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# The Written Employment Contract



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## Introduction

Increasingly, employers are using written employment contracts – and for good reason. The complexity of employment law and high costs of termination have forced them to be more careful when establishing new employment relationships. It is better to deal with the most likely areas of disagreements, before the problems exist. Clarity of terms often avoids costly disputes.

Consideration of a written employment contract means the employer has reviewed the key aspects of the job in advance: duties and responsibilities, remuneration and benefits, how to end the relationship, if necessary, and what obligations continue even after termination. Even though each employment situation is unique, there are common elements which should always be considered beforehand.

In the unionized environment, collective bargaining means that one contract will apply to all bargaining unit members, therefore individual contracts of the type described below are not applicable. However, even the union shop has managers and sometimes sales and office staff who are not covered by the Collective Agreement and for whom individual employment contracts may be helpful.

## Establishing the Employment Relationship

Whenever an employee agrees to work for an employer, a verbal or written contract is established. There are three elements to the contract: offer, acceptance, and consideration. Consideration typically takes the form of a promise by the employee to perform services in exchange for the promise by the employer to pay for such services.

A verbal contract is not illegal, but its terms are more difficult to prove if in dispute. For example, if an employee under a verbal contract is entitled to three weeks' vacation per year, is she entitled to vacation during the first year, or only after 12 months of employment? If the employer and employee disagree, there will likely be hard feelings or disappointment one way or the other.

Courts imply a term into the oral contract that a reasonable period of notice must be given, and the question arises as to what is reasonable in the circumstances of each case. If the contract is in writing, addressing those issues leaves no room for disagreement.

## Impact of Statutes

Part of the complexity of employment law is the impact of a variety of statutes on the private employer/employee relationship.

While the prohibited grounds of discrimination may vary between the jurisdictions, most statutes such as the Ontario Human Rights Code prevent discrimination based on a familiar list of factors including race, religion, colour, nationality, ancestry, place of origin, age, sex, disability, marital status, etc... Most jurisdictions recognize by way of statute or judicial interpretation the concept of "bona fide occupational qualification" or a requirement that may constitute a preference for or against a particular characteristic protected by human rights legislation.

Generally speaking, where an employer has a duty to accommodate the member of the "protected group", the requirement may be excused where the preference is in good faith, and relates directly to the actual requirement of the job.

The Employment Standards Act 2000 provides guaranteed minimum standards of pay, vacation, daily breaks, notice periods on termination, pregnancy/parental leaves, overtime and maximum hours of work. For Federally regulated employers in areas such as interprovincial transportation, shipping, banking, communications, and railroads, the Canada Labour Code parallels the Ontario legislation, but with important distinctions in some areas, such as matters of unjust dismissal.

In theory, contracting out of the Provincial and Federal minimums is prohibited, however the scope and form of the prohibition on contracting out varies from jurisdiction to jurisdiction. The employment contract must be "legal" in that it cannot provide benefits at a level that is below the Provincial or Federal minimums. Should the contractual terms fall under judicial scrutiny in the event of a dispute, the contract will certainly be deemed invalid and unenforceable, although, there may be exceptions to this rule. For example, where an employee agrees to accept a bundle of benefits that exceeds the same bundle under the applicable employment standards legislation, the provisions of the contract will prevail even though individual elements may be less than the legislated minimum.

A prudent employer will ensure that contractual terms abide by statutory requirements. Doing so will avoid discovering later that some parts are invalid, and possibly subject to financial claims by the disgruntled employee.

## The Nature of the Contract

The mention of employment contracts conjures up a picture of complex, multi-paged documents, full of legalese, and small print. In complex relationships, that type of document may be appropriate. Written contracts will not find favour with most employers (particularly in small business) if they are too complicated. The answer is to tailor the contract to your particular needs.

The contracts can be simplified into the form of a letter of employment. In plain, easily understood language, the employer can spell out the terms of employment to the new employee and ask that a copy of the letter be signed by the employee, indicating his or her agreement. The document then becomes part of the employee's file to be available later for either party.

