

Member's Quarterly

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Feature

Are You Remotely Qualified?

How to mitigate the risks and pitfalls of remote hiring

The pandemic has changed much about the traditional employment relationship. One change that may be here to stay is the reality of remote work and as a result, remote hiring. While this 'new normal' may impact employers' ability to properly assess a candidate and their qualifications from a distance, the legal principals remain the same. Given the increased uncertainty with remote hires, it is now more important than ever to ensure that employment contracts and expectations are clearly set out at the beginning of the relationship.

Employers can protect themselves from the pitfalls of remote hiring by taking the following steps:

- 1. Implement a Probationary Period:** This allows for a trial period to assess the candidate's suitability. Should the candidate not meet expectations, the employer can take steps to terminate without notice. It is important that probation and the associated termination rights are set out clearly in an employment agreement and comply with applicable employment standards legislation in order to be enforceable (i.e., 90 days or less in Alberta).
- 2. Early Evaluation:** Schedule a performance review and assessment in advance of the end of the probation period to ensure the opportunity to evaluate the employee's suitability within the probationary timeframe.
- 3. Termination Clause:** Setting out severance provisions from the beginning functions to protect employers in the event the candidate is not what they first seem. Particularly when the candidate is working remotely, it may take additional time (beyond probation) to determine whether they are a good fit. In order to be enforceable, termination clauses must be clear, unambiguous and compliant with applicable employment standards legislation. In the absence of a clear, valid termination clause, an employee will be entitled to "common law" notice or severance which far exceeds what most employers are satisfied and comfortable with.
- 4. Temporary Layoff Provision:** We know that temporary layoffs may prove urgent, necessary and unexpected. Given this knowledge, it is important to include such provisions in the employment agreement in order to lessen the risk of constructive dismissal claims should temporary layoffs be required again in the future.
- 5. Prioritize the Paperwork:** Make sure that employment contracts are provided to the candidate for their acceptance and accepted and signed in advance of their start date. It should be clear that any offer is contingent on the employee signing the contract. Remote hiring may result in essential paperwork falling through the cracks and it is important to remember that contracts signed after the candidate has started will face enforceability challenges. Your employment contract can be as simple as a letter of hire on terms and conditions, with the employee signing at the bottom. However, the key is that it must be clear, offered, accepted and signed prior to confirming the hire and letting the employee commence work.

To ensure enforceability, we recommend seeking legal review and advice for all employment agreements in advance of hiring new candidates.

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