



**IMAGINE CANADA  
WEBINAR**

MANAGING THE RISK OF EMPLOYER  
LIABILITY FOR CHARITIES AND  
NOT-FOR-PROFITS

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April 26, 2010  
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**A. INTRODUCTION**

- Employment law affects our day to day lives in a very real manner. In Ontario, the first Master and Servant statute was passed by the legislature of Upper Canada in 1847. These early laws were heavily weighed in favour of the Employer. Of course, we are living in a very different world today, a working world where Employers face a variety of potential liability issues in dealing with their Employees.



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- In the remainder of this presentation, I will highlight some of the important issues faced by Employers and hopefully provide you with some useful information as to ways of avoiding liability and saving your organization both time and expense during the course of the employment relationship.



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## B. THE IMPORTANCE OF WRITTEN EMPLOYMENT CONTRACTS

- A written employment contract offers the benefit of clarity and certainty concerning the rights and obligations of the employer and employee at the outset of the employment relationship
- With a properly drafted written employment contract, the settlement of disputes in an employment situation becomes a much simpler and less expensive proposition for both the employer and the employee

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- In the absence of a written employment contract, the employer and the employee may have very different recollections concerning what may have been agreed with respect to some of the basic conditions of employment
- The written contract removes the problems associated with faulty recollections of what the parties did in fact agree to at the outset of the employment relationship

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- The key provisions of any employment contract should include:
  1. The position being offered and accepted, as well as a job description
  2. The compensation that will be paid, including the right to receive any bonuses or commissions and the formula of determining these forms of compensation
  3. Whether the employment is for a set length of time or is indefinite

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4. Specifics regarding vacation time and sick leave and whether such time accrues from year to year


5. Whether there will be a probationary period after hiring

6. Possible changes in job or location

7. Protection of the employer's intellectual property and confidential information and whether there will be any post-employment obligations (non-competition, non-solicitation clauses)

8. Pregnancy and Parental Leave policies

9. Employment termination provisions



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**C. COMPLIANCE WITH THE EMPLOYMENT STANDARDS ACT, 2000 (ONTARIO)**

- In drafting the contract, care must be taken to ensure that the terms do not violate any of the minimum standards set out in the Ontario *Employment Standards Act, 2000* ("ESA"), or the employment standards laws of your province.
- The minimum obligations of the ESA cannot be lessened even by agreement between an employer and an employee, such agreements are not enforceable



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- These obligations on employers in Ontario, and other provinces, touch on a number of issues such as:
  1. minimum wage;
  2. overtime pay;
  3. vacation entitlement;
  4. statutory holidays;
  5. pregnancy and parental leave; and
  6. termination and severance obligations



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**D. THE IMPORTANCE OF TERMINATION PROVISIONS**

- Employers must provide reasonable notice, or pay in lieu of notice of termination in cases where termination of employment is without reasonable cause
- In the absence of a contract specifying the notice to which an employee is entitled, a court will determine how much is reasonable under the circumstances



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- These so called "common law notice periods" are typically significantly greater than the minimum standards mandated by the ESA, and as such, the lack of a written termination clause can expose the employer to significant liability in the event of a termination of an employee without cause
- Contractual termination provisions are enforceable, so long as they meet the minimum statutory requirements of the ESA, and are not in violation of any other law, such as the Ontario *Human Rights Code*, or other provincial human rights legislation



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- It is important to have the employee sign the employment contract *prior* to commencing his or her employment
- Recent case law in Ontario has held that a written contract signed by the employee after he commenced his new job did not supersede the oral contract that was agreed to during the course of a telephone conversation between the employer and the employee three days before he was to commence his employment



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## E. BE CAREFUL WITH PROBATIONARY CLAUSES

- For some employers, a probationary period is important, in that it provides a trial period for the employer to assess and evaluate the employee to determine if he or she is suitable for long term employment with the organization
- A probationary term is never implied in an employment contract
- Therefore, it is important that the employee's probationary status be set out either in the employment contract or the offer letter *prior* to the employee commencing work

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- A properly worded probationary clause is also important
- The clause must clearly indicate that the employee is being hired on a probationary basis, as well as the length of the probationary term
- The termination rights of the employer during the probationary term must also be set out clearly
- The ESA does not refer to or create any probationary status for new employees

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- However, it does provide that no minimum pay in lieu of notice is required for employees with less than three months of service
- After that three month period of service, the minimum notice requirements for termination of employment under s.57 of the ESA become operative
- Therefore, if the employer's probationary period is more than three months, the employee's entitlement for *ESA* termination pay become operative

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• The hiring of an employee on a probationary term does not absolve the employer from legal duties with respect to that employee

• Numerous judicial decisions in Ontario and other jurisdictions in Canada have found that an employer hiring an employee on a probationary status has the following duties:

1. Management must assess the employee in a manner that is not arbitrary, discriminatory or in bad faith;



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2. The employer must impose reasonable standards of conduct and the employee must be measured against the standards which are made known to the employee;
3. The employee must be provided with a fair opportunity to demonstrate his or her ability to do the job;
4. The employer must provide a fair, honest and valid assessment of the employee's competence and suitability for ongoing employment



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- Should the employer fail to meet any of the above duties, it may be faced with a wrongful dismissal claim
- Absent a term in the employment contract stating otherwise, an employer cannot terminate a probationary employee without just cause
- While the test for just cause for probationary employees is lower than that of a regular employee, the employer bears the onus of proving that just cause existed for termination within the probationary period



