

Legal Update

When the costs of termination in a group practice become a group problem:

advantages of written employment contracts, and partnerships or cost-sharing agreements

by Thomas Gorsky, LLB

Group practices — two or more professionals practising out of a shared space — is a common arrangement among physicians. One of the advantages is the sharing of resources, including human resources. However, when employees are shared, liability associated with employing and dismissing those staff members is also shared, sometimes for the better, and sometimes for the worse.

When a group practice decides to dismiss an employee, the party or parties responsible for the liability associated with that dismissal may become an issue. If a single physician manages the office staff and/or payroll, but the other physicians reimburse their portion of the expense periodically, is the former physician singularly responsible for the (sometimes significant) termination expenses? Are all the office's physicians equally liable? Does an associate who recently began practising in the space share liability for the termination of a long-service receptionist? The answer is, it depends.¹

The (Potential) Costs Of Ending Employment

Termination of employment is either *with* or *without* notice. A dismissal without notice is permitted if the employer has "just cause," meaning the employee's conduct is so bad it has effectively destroyed the employment relationship. Absent just cause, an employee is entitled to notice of termination, which can

take the form of working notice, pay in *lieu* of notice, or a combination of both.

If there is an employment contract which stipulates what is to be provided upon termination, liability will likely be minimal, so long as the contractual notice period is at least equivalent to

accordance with the common law — judge-made law developed by courts. The amount of reasonable notice depends on a variety of factors, principally including the employee's age, length of service and position, and the availability of comparable employ-

To obtain maximum protection, an employment contract should be prepared or reviewed by employment counsel, and reviewed periodically.

what is required under the Ontario Employment Standards Act (ESA). For practices with a small number of employees, the statutory notice period will range between one to eight weeks, depending on the length of employment.

If the employment relationship is not governed by a valid employment agreement, the employee is entitled to "reasonable notice" determined in

accordance with the common law — judge-made law developed by courts. The amount of reasonable notice depends on a variety of factors, principally including the employee's age, length of service and position, and the availability of comparable employ-

Identifying The "True" Employer — Why It Matters

The relationship among multiple physicians sharing an office often varies from location to location. It can also vary

over time. One clinic might consist of a few physicians in a legal partnership. Another might consist of multiple physicians, each individually incorporated, but in a cost-sharing arrangement. When an employee is hired (or fired), the identity of the “true” employer can become an issue.

Absent a valid written agreement stating otherwise, each physician in a partnership, or each party to the cost-sharing arrangement, could be deemed to be an “employer” in respect of a shared employee. This includes a new physician who, upon joining a practice, may “inherit” the liability associated with an employee already employed.

Significantly, where a physician is using the services of a shared employee and/or is contributing to the shared employee’s salary, despite not signing any paycheques, the physician risks being held “jointly and severally” liable for 100% of the employment costs associated with that employee. In other words, *each* physician is responsible for 100% of the liability (though he or she may call upon the other group members to contribute their fair share).

Fortunately, the uncertainty of joint and several liability can be ameliorated through a written employment contract with staff, and a written business agreement among physicians.

Written Employment Contracts, And Partnership Or Cost-Sharing Agreements: An Employer’s Best Medicine

- **Partnership Or Cost-Sharing Agreements**

While a group practice can be organized in many different ways, two of the more common structures are “partnership” and “cost-sharing.” A written partnership or cost-sharing agreement can assist the parties by requiring them to proactively turn their minds to human resources and other types of liability, and apportion liability as they wish.

- **Employment Contracts**

A well-drafted employment contract can reduce the risk an employer will be exposed to liability for a lengthy notice period; in many cases limiting

termination entitlement to the minimum amounts established by the ESA (weeks rather than months). A written employment contract will also reduce uncertainty for an employer, as the amount of notice is predetermined.

The optimal time for an employer to introduce an employment contract is at the time of hire, prior to the employee commencing work. Historically, courts have been loath to bless an employment contract seen to be imposed on an employee after work has commenced. However, all is not lost if an employment contract is not entered into prior to the employee starting work. There are opportunities during the employment relationship when an employment contract can be introduced — in exchange for fresh “consideration” (e.g., salary increase, promotion, improved benefit plan, etc.). The timing of the introduction of an employment contract, and the nature and amount of the consideration, are critical. Accordingly, the prudent approach is to consult with experienced employment counsel before taking such a step.

It is also important to appreciate

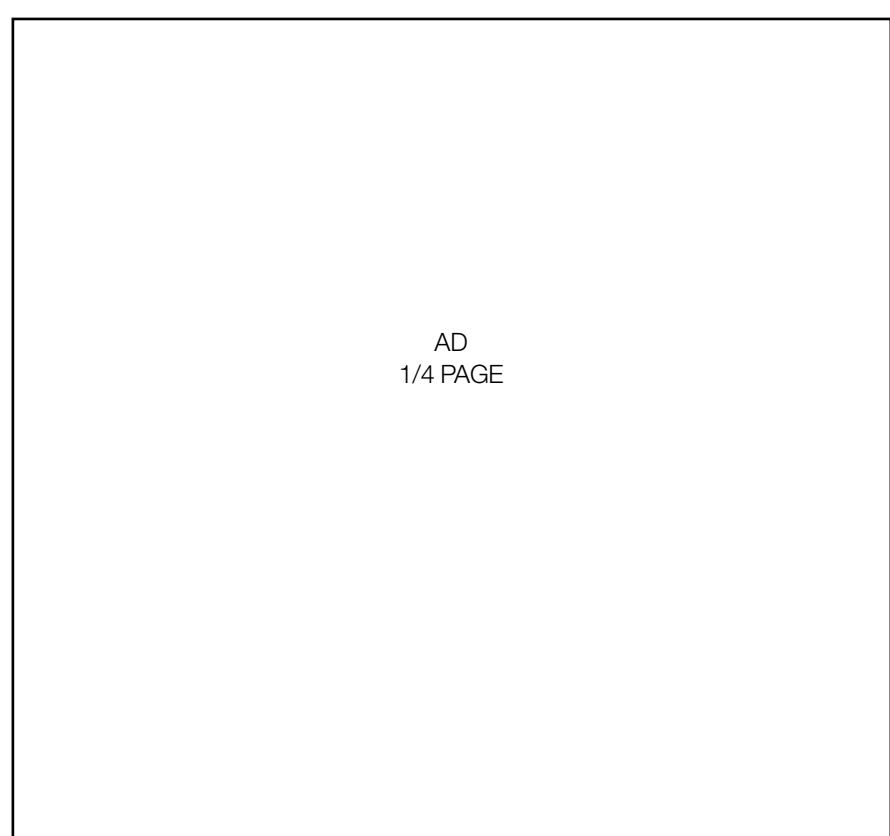
that any ambiguity in an employment contract, real or perceived, practical or legal, will be interpreted strictly, against the employer in favour of the employee, in recognition of the assumed imbalance of power between the parties. To obtain maximum protection, an employment contract should be prepared or reviewed by experienced employment counsel, and reviewed periodically, to ensure the language used continues to be enforceable. ■

Reference

1. While this article is focused on the costs associated with dismissing an employee, there are other risks associated with a shared employee that should not be overlooked, such as costs associated with a workplace harassment or a human rights claim.

The information contained in this article is provided for general information purposes only and does not constitute legal or other professional advice.

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