

The Ten Top Traps in Employment Contracts

Melanie Polowin

Osler, Hoskin & Harcourt LLP

Tel: (613) 787-1003

Fax: (613) 235-2867

E-mail: mpolowin@osler.com

Trap No. 1: The Invisible Contract (or: why what you see ain't what you get!)

An employment contract automatically comes into existence at the point that the candidate is offered, and accepts, a job.

- That employment contract may be oral, written or (most commonly) a combination of both.
- Commonly, the terms and conditions of the employment contract are found in more than one source or document.

But the law automatically implies (“writes in”) certain “invisible” terms in every employment contract.

- Some of these “invisible” terms are mandatory statutory terms (which neither party can contract out of). These include human rights, minimum employment standards, and health and safety protections.
- Some of these “invisible” terms come from judge-made (common law) rules. These terms stand as a “legal baseline”. They will always apply unless both sides explicitly specify otherwise, though an enforceable agreement.
- Furthermore, employee handbooks, policies, guidelines and practices are often treated by our courts as forming part of the employment contract – but usually in favour of the employee.

In short, commonly, an employment contract consists of some combination of:

- written terms, set out in an offer letter and/or formal employment agreements (if any), confidentiality and ownership of intellectual property agreements, non-competition agreements, and employer policies
- “invisible” terms arising from unwritten policies and practices adopted by the employer or prevalent in the industry, or implied either by statute or by the common law.

The benefit of the doubt always goes to the employee.

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Trap No. 2: Timing is Everything (or: it ain't over till the fat lady signs!)

What you say matters....but when you say it can matter even more.

- Unless you want to be saddled with the “invisible” contract, you need to deal with all important employment terms and conditions at the offer stage, as part of the hiring process and hiring documentation.

Don't ever close on a handshake.

- Discuss, disclose and document key terms of employment (and key hiring documents to be signed) as part of the offer package – always pre-acceptance, and always pre-start date.

Get it in writing.

- In your offer letter, don't just advise a candidate that he or she “will have to” sign other key agreements (formal contracts, non-competition agreements, confidentiality and intellectual property agreements):
 - Enclose them with the offer letter.
 - Require them to be signed as a condition of accepting the offer.

Ideal Hiring Time Line:

Application > Interview/2nd Interview > Oral Negotiations > Written Offer(s) > Sign-off > Start Date.

After is too late...

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Trap No. 3: I never promised you a rose garden (or: it's not just what you say, it's how you say it)

Don't make promises you can't (or won't) keep.

Say what you mean, and mean what you say.

Important employment terms need to be designed and documented so as to be:

- clear
- understandable
- capable of certain application.

Be clear.

Finish the thought: ask and answer the big "what if?"

- Hiring and other important employment-related documentation (such as incentive compensation plans) has to be clear and explicit about rights and obligations, especially when the law otherwise implies "invisible" terms.
- The documentation has to be written (and applied) in a way that is consistent with the requirements of employment standards legislation and human rights legislation.

Form matters. Avoid footnotes and fine print.

- When a court deals with contract interpretation and enforcement issues, format actually matters. When you create your hiring and other employment documentation, use format to enhance clarity, emphasize key points, and promote its overall comprehensibility.
- Avoid small font, long complex paragraphs, and complicated language. Use white space, headings, bold and underlining to call special attention to key restrictions on the employee's rights.

Get help.

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Trap No. 4: Take Notice of Reasonable Notice (or: I have to pay more?!)

“Reasonable notice” is the legal default position.

“Reasonable notice” is THE most critical “invisible” term.

- *What it is?* In a nut-shell: when an employer wants to terminate without cause, if there are no enforceable contractual terms that specify rights on termination, then the employer provide advance notice to that employee, for a “reasonable” period of time before the termination takes effect (“reasonable notice”).
- How long is that “reasonable” period? It depends.....
 - There is no “free trial” - no automatic probation period.
 - The minimum statutory notice period specified in employment standards legislation is just a “floor”....but you can’t go under it.
 - The reasonable notice “ceiling” is almost always longer – often far, far longer.
 - There are no hard and fast rules for calculating an appropriate reasonable notice period. You have assess the individual circumstances of each case. Many factors count: age, length of service, and position are only a starting point.

There is no Reasonable Notice Blue Book.

- *What if we don’t give reasonable notice?* If reasonable advance notice is not provided, then the employer owes compensation in lieu. And the compensation in lieu is intended to cover all the salary, bonuses, benefits, and perks that the employee would normally receive during the whole reasonable notice period.

Reasonable notice gives the employee leverage.

Reasonable notice costs time, money, and effort.

To set your own “ceiling”, replace the “invisible” reasonable notice term with a clearly written termination entitlement

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Trap No. 5: Confidentiality and Intellectual Property Ownership (or: close the barn door, the horse has bolted!)

In the “invisible contract”:

- an employer’s confidential information has limited protection
- an employer has limited ownership rights in relation to discoveries, inventions, development and creations made during and in the course of employment.

If trade secrets and IP ownership are core assets in your business, your first priority must be to protect your assets.

