

# YOUR QUESTIONS ANSWERED: Employment Agreements, Policies, Immigration and More!

BC Employers' Fall Conference  
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**CLARK WILSON**

Presented by  
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## Your Questions Answered

Our firm operates from the traditional, ancestral, and unceded territory of the Skwxwú7mesh (Squamish), Səlílwətaʔ/Selilwítlh (Tseil-Waututh), and xʷməθkʷəy̓əm (Musqueam) Nations

# Outline

1. Performance Management Discipline
2. Nexus of Immigration and Employment Law – Employers Responsibilities
3. Employment Contracts
4. Policies
5. Generative AI Policies

# PERFORMANCE MANAGEMENT DISCIPLINE

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## Performance Issues

“Cause” for discipline, including summary dismissal, is conduct that irreparably breaches the trust that is fundamental to an employment relationship.

When does poor performance rise to the level of cause?

## Performance Issues

Proving cause based on performance issues is arduous:

***Hennessy v. Excell Railing Systems Ltd., 2005 BCSC 734***

1. Onus is on employer to prove cause on a balance of probabilities.
2. Employee's performance must be gauged against an objective standard.
3. There must be serious misconduct or substantial incompetence.
4. Suitable instruction or supervision is required to meet the objective standard.
5. Warning that failure to meet the standard will result in dismissal for cause.
6. After the warning, employee had reasonable time to correct the situation.

## Performance Issues

### ***Chawrun v. Bell Mobility Inc.*, 2013 BCSC 102:**

- No evidence the quota was reasonable or attainable.
- Employee's peers also missed quotas.
- Failure to meet quotas not enough to substantiate cause.
- Employer needed to demonstrate the employee was incompetent.
- Employee was not given a reasonable amount of time to improve.

## Performance Issues

### ***Cottrill v. Utopia Day Spas and Salons Ltd.*, 2019 BCCA 26**

- Cause will not be upheld if employee made some improvement, even if not in all areas.



## Performance Issues

In summary, employer must be prepared to:

- Create performance standards and clearly communicate expectations.
- Allow sufficient time for the employee to improve.
- Provide documented feedback.
- Offer additional resources, such as supplemental training.
- Be consistent in applying performance standards and providing feedback.
- Provide clear, unequivocal, and repeated warnings that dismissal may result.
- Consider duty to accommodate.
- Expect a stress leave of absence, a WCB claim, and/or a constructive dismissal claim.

## Performance Issues

- Typically cause will only be found if the poor performance is
  - grossly negligent;
  - causes the employer significant harm; or
  - is the result of a lack of skills that the employee claimed to have during the hiring process.
- In other words, the poor performance must be **culpable**.

## Use of PIPs?

- Should be used if the poor performance does not go to the heart of the employee's role
- Should be used only if employer reasonably believes employee can satisfactorily improve
- Should not be relied on as a means of “papering” poor performance to establish cause

## Takeaways

- Don't try to create a case for cause based on poor performance
- Terminating a poor performer is the cost of doing business.
- Ensure your contracts limit termination entitlements

# NEXUS OF IMMIGRATION & EMPLOYMENT LAW – EMPLOYERS RESPONSIBILITIES

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# Provincial Requirements of BC Employers

## Provincial Requirements of BC Employers Hiring Foreign Workers under the Federal Temporary Foreign Worker Program (TFWP):

1. BC Temporary Foreign Worker Protection Act & Regulations requires BC employers to be **registered** with the Provincial Government to **employ** foreign nationals under the **Temporary Foreign Worker Program** (TFWPA) Pt 3 S10(1).
2. BC Employers do not need to register if only employing foreign workers under the **International Mobility Program** (“IMP”) or the **BC Provincial Nominee Program** (“BCPNP”).
3. **Note:** if foreign worker is employed under the TFWP and recruitment was via a third party recruiter, the employer must ensure the third party recruiter is licensed both as a recruitment agency & under the BC Temporary Foreign Worker Protection Act & Regulations - [https://services.labour.gov.bc.ca/licensing/TFW\\_IssuancePublication](https://services.labour.gov.bc.ca/licensing/TFW_IssuancePublication)