Whatever its form, if the wording is clear and the contents consistent with legislative requirements, the Court will tend to uphold the document as a valid record of the parties' intentions at the time the employment relationship began. Some standard subjects to cover are:

### Ancillary Documents

To keep the contract simple and flexible, it is best to provide additional reference material, such as a benefit booklet or policy manual. Specific policies and requirements such as hours of work, attendance expectations, and systems of progressive discipline, are often set out in employee policy manuals, as are benefits such as paid bereavement or sick leave provisions. A contract would be unduly long and complex if all those items were included. The same applies to benefit plans provided by a third party insurer, such as long term disability, life insurance, and major medical coverage.

One possibility is to attach the items as schedules to the employment letter, but a more flexible approach is to refer to the documents in the letter, and thereby incorporate their terms by reference. It is of particular importance to include a provision that the policies or benefits are subject to change, which will not give rise to an employee's entitlement to terminate the contract claiming constructive dismissal. In the absence of such a clause any changes to a policy manual made after the commencement of employment may not apply unless there is proper notice to the employee and a clear intention of the parties to alter the terms and conditions of employment accordingly.

### Changing the Terms of the Contract

An ongoing employment relationship which is not designed to terminate after a fixed term is the norm in the workplace. Rarely does the employment contract with the original bargain remain unchanged throughout the entire relationship. Once signed, the employment letter usually disappears into

the file, not to be referred to except in situations of some disagreement.

During the course of the relationship, there may be reasons to change the terms, for the benefit of either or both parties. Pay rates can change, benefit coverages adjusted, job duties revised, etc. These changes should be tied in to the original employment letter: the letter should provide for the possibility of changes, and the changes that do occur should be identified as amendments to the original agreement.

Major changes that have a negative impact on the employee or create a significant change to the job should be made on



notice, with the most important changes requiring a longer notice period. To make changes unilaterally or on very little notice runs the risk of eroding employee morale, not to mention the possibility of claims for constructive dismissal.

Any amendment or renegotiation of the contract after the commencement of employment may be unenforceable for lack of consideration. "New" consideration in these circumstances may take the form of a promotion, pay raise, bonus, stock options, etc.. It is advised that employers take caution against such consideration being characterized as a gain which would have been received notwithstanding the negotiation of the new contract.

In a unionized situation, parties sometimes assume that the agreement, once bargained for and ratified, cannot be changed until the end of its term. Generally, that proposition is correct. However, there may well be situations where during the currency of the Collective Agreement, the union and employer are able to agree on amendments to be effective immediately, at least until the contract ends and a further round of

negotiations is undertaken. For example, serious financial matters that negatively affect the employer's profit such as the loss of a major customer or changes in government regulations may require the parties to re-think their previous positions. In those situations, a "letter of understanding" may be entered into which has the effect of modifying the Collective Agreement, and which can be relied on by either party if a grievance is subsequently filed.

## Keeping the Contract Current

To be of any utility, the employment contract must be able to stand judicial scrutiny; that is, it must be viewed as valid by the Court when raised as a defense by the employer to an employee claim, for example, after a termination. Dusted off an ancient agreement that has had little attention paid to it – may not meet with judicial approval if it no longer reflects the nature of the employment relationship. If an entry level employee agreed, 20 years ago, to a minimal amount of notice on termination, that same employee who is now a highly paid vice-president of operations will not likely be held to the same terms.

Ideally, the contract should be reviewed periodically, and particularly when any significant job change occurs.



## Suggested Contract Terms

Some job terms are so basic that they hardly need comment: the employee's title, rate of pay, duties and responsibilities, and line of supervision, are a few. But, just because they seem obvious is not a good reason to omit listing them in the employment letter: a failure to do so may create ambiguity and problems later.

Other terms are less obvious, but are probably still assumed. Identifying them in the contract will make expectations clear. Examples are the employee's obligation to make a full time commitment to job duties, and a statement that the employment contract constitutes the entire agreement (i.e. that there are no collateral promises upon which either party is relying).

