

Employment Law

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Topics

1. Tips for Hiring and Firing
2. Restrictive Covenants
3. Checklist - Requirements for Employers in Ontario

TIPS FOR HIRING AND FIRING

Recruiting - Best Practices

1. Notice Short Service on Resume or Long Breaks
2. Call the References
3. Current Practice of Accessing Public Websites
Pros and Cons
4. Go with your gut

Hiring - Best Practices

- Employment Agreements – Always use them
 - Probationary period clause
 - Termination clause
 - Resignation clause
 - Confidentiality & NDA clause
 - Non-solicitation clause
 - Non-competition clause, if appropriate
- Probationary Period – Track it and use it
- Policies – Distribute and Enforce Consistently and Fairly

Termination Clauses are Crucial in Employment Agreements

Three sources of entitlement on termination:

1 – Contract

2- Employment Standards Act

3- Common Law (aka Danger Zone)

No Termination Clause = Common Law Notice

- Relevant factors
 - character of employment;
 - length of service;
 - age; and
 - availability of similar employment, having regard to the experience, training and qualifications of the employee.

(Bardal v. Globe & Mail Ltd. [1960] O.J. No. 149)
- Trend: Courts were focusing on length of service and re-employability factor

Why I say “aka Danger Zone”

Love and Acuity: 2.5 year employee gets 5 months at trial and bumped up to 9 months on appeal (with commentary from Court of Appeal to focus on all *Bardal* factors, not just length of employment)

Starting Point

Selecting the Notice Period

- Must comply with, or provide a greater right or benefit than, the ESA
- Consider position for which hiring and the Bardal factors (age, position, salary, chances of re-employment, etc.)
- Consider the issue of mitigation (*Bowes v. Goss Power Products*) – no duty to mitigate if fixed notice period in the employment agreement

Requirements for your clause to be enforceable

- Must comply with, or provide a greater right or benefit than, the ESA
- Must include benefit continuation language
- Must provide enough notice to ensure future enforceability
- Must actually limit your liability to the ESA

Need Clear Language Limiting Entitlement to ESA if so desired

- Not enough to say “*you will be provided with notice, severance pay (if applicable) and benefit continuation in accordance with the ESA, etc..*”
- Must use a “wrap-up” sentence that provides that the ESA minimums are all the employee is entitled to receive

Example

“The firm may terminate your employment, without cause, by providing you with notice or pay in lieu thereof, severance pay (if applicable), benefit continuation and any other entitlements owing to you pursuant to the Employment Standards Act of Ontario, or any successor legislation, as amended from time to time (the “Act”). If the Act provides for any entitlements not expressly set out herein, you will receive them. At no time will you receive less than your entitlements under the Act. By signing this Agreement, you agree that upon receipt of your entitlements under the Act, no further amounts will be owing to you whether under statute, under contract, in equity or at common law. For the sake of clarity, you will not be entitled to common law notice.”

QUESTIONS, CONCERNS, COMMENTS?

During Employment – Best Practices

- Use promotions to review Employment Agreements
- Progressive Discipline – Paper it
- Good behaviour – Recognize and Reward it
- Consider a Workplace Assessment (culture, moral)

Terminations – Best Practices

Without Cause

- Contract
- ESA
- Common Law

With Cause

- Was is enough?
- Should you use it strategically ?
- No near cause
- ESA test for cause

Resignations – Best Practices

- Consider whether employee should remain in the workplace (difference between admin and engineer)
 - Risk of theft of confidential information
 - Risk of poisoned work environment
 - Risk of damage (e.g., loss of 411, files, work product, emails, or harm to relationship with clients)
- Requirement to pay for waived portion of resignation notice period

QUESTIONS?

RESTRICTIVE COVENANTS

Non-Competition vs. Non-Solicitation

Non-Competition v. Non-Solicitation

- Non-Competition attempts to keep an employee out of the business altogether
- Non-Solicitation attempts to keep an employee from soliciting clients and employees

“The non-competition clause is a more drastic weapon in an employer's arsenal. Its focus is much broader than an attempt to protect the employer's client or customer base; it extends to an attempt to keep the former employee out of the business.”

Lyons v. Multari, 2000, Ont. C.A., [31]

NON-COMPETITION CLAUSES

“Generally speaking, the courts will not enforce a non-competition clause if a non-solicitation clause would adequately protect an employer’s interests.”

