

Employment Law: What Charities & Not-For-Profits Need to Know

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Employees, Contractors, and Volunteers: obligations and mitigating risks

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EMPLOYEES, CONTRACTORS, AND VOLUNTEERS

Employees

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Employment Standards

Employment Standards Act, R.S.B.C. 1996, c. 113

Sets out minimum standards of employment on a variety of issues, including:

- Hours of work and overtime
- Minimum wage and payment of wages
- Entitlements on termination
- Vacation time and pay
- Various leaves

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Common Law Notice

Based primarily on four factors (known as the Bardal factors):

- The employee's age
- The employee's length of service
- The character of the employee's employment
- The availability of similar employment

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Employment agreements/contracts

Important for setting out terms and conditions of employment

- Employment agreements can benefit both parties as they make entitlements, terms, and conditions clear
- Employment agreements may need to be updated periodically due to changes in the law or changes to the employee's employment

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EMPLOYEES, CONTRACTORS, AND VOLUNTEERS

Contractors

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Independent Contractors

Independent Contractor vs. Employee

Engagement with a company is on a spectrum with employees at one end and independent contractors at the other end.

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Independent contractors

Factors to consider for determining employee vs independent contractor (there is no universal test):

- Is the worker subject to the control of the employer; who sets hours of work, where work is performed, etc.)
- Does the worker have the opportunity for profit or risk of loss associated with the services: are they paid a flat fee for a project or are they compensated for all time spent)
- Business integration: how critical are the services the worker provides to the organization
- Does the worker provide their own equipment
- Is the worker able to hire their own helpers

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Independent Contractors

Dependent Contractors

- Look at same factors for determining whether someone is a contractor or an employee, but then look at:
 - Does the contractor provide services to other companies or organizations?
 - Is the contractor required to serve the organization exclusively?
 - How long has the arrangement been in place?
 - Do the organization and the contractor rely on one another and how closely do they coordinate their conduct or activities?

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EMPLOYEES, CONTRACTORS, AND VOLUNTEERS

Volunteers

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Volunteers

BC has no legislation setting out legalities (from an employment law perspective) concerning the use of volunteers

Guidance comes from the Employment Standards Act definitions of "employee" and "employer"

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Volunteers

"employee" includes

- a) a person, including a deceased person, receiving or entitled to wages for work performed for another,
- b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee,
- c) a person being trained by an employer for the employer's business,
- d) a person on leave from an employer, and
- e) a person who has a right of recall.

"employer" includes a person

- a) who has or had control or direction of an employee, or
- b) who is or was responsible, directly or indirectly, for the employment of an employee

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Volunteers

Some guidance from the Employment Standards Tribunal in *Shawnee Venables (Re)*, 2018 BCEST 11:

- Most cases at the EST involve employers attempting to disguise employment by calling employees volunteers
- The task is to differentiate between individuals who are in fact offering socially valuable volunteer work without any expectation of compensation from individuals who may be exploited by enterprises who mischaracterize the individual to avoid employment standards
- In doing the analysis, the nature of the relationship is most important

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Volunteers

Characteristics of volunteers and factors to consider:

- Volunteer services are offered freely without coercion
- Volunteer services are not usually offered on a consistent, full-time schedule, but rather on an as-needed basis
- The scope, duties, and expectations for volunteers differ from paid positions
- The nature of the enterprise is to be considered, whether it is a civic, charitable, or not-for-profit organization; although this "is not the only determining factor"

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Human Rights, Diversity, and Inclusion: Requirements and Best Practices

Anne Amos-Stewart

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Introduction

- Provincial and federal human rights law
 - *Human Rights Code (BC)*
 - *Canadian Human Rights Act (Canada)*
- Apply to employment (can include volunteers)
- Human rights commissions and tribunals
- Higher accessibility for employee, including minimal costs consequences

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Discrimination

- Prohibited in employment (can include volunteers)
- Protected grounds:
 - Race
 - Colour
 - Ancestry
 - Place of origin
 - Political belief
 - Religion
 - Marital status
 - Family status
 - Physical or mental disability
 - Sex
 - Sexual orientation
 - Gender identity or expression
 - Age
 - Criminal or summary conviction

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Discrimination

- 3 areas:
 - employment advertisements
 - wages; and
 - employment
- = hiring process, course of employment and termination
- Direct, indirect or systemic
- Intentional or unintentional

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Discrimination - Inability to Perform Job

- Inability to perform essential job duties
- Reasons related to a prohibited ground of discrimination
- *Bona fide occupational requirement* (BFOR)
- "Canadian experience" barrier
- Duty to accommodate

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Special Programs

- Employment equity programs
- Pre-approval (Human Rights Commissioner)

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Duty to Accommodate

- Employee's needs, related to prohibited ground
- Undue hardship
- Individual adjustments examples:
 - Physical assistance
 - Technical aids
 - Leave
 - Flexible work schedules

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Harassment

- Harassment = form of discrimination
- No complete list
 - Any unwelcome physical, verbal or other conduct that offends or humiliates on the basis of any of the prohibited grounds
- Prevent and address: policies and investigation

Note: Non-discriminatory bullying and harassment = workers' compensation legislation issue

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Human Rights - Enforcement

- Available remedies:
 - Monetary damages
 - Reinstatement
 - Anti-discrimination policies or education
 - Posting human rights laws
 - Report to the human rights body

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Prevention

- Policies
- Training

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Workplace Safety and COVID-19

Debbie Preston

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WorkSafeBC

A provincial agency dedicated to promoting safe & healthy workplaces across BC

- Established by legislation as agency to oversee no-fault insurance system for workplaces
- Help employers comply with *Workers Compensation Act* and Occupational Health and Safety Regulation
- Promote prevention of workplace injury, illness, disease
- Rehabilitate injured workers
- Provide compensation to replace loss of wages due to injury

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Safe & Healthy Workplace

Employer's have various obligations under *Workers Compensation Act*, including:

- Training employees to work safely, provide proper supervision
- Ensure adequate first aid equipment and trained attendants are on site
- Regularly inspect workplace
- Report all injuries to WorkSafeBC that required medical attention

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Health and Safety Plan

Employers must have a H&S plan aimed at ensuring workers are protected, risks are minimized and a healthy, safe work environment is maintained.

- Identify and control hazards in workplace
- Prevent injury and disease
- Limit financial losses resulting from injuries and disease
- Highlight importance and provide guidance on safe work procedures, workplace inspections

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Right to Refuse Unsafe Work

Employees have the right to refuse unsafe work, without being disciplined

- Employee has responsibility of immediately reporting unsafe condition to supervisor or employer
- Employer must investigate, fix if possible
- If after investigation, still deemed unsafe by employee, notify WorkSafeBC

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Covid-19 Safety Plan

Employers required to have Covid-19 safety plan, addresses risk of exposure, measures to keep workplace safe

- Worker health checks
- Continually assess risk of Covid-19 transmission, apply controls
- Mandatory masks in public places

WorkSafeBC inspections and consultations are part of ensuring H&S in BC workplaces

Covid-19 - Vaccinations

There is not currently any legal mechanism in place to make vaccinations mandatory for employees

- Differing opinions on this topic
- Currently, workplace health and safety laws do not discuss vaccinations and are not likely sufficient to justify a mandatory policy
- Various issues would be engaged with such a policy, primarily human rights protections, so mandatory policies and benefits for those who get vaccinated will create some risk
- However, COVID is a constantly changing situation and as vaccines become more widely available or as the pandemic progresses, it is likely that statements on this issue will be made

Questions?



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