A third category of items for consideration to be included in the contract are those that are specific to the arrangement, such as the terms of termination by either party, a definition of legal cause for dismissal, non-competition, confidentiality, and the length of the contract term.

A thoughtful review of the issues in advance is the key to a good contract.

### (i) Whole Agreement:

If the employment relationship goes bad, one party, or the other may rely on representations made at the time the employment relationship began i.e., during the hiring process. A promise of an ownership interest, a promise of a raise in pay, or an expectation of a promotion within a certain time, are all examples. It is not unusual for there to be a certain amount of optimistic expression made by both parties prior to entering the employment relationship. Excluding them from the contract by a specific term indicating that there are no collateral representations or agreements, and that the terms of the letter constitute the entire agreement, help prevent those issues being raised later.

### (ii) The Probationary Period:

The tendency is to consider the recruitment process ended once the hiring takes place. Attention then turns to training the new employee, and to the basic issues of operating the business. To do so is to forget a very powerful tool available to minimize risk to the employer, namely, the probationary period.

A careful review of the employee and their performance in the job situation can reveal much more information than may have surfaced in the application and interview process.

The employer's power to affect the employee is never greater than during the first few weeks and months of employment, so it is advisable for the employer to use that power to its advantage. No one should be hired except on a probationary basis.

A probationary period will not be implied into a contract of employment and automatically imposed on the employee. The employer must take care to ensure that the terms of the probation period are clearly stated in the offer of employment and agreed to before the employee commences their employment. Providing for the probationary period in the initial contract of employment clarifies expectations and builds in an opportunity for the employer to correct behaviour or terminate the relationship at an early stage.

### (iii) New Employee – “Status”:

A clause clarifying the particular status of the worker as an employee or independent contractor and parameters of the working relationship with the employer can provide the parties with many benefits. The characterization must clearly reflect the reality of the relationship and the employee's position vis-a-vis the employer's operations. Ambiguity may result in the courts or Revenue Canada attacking the provisions despite the intentions of the parties. Proper characterization and clarity is also important due to the many tax implications as well as statutory and common law rights and obligations.

### (iv) Moonlighting:

The job may well require time to be devoted outside of regular working hours, and if there is an expectation for extra commitment, it may be appropriate to prohibit part-time employment in some other employment relationship as part of the duty to commit to full time employment in the new position.

Such restrictive covenants are rigorously examined by the courts as a result of the employee's inequality of bargaining power vis-a-vis his or her employer. In drafting such clauses, the Employer must be careful to strike a balance between the two primary competing considerations: the right of every individual to earn a livelihood and pursue opportunities in an effort to advance their career versus; the right of employers to protect their legitimate business interests and not to be harmed by the misuses of its proprietary or confidential information.

If an Employer wishes to impose such a restrictive covenant, it must: protect a legitimate proprietary interest such as a trade secret or trade connection; the restraint must be reasonable (the use by an employee of general skill and knowledge cannot be restrained); and not be used to solely preserve the employer's competitive advantage (covenant whose object is solely to prevent competition are void).

There is ample support in the case authorities to suggest that a restriction on an employee's right to alternative employment is reasonable and within the employer's right to establish where: alternative employment would interfere with production; the employee has access to particular information which if imparted to a competitor would harm or damage the employer's business; and there exists a form of employer/employee fidelity.

### (v) Contract Term:

Although the typical employment relationship is for an indefinite duration, it is advisable to consider whether or not to impose a specific term, such as one or two years, with an option to renew. This is especially true in situations where the need for the position in the future is not clear, or if there is some question about ongoing funding. Even where

expectations are for an unlimited duration, it is wise to consider an annual renewal of the contract, perhaps in conjunction with an annual performance review in order to keep the contract current with the changing terms of the relationship.

If the employer chooses to impose a specific term, it is important to diarize and follow through with a written renewal or extension of the term, lest it expire and the employee continue to work under what would then become an oral contract.



