

# MANAGING THE MOVE TO SELF-GOVERNANCE

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## Introduction

The move towards greater self-governance challenges First Nations<sup>1</sup> leadership to manage the growth of its administration and adapt its governance structures. As First Nations assume greater control over these structures, the result will be broader and more sophisticated organizations, with more departments, sections and divisions, and greater responsibility over matters such as education, housing, policing, taxation and economic development. In order to effectively run their organization and administer the programs and services they provide, most First Nations will require a considerably greater number of employees than they have at present.

In this context, it is critical for First Nations, as employers, to have a firm grasp on employment issues. This is important for several reasons. First, First Nations that have good employment policies and follow good hiring and firing procedures can greatly reduce their potential liability for wrongful dismissal claims and other claims by employees, such as sexual harassment claims and complaints to administrative bodies such as the Employment Standards Branch. Second, by adopting such policies and procedures, First Nations will be able to ensure that their employees are treated in a reasoned and consistent manner. This in turn will lead to increased job satisfaction, and a more efficient and productive workforce.

In this paper we will provide an overview of the relevant laws and discuss employment policies that comply with these laws. We will then provide recommendations for hiring, and firing employees that will help to protect First Nations from liability. Please note that this paper will not address employees that fall under a collective bargaining agreement.

## RELEVANT LAWS

At present, First Nations are required to follow the relevant federal and provincial employment legislation. It seems open to First Nations to enact their own employment laws under a self-government agreement, through a sectoral agreement<sup>2</sup>, or simply as an assertion of their Aboriginal right to self-governance, but to our knowledge this has not yet occurred.<sup>3</sup>

This area of law can be quite complex, but in general, the *Canada Labour Code* (the “Code”)

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<sup>1</sup> In this paper, the term “First Nations” includes Indian Bands as recognized under the *Indian Act* and “aboriginal peoples” as defined in section 35 of the *Constitution Act, 1982*.

<sup>2</sup> A sectoral agreement is an agreement between a First Nation and government, under which the First Nation is given increased control over an area such as health, education, or policing.

<sup>3</sup> Indeed, although the Nisga’a Lisims Government and the Westbank First Nation have negotiated self-government agreements, it appears that neither organization has enacted its own employment legislation, and both are still subject to the federal and provincial acts.

applies to First Nations as employers. There are, of course, many exceptions to this general rule. First Nations governments and organizations that do not fall under the Code will be subject to the relevant provincial statute. In British Columbia, the relevant statute is the *Employment Standards Act* (the “Act”).

It can be quite complicated to determine whether a particular organization is subject to the Code or the provincial statute, and so until such time as First Nations adopt their own employment statutes, we strongly recommend that they comply with the terms of both the Code and the relevant provincial statute to protect themselves from liability.

## **EMPLOYMENT POLICIES**

Adopting a sound employment policy is an excellent way for First Nations to create certainty and ensure consistency. A properly drafted employment policy, if followed, can help to protect the employer from liability.

Employment policies can range from something very simple to something very complex. They can cover a wide variety of topics. We recommend that, at minimum, employment policies address the following topics:

- to whom the policy applies (e.g. you may wish to exclude casual or temporary employees hiring process)
- conflicts of interest
- work hours and schedules
- overtime (who is entitled to claim it, and under what circumstances)
- vacations
- sick days
- disciplinary structure
- termination process (including notice periods and severance pay)

The following are some optional topics that you may wish to include:

- the purpose and principles behind the policy (e.g. you might wish to state that it is in furtherance of your self-governance objectives)
- code of ethics
- whether preference will be given to employees already working within the organization
- preferential hiring (e.g. whether preference is given to members of the Band or First Nation, or to Aboriginal people, etc.)
- whether medical clearance is required for certain positions
- classification of positions
- wage/salary structure
- harassment
- probationary period

- training
- top-ups for maternity and parental leaves
- medical leave
- disability leave
- funeral or bereavement leaves
- benefits
- travel
- performance evaluations
- health and safety
- confidentiality and security
- dress code
- off-duty employment
- resignations (how much notice employees must give when they resign)

For the reasons set out above, employment policies must, at minimum, follow the standards set out in the Code and/or the relevant provincial statute. For example, the Code and the Act set out requirements for wages, vacation pay, and hours of work, and we strongly recommend that First Nations comply with both to minimize the risk of potential liability. Employment policies must also comply with the *Canadian Charter of Rights and Freedoms* and applicable human rights legislation. For these reasons, we strongly encourage you to seek the assistance of a lawyer in drafting your employment policy.

