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**BLUMBERGS**

# **Fundamentals Of Employment Law For Charities And Non-profits**

**May 13, 2015**

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# Introduction

- This seminar is for legal information not legal advice
- Any views or opinions expressed are my own
- Questions regarding topics are welcome at the conclusion of each topic and at the end of the presentation
- Logistics and timing
- We are covering employment law and not labour law (unions) in this workshop.

# Charity Employment Statistics - 2013

- About 2.7 million Canadians work for Canadian registered charities.
- Employees earn approximately \$122 billion per year.
- Total expenditures by registered charities were \$225 billion.
- About 54% of charity expenditures spent on employment related costs.

**See Largest Canadian Registered Charities by Employment Compensation**

<http://www.globalphilanthropy.ca/blog/largest-canadian-registered-charities-by-employment-compensation>

# Charity Employment Statistics - 2013

Compensation	Schedule 3
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**1** (a) Enter the **number** of permanent, full-time, compensated positions in the fiscal period. This number should represent the number of positions the charity had including both managerial positions and others, and should not include independent contractors. **Do not** enter a dollar amount. .... **300** 1,375,120

(b) For the **ten (10)** highest compensated, permanent, full-time positions enter the **number of positions** that are within each of the following annual compensation categories. **Do not** tick the boxes, use numbers.

<b>305</b> <input type="checkbox"/> \$1 – \$39,999 105,821	<b>310</b> <input type="checkbox"/> \$40,000 – \$79,999 74,394	<b>315</b> <input type="checkbox"/> \$80,000 – \$119,999 16,972
<b>320</b> <input type="checkbox"/> \$120,000 – \$159,999 5,523	<b>325</b> <input type="checkbox"/> \$160,000 – \$199,999 1,908	<b>330</b> <input type="checkbox"/> \$200,000 – \$249,999 994
<b>335</b> <input type="checkbox"/> \$250,000 – \$299,999 601	<b>340</b> <input type="checkbox"/> \$300,000 – \$349,999 343	<b>345</b> <input type="checkbox"/> \$350,000 and over 504

**2** (a) Enter the **number** of part-time or part-year (for example, seasonal) employees the charity employed during the fiscal period. .... **370** 1,269,825

(b) Total expenditure on compensation for part-time or part-year employees in the fiscal period. .... **380** \$ 22,042,082,848

**3** Total expenditure on all compensation in the fiscal period. .... **390** \$ 122,059,860,367

**See Largest Canadian Registered Charities by Employment Compensation**

[http://www.globalphilanthropy.ca/blog/largest\\_canadian\\_registered\\_charities\\_by\\_employment\\_compensation](http://www.globalphilanthropy.ca/blog/largest_canadian_registered_charities_by_employment_compensation)

# Charity Employment Statistics - 2013

	Account Name	Province	390 - Total Comp Expenditure	300 - Full Time	370 - Part Time	380 - part-time expenditure	Total Expenditures	Percentage of budget spent on Compensation
1.	TORONTO DISTRICT SCHOOL BOARD	ON	\$2,454,547,153.00	29206	13294	\$107,830,480.00	\$2,913,663,191.00	84%
2.	FRASER HEALTH AUTHORITY	BC	\$1,659,543,000.00	12541	13825	\$405,227,236.00	\$2,954,944,000.00	56%
3.	THE GOVERNING COUNCIL OF THE UNIVERSITY OF TORONTO	ON	\$1,442,940,000.00	8626	5206	\$205,359,000.00	\$2,389,945,000.00	60%

## See Largest Canadian Registered Charities by Employment Compensation

[http://www.globalphilanthropy.ca/blog/largest\\_canadian\\_registered\\_charities\\_by\\_employment\\_compensation](http://www.globalphilanthropy.ca/blog/largest_canadian_registered_charities_by_employment_compensation)

# Are You an Employee?



Employee

Independent  
Contractor

Volunteer

# Employment Law in Ontario

- Employment Law in Ontario is generally governed by the following pieces of separate legislation:
  - The *Employment Standards Act, 2000*;
  - The Ontario *Human Rights Code*;
  - Canada Labour Code;
  - The Human Rights Code of Canada; and
  - The *Occupational Health and Safety Act*.
- Each piece of legislation operates distinctly but they also operate in tandem with one another, together with the common law (court decisions interpreting the legislation).



