) **does not apply to a professional engineer, trainee or a true “independent contractor.”** It applies to almost all other employees, including:

- technologists – there is an exception for “high technology professionals” in the ESA Regulations
- “draftspersons” or non-registered “engineers”
- nonengineering support staff and draftspersons
- so-called consultants/freelancers/etc. who are legally deemed to be employees and not registered architects

(b) Principal ESA entitlements include:

- 2 weeks’ vacation per year (3 weeks after 5 years’ service)
- statutory holiday pay
- overtime pay:
 - (A) “time and a half” after 8 hours in a day or 40 hours in a week
 - (B) double time for hours over 48 in a week
 - (C) time-banking permitted by written agreement, but must accrue at overtime rates (e.g. 1 hour overtime equals 1.5 banked hours)
- Leaves: Pregnancy (17 weeks), Parental (35 weeks), Bereavement (3 days) and Family Leave (5 days a year). The ESA does not require pay for such leaves.
- minimum termination notice/severance:

3 months - 1 year	1 week
1 year - 3 years	2 weeks
3 years or more	1 week per year of service to maximum of 8

The ESA also contains provisions relating to “mass termination,” i.e., termination rules for over 50 employees at one location within two months

But note: termination notice/pay requirements do not apply to:

- persons hired for a fixed term or project when terminated at end of hire period; or
- persons who are employed at construction sites by an employer whose principal business is construction – there are exceptions to this exemption if the employee has had some degree of permanence with same employer.

IMPORTANT:

- employees cannot “contract out” of the provisions of the ESA (i.e., even by signing a written agreement, employees cannot waive these rights or agree to alternate arrangements)
- some exceptions exist for each entitlement, but exempted categories are few, e.g., “managers” (who meet the test in the ESA) and “high tech professionals” (generally computer or research-type jobs) are exempt from overtime pay

4. TERMINATION ISSUES:

- (a) On departure:

- The employer owns the copyright in drawings and all work product created in the course of employment in whatever form. A contractor retains ownership unless expressly transferred by agreement, so clients need to contract for ownership of rights to designs
 - Try to agree on how to allocate clients/projects
 - properly drafted written agreements can legally restrict solicitation or service of clients, but you will need legal advice (see Restrictive Covenants, below)
 - be aware of Code of Ethics requirements, e.g., principle 4: maintain confidentiality
- (b) **Just Cause:** The onus of proving “just cause” is always on the employer
- (A) warnings may not be necessary in rare cases of **provable serious** dishonesty or disloyalty, such as:
- (1) fraud, theft, dishonesty
 - (2) sexual harassment, where supported by a thorough investigation
 - (3) gross insubordination, e.g., unprovoked verbal abuse of supervisor in front of customers
 - (4) lengthy unjustified absence
 - (5) conflict of interest, e.g., moonlighting by doing cash work for clients

- (B) but in most cases, prior warnings are necessary. Even if warnings are given, the Courts will also consider:
 - (1) the seriousness of the problem relative to overall performance, length of service and other factors
 - (2) the reasonableness of the employer's expectation (e.g., a requirement to increase productivity which others are not required to satisfy)
 - (3) employee excuses
- (C) always seek legal advice when anticipating termination for just cause
- (c) **Terminations “not for cause”**: This covers all other terminations, including:
 - (A) performance problems which do not amount to just cause (e.g., no prior warnings)
 - (B) personality or “fit” issues
 - (C) lack of work, restructuring
 - Notice or Severance will vary according to the employee:
- (d) Term/Project Hires
 - (A) employees hired for a fixed term project are not entitled to notice or severance if terminated at the end of the term/project

(B) if employment continues beyond the original hire term/project without express agreement on an extension, notice or severance will be required

(e) Written Termination Clause

(A) employees hired indefinitely but with a written agreement containing a termination clause must receive the contract notice or severance in lieu

All Others

(B) at a minimum, eligible employees must receive *Employment Standards Act* minimums set out above

(C) most employees (**including engineers!**) are also entitled to receive “reasonable notice” or severance in lieu set by the courts on a case-by-case basis. The terms of notice are set by the common law and are outside the scope of the ESA

(D) the employer can provide working notice or severance in lieu or a combination of both to satisfy both ESA and common law “reasonable notice” requirements

(E) severance must reflect all “integral” components of the employee’s compensation package payable over the notice period, e.g., benefits, non-discretionary bonuses

