

UNDERSTANDING HUMAN RESOURCE OBLIGATIONS IN CHILDCARE ORGANIZATIONS

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Land Acknowledgment

We respectfully acknowledge that the City of Vaughan is situated in the Territory and Treaty 13 lands of the Mississaugas of the Credit First Nation. We also recognize the traditional territory of the Huron-Wendat and the Haudenosaunee. The City of Vaughan is currently home to many First Nations, Métis and Inuit people today. As representatives of the people of the City of Vaughan, we are grateful to have the opportunity to work and live in this territory.

Human Resource “Best Practices” on Policies

- Policies should have a default review date.
- Policies should not be implemented if they cannot be followed on a consistent basis.
- Policies are the first line of defense.
- Do not contain language that could be considered biased or discriminatory.
- Never assume everyone understands policies the same way.

How Policies Can Get You Into Trouble

- Failure to consistently enforce policies
- Inadequate training
- Wrongful discipline
- Negligent performance reviews
- Improper workplace investigations
- Inconsistent documentation
- Ambiguous or discriminatory language

Ontario Human Rights Code (OHRC)

- Written very broadly
- Definitions under the Disabilities Act, Mental Health, & AODA always evolving
- Protected rights expanding
- Awards have increased
- Management should have proper training

Accessibility for Ontarians with Disabilities Act (AODA)

- Integrated Accessibility Standard – employers are required to “be accessible” through the entire employment relationship.
- Mandatory training for employees, placement students, & volunteers.
- AODA accessibility report was to be filed by December 31, 2023.
- Fines for non-compliance \$100,000 for employers & \$50,000 for the Board of Directors.

Accommodation under the OHRC

- Employers have a legal obligation to investigate (within reason) steps to accommodate employee with disabilities up to the point of undue hardship.
- The obligation to accommodate extends to other protected grounds.
- Management should have proper training to reduce the risk of a human rights complaint.
- Organizations should have a Workplace Accommodation Policy that is shared with employees.

AODA Requirements

- Organizations must comply with the customer service standard, employment standards, information and communication and transportation standards where required.
- Organizations are required to train all staff, placement students, and volunteers.
- Organizations are required to report any changes to their profile including changes in the number of employees.
- There will be a new accessibility education standard under the AODA (kindergarten to 12) to be implemented on or before January 1, 2025.

Accessibility Audits

- The Accessibility for Ontarians with Disabilities Division is conducting compliance audits and will enforce noncompliance.
- Organizations with 20 or more employees must have filed their accessibility report by December 31, 2023, to the Ministry for Seniors and Accessibility.
- Organizations with 20 or more employees are required to have written accessibility policies which should be readily available to provide during an inspection.

Accessibility Audits

Organizations with 50 or more employees are required to have;

- Publicly available written accessibility policies.
- Written statement of commitment to accessibility.
- Written multi-year accessibility plan that must be reviewed at least once every five years.
- Your multi-year accessible plan must be posted on your website.
- Your written policies, plan and your statement of commitment must be available in an accessible format if requested.

Employment Contracts

- Termination language in employment contracts have been under attack since 2021.
- Two recent court cases highlight the importance of ensuring your organization has legally reviewed employment contracts.
- Ambiguity in an employment contract will be resolved in favour of the employee.
- Enforceability of a termination clause is dependent on the wording in the clause.

Termination Language – Without Cause

- Termination language that states the employer can terminate an employee at its “sole discretion” and “any time” contravenes the ESA.
- Employers do not have the right to dismiss an employee on conclusion of a job protected leave.
- Language that states only base salary being owed to an employee does not capture “regular wages” such as vacation pay or other entitlements/benefits under a contract.

Termination Language – For Cause

- “For Cause” termination provisions that withhold statutory notice entitlements without separating “willful” misconduct do not comply with the ESA.
- Dismissal for “failure to perform services” is not the same as willful misconduct.
- “Willful misconduct” under the ESA - an employee must knowingly engage in conduct that they know is intentionally or deliberately misconduct.
- Employers must be able show that the employe engaged in misconduct that was knowingly on purpose.

When to provide a current employee with a new employment contract?

- Employers can choose to provide updated contracts to existing employees as long as they give “consideration” (signing bonus/extra paid day off) however employees can refuse to sign.
- Employers should be mindful of older employment contracts when employees are promoted to positions of significantly higher responsibility than their original job.

When to provide a current employee with a new employment contract?

- Recent Ontario Court of Appeal decision on “changed substratum” ruled an original employment contract is no longer valid at termination of employment if the role and responsibilities of the job are not the “same job”.
- Therefore, an employee’s original hiring contract if they have been promoted maybe challenged at termination unless there is language that states the original contract will continue to apply to any promotions in the organization.

Takeaways

- Operators should have legally reviewed employment contracts.
- Contracts should have language regarding layoffs, probationary periods, & constructive dismissals.
- Operators need to ensure that their contract's "termination with just cause" language complies with the ESA Regulation 288/01 in defining "willful" misconduct.
- Operators should be using indefinite term contracts for permanent employees.

Takeaways

- Operators with older employment contracts with language that does not comply with the ESA should be mindful that the contracts will be invalid and can no longer be relied upon when terminating an employee.
- Operators should always consult with an employment lawyer before making any changes to their employment contracts.

