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PUBLICATION

Is Your Employment Agreement Enforceable?

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Often, employers and prospective employees are eager to start their relationship. However, this eagerness can result in serious consequences, usually for the employer.

One situation that employment lawyers routinely see is parties agreeing to the key terms of employment verbally or in a "Term Sheet" but leaving the drafting and execution of a formal Employment Agreement to a later date, most commonly the date the employee commences employment or shortly thereafter. The problem with this approach is that any terms of the Employment Agreement that were not agreed upon as part of the verbal agreement or Term Sheet may not be enforceable.

There have been a number of cases where employees have sued employers (or former employers) to have terms of the Employment Agreement declared invalid or unenforceable for lack of "consideration" on the basis that the term(s) at issue were not discussed or agreed upon prior to signing the Employment Agreement on or after the first day of work. Unfortunately for the employer, the impugned terms are likely unenforceable because, from a court's perspective, the enforceable terms of employment are limited to the terms that were negotiated and accepted before the employee commenced active employment. The additional terms in the Employment Agreement which had not been discussed or accepted are unenforceable as the employer did not provide any fresh or new consideration for those terms.

The way to avoid this situation is simple:

1. When negotiating the terms of employment, always make clear to the prospective employee that the employment opportunity is conditional on execution of a formal Employment Agreement. It is imperative that the employee understands that a formal Employment Agreement will be provided and that its terms will govern the employment relationship.

2. Recommend to the prospective employee that they not resign from their existing employment (if any) until after the Employment Agreement has been signed and delivered to the employer.

3. Provide the prospective employee with a copy of the Employment Agreement well in advance of the anticipated start date. We recommend a minimum of one week.

4. Deliver the Employment Agreement to the prospective employee by email or another method that provides proof of delivery/receipt. This may be important in the future if there are disputes about when (or if) the prospective employee was given the Employment Agreement.

5. Insist that the prospective employee return the executed Employment Agreement before their anticipated start date. It is better to delay the start date than to allow the prospective employee to start working before they have provided written acknowledgment that they accept the terms of the Employment Agreement.

6. Require the prospective employee to write on the Employment Agreement the date on which they signed it. The easiest way to accomplish this is to put a "date" line next to the prospective employee's signature line. Another good tip is to ask the prospective employee to return a copy of the signed Employment Agreement by email so that the employer will have a record of when it received the signed copy.

7. Always keep in mind that disputes about "who sent what and when" will in many cases be litigated years or perhaps even decades later when memories have faded and some of the individuals who were involved in the negotiation for the employer have since left the organization. The documentation set out above may end up being the only records that employer has to rely upon when defending against a claim.

The Consequences

The consequences of having a term of the Employment Agreement declared void or unenforceable can be significant. Usually the terms in dispute are ones that benefit the employer, for example, non-solicitation or non-competition terms. A finding that these terms are not enforceable can be very detrimental to the employer.

Alternatively (or in addition) an employer may face a financial liability that it did not expect. For example, let's assume that the provision that had not been discussed verbally and is now in dispute is a termination provision which limits a 20 year employee who has been dismissed without cause to the minimum requirements of the Employment Standards Act, 2000 (Ontario). Let's further assume that the employer is a large organization with an annual payroll in excess of $2.5 million in Ontario. In this scenario, the employer believes that it only owes the dismissed employee 28 weeks of combined statutory termination pay and statutory severance pay pursuant to the termination clause in the Employment Agreement. However, if the termination clause is found to be unenforceable, the employee could be entitled to as much as 24 months of

notice or compensation in lieu of notice. This would be an unexpected and undesirable outcome for the employer.

While the eagerness to on-board a new employee quickly is understandable, employers have to make sure they have completed the process properly to ensure that their Employment Agreements offer the protection they expect and have the best chance at being enforced.