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Seasonal Employees – Risks and Best Practices

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Spring is here which means golf courses, landscaping companies, summer camps and other cyclical facilities are hiring seasonal employees. In most cases, a seasonal employee has the same employment-related rights as any other employee. However, in some ways, they can be treated differently, so now is a great time to review a few common risks and best practices.

Risk: **Assuming you have an inherent right to temporarily lay off an employee at the end of the season, or not recall them the following year, inadvertently exposing your organization to liability.**

Even experienced employers often use the terms "termination" and "layoff" interchangeably as if they mean the same thing. They don't. When an employee's employment is terminated, the relationship between employee and employer ends. When an employee is laid off, the employer-employee relationship is suspended because there exists the possibility of a return to work.

Contrary to popular belief, in many provinces, an employer does not have an inherent right to temporarily lay off an employee at the end of a season without triggering termination entitlements. The fact that the business is closed for the season may not matter. For example, in Ontario, an employment contract must include an express or implied right to temporarily lay off an employee, failing which an employer has no automatic right to do so. Without this right, a layoff may amount to a without cause termination, entitling the employee to notice or pay in lieu of notice, and possibly severance pay.

An implied right to lay off may exist for some seasonal employers in certain provinces, but this is not guaranteed, and the cost to fight that battle (should you need to) could be high.

Even when an employer is permitted to temporarily lay off an employee, that layoff is deemed to be a termination once a certain period passes. The period varies from province to province and even within some provinces based on certain factors (*e.g.*, whether the employer continues benefits coverage during the layoff). In Ontario and British Columbia, the period can be as short as 13 weeks in any period of 20 consecutive weeks; and in Saskatchewan, the period can be as short as 7 days.

Best practice: **Ensure all employees – including seasonal employees – sign a properly worded, enforceable employment contract that: (1) includes an express right to lay off, and (2) limits termination entitlements to the statutory minimum or some other appropriate amount.**

Without an enforceable employment contract, an employee is presumed to be owed common law notice on termination (regardless of whether the termination occurs immediately, at the end of a temporary layoff, or because the employee is not recalled the following season). Common law notice can amount to more than one month of notice or pay in lieu per year of service. For a long-standing employee, this can quickly add up to five or six-figures.

One way to limit common law entitlement is to agree with the employee to provide something less, so long as that something is not below the minimum statutory entitlement, which itself varies by province, but is typically one week per year of completed service to a maximum of 8 or 10 weeks. The difference between common law notice and the statutory minimum can therefore be considerable. A 15-year employee might be owed 15 months pay under the common law but only two months under statute.

While it is best to have an employee sign an employment contract before they begin work, it is possible to have them do so during the employment relationship, provided it is done correctly.

Finally, the enforceability of employment contracts has been under attack by Canadian courts in the last several years, so it is important to regularly review termination clauses with legal counsel.

Risk: **Violating human rights legislation in the hiring process.**

Human rights legislation prohibits discrimination in employment based on several grounds. While these vary across Canada, they typically include race/ancestry/place of origin, citizenship, religion/creed, sex/gender/gender identify, sexual orientation, age, record of offences, marital/family status and disability (referred to as "protected grounds"). Even inadvertent or accidental discrimination is discrimination, so stay alert to these issues and proactively avoid them.

There are two basic exceptions which allow for discrimination based on an otherwise protected ground: (1) If a job requirement is a *bona fide occupational requirement* (*e.g.*, an ability to lift fifty pounds) and the individual's protected characteristic cannot be accommodated without imposing undue hardship on the employer; and (2) If the employee is under a certain age (usually 18), as human rights legislation in many jurisdictions does not protect against age-related discrimination for those under a prescribed age. Minimum wage also differs in many provinces if the employee is under a certain age.

Best practice: **Be mindful about the language you use.** Ensure the job description does not directly or indirectly discriminate based on a protected ground. An ad that seeks a "young, energetic female" may discriminate based on age, sex/gender and even disability. Similarly, an ad seeking a "strong man able to lift 100-pounds" may discriminate based on sex/gender, or even disability if heavy lifting is rarely required. The examples are endless.

When posting the position, and throughout the selection process, keep language neutral and tied directly to the *bona fide* requirements of the job. If lifting heavy weight is a *bona fide* requirement, say that, but without the extra narrative about "strong man," *etc*. And while you may be genuinely interested to learn

about your potential new colleague, avoid questions like, “where’s your accent from,” “in your spare time, what do you do with your family,” or even more direct, “are you married” or “do you have kids?”

Even if a decision not to hire a candidate is entirely unrelated to a protected ground, the fact the employer gathered this information may expose it to a claim. The most effective way to mitigate this risk at the hiring stage is to ask all candidates the same standardized questions, tied directly to the job requirements.

Final word: **From the initial job posting, to the employment contract, to the end of the relationship, taking the time to do it right from the start will go a long way to protect your organization.** A template contract can often be used for multiple employees (including seasonal and year-around employees) provided it is kept up-to-date with changes in the law. Making this small investment at the outset of the employment relationship will more than pay for itself in the long run.

To learn more and for assistance, contact Sherrard Kuzz LLP.

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