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Employment Agreements in Ontario

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Last Updated: April 2011

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Who is an Employee?

An "**Employee**" is an individual who provides personal services to another person (an "**Employer**") in exchange for pay and other benefits. This relationship usually starts with a written or verbal offer of employment that outlines the terms of the employment. If this offer is accepted, then a separate written **Employment Agreement** will be drawn up for the parties to sign PRIOR to the Employee commencing work. This relationship is also governed by legislation and the common law (i.e. judge-made law) such as:

- the Ontario ***Employment Standards Act, 2000***, which deals with minimal employment standards (which cannot be waived or contracted out) such as minimum wage, maximum hours, holidays, minimum notice requirements for termination, severance, rest periods, parental or pregnancy leave, vacation, etc.;
- the Ontario ***Workplace Safety and Insurance Act***, which strives to promote health and safety in the workplace and provide compensation and other benefits to workers and the survivors of deceased workers;
- the Ontario ***Pay Equity Act***, which requires Employers to pay equal wages for work of equal value, regardless of the employee's sex;
- the federal ***Employment Insurance Act***, which creates an insurance regime to provide temporary financial assistance to unemployed Canadians who have lost their job in certain circumstances; and
- the federal ***Income Tax Act***, which deals with income taxes payable by the Employer on behalf of the Employee.

An Employee who is part of a union may also be governed by a **Collective Agreement** (a private agreement between the union and the Employer and governed under the Ontario ***Labour Relations Act***).

Employees vs. Independent Contractors

A person carrying on business as an INDEPENDENT CONTRACTOR is in business for themselves. They are not employees of the payor. They typically sign a written agreement with a payor to provide services. This agreement is very similar to what employees would sign – with a few important differences. **First, independent contractors have greater autonomy than employees.** They control how they provide services. They usually pick their own hours. They may work for multiple payors. They are not integral to the payor's business, but rather provide ancillary or complementary services to it. They own their own tools of production (e.g. dental tools, equipment, supplies, etc.). **Second, they earn business income.** They can make profit or incur losses. They are typically compensated based on a percentage of gross billings generated minus certain expenses (e.g. lab fees). **Third, the payor does not deduct, withhold, or remit income taxes, Canada Pension Plan (CPP) contributions, or Employment Insurance (EI) premiums in respect of the independent contractor.** Rather, the latter files and remits their own income taxes and can deduct reasonable business expenses incurred to generate income. **Fourth, a payor is not vicariously liable for the actions of an independent contractor. Finally, the payor and the independent contractor can terminate their relationship pursuant to the terms of the associate agreement (oral or written) they entered into.**

A person who is an **EMPLOYEE** forms an integral part of the payor's business. They differ from independent contractors in a number of important ways. **First, the payor has significant control over the manner in which the employee provides services (in terms of supervision, discipline, and training).** The associate employee receives a fixed salary and don't risk losing money in providing services. They do not work for anyone other than the payor. Their schedules are typically determined by the payor. They use the payor's tools and equipment. They provide the services personally and not through a corporation or other business structure. **Second, they earn employment income.** This imposes strict limits on what types of expenses they can deduct for income tax purposes. **Third, the payor is required to deduct, withhold, and remit income taxes, CPP contributions and EI premiums on behalf of the employee. Fourth, an employee's actions or omissions may lead to the payor being vicariously liable to the harm resulting to third parties. Finally, employees benefit from minimum standards laws.** For example, the *Employment Standards Act, 2000* imposes minimum obligations on the payor with respect to things like maximum hours, minimum pay, minimum notice periods (for termination), vacation pay, maternity leave, etc. Employees also benefit from the common law (i.e. judge made law), which requires the payor to provide employees with "reasonable notice" or payment in lieu of notice if the payor wants to terminate the associate without cause (i.e. without the employee having done anything wrong).

There are important differences for the payor and the associate when it comes to characterizing their relationship. **Generally, a payor wants to hire an associate as an independent contractor.** Doing so would relieve the payor of having to collect and pay the government the associate's income taxes, CPP contributions, and EI premiums. For example, hiring an associate as an independent contractor and paying them $50,000 in 2010 would save the payor $3,208 in CPP contributions and EI premiums. Apart from these cost savings, terminating the associate would also be easier: there are no minimum standards laws or reasonable notice obligations (at common law) which must be followed. Rather, the agreement between the payor and the associate would govern. Assuming that the agreement is enforceable and properly followed, the payor could avoid costly legal disputes. The associate may also wish to be an independent contractor: they could make more money by servicing multiple payors and pay less tax by deducting legitimate business expenses. **That said, in certain circumstances, the associate may want to be an employee.** They may not want to be bothered with recording and deducting business expenses for tax purposes. They may not be able to afford their own tools. They may have difficulty marketing their services to multiple payors. They may be dependent on a regular salary and benefits. They may need the protection afforded to employees under the minimum standards legislation for things like minimum pay, maximum hours, vacation pay, maternity leave, and minimum notice or payment in lieu thereof.

(Mis)Characterizing the Relationship

While the payor and associate MAY WANT to structure their relationship in a certain way (i.e. independent contractor or employee), the law MAY SAY OTHERWISE! This typically happens when the parties agree that the associate is an independent contractor, but the associate or the government claim that the associate was an employee. Take the case of an associate independent contractor being terminated without cause. Here, the payor may wish to rely upon the independent contractor agreement to terminate the associate. That agreement may simply say that some minimal notice or payment in lieu of notice is required for the payor to terminate the associate. The associate, however, may decide to start a legal action claiming that they were in fact an EMPLOYEE – and thus entitled to MORE NOTICE OR PAYMENT IN LIEU THEREOF. This may end up in front of the **Ontario Labour Relations Board** (where the associate alleges that the payor failed to provide minimum notice or payment in lieu of notice under the ***Employment Standards Act, 2000***) or in **Superior Court** (where the associate alleges that the payor failed to provide reasonable notice or payment in lieu thereof at common law). For the payor, this could cost more money than they would otherwise have to pay (e.g. legal fees disputing the matter, plus having to provide more notice or

payment in lieu of notice). The characterization of the relationship also gets challenged when the government believes that the associate was an employee and that, as such, the payor ought to have been making CPP contributions and paying EI premiums. The payor may be on the hook for a few years! The costs can add up quickly – particularly if the matter is disputed in court.

Determining whether a person is an Employee versus an Independent Contractor will depend on the context. Employment standards, workplaces safety, taxes, collective bargaining, human rights, etc. each have their own tests for determining whether a person is an employee and what the consequences are. Importantly, the reality of the relationship typically governs, not what an agreement says.

Take the example of determining whether a person is an employee or independent contractor at common law (i.e. judge-made law, not based on any statute). The Supreme Court of Canada has said that there is no one conclusive test to determine whether an individual is an employee or an independent contractor in this context. Rather, factors that should be considered include control, ownership of tools, chance of profit and risk of loss: (***Montreal (City) v. Montreal Locomotive Works Ltd.***, [1946] 3 W.W.R. 748 (Quebec P.C.)). In distinguishing a contract of service (employment) from a contract for services (independent contractor), the Supreme Court of Canada in ***671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*** (2001), 11 C.C.E.L. (3d) 1 (S.C.C.), said:

> "One feature which seems run through the instances is that, under a contract of service, a man is employed as part of the business and his work is done as an integral part of the business, whereas under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it."

The Court, in the same case said:

> "The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of responsibility for the investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks."

The courts have traditionally used a four-part test to determine whether someone is an employee or independent contractor:

- **Control** (a person who is supervised and managed by the payor is more likely to be an employee)
- **Ownership of tools of production** (a person who owns their own tools is more likely to be an independent contractor)
- **Chance of profit** (a person who earns a steady salary is more likely to be an employee)
- **Risk of loss** (a person who stands to lose money because of business costs is more likely to be an independent contractor)

While this four-part test is a good start, the courts have held that it is the TOTALITY OF THE RELATIONSHIP and the intention of the parties (as determined by their agreement and conduct) that will ultimately determine whether an associate is an employee or independent contractor. The distinction is not always clear and the courts have had to wrestle with some seemingly difficult cases. If you're unsure whether you should structure your relationship as an independent contractor or employee, you can consult a lawyer.

Why are Employment Agreements used?

Written Employment Agreements help clarify the relationship the parties have (i.e. employee, not independent contractor), the various aspects of the job which the employee should understand (e.g. duties, pay, term, vacation, etc.) and address future contentious issues such as termination and restrictive covenants (e.g. non-competition and non-solicitation). The high cost of going through litigation has made Employers more mindful of how they structure their relationship with an Employee. Written Employment Agreements – as opposed to oral ones – help to mitigate potentially contentious issues.

The Employment Agreement: 10 Tips and Traps

Tip #1: Put it in writing!

Employers assume things. They do it all the time. Who can blame them? Well, if things go afoul with their employees, they can and should be blaming themselves if they never entered into a written Employment Agreement. Instead of having a he-said / she-said debate about job title, responsibilities, pay, benefits, termination, and restrictive covenants (which are all very contentious issues), put it in writing from the get go and BEFORE the employee start working. If you need a lawyer to help you draft a customized employment agreement, you can contact me directly.

Tip #2: Make sure the Employment Agreement is Clear, Certain, and Complete

Ahhh…the triple C: Clear, Certain, and Complete. These are general grounds upon which an Employment Agreement can be invalid and unenforceable in whole or in part: it was vague and ambiguous (open to interpretation) and missing certain important terms (e.g. compensation, duties and responsibilities). Importantly, if certain things are NOT SAID, courts may imply them as terms of the Employment Agreement. For example, Courts will assume that the Term of the Employment Agreement was INDEFINITE (i.e. starts on one day and doesn't end until the Employee resigns or is terminated) unless the Employment Agreement says in very clear and unequivocal language that it is for a FIXED TERM. Courts will also assume that, absent a fixed term contract or contractual notice provision, an Employer can dismiss an employee by giving them reasonable notice or payment in lieu of notice. Furthermore, Employers can also dismiss an employee for Just Cause without paying them notice or payment in lieu thereof.

