Canadian technology law issues

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What are employment contracts made of?

Think of an employment contract as a human body. The skeleton consists of mandatory statutory laws governing human rights, minimum employment standards, health and safety, and (in some provinces) employee privacy. For most technology sector businesses, the governing laws will be those of the province where the employee primarily works.

The skin consists of common law rules and tests established by judges. Be aware that when it comes to (i) termination; (ii) proprietary property; and (iii) post-employment restrictions, the common law rules and tests heavily favour the employee. Employers and employees can contractually agree to override some, but others can never be overridden — notably, whether a contract is valid, whether non-competition and non-solicitation provisions are enforceable, and whether a contractor is really an employee.

Written terms, if any, such as offer letters/employment agreements, confidentiality and proprietary rights agreements, non-competition agreements, incentive plans and policies, are merely clothing on the body.

Ultimately, every employment contract consists of a combination of written terms in one or more employment-related documents (the clothing) and certain “invisible” terms (the skin and bones). Beware those “invisible” terms!

Enforceability of Written Contracts
To be enforceable, every contract needs to be:

• Properly signed up (no process gap);
• Well-written (no content crap); and
• Preserved over time (no validity lapse).

Both content and process matter, and the benefit of the doubt always goes to the employee. For example, it can be fatally bad process to extend an oral offer of employment. Once the candidate accepts, an employment contract with “invisible” terms automatically arises. If documents are signed later confirming different employment terms, those documents may be unenforceable. Content problems are equally problematic. For example, if your contract does not properly deal with all aspects of termination of employment, then the “invisible” terms will fill the gap.

Avoiding the Process Gap
You can negotiate some key terms and express an interest orally, but any offer of employment must contain all key terms and must be made in writing. All pre-conditions to hiring must be articulated in the offer. All key agreements should be provided as part of the offer package and all of them must be signed back (after a reasonable deadline) before the start date. Ideally, signing deadlines should be at least two clear business days after delivery of the offer. If you don’t follow these process rules, your contracts will be highly vulnerable to enforceability challenges.

Avoiding Content Crap
To effectively override “invisible” terms, you need written contracts that are clear, understandable, consistent with minimum employment standards and human rights requirements, and very explicit. There is no magical level of formality needed: a plain-language offer letter is just as effective as a formal employment agreement full of legalese. In fact, clear communication is key to enforceability, so the easier to understand, the better. Use sections and headings to enhance comprehensibility.
Good content is critical in these three key areas:

• **“Reasonable notice,” the most painful “invisible” term.** If there are no enforceable written termination provisions, then employees are entitled to a “reasonable notice” period — either advance notice or compensation in lieu or some combination of the two. Compensation in lieu includes all compensation elements, not just base salary. Entitlements are assessed individually, based on a number of factors (key factors being age, length of service and role). The law defaults to reasonable notice, and reasonable notice periods typically exceed the statutory minimums. Courts strongly dislike termination provisions that limit notice and severance to the statutory minimums. Be smart: make sure termination provisions give at least a modest amount over and above the statutory minimums.

• **Proprietary property protection.** The “invisible” protection of confidential information is reasonably strong, but the law gives only limited ownership rights to proprietary property. You must implement a well-written (and properly Canadianized) confidentiality and proprietary rights agreement to secure the most protection possible.

• **Post-employment non-solicitation and non-competition protection.** One “invisible” term imposes a duty of good faith on all employees, barring competitive activities during employment. However, another “invisible” term allows post-employment solicitation by most employees. (Fiduciary employees have modest non-solicitation obligations, but the law does not define these, so you need to!) Furthermore, the “invisible” terms allow all employees, regardless of rank or role, to engage in post-employment competition. Without written terms, you have virtually no protection in this area. Well-drafted and properly signed up non-solicitation restrictions are usually enforceable. However, the law will not enforce non-competition restrictions if non-solicitation restrictions suffice to protect an employer’s legitimate business interests. Realistically, non-competition restrictions are not enforceable against many employees, even if the employee agrees to sign them and even if you pay them for it.

**Avoiding Validity Lapse: Preserving Enforceability Over Time**

Even if you do everything right at the hiring stage, contractual terms can become unenforceable due to changes in status (e.g., part-time to full-time, temporary to permanent); promotions and transfers; significant adverse changes by the employer (e.g., wage reductions, demotions); in addition to mistreatment of employees or mishandling departures. Reduce risks by properly documenting — in advance — all significant changes in status or employment terms; making it clear which contract terms continue to apply; and by treating employees decently during and after employment.

**Mind Your Manners!**

Aim for clear and timely communications, and fair and reasonable treatment at every phase of the employment life cycle — because this is the most effective way to reduce risks.

**Audit Yourself and Seek Advice**

When you first set up your Canadian operations, and at least every two years after that, take the time to audit and update your recruitment, hiring and promotion/transfer practices, and related templates, documents, processes, policies and challenges. And remember, your friendly employment law expert can help you clean up any past messes and make sure you do it right in the first place from now on.