*Employment Law – Agency*

*Defining the Employer Relationship*

Determining employer-employee relations is an important part of business, not only because it determines the obligations and duties of both the employer and the employee but also because the existence of such relationship vests an employee with certain rights.

An employee is any person in service of another under any contract of hire, express or implied, oral or written, where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed.

Under common law rules, employer-employee relations exist when an employer can control the services performed by an employee – what will be done and how it will be done. Further, in a case decided by the Supreme Court, even if there is no direct control over the employee, employer-employee relationship will be found under the following circumstances:

* The employer retains pervasive control over the business operation as a whole (Dependent vs. Independent Contractor)
* The employee’s duties are an integral part of the operation (Independence)
* Detailed control is unnecessary because of the nature of the work

*Who is an employee?:*

There are key tests to determine is a worker is an employee or a self-employed individual.

Control Test - Control is the ability, authority, or right of a payer to exercise control over a worker concerning the manner in which the work is done and what work will be done.

Tools and equipment Test - Consider if the worker owns and provides tools and equipment to accomplish the work. Contractual control of, and responsibility for, an asset in a rental or lease situation is also considered under this factor.

Risk Test – The potential risk of loss – employees have no risk of loss.

*The Employment Contract*

Written employment contracts are now standard practice in business. Typically an employment contract outlines an employer’s and an employee’s rights, duties and obligations. Such contracts are becoming more complex as employers seek to protect themselves from potential damages should the relationship go sour.

In addition to clearly describing what the employee is going to do for you (the job) and what you are going to do for the employee (the salary), the contract can address many other aspects of the employment relationship, such as:

* duration of the job (one year, two years, or indefinitely)
* information about the employee's responsibilities
* what benefits (such as health insurance, vacation leave, disability leave, and so on) the employee will receive
* grounds for termination
* limitations on the employee's ability to compete with your business once the employee leaves
* protection of your trade secrets and client lists
* your ownership of the employee's work product (for example, if the employee writes books or invents gadgets for you), or
* a method for resolving any disputes that arise about the agreement.

# *Advantages of a Written Employment Contract*

* Reduces the risk of misunderstandings between the employer and employee
* Addresses contentious issues up front so that they do not become a problem later into the relationship
* Reduces uncertainty created by implied terms and informal arrangements

# *Typical problems to avoid from written Employment Contracts*

Lack of Consideration – in order for a contact to stand, it must demonstrate that it has three essential ingredients: An offer made by one party, an acceptance of that offer made by the other party, and consideration given by both parties. Consideration is anything of value promised to another when making a contract. Each offer/acceptance requires consideration, and past consideration is no consideration. It is essential that an employment contract must be signed before work begins or it becomes unenforceable.

Inequality of bargaining power of employee and employer – If the court has it demonstrated that there was an inequality in the bargaining position of the parties to the employment contract the contract can be deemed null and void. To ensure this does not happen each party should discuss and explain the contract with each other and have adequate time to review the terms and conditions of the employment contract before it is signed (possibly with a lawyer).

Contract obsolesce – If since the contract was signed, the work situation has changed, yet the contract has not been updated, it can be deemed invalid. Contracts should be updated regularly and after a change in the job.

No meeting minimum employment standards set out in statute – Contracts cannot contract below the minimum standards set out in the laws of the jurisdiction in which it operates. Any contract provision deemed to offend the statute will be thrown out.

Use of ambiguous/confusing contract language – In the event of ambiguous language, the courts will interpret it against the party that drafted the contract. Be sure to use clear language, give adequate time to consider the contract, sign a fairly negotiated contract, be sure there is consideration and customize the contract to meet your needs.

# *Common contractual clauses found in written Employment Contracts*

* Job Description – Sets job duties and clarifies expectations
* Remuneration/Benefits – must exceed statutory minimums
* Employment Term – must state the term if there is one
* Termination – states notice period
* Probationary Period – states the period of time from the beginning of the contract that the employer can dismiss without cause.
* Work Relocation – allows employer to relocate the employee if necessary
* Restrictive Covenants – main types of RC’s are non-disclosure clauses, non-solicitation clauses and non-competition clauses
* Ownership of intellectual Property – spells out who owns any invention, payment of copyright of material created by the employee
* Jurisdiction – defines the appropriate labour laws that apply
* Corporate Policies – binds employee to the policies of the corporation
* Entire Agreement clause – specifies the binding agreement between the parties and ensures any side deals are not considered to be part of the agreement.
* Service – Defines the total prior service that the employee will be credited for.
* Independent Legal Advice – Allows for legal assessment of contract
* Severability Clause – if the court rules part of the contract void the remaining parts are still deemed to be in force
* Severance Package (Golden Parachute) – defines the payment that goes to the employee in the event the contract is terminated by the employer.

*Termination of the Employment Contract*

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| * *Provincial:* [Quick guide to NL Employment Standards PDF](http://www.nlimmigration.ca/media/2839/employmentstandards.pdf) * Provincial: [*Nl Employment Standards*](http://www.gov.nl.ca/lra/faq/labourstandards.html) *FAQ* * Provincial: *[Nl Employment Standards Legislation](http://www.gov.nl.ca/lra/agency/legislation.html)* |

*Termination of the Employment Contract*

Any employeer or any employee has the right to end an employment contract provided that certain conditions are met. In this section we look at these conditions.

