

Getting Agreements Signed Before The Relationship Commences

Perhaps the most common error I see businesses trip over – aside from not implementing contracts *at all* – is asking the employee or contractor to sign an agreement (contract) after the commencement of the relationship.

This crucial error usually renders the contract unenforceable and is a bitter pill for the business to swallow (after thinking, sometimes for many years, that it had been diligent in putting contracts in place).

Employee Or Independent Contractor, It Makes No Difference

Whether your business chooses to utilize employees or independent contractors (or both) as its service providers, it is critical to have the terms of the relationship set out in writing. And, in both instances, it is *highly* preferable to complete that step *prior to* the moment the relationship commences.

The Consideration Requirement

In brief, for a contract to be binding and enforceable, there must (among other things) be an exchange of “consideration” between the parties – each party must receive something of value from the other.

In the normal employment (or independent contractor) context, the applicant receives the offer of employment and the business receives the candidate’s agreement to provide the services on the terms the business has offered. In this simple fashion the exchange of consideration is satisfied, but this is only true if all that happens before the individual begins providing services.

The Preferred Process

Ideally, once the business has located a desirable applicant, a cover letter enclosing the contract will be delivered to the applicant *well before the date on which he/she is to commence providing services*. The cover letter must not contain any offers or suggestions of additional, or different, terms than those set out in the contract.

Any other documents referred to in the body of the contract (such as, for instance, a job description, policy manual, benefits summary booklet, commission schedule, etc.) should be attached to, or included with, the contract when it is delivered to the candidate. The candidate should be asked, in the cover letter, to initial and date each attachment to indicate his/her receipt of that item.

The entire contract must be accepted, by way of the candidate signing and returning the document, *prior to the commencement of provision of services*. When the contract package is received back from the candidate, it should be reviewed to ensure it has been signed and witnessed (and that any attachments have been initialed) and to ensure that the individual has not made any changes to the text.

This must all be accomplished *prior to the commencement of the provision of services*. It is, for instance, too late to take care of this on the morning of the employee’s (or contractor’s) first day of work. A minute late is, well, too late.

Agreements for Existing Employees and Contractors?

Contracts can be imposed on *existing* employees and contractors, but that process usually proves to be far more challenging.

When a contract is being imposed upon an existing employee (ie. anyone who has already commenced employment) or independent contractor, there is a critical requirement that the employee be provided with some new form of consideration in exchange for accepting the terms contained in the agreement.

In short, the employee *must* receive something new, of value (a monetary payment, a promotion, some other benefit or entitlement that has actual value to the individual), and the offer of that entitlement *must* be conditional upon the individual accepting the terms of the agreement. Something the individual was going to receive in any event (ie. a schedule pay raise) won't suffice.

The desired contract must be delivered to the candidate *prior* to the date on which he/she is to receive the consideration being offered, along with a cover letter stating simply that he/she is being offered the consideration conditional on acceptance of the new terms and conditions set out in the enclosed contract. He/she should be asked to signify acceptance of those terms by returning the signed and witnessed contract (and related attachments).

It is *absolutely critical* that whatever was being offered in exchange for the employee or contractor signing the agreement is not paid/given until after he/she has actually signed. And, of course (you'd be amazed how many times this step is forgotten) the employee or contractor must actually be given the thing which was offered. Have you ever seen contracts which say something like "In exchange for a payment of \$1.00..."? If that \$1.00 is never paid, that undermines the enforceability of the resulting agreement – it's not just a formality.

Aside from the technical requirement of providing new consideration, the fact is that it is far more challenging to convince existing employees or contractors to sign a new form of agreement. They will tend to be suspicious of the employer's motives in imposing a new agreement and the process may negatively impact the overall relationship.

And then, of course, there is the question of what the business will do if an existing employee or contractor simply refuses to sign the desired agreement.

The practical and legal reality is that it is tremendously advantageous for the business to routinely ensure that employment or independent contractor agreements are signed before the relationship commences. In all material respects, this is the preferred approach.

This item is provided for general information purposes only and is not intended to be relied upon as legal advice. Informed legal advice should always be obtained about your specific circumstances.

Smithson
Employment Law Corporation

306-1500 Hardy Street, Kelowna, B.C. V1Y 8H2 | Phone: 778-478-0150 | Fax: 778-478-0155
www.smithsonlaw.ca