

Employee Practices Liability – A Prevalent Risk during Changing Times in the Workplace

Rapid changes in the work environment and the reliance on a technological backbone in the workplace continue to create new risk exposures for employers. Added to this, **rapid changes in the energy sector can create a stressful workplace for both employers and employees.** The perception of employees being wronged by employers is frequently in the news, whether it is during the employment (hiring/firing) process or due to circumstances where unwanted or harassing behaviour exists. These situations can result in employees choosing to exercise their rights. Employment-related lawsuits are becoming more common and costly.

Some of the more common examples of employment related actions arise from termination without cause, wrongful dismissal and sexual harassment. **These actions can result from either actual or perceived wrongdoing and defending such an action can be expensive.**

Termination without Cause

There may be instances where a company believes they have grounds for dismissal, such as an employee is slow at performing their job. However, courts have several times determined that incompetence is not just cause for termination and the employee can file a wrongful dismissal claim. Another example is where a company alleges that due to employee misconduct the employee was terminated. However, **without documented evidence of progressive discipline, warnings etc., or evidence that the court perceives 'gross misconduct' took place, the employee may be entitled to a wrongful dismissal claim.**

Wrongful Dismissal, Discharge or Termination

If an employee is terminated and an employer does not provide a reasonable notice or pay in lieu of notice, the employee can commence a wrongful dismissal action. Employees may also be entitled to more compensation at common law than minimum as outlined in the Employment Standards Act. The amount of



notice/compensation required depends on factors about the employee that need to be considered including: **character of the employee, age of the employee, length of service and availability of similar employment.** There are law firms which will offer services to terminated employees on a 'don't pay unless we win' basis. The resulting costs to defend an action can be very expensive.

Some of the potential factors or accusations against your company which may be brought forward as part of a wrongful dismissal suit by an employee include: **acting in bad faith, humiliation during the dismissal process, or doing something that would damage the employee's ability to find new employment.**

Sexual Harassment

Sexual Harassment is any conduct which involves unwelcomed sexual advances, requests for sexual favours and verbal, visual or physical conduct of a sexual nature. One type of harassment may be the requirement of sexual favours as a condition of either initial or ongoing employment. A second type, and perhaps more common is **where the conduct creates an intimidating, hostile or offensive working environment.**

What Can Happen?

An employment practices claim can arise from actions brought under either statutory/regulations or civil actions.

Employees may bring an action against their employer under federal or provincial legislation such as Canadian Human Rights Act, Labour Codes, Employment Standards Act, Pay Equity Act or other employment related acts. Or employees who feel they have been unjustly treated by their employer may simply file a claim alleging a wrongful act as a civil action. Such a claim can name specific employees/officers within the company, perhaps along with the Board of Directors. This can result in persons being personally liable for the compensation settlement and/or their personal defense in such a case. It has been reported that **up to 75% of all employment practices claims are groundless**, however the defense of these actions can be very costly.

Risk Control for Employment Practices

Policies and Procedures should be in place to deal with issues which may give rise to employment practices claims. Areas to be addressed should include the following topics:

- Recruiting and Hiring Employees
- Employee and Applicant Testing
- Employee Training and Awareness (Employee Handbook)
- Prohibition of Workplace Harassment
- Employee Evaluation, Discipline and Corrective Actions
- Employee Termination, Layoff and Workforce Reductions

Each of these topics should be developed in conjunction with and reviewed by your legal counsel to ensure compliance with legislation and employment standards. Each topic should outline the corporate policy, application and steps to ensure implementation. On a regular basis there should be an audit to review and update the policies to remain current. It is important employees are educated and informed of these policies and procedures. **The ongoing education and documentation of employee awareness/training is a critical risk management step.**

Insurance Recommendations

A standard CGL liability policy does not provide coverage for the types of actions arising from Employment Practices risks. The optional endorsement to the MEARIE Liability policy, the **Enhanced Plus+ Directors and Officers Coverage provides coverage related to Employment Practices Liability claims for wrongful acts** (either actual or alleged) related to the employment process and the workplace. It is a highly recommended addition for all Subscribers.

Resources:

The following are links to government sites which have additional resources which may be of interest:

[Canadian Human Rights Commission](#)

[Canadian Human Rights Tribunal](#)

[Canada Industrial Relations Board](#)

[Canada Labour Code](#)

[Human Resources and Skills Development Canada](#)

[Human Rights Tribunal of Ontario](#)

[Ontario Employment Standards Act](#)

[Ontario Human Rights Commission](#)

[Ontario Labour Relations Board](#)

[Ontario Ministry of the Attorney General](#)

[Ontario Ministry of Labour](#)

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