

The Basics of Workplace Law. Top 10 Hiring and Firing Tips. Part 1 – Top 10 Hiring Tips

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Organizations today face a dizzying array of legal compliance issues in connection with their human resources management policies and procedures. Not surprisingly, the hiring and firing of employees involves a myriad of legal issues.

Liability for failing to comply with the legal requirements of hiring and firing can lead to substantial damages, and in some cases, into the millions of dollars.

Arguably, monetary damages in any given circumstance, represents only the "tip of the iceberg". The repercussions to the organization may include loss of productivity, diminished employee morale and damage to the reputation of the organization in the community. In addition, this reputational damage may extend to governmental agencies, leading to a "red-flagging" of the organization as a corporation that fails to meet its legal obligations.

The purpose of this 2 part series is to highlight, through the presentation of the most frequently asked client questions, some of the important legal considerations in the areas of hiring and firing, and will further provide some helpful tips in minimizing an organization's risk.

Based on their thirty-five years of combined experience in advising employers on human resources and employment law matters, Stuart and Krista are in a unique position to share their "Top 10" list of frequently asked questions.

Although you may be familiar with the questions, you may be surprised by the answers.

Top 10 Hiring Tips

1. Are there statements that cannot be made during a job interview?

Although the interview process is generally regarded as the most important facet of the selection process during the recruitment of new employees, many employers are not aware of the significant potential for serious infractions of provincial human rights codes ("Codes").

Under the Codes, candidates are afforded protection from discrimination based on such grounds as age, race, handicap, ethnic origin, gender and citizenship. Upon initial consideration of these grounds, compliance would appear to be relatively intuitive. Unfortunately, many questions that appear innocent during the course of an interview can constitute offences under the Codes.

By way of example, under the Ontario Human Rights Code, the seemingly innocent question as to whether the candidate has a valid driver's license is considered an offence under the Code for two reasons:

- i) it may screen out applicants with disabilities without consideration of whether the individual may be accommodated, and
- ii) it allows for using a license to determine age.

If however, driving is an essential job duty (e.g. truck or bus driver), and if individual

accommodation is not possible, it is acceptable to discuss this during an interview. That said, a request for a copy of the driver's license can only be made following a conditional job offer.

Failure to comply with the Codes can result in significant damages awarded against the employer. This may even include giving the position to the candidate as well as awarding significant monetary damages. Even in those situations where a complaint does not proceed to a tribunal, the adjudicative body appointed to hear disputes under the Codes, the investigation process is extremely disruptive within the workplace as well as time consuming and may compromise the reputation of the organization within the community.

In order to minimize risk, it is important to be well prepared prior to conducting any job interview. By preparing the questions in writing and in advance, the interviewers are afforded an opportunity to properly consider inadvertent violations of the Codes.

Employers should also ensure their interviewers keep good notes regarding the candidate's responses to the questions on the interviewer's question sheet as evidence of proper conduct. It is important these notes are limited to competency based factors and that notations on the resume or interview sheet do not include the candidate's physical appearance, ethnicity, or other inappropriate references even if it was intended to assist the interviewer in distinguishing one candidate from another.

2. Why is it important to use a consistent line of questioning when interviewing multiple candidates for the same position?

When interview questions are different for different candidates, it creates a greater likelihood that considerations unrelated to the job duties may be relied upon to make the hiring decision. Without the benefit of a prepared interview sheet, it is only natural that interviewers will ask questions that are arguably unrelated to the candidate's ability to perform the job duties. If more than one interviewer is involved, the result is a wide array of questions unrelated to the candidate's ability to perform the job and an increased risk that at least one of those questions is an offensive question under the Codes.

If an unsuccessful candidate learns that the successful candidate was asked materially different questions during the interview, he or she may allege that those differences constitute discrimination under the Codes.

3. What is the employer's obligation to ensure that employees are legally eligible to work in Canada?

In January 2001, the Government of Canada introduced Bill C-11 entitled "An Act Respecting Immigration to Canada and the granting of refugee protection to persons who are displaced, persecuted or endangered" ("Act"). This Act was introduced as a post 9/11 measure, and was created to replace the previous "Immigration Act". The Act is wide in scope, and includes specific sanctions which directly affect employers.

