

EMPLOYMENT POLICIES FOR FIRST NATIONS EMPLOYERS

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Employers today face potential liability from a number of fronts. For example, employers can be held liable for improperly hiring, firing, demoting or transferring employees. They can face sanctions for failing to comply with legislated minimums, such as wages, vacation time, and medical, disability and parental leaves. Employers may also be held responsible for the actions of their employees, such as in cases of harassment. These issues may be even more complex for employers within First Nations¹ organizations and communities, who face their own unique challenges and circumstances, such as conflicts of interest, biennial elections, and in many cases, limited resources.

To a large extent, a well-written and comprehensive employment policy, if followed, can protect an employer from liability. An employment policy can also help to create certainty and ensure consistency within the workplace.

First Nations in British Columbia are required to comply with employment legislation – either the federal *Canada Labour Code* (the “Code”), or British Columbia’s *Employment Standards Act* (the “Act”). In general terms, a First Nation employing First Nations employees on reserve is subject to the Code, but these determinations are very fact-specific and are made on a case-by-case basis. It can be quite complicated to determine which statute applies to you, and it may be best to consult a lawyer. Alternatively, you may wish to ensure that your employment policy complies with both statutes.

¹ 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*.

Depending on the First Nation's needs, employment policies can be basic, or be extremely detailed. Although certain topics should be addressed in every policy, there is a great deal of flexibility in many of the terms, and an employer can be very creative in developing an employment policy that reflects its vision and philosophy. A well-drafted employment policy can be an extension and an expression of a First Nations' self-governance mandate.

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, your employment policy address the topics discussed below. You should be aware, however, that the minimum standards set out in the relevant legislation, (either the Code or the Act), apply whether or not you have addressed that issue in your policy. We strongly encourage you to meet with legal counsel to make sure that you are in compliance with all the relevant provisions.

ESSENTIAL TOPICS

Application

It is important to set out to whom the policy applies. Your employment policy may apply to all of your employees, or only to certain categories of employees (e.g. full-time or part-time; and temporary, casual or permanent). You may want to exclude managers and supervisors from your policy, or you may wish to have a separate policy that applies only to management.

Hiring Process

Setting out your hiring process in an employment policy can protect you from allegations of favouritism. This is particularly important in First Nations communities, in which familial groups, clans and houses can have a tremendous impact on politics and relationships within the community.

Within this section of your employment policy, you may want to address the following issues:

- minimum qualifications for all employees (e.g. high school or post-secondary education, drivers' license, etc.);
- selection process (tests, interviews, and other assessment mechanisms);
- whether a medical clearance is required;
- whether priority is given to employees within the organization;
- where and how job vacancies will be advertised;
- who is responsible for selecting the successful candidates, and whether that person or persons can participate in deciding whether to hire a relative;
- whether a Band Council Resolution is required to approve the decision to hire the applicant; and
- ensuring that hiring complies with applicable Human Rights legislation.

Conflicts of Interest

It is important for an employer to ensure that its employees put the employer's interests first. Again, this can be particularly complicated for First Nation employers given the complex relationships that exist within a close-knit Aboriginal community. You may want to consider the following issues when drafting your employment policy:

- whether employees and management need to disclose membership, ownership, employment, participation or other interests in groups, organizations, businesses or activities that may conflict with the political, economic, business or other interests of the First Nation;
- if so, whether such disclosures are to be made to the employee's supervisor, to the Band Manager, or to Council;

- whether the supervisor, Band Manager or Council can approve or disallow the employee's involvement with the potentially conflicting entity or activity;
- whether Councillors can also be employees of the organization; and
- what actions (disciplinary and otherwise) are to be taken against employees who do not follow policy.

Work Hours and Schedules

By setting out in your policy the work hours and schedules that relate to each job classification, you can protect yourself from misunderstandings and conflicts. This may be particularly important if you wish to discipline or terminate an employee for failing to work the required number of hours. You may wish to address the following issues:

- whether the work hours and schedule are fixed (e.g. 40 hours per week, Monday to Friday, 9 am to 5 pm);
- whether the number of hours or the schedule can be flexible (for certain positions it may not matter how long it takes the employee to do the job, or when they do the work, so long as the job is done);
- what are the consequences for lateness;
- what are the consequences for failing to come to work;
- whether coffee breaks are permitted, and at what times;
- how long lunch breaks are;
- whether coffee and meal breaks are paid or unpaid; and
- whether employees are entitled to "flex days".

Overtime

Under the Code and the Act, most employees are entitled to overtime pay, but certain employees such as managers and professionals may be exempt. To ensure certainty and fairness, and to keep your overtime costs to a minimum, we

recommend that you address the following issues:

- who is eligible for overtime pay and under what circumstances;
- whether overtime must be pre-approved, and if so, by whom;
- what is the rate of pay; and
- whether employees can claim time off in lieu of overtime pay.

Salaries and Wages

To ensure certainty and fairness and to assist with budgets and financial planning, we recommend that you set out in your policy the salary or hourly wage for each job classification, and address the following issues:

- what is the pay period (e.g. bi-weekly, monthly);
- when is pay day (e.g. every second Friday);
- payroll deductions, both mandatory and voluntary;
- whether there is a probationary wage or salary, and for what period of time; and
- when salaries and wages are reviewed, and when raises take effect (e.g. every six months, or on a certain date each year, etc.).

