Employment Law Mistakes that Charities Should Avoid
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1. Pre-Employment Screening

It is often very prudent for a charity to conduct some level of pre-employment screening of potential new employees, particularly those charities with vulnerable beneficiaries such as children.

Pre-employment screening varies by each particular charity’s needs, but can include criminal background checks or police checks, but could also be as simple as a google search of the individual and checking their public profiles on facebook, LinkedIn, Twitter, etc., which can be invaluable resources for seeing a person’s true personality or background in the community.

2. Employee or Independent Contractor

Many employers seek to avoid the perceived hassle associated with source deductions, or claims for wrongful termination claims by simply classifying an employee as an independent contractor rather than an employee. This is, unfortunately, a dangerous risk for employers.

Incorrectly classifying a worker as an “independent contractor” can result in the charity, board members and other like officials being responsible for the source deductions that were not withheld and remitted plus interest and penalties.

Furthermore, simply classifying an individual as an “independent contractor” will not necessarily negate a claim for wrongful termination and the courts and CRA will often review an is an established, albeit non-exhaustive, criteria for determining whether an individual is actually an employee rather than an independent contractor:

a. the level of control the charity has over the worker;
b. whether or not the worker provides the tools and equipment;
c. whether the worker can subcontract the work or hire assistants;
d. the degree of financial risk taken by the worker;
e. the degree of responsibility for investment and management held by the worker;
f. the worker's opportunity for profit; and
g. any other relevant factors, i.e. written contracts.

3. Employment Agreements

After the interviews are completed and you have selected the ideal candidate for the position, 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, so it is best for Charities to set up a procedure in which all new hires are provided a standard Employment Agreement immediately upon being offered the position.

The Employment Agreement governs the basic terms of the employment relationship, including:

a. A brief job description – including roles and responsibilities;
b. Duration or term of the employment (if applicable);
c. Remuneration / compensation
d. Benefits provided including health, dental, vacations, etc.

The Employment Agreement should also include a probationary period of three months which can be extended, 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 Agreement should also include a Termination Clause. Termination clauses can range from simple to extremely complex and it should, at a minimum, outline the minimum notice that will be provided to an employee on termination, without cause. It is important that the Termination Clause does not attempt to contract shorter notice than is required under the Canada Labour Code or 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 the terminating an employee without cause, which will be discussed further below.
4. 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.

While it is impractical to have policies and procedures for absolutely everything, basic workplace rules should be established and provided to all employees. The enforceability of such workplace policies and procedures is often dependent on a number of factors, including:

a. Whether the written policy was actually provided to the employee,

b. Whether the employee agreed to be bound by the terms of the workplace policies and procedures;

c. Whether the policies and procedures are or were consistently followed for all employees

d. Whether changes to the policies and procedures are brought to the attention of the employees; and,

e. Whether the employee agreed to be bound by changes to the policies and procedures.

Workplace policies and procedures should also outline what would otherwise be considered “common sense” practices, for example:

a. Notification of supervisors and subordinates of absences;

b. Use and misuse of corporate assets, including company credit cards;

c. Use of company property outside the office;

d. Dress code;

e. Telephone and copier use; and,

f. Theft of time and resources.

The workplace policies and procedures should also include more substantive processes like progressive discipline, complaints, investigations and dispute resolution. Regardless of what policies and procedures are set out by the employer, it is imperative that they are enforced consistently and equally for all employees. 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.

5. **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 form in order to evaluate employee performance as well as establish a standardized timeframe for meetings with employees for evaluations – such as it twice a year or annually.

The evaluation should re-affirm the employee’s roles and responsibilities, and review some of the more significant achievements or goals reached over the last period being evaluated. The employer should have an established rating system for key areas of performance, such as:

a. Planning and organization;
b. Time-Management;
c. Ability to work with others;
d. Initiative in the workplace;
e. Dependability;
f. Judgment skills; and,
g. Overall quality of work.

The evaluation should also provide a brief summary stating the employee’s strengths and weaknesses which is consistent to 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.

A copy of the evaluation should be provided to the employee, and they should be asked to sign indicating that they have 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 criticisms with suggested and realistic means to improve performance, the employee will feel that the evaluation was constructive rather than critical.
6. **The Human Rights Code**

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.

