

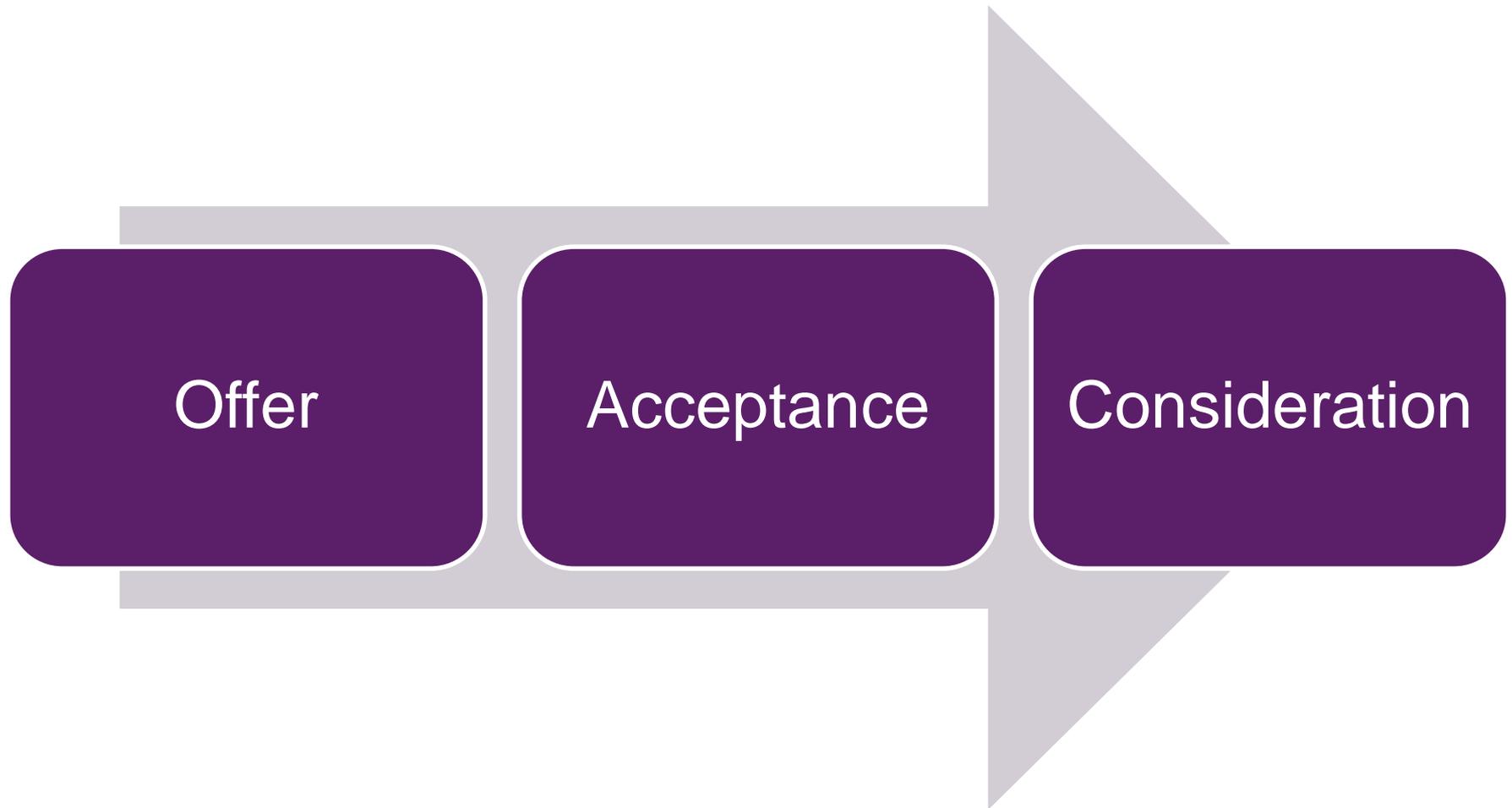
# Dot the i's and Cross the t's

Practical Tips for Drafting Enforceable  
Employment Agreements

# THE EMPLOYMENT RELATIONSHIP

- Every employment relationship is based on the law of contract – either oral or written
- The vast majority of employment disputes can be avoided altogether with a good employment contract.
- A written employment agreement is the most effective way to avoid the consequences that flow from common law obligations.

