



Proudly Presents...

EMPLOYMENT CONTRACT ESSENTIALS

Myths, Risks & Solutions

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The Non-legal Framework

The Marriage Analogy

The Legal Framework

MYTH

Where your business is incorporated and/or where its head office is located is what determines applicable employment laws.

The Legal Framework

Some federal laws apply to all employees in Canada, regardless of where they work:

- immigration (work permits)
- federal income tax
- (un)employment insurance
- Canada Pension Plan (in Quebec, Quebec Pension Plan)

The Legal Framework

When it comes to core laws governing the actual employment relationship:

- federally regulated industries (e.g., aviation, banking, international/cross-provincial trucking): the province of work is largely irrelevant
- otherwise: each employment relationship is governed by the laws of the province where the employee primarily works

The Legal Framework

Key factors determining whose law applies:

- Is your industry federally regulated or not?
- Private sector or public sector or MUSH?
- Union or no union?
- Where does the employee actually work?

The Legal Framework

Our focus: Wise Employer's private sector, provincially regulated, non-unionized workplace.

As a general rule, Wise Employer's employment relationships are governed by the law of the province where the particular employee primarily works.

The Courtship

Human Rights legislation:

- governs *what* you can ask, *when*, and *how*
- provincial differences in grounds/scope of protection matter
- applies to *every stage* of recruitment - your ads, applications, elimination/screening processes, interviews and final decisions

The Courtship

Privacy legislation, to varying degrees, governs:

- *what* information you can collect, use, disclose and keep, and *when*
- whether you need permission
- also applies to *every stage* of recruitment

The Courtship

Know your limits.

Establish protocols.

Train your recruiters.

Avoid premature/unsafe information collection.

The Courtship

General laws require you to:

- take reasonable care to ensure accuracy
- avoid the “nudge, nudge, wink, wink”
- act in good faith (don’t lead candidates down the garden path)

The Courtship

Don't make promises you cannot keep.

Don't say it,
if you aren't willing to confirm it in writing.

The Proposal and the Pre-nup

Beware the Invisible Contract.

The Proposal and the Pre-nup

An employment contract *automatically* comes into existence at the point that the candidate is *offered*, and *accepts*, a job.

In *every* employment contract, the law automatically implies (“reads in”) certain “invisible” terms, and 99% of them favour employees.

The Proposal and the Pre-nup

Wise Employer must use *enforceable* contracts to ensure terms are clearly understood and the business is properly protected.

So what makes a contract enforceable?

The Proposal and the Pre-nup

Bones	Mandatory statutory terms <ul style="list-style-type: none">- labour/employment standards ("Employment Standards") and more
Flesh	Judge- made (Civil Code in Quebec, common law elsewhere) terms, tests and rules <ul style="list-style-type: none">- the legal baseline- some can be overruled by mutual written agreement- some rules and tests are <i>unavoidable</i>
Clothing	External contractual terms <ul style="list-style-type: none">- offer letters, formal contracts (<i>formality is irrelevant</i>)- courts often treat handbooks, policies, guidelines/practices as part of the contract especially <i>if it benefits the employee</i>

The Proposal and the Pre-nup

MYTH

Employment Standards sets the legal default position, if there is nothing in writing to the contrary.

The Proposal and the Pre-nup

Canadian employment contracts typically consist of some combination of:

- written terms
- “invisible” terms implied either by statute or common law (or in Quebec, the *Civil Code*)

The Proposal and the Pre-nup

To be enforceable, employment contracts must be:

1. well-written (good content)
2. properly signed up (good process)
3. and even then.....they must be preserved
over time

The Proposal and the Pre-nup

The main enemies of enforceable contracts are:

1. crap
2. gap (bad process)
3. lapse (invalidation)

The Proposal and the Pre-nup

Benefit of the doubt?

Always goes to the employee.

Always. Always. Always.

The Proposal and the Pre-nup

Well-written means: you say what you mean and mean what you say.

Because otherwise the law implies “invisible” terms.

The Proposal and the Pre-nup

Employment-related documents must be:

- understandable
- capable of certain application
- written (and applied) to be consistent with Employment Standards and Human Rights
- clear and explicit about the consequences of different kinds of termination

The Proposal and the Pre-nup

When dealing with contract interpretation and enforcement issues, *format actually matters*.

Use format to enhance clarity, emphasize key points, and promote overall comprehensibility.

The Proposal and the Pre-nup

Review and update key documents at least every 2 years; sooner if there is any significant change in the law.

Don't give away the “pen”.

Use standardized templates and ensure *both* HR *and* legal approve variations/deviations.

The Proposal and the Pre-nup

Proper process means: all key terms and key agreements are disclosed and documented up front in an offer package.

The Proposal and the Pre-nup

Then that offer package is:

- delivered at least 2 clear business days *before* the signing deadline
- signed and sent back by the candidate *before* the start date

because otherwise the document may be worthless.

