DYKEMAN DEWHIRST O'BRIEN HEALTH LAW

PRESCRIPTIONS FOR EMPLOYERS

EMPLOYMENT CONTRACTS: WHY YOUR ORGANIZATION SHOULD USE THEM

Note: This article applies only to non-unionized workplaces. Collective agreements govern relationships between employers and unionized employees, and the collective bargaining regime precludes unionized employees from entering into individual employment contracts.

A good reason for entering into employment contracts with new employees is to control costs in the event of the termination of that employment relationship.

As an employer, you may not want to think about ending an employment relationship at the outset. However, it can be very costly to your organization if you fail to address termination at the commencement of the relationship. This is similar to a prenuptial agreement; you may be reluctant to initiate the discussion, but you will be glad you did if things go wrong down the road.

Case Example: Consider Employees A and B, both of whom have been employed for four years and each earn an annual salary of $104,000. You have concluded that both Employees A and B must be terminated without cause. The Company is being downsized, and these employees no longer fit within the strategic direction of the organization.

Employee A has an employment contract with a termination clause which limits his notice of termination (or pay in lieu of notice) to the minimum notice entitlements under the Ontario's *Employment Standards Act, 2000*.

Employee B has no employment contract or it is silent about his entitlement to notice of termination.

Employee A is entitled to four weeks' notice or pay in lieu of notice. The cost of his termination is **$8,000** (plus costs for benefit continuation and vacation pay for four weeks).

Employee B may be entitled to notice or pay in lieu of notice in the range of four to eight months. The cost of her termination may range between **$35,000 and $68,800** (plus costs for benefit continuation and vacation pay for four to eight months).

The potential outlay to Employee B of $35,000 to $68,000 is not the end of the story. Four to eight months' notice represents a range of damages that a court may ultimately impose because the parties did not mutually agree upon a termination notice period at the beginning of

the employment relationship. Depending on the circumstances, a court could require the employer to provide more than eight months' notice.

Furthermore, in practice parties often end up in costly legal proceedings when the employment agreement does not provide for a termination provision. The parties take positions at opposite ends of the range of notice that a court may ultimately impose. If the parties are unable to settle (or settle early) and the matter proceeds to litigation, the cost can often match or exceed the total amount for the notice period.

Parties can avoid such unpleasant, costly and time-consuming scenarios by agreeing to a termination provision which is the same as, or exceeds, the Employment Standards Act minimum. As a reminder, the minimum is generally one week per year of service to a maximum of eight weeks. Additional severance pay is required for employees with more than five years' service who are employed by employers with an annual payroll exceeding 2.5 million dollars. An organization may have to exceed the Employment Standards minimum to pursue a high-demand candidate, just as it may have to agree to a better compensation package.

Organizations should start all employment relationships with an agreement which clearly sets out the employee's entitlement upon termination. It is critical to limiting the amount of notice to which an employee may be entitled upon termination and avoiding the costly legal fees when the parties disagree on the appropriate amount of notice. Remember, the organization is always in a far better negotiating position at the beginning of the relationship than at the end of it.

Prescription for Employers

- Ask your lawyer to draft a standard termination clause to be included in all new employment contracts. A carefully crafted termination provision is key to limiting an employer's exposure. Courts will refuse to enforce termination provisions which are unclear, ambiguous or violate any employment laws. Unfortunately, far too many employers draft their own termination provisions or borrow from other contract templates only to end up with an unenforceable termination provision

- Termination provisions can be modified on a case-by-case basis as necessary, but remember to obtain advice from your lawyer before making any changes.

- To protect the enforceability of your employment agreement, ensure that your employees;
  - are provided with sufficient time and opportunity to review the agreement and obtain independent legal advice (if they choose) prior to signing it
  - sign employment contracts **before** they start employment. Do not allow employees to sign the agreement on the first day of employment. Such agreements may not be enforceable.

Dykeman Dewhirst O'Brien LLP assists numerous employers with these and other employment and human resource issues and would be pleased to assist your organization in developing enforceable and user-friendly employment contracts with clear termination provisions.

For more information, please contact: **Maria McDonald**
Employment/Labour Law

416-967-7100 x 228
mm@ddohealthlaw.com

Prescriptions for Employers is for general information purposes only, and is part of Dykeman Dewhirst O'Brien LLP's *Health Law Prescription Series*. It is not intended as legal or professional advice or opinion. Individuals and health care organizations are encouraged to seek their own legal or professional advice when dealing with labour, employment and human resources issues.