

DENTONS

Workplace flexibility: Changing terms and conditions of employment

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Introducing new terms

- Substantial changes can be essentially new agreements
- Unilateral changes can also mean a constructive dismissal
- Need to be approached carefully

Introducing new employment agreement

- Need all elements of a contract
 - Offer
 - Acceptance
 - Consideration
- Not enough that the employee agrees
 - **Need consideration**

No Consideration = No Contract

- If no consideration, then it is a mere promise:
 - Promises are not enforceable in court;
 - Language of the contract doesn't matter.
- So what is consideration?

Consideration in employment agreements

- If done properly this is not an issue:
 - Employee provides services;
 - Employer agrees to pay;
 - This is consideration;
 - Easy at the start of employment.

Consideration in employment agreements

- BUT ... continued employment is **not** consideration:
 - Courts view this as the employer complying with the terms of the original agreement.
 - Without “fresh” consideration agreement is unenforceable.
 - Applies to the 10-year employee and the 3-day employee.

Consideration in employment agreement

- Consideration can be almost anything
 - Signing bonus
 - Promotion
 - Extra paid days off
 - New benefits
 - Bonus
- **But not anything that would have otherwise been promised.**

Consideration in employment agreement

- Courts don't assess adequacy.
- Concern is solely existence of consideration.
- *Giacomodonato v PearTree Securities Inc.:*

“It is not the role of the court to assess the adequacy of the consideration provided by PearTree or to assess whether or not the economic benefits obtained by Mr. Donato outweigh what he gave up”

“Courts are concerned with the existence, rather than adequacy, of consideration”

- **But you need the employee to agree**

Common consideration problems

- Employment contracts not signed before the employee starts;
- Signed “term sheets”;
- New terms added mid-employment;
- Transactional employment agreements.

What about negative changes?

- Employers have the right to structure their workplace.
- However, unilateral changes to the employment agreement can constitute a constructive dismissal.
- Fact specific analysis.

Strategies for constructive dismissal risk

- Reducing risks of constructive dismissal:
 - Communication
 - Provide lengthy notice of the changes.
 - Employees can condone the changes
 - Offer additional compensation

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Thank you!

Feedback survey