The Proposal and the Pre-nup

Include or reference all key agreements, plans/policies:

- include if you can, and require them to be signed/acknowledged as a condition of acceptance
- if you can't include them (e.g., handbooks, policies, equity and incentive plans), at least *reference* them and provide a contact name/number to give the candidate the option of arranging to review them before acceptance

The Proposal and the Pre-nup

Put your cards on the table at the offer stage.

Because otherwise the law may imply “invisible” terms and/or refuse to enforce your documents.

The Proposal and the Pre-nup

So...the ideal hiring process is:

- 1st** application and interview(s)
- 2nd** reference checks
- 3rd** written offer package with reasonable signing deadline
- 4th** return of signed offer package
- 5th** satisfaction of any remaining pre-conditions (e.g. work visas)
- and lastly....**employment begins.

The Proposal and the Pre-nup

A caution about (pre)conditions:

- hiring conditions (e.g., reference checks)
- acceptance conditions (e.g., signing deadlines)
- ongoing conditions of employment (e.g., maintaining professional status/licenses)

must be set out in the offer with (unless obvious) clear consequences for failing to meet them.

The Proposal and the Pre-nup

A caution about confidentiality and ownership of proprietary (intellectual) property/inventions rights:

- the law gives Wise Employer's confidential information has *reasonable* but limited protection
- the law gives Wise Employer *incomplete* ownership rights to discoveries, inventions, developments and creations made by employees

so include well-written contractual provisions.

The Proposal and the Pre-nup

MYTHS

When it comes to post-employment non-competition/solicitation restrictions:

1. bigger is better, and,
2. Wise Employer can bind *any* employee.

The Proposal and the Pre-nup

Reality:

- during employment, all employees owe Wise Employer a duty of good faith and so cannot compete with or try to harm Wise Employer
- even after employment ends, the duty of good faith extends to continued protection of confidential information

The Proposal and the Pre-nup

But...because society values competition, the law favours and protects post-employment competition.

So...the law strictly limits Wise Employer's right to impose post-employment non-competition/solicitation restrictions.

The Proposal and the Pre-nup

Common law tests for enforceability are:

- much stricter for employees (as compared to the tests for stakeholders/vendors who are selling a business)
- poorly understood
- mandatory...you cannot escape them

The Proposal and the Pre-nup

So be aware that:

- the law will enforce written *non-solicitation* restrictions against most employees, if reasonable in:
 - duration
 - geographic area
 - type of forbidden solicitation
 - type/pool of protected “targets”

The Proposal and the Pre-nup

But be aware that:

- the law will *refuse* to enforce written *non-competition* restrictions against many employees, *even if*:
 - the restriction is reasonable
 - the employee agreed to it
 - Wise Employer pays the employee for it

The Proposal and the Pre-nup

In “exceptional circumstances”, the law will enforce reasonable non-competition restrictions against select key employees.

But... Wise Employer's idea of who is a key employee won't necessarily pass the legal tests.

The Proposal and the Pre-nup

Under the “invisible contract”:

- fiduciary ex-employees (typically, high-level employees with significant decision-making authority) cannot solicit former co-workers or clients/customers for a “reasonable” period of time after departing (typically, 3 - 6 months)

The Proposal and the Pre-nup

But under the “invisible contract”:

- non-fiduciary ex-employees are free to solicit
- *all* ex-employees, regardless of level, are free to compete with Wise Employer’s business

The Proposal and the Pre-nup

So....*always* define restrictions in writing as part of the offer package:

- tailor restrictions to the role/level
- only impose a non-compete on truly key employees
- narrow the “who, what, where, when and don’t” of the restrictions as much as possible
- refine “customers, clients” definitions by connections and time
- separate the obligations, and include boilerplate “saving” provisions for severability, enforceability and remedies

Employees v. Consultants

MYTH

The parties themselves have total freedom to choose a consulting relationship instead of an employment relationship.

Employees v. Consultants

The Duck Rule

Employees v. Consultants

Even if *both* sides choose consulting arrangements, the law can just say “No!”

Employees v. Consultants

There is no single test/list of questions to determine if an arrangement will qualify as a true consulting relationship.

Different government agencies have different mandates...so results can differ too!

Employees v. Consultants

The correct classification makes a huge difference to *both* sides, in terms of:

- obligations and entitlements owed to/by each other
- obligations owed to “third parties” (including the dreaded Taxman)

Employees v. Consultants

3 possible legal outcomes:

1. independent contractor (no problem)

2. dependent contractor (termination entitlements may be a problem, but individual is not an employee)

3. deemed employee (lots of problems)

Employees v. Consultants

What you *want* it to be is not necessarily what it turns out to be...

...and getting it wrong is costly and painful, for *both* sides.

Employees v. Consultants

If held to be an employment relationship:

- the “employee” will likely be required to pay additional income tax, interest and penalties
- the “employer” will likely be required to:
 - pay interest/penalties on the income tax which “should have” been withheld
 - pay EI and health tax premiums and CPP/QPP contributions – *both* employer and employee portions - which “should have” been deducted, together with interest/penalties
 - make additional payments to the “consultant” (vacation pay, statutory holiday pay) to meet technical requirements of Employment Standards
 - provide reasonable notice or pay in lieu on termination

Employees v. Consultants

Choose wisely at the outset.

