

## Loss Control

# Bulletin

## Directors and Officers

### Liability Insurance

### 10 Common Employer Mistakes\*

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The legal aspects of managing employment relationships can be complicated and confusing. A lack of awareness or understanding of these “legalities” can result in mismanagement of employees and, ultimately, possible liability for employers. This article provides an overview of 10 common mistakes that employers should learn to identify and avoid.

**Using employment agreement and policy templates without careful customization.** While templates can serve as an effective means to draft agreements or other documents in a cost-efficient manner, it is important to review the terms of the template to reduce the risk that they are inappropriate or ill-suited templates. Employers should determine whether the template was drafted with reference to applicable laws and legal principles. For example, an agreement intended to be used in British Columbia may not be enforceable or have limited application if it is based on a United States template whose terms refer to United States laws or legal principles.

**Considering the employment standards notice period as the only obligation when terminating an employee without cause.** The period of working notice (or payment in lieu of notice) required by employment standards legislation is the minimum requirement for employers. In the absence of express contractual language to the contrary, employers are required to give reasonable notice of an intention to terminate

the employment of an employee, who was hired on an indefinite basis, if the termination is without cause, which may be well in excess of the statutory minimum entitlement.

**Not complying with minimum employment standards legislation in employment contracts.** As noted above, the parties may specify in a written employment contract the amount of notice an employer must provide the employee when terminating the employee on a without-cause basis. However, if the amount of notice specified in the contract does not meet the minimum amount of notice required by the applicable employment standards legislation, the employer cannot rely upon the notice provision and the employee will instead be entitled to reasonable notice.

**Ignoring reinstatement obligations upon a return from leave.** The employment standards legislation in each province provides for certain protections for employees who take statutory leaves of absence. In particular, employees are generally entitled to be reinstated to the position they held immediately before the leave commenced, or a comparable position if their original position no longer exists. The fact that the employee who temporarily replaced the absent employee is a better or more productive employee will not relieve the employer from its reinstatement obligation.

**Conducting background or reference checks after commencing employment.** While it may be possible to terminate an employee for cause if a post-hiring check reveals that the employee provided false or misleading information during the hiring process, this is by no means certain and will depend on the severity of the falsification or misleading information.

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On the other hand, the employer has much more flexibility during the hiring process to deal with false or misleading information, including the decision not to make an offer of employment or to revoke an offer.

**Applying at-will employment principles in Canada.**

Canadian law does not recognize the doctrine of “at-will” employment as it exists in the United States, in which either the employer or the employee may, generally, terminate the employment relationship at any time, for any reason, or for no reason. As discussed above, in Canada, an employee is presumed to be entitled to reasonable notice if the employer decides to terminate the employment contract on a without cause basis. Canadian employers who are subsidiaries of U.S.-based companies should ensure that employment agreements and policies that are based on U.S. templates do not contain reference to at-will employment.

**Relying on an individual’s employment contract that does not reflect his or her current employment circumstances.**

Over time, an employee may be assigned new duties or responsibilities or receive promotions or transfers. If the changes are significant or are not contemplated in the employee’s employment contract, the contract may no longer be enforceable as its substance has been altered or has disappeared. Employers should consider whether a change in an employee’s terms and conditions of employment (i.e., a promotion or transfer) requires a new employment agreement or an amending agreement that maintains the enforceability of the original contract.

**Assuming that an employee is exempt from employment standards legislation simply because the employee has a managerial title or is paid a salary.** Exemptions from provisions of the applicable employment standards legislation, including hours of work limits and overtime pay entitlement, are generally based on the substance of the employee’s duties and responsibilities and not their designated title. Therefore, an employee will not likely fall under a managerial or supervisory exemption unless the employee actually performs managerial or supervisory duties on an exclusive or near-exclusive basis. Similarly, compensating an employee on the basis of a fixed salary, as opposed to an hourly rate

will not automatically result in an exemption from the applicable hours of work limits or overtime pay requirements.

**Involving a lawyer too late in the process.** Benjamin Franklin’s adage that an ounce of prevention is worth a pound of cure applies to obtaining guidance and assistance from legal counsel in employment-related issues. All too often employers turn to their legal counsel only after an issue has escalated to litigation or an investigation by the government. The early or timely involvement of legal counsel can assist in identifying the most appropriate action to take to resolve issues in a quick and cost-effective manner or reduce the potential for litigation or financial liability.

**Drafting restrictive covenants that are unreasonable.**

Restrictive covenants by an employee not to compete or solicit customers following the termination of the employment relationship are considered restraints against trade and are enforceable only if the employer has a legitimate proprietary interest to protect, and the restriction is reasonable between the parties and in the public interest. Furthermore, the courts have held that it will not re-write an unreasonable restrictive covenant to make it reasonable, but will instead strike the covenant in its entirety. Employers must therefore ensure that a restrictive covenant is reasonable as written.

The above list of the various mistakes employers can make is by no means exhaustive but serves as a reminder that a proper understanding of the various issues and the timely involvement of legal counsel with expertise in employment matters can help employers to avoid these mistakes and the liability that may result when such mistakes are made.

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