Spring Cleaning for Employment Contracts



Employment Law is ever changing. Just when we think we have a good handle on how a court will decide an issue, a court releases a decision that revises previously settled law or governments change legislation. Because of this, it is dangerous to rely on old templates for offer letters or employment contracts. Even a template that was drafted last year could have provisions that are now out of date.

Elements of employment offer letters and contracts that are most likely to need updating because of recent changes to the law are:

Constructive Dismissal

- Layoffs Relying solely on the right to lay off workers under employment standards legislation is risky and could result in a finding of constructive dismissal. We recommend including language in the employment contract that clearly allows temporary lay-offs.
- Flexibility for restructuring roles and compensation Including a statement in the employment contract that alerts the employee to the possibility that there could be future changes in their compensation, responsibilities, reporting structure, and the location from which they perform their duties, can help in defending constructive dismissal claims.

Employment Termination

- Probationary periods (i) Make sure that the length of your contracted probationary period does not exceed the maximum time allowed in the applicable employment standards legislation. For example, Alberta employment standards allows for termination within the first 90 days without any requirement to provide notice or termination pay. However, many Alberta employment contracts we see use a 3 month probationary period, which exceeds the maximum allowance. (ii) Expressly state that on termination of employment during the probationary period, the employee will not be entitled to pay in lieu of notice under the common law.
- Without cause termination provisions (i) Make sure that the amounts of severance offered upon termination meet or exceed the minimum amounts required to be paid under applicable employment standards legislation. (ii) If you are setting a specific entitlement to notice or pay in lieu of notice on termination, instead of allowing it to be determined based on common law, use clear language and include a statement that when those terms are met, the employee will not be entitled to any other compensation for termination of employment.

- Releases It is risky to include in the employment contract a requirement for the employee to sign a release to receive payment of a contractual severance amount. If you are going to include that in the employment contract, make sure you understand the risks. Better yet, don't include one at all. Instead, when terminating someone's employment, you can attempt to negotiate for a release with the employee in exchange for a payment that exceeds the contracted severance amount.

Bonuses and long-term incentives

If trying to avoid obligations to pay bonuses or long-term incentives after employment is terminated, the employment contract needs to be explicit that there will be no entitlement to those payments during any contractual, legislated, or common law notice period.

Post employment restrictions

- Remove non-competition restrictions from employment contracts, except in rare circumstances.
- If including restrictions on ability to solicit clients or employees post-employment, make the restrictions as narrow as possible.

Health and Safety

Given recent pandemic experiences, we recommend including an explicit statement in the employment contract that the employer reserves the right to implement measures to protect worker health and safety that could require workers to comply with restrictions including mandatory vaccination policies.

Jurisdiction

With the flexibility many now have to work remotely, employees may decide to work from a location outside of the province where the employer is based. This can result in different employment standards legislation applying with different rights for overtime, minimum wage, termination pay, etc. We recommend express terms in the employment contract that specify the jurisdiction that the employee will be working within and that require the employee to obtain approval before relocating outside that jurisdiction.

Plain Language

Use plain and easy to understand language in employment contracts. Avoid legal jargon.

Consideration

If you are asking existing employees to agree to changes in the terms of their employment, you need to give them something of value in return. The legal term for this is "consideration". The type and amount of consideration needed will vary depending on factors such as the employee's role, seniority, and the extent of the changes in the terms.

Policies

- Have detailed policies, bring the policies to the attention of your employees, consistently follow the policies, and regularly review and update them.
- After updating your employment contracts, consider whether any corresponding changes are required to your policies.

- When updating employment contracts, consider whether to draw attention to any previous changes to policies.

Source: Carbert Waite LLP

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