This means, among other things:

a. 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;
b. The employer has to accommodate employees with disabilities by providing them the proper equipment, services or devices that will allow them to do their job;
c. The employer is required to provide for an employee’s religious needs, including prayer breaks, religious days off and dress requirements;
d. 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;
e. 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*;
   a. Alcohol and Drug testing that has no demonstrable relationship to job safety and performance may be a violation of the employee’s Human Rights.
f. An employer cannot impose a mandatory retirement age for its employees;
g. An employer cannot ask about an employee’s criminal history unless it is directly relevant to the position; and,
h. An Employer cannot ask an employee or potential new hire if they are married, gay, lesbian, or transgendered.

7. **Terminating an Employee**

There are two ways to terminate an employee:

A. Termination without cause; and,
B. Termination with just cause.
Short of catching an employee stealing, 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.

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 existed to justify that the employee should be terminated without notice.

If an employee is being terminated for a performance related issue, the employer is required to show that the employee was advised of the performance issues, provided an opportunity to improve the performance and that they were explicitly warned that if the performance did not improve that they could be terminated. Failure to properly document performance issues of an employee can result in there not being the factual basis for a termination with just cause.

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 either the Canada Labour Code or Employment Standards Act and basically provides that an employee is entitled to one week of notice or one week of pay in lieu of notice for every full year of employment.

However, in the absence an Employment Agreement, 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 and Canada Labour Code only provide the minimum notice requirements to employees. As such, the Courts generally extend the notice requirement to 2 – 5 weeks’ of notice or pay in lieu of notice for every full year of employment. The increased notice is dependent on a number of factors, including whether the employee is in a management position, age, employability, etc.

It is important to note that an employer can terminate an employee without just cause at any time, and no reason needs to be given to the employee as long as the employee is provided adequate notice under the Employment Standards Act, the Canada Labour Code or the common law.
8. Termination Meeting

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, with consideration to the fact that the termination may emotionally impact the employee.

The employer should prepare a Termination Letter outlining that the employee is terminated effective immediately, or on a specific date, with or without just cause. If the employer is relying on just cause for the termination, the cause must be explicitly reference in the letter. If the termination is without cause then no reason needs to be provided, although it is recommended that a reason be given as a courtesy. The Termination Letter need not be read verbatim to the terminated employee, but you should cover some key points during the termination meeting.

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 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 details of such and should also be provided any necessary forms and contact information for pensions, and benefit continuation, etc.

If the employee has corporate property such as a 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 passcards, 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.

The employer is entitled to ask the employee to sign a Release upon termination so that they 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.

Furthermore, 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 and Canada Labour Code must be
paid upon termination regardless of whether the employee signs a Release or not. However, 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 advise 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.

9. **Not Consulting a Lawyer**

It is highly recommended to 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 and a lengthy court battle.

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 the appropriate legal assistance and planning.
Scott Chambers joined the Blumberg Segal LLP Litigation team in 2006 with a practice focusing on Shareholder and Partnership Disputes, Charity Law Litigation, Historic Sexual Assault Litigation, Product Liability Litigation, and Employment Law.

In 1995 Scott acquired a Diploma in Communications (Cinema, Television, Stage and Radio) from Southern Alberta Institute of Technology and worked as a photographer and in the motion picture industry before obtaining Bachelor of Arts (B.A.) in History in 2001 from the University of Calgary and then obtaining a J.D. (Juris Doctor) degree from the University of Western Ontario in 2004. Scott also attended Southwestern University School of Law in Los Angeles in 2004 as part of an international legal exchange program. Scott completed his Articles in 2004/2005 at a prominent litigation law firm where he worked as an associate in 2005/2006 practicing in medical negligence defence litigation and insurance defence litigation before moving to Toronto and joining Blumbergs.

Scott has been published in The Advocates' Quarterly, co-authoring "With Patient Rights Come Patient Responsibilities, Contributory Negligence in Medical Negligence Actions", (2007) 33 Adv. Q. 201, addressing the issue of contributory negligence in medical negligence cases, and has published two photography books, California (April 2011) and New York (September 2011).

Scott is a member of the Law Society of Upper Canada, being called in 2005, and is a Notary Public for the Province of Ontario. Scott regularly appears before Judges and Masters in the Ontario Superior Court of Justice and in the Toronto Commercial Court and has had numerous reported decisions, including cases involving the Victims' Bill of Rights, Security for Costs, Historic Sexual Assault, Mareva and Interim Injunctions, Summary Judgment, Charity Law and Shareholder Oppression Remedy Litigation.

Scott manages the firm’s webpage, twitter, facebook and Linkedin accounts, but you can also follow him on his personal twitter and Linkedin accounts.

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