

Covering your Assets: Common employer liabilities and best practices for managing HR risk

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Avoiding Common Employer Liabilities and HR Risks

1. Invest in a well-drafted (and updated) employment contract
2. Avoiding liability for bonus / incentive payments upon termination
3. Ontario's new Bill 132: what is required?
4. Update your employee leave policies
5. Employee or independent contractor?
6. Effective implementation of workplace changes
7. Keeping on top of AODA compliance requirements
8. New statutory training requirements

1. Invest in a Well-Drafted (and Updated) Employment Contract

- A well drafted employment contract or offer letter is the best protection for an employer
- When describing employee compensation, build in appropriate flexibility
 - Refer to “eligibility to participate”, not entitlement
 - Where appropriate, reference the terms and conditions of the underlying plans, or the employer’s policies, as amended from time to time (e.g. vacation policy)
 - When describing incentive, commission or bonus plans, refer to only the current year’s plan
 - Be careful: specific list of benefits = contractual entitlement

1. Invest in a Well-Drafted (and Updated) Employment Contract

• Restrictive Covenants

It can be challenging to negotiate restrictive covenants as part of a severance package, or even during employment. If they are necessary, negotiate them up front.

Three types:

- Confidentiality and non-disclosure covenants are generally enforceable
- Non-solicitation covenants which are often enforceable if reasonable in scope
- Non-competition covenants, which are generally unenforceable unless exceptional circumstances exist

1. Invest in a Well-Drafted (and Updated) Employment Contract

• Termination Provisions

- Must confirm eligibility for bonus, commission, group benefits and other perquisites during the notice period
- Definition of probationary period – if you want to terminate without notice, the period must be three months less a day
- If you wish to rely on mitigation, notwithstanding a contractual provision that provides for fixed amount of pay in lieu of notice, then include confirmation in agreement
- Requirement to provide a full release of claims in exchange for the contractual termination payment

2. Avoiding Liability for Bonus / Incentive Payments upon Termination

Kielb v. National Money Mart Company, 2015 ONSC 3790

- Kielb was terminated before the employer's bonus payment date, and did not receive a bonus payment in respect of the year he was terminated
- Employer relied on the terms of the employment contract:

Any bonus which may be paid is entirely at the discretion of the Company, does not accrue, and is only earned and payable on the date that it is provided to you by the Company. For example, if your employment is terminated, with or without cause, on the day before the day on which a bonus would otherwise have been paid, you hereby waive any claim to that bonus or any portion thereof. In the event that your employment is terminated without cause, and a bonus would ordinarily be paid after the expiration of the statutory notice period, you hereby waive any claim to that bonus or any portion thereof.

2. Avoiding Liability for Bonus / Incentive Payments upon Termination

Kielb v. National Money Mart Company – continued

HELD:

- Kielb was not entitled to a bonus payment upon termination as he was bound by the contract's terms
- Plaintiff accepted the position with full knowledge that on termination his entitlements would be restricted by the terms of the employment contract

Key Takeaways from *Kielb*:

- Even if bonus payment is integral, an employee can be denied entitlement based on the terms of the employment contract
- Employers should implement clear and unambiguous language in their employment contracts to restrict liabilities upon termination

“The harshness of [a] provision does not make it invalid if both parties have agreed to it”

3. Compliance with Ontario's new Bill 132

Bill 132 – *An Act to amend various statutes with respect to sexual violence, sexual harassment, domestic violence and related matters*

- Introduced in October, 2015
- Received Royal Assent on March 8, 2016: *The Sexual Violence and Harassment Action Plan Act, 2015*
- Amends various acts, including the OHSA
- Amendments to the OHSA come into force on **September 8, 2016**
- Amendments apply to all workplaces of provincially-regulated businesses in Ontario

3. Compliance with Ontario's new Bill 132

- Bill requires that employer's workplace harassment program under the OHSa include the following:
 - Measures and procedures for workers to report incidents of workplace harassment to a person **other than** the employer or supervisor, if the employer or supervisor is the alleged harasser;
 - How **incidents or complaints will be investigated** and dealt with;
 - How information obtained about an incident or complaint of workplace harassment, including identifying information about any individuals involved, will not be disclosed unless the disclosure is necessary for the investigation or corrective action, or is required by law; and
 - How a worker who has allegedly experienced workplace harassment and the alleged harasser (if he or she is a worker of the employer) will be informed of the results of the investigation **and of any corrective action** that has been or will be taken.

3. Compliance with Ontario's new Bill 132

Additional clarity for employers:

- Bill will add explicit recognition that a reasonable action taken by an employer or supervisor relating to the management and direction of workers or the workplace is not workplace harassment
- As you review your workplace policies to bring them into compliance with Bill 132, this clarification should be incorporated if it is not already included

4. Update your Employee Leave Policies

- Expansion of job-protected leaves under ESA (i.e. family medical, reservist, and organ donor leaves) to include 3 new statutory leaves in Ontario:
 - Family caregiver leave
 - Critically ill child care leave
 - Crime-related child death and disappearance leave
- New leaves came into effect as of October 29, 2014.
- Most significant of these is Family Caregiver Leave:
 - **Up to 8 weeks** of job-protected leave each calendar year to provide care or support to an eligible family member
 - Employee must provide certificate from a qualified medical practitioner to confirm that family member has a **serious medical condition**
 - **Note:** This new leave is in addition to the existing Family Medical Leave

