Employment Contracts Quiz

QUESTION

What are the basic conditions to determine if a written or oral agreement between an employer and employee is valid and enforceable?

ANSWER

1. There must have been an offer and acceptance of the contract.
2. The contract and its terms must not be unconscionable, or illegal.
3. There must be **“consideration”** (some benefit for each of the parties) (ie) **Quid Pro Quo** or something for something for entering into the contract.

GENERAL EMPLOYMENT CONTRACTS

Employment Contracts

When hiring new workers, employers often use employment contracts to set out the terms of the employment relationship. The contract may outline the entitlements, obligations and restrictions of both parties. Employees may view the contract as a safeguard to their rights and expectations, but contracts most often result in restricting the employee’s rights and limiting the employer’s obligations in a number of essential areas. Understanding the implications of a properly drafted employment contract helps employees and employers to clarify and set the parameters of their working relationship.

WHY IS IT RIGHT

Written, Oral

Although preferable for the protection of both parties, a contract of employment need not be in written form. Terms can be made by express or implied oral agreement and even through the conduct of the parties.

Although usually signed at the start of the relationship, the employment contract is not necessarily frozen in time. Instead, it often evolves after the initial hiring has occurred. New and modified terms of a contract can occur where an employee has been with an employer for a long period of time and where there have been changes such as promotions, organizational restructuring, increases to remuneration and other factors, which have been mutually agreed to, either expressly or by the parties’ conduct.

Implied Terms—The Unwritten and Unspoken

Some terms in an employment contract may be implied. This means that although not expressly written or stated by the parties, the implied term is reasonably expected by the parties. For instance, it is implied in every contract of employment that an employer will provide the employee with reasonable notice in the event of a termination. It is also implied that an employer may terminate the relationship without notice if there is just cause. Another example of an implied term is that employees will perform their duties with reasonable skill and diligence.

Employment Standards Legislation

These implied terms of the employment contract can be modified through clear, unambiguous written wording that is legally sound, provided that such modifications do not breach statutorily imposed minimum standards. One common area for such modifications is termination provisions that attempt to curtail an employee's entitlement to common law notice. **For such modifications to have effect, they must be drafted very clearly and must not be in violation of current employment standards legislation.**

Restrictions/Limitations

Contracts may contain few or many details. Some of the more common terms included in employment contracts include restrictions and limitations in the following areas:

- Changes to the employee's contract of employment in such areas as remuneration, duties, job title and geographic work location. Unless terms are clearly set out, changes to the essential terms could result in constructive dismissal if the employee refuses the changes.
- Amount of reasonable notice that the employee is entitled to in the event that the employer terminates the employee.
- Competition by the employee by setting up business in competition with the former employer, or by joining a competing company, either during or after the period of employment.
- Soliciting by the employee of the employer's staff or clients, either during or after the period of employment.
- Discussion or disclosure by the employee of the employer's confidential information.

Invalid Contracts – Examples

In some cases, a duly drafted and signed employment contract may be deemed invalid by a court. For example, if an employer were to change the existing employment contract so as to eliminate an existing contractual or common law right of the employee (such as benefits, vacation time or termination notice), consideration may not be present so as to constitute a valid contract, thus rendering the contract invalid. Even if the employee signs the contract, the terms may not be able to be legally enforced by the employer at a later date.

In another common example, an employer may send an employment candidate an offer letter that details only the essential terms of the hiring contract. The candidate is required to accept the abbreviated contract as such, with an expectation of subsequently signing a more fulsome employment contract. If the terms of the employment contract attempt to significantly alter the basic terms of the offer (such as changing the offer from a contract of indefinite duration to a fixed-term contract, changing previously offered termination notice to the statutory minimums, or adding restrictive covenants such as non-solicitation and non-competition) there

may be a lack of consideration in the contract, thus rendering it invalid.