# EMPLOYMENT AGREEMENTS – ELEMENTS OF A CONTRACT



# EMPLOYMENT AGREEMENTS - FRAMEWORK

- An employment agreement can be written or oral
- Timing matters: critical to have a written employment agreement executed before the employee starts work or begins in a new position.
- Otherwise... you will need fresh consideration in order to make the written agreement enforceable

# EMPLOYMENT AGREEMENTS – CORE PROVISIONS

Term

Compensation

Probation

Revisions

Restrictive Covenants

Confidentiality

Termination

# EMPLOYMENT AGREEMENTS - TEMPLATES

## BASE

- Probationary Period
- Overtime Eligibility
- Minimum Standards Termination Clause
- Confidentiality

## MANAGEMENT

- Hybrid Termination Clause
- Compensation Components
- Vacation
- Non-solicit provision

## EXECUTIVE

- Capped Termination Clause
- Detailed Compensation Components
- Non-solicit
- Non-compete
- Fiduciary duties

# EMPLOYMENT AGREEMENTS - TERM

- Risks are driven by the nature of employment
  - Indefinite Term Employment
  - Fixed Term Employment
  - Contractor (Independent / Dependent) [*not an employment agreement*]

# EMPLOYMENT AGREEMENTS - COMPENSATION

- Compensation terms must be carefully drafted
- At common law, a terminated employee is entitled to all elements of compensation they would have received had they worked the requisite notice period.
- This includes bonuses/commissions/long term incentive compensation/perquisites...

# EMPLOYMENT AGREEMENTS - COMPENSATION

- ... unless a written employment agreement carefully stipulates otherwise.
- Language limiting bonus payments to “active employment at the time of payment under the plan” is not clear enough.

# EMPLOYMENT AGREEMENTS - COMPENSATION

- It's not enough to have a bonus plan that stipulates “active employment”
- Employee must either explicitly agree to such term in their employment contract, or the eligibility criteria under the plan must be brought to the employee's attention prior to accepting terms.

# EMPLOYMENT AGREEMENTS - PROBATION

- Probationary periods can be set at the discretion of Company, and can be extended if a contract provides for such extension.
  - 90 days vs 6 months
- If you extend probation past employment standards minimums, the employment agreement must provide that the employee will still receive their statutory entitlements upon termination.

# EMPLOYMENT AGREEMENTS - TERMINATION

- Nothing prevents employment litigation like an effective termination clause
- Not about expecting an end to the relationship; about providing certainty to the parties
- Cost savings can be significant

# EMPLOYMENT AGREEMENTS - TERMINATION

- Key common law principles:
  - Reasonable notice: an employee is entitled to reasonable notice of termination unless a written employment agreement clearly stipulates alternate lawful terms. It is a presumptive right.
    - Character of employment matters less than ever
    - 1 month per year of service metric increasingly prevalent

# EMPLOYMENT AGREEMENTS - TERMINATION

## Minimum Standards

- Limit entitlements to applicable minimum standards legislation

## Hybrid

- Set a modified calculation standard
- eg: ESA plus one week for each completed year of service

## Capped Common Law

- Cap a common law calculation
- eg: 6 months if less than one year of service, 12 months if one year or more

# EMPLOYMENT AGREEMENTS - TERMINATION

- Minimum Standards Clause 1
  - Your employment may be terminated at any time without cause for any reason by providing you with notice of termination or pay in lieu thereof under the *Employment Standards Act, 2000*.
    - NO – attempt to contract out of ESA, as provision does not speak to severance pay, benefit continuance, or vacation payout.

# EMPLOYMENT AGREEMENTS - TERMINATION

- Minimum Standards Clause 2
  - Your employment may be terminated at any time without cause for any reason by providing you with your entitlements under the *Employment Standards Act, 2000*.
    - NO – does not limit to “only” ESA amounts.

# EMPLOYMENT AGREEMENTS - TERMINATION

- Minimum Standards Clause 3
  - Your employment may be terminated at any time without cause for any reason by providing you with only your entitlements under the *Employment Standards Act, 2000* (“the ESA”), as amended from time to time.
    - MAYBE – stronger to spell out entitlements and include provision referencing no further claim to common law damages.

# EMPLOYMENT AGREEMENTS - TERMINATION

- Other key issues to address regarding termination:
  - Inclusive and exhaustive of ESA entitlements
  - Notice, pay in lieu thereof, or combination
  - Define “Termination Date” as date on which notice is given
  - Embedded release language from future claims
  - Explicitly address benefit continuance

# EMPLOYMENT AGREEMENTS – RESTRICTIVE COVENANTS

- Various forms of Restrictive Covenants:
  - Non-solicit provisions
    - Employees
    - Clients
    - Business partners
  - Non-compete provisions
    - Industry
    - Specific competitors