Lyons v. Multari, supra, [33]

Employment Agreement v. Sale of a Business

- Different rules apply depending on whether the clause is contained in an employment agreement or given in the context of a sale of a business

“The interpretation of restrictive covenants requires the application of different rules depending on whether the covenants are found in commercial agreements or in contracts of employment”

Payette v Guay (SCC) 2013

Applicable Considerations

- Imbalance of power presumed in employment relationship, not in sale of a business context – especially when each side advised by competent professionals
- Greater freedom to contract in sale of a business context
- When the two concepts are linked, look at reason why covenant was entered into and in which document

Restrictive Covenants

- *prima facie* unenforceable
- contrary to public policy because they interfere with individual liberty and the exercise of trade
- restrictive covenant will only be upheld if it is reasonable with respect to the interests of the parties *and* the interests of the public in discouraging restraints on trade

The Inquiry Into Enforceability

Step 1

- Is the clause clear and unambiguous?
 - If ambiguous, *prima facie* unenforceable
 - You cannot demonstrate reasonableness if the clause is ambiguous (e.g., if it is not clear what is prohibited as to activity, time, geography)

Step 2

- If the clause is unambiguous, the balance of the inquiry consists of:
 - Is there a proprietary interest entitled to protection?
 - Is the geographic scope of the clause reasonable?
 - Is the time period reasonable?
 - Is the proscribed activity reasonable?
 - Consideration of the circumstances existing at the time the covenant was made

Is there a proprietary interest entitled to protection?

- not hard to establish
- includes things like:
 - confidential or secret information relating to processes, merchandising, customers (e.g. names, addresses, tastes and desires)

Is the geographic scope of the clause reasonable?

- This component considers *where it is the employee cannot work*
- Consider: North America vs Canada vs Ontario vs GTA vs Toronto vs 1 km radius from the office in which the employee worked in Toronto
- Ask yourself: what is necessary to protect your business interests (e.g., where does the employee work vs where does the organization carry on business? Does the employee work in a given territory?)
- If the geographic scope is too broad, can be fatal to enforceability

Is the time period reasonable?

- This component looks at the duration of the restriction
- Generally, 2 years is too long in the employment agreement context, however, there is more flexibility in the sale of a business context (e.g., *Payette* - 5 years post-employment was upheld)
- Consider the “why” behind the period of time you select (e.g. renewal of contracts could be key to this component)

Is the proscribed activity reasonable?

- This component requires consideration of the nature of the business vs the nature of the work the employee undertook on behalf of the employer
- Consider: If you are in the business of A, B, C, D and E and the employee to whom the clause applies only ever carried on the business of A, your clause should not prohibit him/her from engaging in B, C, D, or E
- If the proscribed activity is too broad, this could be detrimental to the enforceability of your clause

Consideration of the circumstances existing at the time the covenant was entered into

- Did the parties have legal advice?
- Was the clause negotiated?
- Were the facts that existed at the time the agreement was signed the same as those in play at the time the party seeks enforcement?

QUESTIONS?

NON-SOLICITATION CLAUSES

The Non-Solicitation Clause

- Often, the better weapon in your arsenal
- These are enforced if properly drafted
- You need this clause for protection because:
 - If no clause, departing employees can technically solicit clients/customers* as long as they do so without using confidential information

*unless the employee was a fiduciary

Drafting is key to enforceability

- If clause, is it enforceable?
 - “*You cannot solicit our clients*” will not always work
- Consider the nature of the business and with whom the employee actually has contact– the Courts generally will not enforce a non-solicitation clause unless the employee knows who he/she cannot contact
- Consider appropriate time period. Max 2 years but again depends on the business

QUESTIONS?

CHECKLIST OF LEGAL REQUIREMENTS

POLICIES YOUR FIRM MUST HAVE IN PLACE

Policies Your Firm Needs

1. Harassment Prevention Policy & Training
2. Violence Prevention Policy & Training
3. Health and Safety Policy & Training
4. Accessibility Policy & Training
5. Integrated Accessibility Policy & Training

Posters Your Firm Must Have In Workplace

- Copy OHSA
- Poster:
“Health & Safety at Work: Prevention Starts Here”
- Poster:
“Employment Standard in Ontario – What You Need to Know”, version 6.0 posted in workplace and copy to employees
- Poster:
“In Case of Injury – 1234”

Other Requirements

- Joint Health & Safety Committee (if your firm employs 20 or more employees must be formed and trained)
- Health & Safety Representation (if your firm employs more than 5 but less than 20 employees must be selected and trained)

QUESTIONS?

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