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Employment Law

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Written Employment Agreements: Why it Pays to "Put it in Writing"

By Tyler Inkster

An employment agreement is a contract between an employer and an employee in which the employee agrees to perform certain duties for the employer in exchange for receiving a specific sum of remuneration. Like any contract, an employment agreement can either take the form of a verbal agreement or a written agreement. The simplest form is a verbal employment agreement, in which the parties discuss the terms of the employment, come to an agreement and the employee commences working for the employer according to the terms that they have agreed upon; however, there are many advantages to taking the time to reduce the terms that have been agreed upon verbally into a written employment agreement.

Advantages of a Written Employment Agreements

A written employment agreement affords the employer and employee with an opportunity to start out an objective job description that will outline the responsibilities and duties of the position. This greatly reduces reliance upon the memory of the employer and employee as to what exactly the employee was hired to do, thereby reducing the possibility for disagreement on the scope of the employee's duties. A well-drafted job description will ensure that both the employer and employee are on the same page when it comes to determining which duties the employee is expected to perform and which duties are outside the expectations of the employer and the employee.

Compensation is another issue that has great potential for disagreement between the employer and the employee. A written employment agreement can be used to clarify all aspects of an employee's compensation, such as their annual salary, any bonus entitlements or commission structure, depending upon the position.

For many employers, a period of probationary employment is important. A written employment agreement can be drafted to provide for a period of probationary employment, which affords the employer the opportunity to assess whether the new em-

ployee is an appropriate hire for the position. For instance, the written employment contract could provide that the employee will be employed on a probationary basis for a period of three months and could furthermore provide that during the probationary period, the employer would have the right to terminate the employment any time without cause and without providing any notice or payment in lieu of notice. If after having an opportunity to observe the employee for a few months, the employer decides that employee is not well-suited to the position or is not a good fit within the employer's organization, the probationary provision would permit the employer to terminate the employee during the probationary period without having to provide the employee with common law reasonable notice or pay in lieu of reasonable notice, which can be costly.

A written employment agreement can also be used to set out or incorporate by reference the employer's workplace policies and procedures regarding such issues as expenses, benefit plans and other perks associated with the employment. If the employer wants to incorporate workplace policies into the written employment agreement, the agreement should specifically reference the policies and procedures and the employer should provide a copy of the policies and procedures to the employee prior to the employee commencing work.

Depending upon the nature of the employer's business, it may be important for the employer to protect its business interests by incorporating into the written employment agreement certain provisions aimed at protecting the employer's business interests by imposing certain restrictions on the employee after the employment relationship has come to an end. The common law imposes on directors and officers certain fiduciary duties of non-solicitation and confidentiality; however, for mid-level or "key employees", the employer may want key employees to enter into reasonable restrictive covenants at the beginning of the relationship which address the issues of confidentiality, non-competition and non-solicitation. As such provisions have the effect of restricting the employee's rights after the employment relationship has come to an end, such provisions must be drafted very carefully in order to ensure that the court will uphold them in the event that they need to be relied upon after the employment relationship has come to an end.

Compliance with the *Employment Standards Act*

Special care must be taken to ensure that a written employment agreement is drafted in such a way as to comply with the provisions of the *Employment Standards Act* (the "ESA"). The ESA imposes certain minimum statutory obligations on employers in Ontario concerning a number of issues, including the minimum wage, hours of work and eating periods, overtime pay, vacation entitlements, statutory holidays, leaves of absence and termination and severance obligations. The ESA provides that an employer and employee cannot contract out of the minimum requirements imposed by the ESA. Furthermore, the Supreme Court of Canada has ruled that in the event that the written employment agreement contains terms that fail to comply with the minimum statutory requirements imposed by the Employment Standards Act, the courts will not enforce such terms.

Clarifying the Employer's Termination Obligations

While all of the foregoing advantages are important, perhaps the greatest advan-

tage of entering into a written employment agreement is the opportunity that it affords to the employer to fix its obligations to the employee in the event that the employer must terminate the employment relationship at some future date. In many situations, the issue of whether an employment contract is a verbal contract or a written contract isn't of any concern to either the employer or the employee while the employment relationship is working well; however, if the employment relationship sours, the nature of the contract becomes very important.

If the parties have not reduced their agreement to writing and the employment relationship deteriorates to the point where the employer terminates the employee, the employee may commence an action for wrongful dismissal against the employer. Both the employer and the employee will have to convince a judge exactly what terms the employer and employee agreed upon concerning the rights of the employee upon the termination of the employment relationship. The judge in such a situation is placed in the unenviable position of having to decide the case without the benefit of an objective, written employment agreement. What often ensues is a very expensive contest of credibility, in which the court is called upon to decide whether it believes the employer's testimony or the employee's testimony concerning the issue.

In the absence of an enforceable written employment agreement, the judge may impose on the employer a duty to provide the employee with "reasonable notice" of termination or to pay in lieu of reasonable notice. "Reasonable notice" means the amount of prior notice of termination that the law requires the employer to provide to the employee. Since most employers choose to terminate the employee without providing any prior notice, the law requires the employer to provide the employee with an amount of pay equivalent to the reasonable notice period, subject to the employee's duty to mitigate his damages by seeking alternate employment.

In an action for wrongful dismissal, in the absence of an enforceable written employment contract, the courts will follow the decision of Bardal v. Globe & Mail Ltd., which stands for the principle that what constitutes reasonable notice is a matter to be determined on the facts of each case, having regard to four main factors: (1) the character of the employment; (2) the length of service at the time of the termination; (3) the age of the employee at the time of the termination; and (4) the availability of similar employment, having regard to the experience, training and qualification of the employee.

Determining what "reasonable notice" is in a particular case is more of an art than a science and employers are quite often shocked to find out how much the court's opinion of what is "reasonable notice" differs from their own. By entering into an enforceable written employment agreement, an employer can contract out of the reasonable notice doctrine, thereby fixing its termination costs, which avoids the uncertainty and expense of a trial to determine the issue.

Implementing Written Employment Agreements: Ensuring Enforceability

Having gone through the time and expense of drafting a written employment agreement, employers must ensure that they properly implement it in order to ensure that the courts will enforce it if push comes to shove. When entering into a written employment agreement with a new employee, the employer should always provide the prospective employee with the

written employment agreement at the time that the job is offered and make the offer of employment conditional upon the employee entering into the written employment agreement. The employer should explain to the employee the terms contained in the written employment agreement and should specifically highlight any terms that are restrictive in nature. The employee should be permitted an opportunity to obtain independent legal advice from the employee's own lawyer concerning the written employment agreement. If the employee chooses to waive the opportunity to obtain independent legal advice, the employment agreement should make specific reference to this fact. The employer should also ensure that the written employment agreement is signed and dated in duplicate and that a copy is provided to the employee. Lastly, the employer should always ensure that the employee signs the written employment contract before the employee commences working for the employer--not on the first day of employment or thereafter.

Conclusion

Written employment agreements can be effective tools for employers to manage relationships with employees, fix termination costs and protect proprietary interests. Employers that do not invest the time and care required to draft and implement written employment contracts often find out the hard way, after the employment relationship has come to an end, that the old adage is true: an ounce of prevention is worth a pound of cure.

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