



# Employment Law

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## What is an Employment Contract?

“Work is one of the most fundamental aspects in a person’s life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person’s employment is an essential component of his or her sense of identity, self-worth and emotional well-being.”

– Supreme Court of Canada, in *Re: Public Service Employee Relations Act* (1987)

You commit yourself daily to work for your employer but do you know the geography of rights and obligations that constitute your employment?

It is fashionable in the marketing departments of some cell phone or cable companies to boast that there is “no contract” required in purchasing services from them. When they assert this, they presumably are taking advantage of consumer aversion for complex written formalities. Contracts are perceived to be impenetrable to human understanding and to lock the consumer into a set of terms that favour the retailer. Hence we are attracted to these modern “no contract” contracts. By the way, if you think there really is no contract, try to stop paying that phone bill. The basis for collecting the debt from you will be – you guessed it – contractual!

Now, we sometimes hear workers also claiming that they have no contract with their employer. This, too, is more impression than reality. If employees do not see or sign official, legalistic papers, they mistakenly believe they are not employed under a contract.

Unlike in the United States, where employment is foremost a special legal “relationship” which can with further negotiation rise to the status of a contract, in Canada all employees are in a contract. This is true whether or not they sign anything.

In fact, most employees accept the job and sign very little, if any, paper. The contract starts as the agreement they have with their employers about the job. If there was no agreement, they would not be going to work and the employer would not be permitting them access to the property.

A prospective, willing employer and employee *can* take the time and effort to negotiate a detailed, legal, written employment contract to serve as the road map to govern their relationship. However, this is feasible only for the few senior employees who can afford legal representation and command that kind of attention from the employer. This is akin to trying to exhaustively negotiate a complete written contract for a cup of coffee. It *can* be done, but probably only the likes of the café’s landlord will carry the clout to hammer out the complex lease. There is still a contract when the customer buys the cup of coffee, but its terms are unwritten, oral, and implied by

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conduct and by law.

Approximately 30% of Canadian workers are unionized and their employment contracts are Collective Agreements. These documents are a comprehensive code governing both employers and employees. They even contain details for raising and dealing with disputes.

This article describes the sources and terms of employment contracts in Canada where there is no

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written formal agreement in place for an individual employee. The employment contract finds its content in the same sources as the contract for a cup of coffee.

## Looking for Terms of the Employment Contract

### Oddments of Writing

Even in the most informal transactions, there is often some writing that pertains to the agreement. The café likely has posted on its wall a price list for the coffee and issues a small, machine-generated record called a receipt with each purchase.

In employment, there will be similar written fragments flowing between employer and employee. These include the advertisement, job description, application letter and résumé, and usually, an eventual offer letter. That letter may go no further than to specify job title, starting date and salary, hours of work, and to whom you report. You may sign your consent to it and return it. There may be emails or faxes confirming job duties and benefits. These all combine to supply content to the employment contract.

An employee handbook and Human Resources policy manual in use in the workplace are “incorporated by reference” into the employment contract. These can be very detailed and provide a significant source of employment rights and obligations that a court will recognize.

### Oral Representations

In the interview and at the offer stage, the employer’s promises and representations, despite being merely oral, form part of the contract. The difficulty is to objectively prove that the employer unmistakably promised “a 15% increase in salary after the first year” or “one paid sick day per month.” As with proving all oral promises, if the issue goes to court one can only tell the judge what oral promises were made and relied upon. These are called express terms because they were actually expressed.

### Terms Implied by Conduct and Context

Employment is dynamic over time and rights and obligations may be implied by conduct and practice between the parties. If, for example, employees are transferred to other locations, such mobility may become an implied term of the contract. If

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an employer has helped a foreign worker obtain permission to work in Canada, a term may be implied for the employer to continue to use best efforts to renew such authorization.

Terms are implied by necessity to give business efficacy to the parties' intentions. Every conceivable item of agreement cannot be expressed orally or in writing. The courts will say what the parties must have agreed to, even if the parties themselves did not address the issue. Rarely, when discussing salary, for example, will the parties actually stipulate that the salary for local employment will be paid in *Canadian* dollars. Absent evidence to the contrary, a court will consider the context and respond "Oh, of course, they would have meant local currency." It would imply the term that salary for work in Canada is to be paid in Canadian dollars.

## Terms Implied by Law

Some of the statutory protections, such as those in minimum employment standards legislation, are implied by law and form part of every individual employment contract. The intentions of the parties are irrelevant. Even if one wanted to, one cannot negotiate or sign away those rights. Most statutes prohibit waiver of them, with language like: "An agreement that this Act or a provision of it does not apply, or that the remedies provided by it are not to be available for an employee is against public policy and void." These statutory terms are justified by a widely-held perception that workers occupy a generally – and often significantly – weaker position when negotiating with employers. Employment standards, human rights, privacy, and occupational health and safety protection legislation all provide a floor or minimum basket of rights for all workers to enjoy on the job.

The common law decisions of judges over the years have also settled terms implied by law. Employees' implied duties include that they:

- are qualified as they represent;
- will work in mutual co-operation;
- will serve in good faith;
- will exercise loyalty and fidelity (such as respecting confidentiality and avoiding competition with the employer);
- will take care of the employer's property;
- will indemnify the employer for wrongful acts on the job; and
- will give reasonable notice of resignation.

Likewise, the common law implies that employers have a duty to provide:

- safe working conditions;
- fiduciary duties in specified circumstances,
- adequate supervision and training;
- regular work;
- indemnification for reasonable authorized expenses incurred in the scope of employment;
- good faith and fair dealing; and
- reasonable notice of dismissal in the absence of cause.

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*When you walk up to a counter to buy a cup of coffee to go, you likely engage in a very informal interaction. You probably do not use any legal words, do not talk about offer, acceptance, or consideration, do not sign any paper – and yet you have made a contract for that coffee.*

The employment contract today is more than a simple agreement to work for money. If the employer and employee do not catalogue their mutual obligations in the employment relationship, the courts have been willing to do so. In the last few decades, Canadian judges have recognized the social (as well as economic) importance of work to the dignity and self-esteem of workers, and other special policy considerations in the employment relationship. Employment has more terms implied by legislatures and judges than any other contract.

## Conclusion

*There were promises made across the desk! You mustn't tell me you've got people to see – I put thirty-four years into this firm ... and now I can't pay my insurance! You can't eat the orange and throw the peel away – a man is not a piece of fruit.*

*– Arthur Miller, Death of a Salesman,  
Act III, p. 69 (1949)*

When you walk up to a counter to buy a cup of coffee to go, you likely engage in a very informal interaction. You probably do not use any legal words, do not talk about offer, acceptance, or consideration, do not sign any paper – and yet you have made a contract for that coffee. Terms will be implied by your conduct in that scenario and the law will imply the obligations of the café that you are getting real coffee, and that it is safe and fit to drink.

The same approach applies to employment. The law looks to many sources – written, oral, and implied – to define the terms of the contract where it is not in paper form.

Working is like buying a cup of coffee. You do not need a lawyer to make the contract. You do not need to sign anything. There is substance to that contract. And the law has got you covered.

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