Top 10 Practical Recommendations for Employers

January 17, 2024

Christine Ashton

Wilson Vukelich LLP
Lawyers

Overview

- Today's webinar will go over our top 10 practical tips for employers
- This webinar is part of our series of employer webinars that we hold throughout the year
- This webinar touches on issues that impact all employers (unionized or not); for unionized employers, please note we hold a labour law update webinar in March each year
- This webinar should not be relied on in lieu of legal advice and you should always consult with your employment lawyer to understand your legal options and obligations

Agenda

1. For all new hires, use enforceable employment agreements.
2. For all promotions, enter into new enforceable employment agreements.
3. Properly manage overtime pay.
4. Properly manage vacation entitlements.
5. Properly manage absenteeism issues.
6. Confirm compensation details at the start of each year.
7. Ensure all allegations of workplace harassment are investigated.
8. Properly handle terminations.
9. Properly handle employee re-hirings.
10. Update HR materials routinely.

1) For all new hires, use enforceable employment agreements

- As a best practice, all new employees should be presented with the offer of employment in the form of a written employment agreement
- An employment agreement is arguably the most important document that an employer can have in place
- The agreement can define and limit numerous employer obligations (e.g. overtime pay obligations) and can establish employee obligations (e.g. non-solicitation obligations)
- One of the most critical provisions in an employment agreement is the termination provision
- With an enforceable termination provision, an employee can be limited to their minimum *Employment Standards Act* entitlements or a greater amount
- Without such a provision, when dismissed, an employee will be entitled to both their statutory termination entitlements and their common law termination entitlements
- With a proper termination provision in an enforceable employment agreement, an employee's termination entitlements could be reduced from 24 months' compensation to only 8 weeks compensation

2) For all promotions, enter into new employment agreements

- Many employers have adopted the best practice of presenting new employees with an offer of employment in the form of an enforceable employment agreement
- However, many Canadian employers are failing to present an updated and new employment agreement when an employee is promoted
- Without a new employment agreement, the original employment agreement may become unenforceable
- For example, in the decision of Celestini v. Shoplogix Inc., the Ontario Court of Appeal held that an employee's contract had become unenforceable due to substantial changes to the terms and conditions of employment

2) For all promotions, enter into new employment agreements

- The employer should present current employees with new employment agreements, when possible
- However, it is important to note that a new employment agreement can only be entered into when the current employee is being offered sufficient new consideration (e.g. a promotion, a bonus, a new RRSP matching plan, etc.)
- Whether something constitutes sufficient new consideration varies, based on the facts
- When entering into a new employment agreement with a current employee, the employer should be using a different template than the offer of employment
- For example, the new employment agreement should expressly confirm the new consideration and the employee's original start date (or their various periods of employment if there has been past re-employment)
- If there is no substantial new consideration, the employee should instead be provided with a memo to sign
- The memo should confirm the new terms and conditions of employment, and that otherwise the terms and conditions in the employment agreement remain enforceable

3) Properly manage overtime pay

- Generally, employees are entitled to overtime pay
- Non-exempt provincially regulated employees in Ontario have statutory entitlements to overtime pay at a rate of 1.5 for all hours worked in excess of 44 hours per week
- This entitlements to overtime pay apply to both salaried and hourly workers
- An employee may, though, be promised more than just their statutory entitlements to overtime pay
- For example, if the employment agreement states that the employee was to work 40 hours per week, then the employee could argue that overtime pay kicks in after 40 hours

3) Properly manage overtime pay

- As an employer, overtime exposure can be limited by:
  i. properly tracking hours of work
  ii. confirming employees are only entitled to overtime statutory minimums, and
  iii. putting into place overtime averaging agreements
- To limit employees to their minimum statutory overtime pay entitlements, the employment agreements and Employee Handbook should include the following language:
  - You are not entitled to any overtime pay beyond what is required by your minimum entitlements under the Ontario *Employment Standards Act* (as amended).

