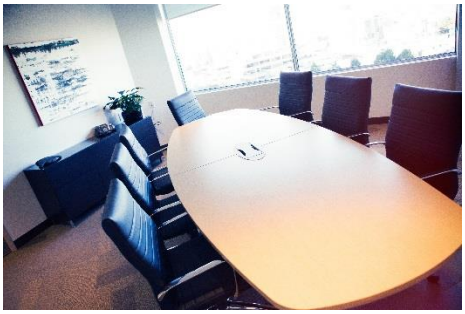
KENT
EMPLOYMENT LAW

Kent Employment Law's Sustainable Employment™

Guidelines for Contracting with Your Employees



The employment contract is *the* foundation for the relationship between employer and employee. Unfortunately, many employers don't have written employment contracts in place, and when they do, they can do more harm than good because of how they're drafted.

We know many business owners want to do things differently. They want to create a workplace culture that is fair, collaborative and reciprocal, and they want their employment contracts to reflect and promote this. They want to engage in Sustainable Employment™ practices, from hiring to firing.

What is Sustainable Employment™? It's an *enduring, mutually-beneficial, and purposeful working engagement between employer and employee*. It involves a flexible, adaptive relationship where both parties' needs are clearly defined, balanced and accommodated. At a minimum, Sustainable Employment™ meets the following ten needs, for both employer and employee:

1. **Mutual Benefit**
2. **Clarity**
3. **Transparency**
4. **Fairness**
5. **Respect**
6. **Collaboration**
7. **Accommodation**
8. **Ownership**
9. **Control**
10. **Purpose**

For employers who want to enable Sustainable Employment™ in the workplace we have developed guidelines for key moments in the employment relationship – the initial interview, the employment contract, benefits packages, performance reviews, dismissal, and more. Here, we offer our *Guidelines for Contracting with Your Employees*, which will not only support you in creating Sustainable Employment™ for your business, but also help you meet your legal obligations to your employees. We created these *Guidelines* to assist organizations of all sizes, across a variety of industries. We realize, of course, that every employee, organization, and employment relationship is unique. If you wish to adapt any of our suggestions to fit your business, **ask us how**, we would be happy to help!

Guidelines for Contracting with Your Employees

1. Negotiate with your new employee comprehensively and collaboratively.

When you find the right person, it can be tempting to "jump right in" to a new working relationship, without taking the time to consider the fine details. We understand the enthusiasm and optimism that accompany a new hire, but it's important to balance these with pragmatism and forethought. If you and your new employee develop the terms of employment cooperatively at the outset, you lay the foundation for a Sustainable Employment™ relationship and reduce the risk of financial and other employment-related problems down the road. Here are some of the key terms you should discuss at the negotiation stage:

- The employee's role, position and duties within your organization.
- Whether she will be subject to a probationary period during which you will you assess her "suitability" for the job.
- Expected hours of work, and overtime policies.
- Whether her employment will last for a fixed term or indefinitely.
- The conduct you expect of all your employees, both on and off the job. Issues to consider in particular include social media use, outside employment, and treatment of co-workers.
- The type of conduct that will give you "just cause" for dismissal, i.e. the right to terminate her employment immediately, without any severance liability.
- Your commitments to the employee, such as:
    - Her compensation package.
    - Your leave policies, e.g. vacation, illness, maternity/parental, family, bereavement, etc.
    - Her severance and other entitlements if she is fired without "just cause".
    - Professional development and continuing education.
    - How disputes will be settled.
- The employee's commitments to you, including confidentiality / non-disclosure, non-solicitation, and non-competition, and assignment of intellectual property rights.

When you raise these issues with your employee-to-be, solicit her feedback, and listen to what she has to say. This collaborative approach will help set the tone for a workplace culture where employees feel heard and valued – feelings which tend to engender loyalty and engagement.

2. Ensure the arrangement is balanced and reciprocal.

Sometimes, hoping to protect themselves and maintain influence in the workplace, employers will create an employment arrangement that is unnecessarily weighted in their favour when it comes to matters such as leave, severance, and post-dismissal competition by (ex)employees. Unfortunately, even

if well-intentioned, this strategy sends a message that the employer neither respects nor trusts its employees.