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## F. EMPLOYEE TERMINATION: ISSUES TO CONSIDER

- The decision to terminate an employee for cause should not be made lightly
- This is because terminating an employee with cause without legal justification to do so will expose the employer to potentially significant liability
- For an employer to dismiss an employee without any statutory or common law notice, the law requires that the employee must have done something contrary to the employment contract, which has had the effect of undermining the entire employment relationship, such that there has been a fundamental breach of the contract

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- The Supreme Court of Canada in *McKinley v. BC Tel* [2001] 2 S.C.R. 161 has stated that just cause will exist where the employee violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or whose conduct is fundamentally inconsistent with the employee's obligations to his or her employer
- The onus (or responsibility) of proving cause for dismissal of an employee lies with the employer

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- If the employer cannot prove just cause on the balance of probabilities, the employee will be deemed to be wrongfully dismissed and the employer will be responsible to pay monetary damages arising from the dismissal
- Since dismissal with cause is such a severe punishment, it can be justified only by the most serious forms of employee misconduct
- There are certain categories of conduct which have been recognized by courts to constitute cause for an employee's dismissal without notice

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• These categories include:

1. Dishonesty (fraud and theft being examples)
2. Insolence and insubordination
3. Breach of trust and/or the duty of fidelity
4. Conflict of interest
5. Chronic absenteeism or lateness
6. Sexual harassment
7. Serious incompetence
8. Intoxication at the workplace
9. Fraudulent misrepresentation as to qualifications/credentials

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• In each case where dismissal with cause is being considered, the employer needs to assess:

1. Whether the employee misconduct can be proven
2. Whether the nature and degree of misconduct is of sufficient severity to cause an irreparable breakdown in the employment relationship, either by violating an essential condition of the employment contract, or destroying the employer's inherent faith in the employee

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• Having termination rights set out in the employment contract is particularly important when the employer is considering dismissal

• In order to avoid wrongful dismissal litigation, it is sometimes better simply to dismiss without cause and pay the relatively small amounts pursuant to the terms of the employment contract, rather than to face defending a much larger wrongful dismissal claim

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### G. OBTAINING FULL AND FINAL RELEASE FROM THE TERMINATED EMPLOYEE

- An employer which pays a terminated employee an amount in excess of what is required under the ESA should require that the employee sign a Full and Final Release of any and all claims relating to his or her employment
- Such a release will protect the employer from the employee coming back at a later date with additional claims
- Without the release in hand, the employee would be within his or her legal rights to do so

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### H. BILL 118 (ONTARIO)

- Ontario's "distracted driving" law is now in force, and needs to be considered by employers whose employees drive during their working day
- Bill 118, entitled *Countering Distracted Driving and Promoting Green Transportation Act, 2008* which came into effect on October 26, 2009, amends the *Highway Traffic Act* to prohibit:
  - Driving a motor vehicle while the display screen of a television, computer or other device is visible to the driver

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- Driving a motor vehicle while holding or using a hand-held wireless communication device or electronic entertainment device
- The new law makes it illegal for drivers to talk, text, type, dial or email using hand-held cell phones and other hand-held communications and entertainment devices
- Rationale:
  - Studies show that a driver using a cell phone is 4 times more likely to be in an accident than a driver focused on the road

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- Other studies show that texting while driving is even more dangerous
- Police commenced issuing tickets on February 1, 2010
- Offenders can face fines of up to \$500
- Exceptions:
  - GPS devices
  - Wireless communication devices, if used in a hands free manner (e.g. a bluetooth device)



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- Commercially used logistical transportation tracking systems
- Collision avoidance systems
- Instruments, gauges and systems providing information to the driver regarding the status of the vehicle
- The new law is a concern for any employer whose employees use a mobile device or drive a vehicle as part of their job



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### H. POTENTIAL LIABILITY FOR EMPLOYERS UNDER BILL 118

- Employers may be found liable for damages if an employee causes an accident while using a hand-held communication device during the course of their employment
- Recent American examples illustrate the potential issues that could be faced by Canadian employers
  - In Pennsylvania, an investment firm settled a negligence suit for \$500,000 after an employee stockbroker hit and killed a motorcyclist while conducting business on his cell phone



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– In Florida, a Miami jury awarded \$21 million to a woman who was severely injured by one of the company's salesmen while he was talking on his cell phone

– In Arkansas a jury found a lumber company liable after one of their employees struck another car, gravely injuring the passenger. At the time of the accident the employee was using the cell phone for a sales call. The case ended up being settled for \$16 million



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• Plaintiffs have been suing under these theories of liability:

- The employer requires or encourages employees to be available to clients at all times and either provides cell phones or reimburses employees for use of their personal items; or
- The employer knows that employees are using phones while driving and fails to ensure that they are doing so safely



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• Recommendations:

- Take a proactive approach to the new law. Do not assume that employees will make the necessary adjustments
- Create or update mobile device use policies to make sure that employees comply with the law and carry out their jobs in a safe manner
- Make sure employees are aware of the law and enforce policy violations
- Provide your employees with the necessary hands free devices, and train them in their use



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– As of April 2010, Newfoundland, Nova Scotia, Quebec, Ontario, Saskatchewan, British Columbia, and Prince Edward Island have legislation banning the use of hand held devices by drivers. Similar legislation is in various stages of legislative process in Manitoba, Alberta and New Brunswick.

– Whether or not your province is presently covered by distracted driving laws, it is a good risk management practice to have a hand held device use policy in place to protect your organization, your employees and the public



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