**Notice of Termination**

Notice of termination has be in writing if an employee has been employed for greater than 3 months. During the first 3 months of employment, no notice of termination is required to be given by either party. As time working builds, notice time builds as well

* For employment from 3 months up to 2 years, 1 week's written notice is required to be given to either party.
* After 2 years but less than 5 years employment, 2 weeks' notice must be given by either party.
* After 5 years but less than 10 years employment, 3 weeks' notice must be given by either party.
* After 10 years but less than 15 years employment, 4 weeks' notice must be given by either party.
* After 15 years employment, 6 weeks' notice must be given by either party.

*Fixed term Contracts*

In most provinces, the employment/labour standards permit employers to not to give notice of termination for fixed term contracts where the employee has been hired for a specific term or task of 12 months or less, unless the employer is ending the contract before its fixed term.

The exemption from providing notice with a fixed term contract is contingent upon the employment ending at the exact date specified in the contract.

Notice will be required even when there is a fixed term contract if:

* The employee works past the date specified in the fixed term contract period (some legislation allows an employee to work for a short time past the termination date before notice is required)
* The fixed term contract is for longer than 12 months
* The employee is terminated before the date stated in the fixed term contract (in this case the employer might have to pay out the balance of the contract)
* The employee is employed on a succession of fixed term contracts

*Dismissal with Cause*

Generally, an employer has the right to dismiss an employee for just cause. Just cause can arise from a broad range of circumstances, from criminal conduct to violations of employer policy.

Notice of Termination is not required in the following circumstances:

Most organizations have a probationary period at the beginning of the employment relationship. However, no province or territory has specific employment standards for 'probationary' employees. All jurisdictions do allow for an employer to terminate the employment of an employee at the beginning of his/her employment without notice or payment in lieu of notice, unless the reasons for termination are because of discrimination as prohibited by human rights codes/acts.

There are other circumstances where an employer has legitimate cause to terminate an employee, if the employee:

* wilfully refused to obey a lawful instruction of the employer;
* has committed misconduct;
* has been so neglectful of duty that the interest of the employer is adversely affected;
* breached a material condition of the contract of service that in the opinion of the director or the Labour Relations Board hearing a complaint, warrants summary dismissal.
* Where the employer pays the equivalent normal wages, including overtime earnings, in lieu of notice (one to six weeks pay, depending on the employees length of employment).
* For a lay-off of one week or less.
* The employee is employed for a firm non-renewable term or for a specific task where the term or task does not exceed 12 months and termination doesn't occur before the term or task is completed.
* Where the employer has to terminate as a result of an unforseen economic or climatic conditions beyond the foreseeable control of the employer, or as a result of a major breakdown or destruction of plant machinery or equipment.
* Where a person has been employed for less than 3 months.

Within 1 week from the date of termination, an employee must be paid:

* all wages owing;
* all vacation pay owing; and
* pay in lieu of notice, if applicable.

Termination with cause may be very difficult to prove in courts and the onus is on the employer to show that the employee's actions were very serious or show a pattern of behaviour.

For long term employees the organization will also have to show that the incompetence or misconduct has not been condoned by a lack of action on the part of the employer over a long period of time

If termination with cause is the result of the progressive discipline process, thorough documentation of the process which shows that progressive discipline was fairly and consistently applied will be needed

If termination with cause is the result of a serious event, the onus will be on the employer to show that a fair investigation of the event took place prior to the termination and that the event was indeed serious enough to warrant dismissal from employment

If the employee had problems - such as alcohol or drug abuse - the employer attempted to accommodate the employee while he or she sought treatment, to no avail

*Dismissal without Cause*

In most circumstances, an employer must provide written notice of the intent to terminate employment and the termination date. If an employer wants the termination to take effect immediately, most employment/labour standards allow employers the option of payment in lieu of a working notice period (a written notice of termination and the date upon which employee ends is still required).

In a termination without cause, there is no legal obligation for the employer to give a reason. However, when being terminated without cause, most employees want to know why. If you provide a reason, it is important for an employer to be fair and honest about the reason for such a termination. Under no circumstances should an employer allege that it has cause for termination when in fact it does not.

Constructive dismissal

Constructive dismissal is when there is a fundamental change in the employment relationship that amounts to a dismissal. A claim of constructive dismissal may occur when the employer, without the consent of the employee:

* Significantly reduces an employee's salary
* Significantly changes an employee's benefits
* Makes a significant change to an employee's work location
* Makes a significant change to the employee's hours of work
* Makes a significant change to the employee's authority or responsibilities

An employee must indicate to the employer that he/she is not accepting the change in order to later attempt to assert that he or she has been constructively dismissed.

An employee may make a claim for constructive dismissal to the courts or, in some jurisdictions, to the employment standards authority. In deciding the merits of the case the courts will determine if the change in the employment relationship was so fundamental that it amounted to a termination of employment and, if so, what compensation is appropriate.

Wrongful dismissal

Wrongful dismissal is a legal claim made before the courts about the cause (in the legal sense) or length of notice/payment in lieu of notice given to the employee when s/he was terminated from employment.

If the claim of wrongful dismissal is justified, then the courts will look at the contract of employment, whether it is in writing or not, and common law or civil law in Quebec, to determine 'reasonable notice' and the appropriate financial compensation in lieu of notice. Under common law 'reasonable notice' has been determined by the courts by looking at things such as: age, profession, experience, length of service, nature of the employment and factors related to the ability of the employee to find similar employment. Common law notice periods and payment in lieu as decided by the courts are often significantly more than the statutory requirements, especially for people in senior management positions.

In cases of wrongful dismissal the courts will also look at the way in which the employee was treated before, during and after termination of employment. If the employer did not act in good faith , the amount of damages awarded to the employee may be even greater (called "Wallace" damages, as explained above)