Finally, if an Employer fails to include certain terms in the Employment Agreement but merely reference them in other documents (e.g. policies, manuals, etc.), then Courts may disregard these external terms and conditions. For example, in ***Christensen v. Family Counselling Centre of Sault Ste. Marie & District*** (2001), 151 O.A.C. 35, the Ontario Court of Appeal found that an Employment Agreement that tried to incorporate termination provisions in a policy manual did not rebut the common law presumption of REASONABLE NOTICE. Recall that REASONABLE NOTICE is the amount of notice or payment in lieu thereof at common law (i.e. based on judge-made law) which an Employer will be required to give an Employee in order to terminate them. The Employer can rebut the presumption that they owe the Employer notice or payment in lieu thereof through a clear and unequivocal Employment Agreement. So in ***Christensen***, the fact that there were too many interpretations of the Employment Agreement concerning whether the termination provisions in the employee manual rebutted the presumption of REASONABLE NOTICE led the court to conclude that id didn't: it wasn't clear and unequivocal. Therefore, they didn't apply. OUCH!

Tip #3: The Whole Deal

Employment Agreements – for whatever reason – sometimes fail to include an Entire Agreement clause in the General Terms (that's where I put this clause, in any event). This clause basically says that the subject matter of Employment Agreement (i.e. the employment) is covered only by the agreement itself and not by external discussions, contracts (oral or written), or understandings. Those things are superseded and replaced by the Employment Agreement. Make sure, however, that you don't accidentally cancel out any required documents like a separate written confidentiality and non-disclosure agreements!

Tip #4: *Contra Proferentem*

Since the Employer is the party drafting the Employment Agreement, courts will interpret any ambiguities in favour of the Employee and AGAINST the Employer! This is the Contra Proferentem doctrine and Employers should be weary of it! For more information, check out these cases: ***Machtinger v. HOJ Industries Ltd.***[1992] S.C.J. No. 41 (Supreme Court of Canada), ***Ceccol v. Ontario Gymnastic Federation***, [2001] O.J. No. 3488 (Ont. C.A.); and ***Christensen v. Family Counselling Centre of Sault Ste. Marie & District*** [2001] O.J. No. 4418 (Ont. C.A.).

Tip #5: Minimum Standards

OK, so you can contract out of the common law when it comes to things like giving notice or payment in lieu thereof (if you need help doing so, consult a lawyer). But can you contract out of minimal standards legislation like the ***Employment Standards Act, 2000***? NOPE! It's minimum standards legislation for a reason. Section 5 says:

> 5. (1) Subject to subsection (2), no employer or agent of an employer and no employee or agent of an employee shall contract out of or waive an employment standard and any such contracting out or waiver is void.
>
> (2) If one or more provisions in an employment contract or in another Act that directly relate to the same subject matter as an employment standard provide a greater benefit to an employee than the employment standard, the provision or provisions in the contract or Act apply and the employment standard does not apply.

So if your Employment Agreement goes against the minimum standards legislation when it comes to things like minimum wage, maximum hours, parental leave, vacation, notice, payment in lieu of notice, severance, etc., then it will be INVALID AND UNENFORCEABLE! The Courts will then turn to the common law doctrine of reasonable notice to determine what the employee ought to have received upon getting terminated.

Tip #6: Give Everything to the Employee up front!

Lets say the Employment Agreement references external rules, policies, procedures, etc. Maybe there are important provisions (e.g. benefits, termination, location of work, expenses) that affect the Employment Agreement. To avoid creating problems later on, the Employer should provide those rules, policies, and procedures up front at the same time as the Employment Agreement is being offered. Employees are often shy and don't want to start demanding things from the get go (particularly if they are on probation). But they can later complain that they didn't understand or agree to terms in rules, policies and procedures which they never knew about! So give 'em everything!

Tip #7: Make the Employee Sign BEFORE they start working

There must be "consideration" any contract in favour of the employer. That is, an employer must provide something in return to the employee if the employer wishes to insert a clause that negatively affects the employee's interests. Therefore, employers should ensure that the employee signs the contract prior to or as part of accepting employment. That way, it can be argued that the employee received the position in return for signing the contract. If the Employee starts working under an ORAL contract or OFFER of Employment (but not a full fledged written Employment Agreement), then they will be receiving consideration (payment and benefits) already. If the Employer then wants to change things up by having them sign a full fledged written Employment Agreement, the Employee can claim they didn't agree, didn't receive any additional consideration (because they were already getting paid for working), and therefore that Employment Agreement is invalid and unenforceable. What would govern in those situations? Basically, the oral agreement, offer of employment, common law, and ***Employment Standards Act, 2000*** could all govern – but not the Employment Agreement – OUCH!

Tip #8: Avoiding Procedural Defects with the Employment Agreement

In the DL Guide entitled "**Is My Legal Form Valid and Enforceable?**", I discussed how contracts (and Employment Agreements are no different) can be challenged on the basis of procedural defects. These procedural defects relate to the way in which the Employment Agreement was entered into – e.g. through duress, undue influence, unconscionable bargain, misrepresentation, etc. Just make sure – as much as humanly possible that is – that the Employee understands the agreement, has had enough time to review it carefully, has had independent legal advice concerning it, is signing freely and voluntarily, etc. Having the Employee initial in the bottom right hand corner of every page and including a certificate of independent legal advice are good practices.

Tip #9: Changing the Employment Agreement

Minor changes can be made to the Employment Agreement – assuming the Agreement itself allows them – by the Employer giving notice to the Employee of those changes. It's a contentious issue. What's minor? Well, this will depend on the specific circumstances of the case. Regular annual pay raises will likely be minor. This is a good thing for the Employee, who may have little to complain about (other than the amount is too little). If the Employer considers changing a policy manual a minor thing, a good course of action is to give the Employee written notice of the change. It's the Employer's hope that the Employee will not claim that the Employee unilaterally changed a fundamental aspect of the employment relationship without giving additional CONSIDERATION (e.g. more pay, benefits, title, etc.). In those situations, the employee can claim that they were CONSTRUCTIVELY DISMISSED AT COMMON LAW and therefore entitled to reasonable notice. So if an Employer wants to make a change to the Employment Agreement and not find themselves in litigation, then they should offer something more than what you're presenting giving the Employee (i.e. new CONSIDERATION). If in doubt, consult with a lawyer.

Tip #10: Review and Make Amendments to the Employment Agreement

Things change. And when they do, you should include those changes as amendments to the Employment Agreement. The Employer and Employee should sign these amendments. Importantly, the amendments should show what new CONSIDERATION is being provided in exchange for the changes. This will help protect the Employer from claims of constructive dismissal. Make sure the amendment agreement confirms the remaining terms of the Employment Agreement other than those that are being changed! If you need a lawyer's help, feel free to make a post.

Hiring Employees: Avoiding Discrimination

When hiring an associate, a payor will ask for a number of things such as the associate's:

- Name;
- Address;
- Immigration status;
- Education;
- Experience;
- Resume;
- Reference Checks; and
- Criminal Record.

Many payors may not realize they are not allowed to ask certain questions or make decisions that violate the Ontario ***Human Rights Code***. For example, a payor cannot ask a potential associate if they have been convicted of a crime for which they have received a pardon. Nor can a payor refuse to hire someone on the basis of their race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or disability.

The Employment Agreement: An Overview

An Employment Agreement is similar to an ordinary commercial agreement in many respects. It is a voluntarily entered-into business arrangement between two capable parties with an intention to create a legal relationship. It identifies the parties, the terms of employment, how the agreement may come to an end, etc. But it is significantly different in a few ways. FIRST, the agreement may be for an indefinite period of time. SECOND, many of the terms of the agreement – for example, regarding pay, holidays, notice for termination, etc. – will be subject to minimum standards legislation. Importantly, you CANNOT CONTRACT OUT (i.e. waive or obtain releases) of these standards. THIRD, the way in which the contract was entered into is subject to the same rules as would apply for ordinary commercial agreements (which can be read about in the DL Guide entitled "**Is My Legal Form Valid and Enforceable?**"), but is ALSO subject to human rights legislation: the employer cannot, in respect of employment, discriminate against a person based on their race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or disability: section 5(1) of the Ontario ***Human Rights Code***. FOURTH, any amendment or renegotiation of the Employment Agreement must generally be agreed to by both parties (not unilaterally imposed) and there must be NEW CONSIDERATION (e.g. pay, benefits, etc.). Otherwise, the employee could refuse the amendment and claim that they were unilaterally terminated (and seek legal action based on the doctrine of constructive dismissal). For the same reason, written Employment Agreements MUST be entered into BEFORE the Employee starts working. Otherwise, the Employee might argue (i.e. in case they are terminated) that they started working under an oral contract and were not provided any additional consideration (e.g. pay, benefits) to sign the written Employment Agreement. As such, the Employment Agreement will not be valid or enforceable and the employment relationship will be governed by the common law and applicable statutes…OUCH!

The Employment Agreement: Basic Terms

In what follows, I will briefly review some of the more significant terms found in an Employment Agreement with an indefinite term. If you are looking for an Employment Agreement WITH a fixed term, go to Dynamic Lawyers. Employment Agreement with an indefinite term may only be terminated if the employee resigns or is terminated in accordance with the agreement, the common law (e.g. based on reasonable notice), or any applicable legislation ***(e.g. Employment Standards Act, 2000***). It's worth mentioning a word or two about the common law of REASONABLE NOTICE. Basically, this is judge made law that requires Employers to provide reasonable notice of dismissal or appropriate compensation instead. During the notice period, dismissed employees are entitled to be given everything they would have had they continued to work (e.g. pay, benefits, bonuses, club memberships, etc.). There is no set formula for determining what this amount is: courts look at various factors to determine what constitutes reasonable notice including the Employee's years of service, age, position, level of responsibility, likely difficulty in finding a new comparable job, and the manner in which he or she was terminated. It's an art rather than a science.