Employment Standards Act (ESA)

- Job Protected Leaves
- Right to Disconnect Policy
- Provisions are constantly changing
- Electronic Monitoring Policy
- Bill 79 Working for Workers Act 2023 received Royal Assent end of October

Bill 149, Working for Workers Four Act, 2024

- With the passing of Bill 149 on March 21, 2024, there are several legislative amendments to the ESA with different timelines.
- This will give employers time to prepare for future legislative changes that will come into force over the next few months and beyond.
- Effective immediately, any individual who is performing work as part of a “trial” period is now considered an employee.

Vacation Pay - June 21, 2024

- Under the ESA (default rule) vacation pay is to be paid to the employee in a lump sum before the employee commences their vacation.
- However, the ESA has permitted alternative vacation pay arrangements by the employer.
- For example, to pay vacation as a percentage on each regular pay cheque or salary continuance throughout the employee's vacation.
- Bill 149 clearly defines that alternative vacation pay provisions must be written in an offer letter or employment agreement and agreed to by the employee.
- If not, then employers will have to create separate stand-alone agreements.

Publicly Advertised Job Postings

- Will be enacted once the government defines what will count as a “publicly advertised job posting” and sets a date.
- Employers will have to include information regarding the expected compensation (or range) for the position.
- Employers will not be allowed to require job applicants to have prior work experience in Canada.
- Application forms cannot include Canadian work experience.

Occupational Health & Safety Act (OHSA)

- Employers are required to take all reasonable steps & precautions to keep employees safe in the workplace
- There are different standards and areas of compliance that must be followed depending on the size of the organization
- Mandatory training obligations for supervisors and staff
- The MOL has increased fine for health & safety violations

Occupational Health & Safety Act

- The MOL & school boards have identified that a child's behaviour can pose a legitimate health and safety risk to the child, other children, and/or staff.
- Employees have the right to refuse to do unsafe work however it must be based on evidence that is substantiated.
- Employee cannot refuse to work based on assumptions that are hypothetical, fearful or speculative.

Workplace Violence & Harassment Policies

- Workplace violence & harassment policies and programs are legislated under the OHSA
- Employers are required to provide training on their policies and procedures including annual reviews
- Training should also address behaviours that may not rise to the level of harassment but are still inappropriate in the workplace
- Risk assessment for violence

Takeaways

- Be prepared for more staff complaints around unsafe working conditions in the classroom.
- Ensure staff have the required training and supports.
- Make sure incidents in the classroom are clearly documented and based on facts not feelings or assumptions
- Make sure staff are informed if they are working with a child who has high support needs or of the possible behaviours which may result in an injury to the child, themselves or others.

Takeaways

- Make sure your workplace violence risk assessment includes possible injury working with children with disabilities.
- Have a workplace health & safety policy specific to address working with children with disabilities.
- Have a plan in place to reduce the risk of injury that includes safety and support tips.

Workplace Investigations

- Employers are required by law under the OHSA to investigate incidents or complaints of workplace harassment/bullying.
- If the alleged target of harassment does not want to complain that does not relieve an employer of their duty to investigate.
- Policies must include how to report incidents and the steps in the investigation process
- Management should be trained on how and what to document in a workplace investigation
- Serious complaints or allegations require legal advice

Cybersecurity/Liability

- Board of Directors/Owners as part of cybersecurity management and data protection should ensure the organization has the appropriate policies and practices in place to reduce the risk of cyber threats.
- Organizations are responsible for personal information under their control and should have security safeguards in place. Lawsuits related to data breaches due to negligence, misconduct and fraud are on the rise.
- Up-to-date antivirus/anti-malware software, encrypted wireless, firewall, backups, educating staff on their role in maintaining computer security, strong passwords that change and cyber insurance.

Ontario Sick Days Proposed Changes

- Currently employers can require an employee to provide “reasonable evidence” based on the situation to verify entitlement to sick leave.
- Proposed legislation under the ESA will prohibit an employer’s ability to ask for a medical/sick notes for the three sick leave days under the ESA.
- However, at this point it will not affect employers asking for medical documentation for sick leaves beyond the first three days in a calendar year.

Ontario Not-for-Profit Corporations Act

- Organizations have six months left to review and/or update their articles of incorporation (letters patent) for accuracy and modify their Bylaws to comply with the ONCA deadline October 18, 2024.
- Organizations who were previously governed under Part III of the Ontario Corporations Act (OCA) are automatically subject to the ONCA moving forward.
- Organizations who miss the deadline will have the government's default Bylaws and rules imposed on them.
- The default rules and Bylaws are not childcare friendly and will have some unexpected consequences that may not be anticipated or desirable.

Ontario Not-for-Profit Corporations Act

- Under the default Bylaws organizations will need majority of the membership at the Annual Meeting or any special meeting of the members to be able conduct any business or amend their Bylaws.
- You will no longer be able to define majority based on an arbitrary number that ensures quorum for these meetings.
- In addition to Bylaws, older “letters patent” missing provisions regarding charitable status, fixed number or directors, or dissolution of the organization must be updated.

Questions

Our next session on How to Transition to the ONCA will be on Wednesday, June 5th from 10:00 a.m. to noon. Please email us for more information.

Thank you for joining us!