Top Ten Must-Haves For Employment Agreements

Employment agreements are now an essential tool for employers. A written employment agreement allows the employer and the employee to negotiate terms at a time when they are most optimistic about their relationship and, therefore, more likely to be fair with one another. The written agreement will provide answers to questions that oft en plague employment relationships. However, badly-written employment agreements can cause more harm than good. To keep you focused on your agreements, here are the Top Ten items you must have:

Number Ten: Consideration

The agreement must be agreed to and signed BEFORE the first day of work. For candidates in existing employment relationships, the agreement should be provided BEFORE they resign. The candidate should be sent the offer and be given the opportunity to review it away from your office and obtain advice, legal or otherwise, before signing the agreement. Don’t allow the candidate to sign the agreement in an interview.

Number Nine: Meet Statutory Minimums

If you don’t know what the requirements are, Google the applicable statute or better yet, get a lawyer to tell you. Here are some common mistakes:

“The Company can terminate your employment at any time with one month of notice.” “You are not entitled to any overtime pay.”

If the agreement does not meet the minimum requirement, it will be set aside and you will be starting from scratch.

Number Eight: Probation

A probationary period is an excellent way to ensure that the candidate is right for the position.

The agreement must use clear language that sets out the concept of and the length of the probationary period. It is not enough just to say “the employee is on three months of probation.” The agreement must also say what happens if the employment relationship is terminated during the probation period. We suggest a six month

probationary period. The agreement should indicate that the employer may terminate the employment during the first three months without notice and without termination pay. If an employer terminates the employment during the next three month period, the agreement must provide for at least one week's notice or one week's pay in lieu of notice in the absence of cause.

Number Seven: Duties

Oft en ignored, but essential to an agreement. The employment agreement should detail the employee's duties, either in the body of the document or attached as a schedule. A schedule is recommended if the employee's duties will frequently change. Instead of signing a new agreement each time the duties change, the parties can initial a new schedule. Job descriptions are easily attached as a schedule.

If properly drafted and the term is reasonable, the employer can negotiate the right to amend the employee's duties, territory, or customers even if the amendment reduces the employee's remuneration. The employee should agree that such changes will not amount to constructive dismissal even if his/her remuneration is affected.

Number Six: Clear Language

The agreement must use language that clearly sets out the parties' entitlements and obligations. Agreements that are ambiguous will be interpreted by judges against the party who has drafted it (which is usually the employer). Prepare your agreement on the basis that a judge will review it in the future. This is the time to get into the details. Ambiguity will result in the loss of any benefit you thought you gained.

Examples of ambiguous language:

"You will be paid for all commissions to your last day of work." "You can be terminated on two weeks." "You will have a three-month probation period."

Number Five: Fixed Term Vs Indefinite

Unless hired for a specific job or for a specific time period, employees should be hired for an indefinite time period. In many cases, employers are too busy to ensure that fixed term agreements are renewed. If the agreement lapses, and is not renewed, the employee's legal rights may be greater than those which were initially negotiated.

Number Four: Time Off

Vacation entitlement, restrictions on annual carry-over of unused vacation days (use it or lose it), approval of requested vacation times, sick day entitlements, requirement for doctor's certificate and submission to medical examination should be addressed.

Number Three: Back Up Documents

Th e candidate should receive the applicable policy manual and be told to read all the documents prior to the first day of work. The signed agreement and the acknowledgment of having read the manual and agreeing to abide by its terms should be collected before the employee commences work on the first day. Check and update these policies – it is essential to have policies that cover Non-Discrimination, Harassment/Bullying/ Violence in the Workplace, Technology (in particular, privacy) and Social Media.

Number Two: Entire Agreement

The written agreement will be the essence of the employer-employee relationship. It must clearly state that any previous verbal or written representations are replaced by the written employment agreement. This point is particularly important if the employer enters into an employment agreement with a candidate who is leaving secure employment. This also helps to defend against claims of a non-contractual nature.

Number One: Confidential Information and Who Owns What?

Employers should include provisions that will protect them after the employee leaves. Every agreement should include a confidential information clause that establishes the employee's duty not to disclose or use confidential information. Confidential information should be defined to fit the workplace and the type of information available to the employee. Perhaps for the employee in question, you also have to include trade secrets or inventions developed by the employee in the course of their employment. A clear statement that any such invention remains the property of the employer may be appropriate.

Another common problem is shared information – for example, contacts saved in Outlook, a sales employee's cellular telephone number. These points have to be addressed at the beginning of the relationship not aft er the employee leaves.

Number One, Did I Say That Already? Restrictive Covenants

A non-solicitation obligation is another essential clause if employees have access to customers and suppliers. This clause protects the employer if the employee leaves to work for a competitor. The clause will give the employer a remedy against the former employee and his or her new employer if the former employee approaches employees, customers and/or suppliers. Many employers make the mistake of asking employees to sign non-solicitation clauses AFTER the employee has been hired. Remember, it is easier to enforce these terms if they are signed BEFORE the employee is hired. Non-competition clauses are complex and will not be discussed in detail in this article. Non-competition clauses (prohibiting a departing employee from competing with the employer in any manner for a period of time within a specified territory) are rarely enforced against mere employees.

Number One, I Mean It This Time: Termination

All types of termination should be covered -resignation, cause and without cause. The agreement should provide that an employer may terminate the employment of an employee at any time, without notice or payment in lieu of notice, for any cause recognized at law.

For terminations without cause, what will be paid and what benefits will be provided should be properly described. Properly drafted agreements that limit obligations on termination to termination and severance pay in accordance with minimum employment standard provisions are enforceable. This is true regardless of the employee's position and length of service. However, judges will look for ways around the agreement so the clauses have to be properly draft ed. An employer should also anticipate that there may be amendments to these laws. Accordingly, future amendments to these minimum standards should be accommodated.

By limiting exposure to specified amounts of notice equal to or greater than the employment standards provisions, an employer can eliminate the problems associated with determining the length of the reasonable notice period at the time it decides to terminate an employee's employment. With a proper agreement, the employer simply has

to review the agreement and provide payment/notice and benefits which it had agreed to provide.

Don’t forget to review and refresh your agreements annually or on a promotion. Significant changes to the employee’s duties, benefits, salary, place of employment, etc., may result in an old agreement becoming outdated and therefore, unenforceable.

Written employment agreements can enhance the employment relationship, create certainty in that relationship, limit the exposure of employers and provide flexibility.

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