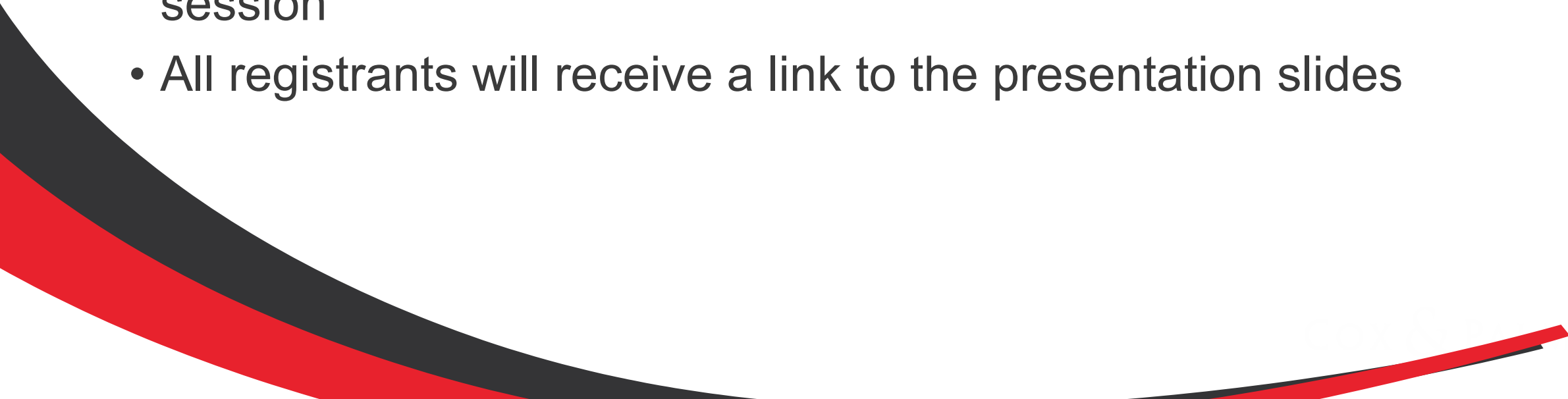


# Welcome to Cox & Palmer's Regional Employment & Labour Group Webinar

*Key Considerations for an  
Effective Employment Contract*

Our presentation will begin shortly.

# Housekeeping Items

- For optimal viewing we highly recommend disconnecting from your VPN to ensure strong connectivity throughout the presentation
  - If you have any questions during the webinar, you can submit them through the Q&A button at the bottom, and our panel will respond to as many questions as possible at the end of the session
  - All registrants will receive a link to the presentation slides
- 
- A decorative graphic in the bottom left corner consisting of two thick, curved lines. The top line is dark gray and the bottom line is red, both curving upwards and to the right.

# Key Considerations for an Effective Employment Contract

May 2, 2024



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# Agenda

- Welcome & introduction
- Employment Contracts
- Termination Clauses
- Pitfalls of a Bad Contract
- Restrictive Covenants in an Employment Agreement
- Q&A
- Closing remarks

# Employment Contract Basics

Neala J. Kielley

# Advantages of a Written Contract

- Clarity and precision
- Consistency
- Ability to limit common law entitlements
- Protection of employer interests
  - i.e., restrictive covenants, intellectual property protection, confidentiality.
- Inclusion of necessary unusual provisions
- Cost savings