Introductory Clause

Here, you'll need to properly identify the parties (e.g. individuals, corporations, etc.) and date the agreement. The parties will be the "**Employer**" (the party receiving and paying for the services) and the "**Employee**" (the party performing and being paid for the services). Identify the parties with utmost precision because if there are any mistakes here, you'll be in a rough spot in case of a dispute. For example, the real person you may want to go after is in actuality not the person who signed the agreement!

Background

This part includes information about the context and purpose for which the parties are entering into the agreement. It leads up to the actual body of the agreement. It's important to identify here what business the Employer is. This will ultimately become a defined word – namely, the "**Business**" – and used throughout the rest of the agreement. The Employer will want to define its Business broadly to protect its interests (for example: by including a clause in the Agreement that ultimately prevents the Contractor from competing in the Business).

Non-Inducement

If an Employee had previously worked for an employer, the new Employer will want to make sure that that prior work will not affect the new employment. If inducement is not addressed prior to the Employee starting to work, Ontario courts may find inducement to exist and lengthen the amount of reasonable notice to which they would be entitled when departing! Therefore, it's a good idea to include a Non-Inducement clause in the Employment Agreement saying that previous employment will NOT be credited for the purpose of determining any entitlements upon termination or otherwise.

Employment

Here, the Employer will identify whether the Employee will be full or part time, what their title / position will be, who they will report to, and what their duties and responsibilities will be. The latter will be called the "**Services**". This is a defined term to be used throughout the rest of the Employment Agreement. The Employer will typically want those Services to be performed at certain standards – for example, by a qualified, competent, and prudent worker engaged in the Business or according to the Employer's own internal rules, policies, and procedures.

Probation

Probation is not automatic. An Employment Agreement should clearly state that the first few weeks or months (typically up to 3 months) are probationary. This gives the Employer the chance to assess the Employee's skills, attitude, performance and other employment-related characteristics with minimal or relaxed obligations to continue employing the Employee (be they statutory or at common law). 3 months is a magical number because the ***Employment Standards Act, 2000*** states that no MINIMUM NOTICE is required for employees with less than 3 months of service: **section 54**. As such, during this probationary period, the Employer can terminate the Employee without the requirement to give notice or payment in lieu of notice. Now that takes care of statutory obligations, but what about the common law (i.e. judge-made law)? There may still be requirements to give reasonable notice or payment in lieu thereof if the Employee was not terminated for Just Cause. In ***Segreti v. Orion Communications Inc.***, 2003 CarswellOnt 1785, the Ontario Superior Court of Justice reiterated the law when it comes to probationary employees as follows:

21 The rights and obligations of a probationary employee and an employer were considered by Madam Justice Epstein in ***Mison v. Bank of Nova Scotia***, [1994] O.J. No. 2068 (Ont. Gen. Div.), where, considering the "more tenuous employment relationship" in such cases, she cited the requirements set forth in ***Kirby v. Motor Coach Industries Ltd.*** (1980), 6 Man. R. (2d) 395 (Man. Co. Ct.) [reversed (1981), 10 Man. R. (2d) 36 (Man. C.A.)]:

> 1. The onus is upon an employer to show that it has "just cause" to discharge even a probationary employee;
>
> 2. "Just cause" may be that the employee is, in the opinion of the employer, unsuitable for a job;
>
> 3. The unsuitability which would justify the termination of a probationary employee may go beyond those grounds which might support the discharge of a regular employee, and may include such considerations as character, compatibility, as well as ability to meet present and future production standards expected by the employer....
>
> 4. Where a probationer has been terminated for unsuitability, the employer's judgment and discretion in the matter cannot be questioned,....
>
> 5. All of the forgoing is subject to the requirement of the employer showing that the discharge was in the *bona fide* exercise of the employer's discretion and judgment that the employee was not suitable and not for some other reason or improper motive which would not justify a dismissal. [pp. 404-405]

The bottom line is that, even though an Employer may terminate an Employee within 3 months without being required to give STATUTORY notice or payment in lieu thereof, the Employer can ONLY terminate the Employee for "Just Cause" in order to avoid giving reasonable notice or payment in lieu thereof at COMMON LAW. So what constitutes "**Just Cause**" with respect to terminating probationary employees? Well, as seen above, the courts have given Employers considerable leeway in terminating Employees based on their being unfit for the job. If you have any comments, questions, or concerns about this, you should consult a lawyer.

Minor Changes: Constructive Dismissal

It is important to include a section that says that minor aspects of the Employment Agreement may change and that such changes do NOT constitute a termination of the Employment Agreement or constructive dismissal. Constructive dismissal refers to a unilateral (one-sided) and fundamental change of the terms of employment by the Employer without additional CONSIDERATION (e.g. higher position, better pay and benefits) which results in essentially a new contract. If the Employee is not happy with those changes, then they can claim that they were constructively dismissed (at common law) and seek damages for failure to give notice and severance (if applicable). To reiterate, the breach must be fundamental: minor or incidental changes won't give rise to constructive dismissal. What constitutes a fundamental change will depend on the fact. What did the Employment Agreement say, what did the Employer allegedly say or do wrong, what are the general circumstances, etc.? Courts will ask what a reasonable person in the Employee's shoes would have known and been able to foresee in determining whether the Employer's changes would significantly affect the fundamental terms of the Employment Agreement. Examples of what may constitute constructive dismissal include changes to: title / position, remuneration or benefits, duties and responsibilities, location of work, hours and start time, sales territory, and accounts. Conduct which is unwarranted and abusive on the part of the Employer may also be grounds for constructive dismissal.

So how can an employer avoid constructive dismissal claims? Well, this leads to a discussion of ***Wronko v. Western Inventory Services Ltd.*** 2008 ONCA 327, leave to appeal refused, 65 C.C.E.L. (3d) 185 (Supreme Court of Canada). In this case, after working for the company for 16 years, an employee was promoted to management. Later that same year, the employee signed a new employment agreement that provided him with a payment of 2 years' salary and bonus in case he was terminated without cause. About a year and a half later, the employee was presented with a revised employment agreement. This new agreement cancelled and replaced his previous termination package with a simple "3 weeks for each year of service" up to a maximum of 30 weeks' notice package. This new package was designed to match other packages for senior executives. This did not sit well with this particular employee, since he stood to gain more under the previous termination package. So he refused to sign. The president of the company sent an email to the employee, advising him that the amended employment agreement was in "full force and effect". The employee fought back, claiming that he had been constructively dismissed. He launched a lawsuit.

The Court of Appeal found that the president's email was evidence of the employer terminating the employment relationship. It was a unilateral and unequivocal change to a fundamental aspect of that relationship. The employee had also repeatedly and steadfastly rejected the amendment – but to no avail. Since the employer had terminated the relationship, the employee had 3 options: (1) accept the change, (2) reject the change and sue for damages for constructive dismissal, or (3) make it clear to the employer that the new terms are being rejected (at which point the employer has to decide whether to terminate the employee with proper notice and offer re-employment on new terms or acquiesce to the employee's position). In the case of (3) above, if the employee does not terminate the employee and permits him or her to keep fulfilling his or her job requirements, then the employee is entitled to insist on adherence to the terms of the original employment contract!

In this particular case, the Court of Appeal found that the third option above fit the bill. Specifically, the employee explained that he had rejected the new changes. Instead of terminating the employee and offering re-employment on new terms or continuing his employment based on the old terms, it simply terminated him. This triggered the old termination clause (not the new one, since that agreement had not been accepted by the employee). As such, the employee was entitled to 2 years' termination pay!

So what can be gleamed from ***Wronko***? Well, if you're an employer and you want to avoid being sued for constructive dismissal, you need to offer fresh **consideration** (something of value to the employee) when you unilaterally change a fundamental aspect of employment. That "**consideration**" cannot simply be continued employment. There must be additional pay, benefits, etc. to reflect a bargain. Furthermore, this fresh consideration must be accepted by the employee. It's best to document this acceptance through a new employment agreement or amendment to the existing one. If that consent is not forthcoming, then the employer has a few options: (1) terminate the employee based on the provisions of the employment agreement (or common law or employment standards legislation) and offer re-employment based on new terms or (2) allow the employee to maintain their employment based on the old and existing terms.

Term: Fixed vs. Indefinite

Employment Agreements can be for an indefinite or fixed term (e.g. 6 months, 1 year). Employment Agreements with an indefinite term will terminate when the employee resigns or is terminated. Here, the termination will be governed by the terms of the Employment Agreement, common law, and any applicable statutes (e.g. ***Employment Standards Act, 2000***). If, however, the Employment Agreement has a fixed term, the relationship between the employee and the employer may come to an end without imposing any additional obligations on the employer arising from statute or the common law. This can have significant consequences for an Employee: they lose the protections of the ***Employment Standards Act, 2000*** (e.g. concerning notice or payment in lieu of notice) and are not entitled to REASONABLE NOTICE under the common law. Worth mentioning is that Employment Agreements with a fixed term cannot exceed 9 years under section 2 of the ***Employers and Employees Act, 2000***. This 9 year limit does not apply, however, to a written Employment Agreement with an indefinite term.

