Top 10 Errors Employers Make



Employers face many challenges and responsibilities in running a successful business, not the least of which is the optimum management of their human resources. In this article, we identify the top 10 errors we have seen employers make and how the costly consequences can be avoided. While this article focuses on workplaces in Ontario, this advice generally applies to other common law jurisdictions in Canada.

Error 1: Not having written employment contracts

There is no legal requirement for written employment contracts. However, having them can prevent legal conflicts, safeguard employers' interests, and reduce liabilities. Including clauses like temporary layoff rights, specifying resignation notice periods, termination pay calculation, and restrictive covenants (like confidentiality and non-competition agreements) can significantly reduce possibilities of common litigations arising from unclear or absent contractual terms.

Failing to have written contracts can lead to increased disputes and less protection for employers. For example, wrongful dismissal is one of the most litigated disputes in employment law, and it is usually caused by not having a written contract with an enforceable termination clause. Many employers are often surprised by the significant amount of termination pay they owe to their employees and frustrated to learn that the common law does not provide a simple mathematical formula to ensure certainty in advance. Any uncertainty could be avoided by having a written contract with an enforceable termination clause.

Error 2: Using Google or AI to create your employment contracts

While it is advisable to have written employment contracts, some employers are tempted to cut legal costs by using pre-made employment contract templates sourced from the internet or generated by artificial intelligence ("AI"). However, rather than saving time and money, this can be a risky and costly mistake that can have serious consequences.

Employment contracts in Canada have to take into consideration relevant employment-related legislation, otherwise the contract could be unenforceable. Relying on pre-made employment contract templates sourced from the internet or generated by AI will almost certainly mean that the contracts will not align with current legal standards.

As such, these templates may not help employers achieve the goals of having written contracts but introduce an unwarranted risk of non-compliance with employment laws, potentially resulting in additional costs.

Error 3: Not revising contracts or reviewing them every year

Employment laws are not static or immutable. Therefore, it is important for employers to review and revise employment contracts regularly, at least once a year, to ensure that they are up-to-date and compliant with the current legal standards.

A notable example in Ontario is the *Waksdale v. Swegon North America Inc.*, 2020 ONCA 391, decision by the Ontario Court of Appeal, which held that if one part of a termination clause is invalid, the entire clause is invalid, regardless of whether the employee was terminated with or without cause.

This means most contracts in Ontario drafted prior to the *Waksdale* decision – and any following that fail to take the decision into consideration – are unenforceable. As a result, employers may have to pay more severance than expected. Failure to conduct periodic reviews may lead employers to discover, to their surprise, that they are now obligated to provide significantly higher termination pay than previously anticipated.

Error 4: Not having customized restrictive covenants

Restrictive covenants are clauses that limit the actions of an employee after they leave the employer, such as non-solicitation clauses and non-compete clauses. Non-solicitation clauses prevent the employee from soliciting the employer's clients, suppliers, or other employees for a certain period of time. Non-compete clauses, which are generally not enforceable, prevent the employee from working for a competitor or starting a competing business in a certain geographic area for a certain period of time.

Restrictive covenants are considered a restraint of trade, which means they interfere with the employee's freedom to work and the public's interest in fair competition. Further, in Ontario, non-competition clauses between employers and employees are prohibited in any contract signed after October 25, 2021, with only two exceptions. The first exception regards the sale (or lease) of a business. Non-compete agreements between the seller and purchaser may be allowed as a part of the sale where the seller becomes an employee of the purchaser immediately thereafter. The second exception is that a non-compete agreement is not prohibited between an employer and its executives.

To be enforceable, both non-solicitation clauses, and non-compete clauses where permitted, must be no broader than necessary to protect the employer's legitimate business interests. They must also be clear, specific, and narrowly tailored to the business and the employee's position and role with the employer. They must be reasonable in terms of duration, scope, or geography, sufficient to protect the legitimate business interests and no more. Therefore, the court will not enforce them unless and "only if it is reasonable between the parties and with reference to the public interest," as elicited by the Ontario Court of Appeal in *H.L. Staebler Company Limited v. Allan*, 2008 ONCA 576 at para 33.

If these clauses are not customized according to these factors, the court may refuse to enforce them. As a result, the employer will not have the protection it wants, creating significant risks, as these employees could take away its clients or business.

Error 5: Laying off employees without contractual right to do so

Employers do not have an inherent right to temporarily lay off employees when facing a business downturn or other challenges. Usually, this right must be created by a temporary layoff clause in a written employment contract. Otherwise, a temporary layoff might entitle the employee to claim constructive dismissal, treat their employment as terminated, and claim damages for wrongful dismissal. Many employees successfully sued their employers during the pandemic when they were laid off in this manner.