Vacation Time

To ensure consistency and certainty, and to assist in planning and personnel management, we recommend that you address the following issues in your policy:

- entitlement for each job classification;
- whether vacation time can be taken all at once, or, for example, one week at a time;
- whether vacation time must be pre-authorized and if so, by whom;
- whether vacation time is mandatory (for example, some employers require each employee to take off at least five consecutive days off each year);
- whether unused vacation time can roll over into the following year; and

- whether employees can be paid out for unused vacation time.

Confidentiality

It is in every employer's interests to ensure that its information and records are not disclosed to the general public. Not only is it increasingly becoming a legal requirement, but confidentiality is very important in small, close-knit First Nations communities, and particularly in the areas of health services, education, human resources, policing and criminal justice. We therefore recommend that your policy set out the following:

- all information relating to the First Nation, its members and employees is to be kept confidential, during or after the employee's employment with the First Nation, except as required in the normal course of employment;
- the employee may not use any such information for his or her own benefit, or for any other person's interests; and
- consequences for breaching confidentiality.

Disciplinary Action

Disciplinary action and termination are two areas in which employers are particularly vulnerable. Employers can greatly reduce their risk of liability in these areas by addressing these issues in their employment policies, and by following those policies once they are in place. We strongly recommend that you address the following issues in your employment policy:

- disciplinary structure – this should be an escalating scale (for example, from a verbal warning for the first offence all the way to termination);
- who is responsible for determining the appropriate level of discipline (e.g. the supervisor, or Chief and Council, etc.), and what factors they are to consider in making that determination;

- what recourse the employee has if she or he thinks the disciplinary action taken is unfair or unwarranted (e.g. grievances, administrative review, etc.); and
- you may wish to set out some examples of unacceptable conduct for which employees will be disciplined (e.g. unexcused absences, insubordination, etc.)

Termination

Defending First Nations employers against allegations of wrongful dismissal and assisting them in negotiating severance packages makes up a significant amount of our employment law practice. In our opinion, First Nations employers can greatly reduce their liability, as well as settlement costs and legal fees, if they include termination provisions in their employment policies, and just as importantly, if they follow the policy each and every time they terminate an employee. We recommend that you address the following issues in this section of your employment policy:

- how much notice of termination an employee is entitled to after each year of service;
- how much severance pay an employee is entitled to if she or he is not given the required notice of termination;
- who has the authority to fire an employee (e.g. the supervisor, the Band Administrator, Chief and Council, etc.); and
- whether a Band Council Resolution is required.

Harassment

- you may wish to make it clear that harassment of any kind is not permitted;
- set out a process for making complaints; and
- consequences for breaching this policy.

OPTIONAL TOPICS

Purpose and Principles

- you may wish to set out the goal or purpose of your employment policy (for example, your employment policy may be in furtherance of your self-government objectives); and
- you may also wish to set out your rights and obligations as an employer, and the rights and obligations of your employees.

Code of Ethics

- some First Nations employers require their employees to sign a Code of Ethics which sets out standards that the employees must follow (e.g. confidentiality, service standards, etc.)

Probationary Period

Many employers wish to set a probationary period for the first few months of employment. Although this may reduce somewhat your liability for severance if you decide not to keep the employee on staff, please be advised that the courts are moving towards providing at least some severance pay, even for employees on probation, and even where the legislation does not require any notification of termination. That said, if you wish to include a policy on probationary periods, you may wish to address the following:

- to whom it applies (e.g. new, re-hired, promoted employees, etc.);
- how long the probationary period lasts;
- notice for termination within the probationary period;
- whether there are any circumstances under which it can be extended; and
- how the employee will be evaluated at the end of the probationary period and by whom.

Classification of Positions

- you may wish to create different categories or classifications of positions within your organization; and
- whether positions can be reclassified, under what circumstances, and how wages will be affected.

Training

- what kind of training is available;
- who is eligible; and
- whether the employer or the employee will pay for the training.

Maternity and Parental Leaves

- whether you will provide a “top-up” of wages to employees who take maternity or parental leaves.

Medical and Disability Leaves

- how many days of sick leave employees are entitled to, if any;
- whether you require a doctor’s note or other proof of illness;
- whether unused sick days roll over into the following year; and
- whether you will provide a “top-up” of wages for employees on disability leave.

Other Leaves

- funeral/bereavement leave;
- special (ie., discretionary) leave;
- cultural leave (to attend longhouse activities, ceremonial activities, etc.);

- leave of absence; and
- jury duty.

Travel

- whether authorization is required before attending conferences, seminars, going on business trips, etc., and if so, who can give the authorization; and
- how compensation for travel-related expenses will be assessed (e.g. Treasury Board rates).

Benefits

- who is entitled and when; and
- examples of benefits include MSP premiums, long-term disability, life insurance, extended health and dental care and parking.

Performance Evaluations

- what is being assessed;
- when and how often they occur (e.g. annually, or at certain intervals, or on anniversary of hiring); and
- consequences of positive, negative evaluations.

Dress Code

- whether a uniform is required;
- standards of attire (e.g. no sandals or shorts); and
- can include safety attire (such as hard hats, vests, etc.).

Off-Duty Employment

- whether employees are allowed to have another job, and if so, under what circumstances.

Off-Duty Conduct and Consequences on Employment

- drug/alcohol abuse; and
- criminal activity.

Resignation

- whether notice is required and how much