## Provincial Requirements for Recruiting Foreign Workers

1. Employment **agencies** must be licensed – unless recruiting for only **one** employer.
2. Anyone that recruits foreign workers under the TFWP must be licensed - Licensing relates to individuals, not companies / organizations.
3. In-house recruiters that only recruit for their employer do not need to be licensed under the TFWPA.
4. Third party recruiters must be licensed to provide recruitment services in BC regardless of the immigration program and their own location.
5. Licenses can be checked:
  1. Recruitment Agency - <https://services.labour.gov.bc.ca/LicensedEmploymentAgencies>
  2. Recruiters - [https://services.labour.gov.bc.ca/licensing/TFW\\_IssuancePublication](https://services.labour.gov.bc.ca/licensing/TFW_IssuancePublication)

# Employer Responsibilities During/Ending/After Employment

## **During Employment:**

1. All immigration programs have conditions and compliance inspection regimes.
2. Inspections can be triggered by:
  - a. Random selection.
  - b. Employee complaint.
  - c. Third party complaint.



## Employer Responsibilities During/Ending/After Employment

3. Inspections focus on compliance with federal/provincial immigration requirements & the terms & conditions of the employment agreement & employer/employee information submitted to the immigration authorities, e.g.
  - a. Occupation – job title, NOC code, job description.
  - b. Hours of work.
  - c. Wage.
  - d. Benefits.
  - e. Vacation.
  - f. Location.
  - g. Safe workplace.
  - h. Employee rights.

## Employer Responsibilities During/Ending/After Employment

4. Due diligence is essential:
  - a. Consult counsel for voluntary disclosure of non-compliance.
  - b. Consult counsel before making any changes to a – h.
  - c. Keep records of any changes that occur.
  - d. Changes can have far reaching immigration and employment law consequences.

## Employer Responsibilities During/Ending/After Employment

### 5. Inspection outcomes:

- a. Compliant – no further action to be taken by IRCC.
- b. Minor non-compliance - no further action to be taken by IRCC if employer has already rectified it.
- c. Major non-compliance – Further action will be taken by IRCC & penalties can include all of the following:
  - a. A fine of up to 100K.
  - b. A ban from employing foreign workers.
  - c. Employers name added to public list of non-compliant employers.

# Employer Responsibilities During/Ending/After Employment

## **Ending/After Employment:**

1. Foreign worker terminations are subject to the same laws as Canadian citizens and Permanent Residents (BC Employment Standards Act, Human Rights Act, Common Law).
2. Some immigration programs require the employer to pay for return travel to foreign workers home country. Regardless of the reason for termination, failure to pay is an immigration law non-compliance issue and potentially an employment law contractual issue.

## Other Matters

1. What to look for on a work permit:
  - a. See example slide
2. Employer/foreign worker wishing to extend work permit.
  - a. Consult counsel to determine eligibility/feasibility.
3. Foreign worker employees asking for support with Permanent Residence applications:
  - a. Don't let employee "lead"/ present a fait accompli scenario
  - b. Best advice – define a policy and process for dealing with these requests, e.g:
    - i. Employee must inform employer before making a PR application that requires employer input/support. E.g. BCPNP.
    - ii. Support is at the sole discretion of the employer & on a case-by-case basis.