# EMPLOYMENT AGREEMENTS – RESTRICTIVE COVENANTS

- The general rule is that restrictive covenants are restraints on trade, which are contrary to public policy and therefore void.
- Generally speaking, employment law favours mobility and competition
- Onus is on employer to demonstrate that the restrictive covenant is necessary and reasonable in the specific circumstances at issue
- This means that restrictive covenant must be drafted as narrowly as possible to protect a legitimate business interest

# EMPLOYMENT AGREEMENTS – RESTRICTIVE COVENANTS

- A restrictive covenant must be tailored to reflect individual employment circumstances
  
- 3 Core Components
  - 1) Define the business interest in need of protection
  - 2) Specify a reasonable geographic scope
  - 3) Restrict activity for a reasonable amount of time

# EMPLOYMENT AGREEMENTS – RESTRICTIVE COVENANTS

- Define the business interest:



- Be specific about what needs protection

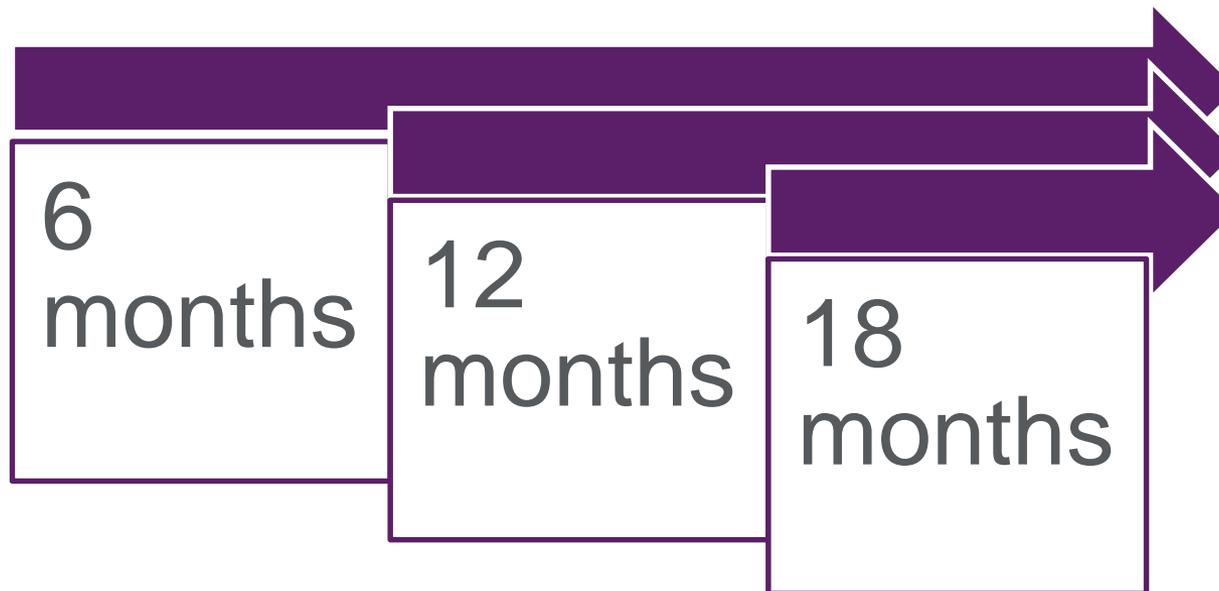
# EMPLOYMENT AGREEMENTS – RESTRICTIVE COVENANTS

- Specify a reasonable geographic scope



# EMPLOYMENT AGREEMENTS – RESTRICTIVE COVENANTS

- Restrict activity for a reasonable amount of time
- How much time will it take the Company to secure its relationships?



# EMPLOYMENT AGREEMENTS – RESTRICTIVE COVENANTS

- Consider other options aside from classic restrictive covenants
- Fiduciary obligations (e.g. – duty of loyalty)
- Robust confidentiality provisions to protect misuse of company information
- Revise terms as relationship evolves

# EMPLOYMENT AGREEMENTS – CONFIDENTIALITY

- Protect misuse of company information
- Intended to protect legitimate business interests – must be reasonable in scope
- No requirement for temporal limitation

# EMPLOYMENT AGREEMENTS – OTHER TERMS

- **Governing law:** generally employment is governed by the law of the land where the work is performed
- **Promotions and the Substratum Principle:** where employment fundamentally changes over time (positions, duties, remuneration), a Court will be unlikely to enforce terms of old contract
- **Severability clause:** typically stipulates that any clause found to be illegal will be deemed to be severed from the remainder of the contract.
- **Independent legal advice:** include a clause that indicates employee had opportunity to review and seek whatever advice s/he thought necessary
- **Review/Revise/Update!**

# Thank you

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