



Legal Corner

By
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The employment contract

In this age of class action lawsuits and contingency fees employers are exposed to greater potential liability than ever before. One of the most important tools an employer can use to limit liability is the employment contract. An employment contract seeks to ensure that the employer and employee understand their mutual rights and responsibilities and as such allows the employer to quantify its potential liability in the event the employment agreement is brought to an end.

Employment Contracts in Construction

Contrary to popular thinking, employment contracts do have a place in the construction industry. Employment contracts can be used for all non-unionized employees, including site supervisors, construction managers, and more. The critical piece is to ensure the contract states clearly, fairly and legally, what the parties have agreed to do in the event the employment is terminated.

What is at Stake?

In the absence of a well written employment contract that sets out the parties' agreement in the event of termination, the law requires an employer to give to an employee "reasonable notice" of termination. This can be either working notice or salary in lieu of working notice (including any bonus amounts). Courts measure "reasonable notice" based upon a number of factors including the employee's age, position, salary, whether they were lured away from other secure employment, and generally how quickly they will find comparable employment. Reasonable notice periods can range from one or two weeks for every year of employment, to more than a month for every year—and can be increased even more if the court finds an employee was terminated in bad faith.

When and How?

The best time to put an employment contract into place is at the time of hiring before the employee begins work. At that point, the employee agrees, as a condition of his or her employment, that the employee will be governed by the terms and conditions contained in the contract. Those terms and conditions can set out things such as the period of employment (if it is for a fixed period of time), wage or salary, bonus entitlement, vacation time and conditions, confidentiality, non-competition, etc. It can (and most definitely should) also set out what is due to the employee should the employee be terminated.

As long as the terms of the contract are properly drafted (i.e. they comply with the law) and implemented at this stage, the employer should be able to rely on them in the event of termination. If the employee's job changes, or he or she is promoted in the future, a new contract should be drafted to take into account any new terms and conditions of employment.

What About Existing Employees?

The hiring stage is not the only point at which an employer can put an employment contract into place. Contracts can still be put into place after an employee has begun work.

How an employer goes about putting the contract in place is crucial. An employer can not simply present a contract to an employee and require the employee to sign it. Instead, the employer must give the employee adequate 'consideration' (meaning something of value, usually a bonus), or provide the same amount of notice that it would give if it were terminating the employee. The court looks at it like this: if an employer changes a fundamental term or condition of employment, this is no different than terminating the employee's employment. As such, the employee is entitled to "reasonable notice".

In terms of mechanics, the employer should provide to the employee notice that on or before a certain date, the employee is required to execute a new employment contract, and that if the employee fails to do so, employment will be terminated on that date.

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Again, the amount of notice depends on the same factors courts use to assess 'reasonable' notice of termination, and as such will vary from employee to employee. The employer should give the employee a copy of the new contract when it gives the employee notice.

If the employee executes the contract on or before the specified date, the working relationship continues under the new terms and conditions contained in the contract. If the employee refuses to execute the new contract, then when the employee is terminated on the deadline date, adequate 'reasonable' notice of termination has already been given. At that point the only issue that may remain outstanding is whether the employee is owed severance under the Employment Standards Act (which is separate from 'reasonable' notice as defined by the courts).

For assistance in determining how to most effectively introduce or amend employment contracts in your workplace, contact any member of the legal team at Sherrard Kuzz LLP.

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