

Employment and Labour Law

Ramanjeet (RJ) Sohal

November 12, 2026

Agenda

- Terms in Employment Contracts – duties, restrictive covenants, termination
- “Employees” v. “Independent Contractors” v. “Dependent Contractors”
- Employment Standards Act
- Human Rights Legislation
- Unions

Implied Terms in Employment Contracts

1. Employee's obligation of fidelity/loyalty
2. Employee's duty of competence
3. Employer's duty to give adequate notice of termination or to pay severance

Duty of Fidelity

- Employee required not to disclose or make use of confidential information (e.g. trade secrets)

- **Trade Secret:** information usually contained in a document, product, formula or patent that has at least some of the following attributes:
  - It is or may be used in a particular industry.
  - It is not widely known in that industry.
  - It has value because it is not widely known.
  - The company tries to maintain its secrecy through reasonable efforts.

- Examples of trade secrets: profit margins, client lists

- **General Rule**
  - If disclosure of the information is valuable to a competitor = confidential

Duty of Fidelity (cont.)

Restrictive Covenants

- Clause in employment agreement that forbids an employee from working for a competitor, usually for a specified period of time after termination of employment, in a specified geographic area, and in a specified area of business.

- Common in engineering employment agreements.

- To be enforceable, a restrictive covenant must:
  - protect a legitimate proprietary interest of the employer;
  - be reasonable in terms of length of time, geographic area, scope of activities and overall reasonableness;
  - be set out in clear, unambiguous terms; and
  - be reasonable with respect to public interest.

- Before signing a contract or leaving employment where a restrictive covenant is in play, obtain legal advice.

Duty of Fidelity (cont.)

Restrictive Covenants (cont.)

- Likely enforceable or not?

1. Engineer not work for anyone in the same field, in the same province, for a period of 15 years.
2. Engineer not work within a narrow area of practice, within the same city, for a period of 1 year.

Duty of Competence

- An employee is expected to be competent in the area of work for which they have been hired.

- If an employee makes a mistake, and that mistake causes the employer to suffer a loss, then the employer may have a right to recover the amount of the loss from the employee.

Vicarious Liability: the liability of an employer for the acts or omissions of an employee

Termination

Just Cause

- Occurs when the employee has committed a fundamental breach of the employment contract that justifies termination.
- The onus is always on the employer.
- Prior warnings are required, unless there is serious dishonesty or disloyalty, such as:
  - Fraud, theft
  - Dishonesty
  - Sexual harassment
  - Gross incompetence or insubordination
  - Lengthy unjustified absence
- Always seek legal advice prior to termination for just cause.

Termination (cont.)

Not for cause

- Performance problems which do not amount to just cause (e.g. no prior warnings)
- Personality or “fit” issues
- Lack of work, restructuring
- Employees hired for a fixed term project are not entitled to notice or severance if terminated at the end of the term/project
- Employees hired indefinitely but with a written agreement containing a termination clause must receive the contract notice or severance in lieu

Termination (cont.)

Notice & Severance

- Where no just cause exists, employer must provide reasonable notice of termination or payment in lieu thereof (i.e. severance)

- The amount of reasonable notice depends on a number of factors, including:
  - age of the employee, length of service, type of position, availability of similar employment

Constructive Dismissal

If the employer unilaterally substantially negatively changes the terms of employment, such as:

- Demotion
- reduced compensation
- reduction in responsibilities
- relocation (in some cases)

Obtain legal advice when terminating sensitive cases such as:

- disabled/sick employee
- alleged harasser
- allegations of dishonesty
- drug/alcohol addiction-related performance problems
- employee on or about to take maternity or parental leave
- possible discrimination allegations
- employees who were “enticed” from employment elsewhere

Employee v. Independent Contractor

Employees including part-time and fixed-term hires

- Tax, EI and CPP is deducted from pay by the employer

Independent contractors: whether called “consultants,” “freelancers” or “contractors” and whether or not incorporated