# Employment Agreements

- The Employment Agreement is the contractual agreement between the employer and the employee and it governs the employment relationship between the parties.
- As a contract, the Employment Agreement must comply with basic contract law – there needs to be an Offer, Acceptance and Consideration.

# Employment Agreements

- It is vitally important to have the employee sign an Employment Agreement before their first day of work.
- It is very difficult to impose an Employment Agreement retroactively (or after the individual has started, even if only a few days after the start date), so it is best for charities and non-profits to set up a process in which all new hires are provided a standard Employment Agreement immediately upon being offered the position.

# Employment Agreements

- The Employment Agreement outlines the basic terms of the employment relationship, providing:
  - A brief **job description** – including roles and responsibilities;
  - **Duration** or **term** of the employment (if applicable);
  - **Remuneration / compensation**;
  - **Benefits** provided including health, dental, vacations, etc.; and
  - **Termination** provisions
- You cannot contract out of applicable Employment legislation, and for the Employment Agreement to be valid and binding it must comply with the *Employment Standards Act, 2000*.

# Employment Agreements

- As the Employment Agreement is a contract, it is important to understand the pitfalls of contract law.
- As employers are the drafters of the Employment Agreement, the legal principal of *contra proferentem* applies – which means that any ambiguities in the contract will be interpreted against the interests of the drafter
- Careful consideration should be taken that the Employment Agreement is well drafted, unambiguous and reflects the true intentions of the parties.

# Employment Agreements

- To be a valid contract, the Employment Agreement must include:
  - An Offer (the offer of employment);
  - Acceptance (the employee taking the position of employment); and,
  - Consideration (the job and the salary that goes with the position)
    - ✦ The job itself is consideration for the contract and as such, the consideration is given only upon acceptance of the position. Accordingly, the contract must be agreed upon and executed prior to the consideration being given (starting the job) otherwise the Agreement can be deemed an invalid contract.

# Employment Agreements

- The employee should be given the opportunity to review the Employment Agreement prior to execution.
- The employee should also be permitted to ask as many questions as necessary about the Agreement and the position prior to execution to ensure unambiguity.
- The employee should be provided the opportunity to consult with a lawyer to review the Agreement, if they choose to do so.

# Employment Agreements

- The Employment Agreement should include, at a minimum:
  - The position of the employee with a defined title;
  - Salary or remuneration;
  - Basic duties and responsibilities;
  - A three month probationary period; and
  - A Termination Clause, including:
    - ✦ Termination With Cause;
    - ✦ Termination Without Cause; and
    - ✦ Termination of the Employment by the Employee (Resignation)

# Employment Agreements

- The probationary period of **three months** should explain clearly that it can be extended by an additional three months, with notice, in writing.
- The probationary period is extremely important as it allows the employer to assess the employee's ability and suitability before committing to retaining the employee on a more permanent basis.
- The *Employment Standards Act, 2000* also allows for termination of employment within the 3 month period without notice or pay in lieu of notice.



# Employment Agreements

- The Employment Agreement should also include a **termination clause**.
- Termination clauses can range from simple to extremely complex and it should, at a minimum, outline the notice that will be provided to an employee on termination, without cause.
- The termination clause must comply with the minimum notice requirements under the *Employment Standards Act, 2000*, which will be discussed in greater detail later.

# Employment Agreements

- The termination clause does not attempt to contract shorter notice than is required under the *Employment Standards Act*, as doing so will render the clause, and perhaps the entire Employment Agreement, void.
- However, inclusion of a termination clause gives the employer an opportunity to ***significantly reduce the potential liability*** for notice of termination under the common law when terminating an employee without cause, which will be discussed further.

