

WHAT HAPPENS WHEN SMALL BUSINESS IGNORES HR ISSUES: Five costly mistakes to avoid

Careful thought and planning in employee matters can save a small business from bankruptcy.

BY GRAEME McFARLANE

The letter comes in a plain white envelope from the Employment Standards Branch. Inside is an order to pay more than \$100,000. An ex-employee has prevailed in her complaint for vacation and holiday pay. The employer, a small business, cannot afford to pay it.

Today, small-business owners frequently hire employees without considering all potential pitfalls. They often make decisions quickly, choosing the path of least resistance. Later, such decisions can have catastrophic results; ensuing legal costs can result in bankruptcy.

The following five hypothetical mistakes, based on real cases, can result in large awards made against an employer. However, with careful thought, planning, and expert advice, each employer could have easily avoided this.

1. You give inappropriate allegations of just cause.

You want to let an underperforming employee go. He's been around for years and although you hoped that he would improve, he did not. You feel frustrated. Sales are down, and your competitors are starting to make inroads into your market. He has to leave — now.

You know that you don't have the paper trail to prove cause. You've wanted to be nice all those years that it didn't work, but you think you have the answer. You sit him down and tell him that his performance is unacceptable and that you are firing him for just cause; therefore, he is not entitled to receive notice.

He launches a lawsuit against your company. You persist in your allegation of just cause because you think that it will give you bargaining power to settle his claim. The employee hires a lawyer, and you quickly learn that allegations of cause where there is none can lead to something known as Wallace damages. By taking your position, you might have increased your liability to this employee.

The matter proceeds to trial and the judge finds that you did not have cause. He awards the ex-employee eight months' notice plus an additional two months because of your bad faith in alleging cause where you had none. The judge also awards the ex-employee costs. In total, not including your legal fees, you owe more than \$75,000.

2. You ignore workplace harassment.

Your small computer and network service company is booming. You have hired a group of talented, bright graduates from local universities to serve your clients. They are pretty loose and carefree, but they work hard. You do not care too much about what they do as long as they get the job done and your clients are happy.

One summer, as a favour to a friend, you hire his daughter for a summer job. You assign her to work with other employees. After a week or so, she comes to you, upset. She informs you that her colleagues are distributing pornographic pictures via the e-mail system as well as telling off-colour jokes. She further tells you that one particular employee is asking her out on a daily basis and this is making her uncomfortable. You don't want to upset your well-functioning team for the sake of a summer employee, so you tell her that she is overreacting and that "guys are just being guys." You then tell her that if she can't handle these conditions, perhaps she should look for work elsewhere.

The summer employee no longer shows up to work and you assume that she has quit. A few weeks later, you receive a letter from the human rights tribunal. Your company and each of the regular service employees have been named in a complaint. Your regular employees, upset by the complaint, quit to find jobs elsewhere. You suddenly find yourself unable to service your clients properly and some go elsewhere. You are then faced with hiring new employees and participating in the human rights complaint.

You decide to go to mediation to settle the matter. Eventually, you resolve the complaint by paying the amount that the employee would have made if she worked for the whole summer. You also have to pay \$1,500 for injuries to dignity. The total cost: \$20,000

3. You call someone a contractor when they're not.

Your Olympic contracting business is taking off. You need three people, fast. You interview and select some individuals. The first suggests that she would like to be paid as a contractor to minimize her tax payment. You like this set-up because all you have to do is receive and invoice and cut a cheque. You don't have to deal with Revenue Canada at all. What could be easier?

Your company performs at a hectic level for three years. You then decide to reduce operations and let the contractors go. A few months later, you receive a letter from the Canadian Revenue Agency. Apparently, none of your contractors paid income tax while working for you. Moreover, the agency does not think that they were contractors. Alarmed, you call your lawyer. She tells you that the supposed contractors would not meet the definition of a true contractor, and therefore, they will be deemed to have been employees. You are now on the hook for all unremitted deductions: employment insurance, Canada Pension, and unpaid income tax. You can try to recover the income tax portion from the departed contractors, but they are long gone. The bill: more than \$100,000.

4. You ignore employment standards obligations.

You run a small ad agency. You pay your employees on a 100-per-cent commission basis, and you provide them with a monthly draw as an advance against those commissions. When they go on vacation or take statutory holidays, you continue their draw, and you do not deduct commissions when they are absent. These employees are very well paid and earn more than \$150,000 a year.

One of your star employees quits and moves back east with her husband. A few weeks later, you receive a claim from the Employment Standards Branch. She alleges that you have not paid her vacation or statutory holiday pay. Your position is that you allowed her to take time off and continued her commission payments. As a result, you feel that you do not owe her extra pay for vacation or statutory holidays.

The Employment Standards Branch does not agree. The Employment Standards Act provides that all employees are entitled to receive a certain percentage of their year's wages as vacation pay. Commissions are considered to be wages. You cannot pay an employee something already earned and classify that as vacation pay. Accordingly, you must pay each commissioned employee over and above their commission payments to satisfy your statutory obligation. The total expense for all of your employees: more than \$100,000.

5. You terminate employees who are injured or sick.

One of your long-service employees develops carpal tunnel syndrome. He goes off work for five months on short-term disability and requires surgery. While he is away, you hire a temporary employee to fill in. Full of energy, she does twice as much as the previous employee.

The first employee writes and tells you that he has received medical clearance to come back to work. However, you want to keep the temp so you tell him that he is being laid off. You pay him an amount in lieu of notice.

A month later, you receive a letter from the human rights tribunal. The employee alleges that you terminated him because of his disability. The case drags on and doesn't get to a hearing for two years. At the hearing, you cannot satisfy the adjudicator that you tried to accommodate the employee's medical condition. The adjudicator finds that your decision to terminate the employee was coloured by his disability, and as a result, you breached the Human Rights Code. You are ordered to reinstate the employee and pay him back wages. The tribunal also orders you to pay \$5,000 to the employee for injury to his dignity and feelings. The final tab: more than \$70,000.

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