

ASK AN EXPERT with Ronald Minken**Minken and Associates P.C.**Have a question on an HR issue? E-mail Jeffrey.R.Smith@thomsonreuters.com.**Are written employment contracts necessary?**

QUESTION: Is it worthwhile for a small employer to go to the trouble of drafting written employment contracts? What are the risks of “keeping it casual” with employees and foregoing this formal document?

ANSWER: It is wise to consider the protection employment contracts provide to both employers and employees. Most employment relationships begin with a brief hiring letter stating the job title, start date, wages, vacation and benefits and the remaining terms are implied into the employment agreement by the common law.

Courts view employees as being vulnerable and in need of protection. A well-drafted employment contract provides certainty and clarity with respect to issues that may arise throughout the employment relationship and at the time of the employees' departure. Such certainty reduces the risks of disputes, litigation and the employer's liability.

Common areas of misunderstanding are: whether the job offer is conditional or firm; whether the term of work is fixed or indefinite; and the scope of the position, including job title, reporting structure, hours of work, geographic location, probation period, remuneration, benefits, confidentiality, notice upon termination, disability and absenteeism, ownership of intellectual property, and competition and solicitation prior to and after departure.

Scope of position

Employers may have a need to modify an employee's job title, reporting structure, hours of work and geographic location. An employment con-

tract can permit a fundamental change in an employment relationship. Without one, certain aspects of a job can be implied and changing them could be considered constructive dismissal, which would require notice to the employee.

Probation period

If an employer wishes to institute a probationary period for a new employee, this must be specified in an employment contract. There is no implied statutory or common law probation period. Rather, the law implies an employment relationship can only be terminated by providing reasonable notice, unless there is just cause. Notice is required even if an employee has worked for less than the typical contractual probationary period of three months. In some cases, notice is required even if an employee hasn't started work yet. An employment contract can contain a probationary period for the purpose of assessing the employee's suitability and limit the amount of notice, if any, required.

Remuneration

There is often confusion about the terms of remuneration, especially with commission or bonus structure, usually as a result of the parties being anxious to enter into the employment relationship. Disputes commonly arise at the time of the employee's departure with respect to whether or not commissions or bonuses are payable for past work. If there is no agreement and commissions or bonuses would have been paid had the work relationship continued, the employee will likely successfully argue she is entitled to such commission or bonus. An employment contract can specify whether there is an entitlement for past work at the

time of departure, as well as limit such entitlement if so desired.

Notice upon termination

Notice can be given through working notice, salary continuance, a lump-sum payment or any combination of these. It is possible to limit notice to the minimum under the employment standards legislation — about one week per year of employment to a maximum of eight weeks — and severance if it is applicable. If notice is not limited to the minimum in an employment contract, common law notice must likely be paid, which could be several months. In some situations, a long-term employee can be entitled to 24 months' or more notice. It makes sense for an employment contract to limit common law notice or eliminate it altogether, along with specifying whether it consists of only salary or also commissions and bonuses.

Disability and absenteeism

What happens when an employee becomes disabled or is absent? Honda Canada faced this situation and dealt with the employee improperly. As a result, it was ordered to pay punitive damages of \$500,000, later reduced to \$100,000 on appeal. A properly drafted employment contract should clearly define the employee's and employer's obligations in the event of illness.

Non-solicitation and non-competition

It is critical in many situations employment contracts be drafted so departing employees can't solicit existing customers, clients, employees or suppliers, or establish or work for a competing business.

Considering the cost of litigation and the protection afforded by contracts, no employment relationship should begin without a properly drafted employment contract.

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