For example, in *Michalski v Cima Canada Inc*., 2016 ONSC 1925, the trial judge found that, in the absence of a temporary layoff clause in the contract, the employer had constructively dismissed the employee. Although the employer tried to call back the employee five months later, the court nevertheless ordered the employer to pay the employee for loss of income incurred during the 5-month layoff period, which resulted in damages of over $33,000 plus interest.

Error 6: Not complying with the ESA

Some employers may think that they have unconstrained freedom of contract regarding employment agreements. However, they should be aware that there is both federal and provincial and territorial employment standards legislation in Canada that sets out the minimum standards for most employees and employers, with government enforcement of their provisions. In Ontario, this is the *Employment Standards Act, 2000* ("ESA"), and enforcement is done through the Ministry of Labour, Immigration, Training and Skills Development ("Ministry"). Any provision in a contract that violates employment standards legislation is invalid and unenforceable.

For example, in one of the common areas where employers fail to comply with the ESA is the payment of wages. The ESA establishes the minimum wage, overtime pay, public holiday pay, vacation pay, and other employee entitlements. If an employer's contract provides for pay that is less than the minimum wage, or overtime pay or other benefits less than the ESA's requirement, the employer may face serious consequences.

In Ontario, an employee who is paid below the minimum wage or denied overtime pay can file a complaint with the Ministry. The Ministry can order the employer to pay the employee the amount owed, plus interest and a penalty under ss.113 and 125.2 of the ESA. For some infractions or multiple infractions, the employer may also be prosecuted and fined up to $500,000 or even imprisoned under s.132 of the ESA.

Error 7: Not respecting Human Rights legislation

Employers have a legal obligation to respect the human rights of their employees and to accommodate their needs based on the protected grounds, such as under Ontario's *Human Rights Code* ("Code"). Like similar legislation passed by federal and all other provincial and territorial legislatures, the Code prohibits discrimination and harassment in employment on the basis of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability. Failure to comply with the Code may expose the employer to significant liability and damages.

For example, in Ontario, if an employee is terminated as a result of discrimination, they may start a legal proceeding before the Human Rights Tribunal of Ontario or the court to address the discrimination. The various remedies could be available, such as reinstatement, back pay, and compensation for injury to dignity, feelings, and self-respect. The Code also enables public interest remedies, such as ordering employers

to make policy changes and providing training or education.

In *Valiquette v. BPM Enterprises Ltd. (Tim Horton's)*, 2023 HRTO 53, the Human Rights Tribunal of Ontario found the employer failed to accommodate the employee's non-work related injuries and terminated her accordingly, and thus, discriminated against the employee on the ground of disability. The Tribunal found that this violated the employee's rights under the Code and ordered the employer to pay her $20,000 for injury to dignity, feelings, and self-respect and $15,290.40 for her lost wages.

Error 8: Terminating Employees for cause without justification

Not every misconduct or poor performance can justify a termination for cause, without notice or pay in lieu of notice. In fact, the courts have set a high bar for employers to meet in order to avoid paying any severance to a dismissed employee.

Under the common law, employers may terminate an employee for cause when the employee "has engaged in misconduct that is incompatible with the fundamental terms of the employment relationship", as stated recently in *Render v. ThyssenKrupp Elevator (Canada) Limited ("Render").* Examples of cause could include theft, fraud, dishonesty, violence, insubordination, and chronic absenteeism.

In Ontario, because of the requirements of its ESA, the employer may only terminate an employee without any notice or pay in lieu of notice if the employee has engaged in wilful misconduct, which is a higher standard than common law cause (as discussed in *Render*). Section 2(1) of *Termination and Severance of Employment*, O Reg 288/01 provides that an employee may be terminated without notice or pay in lieu of notice if "wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer." Hence, absent wilful misconduct, an employer might still have to pay the minimum notice or pay in lieu required by the ESA if common law cause has been proven. This distinction is not that clear to employers.

Employers who carelessly terminate an employee "for cause" or "wilful misconduct", and cannot justify that termination, could face significant risks and consequences. If the court finds that there was no common law cause (or wilful misconduct), the employer may have to pay damages for bad faith, aggravated damages, or punitive damages on top of wrongful dismissal damages the employee would be entitled to had they terminated without cause.

