

VALUE OF EMPLOYMENT AGREEMENTS

The issue of employment contracts often comes up and most times it occurs after the employee is hired. The common thought revolves around whether or not an employer should issue a written Letter of Offer of Employment and/or Employment Contract.

Every employment relationship is a contract, whether it is written, verbal or a combination of both. When an employee is hired, an economic exchange is entered into, which in effect is the contract. The employment contract is an agreement between an employer and employee regarding the terms and conditions upon which the employment is based.

Two common forms of written employment agreements (among many) are the Letter of Offer of Employment and the more formal "Employment Agreement". Both can represent a written contract, however in the case of the Letter of Offer of Employment it may simply provide the basis from which a formal agreement/contract will later be formed. In the case of unionized employees the contract terms are laid down in the collective agreement.

In general, the terms of employment can come from a variety of sources, which can include:

- Verbal agreement;
- Written contract, or similar document;
- Employee handbook or on a company notice board;
- Letter of offer from the employer;
- Required by law (e.g., paid at least the minimum wage);
- Collective agreements (applies to unionized employees); and
- Implied terms ("terms that are not written down but understood to exist").

Why a written Employment Contract?

A carefully written contract will address all the issues (terms of employment) between the employer and employee. It will leave no room for ambiguity or future misunderstandings. This is especially important should a dispute arise (such as in the case of a termination). In addition, the same contract will ensure the neither party will hold a particular advantage over the other in arriving at the agreement.

However, where there is no written contract/agreement or key terms are absent, an employer can be susceptible to a dispute with regard to the promised terms of employment. This can lead to costly settlements and/or litigation where the court is left to decide what are reasonable terms of employment.

Without an employment contract/agreement, such as an informal Offer of Employment or a formal multipage Employment Agreement, employers can incur significant risk - from litigation to frustrated and disgruntled employees, and low workplace moral. Having a written employment contract brings clarity to the working relationship, avoids future misunderstandings, and establishes the key responsibilities of the employer and employee in fundamental areas.

Forms of Contracts

1. Unwritten Employment Contracts

It may sound strange, but even without a written contract, an employer and employee have in fact entered into a contract. The terms and conditions of employment are covered by a variety of laws such as the Employment Standards Act, Occupational Health and Safety Act, Labour Relations Act, Workers' Compensation Act, and Pay Equity Act. Contracts, whether written or not, must meet the minimum standards set out in the legislation and be valid in common law, which is the law that comes from court decisions.

Beyond the legislative requirements, any promise an employer makes to the employee, such as a raise after a specified time or items, such as contained in an employee handbook, will form part of the contract. With regard to legislation, any employment contract cannot "contract out of the law". That means the contract or terms of employment cannot be below the statutory obligation. For example, an employer cannot offer two weeks notice of termination without a proviso that notice will be consistent with the Employment Standards Act.

While the unwritten contract has equal force in law as those that are written, the employer and employee have to place trust in the good faith of the other to fulfill their promises. When this is not the case it will be up to the court to determine the authenticity of promises made and what will constitute reasonable terms. It should be noted that the costs, both monetary and operational, to resolve such dispute can be great – lawyers fees, court costs, settlements and unfavourable court judgments – and can result in disappointment and frustration of both parties.

2. Written Employment Contracts

A written contract can be used for non-union employees. As mentioned earlier, unionized employees are covered by their respective collective agreements from which an employer cannot stray from the terms and conditions of the agreement. However, it may be a good idea to have one when there are terms that may not have been contemplated by the collective agreement. These can be such things as start date, salary, job title, and the Employment Standards Act (ESA) conditions not specifically covered in the collective agreement.

In circumstances where the terms of employment vary little from the legislated minimum, a written contract may not be necessary. Yet there are often additional terms, such as insured benefits that are not covered by the ESA. Written contracts are a good idea when the terms and conditions of employment exceed legislative requirements or there are issues of confidentiality or proprietary information involved.

