FIVE THINGS MANAGERS NEED TO KNOW

Employers commonly give department managers the authority to make employment-related decisions for their own staff. Even when a company has an in-house human resources expert, decisions with legal implications may be made at the department level.

But department managers typically will not be fully trained in employment law. So, are there some basic concepts they can learn which will give their company the prospect of avoiding legal complaints?

In my experience, untrained managers commonly trip over certain issues and, in doing do, create liability for their employer. I've observed at least five obvious examples.

Asking Questions

First, managers who are involved in hiring need to have a basic understanding of human rights law and discrimination in particular. Knowing what questions to ask during the hiring process, and what questions not to ask, is an important skill.

Because of the recent focus on human rights and personal information (or privacy) law, my sense is that managers are afraid to ask any questions relating to age, gender, religious background, etc. Personally, I think we've all gotten a little too worried about crossing the line into personal information, though discretion is definitely a good starting point.

The legal fact is that there are no questions which are, in and of themselves, totally inappropriate to ask during the hiring process. But, when they relate to a candidate's personal characteristics, it is critical that they are reasonably related to the job for which the employer is hiring.

Employment Agreements

Second, it is critical for hiring managers to understand the legalities of implementing employment agreements (or other documents in which terms of employment are set out). The key thing to know is that the employer has a golden opportunity to impose its desired range of terms, including company policies, before the employment commences.

Once the newly hired employee has started working, it is too late to simply stick an employment contract under his or her nose and say, "Please sign this". That is because, by that point in time, the employee typically won't be receiving of value anything in exchange for signing.

So, all hiring managers should be keenly aware that the time to get the candidate to sign an employment agreement or related documents is before he or she commences employment. One day late is, well, too late.

Probation Periods

Third, managers who will be involved in weeding out new hires who don't cut the mustard should know there is no such thing as an implied or automatic probation period. A probation period must be properly described and implemented and an employment agreement is the place to do so.

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It is a very common misunderstanding that, in B.C. at least, employers terminating employees during the first three months of employment are completely protected by our Employment Standards Act. They aren't. The common law of employment – which is the basis of court claims for wrongful dismissal – compels the employer to expressly impose the probation period.

The probation period is, in my view, an employer's best opportunity to view new employees on the job and, if they aren't cutting it, make a risk-free move to get rid of them. But, if the probation period is not properly implemented – again, the employment agreement is the place to do so - a civil action for damages may not be far behind.

Disciplining By Suspension

Fourth, managers who are involved in imposing discipline need to know whether the employee's terms of employment permit the imposition of measures such as unpaid suspensions. Many managers incorrectly presume that such measures are part of the employer's implied managerial authority.

But, like the probation period, these entitlements don't necessarily come into being automatically. Depending upon the circumstances of the employment relationship, imposing severe disciplinary measures such as an unpaid suspension or a demotion may be viewed as a constructive dismissal.

If the suspended or demoted employee decides not to accept the discipline, he or she may well choose to walk away and sue for damages for constructive dismissal. Again, the authority to take these kinds of disciplinary steps arises from a well-drafted, properly-implemented employment agreement.

Firing, Layoffs, Resignations

Fifth, managers making firing decisions need to understand some basic – and critical – concepts. There are many, and entire courses are taught on this topic alone, but a few stand out in my mind.

A source of much confusion is the question of whether employers have an inherent legal right to lay employees off (without pay) temporarily. Put simply, they don't.

The distinction between firing and quitting also seems to confound many managers. In particular, they should know that an employee who won't accept substantial changes to his or her employment can't properly be viewed as having quit – that scenario is called constructive dismissal.

The king of all misconceptions among managers is that the applicable employment standards legislation is the only source of an employee's entitlement to working notice (or pay in lieu). Unless the employer has provided the employee with reasonable notice (or pay in lieu) pursuant to the greater common law requirements (and, ideally, has obtained a signed release), it may expect to be sued.

Understanding these basic legal issues can go a long way towards keeping a company out of court. Employers would be well-advised to give their managers some exposure to at least these minimal concepts.

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