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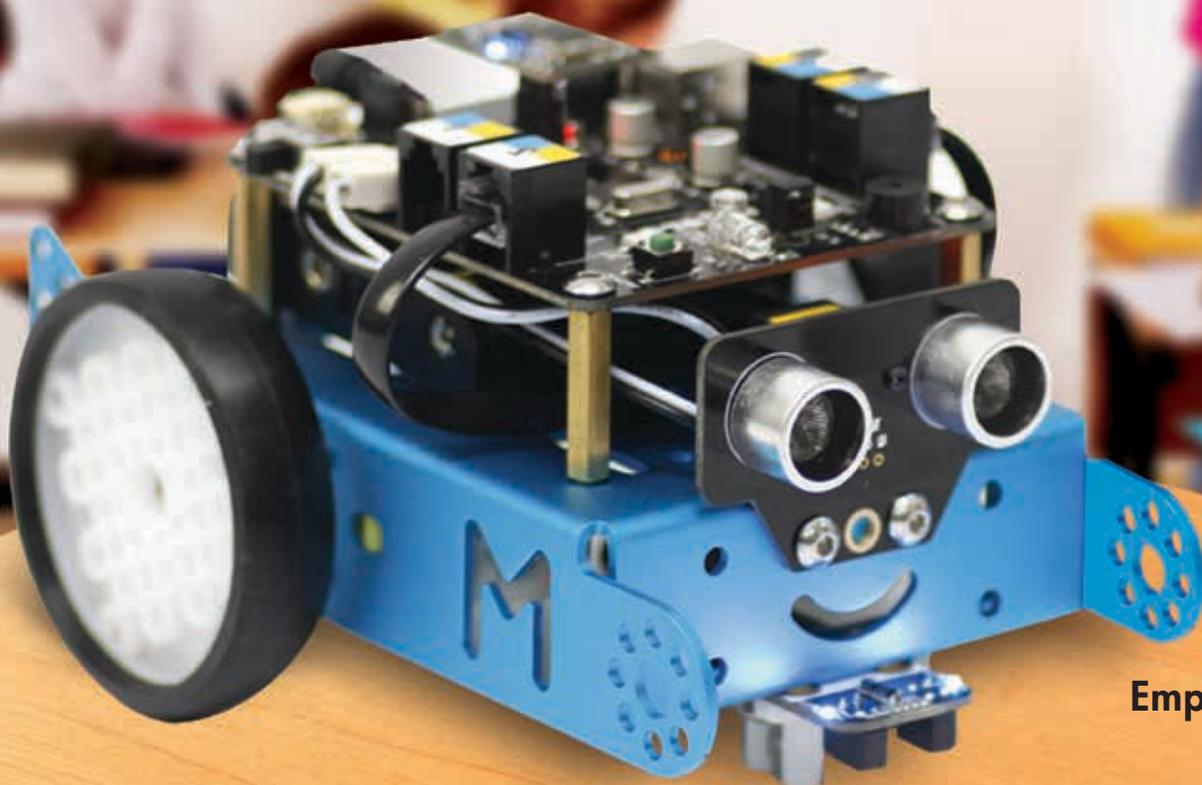
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WHAT'S HOT IN EMPLOYMENT LAW



Making the Case for Employment Agreements and Workplace Policies

By Kathryn Willms

Jian Ghomeshi. The Germanwings plane crash. FHRITP: the acronym that shall not be googled. Some of the biggest news stories of the past year have had one thing in common: they cast new light on the legal relationships between employers and employees.

Employment law is ever-evolving. Laws change but not as fast as workplaces, employee expectations, technologies, and societal norms. As courts must continually interpret laws in new contexts, it can be difficult for businesses (especially SMEs, without in-house HR) to keep abreast of these changes.

As our legal experts point out, however, ignoring these issues can do significant harm to the bottom line, leading to lawsuits, client dissatisfaction, and lost productivity. "I sometimes hear employers

say, 'HR is about soft issues,'" says Laura Williams of Williams HR Law with a laugh. In fact, she identifies this as the area where employers are most vulnerable to issues they could prevent.

