

INVESTING IN EMPLOYEE DEVELOPMENT: MAKING SURE YOU PROTECT YOUR INVESTMENT



What can employers do, from a legal perspective, to ensure that employees they have invested training dollars in, stay with the company after their training is complete?

In a job market where there is a shortage of skilled/specialized employees, some employers are prepared to help employees gain necessary skills/specialization. One method is paying for some or all of the employee's training/education costs associated with acquiring the skills/specialization. However, the reality is that investment can be quickly lost if the employee no longer works for the employer.

In order to protect the investment and increase employee retention, repayment agreements are a tool available for employers. As is the case with most contractual terms of employment, care must be taken to ensure the repayment agreements are properly drafted and entered into, so that they are enforceable at law.

While this article is not capable of providing an exhaustive list of terms and variables, the following are some main points to consider and customize in a repayment agreement.

- The repayment agreement must be in writing and signed by the employee before the payments are made.
- Not all costs can be recovered and an arbitrary penalty amount is not enforceable. To avoid any confusion, the categories of costs sought to be recovered should be listed in the repayment agreement (e.g. tuition, books, travel costs, pay while at school, etc.). Generally costs associated with third-party training which benefits the employee, both with the paying employer and potentially with a future employer, are recoverable. Costs for in-house training that do not benefit the employee outside of that employer have been found to not be recoverable. Similarly, wages while performing

training work have been found to not be recoverable. In particular, the BC *Employment Standards Act* prohibits employees paying any of the employer's "business costs", which generally includes normal/entry level training. Accordingly, caution should be taken to not be overly broad in what costs are sought to be recovered. Ultimately the court will scrutinize the repayment agreement to see if there are statutory or public policy reasons to find it unenforceable.

- Duration of the obligation. There is no set formula for how many years the repayment obligation applies or at what rate/percentage it can be reduced (e.g. two years at 50%/year vs five years at 20%/year vs 100% until three years, then forgiven). Similar to above, the court will scrutinize the repayment agreement to determine if the duration of the bargain is unreasonable and unenforceable.
- Triggers for repayment. Generally the repayment obligation is triggered when the employee resigns or is terminated for just cause. However, there is at least one case that allowed a termination without cause to trigger the payment based on the language in the repayment agreement. A term can be included in the repayment agreement to authorize deduction of wages from a final pay cheque when a repayment obligation is triggered.
- In addition to repayment obligations, employers can also require non-competition clauses as a prerequisite to training payments. The objective is to protect against investing in a future competitor. In order to be enforceable in court, the clause must be reasonable regarding defining the type of work, geographic area, and time limit.

For unionized workplaces, repayment agreements cannot be inconsistent with the collective agreement. Repayment agreements can be negotiated directly with the union (at bargaining or as a separate memorandum of understanding), and if so, they are enforceable via a management grievance. If they are not inconsistent with the collective agreement, there is some case law that says repayment agreements can be negotiated directly with the employee, and in that case, they would be enforceable via the court.

In conclusion, employers have the ability to grow their skilled workforce by funding the necessary training/education for their employees. In order to protect that investment, properly drafted repayment agreements can be utilized to increase the retention of employees, or in the alternative, enable some or all of that investment to be recovered. Please contact the writer or any of our lawyers for assistance with assessing your situation and preparing a repayment agreement.

While every effort has been made to ensure accuracy in this article, you are urged to seek specific advice on matters of concern and not to rely solely on what is contained herein. The article is for general information purposes only and does not constitute legal advice.▲

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