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# *5 of the Most Common (and Costly) Employer Mistakes*

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# *Failing to Use Written Employment Agreements*

- Single best ROI when it comes to containing employee-related costs
- Record not only standard terms/conditions (salary, hours, *etc.*) but protect from liabilities
  - Enshrine right to:
    - Change reporting relationship
    - Amend benefit or bonus plan
    - Change hours of work

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# *Failing to Use Written Employment Agreements*

- Contain termination entitlements
- Without properly drafted and implemented EA, can be 1 month per year of service or considerably more
- However, can contain to ESA-minimum only
  - 1 week per year to 8 max (notice)
  - 1 week per year to 26 max (severance, if 5+ years of service and \$2.5 million ON payroll)

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# *Document, Document, Document*

- You do it for your clients, why not your employees?
  - Multiple purposes:
    - Create record for later supervisors/managers
    - Support termination for cause
    - Defend against allegations of improper employer action
      - ‘decision to terminate was made prior to illness/disclosure of pregnancy’

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# *Document, Document, Document*

- Not everything has to be in formal letters
  - Internal notes
  - Emails
  - Texts (not ideal)
  - Prepared documents
    - Consider ‘meta-data’

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# *Document, Document, Document*

- Think of purpose of document
  - If purpose to record what happened at meeting, make detailed, but avoid ‘editorial commentary’
  - If purpose to prove inadequacies or misconduct brought to employee’s attention, must provide record to employee
    - Track when and how
- Consider how to preserve relevant material
  - Again, is ‘meta-data’ relevant?

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# *Duty to Accommodate*

- Obligation to accommodate an employee with a disability to the point of undue hardship
- Not only work-related injuries/illnesses
  - Can consider cost (if would effectively bankrupt organization) and health and safety
  - ‘Significant inconvenience’ not enough to decline accommodation

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# *Duty to Accommodate*

- The DTA has both a procedural and substantive component
  - Not enough to show can't accommodate, must show how you reached that conclusion; 'show your work'
- Retain all materials to defend against complaint/grievance



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# *Duty to Accommodate*

- Identify employee's functional limitations
- Identify central functions of job
  - Can employee perform, with or without accommodation?
    - If so, assign non-central functions to someone else
  - If not, is there another job where they can perform the central functions WOWA?
  - If not, can we bundle together tasks they can perform WOWA?

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# *Duty to Accommodate*

- Not a ‘moment in time’ analysis
- Must revisit when:
  - Functional limitations change
  - New or different work becomes available
- Employee had obligation to participate in process, including trying duties if not H&S risk
- *Retain all records of accommodation efforts*

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# *Out of Sight...is expensive*

- Employee on extended sick leave is still accruing employment entitlements
  - Not ‘the insurance company’s problem’
- No ‘they’ve been gone for 2 years’ rule
  - Mis-application of own-occ to any-occ LTD transition
- If we don’t end relationship, at virtually any point they may request RTW

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## *Out of Sight...is expensive*

- Employers are independently entitled to reasonable medical information to (a) support employee's absence, and (b) understand limitations so we can assess if we can accom
- Where 'there is no reasonable prospect of the employee's RTW in the foreseeable future, with or without accommodation', may be able to sever due to 'frustration'
- Still must pay out ESA minimum entitlements

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# *Out of Sight...is expensive*

- Need not accept ‘I’ve given everything to the insurer’
- Must not accept insurer’s assessment of likelihood of employee’s RTW
  - Need information directly from employee’s doctor; may not request diagnosis

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## *Missing the Fax*

- An Application for Certification may be served in person, or by fax to business fax number publicized (*i.e.*, Website) or recorded in government documents (*i.e.*, registration)
- Once served, employer has 2 business days to respond, including:
  - List of all individuals with employment relationship with employer
  - Positions on legal issues in dispute

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# *Missing the Fax*

- Only in the most unusual circumstances will Board extend
  - ‘on vacation’, ‘no one checked fax’, ‘our offices were closed’ ...none of these cut it
  - Assume they simply won’t extend deadline
- Failure to respond on time means Board will proceed only with union’s information
  - *i.e.*, number of employees in unit

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# *Missing the Fax*

- Especially if you think your co. is the subject of organizing:
  - Confirm all public postings of address/fax number to ensure accurate
  - Task someone with checking post-5 pm every day
  - Have plan in place to whom any Application will immediately be sent to be addressed



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# Questions?



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