Canadianize your confidentiality and IP ownership provisions.

Use a stand-alone agreement, that must be signed and returned as a condition of accepting employment.

Sign-up everyone....janitor to CEO.

Don’t rely on non-competition and non-solicitation agreements to protect confidential information and IP.

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Trap No. 6: After you're gone... (or: who unlocked the cage?!)

The law protects competition. The “invisible contract” allows post-employment competition

- Non-competition and non-solicitation provisions are known more formally as “restrictive covenants” or “covenants in restraint of trade” or “post-employment restrictions”. In the employment context, our courts are highly reluctant to enforce post-termination restrictions. *They are presumed to be void and invalid.*
- “Regular” (non-management) ex-employees are perfectly free to go to work for a competitor (or to become a competitor). That same ex-employee has some (but not total) freedom to approach (solicit) the ex-employer’s suppliers, customers, prospective customers, employees and consultants.
- Depending on their level, ex-employees who had significant management responsibilities may be viewed as a “fiduciary”. A fiduciary still has freedom to compete, but he or she owes “reasonable” (but undefined) non-solicitation obligations to the ex-employer.
- Employer are not totally unprotected by law. Employees are not allowed to compete with their employer while still employed. And employees – during or after employment - are never allowed to misuse an employer’s confidential information.

Define restrictions in writing, at hiring.

- Deal with non-competition and non-solicitation separately.

Bigger is NOT better.

One size does NOT fit all.

Tailor your restrictions to the job.

- Only impose a non-compete on truly key employees.
- Narrow the “who, what, where, when and don’t” of the restrictions as much as possible.

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Trap No. 7: Here, sign this (Part I) (or: why change might not do you good)

Significant changes always carry a risk of unenforceability.

Risk-management takes time or money (ideally, both).

Enforceable change is the goal.

- With the right planning, and the right process, employers can change important terms of employment, and even impose significant different or new obligations.
- Build in flexibility from the start. Reserve the right to make changes, by inserting language to that effect in the body of the hiring documentation. This won't guarantee enforceability of any particular change, but it will help reduce risks.

Option one: buy it.

- Normally, an employer cannot impose new enforceable obligations on an existing employee, unless the employer gives something of real value – what the courts call “fresh consideration”.
- An already-existing employer obligation or employee entitlement does not count as “fresh consideration”.
- But an employer can “buy” enforceability by giving an employee something new of tangible value: a signing bonus, a raise, a special option grant, a promotion, a better termination package.
- Fresh consideration makes it hard for an employee to argue that he or she was coerced or frightened into accepting the change.

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Option two: give reasonable advance written notice of the change.

- Think of making fundamental changes as making a whole new contract.
- An employer can give the employee “reasonable” advance written notice that on a given future date, certain clearly specified changes or new terms of employment will take effect.
- As long as the advance notice period is equal to (or greater than) the reasonable notice period to which that employee would be entitled, then in theory, the employer can enforce the new obligations. *Remember: reasonable notice is assessed by individual, not by formula.*
- In essence, the “old” employment contract ends after the reasonable notice period expires, and the “new” employment contract begins.

Consider the optics. Weigh the consequences. Communicate.

- Presenting an employee with a “take it or leave it”, even when you couple it with advance notice or a nice signing bonus, can disrupt a good relationship, and make a bad one worse.
- Be careful how and when you decide to message and present changes.

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**Trap No. 8: Here, sign this (Part II):
(or, how to displace the invisible contract)**

**Changing the invisible contract is no different
than changing the written contract.**

Same issues. Same rules. Same solutions.

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Trap No. 9: Let me dance you to the door (or: the perils of the hidden agenda)

If it looks like a duck, walks like a duck, talks like a duck

- Experienced human resources and employment law professionals can almost always recognize a hidden agenda.
- Hidden agendas create stress and distrust, and interfere with the business of business.
- Target employees react with decreased productivity and resentment.
- Strategies back-fire – leading to disability claims for stress or other health conditions.

Ask yourself: can this marriage be saved?

- Who wants to save the employee?
- Does the employee want to be saved?

Don't plan for failure.

- Building a “case for cause” costs time, money and effort – and often backfires.
- Giving an employee enough rope to hang himself isn't worth it.

Bite the bullet, pull the plug, and move on.

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Trap No. 10: Mind your Manners (or: why it pays to be a nice guy)

In employment law, two key concepts are gaining strength and prominence:

fairness and reasonableness

If an employer or an employment term is (or is perceived by a court as) unfair or unreasonable, there is a greater risk that an employment contract will not be enforced.

Fairness and reasonableness means:

- Expectations are clear, and are explicitly communicated to employees in a timely way.
- Documents are clearly written and understandable.
- Employees are given enough time to make decisions.
- Employees are treated with decency and respect.
- There is some balance between the interests of the employer and the employee.
- There is no undue influence, duress, or other circumstance that causes the court to consider it “unconscionable” to enforce the employment contract.

It pays to be fair and reasonable at every phase of the employment life-cycle from recruitment and hiring...to termination.

And it can cost you big-time, if you are not.