

■ Workplace Reorganization

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AGENDA

- 1 Employment Contracts – Best Practices
- 2 The Gig Economy and Contractors
- 3 Downsizing Costs
- 4 Questions

■ Employment Contracts – Best Practices

Terms of Employment

Key Terms in Employment Agreements



Termination provisions



Intellectual property



Restrictive covenants



Continued validity despite changes to position



Confidential information



Temporary layoff

Formation of the Contract

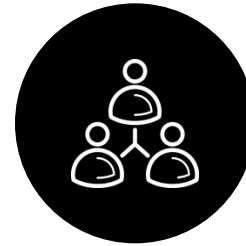
Best practices for making employment contracts:



Send the contract
before the start of
employment



Offer letter makes
position conditional on
signature and return of
contract



Promotion or change of
position:

- Consider a new
employment contract
- Erosion of the
“substratum” of the
employment contract

Dangers of Improper Execution



Holland v. Hostopia,
2015 Ontario Court of
Appeal



*Krieser v. Active
Chemicals*, 2005 Supreme
Court of British Columbia

What If a New Contract is Required?

- Concept of “fresh consideration”
 - *Rosas v. Toca*, 2018 British Columbia Court of Appeal
 - *Quach v. Mitrox Services*, 2020 British Columbia Court of Appeal
- It is recommended to provide fresh consideration to an existing employee for a new contract

New Contracts: Practical Considerations

- How many employees?
 - Many employees may pose difficulty
 - One or two holdouts who refuse to sign may cause difficulties with other employees
- How significant are the contractual changes?
 - Significant changes/harsh terms may affect employee willingness to sign
 - Concerns re: validity: sufficiency of consideration, unconscionability (long term employees)

New Contracts: Practical Considerations Cont'd.



Strategy: use promotions, raises, other changes to consider changes to contracts



Administrative challenges from creating inconsistency between employees



Certain changes and condonation by employees

The Gig Economy and Contractors

Why do we care?

- Rights and entitlements under the *Employment Standards Act, Canada Labour Code*, and/or the common law
- CPP/ EI
- Taxes
- WorkSafeBC
- Liability Insurance
- Growth of the “Gig Economy”

Employees vs. Independent Contractors vs. Dependent Contractors



No conclusive test to determining whether a person is an employee, independent contractor, or dependent contractor



Central question: whether the person who has been engaged to perform the services is, in actual fact, performing them as a person in business on his own account

Employees vs. Independent Contractors vs. Dependent Contractors

Considerations for determining status include:

- **intentions** of the parties,
- the **level of control** the employer has over the worker's **activities**,
- whether the worker provides his or her own **equipment**,
- whether the worker **hires** his or her own helpers,
- degree of **financial risk** taken by the worker,
- degree of **responsibility for investment** and management held by the worker, and
- the worker's opportunity for **profit** in the performance of his or her tasks.

671122 Ontario Ltd. v. Sagaz Industries Canada Inc., [2001 SCC 59](#)

What's a Dependent Contractor?

- Intermediate position between employees and independent contractors
- Formally “contractors,” but entitled to reasonable notice upon termination
- Determining whether a person is a dependent contractor requires two steps:

1

Determine whether the person is a “contractor”;

2

If yes, and they are exclusively contracting for one party, then they may be a dependent contractor.

Cormier v. 1772887 Ontario Limited

- 2019 Ontario Court of Appeal decision
- Wardrobe stylist and fashion studio manager
- Plaintiff claimed she was an employee for 23 years. Defendant claimed Plaintiff was an employee for 13 years, and an independent contractor for 10 years.
- **Issue:** what was the Plaintiff's status for her 23 year working relationship with the Defendant?



Cormier v. 1772887 Ontario Limited

- **Decision:** dependent contractor for 10 years, employee for 13 years → entitled to reasonable notice on the basis of 23 years of service
- **Basis for decision:**
 - Economic dependence
 - Permanence of the relationship
 - Exclusivity of the relationship
- “...the more permanent and exclusive the contractor relationship, then the less it resembles an independent contractor status...”

Canadian Union of Postal Workers v. Foodora Inc.



