

Employment Contracts

Top ten drafting mistakes to avoid

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Why have an Employment Contract?

- Minimize disputes by making everything clear up front
- Enhance flexibility by building in ability to change
- Reduce costs on employee exit (both resignations and terminations)

1. Insufficient Consideration

- Agreement must be signed **WHEN** the person is offered employment, or the offer must be specifically contingent on signing an employment contract
- Must be signed **BEFORE** the employee starts work
- Otherwise, something of value must be given to the employee (i.e. promotion, salary increase, signing bonus, new bonus or benefit)

2. Improper use of fixed-term contracts

- Reminder: A series of fixed term contracts may entitle the employee to common law reasonable notice.
- Statutory notice is due if the fixed term exceeds 12 months.
- Forgetting to have an early termination provision in the fixed term contract. Employer may have to otherwise pay out the full term if it terminates early.

3. Unenforceable Termination Clause

- Important to have a termination clause regardless of whether the contract is for an indefinite length or a fixed-term.
- Termination clause must meet or exceed the *Employment Standards Act, 2000* requirements upon termination.
- Include language on benefit continuance during statutory notice period
- No mitigation set-off unless it is in the contract (*Bowes v. Goss Power Products Ltd.*, 2012 ONCA 425)

4. No Right to Impose Disciplinary Suspension

- Traditional view is that an employer cannot suspend an employee absent just cause
- Reserve the right in the contract to impose disciplinary suspensions with or without pay

5. No Right to Impose Layoffs

- A layoff, even if it is done in accordance with the *Employment Standards Act, 2000*, may result in constructive dismissal.
- Solution: Reserve the right in the contract to impose unpaid layoffs in accordance with the ESA.

6. Failing to Address the Probationary Period

- ESA requires termination notice after 3 months of employment.
- Common law reasonable notice of termination can be significant for employees with less than 3 months of service.
- Stipulate that there will be a probationary period of 3 months and what termination notice, if any, will be given.

7. No anti-obsolescence language

- With time, the initial employment contract may no longer be enforceable if it no longer reflects the reality of the employment relationship.
- Solution: have a clause that says that the terms and conditions of the contract remain enforceable regardless of changes during the tenure of employment.
- Include an acknowledgement that changes to job title, reporting relationship, duties and responsibilities shall not constitute constructive dismissal.

8. Unreasonable Restrictive Covenants

- Overly broad post-employment restrictive covenants, such as non-competition and non-solicitation, are routinely struck down by the courts.
- Factors such as the length of time, territory, and the business to be protected must be carefully considered.
- Must restrict only what is necessary to protect the legitimate business interests of the organization
- Have a severability clause in case one clause is later declared void, so that the remainder of the contract may survive.

9. Inability to change benefits or workplace policies

- Failure to provide for the right to unilaterally introduce, amend or cancel benefit plan or workplace policies may mean the terms remain “frozen” to what they were at the time the employment contract was signed.
- A specific list of benefits = contractual entitlement.
- Failure to refer to the policy may mean the employee is not bound to it.
- Make clear that eligibility to participate in the benefit plan is subject to the terms and conditions of the plan as replaced, amended or revised by the employer from time to time.

10. No Entire Agreement Clause

- Make clear no other promises (either written or oral) the employee is relying upon in accepting the employment offer
- This avoids/minimizes claims of misrepresentation by the employee later on.

Thank You!

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