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Ending the Employment Relationship

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Ending the Employment Relationship: When you Don't Mean To: Constructive Dismissal

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A discussion of the developments in the case law in respect to Constructive Dismissal has already been prepared for this Program.

A summary of the "take aways" from the case law follows below to provide a non-exhaustive checklist of tips for avoiding a constructive dismissal scenario:

1. Don't: forget that a constructive dismissal need not be caused by a single event but can be made out by the stringing together of a number of smaller and/or larger events.
2. Don't: forget that each situation is fact dependent and must be assessed contextually.
3. Don't: disregard the employee's unique factual circumstances in evaluating whether to make a change to a term of employment (i.e. medical accommodations).
4. Don't: reduce an employee's compensation, which includes all components, not just salary, if the change could be considered material based on the circumstances. For example, a court has found a reduction of 12% in base salary to be a constructive dismissal, when taken over the life of the fixed term contract. Unilaterally reducing compensation at all should be avoided at all costs.
5. Don't: make material adverse changes to company-wide commission or bonus plans without adequate notice at common law sufficient to cover all the employees' common law or contractual notice entitlements or adequate consideration.
6. Don't: place an employee on suspension, even a paid suspension, where same is not contemplated in the employment agreement or employment handbook which the employee has received proper notice of.
7. Don't: ignore toxic workplace situations or rehire employees that have had a prior history of creating a toxic work environment.
8. Don't: demote an employee, even if you redcircle the base salary and/or total compensation.
9. Don't: change an employee's reporting structure in an adverse manner.
10. Don't: adversely materially reduce an employee's benefits.
11. Don't: transfer an employee to a smaller affiliated or related organization, which has a smaller or less significant corporate profile than the entity the employee originally worked for.
12. Don't: assign employees to do work for affiliate or related companies without that employment relationship being properly documented by way of a contract of employment that permits same.
13. Don't: force employees to take medical leave, rather than accommodating them.

14. Don't: hire permanent replacements for employees off on medical or other leaves of absence. Hire on a fixed term contract which is renewable or specifically state the position is a fill in for an employee on leave.
15. Don't: materially change an employee's work location without a contractual right to do so; this includes requiring an employee who works from home occasionally to start reporting to the office unless the working from home was subject to change at the employer's discretion.
16. Don't: change an employee's working from home due to a medical accommodation without updated medical support that the accommodation is no longer required.
17. Don't: suspend or layoff an employee without a contractual entitlement to do so (even though the *ESA* permits a statutory layoff in certain circumstances).
18. Do: Contemplate the end at the beginning. Use written employment agreements to outline possible changes in material employment terms that might occur at a future date and expressly state that any such changes will not amount to a constructive dismissal. These changes can include, but are not limited to, job location, reporting structure, and compensation.
19. Do: Use written employment agreements to limit liability in the event of a constructive dismissal, i.e. provide for only specified *ESA* minimum standards (statutory notice, statutory severance pay, if applicable and benefits continuation during statutory notice period) or alternatively the greater of a fixed amount or specified *ESA* minimums, shall be provided in full and final satisfaction of all statutory, common law or any other amounts owing.
20. Do: If suspensions are a part of your organization's disciplinary process, ensure that employment contracts adequately protect the employer's right at common law to place an employee on suspension. If the suspension is to be unpaid, specify same (be mindful of complying with the *ESA* layoff provisions).
21. Do: If your business model utilizes statutory layoffs, ensure that your contracts of employment permit layoffs at common law (be mindful of complying with the *ESA* layoff provisions).
22. Do: Ensure that frontline managers and executives are informed of and receive ongoing and adequate training with respect to issues and/or conduct that might amount to a constructive dismissal.
23. Do: Be proactive throughout the employment relationship. Review your employment agreements and policies annually.
24. Do: When employees working without a written contract of employment or pursuant to a dated contract of employment which does not contemplate constructive dismissal, use opportunities for pay increases and promotions to enter into proper employment contracts. Caution: think of the concept of consideration and ensure that **adequate** consideration is provided.
25. Do: Ensure that new hires and those newly promoted to leadership roles are receiving training on the issue of constructive dismissal as part of their orientation.

26. Do: Ensure that timely and adequate workplace investigations for harassment, bullying and discrimination are occurring in order to not only provide for a safe work environment but also to avoid claims of constructive dismissal where such conduct is allowed to continue unchecked.
27. Do: Job duties naturally evolve over time; therefore, ensure that job descriptions are routinely updated, reduced to writing, provided to the employee for acknowledgement and agreement and are placed on file. This can best be done at the time of an annual review.
28. Do: Ensure that employees are treated fairly, with civility, decency, respect and dignity.
29. Do: *Review the employment relationship before making changes to it.* Before instituting any unilateral material change to an employment relationship, ensure that you have undertaken a thorough review of the employee's employment file, including but not limited to her contract of employment; her current job duties and reporting structure; her performance history; and consider the impact of the proposed changes and your authority for doing so without triggering a constructive dismissal. Also consider the legal exposure to damages should you choose to implement a unilateral and material change to an employee's employment contract.
30. Do: Speak with the employee's direct manager or other members of her leadership team to ascertain any special conditions, arrangements or information that may trigger a constructive dismissal, in case pertinent factors are not documented in the employee's file.
31. Do: Consider the employee's employment status. Are they part-time, full-time, or on a fixed term contract? The impact of a change in employment to a full-time employee may be different than that to an employee on a fixed term contract.
32. Do: Consider your communication strategy with respect to the proposed changes. It is advisable to communicate all proposed changes in writing, so as to avoid any confusion between the employer and the employee. Absent a contractual agreement to vary a specific term of employment, ensure that you expressly state that should the employee not accept the proposed changes then the status quo will continue (unless you are prepared and willing to effect a constructive dismissal).
33. Do: Consider providing the employee with written working notice of the proposed change, equivalent to the notice they would receive at common law or by contract if terminated.
34. Do: Consider offering fresh consideration in exchange for the employee accepting the change in their employment term and should they not accept then the status quo will continue until the expiry of the common law or contractual notice period.