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EMPLOYMENT AND LABOUR LAW

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INTRODUCTION

- “Employees” v. “independent contractors”: the legal test and the major financial implications
- Complying with the *Employment Standards Act*
- Issues arising on termination of employment
- Restrictive covenants
- Human rights legislation

EMPLOYEE v. INDEPENDENT CONTRACTORS

- Employees: including part-time and fixed-term hires
 - Tax, EI and CPP is deducted from pay
- Independent contractors: whether called “consultants,” “freelancers” or “contractors” and whether or not incorporated
 - No tax, etc., deducted from payments
 - Can be challenged by CRA, Employment Standards

The Test

- 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

EMPLOYMENT STANDARDS COMPLIANCE

- The ESA does **not** apply to a professional engineer, trainee (i.e., a person who is enrolled as an engineer in training under the bylaws of the council of EGBC) or a true independent contractor
- If the workplace is unionized, the provisions of the ESA that deal with issues covered by the collective agreement do not apply to those employees covered by the collective agreement

TERMINATION

- Just cause: the onus is *always* on the employer
- Prior warnings are required, unless there is serious dishonesty or disloyalty, such as:
 - Fraud, theft
 - Sexual harassment
 - Gross insubordination
 - Lengthy unjustified absence
- Always seek legal advice prior to termination for just cause

TERMINATION (cont.)

- Not for cause
 - performance problems which do not amount to just cause (e.g., no prior warnings)
 - personality or “fit” issues
 - lack of work, restructuring
- Employees hired for a fixed term project are not entitled to notice or severance if terminated at the end of the term/project
- Employees hired indefinitely but with a written agreement containing a termination clause must receive the contract notice or severance in lieu

TERMINATION (cont.)

- Dependent Contractors
 - a person/company who is a “dependent contractor” is entitled to reasonable notice of termination, similar to an employee
- Indicia of a dependent contractor:
 - Working predominantly for one client
 - Subject to the control of the client as to how services are provided
 - Not permitted to work for a competitor
 - Has to follow client’s policies and wear client’s uniform

NOTICE AND SEVERANCE

- Eligible employees are entitled to ESA minimums
- Reasonable notice or severance in lieu is outside the scope of the ESA
- Courts will award extra severance if an employer's behaviour is found to be in "bad faith"
- Always seek legal advice prior to termination for just cause or offering severance

CONSTRUCTIVE DISMISSAL

- If the employer unilaterally substantially negatively changes the terms of employment:
 - demotion
 - reduced compensation
 - reduction in responsibilities
 - relocation (in some cases)

CONSTRUCTIVE DISMISSAL (cont.)

- Obtain legal advice when terminating sensitive cases such as:
 - disabled/sick employee
 - alleged harasser
 - allegations of dishonesty
 - drug/alcohol addiction-related performance problems
 - employee on or about to take maternity or parental leave
 - possible discrimination allegations
 - employees who were “enticed” from employment elsewhere

RESTRICTIVE COVENANTS

- 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
- To be enforceable, a restrictive covenant must be:
 - limited in terms of its geographic, temporal and activity restriction
 - clear as to activity, time or geography
- Common in engineering employment agreements
- Before signing a contract or leaving employment where a restrictive covenant is in play, obtain legal advice.

HUMAN RIGHTS ISSUES

- 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.
 - religion, ethnic origin/race, skin colour, age, disability and gender
- Employers are permitted to discriminate based on level of education or 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

LABOUR LAW

- Governs union-management relationships as well as employee-union relationships.
- Union is authorized to enter into employment contract on behalf of employees who are members of the union. Employer cannot negotiate directly with employee once union representation is established.
- Employees who are employed in a managerial or supervisory role are often excluded from the definition of “employee” in a collective agreement.

LABOUR LAW (cont.)

