

Employment Law Update:

New Developments & Common HR Pitfalls

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Ryan Anderson
Grady Tyler

Legislative Changes

What All Employers Need To Know

- Key Changes to the BC *Labour Relations Code*
- Key Changes to the BC *Employment Standards Act*
- Pending Changes to the BC *Human Rights Code*

Back To The Future ...

What does the past tell us about what to expect?

- Labour Relations & Unionization
- Employment Standards
- Human Rights

Top Five HR Pitfalls

Avoiding Common & Costly Mistakes

- One: Lure of the Independent Contractor
- Two: Futility of the Invalid Contract
- Three: Counting to Forty is Hard - OT
- Four: Never Cause, So Why Bother?
- Five: Employer as Insurer

Quick Fixes

Too late ... now what?

- Stop and assess
- Get legal/expert advice
- Be honest and (mostly) transparent
- Don't make it worse

Legislative Changes

What All Employers Need To Know

Labour Relations Code

- Union certification – the basics:
 - Certification – process through which union gains the right to represent a group of employees (“bargaining unit”)
 - Unions apply for certification based on union membership cards signed by employees
 - Cards often signed based on false promises, peer pressure, and desire to be left alone
 - BC: if 45%+ of bargaining unit has signed cards, union applies for certification, vote conducted

Labour Relations Code

- Union certification – the basics:
 - 50%+1 of voters participating = certification
 - In BC, minimum of 55% of eligible voters required
 - All employees within the bargaining unit become unionized, regardless of how (or whether) they voted

Labour Relations Code

- Union certification – the basics:
 - Some troublesome arithmetic:
 - 100 employees
 - 55 show up to vote
 - 28 vote YES

The Union is in, with 28% employee support

Labour Relations Code

- Membership cards valid for 6 months
 - Significantly extend the life of union organizing campaigns
 - More pressure on employees
 - Increased likelihood of ULP complaints
- Significant limits on employer communication
 - Prevented from expressing virtually any negative views about unions or unionization
 - Significantly limit employer ability to respond to union organizing and communicate on topic

Labour Relations Code

- Representation votes within 5 days
 - Reduced opportunity for:
 - communication between application and vote
 - employees to make informed decision
 - Operational pressure on employer, as votes generally held at worksite
- “Remedial” certification – bar lowered
 - Further limit on employer communication
 - Increased likelihood of certification without employee support

Labour Relations Code

- “Successorship” automatic in certain industries
 - Health, cleaning, security, foods services – union certification/CAs transfer between contractors
 - Results in certification of certain work/worksites, without employee choice

- “Statutory freeze” extended
 - Employers prohibited from altering terms and conditions following certification
 - Now applies for 12 months
 - Business as usual exception

Employment Standards Act

- Application to unionized worksites
 - CAs must “meet or exceed”
 - No longer permitted to deviate from particular sections of the *Act* in negotiating terms and conditions
- Leaves of absence
 - Increased duration, and new leaves
 - Still unpaid, but very broad circumstances in which employees may qualify
 - E.g. caring for “an individual with a serious medical condition who is like a close relative to the employee”

Employment Standards Act

- Minimum wage hikes continue
 - Headed towards \$15.20/hour by 2021
 - Reduced rate for “liquor server” being phased out
 - Quick progression and substantial increases difficult for many small employers
- Claims made easier to pursue
 - Wage recovery period increased to 12 months
 - Elimination of “Self-Help Kit”
 - More to come...

Human Rights Code

- Wage recovery window increased
 - To 12 months, up from 6 months
 - Retroactive application to filed complaints not yet decided
- Return to Commission model
 - Commissioner appointed – Kasari Govender
 - Purpose is public education about “combating inequality”
 - Time will tell...

Back To The Future ...

**What dose the past tell us about
what to expect?**

Labour Relations

- Increased certification efforts
 - Shorter time periods and inability to communicate will motivate unions
 - Extended validity of membership cards means repeat applications
- More ULPs
 - Tighter regulations on employers means more room for allegations of wrongdoing
 - Potential for remedial certification will further motivate accusations, even without support

Employment Standards

- More complaints and greater liability
 - Easier to file, and effectively no screening process
 - Wage claims going back 12 months, or more...
 - Already back-logged – unclear how they will cope
- Claims regarding leaves
 - Likely to have disputes regarding qualification for various types in specific circumstances
 - Branch interpretation will be required to clear the waters
- Further incentive to unionize?

Human Rights

- More complaints and difficulty responding
 - Longer period of uncertainty as to potential liability
 - Compounded by Tribunal screening delay
 - Tough to gather/maintain evidence
- Commission to shape future changes/cases
 - Commissioner to investigate and make recommendations for future changes to combat discrimination
 - Commissioner cannot file complaints, but has standing right to intervene

Top Five HR Pitfalls

Avoiding Common &
Costly Mistakes

ONE: Independent Contractor?

- Why it happens?
 - Want less commitment
 - Administrative efficiency
 - Candidate insists
- Why it can hurt?
 - Contract is not binding
 - Accruing liabilities (OT, Severance, Insurance, Deductions/Remittances)
- Quick Fix?
 - Achieve 90% of efficiencies with employer/employee relationship and an appropriate employment contract
 - Manage/adjust day-to-day practices to reflect true independent contract relationship

TWO: Invalid Employment Contract

- Why it happens?
 - No valid consideration ... it's mostly about the timing
 - Breach of Employment Standards requirements
 - Ambiguity
- Why it can hurt?
 - Contract is worthless ... back to the common law
- Quick Fix?
 - Do you have a pepper corn? Good, then I can fix this.
 - Re-issuing employment contracts is not so hard.

THREE: Not paying overtime over time

- Why it happens?
 - But we had a deal!
 - Weekly and daily overtime are two different things
 - Banking OT does not change the rules
- Why it can hurt?
 - It adds up .. whether or not you asked for it
 - And, the Employer is supposed to keep track
- Quick Fix?
 - Understand the rules and have a policy
 - Be clear about exemptions
 - Stop it ... just stop it already!

FOUR: Never Cause, So Why Bother?

- Why it happens?
 - Just cause for dismissal is a high standard
 - Dismissals for just cause are controversial, and often costly
 - Documenting deficiencies is time consuming and confrontational
- Why it can hurt?
 - Perception that a without cause dismissal is discriminatory or bad faith
 - *“Surprise, you’re fired!”* ... almost never the best practice
- Quick Fix?
 - A little bit of documentation goes a long way
 - Do you have some more rope?

FIVE: Employer as Insurer

- Why it happens?
 - Termination of employment also terminates life insurance and LTD
 - Reasonable notice obligation *includes* continuation of insurance/benefits
 - This concern is routinely overlooked
- Why it can hurt?
 - Life insurance or LTD claim during notice period can leave Employer on the hook ... for the entire claim
- Quick Fix?
 - Employment contract limiting entitlements upon dismissal (in BC)
 - Release to accompany severance package
 - Secure benefits continuation

Quick Fixes

Too late ... now what?

Quick Fixes

- Stop and assess
 - Haste actually does make waste
- Get expert/legal advice
 - Ten minutes of expert/legal can save tens of thousands
- Be honest and (mostly) transparent
 - Not necessarily admit liability, but don't act in bad faith
 - A “successful cover-up” is a rare thing
- Don't make it worse
 - See above ...

Ryan Anderson

T 604.638.2042

randerson@mathewsdinsdale.com

Grady Tyler

T 604.638.2043

gtyler@mathewsdinsdale.com

North America: Canada - Mexico - United States

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