

CLYDE&CO

Employment & Labour Law

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CIVL 402

Introduction

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



Employee v. independent contractors

Employees including part-time and fixed-term hires

- Tax, EI and CPP is deducted from pay by the employer

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

Employee v. independent contractors: The test

1. The degree of control over how the work is done
2. Who owns or supplies the “tools” of production
3. The chance of profit or risk of loss for the worker in the compensation arrangements, e.g., flat project fee vs. hourly
4. How “integral” the worker is to the business



Employment standards compliance

- The ESA does not apply to an architect, 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 (continued)

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 (continued)

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
 - Required 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)

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 which purport to restrict the ability of an employee to perform his or her 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
 1. religion
 2. ethnic origin/race
 3. skin colour
 4. age
 5. disability
 6. gender



Human rights issues

- 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.



Labour law

- Employees who are employed in a managerial or supervisory role are often excluded from the definition of “employee” in a collective agreement.
- 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.

Labour law

- When purchasing a business or its assets, there is a risk that an obligation to bargain with a union will be attached

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

Thank you. Any questions?

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