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THE BASICS OF AN EMPLOYMENT CONTRACT

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Roger Holland + Jordan Copeland

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I. INTRODUCTION

Employment contracts, like all contracts, do not necessarily have to be written to be given effect at law. Employment contracts can be written, partly written and partly oral, or entirely oral. Even written employment contracts may not look like contracts on their face; employment letters, company policy manuals, and other correspondence may form part of the agreement. An employment agreement may be evidenced by a group of documents and discussions and is not necessarily limited to one document called the "contract."

That said, employers have much to gain by limiting the parameters of an employment agreement to a single document or a defined group of documents. This will increase certainty regarding the terms of the employment agreement and increase the predictability of an employer's obligations upon the termination of the employee. Although employers and employees may still go to court to evaluate the meaning of certain terms of an agreement, courts are less likely to interfere with a well-drafted contract that sets out all the terms that both parties intended to cover the entire employment agreement.

This paper will sum up the basic terms that should be included in a good employment contract. It is important to emphasize that in order to be effective, an employment agreement should consider the characteristics, expectations, and goals of the parties involved. These considerations apply even when an employer is seeking a standard form contract for a specific type of employee. Additionally, as a corollary to these drafting tips, this paper will explain some of the concepts of law that are applicable to employment contracts.

A. General Contract Principles

Employment contracts have to satisfy the requirements for a valid contract at law; accordingly:

1. there must be an offer of employment;
2. an employee must accept this offer;
3. there must be consideration or a promise moving for each party to the other;
4. the terms of the agreement must be certain; and
5. the parties must intend to create legal relations.

In employment contracts the element of consideration takes the form of a promise by the employer to provide employment and remuneration to the employee, and a promise by the employee to provide the services that constitute the employment to the employer. The requirement of consideration can create problems when an employer attempts to unilaterally change the terms of an employee's employment contract on the basis of a promise to continue to provide employment. It is therefore recommended that any such changes be made when the employer is offering something new to the employee, such as a raise, or increased job responsibilities, in return.

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Although employment contracts, like all contracts, are supposed to set out the complete agreement between two parties, they are unique because they may be "stretched" to include other considerations. These other considerations include: human rights considerations, the expectations and interests of employees and employers, industry practice, and relevant legislation. Clear contracts that do not run afoul any of these considerations are more likely to be enforced by the courts.

II. CONTRACT TERMS

i) Parties

At its outset, the contract should accurately set out the names and addresses of the employer and the employee. If the employer is corporation that is part of a larger corporate structure, the employer should consider which corporate entity is the appropriate party to enter into the contract.

ii) Recitals

Customarily, contracts contain a few short statements stating the background and goals of the agreement. These are called recitals and technically don't form part of the legally enforceable promises between the parties. In employment contracts, the recitals should identify the business of the employer and the fact that the agreement is an employment contract.

iii) Job title and Job Description

The contract should state the employee's job title and state the employee's duties and responsibilities. However, employers may want to consider keeping this information general in order to limit an employee's right to argue that he or she has been constructively dismissed if an employer makes changes to an employee's duties down the road. The Supreme Court of Canada discussed the concept of constructive dismissal in a case called *Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846 (Q.L.) at paras. 24-25:

> Where an employer decides unilaterally to make substantial changes to the essential terms of an employee's contract of employment and the employee does not agree to the changes and leaves his or her job, the employee has not resigned, but has been dismissed. Since the employer has not formally dismissed the employee, this is referred to as "constructive dismissal". By unilaterally seeking to make substantial changes to the essential terms of the employment contract, the employer is ceasing to meet its obligations and is therefore terminating the contract. The employee can then treat the contract as resiliated for breach and can leave. In such circumstances, the employee is entitled to compensation in lieu of notice and, where appropriate, damages.
>
> **On the other hand, an employer can make any changes to an employee's position that are allowed by the contract**, inter alia as part of the employer's managerial authority. Such changes to the employee's position will not be changes to the employment contract, but rather applications thereof. **The extent of the employer's discretion to make changes will depend on what the parties agreed when they entered into the contract.**
>
> [emphasis added]

Therefore, an employer should reserve the right to make changes to the job title and job description in the contract. This can be accomplished by reserving the right to make specific changes or else by reserving the right to make changes if specific events occur. However, any such clause authorizing changes should not be too broad if the employer wants it to be upheld by the courts. Generally, broad powers given to employers to make unilateral changes to the employment agreement will be struck down.

