
Introduction
So you need a new employee. You advertise the position and interview the best applicants. If all goes well, you identify a suitable candidate and prepare to make an offer. Should you have a written contract with the employee? Can you dismiss the employee later if it does not work out? Can you prevent the employee from learning your business, then jumping ship to the competition?

Written contracts save money
There is a widespread impression that only some types of employees have “contracts”. However, this is not so – any time you hire an employee, a legally binding contract is created, no matter how informal you want the arrangement to be. The terms of the contract may be written or not, the period may be fixed or indefinite. In any case, where there is an employment relationship there is always an employment contract, the terms of which will either by written by you and your employee or dictated by the Employment Standards Act.

Employment contracts should be written whenever possible. Some people are reluctant to “put it in writing,” believing that a less formal “oral” contract gives them more flexibility in managing employees. However, this is not really the case. What looks like flexibility in an oral contract is actually uncertainty about its terms. Uncertainty leads to different expectations, in which case either you or your employee is bound to be disappointed later when your expectations are not met. A written contract accurately records the terms of employment. It can often be surprisingly short (1 or 2 pages) and it provides a simple and inexpensive way to resolve conflicts before they escalate.

Key terms in employment contracts
To a large extent, employers and employees are free to agree to whatever terms of employment suit them. This freedom, however, is limited in some important ways by the minimum standards required by statutes such as Ontario’s Employment Standards Act, 2000 (the ESA) and Human Rights Code.
You can change the terms of an existing employment contract if you and your employee both agree to the change. However, be cautious when making changes. If done incorrectly, the employee could claim that you “constructively” dismissed them.

**Pay and benefits**

For employees, these are likely the most important terms in the contract. They should clearly describe how pay is to be calculated, what benefits are provided and how much the employee contributes. If you plan to pay bonuses, you can provide a method for calculating them or clearly state that bonuses are only given at the discretion of the employer.

**Job description and location of work**

Many employment contracts contain no job description. In those cases, the law presumes that the employer can change the employee’s duties and work location. If the changes amount to a demotion, however, advance notice is required. Otherwise, the employee could claim constructive dismissal. An alternative is to specify the employee’s duties and responsibilities and the location of work in the contract. You could also include a clause permitting changes to the job description and location as you find necessary. Without this, you may have to give advance notice before changing the job description or location without the employee’s consent.

**Period of employment**

An employment contract can specify a fixed period of employment. If it does not, the contract is presumed to be for an indefinite period (this is what most people call “permanent employment”).

Instead of hiring permanent employees, you might prefer to offer a fixed-term contract. This would allow you to let the employee go at the end of the contract, without advance notice. However, beware that if you renew a series of fixed-term contracts with the same employee, a court may view the employment as indefinite. In that case, you would have to give appropriate notice of termination, despite the use of fixed periods in the contracts.
**Notice of termination**
Generally, serious misconduct allows you to terminate the employee for cause and without notice. Without cause, you can still terminate permanent employees, provided that you give the appropriate notice. The employee is entitled to the same pay and benefits during the entire notice period.

Most wrongful dismissal claims stem from a dispute over the amount of notice given. Unless the employment contract clearly specifies the amount of notice required, you must provide what the courts call “reasonable notice of termination”. The length of the reasonable notice period is determined case-by-case, using a variety of factors. For example, the longer the employee has worked for you, the more senior the position held and the older he or she is, the longer the reasonable notice period will be. The courts have never established formulas, so the determination of reasonable notice can be somewhat unpredictable. However, for long-service, high-seniority employees, reasonable notice can run as long as 24 months and, in very rare cases, even longer.

You can probably avoid many dismissal disputes by simply negotiating the length of the notice period and writing it into the contract. This way, everyone agrees to the required notice period from the outset and there is less chance that your employee gets a nasty surprise upon termination. However, be careful not to set too short of a notice period. The *ESA* has minimum requirements for notice of termination without cause. A contract term that violates the *ESA* minimums is void. In that case, even where the employee freely agreed to the overly short notice period, the employee will be entitled to a much longer “reasonable notice” period as set by the courts.

**Non-competition agreements**
You would probably prefer that your employees not leave your business to work for the competition. Non-competition agreements (NCA’s) can sometimes prevent this. However, these agreements are notoriously difficult to enforce, so they must be carefully crafted.

NCA’s restrain free trade and seriously injure the rights of employees. Therefore, courts will not enforce NCA’s unless the employer can show that the agreement is reasonably necessary and justifiable. This means the NCA must cover only the most important business interests, within a reasonable geographic area and for a reasonable time after termination. If your NCA
overreaches these bounds even slightly, the court will not fix the problem. Instead, it will ignore
the NCA altogether.

**Conclusion**
Employment contract disputes are expensive and distracting. An excellent way to avoid disputes
is to put your employment contracts in writing and to make sure that your employees read,
understand and freely agree to the terms before signing. Employment law is full of twists.
Employers should consider seeking legal advice before entering employment contracts. Legal
advice is a relatively small investment that can help you avoid some very expensive mistakes.

Lori O’Neill, Lawyer, Nelligan O’Brien Payne and Trevor Fenton, student-at-law, Nelligan
O’Brien Payne.