Even though an Employer may see many benefits with having an Employment Agreement with a fixed term, there are additional risks to the Employer which should be noted. Courts will scrutinize the agreement and the realities of the employment relationship to determine if the agreement was indeed one of an indefinite or fixed term. For example, in ***Slepenkova v. Ivanov***, [2007] 60 C.C.E.L. (3d) 303, the Ontario Superior Court of Justice reiterated what previous courts had said about the issue of fixed vs. indefinite terms in the context of whether "reasonable notice" under the common law (not statutory notice under the ***Employment Standards Act, 2000***) had been provided by the employer upon terminating the employee:

> 67 In ***Ceccol v. Ontario Gymnastic Federation***, [2001] O.J. No. 3488 (Ont. C.A.), the Court of Appeal for Ontario considered the line between fixed and indefinite term employment contracts and the requirements for successfully rebutting the common law presumption of reasonable notice. MacPherson J. A. wrote:
>
> > It seems to me that a court should be particularly vigilant when an employee works for several years under a series of allegedly fixed-term contracts. Employers should not be able to evade the traditional protections of the ***ESA*** and the common law by resorting to the label of 'fixed-term contract' when the underlying reality of the employment relationship is something quite different, namely, continuous service by the employee for many years coupled with verbal representations and conduct on the part of the employer that clearly signal an indefinite-term relationship.

> 68 Professor Geoffrey England, in his text *Individual Employment Law* (Toronto: Irwin Law, 2000), wrote that in order to find a fixed term contract, "*the courts require unequivocal and explicit language...and will interpret any ambiguities strictly against the employer's interests*".

In ***Slepenkova v. Ivanov***, the Ontario Superior Court of Justice reviewed the facts of that case and held that the contract did not contain "unequivocal and explicit language" necessary to establish a fixed term contract. The Court came to that conclusion on the basis that the terms of the contract were ambiguous with respect to renewal and extension, the contract had not been renewed at times but employment continued unchanged, and because there were significant variations between the terms of the agreement and the parties' conduct. As such, the written contract did not bind the parties and could not be said to refute the presumption (requirement) of reasonable notice.

So what should you take away from this? BE VERY CAREFUL IF, AS AN EMPLOYER, YOU ARE TRYING TO AVOID THE OBLIGATIONS OF MINIMUM STANDARDS LEGISLATION OR THE COMMON LAW BY HAVING A FIXED TERM CONTRACT! Courts will scrutinize the contract, looking for "unequivocal and explicit language" and will also examine the realities of the employment relationship to determine whether the contract was indeed one of a fixed or indefinite term.

Termination by Employee Giving Notice

If the Employee resigns immediately, then the Employer will have to pay the Employee up to the date of resignation. If the Employee gives notice of their intention to terminate the Agreement, then the Employer can continue employing the Employee until the end of that period (and make payment accordingly) or waive the remainder of that period (and pay only up to the date that the notice period is waived).

Termination by Employer Giving Notice

Here, the Employer can give an Employee notice that they are being let go. The Employer will be required to provide the minimum notice period or payment in lieu of notice under the ***Employment Standards Act, 2000*** (as well as any applicable severance). Whether the Employer will be required to give reasonable notice at common law may depend on what the Employment Agreement says. To avoid this possible point of contention, the Employment Agreement may require the Employee to waive their common law right to reasonable notice, thereby restricting the Employer's liability to provide only statutory entitlements. These clause may be found to be enforceable so long as they are reasonable, not signed under duress, is the result of proper bargaining, is consistent with legislation, is clear and certain enough to interpret, and the result of applying the clause would not be grossly unfair. If you need to consult a lawyer concerning these types of clauses, you can make a post. In ***King v. Weber Manufacturing Technology Inc.***, [2008] 70 C.C.E.L. (3d) 30, the Ontario Superior Court of Justice found that a clearly worded clause that limited an Employee's entitlements only to the ***Employment Standards Act, 2000*** and waived common law rights to reasonable notice was acceptable. The clause is that particular case was clear and unambiguous and therefore rebutted the common law presumption that reasonable notice was required to terminate the Employee's employment. Specifically, the Employee agreed to waive his common law rights by agreeing to accept payment based on the statutory requirements of the ***Employment Standards Act, 2000***.

Termination for Just Cause

Where the Employee has acted inappropriately or not up to certain standards (as defined in the Employment Agreement), it may terminate the Employment Agreement without the need to provide notice or payment in lieu thereof. Examples of "Just Cause" typically include: stealing, lying, regularly providing bad service (despite being warned), being incompetent, failing to follow the client's instructions, not being loyal, breaking the law, being insubordinate towards the client, going bankrupt, breaching the independent contractor agreement (e.g. by failing to show up for work), etc. All of these things will be negotiated at the beginning of the relationship between the Employer and Employee. This is termination for "**Just Cause**". When this happens, the Employer will only be responsible to pay the Employee up to and including the date that such Just Cause allegedly occurred.

Restrictive Covenants

Restrictive Covenants are terms and conditions in the Employment Agreement that limit the Employee's ability to do certain things. Typical examples include restrictions on the use and disclosure of confidential information as well as non-compete and non-solicitation covenants. **Non-compete clauses** generally say that the employee will not him or herself compete with the employer in its business during the term of the Employment Agreement and for a set period of time thereafter and within a set geographic area. **Non-solicitation clauses** generally say that the employee will not solicit customers or employees of the Employer (or its agents, representatives, etc.) to leave the Employer during the term of the Employment Agreement or for a set period of time thereafter and within a set geographic area.

Now the general common law rule is that ALL RESTRICTIVE COVENANTS (because they restrain trade) are contrary to public policy and therefore void. Well, that's not very good for Employers. But this general rule has been relaxed such that courts now have a balancing act to determine whether a particular restrictive covenant is valid and enforceable. On the one hand, the courts will look to the public interest in maintaining freedom of trade. On the other hand, the courts will look at restraining this freedom in the interests of a particular person (the Employer) within reasonable limits.

Courts will look at various factors to determine if a restrictive covenant is reasonably necessary to protect the interests of the Employer while at the same time not being injurious to the public. These factors include whether the restrictive covenant is reasonable (e.g. based on geography, time, and proscribed activities), founded on good CONSIDERATION (i.e. benefits such as payment were provided in exchange for the employee agreeing to the restrictive covenant), and not too vague. Courts may be more prone to enforce restrictive covenants where they are needed to protect the proprietary interests of an employer (e.g. trade secrets, confidential information, client base / connections), are limited geographically (e.g. 25 km within the Employer's office) and in time (e.g. 1 year), and is drafted in clear and certain terms.

Challenging Restrictive Covenants: Substantive Inadequacy

Since restrictive covenants are contractual, the principles of contract law apply to determine their validity, interpretation, and enforceability. When it comes to contract law, there are many ways in which a clause or agreement can be challenged. For starters, the clause or agreement may fail for **substantive inadequacy**. This means that the actual terms (i.e. the words) of the agreement are so deficient that they cannot be enforced.

For example, if the provision is so unclear that it is capable of multiple interpretations or is missing information, then it may not be enforceable. There's also an age-old rule of interpretation called *contra-proferentum* which states that, in the case of an ambiguity, the provision should be interpreted against the party who wrote it (unless the parties intended the opposite).

To avoid having an agreement unenforceable, make sure the language is definitive instead of unclear and avoid providing alternatives – for example "the non compete clause may last 1, 2, or 3 years".

Worth noting is that an agreement to agree about some critical part of the contract at a future time can also be challenged and struck down by a court. If essential terms are left out of a contract and the parties simply agree to come up with an agreement about those terms later, then the entire contract may be challenged! An agreement to agree is generally not enforceable.

Vague and Ambiguous Terms

The case of ***Shafron v. KRG Insurance Brokers (Western) Inc.*** [2009] S.C.J. No. 6 is a good example of how a restrictive covenant can be struck down if it is too vague and ambiguous. In that case, Shafron sold his insurance agency to KRG Insurance Brokers Inc. for $700,000. KRG continued to employ Shafron for a number of years. Their employment contract included a non-compete clause which stated that Shafron was not to compete with KRG's business "within the Metropolitan City of Vancouver" for a period of 3 years after being terminated. When Shafron stopped working for KRG in December 2000 and started working for a competitor in Richmond, British Columbia, KRG sued (claiming that he had breached the non-compete clause in his employment contract).

Now the thing to keep in mind is that there is no such place as "Metropolitan City of Vancouver". It's actually just called the "City of Vancouver". When the matter reached the courts, they had to figure out how to deal with this ambiguity. Should they "read it down" so that "City of Vancouver" actually meant by "Metropolitan City of Alberta", thereby making the provision enforceable? Should they strike it down entirely due to ambiguity? Should the words "Metropolitan" be severed from the rest of the agreement, thereby leaving "City of Vancouver" enforceable? Should the clause be rectified? The matter reached the Supreme Court of Canada, where that Court held that the non-compete clause was unenforceable. The Court held that the clause was too uncertain and ambiguous. There was no mutual understanding of the parties at the time they entered into the contract as to what geographic area the restrictive covenant covered. Thus, it would be inappropriate to re-write the restrictive covenant (thereby interfering with the parties' intentions at the time of contracting) by severing or rectifying it.

Another good example is ***IT/NET Ottawa Inc. v. Berthiaume***, [2002] 29 B.L.R. (3d) 261 (reversed on other grounds by the Court of Appeal in (2006) 13 B.L.R. (4th) 15 and leave to appeal refused by the Supreme Court of Canada in (2006) 357 N.R. 395. In that case, the plaintiff (a management consulting firm) sued the defendant (a subcontractor hired by the plaintiff) for breach of a non-compete agreement, among other things. The defendant's contract with the plaintiff said that he would not move to one of the defendant's competitors. Here's what it said:

4. NON-SOLICITATION & NON-COMPETITION: The [Defendant] agrees that during this Agreement period, and for a period of 12 months after its termination, that s/he will not, directly or indirectly, on anyone's behalf (including, company, partnership, person or self):

4.1 offer or cause to be offered, or to recommend, the offering of employment or subcontract services, to any employee or Subcontractor of [the Plaintiff].