# What is a Contract?

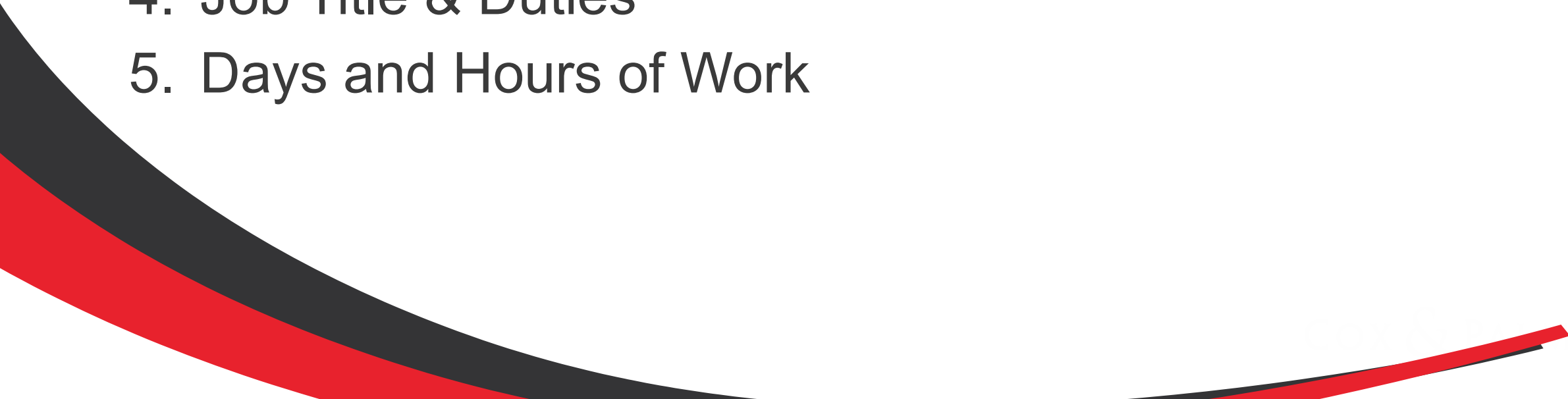
- Elements of a Contract
  - Offer
    - “Will you come work for our company as a bookkeeper?”
  - Acceptance
    - “Yes.”
  - Consideration
    - “I will pay you \$20.00/hour for you to perform the work of a bookkeeper.”
    - Consideration must flow in both directions.

# Minimum Employment Standards

- Legislation:
  - *Labour Standards Act*, RSNL 1990, c L-2 (NL)
  - *Employment Standards Act*, SNB 1982, c E-7.2 (NB)
  - *Labour Standards Code*, RSNS 1989, c 246 (NS)
  - *Employment Standards Act*, RSPEI 1988, c E-6.2 (PEI)
- Some Key Provisions:
  - Minimum wage rates
  - Overtime wage rates
  - Minimum vacation leave/pay entitlements
  - Minimum notice of termination periods
- Some employees/occupations are exempt!



# Employment Contract Terms

1. Names of the Parties
  2. Probationary Period
  3. Contract Duration
  4. Job Title & Duties
  5. Days and Hours of Work
- 



# Employment Contract Terms

6. Temporary Layoff

7. Vacation, Sick Leave, Paid Holidays

8. Expense Reimbursement

9. Remuneration (Pay & Benefits)

10. Protection of Employer

- Confidentiality, exclusivity, intellectual property, moral rights, etc.

11. Workplace Rules/Policies

# Employment Contract Terms

## 12. Termination / Resignation

- For cause termination, without cause termination, resignation
- Sets out applicable notice periods
- May also set out:
  - Duty to mitigate
  - Salary continuation
  - Duty to faithfully continue duties/responsibilities during notice period
  - Return of company property



# Employment Contract Terms

## 13. Restrictive Covenants

- Non-Competition
- Non-Solicitation

## 14. “Standard” Contractual Provisions

- Assignability
- Applicable law & jurisdiction
- Severability
- Entire Agreement
- Amendments
- Notices
- Waiver
- Counterparts

# Employment Contract Terms

16.Independent Legal Advice / Opportunity to Review

17.Dates & Signatures



# Termination Clauses

Erin Mitchell

# Why you **need** a strong termination clause

- The termination section can **make or break** your entire employment agreement.
- Provide **certainty** in the employee's notice entitlement.
- Protections for the employer.

# What goes into a Termination Clause?

EVERY TIME	WHERE APPLICABLE
<ul style="list-style-type: none"><li>• Termination for cause</li><li>• Termination without cause</li><li>• Resignation by employee</li></ul>	<ul style="list-style-type: none"><li>• Probationary period</li><li>• End of Term</li></ul>



# What is “Notice”

- Can be “**working**” or **pay in lieu**.
- Minimum standards + evaluation at common law based on a series of factors.
- More than just base pay!
- Note that some jurisdictions have both “notice” and “severance” requirements

# Common Law VS Statutory Notice

(what's the difference?)

