Why Employers Should Have Contracts For Non-unionized Workers



Although a written employment contract is not necessary in order for there to be an employment relationship, a written employment contract provides many benefits to employers. This article focuses on two types of clauses that typically benefit employers: Termination and layoff clauses.

Termination clauses

The purpose of a termination clause in an employment contract is usually to limit lengthy common law notice entitlements when an employer terminates an employee *without cause*. Without such a clause, a common law notice period can be as lengthy as 24 months. The termination clause will typically provide the employee with either a fixed notice period or, at minimum, just enough so that the termination clause complies with the minimum entitlements prescribed under the *Employment Standards Act* (one of the employment law statutes governing provincially-regulated Ontario employees). These types of termination clauses typically reduce the employer's cost of terminating the employment of their employees. They also have the benefit of fixing a formula for the notice period, since the common law is not formulaic (rather, various factors are taken into account, such as age, seniority of the role, and length of service, in arriving at the proper common law notice range).

However, an employer cannot craft just any termination clause. A termination clause cannot provide less than the minimum standards of the *Employment Standards Act*. A termination clause is not enforceable unless the employer provides the employee with at least the minimum statutory entitlements upon a termination without cause as required by the *Employment Standards Act*. This is important because if a termination clause is found to be unenforceable, then the employee will be entitled to common law notice, which can be much more lengthy and costly. Therefore, it is crucial that an employer ensure that the termination clause is properly drafted.

An employer must also ensure that its termination clause is clear and unequivocal. It should explicitly preclude the employee from an entitlement to common law notice. An ambiguous termination clause will be interpreted in favour of the employee, ultimately defeating the limiting function of the clause.

An employer also cannot insert a termination clause into an existing employee's contract of employment without complying with some additional legal hurdles (usually payment of a "signing bonus" in exchange for the revised contractual terms).

Otherwise, a unilaterally inserted termination clause will not be enforceable.

Since the law in the area of termination clauses is constantly evolving, an employer is well-advised to ensure that a termination clause in an old “pro forma” employment contract is professionally reviewed to determine whether it should be revised and updated.

Layoff clauses

A layoff is where an employer essentially presses “pause” on its obligations to its employees in the short-term while still maintaining the employment relationship in the long-term. However, layoffs are strictly statutory; there is no layoff permitted at common law. Therefore, employers must typically have the right expressly set out in a written contract to lay off their employees, otherwise they cannot legally do so (absent binding legislation or caselaw to the contrary). Ordinarily, an employer obtains the right to lay off its employees by including a layoff clause in an employment contract.

A layoff clause in an employment contract allows an employer to reduce its workforce while avoiding or at least minimizing the risk of claims of constructive dismissal by the affected employees. This is an important term to include in an employment contract as it is common, especially these days, for many workplaces to undergo periods of financial uncertainty, and laying off employees temporarily without pay allows employers to cut costs.

As with termination clauses, a layoff clause must meet the minimum standards provided for in the *Employment Standards Act*. So long as the layoff clause either matches the statutory minimums or offers a greater right or benefit than the minimum requirements set out in the statutory layoff provisions, then that clauses should be enforceable.

With the ever-changing face of the pandemic upon us, it is a good idea to minimize both risk and costs by ensuring that your employment relationships are properly managed with the help of an experienced professional.

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