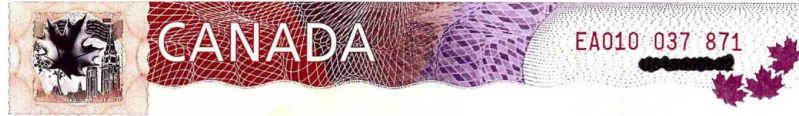
# Sample Work Permit



Immigration, Refugees and  
Citizenship Canada

Immigration, Réfugiés et  
Citoyenneté Canada

PROTECTED WHEN COMPLETED PROTÉGÉ UNE FOIS REMPLI - B



900-885 WEST GEORGIA STREET  
VANCOUVER BC V6C 3H1  
CANADA

Application/Demande: W305504756

UCI/IUC: 1123211366

## WORK PERMIT/PERMIS DE TRAVAIL

### CLIENT INFORMATION/INFORMATION DU CLIENT

Family Name/Nom de Famille: [REDACTED]  
Given Name(s)/Prénom(s): [REDACTED]  
Date of Birth/Date de naissance: 1967/03/12 (yyyy/mm/dd - aaaa/mm/dd)  
Sex/Sexe: MALE  
Country of Birth/Pays de naissance: ENGLAND  
Country of Citizenship/Citoyen de: UK - BRITISH CITIZEN  
Travel Doc No./N° du document de voyage: [REDACTED] PASSPORT - OFFICIAL

### ADDITIONAL INFORMATION/INFORMATION SUPPLÉMENTAIRE

Date Issued/Déjà délivré le: 2021/02/17 (yyyy/mm/dd - aaaa/mm/dd)  
Expiry Date/Date d'expiration: 2023/02/17 (yyyy/mm/dd - aaaa/mm/dd)  
Case Type/Genre de cas: 52  
LMA or Exempt No./N° de l'EIMT ou Dispense: A0605326 [REDACTED] LIMITED  
Employer/Employeur: [REDACTED]  
Employment Location/Emplacement de l'emploi: B.C. NES  
Occupation/Profession: SENIOR CONTRACT CONSULTANT  
In Force From/En vigueur le: 2021/02/17 (yyyy/mm/dd - aaaa/mm/dd)

### Conditions:

1. NOT AUTHORIZED TO WORK IN CHILDCARE, PRIMARY/SECONDARY SCHOOL TEACHING, HEALTH SERVICE FIELD OCCUPATIONS.
2. MUST LEAVE CANADA BY 2023/02/17
3. UNLESS AUTHORIZED, PROHIBITED FROM ATTENDING ANY EDUCATIONAL INSTITUTION, OR TAKING ANY ACADEMIC, PROFESSIONAL OR VOCATIONAL TRAINING COURSE.
4. NOT AUTHORIZED TO WORK IN ANY OCCUPATION OTHER THAN STATED.
5. NOT AUTHORIZED TO WORK FOR ANY EMPLOYER OTHER THAN STATED.
6. NOT AUTHORIZED TO WORK IN ANY LOCATION OTHER THAN STATED.

### Remarks/Observations:

\*\*\*THIS DOES NOT AUTHORIZE RE-ENTRY/CECI N'AUTORISE PAS LA RÉ-ENTRÉE\*\*\*

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# EMPLOYMENT CONTRACTS

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# Employment Contracts

Why should you have employment contracts?

- Clarify the terms and conditions of employment
- Limit the liabilities of the employer, particularly on termination
- Address any specific or other concerns, such as IP, non-competition, non-solicitation, work schedule



# Employment Contracts

What should be in your employment contracts (at a minimum)?

- Termination entitlements
- Compensation (including all forms of compensation – commission, bonus, allowances, etc.)
- Vacation entitlements
- Job title and description (may include hours and/or work location)
- Confidentiality
- Agreement the employee is bound by company policies
- Assignment (the ability for the employer to assign the agreement to another entity)
- IP (possibly)

# Employment Contracts

## Termination Entitlements

- If the Employment Standards Act (ESA) is applicable, the contract cannot provide for a lower entitlement than the ESA on termination
- If you want to hold the employee to the ESA minimum, ensure the clause specifies that the employee will receive “only” their minimum entitlements under the ESA
- If you are providing entitlements beyond what is in the ESA, ensure the provision is clear and easy to understand
- Consider the resignation provisions as well – a longer notice period for resignation may require the company to pay out that period if the company wants the employee to leave earlier
- Address bonuses, commissions, equity compensation and other forms of compensation