Employment agreements – Key Areas

- Employment agreements can be either verbal or in writing and for an indefinite term or fixed term
- Employees must be provided with at least their minimum statutory entitlements in respect of terms and conditions of employment as set out in applicable provincial employment standards legislation
- Written employment agreements are recommended at least if compensation terms are more complex, (for example, benefit and pension terms, if provided, should be set out in an agreement)
- Neither private benefit insurance or pensions are mandatory entitlements
- Restrictive covenants, like non-competition provisions, non-solicitation provisions, confidentiality, and intellectual property protections need to be in writing. To be enforceable, non-competition and non-solicitation provisions must be drafted narrowly.

Prudent Practice

- Review your template employment offers and full agreements to ensure they are in compliance with Canadian law (for example, references to ‘at-will’ employment must be removed as this concept is not recognized in Canada)
- Review your compensation structure and model, including incentive compensation and benefits, to ensure competitiveness in the market
- Consider if you want to establish restrictive covenants or severance provisions and, if so, carefully draft them with legal counsel to ensure, to the extent possible, enforceability
- If you want to hire foreign workers, such workers typically must apply for a work permit. Any employment agreement drafted for such foreign workers must be consistent with representations made in the application for the work permit.

Types of Employment

An employee can be classified according to how often they work and how long they are expected to stay with the company. This employee contract can be used for the following employment types:

- Permanent Full Time
- Permanent Part Time
- Fixed Period
- Flexible Employment

Full Time vs. Part Time: A full time employee works at least 30 hours per week, whereas a part time employee usually works fewer than that.

Permanent Employment vs. Fixed Employment: Permanent employment is indefinite with no end date, and fixed employment is a position with a firm end date.

Flexible Employment: This type of employment has adjustable hours where the employee may not be not restricted to working any set number of hours per day or per week.

Probationary Period

A Probationary Period refers to a duration of time in which an employer has the right to let an employee go without notice. This period is chosen by the employer, and can be anywhere from a month to several months depending on the jurisdiction. An employer does not need to include a probationary period in an Employment Agreement.

Types of Compensation

Compensation is the wage or salary employees receive from an employer in exchange for their work. Employees can be paid according to a variety of methods, including:

- Hourly wage: a dollar amount per hour of work (e.g. $18/hr)
- Weekly/Yearly salary: a dollar amount per week or year (e.g. $60,000/year)
- Commission: a percentage of profits or sales (2.5% per sale)
- Salary + commission: a dollar amount plus a percentage of sales ($45,000 + 2% of gross profits)

In addition to the type of payment, the employer should specify when the employee will be paid (once or twice/month on fixed days, bi-weekly, or every week), as well as if overtime is paid or if there is "time off in lieu", which means that for every extra hour an employee works, he or she may take an hour off.

Confidentiality in an Employment Agreement

Employment Agreements often have confidentiality clauses, which means that all information at the company should remain private and is the property of the employers. The employee is prohibited from sharing this information during, and for a period after, their employment.

Other clauses in the Employment Contract can include:

- Non-Competition: The employee is restricted from competing directly with the business during their employment and for a set period after their employment is over.
- Non-Solicitation: The employee is prohibited from hiring or enticing employees or contractors away from the employer during or after their employment.

WHY IS EVERYTHING ELSE WRONG

Eleven useful questions that delve into the weeds of employment contracts in Canada

1. Do you Know the terms of employment without a written contracts

These details are part of your employment contract even if they are not written. Each detail is a term of the contract. The *Employment Standards Code* entitles you to certain minimums, which you employer must provide to you, like minimum wage.

2. Without a mention of holidays at time of hiring, does that mean that holidays are not in your employment contract?

It depends on whether the *Employment Standards Code* covers your job. If it does, then by law you get a minimum number of holidays. The law treats the agreement as though it includes the minimum amount set out in employment standards law.

3. When an oral Employment Contract will not be effective

The problem with oral agreements is that they are difficult to prove. If a dispute arose, a court would have to hear evidence and decide whose version of the truth to accept. If there is a written agreement, courts will generally be obligated to uphold its terms even if they don't agree with them.

4. Terms of an Employment Contract

- the job position being offered and accepted;
- the term of employment;

- details of holiday, sickness, and grievance policies;
- the compensation that will be provided to the employee; and
- the responsibilities of the employee and employer.
- whether the employee will have a probation period;
- how confidential information is to be treated upon the employee's termination; and
- whether there are limitations on the employee's ability to compete with the employer's business upon the employee's termination.

