

# Avoid Legal Pitfalls with Upskilling



## Steer Clear of Legal Pitfalls When Implementing an Upskilling Program at Your Company

Make sure upskilling programs doesn't expose you to liability for discrimination and constructive dismissal.

In this tight labour market, recruiting and retaining skilled employees will be the key to survival and prosperity. Because people with the necessary digital, tech and other prized skills are in such tight supply, many companies are turning to "upskilling," a strategy that focuses on training current employees to cultivate the skills you need rather than seeking to hire them from the outside. But while it can be cost-effective and extremely profitable, implementing an upskilling program can also get you into legal trouble. Here are 2 legal pitfalls you need to know about and avoid.

### 1. Constructive Dismissal

**Pitfall:** Upskilling typically involves wholesale changes to an employee's job duties and responsibilities. And any time you rework the terms of employment in such a significant way, you run the risk of liability for constructive dismissal. The risk is most significant when the new position is a step-down, such as where an accounting manager is retrained as a programmer. However, constructive dismissal can also occur even if the upskilling-driven changes represent a promotion or step up in responsibilities, especially when the new position involves a different pay or benefits structure.

**Example:** An airline promotes a fixed-salary employee to a Shift Manager position in which compensation is performance-based. The employee turns down the position and leaves the company. The BC court rules that he was constructively dismissed [*Parks v. Vancouver International Airport Authority*, 2005 BCSC 1883 (CanLII)].

**Solution:** The best way to guard against constructive dismissal risk is to negotiate and get the employee to agree to the changes. Just make sure the changes are:

- Put in writing;
- Clearly explained; and

- Supported by consideration, i.e., that the employee receives something of value in exchange for agreeing to any change that may be deemed unfavourable.

## 2. Discrimination

**Pitfall:** Upskilling is all about opportunity—opportunity for employees to advance in the organization, develop new skills and enhance their employability. For that very same reason, it can also perpetuate and expose you to liability for discrimination to the extent you offer upskilling opportunities only to white males while excluding females and employees of other races, nationalities, religions, etc. What makes the pitfall so dangerous is that companies often fall into it inadvertently by using skewed methods and criteria for selecting upskilling candidates. Examples of seemingly nondiscriminatory practices that may have the effect of excluding people of colour and other minorities include offering upskilling opportunities only to employees:

- Who are a “cultural fit” for the company;
- Who currently occupy management positions, which is problematic when minority staffers are all concentrated in lower positions; and/or
- Have advanced business degrees that minorities typically can’t afford.

**Example:** Simply having a non-discrimination policy isn’t enough. Be aware of and take steps to identify and eliminate any forms of systemic and institutional discrimination that may exist at your organization, in not just upskilling but all aspects of your business operations from recruitment to post-employment referrals.