### (vi) Termination for Legal Cause:

Courts have defined legal cause as being the most serious types of employee misconduct or non-performance which go to the root of the employment relationship. In situations where legal cause exists for termination, an employee can be dismissed without notice and pay in lieu of notice since the employee has brought the termination upon himself. The Courts recognize only the most serious forms of employee misconduct as legitimate legal cause for dismissal: stealing, breach of trust, serious insubordination and gross incompetence, etc. Short of conduct which goes directly to the heart of the employment relationship, Courts will find “no legal cause” even though ample business cause for termination may exist.

It may be that the employer wishes to expand the definition of legal cause, for example, to a situation where sales fall short of a required target by a certain percent, or where by some other objective measure, an employee has failed to fulfil the specific terms of employment. If the definition of “termination for cause” is to be redefined, it should be set out clearly in the agreement.

## **(vii) Notice of Termination for No Legal Cause:**

Both the employer and the employee will likely be optimistic about the success of the relationship when it first begins. Despite that natural tendency, it is in both parties' interest to address the issue of the end of the relationship to prevent costly misunderstandings occurring later. If the employee is to give notice of their intention to depart, that notice should be set out and may increase depending on the individual's length of service.

Where an Employer wishes to terminate employment where no legal cause can be established, the legal issue is: how much advance notice (or pay in lieu) should an employee receive? The issue arises from the implied term in the verbal employment agreement that the employer must give reasonable notice in advance of the termination.

The Employer should ensure that there is a specific calculation in advance as to the amount of notice or pay in lieu of notice that will be provided. This notice period should be adjustable to reflect an increasing length of service and promotion to and through the ranks of management. Using the same criteria that Courts rely upon will help satisfy the Courts that the agreement is reasonable, even if the amount of notice or pay in lieu of notice is not identical to that which Courts would otherwise award. In no case should the amount agreed upon be less than the statutory minimums provided by the Employment Standards Act (or the Canada Labour Code for Federally regulated employers).

## **(viii) Post-Termination Remuneration:**

Where an employee is paid on a basis other than regular salary, such as commission, bonus, deferred profit sharing, etc., there should be a specific reference to how final remuneration will be paid if the employment agreement ends. For example, does a sales person receive all commissions on jobs written to the date of termination even if the payment by the employer from the customer is received later? Similarly, will an employer be obligated to make a bonus payment to the terminated employee if the bonus is payable after the

employment terminates? Setting out these matters when the agreement begins will make them easier to deal with since both parties are attempting to create a positive relationship rather than leaving the discussion for a later time when the relationship is ended.

## **(ix) Confidentiality:**

The confidentiality clause is of particular importance in businesses where there are special processes or products, the knowledge of which gives the employee a significant amount of power.

It is an implied term of all employment relationships that an employee will serve their employer with loyalty and good faith. As a result of this duty, an employee is obliged to maintain the confidentiality of information acquired in the course of employment. However, an employee at the end of the employment relationship is free to take general knowledge and skill obtained during the course of the relationship and

apply it to future employment endeavors.

The primary characteristic of information that is likely to be protected by the courts as confidential in nature appears to be that there is some aspect of novelty about the information and that it is not generally known and public knowledge.

Wherever there is a use

of confidential information, an employer may have a cause of action for either breach of confidence and/or breach of fiduciary duty. The particular cause of action will depend on the status of the particular individual using the information.

The problem is particularly acute where a key player in the business, such as sales or marketing manager, or production supervisor, leaves the employer and takes his knowledge gained as to the employer's method of operating and customer lists, etc. to a competitor.

While the common law provides the employer with some protection against the use of confidential information by imposing general duties of good faith and fidelity, an employer achieves greater protection from the potential misuse of confidential information by requiring an employee to sign a confidentiality agreement and including such a clause in a general contract of employment.



By doing so, the employer may specify the information considered confidential and the particular status of the individual subject to the clause/agreement.