5. Duties of the employee

The duties of the employee refer to the tasks that will be performed or the functions and responsibilities of the job position. Ensure that your description of the employee's duties is clear. You should review your description and make sure that it is grammatically correct within the context of the document.

6. Employment Contract and service Agreement

Service Agreements are used to hire service providers or independent contractors, not employees. A Service Agreement is limited to a specific project or time period. Employment Contracts are used to hire employees.

7. Differences between an employee and independent contractor

Generally, employees are viewed as workers who are "employed" whereas independent contractors are viewed as workers who are "self-employed." The law treats employees and independent contractors differently. Employees are usually entitled to certain rights by their employers while independent contractors, being self-employed, are not guaranteed such rights by the people they work for. It is not always easy to establish which category an individual falls into. In cases of dispute, courts will determine the appropriate category by examining a number of factors. Some factors will be considered more important than others. Examples of relevant factors are:

- who is providing the tools for the job;
- the level of skill required for the job;
- who controls the work and the work product;
- whether the hired party must provide oral/written progress reports;
- whether the job is performed on the business premises;
- the duration of the relationship between the parties;
- the ability to delegate or sub-contract the job of the hired party;
- whether the hired party has discretion over how long and when they work;
- whether any insurance or benefits are provided to the hired party;
- whether the hired party's expenses are reimbursed;
- whether the hired party can realize a profit or loss;
- whether the work is part of the regular business of the hiring party;
- whether the parties have a written agreement defining the status of the hired party;
- the method of payment; and
- the way the hired party is treated by taxing authorities.

8. Probationary Period

A probationary period is a limited period of time after the employee commences work during which either party has the right to terminate the agreement. In some jurisdictions, termination can occur without notice or compensation (other than wages owed for hours of work already completed). Many employers require their employees to successfully complete a probationary period before offering them a longer term

position.

9. “Notice” Means

Notice refers to a period of time prior to termination of the employment contract. The purpose of notice is to allow the employee to find other employment or the employer to find a replacement employee. In most jurisdictions, the law requires employers to give employees a notice period (or pay in lieu of notice) before termination. Typically, the length of the minimum notice period required by law depends on the length of the employment relationship. In some circumstances the employer may terminate the employee without notice if there is sufficient “cause”. In most jurisdictions if one’s employment is terminated with cause, there is no requirement on the part of the employer to provide notice or pay in lieu of notice. However, the employer must ensure that the reason for termination is properly communicated at the time of termination. Some examples of cause are dishonesty, disloyalty, insubordination, lateness/absenteeism, disruption of business of affairs, alcohol or drug use, incompetence, neglect of duty, criminal or immoral conduct and sexual harassment. Note that the employer may have to prove to a court (or other tribunal) that there was sufficient cause for termination.

10. Employer in for protect work product and other confidential information

An employer can protect his/her confidential information by inserting a clause that says all confidential information including work product belongs to the employer. This clause is automatic in LawDepot’s U.S. and Canadian forms. The document states that all confidential information including work product belongs to the employer. LawDepot’s Employment Contract broadly defines “confidential information” to protect everything from trade secrets to customer lists.

11. Difference between a non-competition clause and a non-solicitation clause

A non-competition clause prevents the employee from unfairly competing with the employer after the employment is terminated. This means that when the employee’s employment comes to an end, he or she cannot take a job at a business which is in direct competition with the employer. A non-solicitation clause prevents the employee from inducing other employees or contractors from leaving the employer or from interfering with the employer’s relationship with other employees in general. This means that the employee cannot invite the employer’s other employees to move with him or her to another workplace.

Courts MAY NOT enforce a non-competition or non-solicitation clause if:

- the clause could be injurious to the public (e.g. if it could depress the local economy);
- the clause is broader than necessary to protect the employer;
- the clause would cause undue hardship on the employee (e.g. it would make it difficult for the employee to find new employment); or
- the clause has unreasonable time and geographic restrictions.

