

Does your employment contract measure up?

If you are entering into an employment contract do you know what should be included? If you are an employer and using an old contract, should it be reviewed first? It is clear contracts should be individually structured to meet the needs of those involved and in reality both employer and employee should seek legal assistance first before offering or accepting an employment contract.

This article is intended to provide a starting point only and attempts to clarify some of the important information all parties should know.

What terms should always be in an Employment Contract?

Naturally there are some preliminary matters. For example, the identity of the parties needs to be set out as well as the duration of the contract (if fixed).

The contract then needs to specify the terms.

Before the terms are considered, the application of any statutory provisions or award or collective agreement must be considered. Generally speaking, employers and employees cannot contract out of awards or collective agreements.

The following are critical to mention and the particular entitlements need to be specified, including:

- The remuneration;
- The frequency of remuneration reviews;
- The period of the contract (if fixed term);
- The basis of remuneration adjustment and performance management/appraisal;
- Termination conditions;
- Any professional indemnity;
- Specific employment conditions including
 - hours of work;
 - annual leave;
 - annual leave loading;
 - public holidays;
 - long service leave;
 - superannuation;
 - reimbursement of expenses;
 - sick leave or carer's leave;

- parental leave; and
- other leave.

Depending on the nature of the employment and industry it may be important to also include:

- Intellectual property;
- Restrictive covenants;
- Professional development and training; and
- The location of employment.

A statement of duties should be attached to the contract. For this attachment to itself become part of the terms of the contract, it should be expressly incorporated into the contract by a statement which makes it part of the contract in the body of the contract itself or as an annexure.

Workplace policies

Some workplace policies will be incorporated into the contract because of the nature of their content, some will not, and it is often hard to know what matters a court will find are incorporated. If an employer definitely wants to incorporate a policy into the contract, they can expressly do so by reference in the contract.

Employees and contractors

There is often ambiguity in a workers' status, as to whether they are a true employee of an independent contractor. Employment law differs from other law, such as tax law, on these questions.

There are also significant legal consequences of incorrectly assuming an employee is a contractor, or vice versa. The true nature of the working relationship should be considered at the time of drafting an employment contract or a contract for services.

Superannuation

The employer is responsible to ensure that appropriate superannuation contributions are paid into the employee's nominated superannuation fund. Generally a contractor will be responsible for their own superannuation contributions. When offering employment you should clearly state if that offer includes superannuation.

Implied entitlements

Some entitlements and obligations that exist in the employment relationship are implied. This means that they are not written down or stated, but they still exist.

The implied terms include:

- An employee must exercise reasonable skill and care in their performance of duties;
- A general duty exists for an employee to obey all lawful and reasonable directions by their employer;
- There must be fidelity and confidentiality within the employer/employee relationship; and
- If there is no provision for termination within the contract then “reasonable notice” for termination must occur unless in circumstances of “serious misconduct”.

Conclusion

When negotiating an employment contract it is essential for both employers and employees that the contractual arrangements should be specific to the individual and the terms say what you want them to mean. Parties entering into these arrangements are wise to seek legal assistance beforehand to ensure they are right.

If you want to know more or if you run a business and would like your draft employment contracts reviewed please call us on (03) 9600 0162 or email info@lordlaw.com.au.