5. Employee or Independent Contractor?

Keenan v. Canac Kitchens, 2015 ONSC 1055

- The Plaintiffs, a husband and wife, both worked for the defendant as employees between 1983 to 1987
- In 1987, the Defendant notified the Plaintiffs that they would no longer be employees, but instead, would carry on their work as “independent contractors”
- Plaintiffs became responsible for paying installers but this payment was funded by the defendant
- The amount the defendant paid to the Plaintiffs was increased to reflect that their pay was no longer subject to income tax, Canada Pension Plan and Employment Insurance deductions
- Plaintiffs signed written agreement to confirm terms of new arrangement

5. Employee or Independent Contractor?

Keenan v. Canac Kitchens – cont'd

- In 2009, Canac closed its operations and informed the plaintiffs that it no longer required their services
- Plaintiffs argued that they were dependent contractors and were entitled to reasonable notice at common law

HELD:

- Plaintiffs were dependent contractors
- Court awarded each plaintiff 26 months' pay in lieu of notice
- Court particularly noted the fact that the business arrangement was almost exclusively for the Canac's benefit

5. Employee or Independent Contractor?

Key Take-Aways:

- “Converting” an employee into an independent contractor should not be considered an easy means of avoiding liability for common law reasonable notice
- Not necessarily sufficient protection to have the employee sign a confirmation or acceptance of independent contractor status – the courts will look to the specific facts of the case to determine true nature of relationship
- Trend of reasonable notice “inflation” for dependent contractors – in some cases, the range of notice being provided is similar to that given to employees

6. Effective Implementation of Workplace Changes

- When exploring options, balance the potential cost savings against the risk of constructive dismissal
- Manage risk of constructive dismissal claims by:
 - Including language in employment agreement to give employer more flexibility to change terms
 - Using voluntary programs as a first step
 - Planning ahead to provide advance written notice of any changes to affected employees
 - Managing any overall reductions in compensation

6. Effective Implementation of Workplace Changes

- Before implementing change, develop a proactive communications strategy
- An effective strategy has two objectives:
 - reducing litigation risk
 - managing overall employee stress and anxiety that can lead to lower productivity
- Always communicate motive
- Consistency of message by all management personnel is crucial to maintain employee trust

6. Effective Implementation of Workplace Changes

- If you are changing workplace policies:
 - Be proactive in your communications strategy by providing advance notice of the change, and keep record of the employees that received the notice
 - Distribute revised versions of the policy
 - Flag any changes, and invite employees to ask questions in response to the notice
 - Get a signed acknowledgement from the employee that they have received, read and understood the policy – and keep that signed acknowledgment in your file!

7. Keeping on Top of AODA Compliance Requirements

Latest round of compliance requirements under the *Accessibility for Ontarians with Disabilities Act, 2005*

- By **January 1, 2016**, private sector employers with **50 or more employees in Ontario** were required to:
 - Inform employees and the public that written information and other forms of communication can be made accessible, upon request;
 - Work with persons with disabilities to provide accessible information or communication supports;
 - Provide accessible formats in a timely manner, upon request; and
 - Make hiring practices and workplace information accessible by:
 - Informing job applicants with disabilities that they will be accommodated before they apply and when they are selected for an interview; and
 - Providing accessible workplace information upon request to employees with disabilities

7. Keeping on Top of AODA Compliance Requirements

Latest round of compliance requirements under the AODA – continued...

- By **January 1, 2016**, private sector employers with **less than 50 employees in Ontario** were required to:
 - Complete accessibility training for staff and volunteers; and
 - Ensure that any processes currently in place for receiving and responding to feedback are accessible to persons with disabilities by providing, or arranging for, the provision of accessible formats and communications, upon request

8. Employee Training Requirements

In Ontario, employers are required to ensure that employees have received training in the following broad categories:

Occupational Health and Safety Training Requirements

- Instruction and information on the contents of the Workplace Harassment and Workplace Violence policies and programs
- Employees have been trained on the Basic Worker Safety / Basic Supervisor Safety Awareness Training
- Employees have been provided with information and instruction in relation to hazards in the workplace
- Employees who work with or in proximity to a controlled product are trained on WHMIS
- “Enough” employees have been trained in first aid so that at least one person with first aid training is “in charge” of first aid station at all times

8. Employee Training Requirements

Accessibility for Ontarians with Disabilities Act, 2005 Training Requirements

- Employees, particularly those who interact with the public, have been trained with respect to the AODA and the Customer Service Regulations and have received training regarding how to communicate with those with disabilities and how to use assistive devices or equipment on the Company's premises

Privacy-Related Training Requirements

- Best practice to ensure that employees have been trained on the Company's privacy policies and privacy practices

Any questions? Thank you!

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**COVERING YOUR ASSETS:
COMMON EMPLOYER LIABILITIES AND BEST PRACTICES FOR MANAGING HR RISK**

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Occupational Health and Safety Training Requirements	<i>Accessibility for Ontarians with Disabilities Act, 2005</i> Training Requirements	Privacy-Related Training Requirements
<ul style="list-style-type: none"> • Instruction and information on the contents of the Workplace Harassment and Workplace Violence policies and programs • Employees have been trained on the Basic Worker Safety / Basic Supervisor Safety Awareness Training • Employees who work with or in proximity to a controlled product are trained on WHMIS • “Enough” employees have been trained in first aid so that at least one person with first aid training is “in charge” of first aid station at all times 	<ul style="list-style-type: none"> • Employees, particularly those who interact with the public, have been trained with respect to the AODA and the Customer Service Regulations and have received training regarding how to communicate with those with disabilities and how to use assistive devices or equipment on the Company’s premises 	<ul style="list-style-type: none"> • Best practice to ensure that employees have been trained on the Company’s privacy policies and privacy practices