3) Properly manage overtime pay

- Ontario employers can further limit their overtime pay obligations with overtime averaging agreements
- The agreement allows employers to calculate overtime pay based on an average of the employee's hours of work over a specific period of two or more weeks, up to a maximum of four weeks
- For example, an employer with a bi-weekly payroll may find it easier to calculate overtime pay based on whether the employee worked more than 88 hours during the two-week payroll period
- For employers with fluctuating demands, overtime averaging agreements can result in an employee earning no overtime pay
- For example, if Sam's overtime is averaged over two weeks, and Sam worked 50 hours in week 1 and 30 hours in week 2, then Sam would have no overtime pay entitlements
- Without the averaging agreement, Sam would have been entitled to 6 hours of overtime pay
- To average an employee's overtime, the company must enter into an enforceable and executed written overtime averaging agreement with that employee

4) Properly manage vacation entitlements

- For the most part, employees are entitled to 2 – 3 weeks' vacation per annum
- However, some employees, they are entitled to more than 3 weeks
- For example, some employers offer 4+ weeks vacation and federally regulated employees are entitled to 4 weeks vacation after 10 years of service
- As an employer, you should ensure that:
  - vacation entitlements and how to use vacation entitlements are clearly set out for all employees
  - vacation entitlements, vacation requests, vacation approval, and vacation usage are tracked

4) Properly manage vacation entitlements

- There are three common issues that employers run into regarding vacation entitlements
- First, employers are unclear as to how to schedule vacation days, resulting at times in the employer attempting to cancel vacation days or becoming frustrated by the vacation days taken by the employee
- To avoid this, employers should make it clear how to request vacation days, who has to approve them, and how future vacation days will be shared
- Second, employers often assume that an employee is using a vacation day for a sick/personal day, and then the employee later claims they are still owed vacation pay
- To avoid this, if an employee is taking a sick/personal day, then it should confirm if they wish to use a vacation day or take it as a sick/personal day (potentially unpaid)
- Third, employers allow employees to accumulate a substantial amount of earned and unpaid vacation, resulting in a substantial amount owing to the employee
- To avoid this, employers should consider unilaterally scheduling vacations (as and when needed) and paying out earned and unpaid vacation at the end of each year
- Scheduling week-long vacations is permitted by the Ontario *Employment Standards Act*
- However, to unliterally schedule vacations, the company's right to do so must be confirmed in the employment agreement and/or in the HR handbook

5) Properly manage absenteeism issues

- When issues arise regarding an employee's attendance, an employer must tread carefully to avoid any claims of discrimination or harassment
- For example, an employer cannot discipline an employee for taking off many days due to an ongoing health issue
- To address employee attendance there are three steps that an employer may wish to take
- First, all employers should ensure that they have in place a clear policy regarding how absences are to be reported and addressed
- If an employee does not comply with this policy, the employee can then be disciplined
- Second, if there are particular concerns with an employee's attendance, a temporary, varied attendance policy (e.g. instead of requesting supporting documents from the employee if absent for more than 3 days, supporting documentation could be requested if absent for more than 2 days)

5) Properly manage absenteeism issues

- Third, if an employee has frequent and unpredictable attendance issues, the employee may need to be unilaterally placed on an approved leave of absence
- The leave of absence will normally be unpaid, unless the company provides paid sick/personal days or provides short-term disability coverage
- The employee will then remain on the leave of absence until they believe they are ready to return to work and then provides a medical questionnaire prior to the same
- The medical questionnaire should confirm that they can consistently return to work and whether any reasonable accommodation is required
- After reviewing the medical questionnaire, the employer should engage in further discussions with the employee, including potentially requiring the employee to attend an independent medical examination and implementing a written accommodation plan

6) Confirm compensation details at the start of each year

- To ensure everyone is on the same page and to avoid disputes, each year the employee's current compensation entitlements should be confirmed with an annual employee compensation memo
- The memo should be issued at the start of each calendar year and should confirm:
  - ✓ the employee's current or new salary
  - ✓ the employee's current or new commission, bonus, and vacation entitlements
  - ✓ whether the employee carried forward any vacation days and when they will be paid out
  - ✓ whether the employee carried forward any overtime lieu entitlements and when they will be paid out
  - ✓ that compensation packages are to be treated confidentially and not discussed with coworkers