(F) you will need HR/legal advice before terminating or offering severance

- (G) courts will award extra severance for employer's "**bad faith**" behaviour during termination. Examples include:
- (1) false accusations of dishonesty
 - (2) withholding statutory minimum severance as "leverage" in negotiations
 - (3) unwarranted negative references, and
 - (4) other "unduly insensitive" behaviour
- (f) **Constructive Dismissal:** Both Employment Standards and the courts permit employees to leave their employment and claim severance if the employer unilaterally (i.e., without employee agreement) substantially negatively changes the terms of employment. Examples include:
- (A) demotion
 - (B) reduced compensation
 - (C) reduction in responsibilities
 - (D) relocation (in some cases)
- **Special Cases:** Be careful to obtain specific detailed legal advice before terminating in sensitive cases such as:
 - (A) disabled/sick employee
 - (B) alleged harasser
 - (C) allegations of dishonesty
 - (D) drug/alcohol addiction-related performance problems
 - (E) employee on or about to take maternity or parental leave
 - (F) possible discrimination allegations

(G) employees who were “enticed” from employment elsewhere.

5. RESTRICTIVE COVENANTS

- (a) Clauses in employment agreements that purport to restrict the ability of an employee to perform his service or otherwise solicit business after the relationship between the employer and employee has ended are call “restrictive covenants”.
- (b) To be enforceable a restrictive covenant must be limited in terms of its geographic, temporal and activity restriction.
- (c) If the covenant is not clear as to activity, time of geography it is not enforceable.
- (d) The terms are common in engineering employment agreements
- (e) Before signing a contract that contains a restrictive covenant or leaving employment where a restrictive covenant is in play, consult legal advice.

6. HUMAN RIGHTS ISSUES

- (a) Human Rights Tribunal – separate from the Courts. Deals with human rights complaints.
 - In order for discrimination to give rise to a remedy, it must be prohibited by the *Human Rights Code*.
 - Prohibited grounds include – religion, ethnic origin/race, skin colour, age, disability and gender.
 - Employers are permitted to discriminate based on level of education or level of experience.
 - Employers can discriminate based on disability if the physical ability affected is a genuine job requirement and the disability cannot be dealt with through reasonable accommodation such as modifying equipment or furniture to allow the employee to work properly.

7. **LABOUR LAW** – refers to the law that governs union-management relationships as well as employee-union relationships.
- (a) Union is authorized to enter into employment contract with the employer on behalf of employees who are members of the union. Employer cannot negotiate directly with employee once union representation is established.
 - (b) Employees who are employed in a managerial or supervisory role are often excluded from the definition of “employee” in a collective agreement.
 - (c) Different union security arrangements include:
 - **closed shop** – membership in the union is a precondition of hiring.
 - **union shop** – employees must become union members after they are hired.
 - **open shop** – no union membership requirement.
 - **Rand formula** – term in a collective agreement that requires employees to pay union dues but not necessarily join the union.
 - (d) Strikes and lockouts are the ultimate weapons in a labour dispute.
 - as long as collective agreement is in force, strikes and lockouts are illegal.
 - in BC, *Labour Relations Code* prevents employers from hiring replacement workers during a work stoppage.
 - (e) If individual or company purchases a business or substantial assets of a business, there is a risk that along with the business or its assets will be attached an obligation to bargain with a union.
 - (f) A **grievance** is a complaint made either by the union (on behalf of an employee) or an employer, stating that the other party has breached the collective agreement. Third party is appointed to adjudicate the grievance.

- (g) A **layoff** is the temporary suspension of employment.
- Most collective agreements include a clause that permits an employer to increase or decrease size of workforce, depending on business needs.
 - Layoff is not the same as termination, which is the permanent end of the employment relationship.
 - Layoffs and hirebacks have to be based on seniority, i.e., junior workers must be laid off before senior employees and senior employees must be hired back before junior employees.

8. **CONCLUSIONS:** Some key pro-active steps to take:

- (a) Ensure contractor relationships can be defended. Consider restructuring the terms to “bulletproof” from review
- (b) Ensure overtime compliance
- (c) Implement written employment agreements with termination clauses
- (d) Implement good written policies and procedures to cover topics such as performance reviews and evaluations, disciplinary measures, discrimination policy, harassment policy, substance abuse and telephone, internet and email use.

Good luck!