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Mississauga – November 10, 2016

THE TOP TEN HUMAN RESOURCES MISTAKES EMPLOYERS MAKE (AND HOW TO AVOID THEM)

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**The Top Ten Human Resources Mistakes Employers Make
(And How To Avoid Them)**

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Overview of The Top Ten HR Mistakes Employers Make

1. Hiring an Independent Contractor Who is Really an Employee
2. Not Having a Written Employment Contract
3. Drafting Your Own Contracts
4. Incorrect Use of Fixed Term Employment Contracts
5. Incorrect Use of HR Policy Manuals
6. Not Keeping Employee Policies Up to Date
7. Not Having/Implementing a Vacation Policy
8. Not Keeping Written Record of Employees' Performance Issues
9. Misunderstanding the Duty to Accommodate
10. Not Having Insurance for Employee Related Claims

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1. HIRING AN INDEPENDENT CONTRACTOR WHO IS REALLY AN EMPLOYEE

A. Reason for Hiring as an Independent Contractor

- Not required to remit statutory payroll taxes and deductions
 - Income Tax
 - Canada Pension Plan
 - Ontario Employer Health Tax
 - Employment Insurance
- Administrative convenience



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**B. Risks of Incorrectly Characterising an Employee
Canada Revenue Agency (“CRA”)**

- Employers that fail to deduct income tax may be ordered to pay:
 - Unremitted taxes;
 - Employer’s share of premiums owing;
 - Employee’s share of premiums owing;
 - Penalties; and
 - Interest
- CRA Guidance: <http://www.cra-arc.gc.ca/E/pub/tg/rc4110/rc4110-e.html>


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Workplace Safety and Insurance Act, 1997 (“WSIA”)

- When the Workplace Safety and Insurance Board determines that an independent contractor is actually an employee under the WSIA the employer can be:
 - Charged with breaching the WSIA by not remitting premiums for the worker(s) leading to:
 - Investigation by the Board;
 - Charging the employer the outstanding WSIA premiums amounts plus interest
 - Being found guilty of a provincial offence and having fines levied



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C. Recent Cases – “Independent Contractors” held to be Employees


- *Hawkwind Farms Ltd v Hurley-Maloney*, 2016 CanLII 47888 (ON LRB)
 - Horse breeding operation hired an independent contractor but OLRB found worker to be an employee
- *2403986 Ontario Ltd (operating as Milano Pizza and Wings) v Beauchamp*, 2016 CanLII 55238 (ON LRB)
 - Beauchamp hired as an independent contractor but OLRB found worker to be an employee
- Employees owed:
 - ESA minimum wage entitlements
 - ESA vacation and holiday pay

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- *Sistema Toronto Academy Inc v MNR*, 2016 TCC 193
 - Charity hired instructors to teach music to disadvantaged youth
 - Hired as independent contractors
 - CRA determined that they were employees
 - Tax Court of Canada upheld Ministry of National Revenue ruling that 6 “contractors” were employees for EI and CPP purposes and the charity should have made EI and CPP source deductions



Employee
 Independent Contractor

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D. Factors for Determining Employees versus Independent Contractors


- The level of control the payor has over the worker;
- Whether or not the worker provides the tools and equipment;
- Whether the worker can subcontract the work or hire assistants;
- The degree of financial risk taken by the worker;
- The degree of responsibility for investment and management held by the worker;
- The worker's opportunity for profit; and
- Any other relevant factors, such as written contracts

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2. NOT HAVING A WRITTEN EMPLOYMENT CONTRACT

- Why is it important:
 - Potential to misunderstand one another
 - Avoid long-term monetary liability to employees in event of termination of employment
- Essential terms need to be laid out:
 - Hours of work
 - Duties
 - Amount and details of compensation
 - Reporting structure
 - Mechanics for ending the relationship




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3. DRAFTING YOUR OWN EMPLOYMENT CONTRACTS

- “Do it yourself” contracts are frequently unenforceable due to violation of minimum prescribed standards from the *Employment Standards Act, 2000*
- Section 5(1) of the ESA states that no employer or employee can contract out of or waive an ESA standard
- Should have contracts professionally reviewed to avoid future problems



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Example: Termination Clauses

- ESA s. 57 contains the minimum termination notice or termination pay requirements based on years of service
- If the clause in the contract provides less than the s.57 requirement it will not be enforced by a court
- Common law rights, which are usually more generous than the ESA minimums, would apply instead of the contract clause


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4. INCORRECT USE OF FIXED TERM EMPLOYMENT CONTRACTS

A. Correct Uses of Fixed Term Contracts

- Parental leave replacement
- Hiring for specific tasks or projects
- Grant-based projects with definite completion dates
- Time-limited transition requirements (e.g. after the sale or acquisition of a business)



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B. Unintended Liability

a) Continuing to Work after the Expiration of the Term


- Employees on a fixed term contract often continue to work after the end of the term, with no new contract
- If the an employee continues to be employed after the end of the contract they become an indefinite term employee
- Employee can then rely on their common law rights in the event of termination = unexpected liabilities

