

Ask a Business Services Expert

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Q: What do I need to know about Employment Agreements?

A:

1. What is the most important document your employees need to sign?

Employers/franchisees, in the context of the myriad of issues to take care of in starting or operating a franchise, often fail to consider the importance of entering into formal written employment agreements with employees.

As a franchisee you need to be aware that as soon as prospective candidate for employment accepts an offer of employment, a legally enforceable employment agreement has been established. But if the franchisee and the employee have not specifically set out the precise terms of that relationship in a formal written employment agreement, what exactly has been agreed to?

Did the franchise agree to pay the employee a bonus based on the franchisee's overall profitability or the employee's performance or some combination of both? Did the franchisee agree to certain future changes in the employee's job responsibilities or even a promotion?

Unfortunately, the dockets of the courts and governmental agencies are filled with cases dealing with the contracting parties' failure to specifically set out in writing what they intended. As a result, they are forced to appear before a third party who will now try, without the benefit of a well written employment agreement, to determine what the parties intended should happen. No easy task.

As a result, it is fundamentally important the franchisee enter into formal written employment agreements with its employees.

2. Should the employment agreement include provisions relating to the termination of the employment relationship?

Letting the courts decide what should happen in relation to the termination of the employment relationship is fraught with danger. Legally, the courts are entitled to "imply" certain terms in the employment agreement between the parties even if they are not actually set out. Courts will imply what is referred to as an employee's entitlements to "reasonable notice of termination" in the event of a typical termination. The determination of "reasonable notice" generally ranges from one (1) week to two (2) years! Where any given employee is placed in that range will depend largely on such factors as the employee's age, length of service with the employer, position and the ability of the employee to secure alternate employment.

In other words, unless a court is given specific guidance by the parties as to the employee's entitlement on termination of employment in a formal written employment agreement, a court will use its authority to "imply" an employee's entitlement to "reasonable notice of termination". As a result the employer/franchisee is potentially facing very significant severance obligations. By way of example, a store manager with four (4) years of service and forty (40) years of age may be entitled to as much as six (6) months total compensation on account of her entitlement to "reasonable notice of termination".

In order to avoid this significant exposure and uncertainty, it is imperative that franchisees incorporate specific provisions that limit the franchisee's obligation on termination of the employment relationship. In the example referred to above, a properly drafted termination provision in an employment agreement could reduce that store manager's entitlement from the potential of six (6) months total compensation to ONLY four (4) weeks total compensation, a potential savings of more than five (5) months total compensation!

3. When should the employment agreement be signed?

One of the fundamental principles related to the enforceability of a contract is whether it was entered into voluntarily. One of the primary factors considered in determining whether the contract was entered into voluntarily is whether the party to the contract had sufficient time to consider the terms of the contract.

In the employment context this becomes particularly significant given the generally recognized inequality in bargaining power between the employer and the employee. In other words, because the employer is considered to be in a dominant position, a failure to provide an employee with adequate time to consider the terms of the employment agreement may result in a court determining that the employment agreement is not enforceable.

Accordingly, the employment agreement should be presented to the employee well in advance of the commencement of work to permit the employee sufficient time to consider the terms of the employment agreement.

In addition to providing the employee with adequate time to consider the terms of the employment agreement, the franchisee should ensure that the employee actually signs the employment agreement PRIOR to commencing employment. Courts have consistently held that where an employee signs an employment agreement after commencing work, the employment agreement is not enforceable.