Such an approach is not only bad for employee engagement, it can also be legally unwise. An ex-employee involved in a one-sided employment relationship may ask the courts to intervene and "level the playing field", for example, by striking an unfair or unreasonable clause out of an employment contract, which will then prevent you from relying on it.

In short, it benefits both you and your workers to ask yourself "Is this necessary and reasonable?" before putting any restrictions on an employee's employment rights and options.

3. Address "difficult" topics (such as dismissal, severance, and just cause) fairly, directly, and clearly.

Wrongful dismissal claims are the bread and butter of employment lawyers' courtroom practice. Why? In part, because employment termination clauses are often poorly drafted, invalid, or non-existent. While there will always be employees wishing to challenge their severance payouts, you can greatly lessen their chances of success by agreeing to a clear, fair, and legally enforceable severance clause at the time of hiring. The clause should reflect the employee's legal entitlements under both employment standards legislation and the "common law", her role within and contributions to the company, and any challenges you expect she will face in finding re-employment. If it does, the likelihood that she will even contest her severance package will also be reduced.

4. Contemplate a fair and, where possible, collaborative mechanism for resolving disputes.

As much as you may wish to, it's next to impossible to completely eliminate the power imbalance between employee and employer. What *is* possible, and necessary, is to acknowledge this inequality and empower your employees to assert their workplace needs, particularly where a dispute arises between you and the worker.

For more "minor" disputes, such as those involving an employee's work schedule, your employees should feel free to communicate directly and honestly about their needs, without fearing negative consequences for speaking up. If you both commit in advance to an open, reciprocal dialogue, this makes everyone accountable to the process and will help stop disputes before they start.

For more serious issues, such as harassment or constructive dismissal, we suggest you develop an internal dispute resolution mechanism that allows both sides a chance to be heard. In these cases, a process that is fair, reciprocal and accommodating will help you avoid an unwanted end to the employment relationship, or even litigation.

There will be times where conflict is inevitable, such as when an employee is unusually upset about getting fired or dissatisfied with your severance offer. We suggest you take a proactive approach by

dealing with such possibilities in your employment contracts. For example, you might include a clause which describes a multi-step process involving mediation and arbitration if needed. You could even include rules for the arbitration that would "fast track" the process and minimize costs.

5. Place reasonable restrictions on the employee's ability to compete if your relationship ends.

Nothing lasts forever, including your employment relationships. Although you'd probably prefer not to think about the end when things are just starting, doing so can benefit both you *and* your new hire.

One of the most dreaded aspects of employment termination for employers is the possibility that a former employee will compete with your business after she leaves. To try and prevent this, you may include onerous clauses in your contracts prohibiting ex-employees from soliciting customers or disclosing trade secrets.

An overly restrictive response to concerns about employee competition is misguided, however, from both a legal and a human resources perspective. Canadian employment law generally favours an ex-employee's right to pursue her livelihood over an employer's business interests. As such, judges don't tend to look too favourably upon contracts that put significant geographic or time limits on a person's ability to work for a competitor. More importantly, such restrictions are incompatible with "sustainable employment", since they interfere with an employee's ability to work!

Again, the best strategy is to take a balanced, reciprocal approach to your employee's post-termination activities. Be honest with her about your concerns, and address them in a way that accommodates her needs. She's gained valuable knowledge and experience working for you; now that the relationship is over, she deserves to be able to leverage those and continue to thrive professionally. Ultimately, if you agree to a realistic restriction that is rationally connected to both of your needs' post-termination, your employee will be less likely to challenge it later and, if she does, a court will be more likely to uphold it.

6. Formalize your agreement in writing, using succinct, purposeful, plain language that both of you can understand.

Some people (lawyers and non-lawyers alike) believe that the best contracts are the longest, most complicated ones. We don't agree. A lengthy, detailed employment contract filled with "legalese" alienates an employee, leaving him feeling isolated and disengaged…which doesn't bode well for his future with your organization.

To engage your employees at the outset, make sure you're on the same page and speaking the same language – literally. Your agreements can cover all the issues set out in Guideline #1 above, and still be written in clear, direct, plain language that you both understand. If they're not, you're not just sending the wrong message to your new employee, you may also be setting yourself up for future problems.

If an employee doesn't understand what he's signing, he might later try to claim that the contract isn't legally binding, an argument a judge may have sympathy for if he decides to take you to court. The other

thing to remember is that if there is any ambiguity in the contract, the courts tend to interpret it in the employee's favour, since he had less power and influence in the drafting process.

