Contract Clarity: Navigating Employment Agreements With Certainty

For non-unionized employees, having employment contracts in place is imperative to limit liability and uncertainty. In addition to controlling entitlements upon termination of employment, well drafted employment contracts can also limit other sources of liability for employers, which can surface even following the end of employment.

It is not just the wording of the contract that is important. Timing is everything! A new employee should be provided with a copy of their employment contract with their offer of employment.

The employee should be provided with sufficient time (several days) to review the contract and provide an executed copy of the contract to the employer. The employer should ensure that they obtain a signed copy of the contract from the employee before they start their employment. Getting a new employee to sign an employment contract after they have already started their employment can have significant cost implications: *New Brunswick v Dornan, 2023 NBKB 225.*

Merely putting in place a written employment contract for existing employees will result in the employment contract being found to be unenforceable unless the employee receives some form of consideration (something of value) for having signed the employment contract.

The following are some of the key provisions that should be considered in employment contracts:

Start date: the employment contract should clearly state the date employment will begin.

Position and duties and responsibilities: the employee's position and duties and responsibilities should be clearly stated.

Compensation: the employee's salary and other forms of compensation should be set out in an employment contract.

Probationary period: a probationary period of six (6) months coincides with the New Brunswick *Employment Standards Act* ("ESA"), which stipulates that notice of termination is not required for employees with less than six (6) months of service.

Layoff: employers may choose to reserve the right to temporarily layoff employees throughout the employment relationship. Absent a layoff clause in an employment contract, a court will treat a layoff as a constructive dismissal, which results in liability for employers. A layoff must also comply with the requirements of the ESA.

Termination: if there is no employment contract in place, or if it does not contain an enforceable termination clause, non-unionized employees are generally entitled to common law reasonable notice if they pursue a claim in court following dismissal without cause. Common law reasonable notice is significantly more than the minimum notice required by the ESA, which is either two or four weeks depending on the employee's length of service (or six weeks in the event of a mass termination).

The common law reasonable notice period is based on several factors, including age, length of service, the character of employment, and the availability of similar employment.

In *Walsh v UPM-Kymmene Miramichi Inc.*, 2003 NBCA 166, the New Brunswick Court of Appeal awarded 28 months of pay in lieu of notice. The employees were 52 years old and had 31 years of service, at the time of dismissal.

We are also seeing higher common law notice periods for short-service employees. For example, in *Ilkay v Acadia Motors Ltd*, 2006 NBCA 103, the court awarded 2 months pay in lieu of notice to a 36 year old senior sales manager who had only been employed for approximately 11 months.

The results in the above cases could have been avoided with an enforceable termination clause. Termination clauses can limit an employee's entitlements to notice or pay in lieu of notice. These clauses must be drafted very carefully to be enforceable.

Restrictive covenants

Restrictive covenants apply post-employment to protect the employer's business interests. Three types of restrictive covenants in the employment context are: confidentiality/non-disclosure clauses, non-solicitation clauses, and non-competition clauses.

Confidentiality and Non-Disclosure:

Confidentiality and non-disclosure clauses are the most common type of restrictive covenant found in employment contracts and are generally held to be enforceable by courts. These clauses typically state that the employee must not disclose any confidential information of the employer both during and following employment subject to narrow exceptions, such as when required by law to do so. Although courts will imply a duty of confidentiality, it is advisable to provide clarity in an employment contract since, for example, the types of confidential information will vary depending on the employer and business.

Non-Solicitation:

Non-solicitation clauses aim to prevent an employee from soliciting former clients, suppliers, contractors and/or former employees for a specific period of time following the end of employment. Non-solicitation clauses can be held as unenforceable by courts if they are not reasonable. Generally, a court will consider whether the non-solicitation provision is necessary based on the industry and type of employee and whether the clause is properly time limited.

Non-Competition:

Non-competition clauses, often referred to as “non-competes”, are considered *prima facie* unenforceable by courts, which means they will be presumed to be unenforceable unless the employer establishes otherwise. To do so, the employer must show that a non-solicitation clause would not have been sufficient to protect its business interests and that the non-competition clause is reasonable. Generally, courts have only found non-competition clauses to be reasonable and enforceable in the employment context when used with senior executives and where the clause is limited in relation to its geographic scope, duration, and the type of business it covers.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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