# Employment Contracts

## Compensation

- Set out salary/hourly wage
- Include all forms of compensation, including full details for commissions (i.e. when they are considered earned, when they are paid out, whether there may be any adjustments, etc.), bonuses, allowances

## Vacation Entitlements

- Keep in mind the ESA separates out the concepts of vacation time and vacation pay
- You may be creating a contractual obligation to provide an employee with full paid vacation entitlements even on a year where they were on leave

# Employment Contracts

## Job Title and Description

- Important to set out job duties from the outset and consider amending or updating the agreement in the event of a change
- Hours of work may be important to include, particularly if it is a salaried position, if the weekly hours may vary, or if the employee must have flexible availability
- Be cautious with employees who are “managers”

## Bound by Policies

- Policies are important and can govern some aspects of the employment relationship
- Employees should explicitly agree to be bound by all policies, including any amendments to those policies, in their employment contract (they should also sign off on policies and get a copy of the policies to review, ideally it should be appended to the agreement)

# Employment Contracts

## Confidentiality

- There are some general obligations, but it's best to ensure as much protection as possible and clarity around what is considered confidential information

## IP

- IP covers all employee work product
- There is a legal presumption of ownership of most, *but not all*, IP by employers for employee work product (not the case for contractors)

## Assignment

- Can be invaluable in the event of a reorganization or transaction because it allows you to move employees around more freely

# Employment Contracts

## New Trends and Additional Considerations

- Layoff provisions
- Non-solicitation/non-competition
- No contravention (i.e. not violating terms of an agreement with a previous employer)
- Removing probation periods
- Legal authorization to work in Canada
- Criminal background checks (pre-employment or ongoing), pre-employment checks (e.g. reference checks, education/credential verification)

# Employment Contracts

## Important Points and Best Practices

- You cannot contract out of the Employment Standards Act
- Make sure the contract gets signed and keep track of it
- Allow the employee time to consider the contract before signing (for both new and existing employees)
- The contract must be signed *before* the employee starts work
- Additional consideration (i.e. something of value over and above what the employee is already entitled to receive, such as a raise or signing bonus) is required for enforceability of contracts for existing employees or to replace a previous agreement/terms

## Employment Contracts

Cautionary tales:

- *Adams v. Thinkific Labs Inc.*, 2024 BCSC 1129
- *Sui v. HungryPanda Tech Ltd.*, 2024 BCSC 1856

Both cases involved an employee receiving an offer of employment with some terms included, each mentioned that a contract or further contract would be provided. In both cases, the second contract was found unenforceable as there was no consideration provided and the first offer contained terms and was not explicitly conditional upon the employee signing or agreeing to any additional written employment terms.

Takeaway: Avoid entirely or be careful with a two-step process for offers of employment



# Employment Contracts

## Important Points and Best Practices Continued

- If applicable, specify the consideration in the agreement
- Consideration should be conditional on signing the agreement
- Update agreements periodically for all employees, particularly long-term employees
- Review your agreement template(s) every year or two
- Invest in having a lawyer draft or review your employment agreements

# POLICIES

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# Policies

## Why Should You Have Policies?

- Certain policies are required by law
- Clarify procedures
- Set expectations and requirements/obligations
- Fill in the blanks from the employment agreement

# Policies

## What Policies Should You Have?

- Bullying, discrimination and harassment (including complaint and investigation procedures)
- Any other applicable workplace health and safety policies
- Human rights policy
- Confidentiality
- Overtime/vacation/statutory holidays
- Remote work

## Additional Policies and New Trends

- Discipline policies
- Social media policies
- Technology and privacy
- Off-duty conduct
- Artificial intelligence

## Important Points and Best Practices

- Ensure employees review and sign off (both at the start of work and with each edit to the policies)
- Build in exceptions or provide guidance on who to speak to regarding questions
- Review and update policies regularly
- Consider:
  - is that policy a liability?
  - Do you actually need that policy?

# GENERATIVE AI POLICIES

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## What are Generative AI Tools?

