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, so it is best for Charities to set up a process in which all new hires are provided a standard Employment Agreement immediately upon being offered the position.

The Employment Agreement outlines the basic terms of the employment relationship, providing:

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

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.

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.

EMPLOYMENT AGREEMENTS

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 terminating an employee without cause, which will be discussed further.
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.

It is not necessary to re-draft the entire Employment Agreement but drafting a notice of the changes and including a simple line stating that all other terms of the Employment Agreement remain in effect is sufficient.

WORKPLACE POLICIES & 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:

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 by all employees;

d. Whether changes to the policies and procedures were 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 & 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. Appropriate use of corporate assets, including company credit cards;
c. Suitable use of company property outside the office;
d. Dress code;
e. Telephone and copier use; and,
f. 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 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.
PERFORMANCE EVALUATIONS

A copy of the evaluation should be provided to the employee and they should be asked to sign, in acknowledgement 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 criticisms 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:

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;
HUMAN RIGHTS

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;

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.

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.
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.

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 a 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.
In the absence of 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.

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.

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 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.
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 Blackberry, laptop, etc., then a reasonable 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 and Canada Labour Code 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.

CONSULT A LAWYER BEFORE TERMINATION

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 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 appropriate legal assistance and planning.

CONTACT INFORMATION

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