

Seek expert advice to keep up with employment law

Employment law is constantly evolving. As an employer, you need expert guidance to help you keep abreast. Barbara Nicholls, head of the employment and labour law group at Low Murchison Radnoff, can help.

"Changes in society are often reflected in legislation," Nicholls explains. "These changes can also influence interpretations by the courts when they're considering employment contracts or legislation. It's rather circular; society changes, legislation changes and the interpretation of the courts evolves."

Nicholls cites the example of non-compete clauses. These clauses were once quite common in employment contracts, says Nicholls. More recently, they have "fallen out of favour" as courts have viewed them as creating a barrier to terminated employees searching for work.

Basic right

"It's a basic right to be able to look for work and non-compete clauses may prohibit individuals from exercising that right. As a consequence, the courts will read a non-compete clause very narrowly and, if there is any ambiguity, courts may find the non-compete clause to be unenforceable."

That being the case, Nicholls says employers are increasingly turning instead to non-solicitation clauses.

"This can achieve almost the same goal, but still allows an employee to find work in the same area. A non-solicitation clause must be drafted properly so it meets the requirements that the courts have determined to be necessary. It should not be ambiguous, nor extend for too great a length of time. Also, the geographic area it covers has to be reasonable and related to the business that the employer already has and is attempting to protect."

Annual review

Ensuring you have employment contracts for all non-union workers and reviewing and updating them regularly should be part of an employer's routine.



Barbara Nicholls, Head of Low Murchison Radnoff's Employment and Labour Law Group

"A non-solicitation clause must be drafted properly so it meets the requirements that the courts have determined to be necessary."

"A yearly review would allow employers to update their employment contracts to reflect changes in legislation and case law," Nicholls says. "It also allows an employer to take into account any workplace changes that an employee has undergone."

Such changes, including promotions or raises, may negate the original employment contract. Nicholls advises that, by having the employee confirm the existing contract, or sign a new one reflecting the changes, "the employer will be protected."

Defining 'just cause'

The necessary elements to create enforceable termination clauses in employment contracts have also evolved.

Employment contracts should still include a provision for termination for "just

cause" but it is now advisable to include a definition of "just cause." That definition should only include references to willful misconduct, says Nicholls.

An employment contract should also deal with termination without cause.

Nicholls states that: "while an employee who is terminated without cause is entitled to notice, a properly worded termination clause can limit the length of that notice."

Although, an employer can't contract out the notice provisions of the Employment Standards Act, it is possible to limit common law notice entitlement in an employment contract. The difference can be considerable.

The parties to an employment contract can establish at the outset what they agree to be reasonable notice. As long as the

notice meets the minimum legislative requirements, then the parties' agreement can be included in an employment contract. Employment contracts, she adds, cannot be used to circumvent legislation.

Nicholls concludes with a warning. While it is prudent for an employer to have employment contracts in place, a contract will not be enforceable if an employee is not given sufficient time to review and consider the document. Finally, the employee must sign the employment contract prior to commencing work.

bnicholls@lmrlawyers.com
lmrlawyers.com

LMR
LAWYERS / AVOCATS
lmrlawyers.com 613-236-9442