# Can Employment Contracts Be Airtight? – Avoiding Common Pitfalls

written by Rory Lodge | September 15, 2013

There are always new things of interest to the NFP and charities law sector and we report on several in this edition of our newsletter. For organizations incorporated in Ontario, we include an update on the Not-for-Profit Corporations Act, 2010 ("ONCA") and the recently introduced Bill 85, which amends the ONCA. Note that as of the publication date, Bill 85 has not been passed and the government has announced that the proclamation date of the ONCA will be at least six months after the passing of Bill 85. It will be important for organizations to ensure necessary amendments are made to effect compliance with the ONCA. There also have been recent CRA guidances and we discuss two on drafting charitable purposes and fundraising. We also look at parallel foundations. Employment issues are relevant to any person with even one employee. We consider whether an employment contract can be airtight and how to minimize risk. Advertising rules can impact NFPs and we discuss the ASC code of standards. We provide an update on British Columbia's Community Contribution Companies.

In recent years, written offer letters and employment contracts have become much more common. Employers and employees typically agree that reducing essential terms and conditions to writing ensures certainty both during the employment relationship and at the time of termination, and reduces the likelihood of costly litigation.

In order for an employment contract to be enforceable, it must contain the essential elements of a contract: an offer by the employer, acceptance by the employee, and consideration. Consideration consists of a benefit flowing in both directions (at its most basic level, the employee provides services, and in exchange is paid compensation). In addition, employment contracts must comply with the minimum requirements of the Employment Standards Act, 2000 (the "ESA"), or other applicable employment standards legislation. For example, employers cannot contract to provide less than minimum ESA termination notice or pay, and severance pay, if applicable, upon a termination without cause. Finally, employees should enter into employment contracts freely, voluntarily, and without undue influence or duress. If undue influence or duress can be shown, the employment contract will be unenforceable.

## GENERAL PRINCIPLES APPLICABLE TO WRITTEN EMPLOYMENT CONTRACTS

When drafting and entering into employment contracts, certain general principles apply:

- Employment contracts must be signed before the first day of work. If an employment contract that contains onerous terms (like a restrictive termination provision) is signed after the employee's first day of work, it will be unenforceable for lack of consideration Give employees time to review the agreement. It is important to provide the contract to the employee several days or a week prior to his or her start date in order for the employee to review it and seek independent advice if he or she sees fit.
- All important terms and conditions should be included in the employment contract. If terms have been agreed to orally, those should be reduced to writing. It is advisable to include an "entire agreement" clause in the contract so that the employee cannot argue that other binding terms not included in the contract exist.
- If there is reference to terms and conditions found in other documents such as employment policies, a Code of Conduct, or Confidentiality and Non-Disclosure agreement, those documents should be attached to the employment contract.
- Use clear, explicit and detailed language, as ambiguity will be interpreted in favour of the employee, and not the employer- the drafter of the contract (the contra proferentum rule).
- Bring onerous clauses (e.g., termination clauses) to the attention of the employee when the employment contract is presented to the employee. In addition, it is wise to provide employees with the opportunity to seek independent legal advice prior to signing the contract. An employment contract is more likely to be enforceable if the employee reviewed it, or at a minimum was given the opportunity to review it, with a lawyer.
- Beware of imposing an employment contract on an existing employee. New terms and conditions can be implemented with the agreement of an employee who has already started working, but fresh consideration is required. For example, if the employer seeks to include a non-competition provision in an employment agreement with an existing employee, additional consideration should be provided to the employee, for example, in the form of a bonus or increased compensation, or the new contract terms should be implemented at the time of a promotion. The consideration should not be an amount or benefit that would be provided to the employee in the normal course. Alternatively, new terms and conditions can be imposed on existing employees, if reasonable notice is given.
- Finally, termination clauses must stand up to scrutiny. In employment law there is a "rebuttable presumption" that an employee is entitled to common law reasonable notice, unless a more restrictive written termination provision exists. In order to be enforceable, a termination clause must be included in the employment contract (not just in a policy), must be clearly worded and unambiguous, and must meet or exceed employment standards minimums.

Reducing terms and conditions to a written agreement has the benefit of avoiding costly disputes down the road if the above principles are observed.

Article by Jennifer M. Fantini

**Borden Ladner Gervais LLP**