Precise Language Can Help Limit Employers’ Liability/Termination Clauses

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In Canada, if an employer wishes to terminate an employee without cause, it must provide notice or pay in lieu thereof. In other words, unlike in the United States, Canada does not have employment at-will. American businesses operating in Canada may find that Canadian employees whose employment has been terminated without cause will be entitled to *no less than* one month per year of service if a judge is left to

decide an employee's severance package. For this reason, employment contracts—and, specifically, the termination clauses in those contracts—are essential to controlling severance costs in Canada.

Two regimes govern the entitlement to notice of termination in Ontario: the *Employment Standards Act, 2000* (ESA) and the common law (i.e., case law). If terminated without cause, an employee is presumed to be entitled to common law notice (or pay in lieu thereof), unless there is an enforceable termination provision in the employee's contract of employment that ousts this presumption. While an employer cannot contract out of the ESA to provide less than what the legislation prescribes, an employer can contract out of the common law. It is often prudent to do so.

The common law notice period can be difficult to predict with precision, as it depends on a myriad of factors, and generally exceeds the minimum entitlements under the ESA by a large margin. As such, some employers seek to limit their obligations to terminated employees to the less costly and more predictable minimums under the ESA. (Of course, employers can use termination clauses that exceed the minimums under the ESA, but the focus of this article is on "ESA-only" type termination clauses.)

Limiting employees' entitlement to the ESA minimums requires clear and precise drafting. The validity of such provisions in employment contracts has been litigated intensely in recent years. Unfortunately, the resulting case law does not clearly prescribe the precise language to be used by employers in every case, but it does identify some drafting pitfalls.

An effective "ESA-only" termination clause makes explicit reference to all types of entitlements that *could possibly* be owed to an employee under the ESA, and explicitly displaces any additional entitlements under the common law. Judges interpret these provisions carefully, resolving any ambiguity in favour of employees (because they were not the drafters).

A termination clause must not violate the ESA. If a termination clause is valid presently but has the *potential* of violating the ESA at some later date, it will be declared null and void from the outset. For example, an employee may not be entitled to statutory severance pay under the ESA because the employee was terminated after less than five years of employment. However, if the entitlement to statutory severance is not addressed in the termination clause, it could render the clause void, since the employee *could have been* entitled to statutory severance at some point in the future.

Judges are likely to scrutinize "ESA-only" termination clauses. Recently, the Ontario Court of Appeal (*Andros v. Colliers Macaulay Nicolls Inc.*, 2019 ONCA 679) confirmed that courts are still quite unforgiving in their interpretations of termination clauses, stating that: "If a termination clause purports to contract out of an employment standard without clearly substituting a greater benefit in its place, the entire termination clause is void."

Termination clauses, especially "ESA-only" type clauses, are an extremely useful tool in limiting liability to a dismissed employee in Ontario and the legal costs that are associated with litigating how many months the common law affords employees. However, employers may want to draft these clauses very carefully and review them periodically to ensure that they remain current with the law.

Does your company's termination clause measure up?

- Does it specifically address all ESA entitlements, including employment standards that might not be applicable presently but could be applicable in the

future? For example, well-defined termination clauses typically address mandatory benefits continuation during any statutory notice period even if the employee isn't currently eligible to enroll in the company's benefits plan because, for example, he or she is part-time.
- Does it use the word "only" (or words to that effect) correctly to make it clear that the employee has accepted that he or she will receive nothing more than what the ESA provides? It is not enough to merely say that an employee will receive ESA entitlements upon termination—that goes without saying—and it is therefore meaningless unless the termination clause clearly states (and repeats!) that is all the employee will receive.
- Does it clearly show an intention to contract out of the common law? Judges are likely to examine a termination clause to see whether it specifically mentions the words "common law."
- Does it include "saving" language to express an intention to comply with the ESA in every way and at all times? Employers may want to consider stating in a termination clause that they intend to comply with the ESA even if (and when) it is amended in the future.

Enforceable termination clauses can save employers enormous amounts of time and money. However, employers may expect that judges will be even less forgiving of imprecision and ambiguity as termination clauses are increasingly scrutinized.