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iv) Remuneration

The contract should state the employee's salary or hourly pay and the frequency of payments to the employee. The employer may also want to provide for the power to review any salary increases on a regular basis. In terms of salaried employees, if a set salary and a set amount of work hours are stated in the employment contract, courts may imply that they employee is entitled to additional remuneration for overtime. Accordingly, it may be prudent for employers who include a statement of daily or weekly hours to include additional writing to the effect of "such additional hours as may be requested or necessary from time to time."

Additionally, if the employee is going to be eligible for bonuses, the contract should state the basis for the award of a bonus and the amount or method by which it will be calculated. If the employer would like to retain the discretion to award a bonus, this should be expressly stated. Also, no implied or explicit references to the amount or value of any such bonuses should be referenced unless the employer can most definitely agree to be bound to such amount.

v) Benefits

The contract should state the benefits that the employee is entitled to receive while employed, such as medical and dental benefits, long term disability insurance, and life insurance. An issue that may arise in connection with benefits is whether manuals containing information about the benefits form part of the employment agreement. Courts in B.C. have not adopted a general rule about the incorporation of such materials and generally look to the facts of each case. If an employer does wish to make the terms of a policy part of the employment contract, then the following steps should be followed:

1. the written employment contract should attach policies as a schedule or alternatively, specifically reference the internal policy and state that it contains terms and conditions of employment;

2. the employer should advise the employee of the policy at the outset of the employment relationship and confirm that it has advised the employee in writing; and

3. the employee should be given a copy of the policy and sign an acknowledgment confirming that he or she has received the copy.

The contract may incorporate the policy by either fixing it at the time of employment or state that the materials are to be incorporated, as they are amended from time to time. In the context of benefits policies, it generally makes more sense to provide for amendments to the policy as these terms are subject to change at the direction of insurers.

vi) Vacation Policy

A contract should state the amount of vacation time that the employee is entitled to or the formula for determining it. An employer should also reserve the right to determine dates on which an employee takes vacation.

vii) Geographical location

An employer may want to set out terms relating to travel, mobility and geographic reassignment. For example, a term stating that an employee must be available for travel may be important for agreements with sales employees. Additionally, any employer may want to reserve the right to relocate an employee. Because of the doctrine of constructive dismissal, discussed above, an employer may want to attempt to preclude an argument by an employee that requiring him or her to work at a new location amounts to a dismissal. This may be particularly important for

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companies with various branch offices. Employers may also want to consider provisions that designate several work locations within a defined territory.

viii) Implied Duties Owed to Employer

During the term of employment, the employee owes a number implied duties to his or her employer. These duties are implied by law even if they are not set out in the contract, such as the duty to:

1. serve the employer faithfully;
2. not reveal confidential information; and
3. not conceal important information from the employer.

Although these duties may be implied by a court, it is still recommended that employers describe them in an employment contract. These express provisions draw the duties to the attention of the employee and can help employers from stopping harmful conduct if and when it occurs. For example, an employer may want to include a general statement regarding the employee's duties of loyalty and faithful service.

ix) Suspension Provisions and Discipline Policies

An employer may wish to provide for employee suspension and discipline in the event of unsatisfactory performance or misbehaviour. Generally a temporary lay-off amounts to a dismissal at law; however an express term in a contract may prevent this doctrine from operating. The contract term should set out when a suspension may be imposed and the terms and conditions governing such a suspension. Further, the contract should state whether the employee is entitled to benefits and pay while suspended and whether or not the repayment of any wages paid during the suspension period will be required if the employee is ultimately dismissed for cause.