# Employment Agreements

- The termination clause should explain the different legal obligations in the event of termination for cause or termination without cause (which will be discussed in greater detail later).
- The termination clause should also outline the minimum expectations of notice that the employee should provide to the employer on resignation, i.e. 1 week per year of service, etc.
- There is no requirement at law for an employee to give any notice of termination of their own employment.

# Employment Agreements

- An important and often overlooked aspect of the Employment Agreement is to update it upon ***changes in the employment relationship***; such as the employee being promoted, provided a raise, or if the employee has a significant change of responsibilities.
- Consideration is required for the amendment to the Employment Agreement.
- ***It is not necessary to re-draft the entire Employment Agreement*** but a simple addendum specifying the changes in the position, salary, responsibilities, etc. and stating that all other terms of the Employment Agreement remain in effect is sufficient

# Executive Compensation

- Board is trustee of charitable assets
- Determining compensation not exactly the same as for profit sector
- Can pay no more than fair market value
- Must be reasonable for the organization
- Consider all stakeholders

# Executive Compensation

- Compensation of a charity's most senior employee is an important policy decision
- What they are going to be paid? - salary, incentive payments, fringe benefits, phone, signing bonus, incentive payments, retirement benefits, travel (first class), sabbatical, termination payments etc.
- Must look at whole picture and ask is it reasonable and no more than fair market value?

# Factors

- Market data
- Character and condition of organization (how well is it doing? is it outperforming others? does it compete with for profits or international non-profits for talent? is it large and complex?)
- Role and scope of the position and qualification and experience of incumbent
- Compensation policy and internal consistency
- Is similar compensation offered to others? (e.g. signing bonuses, incentive compensation, retirement amounts)
- Can we really afford it?
- Intangibles - What evidence do you have?

# High Costs of Excessive Compensation

- A number of media pieces on excessive compensation
- Can be costly in terms of payroll to pay executive unreasonably large amounts
- Can hurt reputation of institution and fundraising/stakeholder relations including hurting morale of employees
- Can hurt reputation of person receiving excessive compensation
- Can make board look out of touch/incompetent/poor stewards



# How Would Anyone Know?

- Internal discussions and audit
- You need to report top 10 employees in boxes on T3010
- Whistleblower
- Ontario government filings and sunshine list
- For small organizations hiring, firing and compensation can affect financial statements in a significant way

# Best Practices

- CRA guidance on fundraising
- Market data
- Compensation consultant
- Avoid conflicts of interest
- Charities should negotiate
- Avoid commission compensation

# CRA Fundraising Guidance

142. When hiring in-house staff for fundraising activities, a charity should:

- contact organizations with a profile similar to the charity's to determine reasonable compensation for the type and amount of fundraising to be undertaken;
- base the compensation on a salary survey; and
- set compensation that is appropriate based on the remuneration received by other employees of the charity in light of the respective responsibilities and requirements of the positions.

# CRA Fundraising Guidance

143. Important considerations for charities include the following:

- ...a charity should fully document procurement, negotiation, and approval of all contracts (see [Keeping complete and detailed records relating to fundraising activities](#)); and
- details of purchasing and hiring practices and processes should be disclosed to the public (see [Providing disclosures about fundraising costs, revenues, practices, and arrangements](#)).

# Insufficient Compensation

- Large number of staff are paid poorly
- Bad for morale, high turnover, difficult to attract new people
- Fairness perspective
- High cost of high turnover
- Charities need to be careful not to exploit vulnerable

# Broader Public Sector Executive Compensation Act, 2014

- "The purpose of this Act is to manage executive compensation in the broader public sector by authorizing the establishment of compensation frameworks applicable to designated employers and designated executives."
- The Act applies to hospitals, boards of education, universities, colleges, other post-secondary institutions, community care access corporations to name a few and also any other board, council, corporation, foundation or organization that is prescribed by the Ontario government. It does not apply to for-profit corporations.