"It's making sure that you've got the tools in place to ensure that the standards, expectations, obligations, entitlements, and requirements in the employment relationship are clearly communicated," she says. "And you do that through employment agreements and workplace policies."

One trend our experts identified is that courts are interpreting employment agreements and workplace policies more strictly than ever before.

"The Supreme Court of Canada has said it views employees as being vulnerable," says Ron Minken of Minken Employment Lawyers, "so as a result, any ambiguity is interpreted in the employee's favour."

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In this two-part series, we call on the expertise of two Markham law firms specializing in employment law to discuss common legal challenges employers face and how best to navigate new laws and emerging trends that may affect your business.

This means that employers lacking strong, valid agreements are at legal risk. A good employment agreement must be constantly updated to stay current with provincial and federal law. And it must be tailored to individual workplaces.

“An agreement that is good for one workplace may not be appropriate or suitable at another,” says Minken. “And if it’s inappropriate, the court may not uphold or enforce the agreement.”

While each workplace will have different focuses and challenges, our experts have identified three areas in employment agreements and policies that have become particularly “hot.”

Off-duty employee conduct has become a hot issue as the boundaries between public and private life continue to blur. One obvious culprit is social media. As people become more comfortable sharing personal details on public channels, employers can’t afford to ignore the effects this openness can have on their businesses.

Termination clauses are a hot issue because of how often they are misunderstood by employers. Employers seeking to part ways with long-term employees are often unprepared for their obligation to provide notice.

The question becomes, how much can they do about it? Williams says it’s a delicate balance. Just because an employee engages in behaviour that the employer does not approve of does not mean that it is an actionable offence. On the other hand, she warns employers against taking “an ostrich approach.” Truly offensive behaviour should be evaluated for its effect on the organization and the workplace. Employers must consider whether there is a link between the conduct and the workplace, and whether they have clearly defined what’s acceptable to their employees, through a code of conduct. Putting tools such as a code of conduct and social media policy in place is vital, but they won’t hold up in court unless employers are consistent in enforcement.

“You can’t pick and choose when you enforce something,” says Minken.

Another hot issue is restrictive covenants, which ensure that the business is protected when employees leave. These

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covenants include contractual terms for non-competition, non-solicitation of employees, and non-solicitation of

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customers. Minken says in tech-heavy Markham, these clauses are the most litigated over, and he has one simple piece of advice: "Don't overreach."

Sara Kauder of Minken Employment Lawyers explains that, even though it's natural for employers to want to restrict former employees from competing, the courts are liable to disregard clauses that are overly broad – in time limit, geography, and types of businesses covered. Employers are better served by focusing on "what they really need to protect their businesses – and their customers," and employing a lawyer to settle on appropriate ranges.

"It's not one size fits all," she says.

Termination clauses are a hot issue because of how often they are misunderstood by employers. Employers seeking to part ways with long-term employees are often unprepared for their obligation to provide notice, which can be anywhere from the minimum notice specified in the Employment Standards Act (one week/year for up to eight years), to a greater reasonable notice based on age, length of service, scope of responsibilities, and market conditions. Employers who have not specified minimum notice in their employment contracts or who have no

termination clause at all may find the results hard to swallow.

"Then it becomes a function of negotiation," says Williams. "And you could be facing a demand of a year, or more, which could be crippling for a smaller employer."

Kauder says that employers also risk trouble by being too restrictive. For example, calculating notice based solely on an employee's base salary is a violation of the Employment Standards Act (which stipulates using total compensation) and will not be upheld even if it is included in the employment agreement.

For our legal experts, the takeaway message is clear: Employers should think of employment agreements and workplace policies not as a means to protect themselves from their employees, but as the conduits for communicating expectations and creating an engaging and productive work environment.

"It should be a win-win," says Williams. ▣

Part 2 of this article, which will run in February's *Voice*, will discuss trends around accommodation and workplace safety.

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