

WHAT EVERY EMPLOYER SHOULD KNOW...AND DO

Lisa M. Bolton

*Sherrard Kuzz LLP, Employment & Labour Lawyers
June 2015*

Many employers underestimate the value of a written employment contract, considering it merely an option, and primarily for senior employees. However, an employment contract is much more than an option or mere formality. It allows an employer to set the terms and conditions that will govern its relationship with all employees –in good times and bad times, protecting the interests of the business.

Key Terms and Conditions

Entitlement upon termination

One of the most important benefits of an employment contract is the ability for an employer to specify the employee's entitlement in the event the employment relationship is terminated. This provides an employer with much-needed predictability and the opportunity to reduce the potential for litigation and related costs. The only legal requirements are that terms and conditions meet or exceed any minimum statutory requirements (e.g., employment standards) and not be 'unconscionable'.

As a general rule, in the absence of an employment contract limiting an employee's entitlements upon termination, an employee dismissed without cause is entitled to "reasonable notice" - a term used by the courts, intended to be a rough estimate of how long it should reasonably take the employee to find comparable alternate employment.

It is often difficult to predict what constitutes reasonable notice because it depends on the assessment of a

number of factors, including: the employee's age; compensation; length of service; nature of the position (e.g., managerial or administrative); availability of comparable employment (with regard to the employee's experience, qualifications; training and current economic climate); custom in the trade; and whether the employee had been 'lured' from or induced to leave previous secure employment.

Through the application of these factors 'rough general rules' emerged including: one month notice per year of service; notice periods capped at 24 months; longer notice periods for highly skilled senior employees; and employees on the cusp of retirement being "bridged" only to age 65. However, there is a growing sense these 'general rules' no longer apply. As a result of several recent, high profile decisions, the trend is now toward longer notice periods generally, especially for low-skilled, short service and older employees.

It is this very uncertainty inherent in determining how much notice is reasonable which can lead to increased risk of litigation and potential for liability for wrongful dismissal. A properly drafted employment contract can avoid that uncertainty.

By way of example:

Assume the common law reasonable notice period for an older, long service, senior level employee is 18-24 months. That same employee, if contractually limited to the minimum statutory entitlement on termination, may only be entitled to receive up to 8 weeks' notice or pay in lieu, and up to 26 weeks' severance (if applicable) for a maximum potential payout of 34 weeks (approximately 8 months), representing a significant savings of some 10-16 months' pay.

Protecting business interests during and after termination

During employment a contractual term permitting the employer to temporarily layoff an employee provides flexibility to adjust a workforce to respond to market conditions such as the loss of a key customer or an economic downturn. After employment a well drafted non-solicitation provision can protect an employer from unfair competition by a former employee. Neither of these terms can be implied into an agreement, and must be expressly stated.

Performance standards

An employment contract can also play an important role in setting expectations for employee performance and compliance with workplace rules, so that if and when those standards are not met an employer is in the best position to defend disciplinary action.

Legal nuts and bolts

To achieve the benefits of an employment contract there are essential rules that must be followed. The most obvious is the requirement for 'consideration'. The employer must provide the employee with valuable consideration in exchange for agreeing to the terms of the contract. In the case of a new employee consideration is usually the job itself.

For that reason an employment contract with a new employee should be signed before the employee starts working. In the case of an existing employee the employee must receive something of value to which he or she is not otherwise entitled in exchange for agreeing to the employment terms. This can be a cash payment, wage increase, promotion, additional paid vacation or other benefit. The employee must also enter into the contract voluntarily without duress or undue influence by the employer.

Best practice

As you can see, there is great value to an employer having employment contracts at all levels of its organization. The idea held by some that an employment contract is only necessary for a senior employee is simply not true. With the right set of facts, even the termination of a younger, less-experienced employee can be very costly. The bottom line is that an employment contract is a relatively inexpensive insurance policy that should be considered by every employer.

To this end, consider the following best practices:

- Make an offer of employment conditional on signing an employment agreement
- Ensure contract terms and conditions comply with minimum statutory requirements
- Give the employee time to review the contract and obtain legal advice before being asked to sign
- Ensure the employee signs the contract before starting work
- Attach documents that are incorporated into the contract (e.g., policies, code of conduct, etc.)
- Keep records of all communications relating to the negotiation of the contract
- Periodically review existing employment contracts to ensure legal enforceability as the law will invariably change
- Require the employee to sign a new employment contract as a condition of accepting a promotion or change in position
- Finally, while the benefits of a properly drafted employment contract are significant, there are many possible pitfalls arising out of the process and terms which may result in a court refusing to enforce all or part of the contract. For these reasons, an employer is well-advised to ensure its employment contracts are drafted or reviewed by an experienced employment lawyer.



Lisa M. Bolton is a lawyer with Sherrard Kuzz LLP, one of Canada's leading employment and labour law firms, representing management. Lisa can be reached at 416.603.0700 (Main), 416.420.0738 (24 Hour) or by visiting www.sherrardkuzz.com.

The information contained in this article is provided for general information purposes only and does not constitute legal or other professional advice. Reading this article does not create a lawyer-client relationship. Readers are advised to seek specific legal advice from Sherrard Kuzz LLP (or other legal counsel) in relation to any decision or course of action contemplated.