These specific sanctions include enforcement provisions to ensure that employers have actually examined documents provided by new employees to determine that the employee has the appropriate documentation necessary to work legally in Canada. Employers are no longer permitted to just accept proof that the employee

has a social insurance number. In addition, the employer's obligation extends to determining if a foreign-worker employee has a criminal record which places the employee in an inadmissible class for employment in Canada.

Employers risk being liable for a fine of up to \$50,000 or imprisonment for a term not more than two years or both, if they have not exercised the necessary "due-diligence" required under the Act.

This need to examine documents provides an added burden on employers and accordingly, this level of due-diligence ought to form part of any organization's orientation program for all new employees.

4. How does an organization 'sell a job' without misrepresenting its duties and creating a risk of a 'wrongful hire'?

Wrongful hire refers to the situation where an employer makes statements that are recklessly inaccurate with the intent of enticing a candidate to accept employment with the employer. If as a result of these statements, the employee accepts employment, and subsequently learns that the circumstances as represented during the interview are materially different he or she may be eligible to claim damages against the employer based on the legal principle of negligent misrepresentation.

By way of example, if an employer represents to a candidate the current existence of funding for a special project, and that funding never materializes, the employee's job duties would be fundamentally changed. As a result, the employee could elect to resign and bring an action against the employer based on this principle of 'wrongful hire'.

While you should certainly sell the benefits of the job and the company, overstating the job can not only lead to employee dissatisfaction, but may also give rise to costly litigation in the event the 'overstated selling' attains the threshold of a misrepresentation. It is therefore critical that the duties of the position be represented accurately during the interview.

5. Does an oral job offer create a legally binding contract?

A 'contract' is established in law when an offer is made, when some item of value is exchanged between the parties, and the person in receipt of the offer accepts the terms of the offer. If those elements are present, the fact that the 'offer' and 'acceptance' are not in writing does not mean that a contract has not been formed. Indeed, an oral offer that is accepted orally is a contract that is enforceable in law.

The same principle applies to an oral offer of employment. If an oral offer of employment is made and accepted, a binding agreement is formed between the parties.

As a result, it is important that in the context of candidate interviews, employers be mindful of the fact that oral statements may be characterized as offers of employment. To the extent the candidate communicates his or her acceptance to the 'offer', a contract is formed whether or not those terms are acceptable to the employer.

It should always be clear during the interview that an offer of employment will be made in writing, and that no formal offer of employment should be considered to

have been made until the written offer of employment is provided to the candidate. In this way, statements made by the interviewer during the pre-closing stage will not be 'elevated' to formal terms of an offer of employment capable of being accepted by the candidate.

6. Should offers of employment be made 'conditional' on satisfactory reference checks?

Once an offer of employment is extended to and accepted by a candidate, a binding employment contract is formed. As a result, reference checking that takes place after the offer is accepted is like 'closing the barn door after the horse has left the barn'. If the employer subsequently obtains negative references about the new employee, and determines that it no longer wishes to retain the employee, the only option available to the employer at this point is to terminate in accordance with the terms of the employment contract. Depending on the termination terms of the employment contract, there may be a dispute regarding the employee's entitlement to compensation in lieu of notice, since the employee will not have had an opportunity to demonstrate his or her capability of performing the job responsibilities.

It is therefore important that the employer draft an employment contract that does not become effective unless and until the condition of receiving satisfactory references is satisfied. Of course, the alternative is to conduct the reference checking prior to making the offer of employment.

The following is an example of contractual language which makes the offer of employment conditional on receiving satisfactory references:

"This offer of employment is conditional upon the receipt by the employer of employee candidate references satisfactory to the employer. Such determination will be in the sole and exclusive discretion of the employer."

7. When should the contract of employment be signed?

One of the fundamental principles related to the enforceability of a contract is whether it was entered into voluntarily. One of the primary factors considered in determining whether the contract was entered into voluntarily is whether the party to the contract had sufficient time to consider the terms of the contract.

In the employment context this becomes particularly significant given the generally recognized inequality in bargaining power between the employer and the employee. In other words, because the employer is considered to be in a dominant position, a failure to provide an employee with adequate time to consider the terms of the offer of employment may result in a court determining that the employment contract is not enforceable.