A written contract which includes a confidentiality clause prevents future disputes such as the status of the individual as an employee or fiduciary and provides evidence or support should a dispute arise.

If the Court is satisfied that the employer and the employee addressed the issue of confidentiality when formulating the contract, it will normally accept that there is a confidential relationship which the employer has a right to protect.

### **(x) Non-competition:**

The general common law rule is that any non-competition covenant being a contract in restraint of trade is contrary to public policy and is prima facie unenforceable. This rule has been relaxed in more modern times, and the courts now balance the interests of the community in maintaining freedom of trade against the interests of the employer in having adequate protection. In order for such a covenant to be enforceable it must not only be reasonable with respect to the interests of the parties but must protect a legitimate proprietary interest (trade secret, confidential information, client base/connections) and must be reasonable with respect to duration and geographic scope.

Non-competition clauses are questioned by Courts so as not to prevent people from carrying on their livelihood. However, if the non-competition clause is drafted to protect the reasonable interests of the employer within a geographic area where the employer would normally be trading, and for a reasonable period of time, the restriction will likely be upheld by a court. The issue of reasonableness is the key in each case.

Defining the reasonable duration of a restrictive covenant could be based on the time that the employer's customer connections could reasonably be expected to endure.

If an employer's trading area is within the Niagara Peninsula, it would be unreasonable to restrict a former employee from competing outside that area. As well, if, for example in the insurance industry, policy renewals are annual, it would be unreasonable to attempt to restrict competition much beyond one year.



## **Employment Law Group**

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In some cases, especially where the employee has not sold his former business to the employer, the courts find that any non-competition clause is too broad and they ask whether a less restrictive "non-solicitation" clause would have been sufficient, restricting the employee (for a defined period of time) from contacting existing customers or clients of the employer.

### (xi) Mediation:

The principle advantage to providing a mediation clause within the very terms of an employment contract is that the parties are required by the terms of such a clause to first explore and exhaust mediation before premature escalation of a dispute and resorting to formal, expensive and lengthy legal proceedings and the consequent lasting harm to the relationship.

If properly drafted, an alternative dispute resolution clause inserted in the agreement will facilitate the speedy resolution of disputes. In theory, the earlier the concept of negotiation or mediation is introduced, the greater its chances of success.

### Conclusion

In general terms, a written employment contract, in letter form or otherwise, will be enforceable by both parties if it is fair. Assuming that the contract is entered into at the beginning or at some other key point of the employment relationship where both parties had an opportunity to consider its terms and seek advice if required, and if the contract has been kept current, it will represent the single biggest

protection that an employer can provide itself against claims that may arise when the employment relationship, for whatever reason, sours.



## Employment Law Department

### **Leanne E. Standryk:**

Ms. Standryk is the senior partner of the Firm's Labour, Employment and Sports Law Department. She acts for a variety of employers in the private, charitable, not for profit and public sector. She is experienced in the full range of employment and labour issues including employment contract negotiation, terminations, workplace restructuring, labour relations, collective bargaining, wrongful dismissal, workplace privacy issues, occupational health and safety, human rights and human resource policy development, etc. In addition to her negotiation and

counsel experience, Leanne provides assistance to our Corporate lawyers regarding labour and employment matters that arise during the purchase and sale of a business. Leanne also acts for several sports organizations regarding contract negotiation, athlete appeals and risk management. She has experience before the SDRCC and has acted as a panel member regarding appeals in amateur sport.

**Civita M. Gauley:** Vita is a Partner at Lancaster, Brooks & Welch. She was called to the Bar in 2012 and is a member of the Labour & Employment team. Through her

focus on detail, positive outlook, motivation and energy, Vita offers her clients great skills and experience.

**Emily V. Keene:** Emily is a proud Niagara resident, having moved to the region at a young age. Emily was called to the Ontario Bar in June 2014 and joined Lancaster, Brooks & Welch. Emily is committed to providing excellent legal services, including understanding the legal issues clients face, offering proactive approaches for resolution, and advocating with strong legal writing and communication skills.

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