Written contracts are typically used in the following circumstances:

- To avoid misunderstandings between the parties about terms and conditions of employment (especially when they are exceed the legislative minimum)
- To set specific terms of employment (fixed terms of less than 12 months attract no notice or severance under the Employment Standards Act)
- To address particular performance goals/targets as condition of employment
- To specify and detail probation and termination provisions
- To address and protect employer's confidential and proprietary information

- To establish non-competition or non-solicitation restrictions on employee (depending on the nature of the position)
- To address complicated salary issues such as bonus, profit sharing and ownership
- To identify specially negotiated terms such as car lease, health benefits, and memberships

Usually, hiring takes place via a Letter of Offer of Employment, which contain all the key terms of employment. The offer letter and the obligations under legislation together with the organizations policies are the terms of the new agreement between the employer and employee. In the case where there are more involved terms of employment - which can be the case with senior management or professional positions – it may be advisable to hire via a more detailed contract. This provides the opportunity and scope to adequately address such issues as bonuses, performance requirements, issues of confidentiality and any other specially negotiated terms.

(For templates of Letter of Offer for employment or Employment Agreement visit the HR Council for the Nonprofit Sector at: hrcouncil.ca/hr-toolkit/right-people-selection.cfm#_secA6)

At a minimum any offer letter or for that matter, any agreement should include the following information:

- Starting date
- Position and scope of duties
- Reporting relationship
- Hours of work
- Salary – for salaried employees it is common to annualize the amount paid but the frequency of pay can be weekly, monthly or semi-monthly
- Vacation – qualifying period, accrual, pay out on termination are important issues
- Benefits – qualifying period, cost share
- Termination – notice form either party for non-cause and address “for cause” termination
- Any special terms that may not be covered by the organizations policies
- Acceptance – require the signature of the employee to indicate they have “read, understand and accept the offer of employment”. The employee acceptance should be prior to starting date

There are other matters you may wish to include in an employment contract:

- Relocation or moving expenses
- Non-waiver clause – states that a waiver of one part of the agreement does not invalidate the rest of the contract
- What law will govern the agreement? It is usually the law of the province that the parties are located in, unless covered by federal codes
- A statement that says the document represents the entire agreement between the parties and any other discussions, agreements or understandings, whether written or oral, are excluded and not enforceable
- How the contract can be modified

In addition, as the employer, in most instances, holds the advantage in recruiting, it is wise to give a prospective employee time to consider the offer. The employee should be

encouraged to seek independent advice on the terms and conditions contained in the agreement.

Key Principles

The following are some key principles to make note of when considering a written contract. Some may seem obvious, but omissions can be dangerous.

- The contract must be mutually agreed upon – a contract signed under coercion or duress will not be deemed valid if challenged in court. Consideration should be given to having the employee seek independent legal advice and to reference this in the agreement. *This is especially so in contracts with executive levels.*
- Use clear and unambiguous language
- Date the agreement
- Use the proper names of the parties
- Term – if a specified term, spell it out clearly – start and end date. Address what happens if the term is reduced or lengthened.
- Termination – it is wise to include a provision for termination of the agreement. Having such a provision allows the parties to understand behavior expectation, process of termination, and method of granting any severance or termination. It is generally wise to include language for both “just cause” and other situations that give rise to termination. Notice in case of termination should be quantified.
- Include for senior positions especially but consider for all others, a clause that addresses non-competition, confidentiality and non-solicitation. If employees have access to confidential or proprietary information, this clause is advisable as opposed to relying solely on company policies that apply to all employees.

Summary

The hiring process is the most important part of the employment relationship. The decision to use a contract that is beyond the bare legal requirements should be made prior to the actual hiring. You should address the job levels for which you will use: offer letter only or detailed contract

Consider the contents of either form used. Make sure the policies you rely on in the employment relationship are current and are in fact being applied in the organization. For example, if you state that vacation will be in accordance with our attached policy and yet the policy is not being applied, you have the seeds of a future misunderstanding.

There is recent case law that advises employers that in order for an employment contract to be enforceable, it must be clear and the employee has to sign prior to their first day of work. This applies to oral agreements as well. The essential terms of the oral agreement must be established prior to the starting date.

A valid contract requires an exchange for entering into the agreement. This is commonly referred to as “consideration”. The consideration is spelled out in the agreement. Should the employer wish to alter the agreement at some later date, it must show that the employee received adequate consideration for agreeing to the changes.

Because written contracts are often unique to each individual, you should consider seeking legal advice to ensure it is reasonable and able to withstand a court challenge. You may aid the legal review by having a suggested template and by seeking advice on its particular application.

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