

What employers need to know about executive employment contracts | Frank Portman

By **Frank Portman**

Law360 Canada (October 11, 2024, 12:56 PM EDT) -- In my last article about executive employment contracts, I wrote about the importance of understanding the issues and interpretation of those contracts from the executive's viewpoint. Executive employment contracts are equally important for employers, though, of course, employers have opposite priorities.

While most employers are focused on attempting to ensure termination clauses reduce an employee's entitlements as much as possible, employers are well advised to understand every aspect of executive employment contracts so they manage them well and how to derive the most benefit from their use.



Frank Portman

1. The most important thing a termination clause can give is certainty

One of the most valuable things that employers look for in executive employment contracts is a limitation on their liability to an employee in the event of a "without cause" dismissal. In some cases, an enforceable termination clause in an executive employment agreement can result in the reduction of an employee's entitlements from 24 months of pay and bonus to just eight weeks of base pay.

However, the value of termination clauses is not limited to employers who want to reduce their exposure to termination to the minimum possible. Termination clauses are valuable even in cases where an employer is prepared to go beyond the bare minimums required by employment standards legislation.

This is for a simple reason: termination clauses offer certainty. In the absence of a termination clause, an employee's entitlements are governed by the principle of reasonable notice. Reasonable notice for an employee is not, however, a mathematical formula; instead, it's an estimation based on a range of outcomes. Realistic estimates of reasonable notice can vary by as much as six months or more. In such cases, conflict is bound to ensue.

This results in legal fees and conflict that can last months or even years. Employers are far better off with a defined payment, even a slightly larger one, that will be simple and straightforward to process rather than fighting about the exact number of months to which an employee may be entitled. In order to obtain that certainty, an executive employment contract is required.

2. Executive employment contracts impose almost any post-employment protection

Contrary to public perception, there are almost no restrictions on a departing employee's activities after their employment ends in the absence of an enforceable executive employment agreement. An employee can resign and immediately begin soliciting all of the employer's clients to get hired by them, and in most cases, there is little a former employer can do about it.

In addition, the law permits an employee to leave a position very quickly without consequence. In Ontario, the *Employment Standards Act, 2000*, does not actually stipulate a minimum notice period for an employee's resignation. While an employee will be subject to what is "reasonable," this is

seldom more than a week or two of notice. For specialized employees or senior executives, this may simply not be enough for the employer to ensure operational continuity.

Despite the 2021 change to the *Ontario Employment Standards Act, 2000*, which severely restricted those employees who can be subject to enforceable non-competition agreements, there are still many tools an employer can use to defend themselves from the impact of departing employees.

The use of non-solicitation clauses, contractual provisions reserving the right to advise clients of an employee's departure, confidential information protections as well as clauses requiring a resigning employee to provide fixed, extended notice of resignation may be enforceable and can significantly protect an employer from an employee's sudden departure.

3. Executive employment contracts need to be monitored actively

Most employment contracts are signed at the point of hire, filed in a cabinet and then forgotten about as the employee continues their career with the employer. The executive employment contract only sees the light of day again once a dispute arises, usually when a dismissal is in the offing.

That intervening period can have a massive impact on how an employment contract can be interpreted. This is because, unlike most other changes in the law, changes in the approach that courts use to interpret employment agreements have a retroactive effect and can invalidate contracts that were previously thought to be bulletproof.

A good example of this is the decision of the Ontario Superior Court of Justice in *Dufault v. Corporation of the Township of Ignace*, 2024 ONSC 1029, which held that a clause that permitted the termination of the employee's employment at its sole discretion at any time violated the *Employment Standards Act, 2000*. Such language has been common in employment contracts for many years, including many that have been found to be enforceable by applicable courts. Now, however, any contract that uses such a term is at risk of being found invalid, even if everyone believed it was enforceable when signed.

What does this mean? Executive employment contracts should be constantly reviewed by employers to ensure that the language is as clear and legally compliant with current standards as possible. Failing to do so risks losing the protection those contracts are meant to afford.

4. An executive employment contract can serve as a 'one-stop shop' to determine an employee's rights

One less prominent advantage of an executive employment contract is its ability to include an "entire agreement" clause. Ubiquitous in commercial contracts, an "entire agreement" clause means that, for those matters set out in the contract, the contract is the final word on them, eliminating any suggestion that there was a deal other than what was set out on the page.

Such a clause can have a very important impact on the ability of an employee to claim additional rights under a contract. For example, if a contract doesn't mention a right to a particular bonus or renders it discretionary, then an employer's decision not to award one is immune from challenge. However, in the absence of an "entire agreement" clause, the employee can argue that past practice, conversations with superiors or other factors resulted in an unwritten, enforceable expectation of a benefit. This can lead to friction and even constructive dismissal assertions.

The "entire agreement" clause is critical in establishing mutually understood and enforceable expectations out of an employment relationship. It can only be established through a written employment contract.

5. Less can be more for employers

Given that executive employment contracts help provide certainty, many employers are tempted to include as much as possible in the contract. Many employers expect to see all sorts of details about employment, such as hours, detailed vacation policies and even discipline policies in the employment contract.

The “everything and the kitchen sink” approach can, however, backfire and actually restrict employers rather than give them flexibility. Once a term of employment is enshrined in a contract, it must be followed through, subject to only a change of contract agreed upon by both parties. This can give an employee an effective veto over changing matters set out in an employment contract.

If, however, part of the employment relationship is not found in a contract, it may be subject to reasonable modification by the employer. There are still limits to this ability, but reasonable flexibility is essentially “built in” to the employment relationship. This means that employers can use and change policies reasonably to dictate employment conditions like pay periods, hours of work and even vacation booking processes to best respond to their business needs. Including these terms in employment contracts can severely restrict that flexibility.

The bottom line

Executive employment contracts are a valuable tool for employers to establish expectations, obligations and rights. However, they need to be used tactically and with thought to ensure they meet all the goals of the employer.

Employers are wise to seek legal advice for each new hire to ensure an appropriate executive employment contract is constructed. A failure to do so could relinquish these protections and expose an employer to significantly greater liability.

Frank Portman is an employment lawyer at Massey LLP. His specialty is executive employment law where he assists presidents, vice-presidents and other C-level executives and the organization seeking to hire their talents to complete the deal through effective executive employment contracts.

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