

Member's Quarterly

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Feature

Pre-Employment Misrepresentations

Legal Implications and Termination Considerations

If an employee made misrepresentations during the pre-employment process, termination for just cause may be an option, depending on the circumstances. However, deciding whether this is the appropriate course of action requires careful consideration of both the severity of the misrepresentation and the overall impact it has on the employment relationship.

When an employer seeks to terminate an employee for just cause based on pre-employment misrepresentations, the burden of proof lies with the employer. The employer must demonstrate that the misrepresentations were indeed false. Proving the falsity of certain misrepresentations can vary in difficulty. For example, showing that an employee lied about their credentials or work history may be straightforward because these details can be typically confirmed through public records, reference checks or professional certifications. On the other hand, proving that an employee misrepresented their connections and industry contacts can be much more challenging. This is because such claims can be subjective, difficult to verify and often rely on unsubstantiated personal networks or vague assertions.

To establish fraudulent misrepresentation, there are specific legal requirements. The full test for fraudulent misrepresentation contains four key elements:

1. There is a representation made by the defendant to the plaintiff;
2. The representation must be false;
3. The defendant must have known the representation was false at the time it was made; and
4. The false representation caused the plaintiff to act.

Therefore, in the employment hiring context, the employer must prove that the misrepresentation was key in the hiring of the employee.

Courts have determined that if an employee misrepresents their educational achievements and credentials to an employer, and the employer, had they known the true credentials, would not have hired the employee, this could justify termination for just cause. Conversely, in a case where an employee misrepresented their previous salary, the employer could not prove that the employee would not have been hired if the correct salary had been disclosed, and as a result, just cause for termination was not established.

Additionally, courts evaluate the severity of the misrepresentation in relation to the overall employment relationship. They will consider whether the misrepresentation was essential to the trust and integrity required in the job.

Even in the absence of fraudulent misrepresentation, there remains an ongoing duty of honesty in contractual performance. As established by the Supreme Court of Canada, both parties in a contract must refrain from misleading each other or knowingly providing false information. This duty applies to the



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employer-employee relationship from the moment the hiring process begins and extends throughout the entire employment relationship.

Recent employment caselaw continues to emphasize the need for honesty in the employer-employee relationship. For example, it has recently been found that dishonesty on a pre-employment questionnaire was acceptable grounds for the employer to withdraw the promise of employment.

In today's digital age, it is important to consider potential virtual misrepresentations. If an employer discovers information about a prospective candidate that is not included in their resume - such as details on LinkedIn - it is best practice to verify this information with the candidate. The internet is rife with false or misleading content, so employers should always confirm the accuracy of any information obtained from an external source directly with the applicant. Honesty and truthfulness are essential in the employment relationship. However, not all pre-employment misrepresentations or acts of dishonesty will be deemed serious enough to justify termination for just cause. Employers should carefully assess the nature and impact of any misrepresentations before going the just cause route.

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