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It's in the contract...or is it?

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TORONTO, Ont. - The casualness with which employees are hired and fired in this business is enough to make a contract lawyer cringe. Even those carriers that do have employment agreements often have flaws in them that make them unenforceable, or as the saying goes, not worth the paper they're written on.

Carole McAfee Wallace of WeirFoulds LLP estimates about 60% of employment agreements are improperly written and may not stand up in court.

"I had a client who used a lawyer to draft an employment agreement, so all is good, but then this client decided to change some terms in the employment agreement," Wallace recalled during a Driving for Profit seminar that covered legal issues.

"That employment relationship ended and the employee sued, and when I looked at the employment agreement the changes that the client had made without legal advice had rendered the contract unenforceable."

In this instance, the change made by the client offered less than the minimum required by the Employment Standards Act, rendering the contract null and void, Wallace said.

"Here was a client who had done the right thing and got a lawyer involved in drafting the

agreement, but then took it upon himself to change the terms of the agreement," Wallace recalled with some frustration.

Changing an agreement is just one pitfall to avoid when managing employee relations. An equally egregious mistake is to simply not have an employment agreement in the first place.

"Companies, the middle management, really avoid paper at all costs," said Miriam Eisenberg, who also presented on the panel. "You can't avoid paper...try and protect yourself with drivers and everybody else. I am talking about the people that work the computers and the people that do dispatch - everybody should have, at the minimum, a one-page contract."

So what exactly should go into an employment agreement? Among the most important elements are details surrounding future termination.

For a federally regulated company, they must at be at least as generous as those laid out by the Canada Labour Code while in Ontario, provincially regulated companies must meet the minimum requirements found in the Employment Standards Act.

"It is always open to an employer to offer better than the minimum standards," Wallace said. "An employer can never contract out of those minimum standards, so whatever your agreement says, you have to make sure that it never offers less than what the legislation provides."

The employment agreement should also detail: the position and responsibilities; compensation; a policy handbook (which should be attached); confidentiality (to ensure the employee does not share sensitive information about your company); and in some cases, vacation entitlement. The agreement should also refer to the governing law (ie. the law of Ontario) and should also include an invitation for the employee to have the agreement reviewed by their legal advisor.

"You want to give the employee the opportunity to seek his or her independent advice on signing this contract," Wallace suggested. "Whether they seek that legal advice or not is not your problem."

Drawing up an owner/operator agreement is even dicier, since it's important not to blur the lines between independent contractor and employee.

"The overriding theme to owner/operator contracts is that you are working with these folks as independent contractors and you want that contract to be supportive of an independent contractor relationship and not to start to look more like an employment relationship," Wallace pointed out. "Because once it starts to look like an employment relationship, you may then be on the hook for things like WSIB and termination pay at the end of the relationship."

It's also important to note the contract must be spelled out in "clear language" that an owner/operator would be expected to understand, not legal mumble jumble. Wallace said she's involved in one case where an owner/operator was not fluent in English and is now arguing he

didn't understand the contract very well when he signed it.

"If there are any ambiguities in a contract, one of the golden rules of contract interpretation is any ambiguity is usually interpreted in favour of the party who did not draft it," Wallace warned.

In addition to employees and owner/operators, there's a third category of driver, which Eisenberg refers to as "grey employees." These include drivers - either incorporated or otherwise - who are paid on a percentage of gross revenue basis.

"A lot of these (drivers) go from company to company and they say 'I don't want deductions, I don't want to be an employee and I'm not a contractor because I don't own my own equipment. I just want to be paid gross.' That is honky dory as long as everybody's happy. What happens is, if there is ever a problem, you've got a really big problem."

Eisenberg warned that this type of employment arrangement is on Canada Revenue Agency's radar in a big way.

"What ends up happening is it is a very major burden if you get in trouble," she said. "If you take nothing else out of here today, please, if you have any 'grey' employees, convert them. Either make them a true employee or at least incorporate them."

Companies that don't have an employment agreement should create one, the Driving for Profit panelists agreed. Wallace said applying its terms to existing employees after their hiring "may cause problems with enforceability," however it will at least be useful for new hires going forward.

While in some cases a contract may be as simple as a single page, Wallace had this advice for companies that are drafting an agreement: "This is going to sound self-serving, but you need to talk to a lawyer. I have drafted some that are 14 pages long and I appreciate that that is not realistic or even necessary in a lot of circumstances. But you want to have something in writing because, in the absence of something that fits the requirements of a formal agreement, it is unenforceable. You are a business person and you need to protect your business and not leave yourself open to potential costs and lawsuits when the relationship comes to an unhappy end."

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