PRESCRIPTIONS FOR EMPLOYERS

EMPLOYMENT CONTRACTS: TOP 10 TIPS

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.

In the last issue of our *Prescriptions for Employers Series*, "Employment Contracts – Why Your Organization Should Use Them", we emphasized how a well drafted termination clause in an employment contract could substantially limit your financial exposure when terminating an employee.

In this issue, we list ten additional tips to help protect your organization's interests when drafting employment contracts:

TOP 10 TIPS:

1. **Importance of Sufficient Consideration**: Do not enter into an employment contract (especially one with a termination clause) with an employee who does not currently have one, unless you provide sufficient consideration, such as a one-time payment, salary increase, longer vacation time or other benefit, in exchange. Failure to provide sufficient consideration may lead to the contract being unenforceable.

   The promotion of an employee, who does not have a written employment contract, represents an opportunity to enter into one. The promotion, itself, if meaningful and significant, may be sufficient consideration to make the contract enforceable.

2. **Policies and Procedures**: Include a provision which incorporates your organization's policies and procedures into the employment contract and ensure that the employee receives copies of or reviews the policies/procedures before signing the contract. If you have an interest in restricting an ex-employee's efforts to compete or to solicit your customers or employees post termination, your contract should contain non-competition and non-solicitation clauses. These clauses are often difficult to enforce, but a properly drafted and reasonably restrictive clause may provide your organization with the opportunity to reduce or restrict competition and solicitation post termination.

3. **Termination of Fixed-Term Contracts**: Make sure you clarify the notice required to terminate a fixed-term contract (contract for a specific period, such as one year). Failure to specify the required notice could result in your organization's liability for all payments under the original term of the contract.

4. **Danger of Less than Minimum Required Notice**: Never provide for less than the minimum termination notice set out in the *Employment Standards Act, 2000* ("ESA Minimum Notice"); otherwise, if challenged, the contract is likely to be voided, and your organization held responsible for more extensive common law notice.

5. **Importance of Limiting Benefits**: If you provide for more than the ESA Minimum Notice, make sure that you create a caveat for benefits and limit them to the ESA Minimum Notice. Legally, use of the term "notice" requires that **all** terms and conditions of the employee's compensation plan, including healthcare benefits, continue during the specified notice period. Many organizations unwittingly expose themselves to a potentially huge liability by providing notice well in excess of the ESA Minimum Notice, only to discover their insurance companies won't extend the benefits beyond the ESA Minimum Notice. If a terminated employee were to become disabled during the contractually extended notice period and the insurance company refused to cover the long-term disability benefits, your organization could find itself liable for those benefits. Such liability could extend to monthly payments until the now disabled, former employee turns sixty-five.

6. **Alignment with Your Insurer**: Make sure your insurer will continue **all** benefits, including long-term disability benefits, during the ESA Minimum Notice. All benefits should continue even when the employee stops work immediately and receives pay in

lieu of notice. Take the necessary steps to ensure your insurance company will do this. Employers are legally obligated to continue all benefits during the ESA Minimum Notice, and insurance companies should work with their clients to be statutorily compliant.

7. **Advantage of Payment in Lieu of Extra Notice**: If your employment contract provides an employee with more than the ESA Minimum Notice, consider giving the excess as base salary instead of extra notice. As stated above, "notice" usually implies a continuation of all elements of the compensation plan, including benefits and bonus.

8. **Implications of Changes to Constructive Dismissal**: Recent changes to the law of constructive dismissal have resulted in employers no longer being able to unilaterally alter terms and conditions of employment after providing an employee with appropriate notice. A possible method of overriding these changes is to include a clause that allows the employer to alter the terms and conditions of employment after providing the employee with at least ESA Minimum Notice.

9. **Create Enforceable Contracts**: Maximize the enforceability of a contract throughout the term of employment by including a stipulation that it will apply regardless of any changes to the terms and conditions of employment (such as a promotion), unless it is modified in writing. For added measure, clarify in writing prior to a specific substantial change in employment, such as a promotion, that the employment contract continues to apply subject to the specific written employment changes resulting from the promotion (such as salary, reporting relationship, etc.).

10. **Proper Execution of Contracts:** Provide prospective employees with sufficient time to review the employment contract before being required to return a signed copy. We recommend at least five (5) business days if possible. In addition, always require your new employees to provide you with a signed copy of the employment contract at least one day prior to their first day of work. Avoid having new employees sign the contract during their first work day; this could negatively affect the enforceability of the contract.

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1. You should have a standard employment contract which all new employees are required to sign and which provides for the amount of notice an employee is entitled to upon termination of employment.

2. Review your standard employment contract to ensure it contains all the relevant provisions to protect your organization's interests.

3. Ensure that all personnel involved in the process of hiring or management of employees are trained to:
   - Provide new employees with sufficient time to review the employment contract prior to execution
   - Require a signed copy of the contract prior to the first day of work
   - Document in writing any significant changes in employment and to specify that the original employment contract/termination clause continues to apply

4. Contact your insurance provider to ensure that it will continue all benefits during the ESA Minimum Notice period regardless of whether the employee works during the notice period.

5. Make a list of employees without an employment contract and look for opportunities to introduce one (such as when there is a significant change to the terms and conditions of employment).

Dykeman Dewhirst O'Brien LLP assists numerous employers with these and other employment and human resource issues. Although they may appear straight forward, simple employment contracts can be fraught with risk when relevant areas of law are overlooked. We would be happy to assist you to minimize those risks and develop enforceable and user-friendly employment contracts.

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