Use proper written agreements.

Include protective “just in case” provisions.

Remember the Duck Rule.

The Marriage

During the employment relationship, any of the following events (alone or in combination) can convert an enforceable contractual provision (or even a whole employment contract) into a lapsed or invalid one....

The Marriage

- recruitment-stage promises/representations
- changes in status (from part-time to full-time, temporary to permanent, contractor to employee)
- advancement/re-deployment (promotions, transfers, changed roles)

The Marriage

Also..

- significant adverse changes (wage roll-backs, forced furloughs, demotions)
- mistreating employees
- mishandling departures
- routinely ignoring contractual provisions (e.g., always offering more on termination than the contract requires)

The Marriage

So...confer with HR and legal *before* making changes (*and* before discussing changes with employees).

Follow the same paper and process and timing rules that apply to new hires.

The Break-up and Divorce

MYTH

Probationary periods are useful.

The Break-up and Divorce

Employment Standards requires no notice or pay in lieu to terminate during first 3 months, but...common law has no such automatic “free trial” !

So...you cannot terminate for “free” in the first 3 months without a a well-written probationary provision.

The Break-up and Divorce

Problems:

- experienced employees often resist/resent probation
- managers mishandle probationary periods or miss deadlines
- common law duty to give fair warning of issues and an opportunity to correct them
- employer has *less* freedom to act, not more

The Break-up and Divorce

Wise Employer's best bet?

Instead of referencing a probationary period, Wise Employer's employment contract will include a well-written termination provision that gives an easy and inexpensive "early out" in the first 3 – 12 months.

The Break-up and Divorce

MYTH

Termination for cause is easy, and it is better (cheaper) for Wise Employer.

The Break-up and Divorce

Termination for cause is the “capital punishment” of employment law:

- legal tests are very hard to meet, particularly if the problem is poor performance
- vast majority of terminations are without cause
- no such thing as “near-cause”

The Break-up and Divorce

Claiming cause without proving cause can backfire badly!

So....it is critically important to have well-written termination provisions that give Wise Employer a clear way out of a “bad marriage”, any time, without cause.

The Break-up and Divorce

Legal framework for termination without cause:

- Employment Standards (mandatory “floor”)
- common/civil law “reasonable notice” rules (*the legal default position*)
- written contractual terms (*if enforceable*)

The Break-up and Divorce

MYTH

Wise Employer should limit termination entitlements to Employment Standards.

The Break-up and Divorce

Pros:

- cheapest option
- rules are theoretically clear

The Break-up and Divorce

Cons:

- rules are not well-understood or easy to apply
- Courts *hate* such provisions and will look for any legal excuse to avoid enforcing them
- very challenging to write properly
- very challenging to sustain enforceability over time

The Break-up and Divorce

Wise Employer's best bet?

Wise Employer's standard written termination will provide for the *greater of* Employment Standards minimums *or* a formula-based amount that sets the “floor” and “ceiling” by reference to *both* length of service and role.

The Break-up and Divorce

“Reasonable notice” is an “invisible” term that applies whenever:

- there are no written termination provisions
- there are gaps in coverage in the written termination provisions, or
- for any reason (crap, gap, lapse) the written provisions are inadequate or unenforceable

The Break-up and Divorce

In those situations:

- if Wise Employer terminates without cause, then Wise Employer must provide a “reasonable” period of advance notice of termination or else provide compensation in lieu (or a combination of both)
- compensation in lieu includes *all* compensation elements and benefits the employee would have received if he/she had stayed until the *last day* of the reasonable notice period

The Break-up and Divorce

So reasonable notice is the legal default position...

...*not* Employment Standards.

The Break-up and Divorce

Any reasonable notice period will include Employment Standards minimums - but normally exceeds those minimums... *significantly!*

The Break-up and Divorce

How much? It depends....

- there is no "blue book", no hard and fast rule
- Wise Employer must assess the *individual* circumstances of each case
- *age, length of service, and position* are primary (but not only) factors - all relevant factors need to be considered
- "soft" factors (e.g., bad timing, harsh treatment, state of the economy/industry) matter too

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The Break-up and Divorce

Reasonable notice drives all change planning.

It gives the *employee* leverage.

It costs employers time, money, and effort.

It gives lawyers and courts control over outcomes.

The Break-up and Divorce

Wise Employer's best bet?

Wise Employer's employment agreement will include well-written termination provisions that are clear and explicit about all consequences of different kinds of termination.

A Final Word to the Wise

Sad truths:

1. Just because it's in writing doesn't mean it is *enforceable*.
2. What you *don't* see can be as important as (or more important than) what you *do* see.
3. What you see ain't always what you get.

Thank you for attending the
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