Fast-changing law means employers should review their employment contracts now

Termination clauses are especially ripe for review

BY Julius Melnitzer / 07 Sep 2022 / Share

It's time for Ontario employers to review their employment contracts comprehensively – and the sooner, the better.

"If an employment contract, particularly one based on a standard form, has not been updated in the last six months to reflect recent changes in the law, there is a very good chance that some of its key terms are no longer enforceable in Ontario," says Talia Bregman, an employment law partner in Bennet Jones LLP's Toronto office.

Especially ripe for review are termination clauses.

"Historically, employers have focused on termination without cause, but recent case law shows that any provisions that deal with entitlement on termination, whether it relates to dismissal for cause or without cause, resignation or probationary clauses, are at risk," Bregman says.

The Ontario Court of Appeal's 2020 decision in *Waksdale v. Swegon North America Inc* is key here.

"The court concluded that an otherwise enforceable termination 'without cause' provision in an employee's contract was unenforceable because a separate 'with cause' provision was unenforceable, even though the employee was not terminated 'with cause' and the employee was offered more than his employment standards entitlement," Bregman says. "The result was that the employee was entitled to the longer common law notice period determined by the court."

Courts have also invalidated without cause provisions because they attempted to exclude or expressly failed to address

Most recently, the Ontario Superior court ruled in *Henderson v. Slavkin* that unenforceable confidentiality and conflict-of-interest clauses that violated employment standards legislation invalidated a termination clause that itself complied.

"Waksdale, which is now entrenched by cases that adopted it, made a mess of termination clauses for employers," says George Vassos, a partner in the Toronto office of labour and employment law boutique Littler Mendelson P.C. "The decision requires courts to examine all the clauses involved in bringing a relationship to an end, and if one portion of one clause is unenforceable, it taints them all."

Non-competition covenants are also under the microscope in Ontario since the government expanded restrictions on their use and breadth, subject to limited exceptions for "executives" as defined in Ontario's employment standards legislation and for circumstances that involve the sale of a business.

Otherwise, since October 25, 2021, it has been illegal to include a non-competition covenant in an employment agreement – a prohibition that, Bregman points out, will significantly impact technology companies that regularly use such clauses with their key development employees.

Nor is the status of non-competition agreements pre-dating the legislation clear.

"While non-competition agreements entered before October 25, 2021, are 'grandfathered,' it's not clear whether they can be amended," Bregman says.

However that may be, Bregman recommends that in light of the ban on non-competition covenants, Ontario employers should pay extra attention to non-solicitation and confidentiality covenants by way of protecting their confidential information and proprietary interests.

But care is necessary for drafting these covenants.

“Employers need to be sure that what they’re calling a non-solicitation clause isn’t drafted in a way that makes it a non-compete in substance,” says Shana French, a partner at Toronto workplace law boutique Sherrard Kuzz LLP.

Bonus language is also worth a look.

“If employers want to avoid liability for bonus clauses during the notice period, our courts have said that very clear language is required to do so,” Bregman says.

And finally, while arbitration clauses are uncommon in Ontario employment contracts, employers should be aware of the Supreme Court of Canada’s 2020 ruling in *Uber Technologies Inc. v. Heller*, where the court outlined the features necessary to

1. The seat of the arbitration should be in the jurisdiction where the employee works;
2. The employer should pay all, or a larger portion, of the fees of the arbitration; and
3. The arbitration clause should permit the employee to access statutory dispute resolution mechanisms.

Having reviewed their agreements adequately, however, employers still need to keep their eyes open, best done by conducting periodic reviews every six months or at least once yearly.

“Governments love to tinker with employment issues because they’re so visible,” Vassos says.