4.2 he/she will not attempt to solicit business from any IT/NET clients or prospects without the written consent of [the Plaintiff]. The intent of this clause is to reasonably protect the goodwill of [the Plaintiff] while at the same time not unduly limiting the ability of the [the Defendant] to continue in the practice of his/her profession.

The defendant left the plaintiff and was engaged by a competitor. When the plaintiff sued, the defendant claimed (among other things) that the non-compete agreement was too vague and ambiguous.

Justice Aitken of the Ontario Superior Court of Justice agreed and found that the non-compete agreement was, in part, too vague and ambiguous to be enforceable. He wrote:

(c) Were the terms of the restrictive covenant clear, certain and not vague?

96 The Master Agreement is not an example of clear drafting. There are several concepts contained in the Master Agreement which are not adequately defined. As a result, the terms of the restrictive covenant, when considered in the framework of the Master Agreement and in the context of the consulting business, are ambiguous.

97 The non-solicitation and non-competition clauses are said to apply "during this Agreement period and for a period of 12 months after its termination"; however, the "Agreement period" is not defined in the Agreement and the ways in which the Agreement can be terminated are not clarified. The first clause states that "[The Plaintiff] engages the [Defendant] to provide services to [the Plaintiff] for an indefinite term, subject to the termination provisions in clause 3″. Clause 3 only discusses those situations where [the Plaintiff] can terminate the Agreement immediately upon notice to the subcontractor — and those situations simply mirror the circumstances where [the Plaintiff]'s client terminates its arrangement with [the Plaintiff] or complains that the subcontractor is not performing his or her duties appropriately. The Agreement still contemplates other situations where either [the Plaintiff] or the subcontractor will terminate the Agreement, but those other situations are not described. Clause 6.2 refers to the non-solicitation and non-competition clause and the duty of confidentiality clause continuing in force notwithstanding the termination of the Agreement by either party or the reasons for that termination. So the first area in which the Master Agreement's terms are ambiguous is in regard to how and when the Agreement is terminated. This means that the concept of "Agreement period" in clause 4 is unclear.

98 The second concept which is unclear is that of "employee or Subcontractor of [the Plaintiff]", as used in clause 4.1. Clarification is required as to whether this refers to someone who was at any time in the past or will become at any time in the future an employee or subcontractor of [the Plaintiff] or whether it refers only to those individuals who were employees or subcontractors of [the Plaintiff] when [the Defendant] and [the Plaintiff] signed the Master Agreement. Does it simply refer to anyone who is an employee or subcontractor of [the Plaintiff] at the point in time that [the Plaintiff] may want to offer work to that person or recommend that person for work?

99 The third concept which is unclear is that of [the Plaintiff]'s "clients or prospects". Does this refer to anyone who has been in the past or may be in the future a client or potential client of [the Plaintiff]? Does it refer to an organization or individual at the time [the Defendant] and [the Plaintiff] signed the Master Agreement to whom [the Plaintiff] was supplying services or to whom [the Plaintiff] was actively marketing in an effort to land a contract or to whom [the Plaintiff] had submitted a proposal? Does it refer to any organization or individual that would fit one or more of these descriptions at any point during the entire period of time in which the Master Agreement was binding on [the Defendant] and [the Plaintiff] plus 12 months thereafter. The statement in clause 4.2 that "The intent of this clause is to reasonably protect the goodwill of [the Plaintiff] while at the same time not unduly limiting the ability of the Subcontractor to continue in the practice of his/her profession", although an appropriate statement of intention, does not go far enough to clarify the precise meaning of clause 4.2, and does not help to clarify the other concepts in clause 4.

100 The best evidence from the point of view of [the Defendant] tending to show that the wording of the non-solicitation and non-competition clauses in the Master Agreement was vague and ambiguous, was that of Brown. When he was pressed during cross-examination to describe the limits of the terms "clients" and "prospects", he was unable to provide a clear answer. He was very clear that the term "client" included the government branch where the consultant was working and that the consultant was not free to have his services in regard to that position bid by another company at the end of [the Plaintiff]'s contract with that government branch. However, he was unclear as to whether the consultant could have his services bid by another company in regard to another position at the government branch which may have come to his attention when he was an [the Plaintiff] consultant at that branch. He was also unclear as to whether the consultant was free to have his services bid through another company in regard to a position at another government branch where [the Plaintiff] was actively marketing and hoping to be invited to bid. Later he clarified that it was only if [the Plaintiff] were actively trying to place the consultant in another position would the consultant be prohibited from taking that position through another consulting firm. What Brown considered the meaning of the non-solicitation and non-competition clauses is of some interest in that he was the person who signed the Master Agreement on behalf of [the Plaintiff], and who answered any questions [the Defendant] had about the agreement before it was signed.

101 For reason of lack of clarity alone, the non-solicitation and non-competition clauses in the Master Agreement are unenforceable.

So what's the moral of the story? Well, first, you need to make sure that you have crystal clear and complete terms when you're drafting non-compete and non-solicitation clauses. This means that the definitions – such as the "**Business**" that you want to protect, the "**Customers**" and "**Employees** that you want to prevent from being solicited, and the **geographic scope** of the covenant – are all properly drafted.

Lack of Consideration

For any restrictive covenant to be valid and enforceable there must be something called "**Consideration**". "**Consideration**" is some benefit which the Employee receives in exchange for agreeing not to do something that they were otherwise able to do. Consideration in an employment agreement is the pay and benefits that the associate receives in exchange for providing services. The bottom line is that the party seeking to enforce the promise must show consideration. Motive or desire to make a promise does not constitute good consideration. If a party is already under a pre-existing legal duty to do or not do something, that may be challenged as not being adequate consideration. Similarly, if a party is under a public duty to do something, then that is generally not considered adequate consideration. Finally, a pre-existing duty owed by one party to the other may not be adequate consideration unless something new of value is being provided. To wrap your head around it, just think about this example: if I promise to give you $1,000 if you like me more, there is NO consideration. Why? Because liking me more is not something that is recognized as having monetary value by our judicial system. It is not a promise that that can be enforced. So it is lacking consideration and is not valid. Get it? Here's another example of an agreement WITH consideration: in exchange for paying you $1,000, I promise not to sue you for the damage you did to my house. This time, I'm promising not to make a claim against you, even though I could. I'm giving up something of benefit in exchange for something valuable from you (i.e. money). There is a real and fundamental exchange here so this agreement can be valid and enforceable.

Challenging Restrictive Covenants: Procedural Defects

A restrictive covenant that meets all of the above-mentioned substantive requirements could still be rendered invalid and unenforceable on the basis of a procedural defect. Procedural defects involve the way that the agreement was entered into. Such defects include a party claiming that:

- they did not have legal capacity (e.g. they were mentally incapacitated) at the time of entering the non-compete or non-solicitation agreement;
- they were under duress or undue influence;
- the restrictive covenant was unconscionable (i.e. substantively and procedurally unfair);
- they relied on a misrepresentation (e.g. fraudulent, negligent, etc.) made by the other party; or
- the party wanting to rely on the non-compete had fundamentally breached the agreement (and therefore the entire agreement was void).

Duress

DURESS is a legal doctrine that allows a party to challenge an agreement on the basis that they were so seriously coerced by another's party's illegitimate exercise of power such that they could not freely consent to entering into the agreement. Examples of duress include threats or acts that are unlawful (e.g. criminal, breaches of contract, etc.) or illegitimate (e.g. threatening to refuse to enter into a contract or threatening to terminate a contract lawfully unless…). If there's some kind of unlawful or illegitimate pressure that isn't in the normal course of market forces, then it could amount to duress. Specific examples could include a party threatening another party's life or limb, to sue, or call the police unless they enter into an agreement.

Undue Influence

UNDUE INFLUENCE is similar to duress as it is concerned with the adequacy of a party's consent to enter into an agreement. Unlike DURESS, however, undue influence may exist without violence or threats. Undue influence depends on the RELATIONSHIP between the parties (e.g. parent-child) which causes one party to confide in the other and leads the other to take advantage and exert a natural influence over the other. So the contract is challenged on the basis that a weaker party was dominated by or unduly influenced by the other party. There's a special relationship that involves trust, confidence and influence. To get around this type of challenge, a party could try to argue that the other party received full disclosure, had independent legal advice, and had only a minor disadvantage when it came to unequal power.

Unconscionable Bargain

Agreements which amount to UNCONSCIONABLE BARGAINS can also be challenged. This doctrine relates to an unfair advantage gained by an unconscionable use of power by a strong party against a weaker party. So there are substantive and procedural elements here. The substance is the contract itself: how fair were its terms? The procedural element has to deal with how it was entered into. The defence of unconscionable bargain may apply to situations where there is no unlawful threat (duress) or domination (undue influence). So to recap: there is an inequality of bargaining power and one party has taken undue advantage of that inequality. That inequality in bargaining power may result from poverty, age, ignorance, emotional vulnerability or mental infirmity of one party. This doctrine is not meant to simply undue bad bargains. It looks at factors such as fairness, relationship between the parties, their respective knowledge and weaknesses, sources of power, conflicts of interest, grossly inadequate consideration in the contract, etc.

Misrepresentation

A MISREPRESENTATION is a material statement which is false and which an innocent party reasonably relies upon to their detriment to enter into the contract. The false statement could have been made fraudulently (i.e. where a party knew it was false, but said it anyways with the intention of having the other party rely upon it as being true), negligently (where a party was careless or reckless in knowing the truth of the statement, but says it anyways), or innocently (a party was innocent of fault in making a misrepresentation). If there has been found to have been a misrepresentation, then the contract can be challenged and rendered invalid and unenforceable.