- 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.
- When purchasing a business or its assets, there is a risk that an obligation to bargain with a union will be attached
- A grievance is a complaint made either by the union (on behalf of an employee) or an employer. A third party is appointed to adjudicate the grievance

CONCLUSION

- Ensure that contractor relationships can be defended
- Ensure overtime compliance
- Implement written employment agreements
- Implement good written policies and procedures for:
 - performance reviews and evaluations
 - disciplinary measures
 - discrimination
 - harassment
 - substance abuse
 - telephone, internet and email use



LAW CORPORATION

**AN OVERVIEW
OF EMPLOYMENT AND LABOUR LAW**

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AN OVERVIEW OF EMPLOYMENT AND LABOUR LAW ISSUES

1. Although designed primarily from the perspective of employers and managers, the following information will also be relevant to an employee/contractor. This overview will address:
 - (a) “employees” v. “independent contractors”: the legal test and the major financial implications
 - (b) complying with the *Employment Standards Act* (“ESA”)
 - (c) issues arising on termination of employment
 - (d) restrictive covenants
 - (e) human rights legislation

INDEPENDENT CONTRACTORS

2. When planning to hire 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:
 - (i) employees: including part-time and fixed term hires;
 - (A) tax, EI and CPP is deducted from pay.
 - (ii) independent contractors: all others, whether called “consultants,” “freelancers” or “contractors” and whether or not incorporated;
 - (A) no tax, etc., deducted from payments
 - (b) government agencies (Canada Revenue Agency (“CRA”), Employment Standards) can challenge your agreement on contractor status.
 - (c) if the “client” (the party that retains a person as an individual contractor) is deemed an employer, it can lead to:
 - (i) possible exposure for retroactive liabilities for income taxes, EI, CPP and overtime, statutory holiday and vacation pay; and
 - (ii) employer liability for amounts owed by the “contractor” when deemed by CRA to be an employee in relation to unpaid income taxes, EI, CPP and other statutory payments.

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

EMPLOYMENT STANDARDS COMPLIANCE

4. The entire ESA does **not** apply to a professional engineer, trainee (i.e., a person who is enrolled as an engineer in training under the bylaws of the council of EGBC) or a true independent contractor. As presently worded, the ESA appears to apply to engineering co-op students unless such co-op students are, in fact, enrolled as “engineers in training” with EGBC, in which case the ESA would not apply to those students.
5. ESA applies to almost all other employees, including:
 - (a) technologists – there is an exception for “high technology professionals” in the ESA Regulations
 - (b) “draftspersons” or non-registered “engineers”
 - (c) non-engineering support staff and draftspersons
 - (d) so-called consultants/freelancers/etc. who are legally deemed to be employees and not registered architects
6. If the workplace is unionized and a collective agreement is in place and if the collective agreement includes provisions relating to any of the following:
 - hours of work
 - overtime
 - statutory holidays

- annual vacation or vacation pay
- seniority retention
- recall
- termination of employment
- layoff

then the provisions of the ESA that deal with these issues do not apply to those employees covered by the collective agreement. For example, if the collective agreement provides that employees are not entitled to overtime pay, then the collective agreement governs and the employee cannot make a claim for overtime pay pursuant to the provisions of the ESA.

7. Principal ESA entitlements include:

- (a) 2 weeks' vacation per year (3 weeks after 5 years' service)
- (b) statutory holiday pay
- (c) overtime pay
 - (i) "time and a half" after 8 hours in a day or 40 hours in a week
 - (ii) double time for hours over 48 in a week
 - (iii) time-banking permitted by written agreement, but must accrue at overtime rates (e.g., 1 hour overtime equals 1.5 banked hours)
- (d) Leaves: Pregnancy, Parental, Bereavement Compassionate Care Leave and Family Leave. The ESA does not require that employees be paid for such leaves.
- (e) Probationary period - a defined time period (often 3 months, but it can be longer or shorter) established at the start of employment which is intended to give the employer sufficient time to determine the employee's suitability for the job. If, during this period, the employer determines that the new employee is not suitable, the employer may be able to terminate the employee without cause and without any obligation to give notice or severance, as long as there was a clear understanding that the employer could do this during the probation, and the assessment of the employee's suitability is done on a fair and reasonable basis and was not done in bad faith or for an improper motive. In all cases, if a probation period lasts longer than 3 months and an employee is terminated without cause, the employer is still required to give the employee the minimum notice set out under the ESA. The employer can, of course, terminate the employee for just cause (i.e., without notice or severance) during the probationary period.