# BPSECA

- Dec 11, 2014 – received Royal Assent
- The Act only applies to "designated executives" who make cash compensation of \$100,000 or more.
- It does not apply to unionized employees.
- The Ontario government may provide directives requiring disclosure of salaries, bonuses, incentive plans, allowances, agreements, compensation policies and compensation studies to name but some of the items.

# BPSECA

- The Act notes: "A compensation framework may govern the compensation that may be provided by a designated employer to a designated executive and, without limiting the generality of the foregoing, may provide for and limit the compensation and payments and elements of compensation and payments that may be provided to designated executives, including salaries, salary ranges, benefits, perquisites, discretionary and non-discretionary payments, payments payable on or in connection with termination, performance plans, incentive plans, bonus plans, allowances and any other form of remuneration."



# BPSECA

- Does not affect compensation "implemented on or before the effective date";
- Any agreement to pay more than that which is allowed is void and unenforceable to the extent of the conflict;
- This Act applies to new hires;
- If there is a change in position for a designated executive then the applicable compensation framework must be used;
- The Ontario government can appoint a public accountant to audit the records of the employer;
- Any breach of this Act is deemed to be a breach of a funding agreement between the employer and the Ontario government;

# BPSECA

- Any payment in excess of what is authorized is an overpayment and Ontario government can demand payment of that amount;
- The employer can go after the employee for the over-payment as well;
- Rights or entitlement under the Human Rights Code, certain sections of the *Employment Standards Act* or the *Pay Equity Act* are not affected by this legislation; and
- There is no constructive dismissal when an employer does something pursuant to the Act.

# Workplace Policies and Procedures

- It is important for employers to have in place **standardized workplace policies and procedures that are applicable for all employees.**
- These workplace policies and manuals often fill in the gap between the formal employment agreement and the actual workplace conditions.

# Workplace Policies & Procedures

- The enforceability of such workplace policies and procedures is often dependent on a number of factors, including:
  - Whether the written policy was **actually provided to the employee**;
  - **Whether the employee agreed** to be bound by the terms of the workplace policies and procedures;
  - Whether the policies and procedures are or were **consistently followed by all employees**;
  - Whether **changes** to the policies and procedures were brought to the attention of the employees; and
  - Whether the employee **agreed to be bound by changes** to the policies and procedures.

# Workplace Policies & Procedures

- Workplace policies and procedures should also outline what would otherwise be considered “*common sense*” practices, for example:
  - Notification of supervisors and subordinates of absences;
  - Appropriate use of corporate assets, including company credit cards;
  - Suitable use of company property outside the office;
  - Dress code;
  - Telephone and copier use; and
  - Theft of time and resources.

# Workplace Policies & Procedures

- The workplace policies and procedures should also include more substantive processes like progressive discipline, complaints, investigations and dispute resolution.
- When an employee violates a workplace policy and procedure, it is also vitally important that such incidents are **properly documented** so that a paper-trail of violations, warnings and discipline is created. The documentation of serious and repeated violations of an employee can be the underlying basis for a proper termination with cause.

# Performance Evaluations

- Advising employees of below average performance is one of the most unpleasant parts of the employer/employee relationship.
- Employers should establish a **standardized appraisal form** in order to evaluate employee performance as well as establish a **standardized timeframe** for meetings with employees for evaluations – such as twice a year or annually.

# Performance Evaluations

- The evaluation should **re-affirm** the employee's **roles and responsibilities** and review some of the more **significant achievements** or **goals reached** over the period being evaluated.



# Performance Evaluations

- The employer should have an established rating system for **key areas of performance**, such as:
  - Planning and organization;
  - Time-Management;
  - Ability to work with others;
  - Initiative in the workplace;
  - Dependability;
  - Judgment skills; and
  - Overall quality of work.