7) Ensure all allegations of workplace harassment are investigated

- When an employer learns about potential workplace harassment, it is important that it is responded to, even if the allegations seem baseless or the complainant does not want to escalate matters
- If an individual wishes to make a complaint of workplace harassment, then the employer should require the complainant to submit a complaint using a standard formal complaint form
- If the individual does not wish to further escalate matters, then the allegations should still be responded to
- A proper response after the initial complaint will include conducting an investigation (which can vary significantly in scope) and address any incidents of harassment (e.g. disciplining or dismissing the employee that engaged in harassment)
- Establishing a consistent practice of documenting and responding to all allegations of harassment will substantially place the company in a better position in the event of litigation

8) Properly handle terminations

- If an employment relationship is not working, leaving aside *Human Rights Code* and reprisal considerations, the employee may be dismissed
- When an employee is dismissed, generally the employee will be entitled to their minimum statutory termination entitlements and reasonable notice at common law (judge based law)
- There are three exceptions to this:
  1) where the company is dismissing the employee for cause and for wilful misconduct
  2) where there is frustration
  3) where the company has properly limited the employee's termination entitlements by way of an enforceable employment agreement

8) Properly handle terminations

- When preparing to terminate an employment relationship, the employer must properly understand the termination liability that they are triggering and the implications
- For example, it should be confirmed:
  - whether the employee is limited to their minimum statutory entitlements by way of a written employment agreement;
  - whether there is just cause and willful misconduct;
  - whether the employment relationship is coming to an end due to frustration;
  - what the employee's statutory and common law entitlements are or would be (if it was determined they were entitled to same); and
  - whether there are other categories of damages that may be owing to the employee (e.g. unpaid vacation pay, unpaid overtime pay, compensation for a violation of the *Human Rights Code*, etc.).
- In addition, the impact of the decision on the company should be reviewed

8) Properly handle terminations

- Once you have confirmed the facts, then decide which path makes the most sense:
  1) An alternative to a dismissal with an offer of a mutual separation package, conditional on a release;
  2) an offer to agree to a mutual separation package;
  3) an alternative to a dismissal and an offer of a mutual separation package, conditional on a release;
  4) a termination without any entitlements;
  5) a termination with only statutory entitlements; OR
  6) a termination with an offer beyond minimum statutory entitlements, conditional on a release.
- The best approach will vary based on the facts and the personalities

9) Properly handle employee re-hirings

- It is important to be mindful of the implications of re-hiring an employee
- With an enforceable employment agreement, am employee can be limited to only their minimum statutory entitlements
- However, for statutory purposes, employers may still be required to consider the employee's original period of employment, even if they resigned or were previously paid termination entitlements
- For example, in Ontario, the statutory termination entitlements require that an employee's previous period of employment be counted (unless there is a 13 week gap between periods) and the statutory severance entitlements require that the employer always counts the employee's previous period of employment (once they have over 5 years of service and if the payroll is over $2.5m per annum)
- With any rehire, the employer should prepare a full and proper offer of employment
- Under the termination provision, you should include the note: "Where required in accordance with your minimum statutory entitlements, we will recognize your previous period of employment with ABC Aluminum from [insert date] to [insert date]."

10) Update HR materials routinely

- As a general best practice, HR material should be updated:
  i. when required by law (e.g. the workplace violence and harassment policy must be reviewed annually);
  ii. when a new law is enacted or a current law amended (e.g. the introduction of workplace monitoring policy obligations);
  iii. when the Courts issue a decision that changes employer best practices;
  iv. whenever something substantially changes (e.g. a new bonus program); and
  v. when it is noticed that something has been overlooked (e.g. no mention of remote work in your Employee Handbook)
- As a good rule, at a minimum check every 2-3 years to determine if the template employment agreements should be updated and every 3-5 years to determine if the Employee Handbook should be updated

Managing Your HR Issues

Wilson Vukelich LLP can help ensure that your employment and labour law matters are handled effectively and efficiently, and in a manner that is reflective of new legal developments and obligations. If you have any questions or require further information, please contact:

Christine Ashton

905.940.0526

cashton@wvllp.ca

Wilson Vukelich LLP
Lawyers