In *Galea v. Wal-Mart Canada Corp., 2017 ONSC 245*, the employee was a senior executive who had worked for the employer for over 10 years. The high-handed actions of the employer cost them $750,000 in damages. She was terminated for cause without any notice or severance, and the employer alleged that she had engaged in misconduct, such as dishonesty, fraud, and breach of fiduciary duty. However, the employer failed to provide any evidence to support its allegations, and the court found that the termination was wrongful and without cause. The court also found that the employer had acted in bad faith, by making false accusations, delaying the payment of her entitlements, and mistreating her during and after the termination. The court awarded the employee damages for wrongful dismissal based on a 24-month notice period, as well as $250,000 for aggravated damages and $500,000 for punitive damages. The court stated that the employer's conduct was "callous, high-handed, insensitive and reprehensible", and that the punitive damages were necessary to denounce and deter such behaviour.

Error 9: Misclassifying an employee as an independent contractor

Many employers may be tempted to hire workers as independent contractors rather than

employees, thinking that it will save them money and hassle such as avoiding overtime pay or deducting tax, EI premium, and CPP from payroll. However, this can be a costly mistake if the workers are actually employees due to the nature of their working arrangement. Hiring independent contractors is not a way for employers to avoid the obligations and liabilities that come with hiring employees.

Workers can be classified as an employee, a dependent contractor, or an independent contractor. As explained by the Ministry of Labour and Keenan v. Canac Kitchens, 2015 ONSC 1055, a worker's legal status is determined by actual reality of the working relationship. The main difference between an employee and an independent contractor is the degree of control that the employer has over the worker. A dependent contractor falls somewhere in the middle.

An employee misclassified as an independent contractor could lead to significant liability to the employer. These liabilities could include failure to meet obligations under the ESA, possibly the common law, as well as for failure to take deductions and make remittances to the government. This could lead to serious and costly consequences.

For example, the employer may have to pay the employee in accordance with the ESA, including overtime pay, vacation pay, and holiday pay. If the improperly classified independent contractor was terminated, the employer could be liable at the very least to ESA termination and severance pay, or, more likely, significant liability for common law reasonable notice or pay in lieu. On top of that, there could also be liability to the CRA, including fines and penalties, for failure to deduct and remit payments for tax, EI and CPP.

This is especially important to consider when considering potential risks within the gig economy.

Error 10: Improper handling of employee harassment complaints

Harassment in the workplace is a serious issue that can have negative consequences for both employees and employers. Harassment can create a toxic work environment, lower productivity and morale, damage the employer's reputation, and expose the employer to legal liabilities. Therefore, not handling employee complaints of harassment properly could lead to multiple layers of liabilities for the employer.

The employer could be liable for the harassment under certain circumstances. For example, if the harasser is a manager, who is a directing mind of the employer, the employer could be directly liable for the manager's harassment. The employer could also be liable for failing to prevent or stop the harassment or retaliating against the complainant.

Workplace Investigation: Under certain circumstances, (i) the employer has to conduct a workplace investigation into the harassment complaints, and (ii) the investigation has to be done properly.

If the employer fails to conduct a workplace investigation at all, it could be forced by the labour board to conduct an expensive workplace investigation. This could involve hiring an external investigator to interview witnesses, collect evidence, and produce a report. The investigation could also disrupt the normal operations of the workplace and cause further stress and conflict among the employees.

In addition, if the employer fails to conduct the investigation properly, it could also face bad faith and moral damages. For example, in *Rutledge v Markhaven Inc.*, 2022 ONSC 3183, the court ordered bad faith and moral damages in the amount of

$50,000 against the employer, partly because, as the court explained (at paragraph 44), (i) the investigation was not by "an independent third party" as the employer informed the employee; (ii) the investigator obtained information from the employee without her prior knowledge; and (iii) no reasonable or prudent steps were taken during the course of the investigation to keep the matter confidential.

Constructive Dismissal and Damages: The employer could face a constructive dismissal claim from the complainant, who could argue that the employer breached their duty of good faith. In *Matthews v. Ocean Nutrition Canada Ltd.*, 2020 SCC 26 (at paragraph 82), the Supreme Court of Canada clarified that the employer's duty of good faith includes the obligation to "safeguard employees from bullying, intimidation, and harassment initiated by managers. The complainant could also seek aggravated or punitive damages for the emotional distress and humiliation caused by the harassment and the employer's inaction. In *Humphrey v. Mene*, 2021 ONSC 2539 (at para 180), the employer was ordered to pay $50,000 in aggravated damages and other damages and liabilities for breaching the duty of good faith.

Navigating employment law matters in the workplace requires vigilance and a proactive approach. By addressing these top 10 errors, employers can mitigate legal risks, manage financial exposure from employment disputes, and ultimately contribute to the success and sustainability of their business.

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The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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