## **HIRING EMPLOYEES**

A significant proportion of problems that employers face in the employment context arise when they fire employees. However, the potential for such problems can be greatly reduced if employers take certain steps when hiring employees.

We strongly recommend that employees be required to enter into an employment contract when they are first hired. This contract should clearly set out the employee's position, wages, probationary period (if any), and notice periods for termination or resignation. A detailed job description should also be signed by the employer and the employee and attached to the employment contract. We also recommend that new employees be required to review and sign the employment policy at the time they are hired.

## **FIRING EMPLOYEES AND CONSTRUCTIVE DISMISSAL**

Employers can incur tremendous liability if they are not careful in how they fire their employees. If an employee is not fired properly, he or she can then file a complaint under the Code or relevant provincial statute, or sue the employer in court. Employers who are found to have acted wrongly are often forced to pay significant fines or damages to the employee. Further, courts will often award additional monetary damages to the employee if they find that the employee was fired in a humiliating or mean-spirited manner, or if the employer otherwise acted inappropriately. We strongly encourage you to handle terminations in writing, and in a professional and neutral manner.

In addition to our recommendations regarding employment policies and hiring processes, employers can also minimize their risk of liability by ensuring that employees are only fired with “reasonable notice”, with severance pay in lieu of notice, or where they have “just cause”.

### Just Cause

An employer can fire an employee without giving the employee any notice when the employer has just cause to fire the employee. Just cause means that the employee has done something so severe that the employment contract is no longer valid and the employer is entitled to fire him or her on the spot. For example, employers have been found to have just cause to fire the employee on the grounds of neglect of duty or incompetence, dishonesty, theft or fraud, disobedience, insolence, and insubordination. However, except in the most severe cases, a single incident will not be sufficient grounds for termination. In most cases, before the employer has grounds for just cause it must warn the employee that the conduct is unacceptable, advise the employee that she or he may be fired if the conduct does not improve, provide an opportunity for improvement, and take disciplinary action if the conduct does not improve.

### Reasonable Notice

Where an employer wishes to fire an employee but does not have just cause to do so, the employer can avoid liability by providing the employee with reasonable notice. For example, the employer might advise the employee that his or her position will be terminated in one month's time. At minimum, the employer must provide the employee with the notice period set out in the Code or relevant provincial statute. However, where the employer has notice provisions set out in the employment contract and/or employment policy, it must comply with those provisions. You should be aware that, if the employment contract or policy does not set out notice periods, (or if there is no employment contract or policy at all), and an employee decides to sue an employer in court, the court will consider a range of factors in determining how much notice is reasonable, and will often award much more notice than required under the legislation.

In particular, courts tend to consider different factors in cases involving First Nations employers than they do for most wrongful dismissal cases. For example, courts have increased the notice period where the community is remote and the employee is less likely to find similar alternative employment in the area. However, courts have also held that because Chief and Council are subject to re-election every two years, employees of First Nations governments have a reduced expectation of permanent employment, and have decreased notice periods accordingly.

### Severance Pay

An employer is also entitled to fire an employee without just cause and without reasonable notice if the employee is given severance pay in lieu of notice. For example, if an employee would be entitled to two months' notice, the employer must provide the employee with two months' wages. Although cases can vary greatly, the employer must usually also provide the employee with benefits. An employer can also provide an employee with a combination of severance pay

and benefits. For example, if the employee would be entitled to two months' severance, the employer can provide him or her with one month's notice and one month's wages. If you intend to fire an employee and provide severance pay in lieu of notice, we strongly recommend that you have the employee sign a release before giving him or her the severance pay.

### Constructive Dismissal

Employers also need to take great care when they wish to change or vary a condition of the employment arrangement to avoid liability for "constructive dismissal". Constructive dismissal occurs where an employer makes a change to an integral or essential part of the employment agreement without first consulting the employee. The employee is entitled to either accept the change, or treat the change as if she or he had been fired. For example, if the employer changes the employee's salary, hours of work, demotes the employee, or makes a lateral transfer to a different position, then the employee can sue the employer for constructive dismissal. We strongly recommend that you speak to the employee before making such a change to his or her position, and when in doubt, consult with a lawyer.

### **CONCLUSION**

Employment issues are of great importance to First Nations, and will become of greater importance as these groups move towards self-governance. First Nations can significantly decrease their potential for liability by familiarizing themselves with the law and by following good practices in human resource management. First Nations that take these steps will have satisfied employees, and a more efficient and productive workforce.

### **CONTACT INFORMATION**

Please do not hesitate to contact us if you have any questions:

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