- 2020 Ontario Labour Board decision
- Foodora couriers attempting to unionize – only permitted to unionize if they were employees or dependent contractors
- **Issue:** were Foodora couriers employees, independent contractors, or dependent contractors?

Canadian Union of Postal Workers v. Foodora Inc.

- **Decision:** Foodora couriers are dependent contractors.
- **Basis for Decision:**
 - Use of or right to use substitutes/control over performance
 - Ownership of equipment
 - Evidence of entrepreneurial activity
 - Selling of one's services to the market generally
 - Economic independence
 - Ability to vary fees
 - Integration in business

Uber BV and others v. Aslam and others

- 2021 UK Supreme Court Decision
- Uber drivers brought claims to employment tribunal claiming that they were “workers”
- Uber argued that the drivers were self-employed, and therefore not entitled to any protections or legislative entitlements
- **Issue:** whether Uber drivers are self-employed or workers?



Uber BV and others v. Aslam and others

- **Decision:** Uber drivers are workers and therefore entitled to employment protection rights of workers (minimum wage, paid leave, etc.)
- **Basis for decision:**
 - Uber dictates the fares
 - Contract terms are imposed by Uber
 - Drivers are penalized for refusing rides
 - Rating System
 - Relationship between driver and passenger is limited

Takeaways



Contracts are important, but what you call someone in a contract doesn't matter as much as **what that person does** and the actual **relationship** between the parties.



If you hire “independent contractors” for a long period of time, **consider their role** in your business and whether the person is **economically dependent**.



Courts/ tribunals will find someone to be a dependent contractor if they can, and allow claims for reasonable notice

Downsizing Costs

Downsizing Costs - Intro

- New challenges to termination provisions
- Termination costs:



Incentive pay



Benefits
(auto; health)



Mitigation

Termination Language - Recent Developments

01

“Just cause” definition

02

Probationary period

03

Length of notice

04

Severance / benefits

“Just Cause” Definition

- Ontario reg. 288/01, s.2(1) excludes from statutory entitlement an employee “guilty of wilful misconduct, disobedience or wilful neglect of duty ...”
- Use of “just cause” language in contract may result in contract termination provisions declared void (see *Waksdale*)
- Court refused to sever language from contract despite clause in contract providing for severability

Length of Notice

- Meaning of probationary period
- Notice during probationary period, and after
- Length of notice after probationary period by province:

BC	ALTA	MAN
1 week after 3 months	1 week after 90 days	1 week at 30 days
2 weeks after 12 months	2 weeks at 2 years	2 weeks at 1 year
3 weeks after 3 years	4 weeks at 4 years	4 weeks at 3 years
+1 week for each year to max 8 weeks	5 weeks at 6 years	6 weeks at 5 years
-	6 weeks at 8 years	8 weeks at 10 years
-	8 weeks at 10 years	-

Other Basic Contractual Requirements

- Statutory severance (Ontario)
- Benefits (Ontario)
- More than salary? (Regular wage, for normal or average hours (BC))
- Group termination pay?



Effect of Finding of Violation

Depending upon legislation, agreement void and entitlement to reasonable notice:

- **BC:** s.4, “...agreement to [statutory entitlement] has no effect”
- **ALTA:** s.4, “...against public policy and void”
- **ONT:** s.5, “any such contracting out or waiver is void”
- **MAN:** s.3(3), “This Code prevails over any...agreement...that provides...less than an obligation...under this Code.”
- **SASK:** s.2(6), “No provision of any agreement has any force or effect if it deprives an employee of...benefit provided by [Act]”

Salary Continuance or Lump Sum Offers



Incentive pay



Average monthly
bonus vs. Earnings
during notice period



Benefits
Auto/cell – Personal
Use v. Loss
Health – Premiums
v. Loss



Mitigation (actual;
anticipated; failure)

Benefits

- Effective language to exclude claim
- “Active employment” or “Employed when payment made” **not sufficient**
- *Marazzato v. Dell Canada* found LTIP language sufficient:
 - “such payments were outside the scope of employment agreement”
 - “not be sued for calculating any severance... and you waive any claim on such basis”

 **Questions?**

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Thank you



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