

REHIRING FORMER EMPLOYEES: POTENTIAL HIDDEN COSTS

Opportunities sometimes arise to re-employ former employees. During the prior period of employment, the former employee may have proved himself or herself to be highly capable, loyal and effective, and the employment might have been terminated for reasons entirely unrelated to the quality of the employee's performance. For example, a long term employee might resign to move back home to help with aging parents or for any other reason. In the case of voluntary resignation from employment, neither termination pay nor severance pay is payable.

When the opportunity subsequently arises to re-hire a former employee, the employer will be understandably interested if the individual was a proven performer. Even if the person is not an exemplary performer, he or she is still a "known quantity" in what may be a tight labour market for the skills in question.

Except in the case of just cause, if it later becomes necessary to sever the employment for any reason (for example, due to economic conditions and downsizing), the employer may be surprised to find that the *Employment Standards Act, 2000* requires that the employee's entire history, whether or not continuous, must be used when determining entitlement to, and calculating the amount of, severance pay (but not termination pay).

Under the *Employment Standards Act, 2000*, an employer is required to pay severance pay to a severed employee if he or she was employed for five years or more, and either (i) the employer has an annual payroll of \$2.5 million or more, or (ii) the severance occurred because of a permanent discontinuance of all or part of the business at an establishment and the employee is one of 50 or more whose employment is severed within a six month period as a result. Severance pay is then calculated as one weeks' regular pay for each year and part year worked, to a maximum of 26 weeks' pay.

For example, if the severed employee worked 16 years, 6 months, the amount of severance pay is 16.5 weeks pay.

If a severed employee had worked 12 years, and had then left the employer for 4 years before being re-hired for the remaining 4 years and 6 months, the prior employment period of 12 years is included in determining both the entitlement to severance and the amount of severance pay under the *Employment Standards Act, 2000*. In this specific example, but for the fact that non-continuous employment must be considered, there would have been no obligation to pay any severance pay because the second term of the person's employment was for less than 5 years.

Since the parties cannot contract out of the *Employment Standards Act*, a written employment contract which attempts to change this result will not be effective.

We don't suggest that former employees should never be re-hired; the skills, experience and track record of the proven performer will usually outweigh this concern. However, this consideration should become more significant in the case of the former employee who was a marginal performer or with respect to whom there are question marks as to whether re-employment is a wise choice.

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Up-dated: November, 2006