Mistake

An agreement may be challenged in whole or in part on the basis that there was a mistake. Mistakes get made all the time. Sometimes, only one party makes the mistake (UNILATERAL MISTAKE). Other times, both parties make the same mistake (COMMON MISTAKE). And other times, both parties make mistakes but their mistakes are different (MUTUAL MISTAKE). Interestingly, a contract may actually contemplate that there is a mistake and how it ought to be dealt with. Sometime, the parties claim that there was a radical or fundamental difference between the document they thought they were signing and the document actually signed (in terms of character, contents or otherwise). But the signer cannot raise that defence if they failed to use reasonable care in signing the document.

Challenging Restrictive Covenants: Reasonableness (under the Common Law)

Even if a restrictive covenant can withstand substantive and procedural challenges, the common law (i.e. judge-made law) says that they are in restraint of trade and hence contrary to public policy. **THEREFORE, THEY ARE PRESUMED TO BE VOID AND UNENFORCEABLE!** But this general rule has been relaxed such that courts now have a balancing act to determine whether a particular restrictive covenant is valid and enforceable. On the one hand, the courts will look to the public interest in maintaining freedom of trade. On the other hand, the courts will look at restraining this freedom in the interests of a particular person (e.g. the employer) within reasonable limits.

Courts will look at various factors to determine if a restrictive covenant is reasonably necessary to protect the interests of the party seeking to enforce it while at the same time not being injurious to the public. These factors include whether the restrictive covenant is reasonable (e.g. based on geography, time, and proscribed activities), founded on good CONSIDERATION (i.e. benefits such as payment were provided in exchange for the employee agreeing to the restrictive covenant), and not too vague. Courts are more prone to enforce restrictive covenants where they are needed to protect the proprietary interests of a payor or partner (e.g. trade secrets, confidential information, client base / connections), are limited geographically and in duration, and is also drafted in clear and certain terms.

A good starting point when it comes to challenging non-compete clauses and agreements generally is the case of ***Rogers & Rogers Inc. v. Pinehurst Woodworking Co.*** [2005] 14 B.L.R. (4th) 142. In that case, the plaintiff (a business that supplied and installed store fixtures in high end stores) sued the defendant subcontractor (a business that manufactures store fixtures) for disloyalty. Specifically, the plaintiff alleged that it showed the defendant a business opportunity to supply a client with store fixtures. The contract between two parties stated that any future product inquiries by that client to the defendant were to be directed through the plaintiff. The defendant won the client's business and the plaintiff sued.

Justice Perell of the Ontario Superior Court of Justice reviewed the various allegations and largely dismissed the action against the plaintiff, awarding only nominal ($6,000) damages for a breach of contract claim.

What's important here is Justice Perell's summary of the jurisprudence concerning the validity and enforceability of clauses that try to restrict trade generally. Here's what he wrote at paras. 95-100:

> **95** A contract in restraint of trade is one in which a party to a contract agrees to restrict his or her liberty in the future to freely carry on trade with other persons not parties to the contract: ***Stephens v. Gulf Oil Canada Ltd.*** (1975), 11 O.R. (2d) 129 (Ont. C.A.) at p. 138-9; ***Esso Petroleum Co. v. Harper's Garage (Stourport) Ltd.*** (1967), [1968] A.C. 269 (U.K. H.L.) at p. 317.
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> **96** All restraints of trade are contrary to public policy and are prima facie void unless they can be justified as being reasonable with respect to the interests of the parties and the public: ***Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.***, [1894] A.C. 535 (U.K. H.L.) at p. 565; ***J.G. Collins Insurance Agencies v. Elsley***, [1978] 2 S.C.R. 916 (S.C.C.); ***Doerner v. Bliss & Laughlin Industries Inc.***, [1980] 2 S.C.R. 865 (S.C.C.).
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> **97** The test of reasonableness as between the parties is that the restrictive covenant not go beyond what is adequate to protect the interest of the party seeking to uphold the covenant: ***Herbert Morris Ltd. v. Saxelby***, [1916] 1 A.C. 688 (U.K. H.L.).
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> **98** A four-part inquiry is required to determine if a contract is in restraint of trade: ***Tank Lining Corp. v. Dunlop Industries Ltd.*** (1982), 40 O.R. (2d) 219 (Ont. C.A.). The questions are: (1) Is the covenant in restraint of trade? (2) Is the restraint against public policy or is it one of several exceptional cases? (3) Is the restraint justifiable as reasonable between the parties? and (4) Is the restraint justifiable as reasonable with respect to the interests of the public?
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> **99** The onus is on the party seeking to enforce the contract to establish that it is in the interests of the parties and the onus for establishing that it is not reasonable in the public interest is on the party seeking to oppose enforcement; ***Stephens v. Gulf Oil Canada Ltd.***, supra; ***Tank Lining Corp. v. Dunlop Industries Ltd.***, supra. Reasonableness is determined in the light of circumstances existing at the time the contract is made, which includes the parties expectations of what may possibly happen in the future: ***Stephens v. Gulf Oil Canada Ltd***., supra.; ***Tank Lining Corp. v. Dunlop Industries Ltd.***, supra.

> **100** That the covenant could have been drafted in narrower terms will not save it, because the court will examine only the agreement actually made: ***Elsley v. J.G. Collins Insurance Ltd.***, supra at pp. 925-6; ***Mason v. Provident Clothing & Supply Co.***, [1913] A.C. 724 (U.K. H.L.) at p. 732; ***Maguire v. Northland Drug Co.*** [1935] 3 D.L.R. 521, [1935] 3 D.L.R. 521 (S.C.C.).

These observations were reiterated by the Supreme Court of Canada in ***Shafron v. KRG Insurance Brokers (Western) Inc.***, as discussed above. From Justice Perell's review of the jurisprudence, it becomes clear that courts don't like clauses that restrain trade. These clauses are contrary to public policy. Therefore, they are void unless they can be justified as being reasonable as between the parties and the public interest. There are tests for determining the latter, onuses that must be discharged by parties trying to rely on this or that, and factors that should be considered and weighed accordingly by a court.

So just to recap, for a non-compete to be enforceable, it must be reasonable as between the parties themselves and in light of the public interest. What is reasonable will depend on all of the circumstances.

Reasonableness of Duration

For starters, courts will look at the reasonableness of the duration of the restrictive covenant. A one or two year restrictive covenant is more likely to be upheld than one that is for ten years.

Reasonableness as to Geographic Limit

Courts will look at the reasonable expectation of the parties when they enter into the agreement. What is reasonable will depend on the circumstances that existed AT THAT TIME. Geographic limits that are excessive may not be enforceable (e.g. province or country-wide). In ***Carnaghan Insurance Ltd. v. Lundy***, (1974) 9 N.B.R. (2d) 651 (Q.B.), the court found that a non-compete which restricted competition for a 3 year period following termination of employment within the province of New Brunswick was unenforceable because the employer's business was concentrated around Saint John. Here's what the court wrote:

> **19** However the plaintiff has not satisfied me that the area covered by the agreement, i.e. the Province of New Brunswick, was reasonable. The business of the plaintiff was concentrated in the Saint John area. While there was no evidence adduced I think I can note that in a geographical sense the Saint John area is a minimal fraction of the province while from the point of view of population it represents about one-sixth of the province. In view of the fact that the plaintiff does not do any substantial amount of business in the rest of the province the agreement was, as regards area, unreasonable and excessive.

Furthermore, in an old Manitoba Court of Appeal case (***New Method Cleaners & Launderers Ltd. v. Hartley***, [1939] 1 D.L.R. 711 (Man C.A.), an employee agreed to a restrictive covenant which prevented him from soliciting dry cleaning or laundry business within Manitoba for a period of 1 year. But the employer's business was primarily located in the City of Winnipeg, not the entire province. **As such, the Court ruled the restrictive covenant was not reasonable in its geographic scope:**

> **11** The plaintiff's business, it has been seen, is in the city of Winnipeg and neighbourhood. The protection they were entitled to was with respect to route No. 1, and possibly the area within which they do business. A covenant in the circumstances which extends to the whole province necessarily is bad in toto. It is also invalid because within its scope are customers the defendant did not have business with, and persons with respect to whom he might or could have no knowledge that they were customers of the plaintiff, including customers obtained by the plaintiff after the termination of his service.

In ***Steele v. Ingram*** [2009] O.J. No. 3665, Steele sold his 50% interest in an insurance brokerage and, as part of that transaction, entered into an employment agreement which contained a non-compete clause. That non-compete clause required Steele to continue working for the insurance brokerage for 2 years after the sale and then not compete with the brokerage for a period of 5 years in Canada and the U.S. after the termination of his employment. When he was terminated, he went to work with another insurance company in Cambridge, Ontario. The brokerage refused to pay the outstanding purchase price on the basis that Steele breached the non-compete; the matter ultimately went to court. The Ontario Superior Court of Justice held that it was not reasonable for the parties to assume or expect that the business sold by Steele would expand into all of Ontario, into all provinces of the country and into the United States of America.

In short, the reasonable expectations of the parties as to the future scope of the business did not support a geographic restriction as wide as that contained in the Non-Competition Agreement. Now, worth mentioning is that the purchasers of Steele's interest tried arguing that the advent of the Internet defined the parties expectations about being able to expand throughout all of Canada and the United States. The Superior Court rejected that argument on the basis that that company was regionally based in Guelph, Kitchener and Waterloo, and sold products identical or similar to those available to the public all over the world through countless other brokers. Besides, any business with a product to sell could theoretically purport to have a worldwide market because of the Internet; as such, the Internet could not as a general rule inform reasonableness for purposes of determining the validity of a non-competition agreement.

Reasonableness as to Activities

Assuming that a restrictive covenant is reasonable with respect to duration and geographic scope, there's still the issue of whether the nature of the activities sought to be restricted are reasonable. In ***Steele v. Ingram*** (discussed above), the Ontario Superior Court of Justice scrutinized the non-compete clause and ultimately held that it was unreasonable and unenforceable. Part of the court's reasoning was that the non-compete clause's restriction on activities – namely, not being able to engage in the insurance business at all – was too severe and showed how unreasonable the geographic scope of the covenant was.