8. 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

9. An employee may be entitled to longer notice/more severance than the minimum provisions set out in the ESA. The common law often requires a longer notice period than is provided in the ESA. The amount of notice an employer might be required to give at common law is “reasonable notice.” The length of reasonable notice depends on several factors, including the character and length of employment, the employee’s age, experience, training and qualifications, and the availability of similar employment.
10. If an employer has a written contract with the employee that deals with notice and/or severance, then the provisions in the contract will determine how much notice the employer is required to give an employee terminated without cause, so long as it is not less than what they would be required to give under the ESA.
11. Employers are not allowed to contract out of the minimum notice provisions set out in the ESA. If the contractual provisions dealing with notice and severance are not worded properly, that entire section of the contract could be void, in which case the common law rules for calculating notice would apply.
- (a) The ESA also contains provisions relating to “mass termination,” i.e., termination rules for over 50 employees at one location within two months
 - (b) Termination notice/pay requirements do not apply to persons hired for a fixed term or project when terminated at the end of the hire period

IMPORTANT:

12. If the ESA applies to the employee, the employer cannot “contract out” of the provisions of the ESA (i.e., even by signing a written agreement (with the exception of collective agreements entered into between the union and the employer).

TERMINATION ISSUES:

13. **Just Cause:** The onus of proving “just cause” is always on the employer. Warnings may not be necessary in rare cases of **provable** serious dishonesty or disloyalty, such as:
- (a) fraud, theft, dishonesty
 - (b) sexual harassment, where supported by a thorough investigation
 - (c) gross insubordination, e.g., unprovoked verbal abuse of supervisor in front of customers
 - (d) lengthy unjustified absence

- (e) conflict of interest, e.g., moonlighting by doing cash work for clients
14. In most cases, prior warnings are necessary. Even if warnings are given, the Courts will also consider:
- (a) the seriousness of the problem relative to overall performance, length of service and other factors
 - (b) the reasonableness of the employer's expectation (e.g., a requirement to increase productivity which others are not required to satisfy)
 - (c) employee excuses
15. Always seek legal advice when anticipating termination for just cause.
16. **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
17. Notice or Severance will vary according to the employee:
- (a) Term/Project Hires
 - (i) employees hired for a fixed term project are not entitled to notice or severance if terminated at the end of the term/project
 - (b) Written Termination Clause
 - (i) employees hired indefinitely but with a written agreement containing a termination clause must receive the contract notice or severance in lieu
 - (c) All Others
 - (i) at a minimum, eligible employees must receive *Employment Standards Act* minimums set out above
 - (ii) most employees 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
 - (iii) 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
 - (iv) you will need HR/legal advice before terminating or offering severance.

18. **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)

19. **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.

RESTRICTIVE COVENANTS

20. 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”. To be enforceable a restrictive covenant must be:
 - (a) limited in terms of its geographic, temporal and activity restriction; and
 - (b) clear as to activity, time or geography.

21. The terms are common in engineering employment agreements

22. Before signing a contract that contains a restrictive covenant or leaving employment where a restrictive covenant is in play, obtain legal advice.

HUMAN RIGHTS ISSUES

23. The Human Rights Tribunal is separate from the Courts, and deals with human rights complaints.
- (a) In order for discrimination to give rise to a remedy, it must be prohibited by the *Human Rights Code*.
 - (b) Prohibited grounds include religion, ethnic origin/race, skin colour, age, disability and gender.
 - (c) Employers are permitted to discriminate based on level of education or level of experience.
 - (d) 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.

LABOUR LAW

24. Labour law governs union-management relationships as well as employee-union relationships.
25. 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.
26. Employees who are employed in a managerial or supervisory role are often excluded from the definition of “employee” in a collective agreement.

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