A recent decision from the B.C. Court of Appeal[1] indicates that a leave of absence taken by an employee as an alternative to harsher disciplinary measures stated in a company's discipline policy will not amount a dismissal of the employee. This decision also indicates that warning letters from employers to employees threatening future dismissal in the event of future unsatisfactory performance are permissible. Accordingly, employers should consider drafting discipline policies and incorporating them into the employment contract by reference. These discipline policies can be part of a progressive scheme which may ultimately result in dismissal of an employee for cause.

x) Privacy Policies

Organizations have obligations regarding employee's personal information under the new *Personal Information Protection Act*[2]. Accordingly, employers may want to make adherence to privacy practices and procedures a term and condition of employment. This is especially relevant for employees in departments such as human resources, who will be privy to the personal information of many employees.

As an aside, employees are often on the front lines in terms of protecting the privacy of a business' clients and employees. Therefore, clearly articulated privacy policies and protocols need to be

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[1] *Sinclaire v. Intrawest Resort Ownership Corp.*, [2005] B.C.J. No. 16 (Q.L.) at para. 22.

[2] *Personal Information Protection Act,* R.S.B.C. 2003, c. 63.

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established and communicated to all employees. This is especially the case where an employer wishes to make adherence to such policies and protocols a term and condition of employment.

xi) Termination for Cause

Generally, employees can be terminated for cause or without cause. The Ontario Court of Appeal has set out the following definition of just cause:

> If an employee has been guilty of serious misconduct, habitual neglect of duty, incompetence, or conduct incompatible with his duties, or prejudicial to the employer's business, or if he has been guilty of willful disobedience to the employer's orders in a manner of substance, the law recognizes the employer's right summarily to dismiss the delinquent employee.[3]

Although an employer retains this right at law, it is prudent for an employer to reserve the right in an employment agreement to terminate an employee immediately with cause. This can be accomplished with a statement that makes this right of the employer clear and enumerates the type of conduct that will lead to termination.

xii) Termination Without Cause

Employers can terminate an employee without cause by giving an appropriate amount of notice to the employee or paying an amount of severance pay in lieu of notice. If an employment contract is silent as to notice, a court will imply an obligation on an employer to give "reasonable notice." If an employer gives less than what a court finds to be reasonable notice, then the employer will be liable to pay the employee money equal to the salary that the employee would have been entitled to during the reasonable notice period. Reasonable notice will depend on various factors such as an employee's age and position, and thus is very difficult for an employer to accurately determine.

In order to avoid the uncertainty surrounding reasonable notice, employers can state a set notice period in the employment contract or provide that the notice period is to be governed by the *Employment Standards Act ("ESA")*.[4] If an agreement incorporates the notice periods in the *ESA,* the provision should take into account later changes by incorporating it "as it is amended from time to time" in order to avoid being void in the future. Currently the *ESA* provides for one to eight week notice periods depending on the employee's length of service; these represent the minimum notice periods that an employer can give by law. A prudent employer might want to also provide that the termination provisions survive any changes to other terms and conditions of employment to avoid an employee arguing that significant changes to their job mean that the original notice provision no longer applies.

Note, the *ESA* notice periods are often varied by courts as merely setting a minimum floor as to an employee's entitlement to a notice period. This is especially the case for skilled or professional employees. Therefore, in many instances, a reference to the notice requirements under the *ESA* may be set aside by a court where a court believes that such a notice period does not constitute reasonable notice.

xiii) Deductions from Severance Pay

At law, employers can generally deduct from severance pay the wages that an employee receives during the notice period from any new employment. Accordingly, employers may want to include

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[3] *Port Arthur Shipbuilding Co. v. Arthurs* (1967), 62 D.L.R. (2d) 342 (Ont. C.A.) at p. 348.

[4] *Employment Standards Act,* R.S.B.C. 1996, c. 113, s. 63.

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provisions in the employment contract that state that wages and certain benefits will be deducted from any severance pay.

xiv) Return of Employer Property

Employers can request the return of their property when the employment relationship ends. However, employers may want to provide for a specific provision in the employment agreement setting out the employee's duty to return any property upon the termination of employment. This provision should require the employee to return any computer files that are not stored on the employer's computer to the employer and to delete any files off the non-employer computer.

