

# The Top 10 HR Related Risks Employers Should Not Take



## 1

I have hired my last three computer techies as consultants – that way I can save on EI and CPP. Now I can get rid of them without having to pay a huge package.

### HR Issues

- What are the payroll implications and costs if the individual is found to be an employee
- Due diligence and HR policies

### Legal Issues

- Employee v. Independent contractor Legal Test
- What is the legal exposure if the individual is found to be an employee?

## 2

I hired you on salaried. I can have you work extra hours without paying overtime.

### HR Issues

- The effect on morale of not treating non-exempt employees fairly
- Increased awareness of rights through internet and other solutions
- The threat of unionization

### Legal Issues

- Not all salaried employees are exempt from overtime pay
- The calculation of the overtime rate for standard employees
- Risk of involvement in class action lawsuits

## 3

Employees who don't take their vacation in the year, lose it

### HR Issues

- The need for proper policies to be in place
- The proper training of managers

### Legal Issues

- Employment Standards Act* employees must take minimum vacation time and be paid minimum vacation pay within 10 months of the year for which is earned
- Employees who do not take it within 10 months must be paid their accrued vacation
- Calculation of Vacation Pay includes commission and non-discriminatory bonuses
- Company policies re: vacation in excess of minimums

## 4

I pay my employees a fixed daily rate for days they travel for business

### HR Issues

- To view this practice from a total compensation perspective
- Be upfront for consistency
- Ensure compliance with the *Employee Standards Act* minimums in the employee agreement

### Legal Issues

- Employee Standards Act*
- “Travel Time” (is counted as work time so must be paid)
- “Commuting Time” (is not counted as work time and so is not paid)
- Overtime obligations
- Maximum Hours of Work Thresholds

## 5

I have employees who really need the money so they work any overtime they can get – even back-to-back shifts

### HR Issues

- The impact on morale
- The threat of unionization
- Training line managers on work scheduling rules
- The need for consistency

### Legal Issues

- The Employee Standards Act*: maximum hours of work per day and per week, including overtime
- Permits: Exemptions with Director approval
- Criminal liability punishment for Bill C-45

## 6

My employee has not shown up for work in three days. He has obviously resigned.

### HR Issues

- To rely on resignation, documentation is essential: policies for call-ins and absenteeism
- This should be part of the orientation of supervisors and other employees
- Common sense approach

### Legal Issues

- Test for Termination v. Resignation
- There must be a clear and unequivocal intention to resign
- Termination = costs/Resignation = no costs

## 7

I have an employee off on WSIB. I'm told that I don't have to bring them back under the Workplace Safety and Insurance Scheme. So I'm not going to bring my employee back to work.

### HR Issues

- Disability or medical management program:
  - Assessments
  - Physical Demands Analysis
- The Goal: is to get employee back to work faster
- Significant cost when you ignore early and safe return to work systems.

### Legal Issues

- Workplace Safety and Insurance Act v. Ontario Human Rights Code*: WSIA re-employment obligations v. OHRC duty to accommodate
- OHRC obligation may exceed WSIB obligation
- Repercussions for failure to accommodate under the OHRC

## 8

I need to terminate an employee. I have checked with the MOL and they have told me one week per year of service. That should be good enough.

### HR Issues

- The importance of regular performance evaluations
- To establish a better process for performance management
- To avoid surprises, unless the employer is restructuring

### Legal Issues

- Employment Standards Act* = Minimums only
- The common law notice periods (judge made law) usually **exceed** the requirements under the *Employment Standards Act*
- The use of Employment contracts to limit liability/exposure

## 9

I have an employee who is on maternity leave but I like her replacement better. I'll keep the replacement and let go of my employee when she gets back.

### HR Issues

- Establish a performance management plan for all employees
- Evaluate employees over a large period of time
- Hire an employee on a fixed term contract as a maternity leave replacement

### Legal Issues

- Employment Standards Act*. employer obligations to reinstate to the same position most recently held or to a comparable one if the original position does not exist.
- Reinstatement is not required if the reason for not reinstating is unrelated to the leave
- The “But For” test

## 10

I have an employee that has been approved for LTD. I am proceeding to hire his replacement since I do not plan to bring him back.

### HR Issues

- Hire the replacement employee on a fixed term contract
- Maintain good employee relations by treating the employee as an active employee
- Performance management for all employees

### Legal Issues

- The obligation to maintain the employment status intact
- How long?
- Frustration of contract:
  - Still required to pay the *Employment Standards Act* minimums re: termination and severance