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b) Consecutive Fixed Term Contracts

- Court may see such contracts a ruse to avoid termination obligations
- The longer the employee remains on consecutive fixed term contracts the greater the risk that the employee will be declared an indefinite employee
- Employee can then rely on their common law rights



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c) Termination Damages to End of Term


- If an employee on a fixed term contract is terminated on a without cause basis the cost may well exceed what would be owed under an indefinite term contract
- *Howard v Benson Group*, 2016 ONCA 256
 - Fixed term employee terminated without cause owed damages equivalent to the remainder of his contract term because the contract was unclear about termination rights

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5. INCORRECT USE OF HR POLICY MANUALS

- If intention is to have the employee bound by the obligations and rules contained in the policy manual the employee must:
 - Be made aware of its contents
 - Be required to sign off and agree as a condition of employment
- An employee should be provided with a copy of the manual and sign an acknowledgement form in the manual agreeing to terms
 - Terms include the employer's right to amend the policies as needed



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- In *Cheong v Grand Pacific Travel & Trade (Canada) Corp* (2016 BCSC 1321) the termination policy of the corporation was contained in the policy manual rather than the employment contract
- The termination policy was held not to be enforceable because the employer could not provide evidence that the employee agreed to its terms
- Employee could rely on common law rights re termination entitlements

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6. NOT KEEPING EMPLOYEE POLICIES UP TO DATE

- Employers, including charities and NFPs, are legally required to adopt/implement a variety of HR policies
- Example:
 - Ontario *Occupational Health and Safety Act* (OHSA)
 - Mandatory health and safety awareness training
 - Mandatory workplace violence/harassment policies
- Latest OHSA amendments re: sexual harassment in force as of September 8, 2016



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- Policies need to be kept up to date to keep up with legislative changes
 - Board of Directors has the legal responsibility to remain compliant with changing laws
 - Annual policy review should be on the directors' agenda
 - Ontario Ministry of Labour Website has useful information/training modules: <https://www.labour.gov.on.ca/english/hs/training/>

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7. NOT HAVING/IMPLEMENTING A VACATION POLICY

- Employees commonly do not use all their annual vacation time
- What happens to unused vacation time?
 - Accrue to the next year?
 - Time lost?
 - Monetary payout?
- Without a policy:
 - Potentially accruing a large contingent liability to the Employee



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- The potential liability can be easily resolved through:
 - Employment contract vacation provision
 - Vacation policy
- Policy could stipulate:
 - Unused vacation beyond the ESA minimum (2 weeks vacation per year) will not be paid out and that vacation is provided on a “use it or lose it” basis
- Employees should not be allowed to assume that their unused vacation time will accrue year after year

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8. NOT KEEPING WRITTEN RECORD OF EMPLOYEES' PERFORMANCE

- “Dos and Don'ts of Employee Acquisition and Termination for Charities and Nonprofit Organizations” - <http://sectorsource.ca/resource/video/dos-and-donts-employee-acquisition-and-termination-charities-and-nonprofit>
- Termination for cause is difficult to prove



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A. Justifying “For Cause” Terminations


- Though a single event may not justify termination for cause multiple infractions can
- However, the infractions must be part of a written record and a progressive discipline process
- Things to include:
 - Performance issues
 - Past incidents of misconduct
 - Verbal or written warnings
 - Other forms of discipline short of termination
- Positive actions can also be recorded

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9. MISUNDERSTANDING THE DUTY TO ACCOMMODATE

- “Human Rights Challenges in the Workplace” - <http://www.carters.ca/pub/seminar/chrcslaw/ott/16/Human-Rights-2016.pdf>
- Caution is required when dealing with employees absent for medical reasons
- Employees are protected by the *Ontario Human Rights Code* (“OHRC”) including the right to “reasonable accommodation” in the workplace
- Reasonable accommodation may include time off work, a gradual return to work plan, use of adaptive devices, etc.



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- Employer has legal duty to make bona fide efforts to accommodate employees with disabilities to the point of undue hardship - s.17 OHRC
- Do not assume an employee may be dismissed for being off work for a certain time period
- Unless it is clear (based on available medical information) that there is no reasonable likelihood of a return to work in the foreseeable future, it is unlikely a court will deem an employment contract frustrated

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10. NOT HAVING INSURANCE FOR EMPLOYEE RELATED CLAIMS

- Employment Practices Liability Coverage
 - Could be included as part of an organisation's directors and officers insurance policy or its general liability policy
 - Provides coverage for a variety of employment related claims
 - If you are not sure if you have this coverage speak to your broker or insurer to find out
 - Remember that there are conditions and limitations
 - This coverage is typically limited to legal defence costs



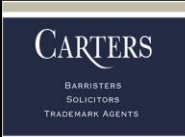
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Conclusion

- HR mistakes can be avoided by exercising due diligence
- Protect your organization - take the time to review your HR practices
- If in doubt, seek professional advice

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