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<p><b>Key Issues in Drafting Employment Contracts</b></p> <p><b>By Barry W. Kwasniewski, B.B.A., LL.B.</b> bwk@carters.ca 1-877-942-0001</p> <p>© 2021 Carters Professional Corporation</p>	
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<p><b>A. INTRODUCTION</b></p> <p><b>1. Overview</b></p> <ul style="list-style-type: none"><li>• The COVID-19 Pandemic has renewed discussion about employment contracts for churches and charities<ul style="list-style-type: none"><li>– Required to take a closer look at employment contracts to determine employees' legal rights</li></ul></li><li>• Because employment laws change so frequently, employment contracts need to be kept up-to-date</li><li>• The employment laws discussed in this presentation relate to Ontario, so it's important to consult with employment lawyers in other provinces as necessary</li></ul>	
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## B. THE IMPORTANCE OF WRITTEN EMPLOYMENT CONTRACTS

- In the absence of a written employment contact, the employer and the employee may have very different opinions about what conditions of employment they agreed to
- In drafting employment contracts, employers must ensure that the terms do not violate any of the minimum standards set out in their provincial labour legislation

### The key provisions of an employment contract should include

1. The position being offered and accepted, as well as a job description;
2. The compensation that will be paid, including the right to receive any bonuses or commissions and the formula of determining these forms of compensation;
3. Whether the employment is for a fixed-term or is indefinite;
4. Specifics regarding vacation time and sick leave and whether such time accrues from year to year;
5. Whether there will be a probationary period after hiring;
6. Possible changes in job or location;
7. Protection of the employer's intellectual property and confidential information and whether there will be any post-employment obligations (non-competition, non-solicitation clauses);
8. Pregnancy and Parental Leave policies;
9. Employment termination provisions

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### C. ONTARIO LEGAL FRAMEWORK

- Most Ontario employers are governed by the Ontario *Employment Standards Act, 2000* (the “ESA”)
  - ESA sets out the minimum employment standards
    - Standards cannot be lessened, even by an agreement between an employer and an employee
  - Minimum obligations touch on a number of issues:
    - Minimum wage, overtime pay, vacation entitlements, statutory holidays, job protected leaves of absence and termination obligations

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- ESA minimum termination notice or pay in lieu of notice requirements:
 

Length of Employment	Notice Required
Less than 3 months	None
3 months but less than 1 year	1 week
1 year but less than 3 years	2 weeks
3 years but less than 4 years	3 weeks
4 years but less than 5 years	4 weeks
5 years but less than 6 years	5 weeks
6 years but less than 7 years	6 weeks
7 years but less than 8 years	7 weeks
8 years or more	8 weeks
- Note: If the employee is covered by a group benefit plan, the employer must extend the former employee’s benefits for the same number of weeks as the notice required

NOTICE OF TERMINATION

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- Severance Pay
  - Regulated by ESA
    - Only applies to employees who have been employed with the same employer for 5 years or more; and
    - Employer has a global payroll of at least \$2.5 million per year
  - Based upon number of years and months of service
    - Maximum amount of severance pay is equal to 26 weeks of pay

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## D. THE IMPORTANCE OF CONTRACTUAL TERMINATION PROVISIONS

*Waksdale v Swegon North America, 2020 ONCA 391*  
(June 17, 2021)

- Contractual termination clause must comply with O Reg 288/01 under the *Employment Standards Act* to be valid and enforceable
  - O Reg 288/01: an employee can only be deprived of termination notice of pay and severance pay if employee was “guilty of willful misconduct, disobedience or willful neglect of duty that is not trivial and has not be condoned by the employer”
  - Court will declare employment contracts which go beyond O Reg 288/01 standards to have invalid and unenforceable termination clauses

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- Both for cause and without cause termination clauses in contracts should be considered as a whole
  - If one clause is invalid, then the entire clause is unenforceable
- Leave to appeal the case to the Supreme Court of Canada denied
- Case not applied outside Ontario

**TERMINATION  
OF  
EMPLOYMENT**

## E. THE IMPORTANCE OF REMOTE WORK PROVISIONS

- Historically, the general expectation was that work would be carried out at the employer's premises
  - As a result, case law about work location considers relocation rather than remote work
- Working remotely is now much more common
- If an employer wants employees to work at its premises, not remotely, this should be made clear in the employment contract
  - Clear provisions will reduce the risk of constructive dismissal claims if an employee unilaterally decides to work remotely

## F. TEMPORARY LAYOFFS

### 1. The Law in Ontario

- The ESA allows for temporary layoff of employees for certain limited time periods, without the temporary layoff deemed to be a termination
- Nevertheless, courts in Ontario have ruled that – unless there is a written employment contract that clearly states that the employer has the right to temporarily layoff an employee – the temporary layoff will be considered to be a termination without cause (unless the employee agrees to the temporary layoff)
  - Under a termination without cause, the employee is entitled to termination compensation

**Employment Standards Act, s 56(2)** ... a temporary layoff is,

- a. a lay-off of not more than 13 weeks in any period of 20 consecutive weeks;
- b. a lay-off of more than 13 weeks in any period of 20 consecutive weeks, if the lay-off is less than 35 weeks in any period of 52 consecutive weeks and,
  - i. the employee continues to receive substantial payments from the employer,
  - ii. the employer continues to make payments for the benefit of the employee under a legitimate retirement or pension plan or a legitimate group or employee insurance plan,
  - iii. the employee receives supplementary unemployment benefits,
  - iv. the employee is employed elsewhere during the lay-off and would be entitled to receive supplementary unemployment benefits if that were not so,
  - v. the employer recalls the employee within the time approved by the Director, or
  - vi. in the case of an employee who is not represented by a trade union, the employer recalls the employee within the time set out in an agreement between the employer and the employee;

## 2. Pandemic-Related Amendments to ESA

- In May 2020, the Ontario government passed regulations under the ESA which provided that all temporary layoffs due to COVID-19 are deemed to be Infectious Disease Emergency Leave (“IDEL”)
- In accordance with IDEL, the following are not constructive dismissal if occurring during COVID-19 period (March 1, 2020 – January 1, 2022)
  - Temporary reduction / elimination of an employee’s work hours for reasons related to the designated infectious disease
  - Temporary reduction of an employee’s wages for reasons related to the designated infectious disease

- Goal of IDEL to protect employers from expensive employee lawsuits from COVID-19 related temporary lay-offs, but subsequent litigation concluded with vastly different results
  - ***Cuotinho v Ocular Health Centre, 2021 ONSC 3076*** (27 April 2021) → Despite IDEL, an employee placed on temporary leave could in fact sue for wrongful dismissal
  - ***Taylor v. Hanley Hospitality, 2021 ONSC 3135*** (7 June 2021) → IDEL took away the right of employees on temporary leave to sue for constructive dismissal
- Important for charities and not for profits to consider adding temporary layoff clauses to employment contracts

## G. KEY TAKEAWAYS

- Properly drafted employment contracts help limit potential liability to employees and effectively manage financial and human resources
- Remember to review and update employment contracts which are used on a regular basis so that they remain current and legally enforceable

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