

SOLVING THE SEASONAL EMPLOYEE DILEMMA

At this time of year, I'm commonly asked by employers about their hiring practices relating to seasonal employees. These seasonal folks pose some real challenges when it comes to the hiring process, particularly the contracts they are asked to sign, and can be a real liability when it's time to end the relationship.

Who Are The Problem Employees?

Seasonal employees come in (at least) two varieties – one-time hires who work for only one season and then are gone and never heard from again, and ongoing hires who work for each season and return year-after-year.

The first group – the one-time hires – are fairly easily dealt with. The employer will typically utilize a “defined term” contract, the employee will work for the duration of the term, and then he/she will go away. It's all neat and tidy and, properly handled, poses few liability issues.

The second group – the ongoing, seasonal hires – are the problem group. More specifically, the legal problem is that employers tend to treat these year-over-year folks in the same fashion as the one-time hires.

Employers sign the year-over-year hires to a defined term contract each season, thinking that's all they need to do. That practice creates the potential for large liabilities when it comes time to end the relationship.

Why Do Year-Over-Year Seasonal Hires Have To Be Treated Differently?

The issue arises out of contract law and, specifically, the way judges treat employers' *repeated* use of defined term contracts.

If used properly, so-called defined term employment contracts can be a useful and effective tool for structuring employment relationships. In my experience, however, there are four common outcomes from the use of defined term employment contracts and *three* of them are undesirable.

One of those undesirable outcomes arises from employers' tendency to hire the same individuals year-after-year. Although these seasonal employees go through an unpaid layoff (or other break in active service) each year, they regularly come back to work each year and there is really no question that their employment will pick up right where it left off.

In this scenario, the employer *believes* it has the protection of the defined term contract of employment which it has the employees sign each year. It thinks it can simply cut employees loose at the end of a season with no risk of liability.

But what the employer often isn't aware of is the tendency of courts to *disregard* the “defined term” label after 2 or 3 years (or seasons) of employment. When that occurs, the relationship is re-labeled as “indefinite” in nature – this raises the implied common law obligation on the employer's part to provide reasonable working notice of termination and, if it doesn't do so, raises the likelihood of wrongful dismissal actions by terminated employees.

The common law of employment (or wrongful dismissal) provides employees with this entitlement to reasonable working notice of termination. Depending on the circumstances (the employee's age, period of service, position and degree of authority, pay level, and likely difficulty he/she will have in finding new employment), the reasonable working notice entitlement can be as high as 24 months.

If reasonable working notice is not given, the employee is entitled to claim damages (pay) in lieu of the notice. This is the underlying basis of the entire common law of employment/wrongful dismissal, and is something to be avoided.

What To Do?

The solution to this dilemma is fairly simply stated – employers should only use defined term contracts when they truly expect the employee to go away after the term for which he/she has been hired.

If there is *any* possibility or expectation that the employee will return for a second season (or subsequent seasons) a different kind of contract is required. In essence, the ongoing, seasonal hires I'm referring to (the year-over-year folks) should be signed to an *indefinite* contract of employment (one which contemplates only seasonal provision of service) and which contains a binding and enforceable termination clause.

This *indefinite* contract will properly entitle the employee to working notice of termination based on his/her entire period of service (starting with the original hire date) but will limit that notice in a way which is legally binding and enforceable. In this fashion, the year-over-year nature of the relationship is properly contemplated, there is no risk that the relationship will be viewed by a judge as something other than what was intended, and the employer's termination obligations and liabilities will be tied up neatly.

Practically Speaking...

The practical question for employers of ongoing, year-over-year seasonal employees is whether to sign those folks to the indefinite contract at the outset or, alternatively, to sign them to a defined term contract for the first season (only!) and when they return for season #2 sign them to the indefinite contract.

Personally, I recommend signing them to the indefinite contract right at the outset. Doing so saves effort and avoids the very real risk of forgetting to do it when they return for season #2. But, employers may prefer to go with the defined term contract for the first season because, when that season comes to an end, that contract will allow the employer to send the employee on his/her way with no prior notice (or pay in lieu).

Regardless, if the employee returns for season #2, he/she should be signed to the indefinite employment agreement. One nice benefit of doing so is that – typically – the employer will never have to require the employee to sign another new employment agreement in subsequent seasons. That's one administrative task (and headache) that most employers are happy to eliminate.

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.

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