

Member's Quarterly

Winter 2023 Edition

Ask the Expert

Most Avoidable Mistakes Employers Make



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Q *What in your opinion are the most common easily avoidable mistakes that employers make over and over again?*

1. Being scared off by doctors' notes or harassment claims just as the employee is on the verge of being fired.

It is not a coincidence that claims are then launched and it is often at their lawyer's advice. Unless the doctor's note clearly indicates a disability which caused the performance or conduct issues, there is nothing stopping you from proceeding with the dismissal. The same goes for a harassment allegation. Unless it is soundly based, it also should not dissuade you from proceeding. In fact, not proceeding with the next step of discipline when it is warranted will condone it, making it more difficult to terminate later. It will also permit the employee to say that since they were not disciplined for that misconduct, they had no reason to believe that the employer viewed it seriously when they repeat it.

2. Giving salary increases, positive performance reviews or making positive comments about employees who should be receiving warnings instead.

Many employers have difficulty delivering tough news and are all too ready to say positive things about any accomplishment. Remember that to build a case for cause for discharge, it must be very clear to the employee that their conduct or performance was entirely unacceptable. Don't weaken your own case.

3. Failure to require and maintain employment contracts with valid termination provisions.

Especially in Ontario, the case law over the last three years has invalidated almost every existent employment contract. Why pay wrongful dismissal damages when most employees will sign employment contracts upon hiring and, having signed them, most will sign updated ones when the law renders your existing ones invalid? Remember that if you are to have an enforceable contract, you must provide the employee something in return for it. At the commencement of employment, that is the job itself. But after that, you should do it at salary increase or bonus time and make that increase or bonus conditional upon signing the contract.

4. Not complying with the law upon termination.

Issue the ROE in a timely fashion, quickly pay outstanding wages, vacation pay and pay the ESA termination and severance pay when you are required to pay. Too many employers hold off on paying because they believe they are negotiating severance or are just careless. Judges right now are punishing employer after employer in punitive and bad faith damages explicitly because they are not complying with the law upon termination.

5. Making ridiculously low ball offers

Not only does that encourage litigation, but courts have held employers liable for additional bad faith damages because their initial offer was so unreasonable.

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Feature continued

6. Not providing a deserved reference when requested.

Courts provide employees additional amounts when that occurs. Also pay attention to that request hidden inside an inflammatory demand letter from legal counsel. You can ignore the rest, but don't ignore that portion. The employee's lawyer is hoping that you don't provide it.

7. Making bogus allegations of cause

Employers are often too quick to allege cause, either because they believe it or they hope that it provides leverage. Smart employee counsel will jump on that because courts award additional bad faith damages specifically based on allegations of cause which they believe are made in bad faith. That should not prevent you from asserting cause if you have a legitimate prospect of success though.

8. Misclassifying employees as independent contractors

Most independent contractors really aren't. Don't confirm that status too quickly because workers request it. Yes, you might avoid paying benefits or even paying them a bit less in return. However, you become vulnerable to overtime claims, wrongful dismissal damages and massive income tax reassessments for not withholding, including penalties if CRA or the employees themselves decide that it is more advantageous to take a different position. Keep in mind that it's a tax fraud and, like many of the points above, discuss this with legal counsel before exposing yourself to risk.

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