

Member's Quarterly

Spring 2023 Edition

Ask the Expert

10 Biggest Mistakes in Employment Contracts

What makes them unenforceable?

Q | *Enforceable employment contracts eliminate wrongful dismissal claims but few contracts are actually enforceable. Why is that?*

A | *Here are the biggest mistakes employers make in implementing and administering employment contracts.*



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1) Timing

This is the first thing any employee's lawyer will look for in seeing whether your contract can be set aside. The contract has to be agreed to as part of the offer of employment. If your employee can prove that the essential terms are already agreed to such as salary, position, etc. before they ever agreed to the contract, the contract will be unenforceable. It is for this reason that contracts provided and signed on the first day of work are unenforceable. This is because by the time the employee showed up, the terms of employment obviously had already been agreed to.

2) Changing contracts without providing anything in return

This often occurs annually or simply when the employer wants to add something new to the contract such as a non-competition, confidentiality or termination provision to an existing contract without a new one. In return for any term damaging to an employee's interest like one of those to be enforceable, the employee must receive something in return. That "something" is called consideration. It does not have to be very much—even a dollar will do.

3) Concealing the punitive provision

The Supreme Court of Canada decision *Matthews v Ocean Nutrition Canada Ltd.*, in which I acted, made clear that any punitive provision must be clearly brought to the employee's attention. It cannot be buried in the contract or it will not be enforceable.

4) Giving employees a genuine choice to accept the new contract

Even if an employee receives consideration for a change to their contract with a punitive term, the employee still must have a genuine choice whether to accept that new contract with that new term or continue under the previous terms.

5) Duress

This comes into play more in agreeing to severance than in signing a new contract. After all, the employee does not have to accept that job on those terms and give up what they already have. However, if an employee is offered the job and told to sign immediately or the offer is withdrawn, some courts could well find that to constitute duress. For that reason, you want to provide the employee with a reasonable

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timeframe to sign. If they do then choose to sign immediately, it is not a problem. Make sure the time to sign is stipulated in writing so there's no debate later.

6) **Sign or else you will be fired**

If you have an existing employee and rush an imprudent contract on that employee making it clear that they cannot keep their job if they do not sign, that contract will not be enforceable.

7) **Waksdale and its children**

This decision of the Ontario Court of Appeal and various cases expanding it since then have made clear that if any provision of the employment contract could possibly, at any time in the future, become unenforceable by violating a provision of the Employment Standards Act, then the entire termination provision will be unenforceable. The most common instance is permitting termination without severance or notice for cause when, under the Employment Standards Act, you can only pay no severance if there is wilful misconduct and some causes, such as gross incompetence, are not willful. If the provision permitting termination for cause without any payment is in the contract, even the severance provisions of the contract, which might otherwise be enforceable and compliant with the ESA, will be rendered unenforceable. Another common example is the contract not providing for benefit continuance after termination in the termination provision. Since the ESA requires such continuation, that renders the entire termination provision unenforceable. It does not matter if the ESA is in fact complied with. The contract is unenforceable if it does not provide terms which are compliant through the lifetime of prospective employment.

8) **"Savings provisions" generally do not work**

If a contract is written in a manner to be unforeseeable but has a term that, notwithstanding anything else in the contract, the employer will comply with the ESA, the court will generally find the contract unenforceable because of ambiguity.

9) **Be careful with particular provisions**

There are particular provisions such as non-competition clauses which have their own unique rules for enforceability. Keep in mind that in Ontario, new employment contracts cannot contain such provisions unless it is for a C-Suite executive.

10) **ILA- Independent Legal Advice**

An employee does not have to get independent legal advice for a contract to be enforceable. However, if they are not even given that opportunity, a court might render the contract unenforceable. It is wise to put into the letter with the contract that the employee is encouraged to obtain independent legal advice and provided time to do exactly that.

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