- No tax, etc., deducted from payments
- Can be challenged by CRA, Employment Standards

Employee v. Independent Contractor: The Test

1. The degree of control over how the work is done
2. Who owns or supplies the “tools” of production
3. The chance of profit or risk of loss for the worker in the compensation arrangements, e.g., flat project fee vs. hourly
4. How “integral” the worker is to the business



Rule of Thumb
If person is providing similar services for more than one client or employer
→Independent Contractor

Dependent Contractor

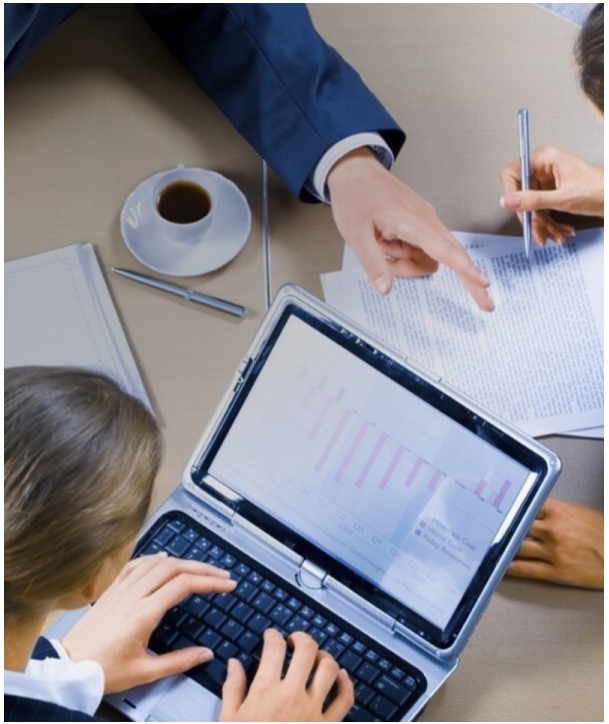
- Indicia of a dependent contractor:

Working predominantly for one client
Subject to the control of the client as to how services are provided
Not permitted to work for a competitor
Required to follow client's policies and wear client's uniform
May not be bound by a contract of employment

- A person/company who is a "dependent contractor" is entitled to reasonable notice of termination, similar to an employee

Employment Standards Act (“ESA”)

- The ESA does not apply to an architect, professional engineer, trainee (i.e., a person who is enrolled as an engineer in training under the bylaws of the council of EGBC) or a true independent contractor
- If the workplace is unionized, the provisions of the ESA that deal with issues covered by the collective agreement do not apply to those employees covered by the collective agreement
- Reasonable notice or severance in lieu is outside the scope of the ESA



Human Rights

- Human Rights Tribunal – separate from the Courts – deals with human rights complaints.

- In order for discrimination to give rise to a remedy, it must be prohibited by the Human Rights Code:
  - •Religion
  - •ethnic origin/race
  - •skin colour
  - •Age
  - •Disability
  - •Gender
  - •sexual orientation



Human Rights (cont.)

- Employers are permitted to discriminate based on level of education or experience

- Employers could discriminate based on disability if the physical ability affected is a genuine job requirement and the disability cannot be dealt with through reasonable accommodation

Labour Law

- Governs union-management relationships & employee-union relationships.

- Union is authorized to enter into employment contract on behalf of employees who are members of the union.

- Employer cannot negotiate directly with employee once union representation is established.



Labour Law (cont.)

- Employees who are employed in a managerial or supervisory role are often excluded from the definition of “employee” in a collective agreement.

- Strikes and lockouts are the ultimate weapons in a labour dispute.
  - As long as collective agreement is in force, strikes and lockouts are illegal.In BC, Labour Relations Code prevents employers from hiring replacement workers during a work stoppage.

Labour Law (cont.)

When purchasing a business or its assets, there is a risk that an obligation to bargain with a union will be attached.



Thank you. Any questions?



Ramanjeet (RJ) Sohal

+1 604 684 0727

Ramanjeet.Sohal@clyceco.ca

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