# Performance Evaluations

- The evaluation should also provide a brief summary stating the employee's **strengths and weaknesses** which is consistent with how they have been rated.
- **Areas of weakness** that are identified should have corresponding remarks **with suggested methods to improve together** with a **timetable for achievement**.

# Performance Evaluations

- A copy of the evaluation should be provided to the employee and they should be asked to ***sign***, in acknowledgment of having been provided a copy of the evaluation and that the contents of same were discussed fully with them.
- The employee should also feel as though they are a valued member of the team, even if they have shortcomings. By offering **constructive criticism with suggested and realistic means to improve performance**, the employee will feel that the evaluation was constructive rather than critical.

# Human Rights

- Everyone in Ontario is protected by the Ontario Human Rights Code which essentially provides protection from discrimination on the basis of:
  - *race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or disability.*

# Human Rights

- The *Human Rights Code*, means, among other things:
  - That **an employer must treat everyone equally** in the hiring process and in the employment relationship, otherwise a complaint or claim under the Human Rights Code may be initiated by a disgruntled employee;
  - The **employer has to provide reasonable accommodation** to employees with disabilities by providing them the proper equipment, services or devices that will allow them to do their job;

# Human Rights

- The **employer is required to provide for an employee's religious needs**, including prayer breaks, religious days off and dress requirements;
- The **employer cannot have height and weight requirements** for its employees unless such policies were adopted for a purpose or goal that was rationally connected to the job being performed;
- **Alcohol and drug addiction is considered a disability** under the Human Rights Code and addicted employees are protected from discrimination in the workplace under the Human Rights Code;

# Human Rights

- An **employer cannot impose a mandatory retirement age** for its employees;
- An **employer cannot ask about an employee's criminal history** unless it is directly relevant to the position; and
- An employer cannot ask an employee or potential new hire if they are **married, gay, lesbian, or transgendered**.

# Human Rights

- **Family Status** is the latest area of Human Rights discrimination to be assessed by the Courts.
- Family Status is broadly defined as the obligations that a parent has to their child (i.e. childcare needs and requirements), but also applies to circumstances where an employee is caring for an elderly parent.
- The First major case in this area was *Johnstone v. Canada Border Services Agency (CBSA)*. This case involved a labour union employee who was unable to work the required shifts at Pearson Airport due to child day care requirements. The employer refused to accommodate Johnstone's request for modified 9-5 hours and the matter went to the Human Rights Tribunal and then the Federal Court of Appeal.



# Human Rights

- Both the Human Rights Tribunal and the Federal Court of Appeal held that the CBSA discriminated against Johnstone on the basis of Family Status and required them to modify the hours to allow for Johnstone's day care schedule. Additionally, the CBSA was fined \$25,000.00 for the violation.
- In the non-union realm, the same argument was successfully made in January 2015, in *Partridge v. Botony Dental Corporation*, where a non-unionized employee returned from maternity leave and was asked to work a later shift as a dental assistant. The shift interfered with her day care arrangements and the employer refused to accommodate. The Ontario Superior Court of Justice held this to be discrimination, relying on the *Johnstone* decision and awarded \$20,000 in damages plus damage for constructive dismissal.

# Resignation of an Employee

- An employee has no obligation at law to provide any notice of resignation of their employment to their employer unless it is explicitly required in their Employment Agreement.
- It is recommended that the Employment Agreement require an employee to give at least 1 week notice of resignation per year of employment which, at the sole discretion of the employer, can be reduced.
- Often in circumstances of more senior employees they are difficult to replace and time is needed to find a suitable replacement employee and time to train that employee in the position.

# Terminating an Employee

- There are two ways to terminate an employee:
  1. Termination without cause; and
  2. Termination with just cause.
  
- Outside of theft, **there is very little likelihood that an employer will have “just cause” to terminate the employment** of an employee. “Just cause” is a legal term meaning that the employer has a factual basis to justify the termination of the employee without providing the employee any notice of the termination, or severance pay.