In certain circumstances, a Court may say that a non-solicitation agreement would have been sufficient and that a non-compete was too onerous and not reasonable. The case of ***Lyons v. Multari*** (2000), 3 C.C.E.L. (3d) 34 becomes relevant here. This is a leading case by the Ontario Court of Appeal concerning an employee dentist who was sued for allegedly breaching a non-compete clause in an employment contract.

The issue before the court was whether that restrictive covenant was enforceable. The facts of that case are straightforward. One dentist was a principal of the business (i.e. the employer). Another dentist was an associate (i.e. employee). The two dentists signed a short-hand note that limited the associate's ability to practice dentistry if he chose to leave. The entire non-compete clause said: "Protective Covenant. 3 yrs. – 5 mi." After 17 months of working, the associate dentist left and opened up his practice – which competed with his employer's business and was 3.7 miles away. The employer sued for breach of contract. The Ontario Court of Appeal disagreed, holding that the non-compete clause was unenforceable.

So how did the Court of Appeal end up there? Well, it started off by saying that all restrictive covenants go against public policy (free trade, etc.) and are therefore VOID. The only exception to this general rule is if the restraint is reasonable in the interests of the parties and also reasonable in the public interest. So there are a few factors which a court should consider to answer these questions: (1) whether the employer has a proprietary interest entitled to protection, (2) whether the temporal or spatial features of the clause are too broad, and (3) whether the covenant is unenforceable as being against competition generally, and not limited to proscribing solicitation of clients of the former employee. So with this test and factors in hand, the Ontario Court of Appeal held the following:

- The employer had NO proprietary interest in other dentists who referred clients (so those referring dentists were up for grabs);
- The employer benefited from the relationship with the employee;
- The role played by the employee was not special; and
- A non-solicitation clause would have sufficed (a non-compete clause was too drastic).

Overall, based on all of these factors, the Court of Appeal concluded:

> **48** For all of these reasons, I conclude that Dr. Lyons' non-competition clause is unenforceable. His legitimate interest in protecting his own referring dentists and patients could have been protected by a non-solicitation clause. An established professional person or firm — be it in the field of dentistry, medicine, engineering, architecture, law or other professions — will constantly seek to recruit entry level associates to the practice. Such recruitment is good for the established person or firm and for the young associate.

Sometimes, a non-solicitation clause will not be enough to protect a party's proprietary interests. In ***Elsey v. J.G. Collins Insurance Agencies Ltd.***, [1978] 2 S.C.R. 916, the Supreme Court of Canada had to decide whether a former insurance agent employee had violated a non-compete clause in an employment contract with his former employee. The clause stated that the employee was not to directly or indirectly engage in the business of a general insurance agent within the defined area for a period of 5 years after termination of his employment as manager. The employee worked a number of years for the employer. During that time, he dealt with customers and gained knowledge of insurable assets, financial credit, and the likes and dislikes and idiosyncrasies of each customer in a recurring and confidential relationship. He then left and started his own general insurance agency, taking 3 employees with him. He advertised and his former employer's clients left to become his clients**.** The Court found that the non-compete clause was reasonable in duration, geographic scope, and in the public interest. Because the employee had acquired a close personal acquaintance with the customers of the business, a covenant which prevented the employee from establishing his own business may be justified as opposed to a covenant which merely prohibits the solicitation of former clients by the employee. In other words, a non-solicitation covenant would have been inadequate to protect the employer's proprietary interest in its clients.

The Ontario Court of Justice (General Division) also upheld a general non-compete agreement in ***Chen v. Kiss***, [1995] O.J. No. 2771. There, a dental surgeon (Dr. Chen) signed an agreement to associate with another dental surgeon (Dr. Kiss) who owned a dental practice in Georgetown. That agreement stated that, if Dr. Chen left the practice, then he would not be able to practice dentistry within a 3 mile radius of that practice for 3 years. Dr. Chen ultimately left the practice but wanted to come back to Georgetown to establish a dental practice. Dr. Chen argued that he had established a reputation as a dentist in Georgetown, had a relationship with a number of patients who were never treated by Dr. Kiss, and had an unequal bargaining power at the time of signing the agreement to associate. As such, Dr. Chen wanted the non-compete clause to be void as unlawful restriction on competition.

The Court ultimately found that the non-compete agreement was reasonable and enforceable.

Davidson J. came to that conclusion on the basis that:

- Dr. Kiss had recently purchased her practice in Georgetown and needed to protect the goodwill of her practice;
- Dr. Chen was not restriction in his practice which he established in Mississauga where he lives;
- There was no restriction on any of his former patients having access to Dr. Chen's services;
- Dr. Chen could not prove that this Georgetown patients had trouble getting to his other office in Mississauga; and
- Approximately 50 patients advised Dr. Kiss on the telephone that they wanted to be treated by Dr. Chen in Mississauga.

Courts are generally more inclined to enforce a non-compete and non-solicitation clause in the context of an association agreement (e.g. ***Chen v. Kiss***) than it would be to enforce a similar covenant in an employment contract (e.g. ***Lyons v. Multari***). Case in point, in ***Button v. Jones***, [2001] O.J. No. 1976, the Ontario Superior Court of Justice granted an interlocutory injunction (i.e. a temporary order prior to the hearing of the trial) which prevented a dentist (Dr. Jones) from competing against or soliciting the patients of another dentist (Dr. Button). The facts of this case are as follows. Dr. Jones sold his dental practice, including patient records, to Dr. Button. As part of the agreement of purchase and sale, the parties entered into an association agreement. The association agreement contained a non-competition and non-solicitation clause whereby Dr. Jones agreed that, for four years after the agreement terminated, he would not carry on a dental practice within the same municipality, nor would he solicit patients of the practice to seek treatment elsewhere. After several years, Dr. Jones gave notice to his patients that he intended to set up a practice in the same municipality and ultimately set up his own practice – in contravention of the associate agreement. Hambly J. upheld the non-compete and non-solicitation clauses on the basis (among other things) that:

- Both dentists were in their fifties, had self-sustaining practices, and carried on as independent businesses (i.e. there was no employee / employer relationship);
- The restrictive covenants were meant to protect the goodwill (including patient records) in Dr. Button's practice, which he had paid Dr. Jones $80,000 for;
- The purchase and sale agreement "feeds" the associate agreement; and
- The Court will be more inclined to enforce the restrictive covenant in the association agreement than it would be to enforce a similar covenant in an employment contract.

Non-Competes: Exceptional Circumstances

Courts have said that they are prepared to enforce general non-compete agreements only in EXCEPTIONAL CIRCUMSTANCES. In ***Elsey v. J.G. Collins Insurance Agencies Ltd.*** (discussed above) and ***Lyons v. Multari*** (discussed above), the Supreme Court and the Ontario Court of Appeal (respectively) confirmed that, in the employment context, non-solicitation clauses are permissible whereas non-compete clauses will only be upheld "in exceptional circumstances". So what constitutes an exceptional case for a non-compete clause to be upheld by a court? Although the Supreme Court and Ontario Court of Appeal did not have much to say about this, there was a case in Manitoba which did try to answer that question. In ***Winnipeg Livestock Sales Ltd. v. Plewman***, [2001] 1 W.W.R. 153, the Manitoba Court of Appeal reviewed the various Canadian authorities on the issue of "exceptional cases" and held that the following factors were relevant:

1. The length of service with the employer.
2. The amount of personal service to clients.
3. Whether the employee dealt with clients exclusively, or on a sustained or recurring basis.
4. Whether the knowledge about the client which the employee gained was of a confidential nature, or involved an intimate knowledge of the client's particular needs, preferences or idiosyncrasies.
5. Whether the nature of the employee's work meant that the employee had influence over clients in the sense that the clients relied upon the employee's advice, or trusted the employee.
6. If competition by the employee has already occurred, whether there is evidence that clients have switched their custom to him, especially without direct solicitation.
7. The nature of the business with respect to whether personal knowledge of the clients' confidential matters is required.

8. The nature of the business with respect to the strength of customer loyalty, how clients are "won" and kept, and whether the clientele is a recurring one.
9. The community involved and whether there were clientele yet to be exploited by anyone.

So if you are thinking about having another party sign an agreement with a non-compete clause, you should think long and hard about these factors to help reduce the risk of future challenges to the enforceability of such a clause.

Reasonableness as to Public Interest

The final element of reasonableness has to do with the public interest: is there an overriding interest (e.g. free trade, competition, etc.) which would render a non-compete or non-solicitation clause unreasonable and therefore unenforceable? If, for example, there was insufficient labour or a shortage of competition in a particular industry, a non-compete or non-solicitation clause may be unreasonable. Using a non-compete clause to systematically eliminate competition will also be unreasonable.

Should an Employer demand both?

While an employer can always DEMAND that an Employee sign an agreement containing both non-compete and non-solicitation clauses, there are a few reasons why he or she may decide against doing so. First, having both may dissuade a prospective employee from signing on. They may feel that, if anything goes wrong and they leave, they will be unemployable. Related to this is the morale factor: a new employee may feel bad because, right away, they're threatened with sanctions if things don't work out and they try to do something akin to what they'll be doing for the employer. Finally, having non-compete and non-solicit clauses may actually INCREASE the amount of notice (or payment in lieu thereof) an employee is entitled to at common law if the matter gets litigated: courts may increase the normal amount of notice or payment in lieu thereof because it would take the employee longer to find suitable work with the existence of non-competes and non-solicit clauses.