In relation to any and all intellectual property, including without limitation patents, trademarks, trade secrets, and copyright, the contract should also provide that the employee agree to transfer ownership of all intellectual property that the employee created during his or her employment and include a waiver of moral rights. An employer should also provide a clause requiring the employee to return everything that he or she used to create the intellectual property.

xv) Non-disclosure / Confidentiality

Specific terms setting out what type of information is proprietary to the employer, such as trade secrets, helps to define the rights and remedies of the employer in relation to the non-disclosure of its confidential information. The policy or clauses regarding confidential information should adequately describe what confidential information is, explain when it can be disclosed, explain how to obtain permission for its disclosure, and state the punishment for disclosure of such confidential information.

Non-disclosure agreements, as well as non-solicitation and non-competition agreements discussed below, may be contained in an employment contract or in a separate agreement. If they are contained in a separate agreement, it is better that such agreements are incorporated into the employment agreement by reference rather than being entered into on a date after the original employment agreement is signed. This is to avoid giving employees the opportunity to argue that such agreements are void because the employer provided no consideration, or a new promise, to provide the basis for any such non-disclosure, non-solicitation or non-competition agreement.

xvi) Non-solicitation

A non-solicitation clause or agreement restricts employees from soliciting the customers or employees of their current or previous employer. Such clauses become especially important after termination of employment because the law generally only imposes this obligation automatically on a higher-level employees who are held to have a special relationship with their former employer, defined by something called a fiduciary duty. The likelihood of courts implying fiduciary obligations is more likely for high-level managers than lower-level employees. With respect to soliciting customers, control by employers of their employees is less likely than not in the absence of an express contractual provision.

The B.C. Court of Appeal recently held that in order for a provision such as a non-solicitation clause to be enforced, an employer must show that it has a proprietary interest entitled to protection and that the temporal and spatial restrictions in the clause are no wider than reasonably required to adequately protect that interest.[5] Accordingly, non-solicitation clauses should be limited in both time and geographic area in order to avoid being struck down by the courts as being in restraint of trade.

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[5] *Valley First Financial Services Ltd. v. Trach*, [2004] B.C.J. No. 1127 (Q.L.) (C.A.) at para. 44.

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xvii) Non-competition

The B.C. Court of Appeal recently described the difference between non-solicitation provisions and non-competition provisions as follows:

> A non-solicitation covenant aims to prevent a departing employee from soliciting the customers of the former employer. It does not otherwise prevent the departing employee from competing. A non-competition covenant, on the other hand, seeks to keep the former employee out of the business completely. The courts will generally refuse to enforce a non-competition covenant when a non-solicitation covenant would adequately protect the employer.[6]

Therefore, employers should be careful when considering whether to include a non-competition clause in an employment contract if a non-solicitation clause will protect their interest. One option open to employers is to include both types of clauses and provide that if one is found to be void, the other will still govern.

III. INDEPENDENT CONTRACTOR AGREEMENTS

Employers should be aware that the considerations relating to the drafting of employment agreements are different from those relating to the drafting of agreements with independent contractors. However, some of the provisions with be similar or the same. For example, independent contractors can be bound by non-disclosure agreements and their relationship with an "employer" can be terminated for cause.

Additionally, employers should be aware that courts, and possibly of greater concern, the Canada Revenue Agency, are not bound by the parties' description of the employment relationship and will look to the total relationship of the parties to determine if a party is an employee or independent contractor.[7] The considerations that courts take into account and the provisions that employers can use to protect themselves are beyond the scope of this paper. At the very least, any contract should clearly state whether it is a contract of employment or independent contractor contract to indicate the intentions of the parties.

IV. CONCLUSION

A carefully drafted employment agreement can help an employer to protect its interests and reduce its risk. Such written agreements can also benefit employees by protecting their rights and clarifying the responsibilities and duties they owe to their employers. This paper has set out the types of terms that should be included in a good employment agreement and the considerations that employers should take into account to when drafting such agreements. Although this paper has attempted to provide some general guidance, it should not be taken to replace legal advice that addresses a specific employer's needs, goals, or factual situation.

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[6] *Valley First Financial Services Ltd. v. Trach*, [2004] B.C.J. No. 1127 (Q.L.) (C.A.) at para. 49.

[7] *Walden v. Danger Bay Productions Ltd.*, [1994] B.C.J. No. 841 (Q.L) at para. 38.

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