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Employment Update: What Employers Need to Know About Recent Legal Developments Relating to Employment Contracts

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Following recent court decisions and legislative changes around non-compete agreements in Ontario, employers should be reviewing and updating their employment contracts. Especially ripe for review are termination, restrictive covenant and arbitration clauses. Ontario Courts have recently provided valuable guidance to ensure that such clauses are enforceable and fulfill their intended purpose. The following decisions serve as an important reminder to employers to draft clauses in an employment contract very carefully.

Does your Employment Contract have "For Cause" Termination Language that is Linked to Protecting Confidential Information or Avoiding Conflicts of Interest?

In *Henderson v. Slavkin et al.*, 2022 ONSC 2964, a receptionist at an oral surgery clinic was terminated with six-months' working notice because the owners of the business were retiring. The case centered around "for cause" termination language that was found within the employment contract but outside the formal termination clause. First the "Conflict of Interest" provision provided that the employee would be terminated for cause "without notice or compensation in lieu of notice" if they engaged in any of the enumerated conflicts of interest without reporting them to the employer. The Court held that the provision was overly broad, unspecific, and ambiguous. It was unclear in what circumstances an employee would be engaged in a conflict of interest that violated the provision.

Second, the "Confidentiality" provision prohibited the use and disclosure of confidential information. The employee could also be terminated for cause "without notice or compensation in lieu of notice" if this provision was violated. Again, the Court was of the view that the provision could be triggered in situations where the disclosure of confidential was not willful or where the breach was trivial.

Both provisions were also to be unenforceable. The statutory threshold for just cause termination "without notice or compensation in lieu of notice" under the Ontario *Employment Standards Act, 2000* (the "*ESA*") is "wilful misconduct, disobedience or wilful neglect of duty that is not trivial." This threshold cannot be lowered or contracted out of. The Court held that, because the provisions did not differentiate between wilful vs. accidental, or trivial vs. non-trivial use and disclosure, they were an attempt to lower the statutory threshold.

The following are key takeaways that Ontario employers should consider in light of this case:

1. This case serves as a reminder that the Court can and will scrutinize the entire employment contract (or even the employee handbook) for language that affects an employee's entitlements on termination. All such language needs to be compliant with the *ESA* enforceable in order to rely on it. It is not enough that a single provision applicable to the facts is enforceable.

2. It is vital to have a clear and detailed termination clause. Prior to forming the employment relationship, it needs to be abundantly clear to employees in which exact situations they may be terminated.

3. The statutory just cause threshold in Ontario is expressly defined in the *ESA*. Any attempt to lower this threshold will be unenforceable. It would be wise to incorporate the precise threshold into your termination clause to ensure compliance.

Does your Employment Contract have Restrictive Covenants (Non-Competition and Non-Solicitation)?

A restrictive covenant clause in an employment contract is designed to place restrictions on an employee's employment and post-employment activities. The restrictive covenant may limit an employee's ability to work in or carry on a business activity that is competitive with the employer's business. It may also limit the employee's ability to solicit the business of the employer's clients, suppliers or other employees. Effective October 25, 2021, it is illegal to include a non-competition clause in an Ontario employment contract, absent a few exceptions. Non-solicitation clauses tend to be less restrictive than non-competition clauses and may be enforceable, so long as they are not overly broad and are reasonable in geographic scope and duration.

In *M & P Drug Mart Inc. v. Norton*, 2022 ONCA 398, the Ontario Court of Appeal upheld a decision which found that a non-competition clause in an employment contract for a pharmacist was overly broad and therefore unenforceable. The language of the provision failed to limit its application to (i) the pharmacy aspects of a business that may include non-pharmacy aspects, such as a supermarket, or (ii) working as a pharmacist, in contrast to doing work for a business that was unrelated to the practice of pharmacy or simply being a passive investor.

Does your Employment Contract set out a Fixed-Term for the Duration of the Employment Relationship?

The recent decision of the Ontario Superior Court in *Tarras v. The Municipal Infrastructure Group Ltd.*, 2022 ONSC 4522 serves to remind employers of the risks involved in agreeing to a

fixed-term employment relationship. The employee agreed to a three-year fixed-term contract which provided a salary of $250,000 per year. The employee was terminated without cause after 13 months. In doing so, the employer relied on a termination clause that turned out to be unenforceable. In keeping with an extensive body of case law, the Court held that the employee was entitled to damages for wrongful dismissal in the amount equal to the remainder of the compensation owed for the 3-year fixed term. Therefore, the employee received a hefty award of $479,166.67, with no requirement to mitigate damages.

Though they are inherently risky, there may be valid reasons to implement a fixed-term provision in an employment contract. For example, it can be a bargaining chip used to recruit a desirable employee. If a fixed term provision is necessary in the circumstances, employers should be sure to protect themselves. For starters, both the for cause and the without cause termination provisions within the fixed-term contract must be compliant with the applicable employment standards legislation. Otherwise, the entire termination provision may be unenforceable and invalid. When done properly, a clear and compliant termination provision can be utilized to minimize an employee's entitlements upon termination.

Does your Employment Contract have an Arbitration Clause?

In *Irwin v. Protiviti*, 2022 ONCA 533, the plaintiff brought a civil action against the employer for constructive dismissal. However, the employment contract governing the relationship contained a clear arbitration clause. In holding that the action should be stayed in favour of arbitration, the Court of Appeal noted that there were no access to justice concerns (as the employee was well-paid and had the benefit of legal advice prior to signing the employment agreement, and that the challenges to the enforceability of the arbitration provision should be determined by an arbitrator and not by the court.

However, it is clear from this decision that the Court of Appeal did not intend to create a free-standing rule that arbitration clauses in employment contracts will always be enforceable. In light of the recent case law on this issue, employers would be well advised to consult the following tips when drafting an arbitration clause in their employment contracts:

a. Ensure that the cost of arbitration at the specified forum is not disproportionate to the amount of the foreseeable claims;

b. Select an arbitration forum that is reasonably accessible to the employees who may seek to bring a claim;

c. Provide each prospective employee with the opportunity to obtain legal advice before signing the employment contract; and

d. Be clear as to what types of disputes the arbitration clause applies to.

Employer takeaways

Given these recent changes, employers should pay extra attention to the termination, restrictive covenant and arbitration clauses in their employment contracts in order to create more certainty, minimize potential damages and protect their proprietary interests.

For specifically tailored advice on your employment contracts, please reach out to a member of Blaneys Labour and Employment Group.

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