# Terminating an Employee

- The courts have consistently held that “*just cause*” is an extremely high test and that it is up to the employer to prove that it exists to justify that the employee should be terminated without notice.
- In most cases progressive discipline is not effective to establish just cause.

# Terminating an Employee

- If there is no “*just cause*” to terminate the employee, then the employee is entitled to notice, or pay in lieu of notice.
- The notice requirement is dictated by the *Employment Standards Act* and it basically provides that **an employee is entitled to 1 week of notice or pay in lieu of notice for every full year of employment up to 8 weeks for 8 years of service**, if the agreement properly provides for such notice, otherwise it is common law that determines reasonable notice.

# Terminating an Employee

Mandatory Notice under the *Employment Standards Act*.

Length of Employment:	Notice Required
Less than 3 months	None
3 months but less than 1 year	1 week
1 year but less than 3 years	2 weeks
3 years but less than 4 years	3 weeks
4 years but less than 5 years	4 weeks
5 years but less than 6 years	5 weeks
6 years but less than 7 years	6 weeks
7 years but less than 8 years	7 weeks
8 years or more	8 weeks

# Terminating an Employee

- In the absence of an Employment Agreement, or an appropriate termination clause, an employee is also entitled to **common law notice**, which is the notice period that the Courts have determined is appropriate for the length of service.
- The Courts have continually held that the *Employment Standards Act* provides the minimum notice requirements to employees. As such, the **Courts under common law can extend dramatically the notice requirements that a non-profit or charity must provide.**

# Factors to Determine Reasonable Notice

- is there an employment contract?
- length of service
- indefinite vs. term
- previous employment and luring
- salary, bonuses,
- age
- seniority/position



# Factors to Determine Reasonable Notice

- availability of alternative employment given training and qualifications
- health/disability
- manner of termination (Wallace)
- date of notice, working notice?
- reason for dismissal
- group health/Short or Long Term Disability Insurance
- was release signed?

# Factors to Determine Reasonable Notice

- ESA severance – over 5 years and over 2.5 m payroll?
- mass layoff or single termination
- has employer alleged cause?
- vacation pay, overtime
- reference
- mitigation (job search activity – keep copies of letters, notes on phone calls, costs etc.)

# Termination Meetings

- It has been recognized by the Canadian Courts that *the employment relationship is one of the most important relationships in a person's life.*
- Accordingly, termination of the employment of an individual needs to be handled professionally and with consideration of the fact that the termination may emotionally impact the employee.

# Termination Meetings

- The employer should prepare a **Termination Letter** outlining that the employee is terminated effective immediately, or on a specific date and either with or without just cause.
- If the employer is relying on *just cause* for the termination, the **cause must be explicitly referenced in the letter**. If the termination is without cause then **no reason needs to be provided**.

# Termination Meetings

- The individual conducting the termination meeting should be polite and professional while explaining to the employee that they are terminated as of a specific date and advise them of how much notice they will be provided or pay in lieu of notice.
- The employer should advise that the employee's **extended benefits will continue through the notice period** (which is legally required) and that they will be sent a ***Record of Employment*** at the end of the notice period. If there is an employee assistance program the employee should be given details of such and should also be provided any necessary forms and contact information for pensions, and benefit continuation, etc.

# Termination Meetings

- If the employee has **corporate property** such as a iPhone, Blackberry, laptop, etc., then a reasonable a timeframe for the return of all property should be discussed.
- The employee should be required to return keys and pass-cards, corporate credit cards, etc. It is advisable to create a detailed list of property and items that the employee may have prior to the meeting to determine what needs to be returned and when.

