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SPRING/SUMMER 2007

EMPLOYMENT LAW NEWS

The Employment Law Group at Soloway, Wright specializes in wrongful dismissal litigation, Human Rights complaints, negotiating and structuring severance packages, drafting employment contracts and non-competition clauses, and advising on the legal implications of corporate re-organizations and layoffs. All of its services are available in both English and French: tous ces services sont disponibles en français et anglais, selon vos besoins.

For more information contact one of the four professionals in our Employment Law Group:

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DID YOU KNOW THAT:

- After resigning, an employee usually continues to be bound by certain ongoing legal duties toward you, including a duty not to reveal confidential information to third parties which might hurt you and a duty not to use confidential information about your business for his or her own personal benefit or the benefit of his or her new employer.
- It may be illegal to fire an employee because he is an alcoholic or a drug addict.
- A non-competition clause, in an employment contract, prohibiting an employee from subsequently working for a competitor may be unenforceable.
- If an employee is given new responsibilities, at the same salary level, this may mean that he has been wrongfully dismissed.
- If an employee is fired without just cause, his employer cannot necessarily be forced to hire him back, even though the firing was illegal.
- If an employee sexually harasses another employee, the employer may be held strictly liable for damages suffered by the victim, even though the employer had no idea that he/she was being harassed.
- A probationary employee usually cannot be dismissed unless you provide him or her with reasonable notice or pay in lieu of notice, unless the employment contract expressly provides otherwise.
- A clause enabling an employer to dismiss an employee without providing termination pay during his 6 month probation is void and therefore legally unenforceable.
- When dismissing a probationary employee, an employer cannot be arbitrary in the manner in which it dismisses the employee, and cannot dismiss the employee in bad faith.

WHAT NOT TO DO WHEN DOWN-SIZING YOUR WORK FORCE:

Many employers labour under serious misconceptions about what they can and cannot do when down sizing or re-organizing their work force. Some of the most frequently asked questions are as follows:

- Q: If staff are laid off because there is not enough work for them, do they have to be paid severance?

A. Not necessarily. Severance need only be paid to employees who have worked for 5 years or more and then only if the employer's payroll exceeds \$ 2.5 million a year. However, where the layoff is indefinite, or for more than 13 weeks, all employees who have more than 3 months of service must be given about 1 week's notice of termination for each year of service.

Q: Can I lay off the least productive employees and keep my most productive ones?

A. No. There are certain limits to the employer's discretion as to who it may lay off. Employees who are on maternity leave or sick leave cannot be laid off because of their condition. Furthermore, in many circumstances an employer may not lay off employees whose poor performance is the result of alcoholism, drug addiction, or illness. The employer also may not lay off an employee because she has announced that she is planning to take maternity leave. If necessary, the employer must lay off other employees in order to preserve the jobs of the aforementioned.

Q: Instead of laying off *some* of my employees, can I reduce the wages and hours of work of *all* of my employees?

A. No. Not unless they consent to this. Significant reductions in salary or working hours can amount to constructive dismissal. In this situation, the employees may all sue you for wrongful dismissal.

Q: Can I move an employee to a totally different position, so long as I keep his salary at the same level?

A. No. Not necessarily. If the new position has less responsibility, less security, is at a lower point in the organization, involves a loss of prestige, or a significant loss of potential for career advancement, or

requires the employee to relocate to another city or region, your decision may amount to constructive dismissal of the employee. In this case, you must either get the employee to agree to the change or face a potential law suit.

Q: When an employee is dismissed, will he be bound by the non-competition clause in the employment contract?

A. Sometimes not. When an employee is dismissed without reasonable notice, and without having committed misconduct serious enough to constitute just cause for dismissal, the dismissal thereby frees the employee from any prior contractual undertaking not to compete or to work for a competitor. You should therefore think twice about laying off specialized or senior employees whose future competition could cause damage to your business.

Q: Can an employee who resigns then solicit my customers and my employees after his resignation?

A: The law often prohibits an employee from soliciting customers and employees of his former employer, for a period of time following the resignation. This prohibition against solicitation often applies even when the employee never signed a non-competition or a non-solicitation agreement with your company.

Q: Can an employee who resigns immediately begin to compete against me by working for a direct competitor or starting a competing business doing exactly what my business is doing?

B. Unless the employee signed a non-competition agreement, or is actually soliciting your customers on behalf of a competing business, or is using confidential information which belongs to your company, he or she is generally not prohibited from beginning to compete against you as soon as he or she resigns from your company.

SOLOWAY, WRIGHT LLP: Dedicated to Excellence in the Area of Employment Law and all other areas of law.

SOLOWAY, WRIGHT LLP Nous sommes heureux de répondre à tous vos besoins en matière de droit du travail et dans les autres domaines du droit.

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