Generative AI refers to a class of artificial intelligence systems designed to create new content, data, or information based on patterns learned from existing data. Unlike traditional AI, which typically focuses on analyzing or classifying data, generative AI models generate novel outputs that can mimic or extend the characteristics of their training data.



## Examples of Generative AI tools



### Large Language Models (LLM) and Chatbots:

OpenAI Chat GPT  
Microsoft Copilot  
Google Gemini (formerly Bard)  
Claude



### Gen AI included in business products:

Microsoft 365 – CoPilot  
Zoom – AI Companion  
Salesforce – Einstein  
Mailchimp – Email Content Generator

Generative AI tools can create text, code, images videos and audio.

## Major Risks with using Generative AI

**Intellectual  
Property  
Issues**

**Fraud and  
Deepfakes**

**Quality and  
Accuracy**

**Confidentiality  
Issues**

**Privacy and  
Security**

**Bias and  
Fairness**

# Intellectual Property Issues

- **Ownership of Outputs**

- The legal ownership of AI-generated content and the rights to use or modify it as not settled at law
- Current ChatGPT Terms:

Ownership of content. As between you and OpenAI, and to the extent permitted by applicable law, you (a) retain your ownership rights in Input and (b) own the Output. We hereby assign to you all our right, title, and interest, if any, in and to Output.

- **Copyright Concerns**

- Gen AI is trained on vast amounts of information sourced from the web
- Concerns that protected works were used to train AI without authorization
- Outputs may infringe copyright if they closely mimic protected works

# Quality and Accuracy Issues

- Generative AI tools can provide incorrect answers to questions and produce fictitious information called “hallucinations”
- The process of identifying patterns and estimating what comes next produces false information through at least two mechanisms:
  - The internet is already filled with false information
  - Generative AI combines information in different and unexpected ways based on billions of patterns, meaning that even if it is solely learned from text that is accurate, it may still generate something that is not
- If you ask a chatbot the same question twice, it can generate different answers
- In the words of an internal Microsoft document, generative AI is built “to be persuasive, not truthful” meaning that “outputs can look very realistic but include statements that aren’t true”

(Karen Weise and Cade Metz. “When A.I. Chatbots Hallucinate”, *The New York Times*  
<https://www.nytimes.com/2023/05/01/business/ai-chatbots-hallucination.html>)

## Confidentiality Issues

- Any information input into a generative AI prompt becomes available to for the AI owner to use to train the AI and other purposes
- By putting confidential, sensitive or personal information into a generative AI system, there is a risk of unauthorized use and disclosure
- Samsung Confidentiality Breaches:
  - One employee copied source code from faulty semiconductor database into ChatGPT to find a fix
  - Another employee shared confidential code to a fix for defective equipment
  - Another employee submitted a meeting recording to create meeting minutes

Each of these breaches occurred within 3 weeks of lifting a ban on using generative AI  
(Source: <https://gizmodo.com/chatgpt-ai-samsung-employees-leak-data-1850307376>)

# Key Issues for Gen AI Policies



**SCOPE**



**CONFIDENTIALITY  
AND PRIVACY**



**VALIDATION AND  
ACCURACY**



**OTHER  
REQUIREMENTS FOR  
AI GENERATED  
CONTENT**



**CONSEQUENCES FOR  
NON-COMPLIANCE**

# AI Implementation Process – Risk Mitigations

## Planning Phase

- Define objectives in advance
- Conduct needs assessment
- Initial risk assessment

## Due Diligence

- Enterprise tool
- Legal terms review
- Privacy and security review

## Implementation

- Identify training data
- Future updates and growth
- Internal change management processes

# AI Implementation Process – Risk Mitigations

## Accountability

- Human in the loop for all decisions
- Obligation to check for accuracy and quality
- Individual is ultimately responsible for outputs

## Continuous Monitoring and Improvement

- Reviewing outcomes for bias and other issues
- Verify use case and application
- Real-time course corrections

## Oversight and Governance

- Set strategic direction and policy
- Manage ethical issues and regulatory compliance
- Set and approve risk profile for AI tools



# QUESTIONS?



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