Watch Your (Employment Contract) Language—“In Consideration of Employment”



Beware of using this phrase when contracting with employees you already employ

The phrase “in consideration of employment” is a staple of employment contracts. While the concept of consideration is crucial to ensuring that contracts are enforceable, misuse of “in consideration of employment” can have exactly the opposite effect. The risk is especially great when the contract is with an employee whom you already employ. Consider the following scenario.

SITUATION

A few weeks after a sales manager begins working for a BC chemical company, his boss asks him to sign an employment agreement. Nobody had said anything about signing an employment contract when he was applying for the job. The agreement he’s presented with says that it’s being made “in consideration of employment.” It includes a non-compete agreement as well as a severance clause.

Six years later, the company fires the sales manager. It pays him 6 months’ severance as required by the agreement. But if the agreement didn’t exist, the manager would have been entitled to a bigger severance payment under common law, i.e., law based on court cases rather than the employment standards statute. The manager sues the company, arguing that the agreement is unenforceable for lack of “consideration.” The court sides with the manager and orders the company to pay him 13 months’ severance instead of the 6 months required in the contract.

PROBLEM

Contract Law, 101: For an employment agreement to be enforceable, employers must show that the employee received a benefit for signing it. The legal term for such a benefit is “consideration.” Consideration doesn’t necessarily have to be money; it can be additional time-off, a company car, or anything else of value. But it can’t be something that the employee was already entitled to receive, such as a job that he already had.

The contract in this case purported to take away some of the manager’s rights to severance “in consideration of employment.” But the manager was **already** employed, so he wasn’t getting anything new. In other words, he wasn’t receiving consideration.

Conversely, the employer was getting something of value from the manager—a signed contract that included less severance and a non-compete clause. The employer had never mentioned the contract during the interview, so the manager didn't know he'd have to sign an agreement or trade away his severance rights. In effect, then, the contract was all one-sided in the company's favor. There was no benefit to the manager. And since there was no consideration, the contract wasn't enforceable [*Krieser v. Active Chemicals Ltd*., [2005] B.C.J. No. 2056].

THE LESSON

DON'T: Offer employees things they already have in exchange for giving up rights or benefits. As in the BC case, false consideration would include employment to the extent they're already working for you and were never told that they'd have to enter into a written agreement. Phrases to avoid in this situation:

- "In consideration for prior services;"
- "In consideration for continued employment;" and
- "In consideration for past work."

DO: Tell prospective employees that your company requires them to sign an employment agreement before they're hired. And have them sign the agreement on the day they start, so there's no misunderstanding. It's also a good idea to include a brief description of what the employee is gaining in the actual employment agreement. Here are some examples:

- "In consideration of the employer's forbearance of the right to terminate employee at will;" and
- "In consideration of employer hiring employee, and with the understanding that such employment is conditioned upon employee's signing of this agreement.