



3 Common Misconceptions About... Employment Contracts

By David J. Doyle

In our experience, most employers do not have their employees sign detailed employment contracts before the employee commences his or her employment. Part of the reason for this is that the presentation of a detailed employment contract could dissuade an employee from taking a position with the employer. There may also be a feeling in many business communities that presenting a written employment contract with a job offer is akin to presenting a future spouse with a pre-nuptial agreement attached to the engagement ring. Although historically they may have been misused, employment contracts do not have to be used as chains to keep employees tied to the employer or as a sword dangling over the head of any employee that does not toe the company line. In order for written employment agreements to become more prevalent (to the benefit of all involved), both employees and employers will have to overcome some common misconceptions.

MISCONCEPTION #1. As an employer, if I sign a detailed, written contract with my employee I may lose some of the flexibility I have in dealing with that employee.

This misconception may have been true in the not-too-distant past. Most of the flexibility provided by not having written employment contracts was not based in law, but was based around the premise that: (i) an employee will either accept the changes the employer unilaterally made because they have no better alternative; (ii) an employee will reject the changes by quitting and moving on to a new job because they have to pay their mortgage; and/or (iii) in the case of either (i) or (ii), an employee will not be able to afford to hire a lawyer to fight about the vague particulars of what may or may not have been the verbal arrangement of the parties when the employee originally started work in the distant past.

These tactics worked in the past because most employees expected to stay in one job for much of their career and were willing to accept the employer making some changes to their jobs without their consent as just part of life. Present day employees do not share this worldview. If anything, we now regularly get calls from employees that find extremely minor discipline or changes to their duties to be a breach of their deal with the employer. Many employees know the term “constructive dismissal” and would like it applied very liberally.

The courts continue to seek to protect employees from employers that are acting in any manner that is seen as unfair and that, combined with the high salaries that certain

employees can make and the high cost of litigation, makes an employer exercising any flexibility that an oral contract is thought to provide a potentially expensive choice.

MISCONCEPTION #2. As an employee, if I sign a detailed, written contract with my employer all that will happen is that I will lose some of my ability to negotiate with the employer later.

It is true that a negotiated, signed employment contract that provides for a certain amount of termination pay or has specified duties (for two examples) may limit the employees ability to sue the employer. It may also set the relationship on a course that will avoid the employee ever having to sue. In our view, the value of the employee having agency in, and personal responsibility for, negotiating the terms of his or her employment contract and the employee achieving certainty of his and her employment entitlements is well-worth the compromise.

We regularly deal with employees who are terminated and are presented with a compensation package that provides for termination notice or pay in lieu thereof. When they do not have a written employment contract, their first question is, “Is this offer fair?” We then enter into a lengthy discussion with the employee about the statutory and common law principles that require an analysis of the individual circumstances of the employee so that we can come up with an estimate of what the court might decide if everything goes right and what the court might decide if the decision goes against the employee or he or she gets another job. Invariably the employee is left with the unhappy task of quickly deciding whether he or she is willing to pay a large legal retainer to gamble on a potential court award (that is months or years away) that he or she can undermine by doing the one thing he or she should be doing to move on with his or her life – getting another job as quickly as possible. If the employee does have a negotiated, written employment contract that provides for termination notice, the employee will often say, “This looks right, I just wanted to check it with you and see if I am missing anything”. All they want to know is whether they got what they bargained for and, if they did negotiate the deal, they do not tend to be very concerned with what they could have gotten if they were able to sue for a greater amount. The financial savings (in legal fees and lost time) arising from a meeting that starts with “This looks right” are also very substantial for both the employer and the employee.

When an employee starts a job the employee is entering a world of very little certainty. There is often no certainty about how long the job will last and there are many factors that will affect the employee’s employment that are beyond his or her control. If more certainty through a written contract is an option, it may allow the employee to reduce the gamble that they are taking by committing to this new relationship.

MISCONCEPTION #3. The terms of the employer’s employment contract are non-negotiable.

This is a misconception held by both employees and employers.

Some employers view employment contracts as a necessary evil, drafted by their lawyers to protect them from their employees. For these employers, negotiating the terms of a written agreement may be perceived as a waste of time and effort as the agreement will rarely be consulted and may have some limited value for coercive purposes. Similarly, many employees are happy to be finished with the interview process and are content to have “won” the position. They do not want to worry about the legal language in an agreement that will not even matter if they quit in six months. They also do not want their first act as an employee to be challenging a document that many other “team players” have signed before. They want to sign and get to work.

This puts both the employer and the employee in a position where they feel no connection to the written record of their agreement and no moral obligation to live up to its terms. When neither party considers the contract binding, both the employee and the employer will attempt to undermine the importance of the signed document when it suits their respective purposes. As a result, there are a myriad of lawsuits where a written contract is set aside because no independent legal advice was given or because it was signed several months/weeks after the employee started to work or because the terms were vague. The common perception of employment contracts as generally having little value is a result of both of the parties to the contract ascribing it little value.

Many employers are willing to negotiate their agreements with sought-after employees. In our view, more would be willing to negotiate if the employees are willing to trade an employer concession for one of his or her own. For example, an employee might trade \$5000 of first year salary for an extra two weeks of termination notice or pay. This employee is trading some security of his or her position for more immediate financial gain. These trades of security for more immediate salary are made every day when, for example, an employee chooses certain government positions over the private sector. There is no reason that these issues have to be non-negotiable within one employment relationship. It is only when everything is non-negotiable that we see both parties trying to pull everything they can to their side before the other side does.

Our Suggestion:

Employers and employees should enter mutually-acceptable written employment contracts. Negotiated, written employment contracts are relationship management tools that provide much more certainty of the terms of employment for both the employee and the employer. Uncertainty in employment relationships leads to unhappy employees, unsatisfied employers and lawyers with their own helicopters.

Negotiated, written employment contracts also provide a competitive advantage to both the employer and the employee. In these uncertain economic times, sought-after employees are not all high-powered executives or world-traveling double doctorates. Employees that want to work and will work collaboratively with employers are in demand. In order to retain employees, employers will have to continue out-compensating all competitors at all times, or they will develop a lasting committed relationship that is constantly refreshed by the parties living up to their end of the bargain. This relationship

will often be more valuable than the little bit of extra money (for an unknown period of time) offered by the employer's competition.

The written aspect of the deal gives the employee comfort that they will not be tricked into taking a dream job that will become a nightmare. For employers, an employee that has carefully considered its obligations and intends to commit to them in writing has significant value. In the event that the employee does not live up to its obligation, the written agreement can then be used as a relationship management tool to remind the employee of their commitment. If either party is unsatisfied with their relationship, the written agreement will provide a path to ending the relationship that does not require the expensive legal advice that so often accompanies termination events.

In our view, the initial work done to have a detailed written agreement prepared, negotiated and executed is easily justified by removing much of the uncertainty of legal rights and obligations that can arise from vague, oral employment terms and the ill-will that can arise from one-sided, non-negotiable employment contracts.

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