[Employment Agreement Pitfalls | Let's Go Beyond The Termination Clause]

Most employers are acutely aware that termination clauses need to be reviewed and revised often to keep up with the moving target legal challenges that continue to arise. However, even a well-drafted, legally current termination clause is only as good as the processes followed and its fellow terms of employment. Put another way, a perfect termination clause can still be at risk of being rendered unenforceable be other legal missteps along the way.

Updating termination language alone will not be sufficient if certain key aspects of an agreement are not reviewed and updated in tandem. Further, updating contract language will hold little weight if the timing and process surrounding those changes are not diligently considered. Let's review some of the more common pitfalls we see when it comes to successfully drafting and implementing Employment Agreements beyond the Termination Clause.

Illegal Probationary Periods and/or Other Terms: We see this often. An employer has implemented a shiny new termination clause into their Agreements but does not review the remainder of the Agreement itself for compliance with the applicable employment standards legislation. A very common example in Alberta, following 2018 amendments to our legislation, is maintaining a 3-month probationary period, or longer, in the contract. While the length of the probationary period itself is not illegal, any language purporting to allow termination without notice during the first 3 months of employment would run afoul of the legislation, which now only allows termination without notice during the first 90 days of employment. This is because in almost every scenario, the calculation of a 3-month period will exceed 90 calendar days.

Notably, many employers believe if they define a probationary period, no matter the length, they can terminate an employee during that period without any notice. This is not the case, rather, an employer's ability to terminate without notice is directly tied to the applicable employment legislation and the

minimum notice requirements set out therein. Once an employee has been employed longer than that statutorily prescribed period of time, they will be entitled to at least the minimum notice required by the legislation. In relation, employers cannot impose new probationary periods on current employees, either during employment or upon promotion. Doing so, particularly in relation to termination entitlements can result in the entire Agreement being non-compliant with the legislation and its termination provisions therefore unenforceable.

In relation if you have other terms and conditions which are incidentally tied to termination, and violate the applicable employment standards legislation, they may also raise enforceability concerns or in the very least could be susceptible to an attempted legal attack or challenge.

Poor Timing of Agreements: A perfectly drafted Employment Agreement in all other respects will fall short if it is not executed at an appropriate time by the employee. Now, what do we mean by an "appropriate time"? In order for an Agreement and its termination provisions to be enforceable, "consideration" (i.e. something of value to the employee) must be given to the employee in return to accepting the terms of employment. Generally speaking, for new employees, the consideration for an Employment Agreement and accompanying notice or severance limiting termination provisions is the job itself. However, if an employee is permitted to commence the job without signing the Agreement first, that consideration to bind the employee to the termination provisions no longer exists because they have now been given the benefit (the job) without it being contingent on agreeing to the Agreement terms. For current employees, the consideration can be a raise in salary or promotion. However, again, the Employee must accept the terms of the offered employment before they commence employment or the new role, in order for an Agreement's termination provisions to be enforceable.

Amending Agreements / Employment Terms: It is not uncommon for employment terms to be amended throughout the course of employment for a variety of reasons. However, if amendments are made to terms and conditions of employment and reference is not expressly made to the prior agreement and the terms that continue to apply, enforceability issues can arise. This issue can generally be addressed in two ways: 1) include a clause in your employment agreement that contemplates the termination provisions continuing to apply even in the event of a fundamental change of employment; 2) draft an amendment letter or amending contract which clearly sets out the terms that are being changed and those that will remain the same, including reference to the prior agreement and termination terms which will continue to apply.

Finally, before implementing changes, new agreements or new contractual language, we recommend speaking with a lawyer to ensure both process and drafting result in an enforceable Employment Agreement.

* * *

Brownlee LLP is a member of the Canadian Litigation Counsel, a nationwide affiliation of independent law firms.

Authors: Kyle Allen, Megan Van Huizen

Canadian Litigation Counsel