# Termination Meetings

- The employer is entitled to ask the employee to sign a **Release** upon termination so that the employee will not commence legal action for wrongful termination, but it is important that the employee is provided an opportunity to consult a lawyer before signing a Release, otherwise it will be void.
- The minimum statutory notice payments cannot be withheld pending the return of corporate property or until the employee has executed a Release. **The notice pay under the Employment Standards Act must be paid upon termination regardless of whether the employee signs a Release or not.**

# Termination Meetings

- Any additional payment beyond the minimum payments required under legislation can be withheld in exchange for a Release.
- **An employee should always be encouraged to contact a lawyer for independent legal advice prior to signing any documentation at the termination meeting.**
- Failure to allow the employee an opportunity to consult with a lawyer can render any signed documents, including the Release, void.



# Termination Meetings

- **It is highly recommended that employers consult with a lawyer** before taking any steps to terminate an employee as a wrongful termination lawsuit could result in hundreds of thousands of dollars in legal costs, a lengthy court battle, and reputational issues.
- Additionally, a lawyer can help draft the Employment Agreement, establish comprehensive workplace policies and procedures, assist in properly documenting employee progressive discipline, and help in determining if there is “*just cause*” to terminate an employee and assist in drafting an appropriate termination letter.
- Employment law is rife with pitfalls that can easily be navigated with appropriate legal assistance and planning.

# Employment Litigation

- Litigation can result in any case whether the employee is terminated with cause or without cause, whether the employee is provided minimum notice under the *Employment Standards Act* or is provided a comprehensive termination package.
- Normally, litigation is commenced with a demand letter outlining the perceived shortcomings in the termination package and demanding an enhancement of the termination package in some area, normally increase to the notice period.
- A well-drafted termination package that is cognizant of the minimums required under the ESA and the common law can thwart many a costly lawsuit.

# Employment Litigation

- Most lawyers who practice in Employment Law know exactly what is required by the ESA and common law for a reasonable termination package and most litigation can be avoided by preparing a reasonable termination package.
- Following a demand letter, negotiation between counsel can often resolve the bulk of the outstanding issues. Employers should be aware that ESA minimums will rarely be sufficient in termination packages, and various other factors come into play.

# Employment Litigation

- If negotiation fails, the employee may choose to commence legal action by issuing a Statement of Claim suing the employer for wrongful termination or violation of Human Rights.
- Litigation is a stressful, complicated and costly exercise.
- In order to avoid litigation in the first place, a properly drafted Employment Agreement and comprehensive termination package are of the utmost importance.

# Independent Contractors

- Factual determination whether person is independent contractor or employee
- Are you really independent contractor?
- Is it really better to be an independent contractor?
- Better often to be employee if – you get fired, hurt, get pregnant, have to pay outstanding taxes or CPP etc.

# Independent Contractors

- Factors include:
  - the level of control the payer has over the worker's activities;
  - whether the worker provides the tools and equipment;
  - whether the worker can subcontract the work or hire assistants;
  - the degree of financial risk the worker takes;
  - the degree of responsibility for investment and management the worker holds;
  - the worker's opportunity for profit; and
  - any other relevant factors, such as written contracts.
  
- CRA publication “RC4110 Employee or Self-employed?”  
<http://www.cra-arc.gc.ca/E/pub/tg/rc4110/README.html>

# Independent Contractors

- Intellectual property – owned by independent contractor unless provision to the contrary.
- Directors can be liable for unremitted source deductions.
- Vital to have contractor agreement which covers ownership of intellectual property, termination provisions and that contractor is responsible for payment of own taxes.

# Volunteers, Interns & Employees

- In September 2014 the Ministry of Labour released the results of a “blitz” it undertook in regard to unpaid internships.
- Result: many unpaid interns in various sectors of the economy were improperly classified as unpaid interns and were actually employees covered by the *Employment Standards Act*.
- Entitled to minimum wages, vacation pay and other protections afforded to employees that are not available to unpaid interns or volunteers.



# Volunteers, Interns & Employees

- While the Ministry of Labour did not specifically target charities and non-profits in this blitz, there are many lessons to be learned due to the large number of volunteers and unpaid interns working in these sectors.
- Although there are some very limited exceptions, generally, if a person who is not in business for themselves performs work for another person, company or organization, they are deemed to be an employee and are entitled to rights and protections under the *ESA*; including, but not limited to, minimum wage.