Accordingly, the offer of employment should be made well in advance of the commencement of work to permit the employee sufficient time to consider the offer of employment and all of its terms.

In addition to providing the employee with adequate time to consider the terms of the offer of employment, the employer should ensure that the employee actually signs the employment contract prior to commencing employment. Courts have consistently held that where an employee signs an employment contract after commencing work, the employment contract is not enforceable.

8. What is the relationship between the employee handbook and the contract of employment?

Many employers prepare and circulate some form of employee handbook to their employees setting out various workplace policies and rules. In addition, employers may also have some form of employment contract that they have entered into with their employees.

A question often arises as to whether the terms of the employee handbook can be enforced in the same way that the terms of an employment contract are enforced.

Since the vast majority of employee handbooks are not presented to the employee until after the employee has already accepted his/her employment contract, it can be difficult to convince a court that the terms of the employee handbook should be enforced. The rationale is that the employment contract was formed when the employee agreed to the offer of employment. Terms that are introduced by the employer after the employment contract was formed (such as those in the employee handbook), may not be enforceable because they did not form part of the initial employment contract.

Accordingly, if the employer wishes the terms of the employee handbook to form part of the employment contract, it is important that the employment contract refer to the employee handbook and that the employee handbook actually be provided to the employee for his or her review prior to the employee accepting the offer of employment.

In fact, for particularly onerous provisions within the employee handbook, the employer should make the effort to specifically identify these provisions to the employee candidate prior to the employee candidate's acceptance of employment with the employer.

9. Should termination provisions be included in an employment contract?

The fundamental advantage of entering into a written employment contract is to create a level of certainty between the parties. In other words, both the employee and the employer have a document that each can refer to in order to seek confirmation of such employment terms as: compensation, vacation, reporting relationship, and eligibility for benefit enrolment.

Invariably, however, the most contentious issue in the employment relationship is the employee's entitlement in the event of the termination of his or her employment. The reason it becomes so contentious is that there is no clear formula in law for the determination of an employee's entitlement on termination. Although the legal principle provides for an employee terminated 'without cause' to be provided with reasonable notice of termination or compensation in lieu of notice, the determination of what is 'reasonable' is not based on any formula in law. Indeed lawyers have established full careers on the issue of an employee's entitlement to notice of termination or compensation in lieu of notice upon the discontinuance of the employment relationship.

The only way to avoid this uncertainty and resulting risk of litigation is to include a clear termination provision in the employment contract. In this way, both parties

know at the outset of the relationship what the employee's entitlement is in the event of a termination 'without cause'. This will help ensure that the employee understands the level of financial support he or she will receive upon termination of the employment relationship and the employer can clearly identify and budget for its financial obligation to the employee.

10. Does a contract of employment ever get 'stale'?

Although an employment contract is the best way of ensuring certainty of employment terms and conditions, it is important to revisit the employment contract each time the employment relationship undergoes a material change. For example, if the duties and responsibilities of the employee change so that the employment contract signed at the time of hire no longer represents the employee's current position, a court may find the employment contract to be 'stale'.

Should the court find the employment contract to be 'stale', the employment contract may be disregarded by the court. This is particularly important in respect of originally negotiated termination pay provisions.

For example, if the employment contract identifies the employee as an 'Accounts Payable Clerk', and she was subsequently promoted to 'Chief Financial Officer', it is clear that a material change has occurred, and a court may consider that the termination pay terms initially entered into are now 'stale' and no longer enforceable. In this case, it is likely that a court will apply common law principles of reasonable notice.

In order to minimize this risk, it is important to ensure that the organization's employment contracts are kept 'fresh' at all times through a process of regular review. In addition, the employment contracts should be updated when employee duties and responsibilities change materially.

Next week we will look at the "Top 10 Firing" tips and draw some conclusions, observations and general comments.

The information contained in this paper is general information meant to provide an introduction to the topics covered. To find out how this information applies in practice to any specific situation, readers are advised to seek a consultation with a qualified employment law lawyer. Readers should not rely on this information as a substitute for obtaining appropriate legal advice.

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