



Using the Employment Agreement Template

Gold Seal offers an array of tools and templates to help you manage your HR obligations.

Amongst these templates is a Common Law Employment Agreement Template.

This agreement has been prepared by lawyers and provides the following benefits for you:

1. Being a template, it can be tailored for your business and for the conditions of employment you wish to provide
2. It takes into account all areas of Employment Law and Statutory requirements that impact on your business
3. It was prepared with a view to standing up to challenge. So if you end up in court over, say, the restraint areas, the cascading clauses that are in the template are designed to withstand that challenge.

In the template, you will note that there are areas that are marked "Optional" and are in blue text. Those are areas that you may delete/include with impunity, for they are drafted to give you some flexibility in the design of your employment conditions – where the *law* gives you flexibility. Where the law is not flexible, say in the matter of annual leave, or personal/carer leave entitlements, or post-employment restraints, if you alter the documents, you may be affecting an area which is set in law. If you breach those employment conditions, you may be acting illegally, and your Employment Agreement may not withstand legal challenge.

Here are some examples:

Restraints

Courts will usually only enforce post-employment restraint clauses if they are 'reasonable'. In New South Wales, the Restraints of Trade Act, 1974 allows a court to 'read down' the terms of a restraint clause to modify it (as to the time period or geographic area etc) until it is reasonable.

However in other states and territories, the Courts do not have this discretion. Therefore if a restraint clause is not 'reasonable' then a court will usually find the whole clause to be void and unenforceable. This is why you often see restraint clauses with 'cascading' provisions which cover a number of alternatives. For example, the clause may say that the restraint is for 1, 2 or 3 years and cover Brisbane, Queensland or Australia, whichever is reasonable. This allows a Court to pick whichever scenario is 'reasonable' and avoid the whole clause from being held unenforceable.

Uncertainty/ambiguity/incompleteness

If definitions or other clauses are changed and this affects the meaning/interpretation of the contract, the court will usually find that any ambiguity or uncertainty as to the terms of the contract will not be read in favour of the person seeking to enforce the contract. This might be the case if the language used is too vague, or incapable of definite or precise meaning, capable of more than one meaning or ambiguous. In extreme cases a court may treat the contract as void for uncertainty. The courts will try to save a contract where the parties intended it to have binding effect and in such cases they can:

- Look beyond the contract at the custom or practices that prevailed between the parties
- Apply an external standard of reasonableness
- Look to one party to resolve the uncertainty; or



- Sever the uncertain part from the contract entirely

If a contract is incomplete it can be ruled as void if the missing element is an essential term.

Because you may be at the whim of the courts if your contract is incomplete, ambiguous, vague or uncertain, it is important to carefully draft and customise contracts so as not to remove essential elements or change the meaning of the contract in a way which could adversely affect its legal interpretation.

Of course this doesn't mean parts of the Employment Agreement are carved in stone. If you should require an amendment to suit your particular circumstances, our very strong recommendation is that you seek the advice Gold Seal. In this way you will help the changes you make to withstand legal challenge.

Further Assistance

For assistance or guidance on these or any HR/IR matters contact 03 9510 5100 or email hrservices@goldseal.com.au