Common Law Notice	Statutory Notice
CAN contract out (in theory)	CANNOT contract out
Mitigation CAN factor	Mitigation NOT a factor
Up to 36 months (and climbing?)	Up to 8 weeks max*
Based on multiple factors: (1) the character of the employment; (2) the length of service of the employee; (3) the employee's age; and (4) the availability of similar employment, having regard to the experience, training, and qualifications of the employee.	Based on length of service only.
Ceiling?	Floor.

\* Maximum depends on the jurisdiction. Different rules apply when multiple employees are laid off

# What is “just cause”

- Depends on the jurisdiction.
- Generally: employee misconduct that gives rise to a breakdown of the employment relationship.
- Misconduct must be:
  - a violation of an essential condition of the employment contract;
  - a breach of the trust that is inherent in the working relationship.
  - fundamentally or directly inconsistent with the employee's obligations to the employer.

NS, NL, ON: **wilful misconduct, disobedience or neglect of duty that has not been condoned by the Employer**

# Drafting a Termination clause: **things to consider**

- Does your jurisdiction have a “Tenure Rule”? NS & QC
- Resignation – how much to ask for?
  - NL: not more than notice to employee
  - Working vs pay in lieu (reserve discretion)
- Structuring without cause notice
  - Consult an employment lawyer to ensure enforceability
  - Always at or above minimum standards

# Entire Agreement must be compliant

## Waksdale v. Swegon North America Inc., 2020 ONCA 391

- Short term employee was terminated on a without cause basis. Employment contract contained standard “with” and “without” cause termination provisions. He was provided **two weeks’** pay in lieu of notice.
- Employee commenced a wrongful dismissal action, arguing that while the “without cause” provision was valid, the “for cause” provision was not, as it attempted to contract out of employment standards.

“...An employment agreement must be interpreted as a whole and not on a piecemeal basis. The correct analytical approach is to determine whether the termination provisions in an employment agreement read as a whole violate the ESA. ”

## Technicalities: “for any reason” vs “at any time”

Dufault v. the Corporation of the Township of Ignace, 2024 ONSC 1029

- Employee on a 2-year fixed term agreement
- Terminated after 1 year (early termination)
- without cause language allowed for the termination of her employment **“at any time.”**
- ON employment standards prohibits an employer from terminating an employee in reprisal for attempting to exercise a right under the ESA or when they conclude a statutory leave

# Quick Tips & Takeaways

- **Avoid absolutes:** “Where permitted by law”\* or “Except if expressly prohibited by legislation”
- **Be specific:** “complete entitlement” “no right to reasonable notice at common law”
- **Define cause:** do not rely on common law unless your jurisdiction permits it.
- **Fixed-Term – a word of caution.**
- Consult a lawyer

\*cite employment standards statute

# Employment Contract Pitfalls

Meaghan Hughes





# Overview

1. No Fresh Consideration
2. Not Addressing Obsolescence
3. Non-Inclusion of Policies
4. Lack of Opportunity for Independent Legal Advice

# Pitfall #1 - No Fresh Consideration

- Each party must give and receive something to make a contract binding.
- Consideration can be in various forms:
  - A promotion, a salary increase, a signing bonus, a new bonus plan, benefits, a new stock option agreement, etc.
- Risk of no consideration: an unenforceable employment agreement if the employee disputes the agreement in the future.

# Pitfall #1 – No Fresh Consideration

- New Employees:
  - Once an employee begins work, a contract is formed (whether verbal or written).
  - At the outset of the relationship, employer's promise to pay in exchange for the employee's services will serve as sufficient consideration.
  - But, contracts signed shortly after start date can be void for lack of consideration.
- Current Employees:
  - Modifying employment terms during the employment relationship (e.g., adding duties, changing termination clause), should be accompanied by “fresh consideration”.

# Pitfall #1 – No Fresh Consideration

## Case Law Example:

*Dornan and New Brunswick, Re, 2023 CarswellNB 46 (aff'd in New Brunswick v Dornan, 2023 NBKB 225)*

- Employer provided the physician with a written contract 2 weeks after start date. Terms had been agreed to orally (and by text message) before starting work.
- Contract reflected the terms of the parties' informal agreement, but in addition, included a termination provision.
- Arbitrator held: introduction of termination clause required "fresh consideration".
- Employer argued that payment of physician's fees were fresh consideration. Arbitrator rejected - no evidence that the offer was linked to the addition of a termination clause.
- Employee was 4 months into a fixed-term contract and was awarded approximately \$2 million in damages.