One final caution: We strongly suggest that you NOT take a "do it yourself" approach to contract drafting. We know there's a wealth of sample documents available on the internet, but "borrowed" contracts bring with them a slew of problems. One we see quite often is that the document was written for use in the U.S. Because our southern neighbour's employment laws differ from those in Canada, no matter how well an American agreement is drafted, it still won't hold up to legal challenge here in BC.

7. Contemplate the possibility of future changes to your relationship.

Try as you might, there's no way to predict the future with your new hire. Because of this, Guidelines #3 and #4 encourage you to consider worst-case (or at least less than ideal) scenarios and plan for those in a sustainable way. Despite all of our cautions, however, we also believe you need to envision positive outcomes and how to deal with them.

As an example: Imagine your new employee is such a good fit for your business that you decide to acknowledge her with a promotion and increased compensation. If her contract doesn't contemplate the possibility of future changes to her salary or job position, it won't apply to your relationship after the raise and promotion occur. This means that all the clauses you both agreed to and put in her contract, including those dealing with severance, confidentiality and non-solicitation, essentially disappear, which is problematic since you likely intended that they would last for the life of your relationship.

So that all your collaboration and forward-thinking at the pre-employment stage is not for naught, decide now how you want to deal with future employment transitions. Maybe you'll both sign a new contract whenever there's a change in her employment? Whatever you decide, just make sure you include it in the agreement.

8. Get legal advice and encourage the employee to do the same.

Before you finalize the terms or wording of any employment contract, we strongly suggest that you speak to an employment lawyer and encourage your employees to do the same.

The reason we didn't put this item at the top of our list is that we think it's important for you to reflect on the above Guidelines before you get legal advice. This allows you and your employee to create your ideal vision for his employment, which you can then discuss with a lawyer, who will help you tweak your plan so that it meets the needs of both the employee and your organization, as well as your obligations under the law. The employee's lawyer will have his interests at heart, and will serve as an extra assurance that the arrangement is "sustainable" from his perspective.

9. Sign the contract – and do so before the employee starts any work.

Finally, now that you've both done all this hard work reaching and formalizing a Sustainable Employment™ agreement, don't forget to sign on the dotted line! If it's not signed, the contract's not worth the paper it's written on. Also, make sure to have a fully signed copy of the document in your files

before the employee starts work. Hopefully it will never come to this, but if there's a dispute between you later on and there was any significant delay between the employee's first day of work and the signing of the agreement, she could claim (successfully) that she did not receive adequate legal "consideration" from you in return for certain clauses of the contract, thereby making the contract void.

Summary

In developing these *Guidelines for Contracting with Your Employees*, we stayed mindful of the **ten Sustainable Employment™ needs** described above. If you look closely, we believe you'll see their presence throughout the contracting process:

- ✓ The negotiation process is *collaborative* and *purposeful*, allowing both parties a degree of *control* and *ownership* over the process.
- ✓ The contract language is drafted in a *clear* and *transparent* manner.
- ✓ The terms of employment are *fair, respectful, mutually beneficial* and *accommodating*.

What's Next?

- ❖ **Share** these Guidelines with your colleagues.
- ❖ **Have questions** about your employment contracts?

  Contact us at help@kentemploymentlaw.com or **604-266-7006**

- ❖ **Want to stay current** on employment law issues that are key to your business?
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  - ➢ **Subscribe** to our e-Newsletter and receive a **free** copy of our e-book, **An Introduction to Sustainable Employment™**

Sustainable Employment™
Checklist: Contracting with Your Employees

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5. Place reasonable restrictions on the employee's ability to compete if your relationship ends.
6. Formalize your agreement in writing, using succinct, purposeful, plain language that both of you can understand.
7. Contemplate the possibility of future changes to your relationship.
8. Get legal advice and encourage the employee to do the same.
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KENT EMPLOYMENT LAW
SUITE 560 – 1285 WEST BROADWAY
VANCOUVER, BC, V6H 3X8
DIRECT: 604.266.7006
FAX: 604.734.7006
EMAIL: HELP@KENTEMPLOYMENTLAW.COM

WWW.KENTEMPLOYMENTLAW.COM