Restrictive Covenant Tips

Here are some general tips to help strengthen the enforceability of your restrictive covenants:

Explain why it's needed

It's a good idea to state the reason for having those types of restrictive provisions. This will form part of what the parties knew at the time, as well as the consideration (i.e. the benefits and detriments that passed between the parties as part of making the fundamental exchange). Typical reasons for having restrictive covenants include:

- The employee will be provided with confidential information for his or her job;
- The employer has invested a lot of time, energy, and resources to developing a trade secret, patent, or technology;
- The employee will have direct access to patient and patient lists;
- The employee will be a representative of the business (such that the public equates the identity of the employee with the identity of the business);
- The employee will gain significant insight into the employer's business; and
- The employer's industry is new, specialized, or very competitive.

Pay for it!

Always remember that asking an employee to give up a right doesn't come for free. Their right to compete and solicit can only be restricted temporarily and in exchange for consideration (i.e. pay, benefits, etc.). So just make sure to equate this consideration with the right that the employee is agreeing to give up.

Things change over time: make amendments

Review your non-compete and non-solicitation agreements every now and then and renew them (i.e. by reinforcing their existing and providing additional consideration for the employee to agree). Why? Well, if your 10 year old restrictive covenant says that the employee cannot compete in the business and the business has changed over time, then it may be too vague to enforce. You need to be more specific and have the agreement reflect with some precision what the business is. Only that way can you reduce the risk of potential court challenges. The same thing goes if you say that the business involves the employer selling products or services. What it sells today may be different from tomorrow. And if that changes, then so too should the contract.

How long is too long?

1 to 2 years seems reasonable and capable of being upheld – particularly in the employment context. 20 years is unlikely to be enforceable. Courts will look at a number of factors to determine whether the temporal limits are reasonable – such as the employee's age, position, experience, time with the employer, and termination pay (the more they are paid, the longer the restrictive covenant will tend to be enforceable for). What's reasonable will depend on the specific facts applicable in each situation. Worth noting is that courts have tended to uphold longer periods for non-competes in the context of a sale of a business rather than in the employment context.

How far is too far?

You want to be pretty precise here in terms of language, but also reasonable. If you as the employer try to say something like "you can't compete in the same area as where my customers live", it's unlikely to be enforceable (because it's too vague: where the heck do the customers live?). Also, you can't ask for the moon by saying that a person can't compete within a very large geographic area (e.g. country). Sometimes, an employer will be able to claim an entire country or province as off limits, but that will be because they actively operate throughout that area. You need to be fair and reasonable here or else your restrictive covenant won't be enforceable. What's fair and reasonable will depend on the mutual expectation of the parties at the time the contract is made.

What's Prohibited?

Restrictive covenants must also be reasonable in light of what activities they try to prohibit. As discussed above, sometimes a general non-compete may be too onerous when a simple non-solicit would have sufficed.

Take time to review, get legal advice, and negotiate

Finally, it's always a good idea for an employer to provide time to the employee to read and understand the agreement, get legal advice (this will effectively impute the knowledge of the lawyer onto the employee), and even negotiate the terms of the restrictive covenant. Showing these things will help to reduce the risk of potential challenges. It's particularly important for the employer to demonstrate that the employee negotiated the clause (and just didn't accept things blindly), as this will prevent the employee from arguing things like they were under duress, undue influence, etc. which forced them to sign. It cannot be stressed enough that there should be a clause in the agreement that says that the parties have received independent legal advice. Courts will not look kindly on those parties which received such advice and then later claim they didn't understand or agree to the restrictive covenant. The court may say: too bad!

What if an Employee never agreed to a Restrictive Covenant?

So the situation is as follows: an employee has left and is basically competing with you in the same business and soliciting your patients and employees to join them. Nothing was ever written or signed to the effect that they could not do so. So where does that leave you? It's a very complex area of law, but there was an important case that talked about this very situation – albeit in very unique circumstances.

In ***Gertz v. Meda Ltd.*** (2002), 16 C.C.E.L. (3d) 79, the Ontario Superior Court of Justice was faced with the following situation. An employee engineer worked for a placement agency for 8 years. The employee was dismissed and then went to work briefly for another placement agency to help put together a proposal he had previously given to the original placement agency. This is where things got contentious: the original placement agency sued for damages resulting from breach of fiduciary duty and confidentiality.

So the issues before the Court were twofold: (1) was the employee a fiduciary of the employer which required him NOT to compete against the employer and (2) did the employee breach confidentiality provisions. Keep in mind that there was no written agreement dealing with these matters, so the Court would have to rely on common law (i.e. judge-made law).

With respect to whether the employee breached his fiduciary duty to the employer by leaving and then immediately competing, the Court concluded that this particular employee owed NO SUCH DUTY. Therefore, the employee was free to do so. The Court reasoned that, while certain employees (such as top management, directors, officers, etc.) may have a fiduciary duty not to do so (in accordance with their duty of loyalty, good faith, and avoiding conflicts of interest, etc.), this particular employee was simply a glorified salesman:

> **38** I conclude on the evidence that Mr. Gertz was, essentially, a salesman who managed the Chrysler account and others, with a view to selling labour at a markup. He had little or no authority to make decisions that affected the company. He had no power to direct and guide the affairs of the company. As issues arose that required the exercise of authority, his function was to make recommendations only, while the power to make decisions remained with Mel Lawn and, to a lesser extent, Mr. Rosenthal. To use the label that emerges from the caselaw, I find that Mr. Gertz was a "mere employee", to whom a fiduciary duty does not attach.

OK, so the court found that MERE employees are entitled to get up and compete with their previous employer. Those in top management, however, may not be so lucky – even if no contract is signed. Their duties of good faith, loyalty, and avoiding conflicts of interest may restrict their ability to compete.

So that takes care of the first issue. But what about using confidential information? When the employee left, he didn't take anything with him other than his accumulated knowledge retained in his mind. The Court found that there was no breach of confidence. So how did it get there? Well, first the Court said that a breach of confidence requires 3 elements:

1. confidential information;
2. which was communicated in confidence; and
3. which was misused by the party who received it.

Among other things, the Court found that the information was not confidential (it was shared, common to the industry) and it was not unfair for the employee to use that information anyways since he had been wrongfully terminated. So what's the moral of the story? Well, just because employees haven't signed restrictive convenant agreements (e.g. non compete, confidentiality, non-solicit) doesn't mean that they can be PREVENTED from competing or soliciting. At common law, they CAN be PREVENTED from doing so if they owed a fiduciary duty or a duty of confidence to the employer. There are common law tests that need to be met before a judge will conclude that the employee did anything wrong. So why wait until a judge rules on an unclear matter when you can just have a contractual obligation entered into at the beginning of the relationship and perhaps at the end? If they are clear, reasonable, and fair and entered into properly, then you (as an employer) stand a much better chance of enforcing them if you need to.

Confidentiality and Non-Disclosure

The Employer may want to include provisions dealing with the Employee's use and disclosure of any confidential information. It's best to do this through a separate written agreement, as this can make the Employment Agreement bulky (i.e. you'll end up adding 5-10 more pages for a confidentiality and non-disclosure agreement). Remember: if you do end up saying that a separate written confidentiality and non-disclosure agreement is going to be entered into, don't invalidate it in the Entire Agreement section of the Employment Agreement by saying that's there's no other applicable agreement that is included in the Employment Agreement! You need to make some room (i.e. identify) for any other agreement that may be included in the parties' overall relationship – such as a separate written confidentiality and non-disclosure agreement.

Proprietary Rights

This section of the Employment Agreement deals with who owns proprietary rights and enhancements to them. You should give careful consideration to defining the proprietary rights as all of the provisions related to it flow from what it includes.

Non-Compete, Non-Solicitation, Non-Disparagement

Non-compete clauses are designed to protect the Employer by preventing the Employee from competing in the Business (recall that this is a defined term) during and after the term of the Employment Agreement. Non-solicitation clauses are another form of restrictive covenant whereby the Employee agrees not to solicit Customers or employees of the Employer. Finally, Non-Disparagement clauses are meant to prevent the Employee from making defamatory statements against the Employer. Make sure to have a lawyer review these clauses for you if you have any doubts as there are strict legal tests that must be met in order for these clauses to be enforceable.

Injunctive Relief

The Employer will want to be able to bring an interlocutory injunction (think of it like a mini trial prior to the trial) to the court to require the allegedly offending party to stop competing (due to the irreparable harm they caused) until the entire matter is disposed of at trial. This remedy does not require that the Employer actually prove damages and is in addition to other remedies which the Employer may have in the contract or elsewhere (e.g. based on negligence).

General Terms

The end of the Employment Agreement should include general terms to help fill in certain blanks about the agreement, how it is to be entered into or interpreted, etc. Some of these terms include:

- **Acknowledgments**: the parties acknowledge that they've read the agreement, understood it, believe it to be fair and reasonable, have had independent legal advice regarding it, and are entering into it freely
- **Assignment:** can this be done at all, by one of the parties, by both parties consenting in writing?
- **Amendment:** can this be done at all, for example, by both parties consenting in writing?
- **Entire Agreement:** i.e. this agreement supersedes all other agreements – whether oral or written – relating to the same subject matters in the agreement
- **Governing Law:** which jurisdiction governs the interpretation and enforcement of the agreement?
- **Interpretation:** singular vs. plural; masculine vs. feminine, section headings, etc.
- **Severability**: in case one provision is struck down and rendered invalid doesn't mean the rest of the agreement is
- **Survival of Terms:** which terms, if any, survive the expiration or termination of the agreement?
- **Waiver:** e.g. no failure or delay of a party to enforce or exercise its rights under the agreement constitutes a waiver

You should read these terms carefully and modify them according to your specific situation.

Signing

The final section of the agreement requires that the parties sign and deliver the agreement. Signing the agreement without delivering it is not enough to make the agreement effective. There must be delivery. While not a legal requirement, it is a good practice that witnesses be present and sign their names alongside the parties'. Also, it is a good practice for the parties to initial their names on the bottom right hand corner of every page.

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