# Pitfall #2 - Not Addressing Obsolescence

- Employment contracts should be reviewed on a periodic basis to protect against “obsolescence” (outdated).
- Contract may be not be enforced unless it reflects the reality of the employment relationship, i.e., the employee’s current position.

# Pitfall #2 - Not Addressing Obsolescence

- Parties can attempt to provide language to show the intention for the contract to endure through changes in the relationship.
- A contract can include anti-obsolescence language
  - e.g. terms and conditions agreed upon govern and bind the parties, regardless of the length of employment or any changes to the Employee's position, compensation, title and regardless of whether such change is material or otherwise.

# Pitfall #2 - Not Addressing Obsolescence

## **Case Law Example:** *Stench v Canem Systems Ltd.*, 2005 BCSC 1736

- Stench was a construction manager later promoted to branch manager.
- After termination, he alleged that the termination clause should not be enforced.
- Court ruled in favour of the Employer:
  - Contract contemplated potential future changes, and it would maintain validity through adjustments (e.g. salary "... will be reviewed from time to time at the Company's discretion").
  - Oral changes were permitted.
  - Changes to Stench's employment were not substantial.
  - Parties turned minds to the fact that conditions of employment might change in the future and the contract would continue in force and incorporate such changes.

# Pitfall #3 - Non-Inclusion of Policies

- Include/attach policies to the contract that are meant to be binding and enforceable.
- Include provision acknowledging the employee's review and agreement to policies.
- But also, consider drawback that binding policies can be more difficult for employers to unilaterally change.



# Pitfall #3 – Non-Inclusion of Policies

## **Case Law Example:** *Ellision v. Burnaby Hospital Society*, [1992] B.C. J. No. 858

Court ruled that a policy manual that was instituted and given to an employee after the employment relationship began did not form part of the contract of employment.

*“There is no question that a policy or benefits package of an employer can form part of the contract of employment if it is clear that the employer and employee intended it to do so. In this case, however, I am not persuaded that the policy formed part of the contract of employment between the plaintiff and the defendant. The policy was instituted long after the plaintiff was originally hired by the defendant, albeit before she received her last promotion. The policy was simply given to the plaintiff without any request that she read it, or any other indication that the defendant was relying on it as forming part of the contract of employment. The plaintiff glanced at the policy, but did not in any way communicate to the defendant that she accepted the statements set out in the policy as terms of her employment. The language of the policy is not reflective of a contractual document, but rather of an information package.”*  
(para.14)

# Pitfall #4 - Opportunity for Independent Legal Advice

- Provide contract prior to signing to allow employee time to seek independent legal advice.
- Agreements can be long and complex.
- Inequality of bargaining power in the employer/employee context.
- Opportunity for independent legal advice reduces the risk that an employee will later claim that they did not understand the terms of the contract.

# Pitfall #4 - Opportunity for Independent Legal Advice

**Case Law Example:** *Natalie Nedel v Davidson Violette & Associates Inc., 2019 CanLII 38006 (Ontario Labour Board)*

- Employee received the contract by email after interview, signed it the next day.
- No realistic opportunity to obtain independent legal advice.
- Labour Board stated, “As experienced labour and employment lawyers know, a written employment contract may be worthless if an employer fails to follow certain mandatory procedural steps. Just getting a new employee to sign a document on the first day at work, especially one as complex as the EA [employment agreement], may fail to meet these key procedural requirements.”

# Restrictive Covenants in Employment Agreements

Dawson Harrison

# What is a Restrictive Covenant?

# Restrictive Covenant Defined

- A restrictive covenant places restrictions on the conduct of an employee after the employment relationship ends.

# What is the Purpose of a Restrictive Covenant?

- A restrictive covenant is placed in an employment contract to protect the business of the employer.

# Types of Restrictive Covenants

1. Non – Competition
2. Non – Solicitation
3. Confidentiality



# Non – Competition Clause

- What is it?
- What are the issues that arise from a Non – Competition Clause?

# Non Solicitation Clause

- What is it?
  - Two Types
    - Non Solicitation of Employees
  - Non Solicitation of Clients
    - What are the issues that arises from a Non-Solicitation Clause?

# Confidentiality Clause

- What is it?
- What are the issues that arises from Non Confidentiality Clause?



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