Putting last things first: contracts &letters of agreement

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In the euphoria of getting that dream job, let's stop for just a few minutes and think about a few years from now when the next dream job will surface. Let's look at the end while we are still at the beginning. It is crucial that you take time to look at your employment contract and/or the letter of agreement before signing up with your new employer.

What is an employment contract?

The agreement of an employee to supply labour in return for the agreement of an employer to pay a wage: an employment contract exists to inject a substantial degree of certainty and clarity into the legal relationship between employer and employee. The various provisions of the contract can be general in nature, or can be tailored to fit the specific nature of the particular relationship. For example, the contract of a manager or support staff person may have standard wording outlining the organization's offer as regards compensation, benefits and vacation. At the executive director, senior vice-president or director level, however, a more formal, detailed contract would likely be in order.

In most employment relationships, the employee contract takes the form of a simple letter, a more formal document generally appearing too intimidating. Nonetheless, whatever their format, they are legally binding. In almost all cases, the courts have held that the employment relationship is contractual, whether oral or written, expressed or implied.

Why bother having a contractual arrangement?

Almost all organizations include a letter of agreement and now more than ever is important. There has recently been increased employee movement in the nonprofit sector, a field where at one time employees tended to stay for long periods of time in one organization.

Current figures indicate that length of employment in the nonprofit sector is now averaging 18 to 24 months.

All organizations are demanding more of executive employees – more funds raised, more/better services, improved communication. In many organizations there is a revolving door for employees due to poor management practices, lack of planning, budget cutbacks and elimination of departments, and greater emphasis on the bottom line.

Potential employees should do whatever they can to protect their income in the face of this instability and insecurity. By spelling out with certainty the benefits, incentives and severance to which you are entitled should your employer terminate you without cause, employment contracts can offer protections beyond those otherwise available under standard employment legislation.

An employment contract takes the guesswork out of the employer/employee relationship. Should a decision to terminate employment be made, it will help ensure that all parties understand the full ramifications of such a move.

Negotiating the contract

Employers often feel they have the right to dictate the terms of the contract, and some lawyers agree that employees have very little bargaining power. In fact, in many hiring situations, employees will often feel somewhat uncomfortable discussing terms of termination and severance. Salary, benefits and vacations are much easier subjects to broach. Nonetheless, however uncomfortable the discussion may be, this is unquestionably the ideal time to discuss exit terms – when goodwill and optimism are at their highest. This is especially true for the new employee, carefully selected and highly anticipated by the organization.

Contracts must be entered into before the employee actually commences employment. The courts have determined that when a confirmation letter or letter of engagement is issued to a new employee, the contract between employer and employee is made at the time when the employee accepts the terms of the letter.

Many possible contract provisions

The essential ingredients of a contract are the offer, acceptance and consideration. Although it is not essential that both parties seek legal advice, by doing so, the risk is reduced that a court will later overturn the agreement because a particular provision is vague or unenforceable for some unforeseen reason. Although there are many provisions that may appear in a contract, some of the more common are listed below:

1. Employment

- position and title
- duties – specify
- term of agreement

2. Exclusive service

- employee to devote time and expertise exclusively to the organization
- employed on a full-time basis

3. Confidential information

- confidential to employer: list confidential subjects (donor lists, mailing list, organizations strategic plans)

4. Remuneration and benefits

- salary
- when payable
- review dates
- probationary period
- bonus compensation
  (clear formula, what happens at termination)
- signing bonus

5. Benefits

- health, major medical, disability (what happens during periods of notice or long-term disability, probationary term)
- car or car allowance
- vacations
- club memberships

6. Termination of employment

- written notice
- severance package

7. Notice period

- Pay in lieu of notice (grows with employee tenure)

8. Non-competition

- restriction against being subsequently employed by a competitor of the employer (rare in nonprofit contracts)

9. Change of control

- golden parachute provision dealing with change of control of organization (will accrued length of service and seniority be transferred to successor employer)
- assignment of rights

10. Modification of agreement

- must be in writing
- must be signed by both employee and employer

11. Notices

- must be delivered in writing
- must be registered mail
- must be delivered personally

12. Governing law

- in accordance with law of province or territory in which the employment takes place

Perhaps the most overlooked provisions and those that have become increasingly litigious, are those involving termination, notice and severance. Many employees are dismissed without cause, with employers invoking "you don't fit" when they are unhappy with performance or wish to get rid of a troublesome employee.

Justified cause not necessary

Employees continue to believe that in order to be terminated, their employer must have some justified cause, such as misconduct or theft, but this is not the case. Employers do not have to have a reason to terminate employment, as long as they live up to their legal and contractual obligations to provide adequate notice of termination or the compensation required by provincial statute or general common law. For example, pursuant to the Ontario Employment Standards Act, a two-year employee can be "fired" and given two weeks salary in lieu of notice, if there are no specific provisions protecting the individual in his or her contract (or if no contract exists.) Under common law, in fact, employees are generally entitled to much more than the Employment Standards Act provides for, but if there has been just cause, you can be terminated without notice and receive no compensation.

Termination clauses – especially those concerning severance packages – should always be closely examined. Employers are only obligated to lay out severance pay equal to the assigned period of notice required by the employment standards legislation. A more generous severance formula can be negotiated based on age, level of position, and length of service. Provincial statutes outline the minimum standards for severance payout.

Review – and renew – your contract regularly

You have been with your organization for eight years, your responsibilities have grown and there have been major changes in the organization. The new board chair has dictated personnel changes are to be made and you find yourself out of a job with a severance package that appears to be grossly out of date. "Unfair" you cry! But fairness, you will find, is immaterial. Unless the fundamental relationship between boss and employee has changed, the contract remains supreme.

Employment contracts should be reviewed regularly, and if necessary, updated to take into account new consideration. However, when a new contract is entered into, there must be "fresh consideration." The principle of "consideration" means that there must be a new item or new benefit at the time of signing. If the new contract is signed after the benefit has already been exchanged, the employee runs the risk of having the contract overturned later, because it was without consideration. The benefit must come into existence, or take effect at the same time that the contract is signed.

Employment contracts are becoming increasingly important. When they are properly drafted, comply with legislative requirements, and have the benefit of independent legal advice for both parties, they can clearly outline for both the employer and employee negotiated terms that have been dealt with when goodwill is at its highest. The end may not ever come, but just the same, look at it at the beginning.

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