# Volunteers, Interns & Employees

- According to the Ministry of Labour, an intern or volunteer will be considered to be an employee for purposes of the *ESA*, unless **ALL** of the conditions below are met:
  - The intern's training is similar to that which is given in a vocational school;
  - The training is for the benefit of the intern. The intern must receive some benefit from the training, such as new knowledge or skills;
  - The employer derives little, if any, benefit from the activity of the intern while he or she is being trained;
  - The intern's training doesn't take someone else's job;
  - The employer isn't promising a job at the end of the training; and
  - The intern has been told that he or she will not be paid for their time as an Intern.

# Volunteers, Interns & Employees

- Charities and non-profits who run unpaid internship programs should be cognizant of the conditions that need to be satisfied for a person to be considered a true intern rather than an employee, as should the individuals working in that capacity.
- Volunteers, like unpaid interns, are not covered by the *ESA*, and while the *Occupational Health and Safety Act* defines a worker as a “*person who performs work or supplies services for monetary compensation,*” charities and non-profits relying largely on a volunteer workforce still have responsibility for the health and safety of people visiting or helping out in their workplaces.

# Volunteers, Interns & Employees

- Additionally, charities and non-profits should be aware that there is a fine line of distinction between a volunteer and an employee governed by the *ESA*. Some questions to consider in determining whether an individual is a volunteer or an employee include:
  - ✦ Is the worker motivated by a personal civic, humanitarian, charitable, religious or public-service motive?
  - ✦ Are the services performed typically associated with volunteer work?
  - ✦ Are the services provided different from those typically performed by paid employees and are the hours of service less than full time?
  - ✦ How much control does the non-profit exert over the volunteer while he or she is performing the services? and,
  - ✦ Does the volunteer typically arrange his or her own schedule to provide services when it is convenient for the volunteer?

# Volunteers, Interns & Employees

- Although the above list is not exhaustive or entirely determinative, if an individual is providing services to a non-profit or charity that would normally be provided by a paid employee with remuneration rather than a traditionally volunteer position, then it is likely that the individual is an employee rather than a volunteer. If the position is determined to be an employment position, then the charity and non-profit may be liable for payment of minimum wages, vacation and holiday pay to the individual.
- Additionally, some charities and non-profits offer perks or rewards for its volunteers, such as free parking or free memberships to fitness facilities and, on a strict interpretation, this could be considered compensation and potentially alter the relationship to one of employment, governed by the *ESA*. In this case, the volunteer may be deemed an employee and the *ESA* may apply, requiring minimum wages etc.

# Volunteers, Interns & Employees

- Employees of charities and non-profits often seek to provide some volunteer services to their employer. This is permissible but the volunteer work should not be the same or similar, or related to their normal job duties, or during normal work hours, as it could simply be viewed as a continuation of the employee's duties without proper remuneration or overtime pay, in contravention of the *ESA*.
- The nuances of the *ESA* and its effect on unpaid internships and volunteers is vitally important for charities and non-profits. Non-compliance could result in the Ministry of Labour ordering the charity and non-profit to pay wages that should have been paid to the “volunteer” and “interns”.

# Other concerns with interns

- Can hurt reputation and be viewed as exploitative.
- Ethical concerns that internships in some cases do exploit people who are vulnerable.
- Limits group who could take advantage of internship

# General Issues

- Constructive dismissal
- Non-solicitation versus non-competition



# Summary of Biggest Mistakes

- Failure to have properly drafted employment agreement with appropriate termination clause
- Improperly dealing with disability
- Improperly terminating an employee
- Using “just cause” when not applicable

# Summary of Biggest Mistakes

- Wasting time trying to justify “just cause”
- Thinking you only have to pay ESA minimum
- Decision paralysis
- High cost of poisoned work environment or turnover resulting from abusive employee

# Thank you!

## **Scott Chambers**

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