

# **A GUIDE TO EMPLOYMENT CONTRACTS FOR COACHES**

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## **Part 1. OVERVIEW**

In the 1990s, amateur sport organizations have had to become much more business-like in how they manage their affairs. Marketing, sponsorship, risk management and dispute resolution are issues that are demanding an increasing amount of attention from volunteer directors and administrators.

Likewise, the coaching profession has evolved significantly in recent years. Today's coaches are no longer exclusively volunteers, and many have access to extensive training and professional development opportunities. Coaching is a viable career and many individuals now make their living coaching in amateur sport, either as employees of sport organizations or as self-employed coaches offering their services for a fee.

This handbook is written for the paid coach who works part-time or full-time in coaching for a sport organization, club, educational institution, and/or a combination of these. The handbook also addresses many of the issues relating to the private coach -- that is, the coach who enters into a coaching, business or profit-sharing relationship with an elite amateur athlete.

The purposes of this handbook are three-fold:

- to explain the critical distinction between an employee relationship and a contractor relationship.
- to suggest some essential elements of the coaching contract; and
- to give coaches some basic knowledge to help them negotiate a fair and effective contract with their employer.

It is important to emphasize that no two contracts for coaching services will be alike. While all contracts will have some common elements, each contract *must* be tailored to suit the coach's particular circumstances. As a result, this handbook does not advocate a "model" coaches contract – it does provide some essential components of a contract and gives the coach the necessary knowledge to negotiate contract terms which best meet their needs.

The following process is recommended to the coach who is ready to negotiate and execute a contract for coaching services:

- Discuss and negotiate the desired elements of the contract with the employer
- Have the employer prepare a draft contract that reflects the elements that have been agreed upon
- The coach should review the draft contract, making additions and revisions as appropriate
- The coach should then have a lawyer review and refine the contract

Involving a lawyer is highly recommended, and the fee that the coach will pay to the lawyer to review and refine the contract will be well worth it over the long term.

## **Part 2. EMPLOYEE OR INDEPENDENT CONTRACTOR?**

This section of the handbook discusses the differences between two approaches to coaching employment – the coach as an employee and the coach as an independent contractor. Understanding these differences will help the coach determine which is their preferred approach, and will give the coach direction in designing their working relationship with the employer that accurately reflects the reality of the job. Properly structuring this relationship is important for both legal and financial reasons, not only to the coach but also to the coach’s employer.

### **2.1 Should I Be an Employee or Self-Employed?**

An *employee-coach* is just like any other employee of an organization – he or she works for regular pay, with income taxes, unemployment insurance premiums, and government pension plan contributions withheld by the employer and submitted to the government in regular installments. An employee-coach may participate in the employer’s benefits and private pension program, may have a written job description, and may have a written employment contract or other written agreement with the employer.

A *self-employed coach* is an independent contractor who provides his or her services to a sport organization, club or institution for an agreed-upon fee. The self-employed coach also includes the private coach who enters into a contract with individual athletes. The terms and conditions of the relationship between the self-employed coach and his or her employer is set out in a written agreement. The employer pays the self-employed coach the full amount of the contract according to the agreed-upon payment schedule and does not withhold taxes or other payments. The self-employed coach is essentially his or her own employer, and is responsible for making tax and other payments to the government directly.

There are advantages and disadvantages associated with each approach to coaching employment. Often the coach will not have an opportunity to choose one over the other as it will be clear from the nature of work done that the coaching position is one of an employee and not an independent contractor, or vice-versa. However, where the coach does have the opportunity to negotiate one or the other arrangement, he or she will want to carefully consider these advantages and disadvantages of each and be satisfied that the type of employment selected meets all applicable legal tests.

In terms of the implications for the individual coach, the employee and contractor approach differ in three main aspects: personal liability; taxes, benefits and pensions; and dismissal. Each of these is discussed in turn.

#### **Personal Liability**

This issue is primarily a legal one. Typically, an employer is responsible (or “liable”) for the wrongful acts of employees acting within the scope of their employment duties. This is

known as *vicarious liability*. It means that in a situation where the negligent behaviour of an employee causes injury or damage to another party, the employer will be held vicariously liable, or responsible, for those losses - even though the employer may have done nothing wrong.

The underlying rationale for this legal principle is that the employer and employee are considered associated parties in the ongoing business of the organization. They may also be described as having a *master-servant* relationship, where the employee is the servant or agent carrying out the directions and actions of the employer.

There is also a practical reason for this principle. From a public policy perspective, the vicarious liability principle provides an injured party with a source from which to collect damages in the event of a successful legal suit. Most employers would have the resources (usually insurance) to cover such damages, whereas the individual employee typically would not.

The liability situation for the self-employed coach is quite different. The coach who is an independent contractor is his or her own employer and is thus responsible for his or her own negligent acts. Instead of having the protection of the employer's liability insurance policy (or other "deep pocket" such as cash, reserve funds or other assets), the contractor coach may be *personally liable* for his or her own actions. He or she may also be responsible for any legal costs that might be incurred to defend a lawsuit from other parties, whether or not the lawsuit is successful.

The independent contractor coach clearly has legal obligations that the employee-coach does not have. These obligations will vary depending on whether the coach operates under an incorporated business or as an unincorporated sole proprietor, but in both cases they are significant. The prudent self-employed coach may wish to purchase liability insurance. Also, depending on the terms of the contract with the sport organization, the contractor coach may not have the choice and may be required to purchase this insurance.

## **Tax, Benefits and Pensions**

This issue is primarily a financial one. An employer is responsible for withholding certain payroll deductions on behalf of an employee, including income tax, unemployment insurance premiums, old age pension and, in some provinces, health care. Employers also pay workers compensation board (WCB) premiums for their employees. Employers are required by provincial and territorial employment laws to pay overtime wages or to provide time off in lieu of extra time worked. They are also required to pay wages on statutory holidays when the employee does not work, and to provide the employee with a minimum number of paid holidays per year. Some employers may also contribute to additional benefits for employees, such as extended health care and retirement savings plans.

An independent contractor, on the other hand, has none of these benefits or "perks" provided to him or her. The independent contractor does not get paid for overtime or holidays. The independent contract is not covered by workers compensation and in many cases must pay

their own health care insurance. The independent contractor is also responsible for funding his or her own benefits and pension programs.

Tax advantages may be a factor to consider for the coach who opts to be self-employed. With careful tax planning, it is possible to achieve higher earnings when self-employed than when employed, particularly if the self-employed individual has an incorporated company. This tax advantage occurs for two reasons: first, many ongoing expenses can be legitimately linked to the pursuit of business and can be used to offset income before taxes, and second, except at very low income levels, the corporate income tax rate. Not however, that corporate income is really taxed twice, once when it goes into the company and a second time when it is removed the company and goes to the coach as salary or a dividend. Determining the actual tax rate will usually require profession advice.

There are also disadvantages to self-employment, including the time and cost required to incorporate as a company, and the ongoing administrative work which is required to keep accurate financial records, to collect and remit taxes, and to submit annual tax returns.

In evaluating the pros and cons of self-employment, the coach should always balance the possibility of tax advantages against the financial risks, which include the lack of benefits, disability insurance and income security (whether through the stability of employment or the fall-back protection of unemployment insurance).

## **Dismissal**

This third issue relates to job security. Under provincial law, an employer must have “cause” to dismiss an employee without notice. Lacking cause, as defined by the law, an employer can terminate an employee only if the employer provides proper notice of termination as set out in employment law or employment contract, or alternatively, if the employer pays the employee a lump sum in lieu of the required notice.

The relationship between the independent contractor and the employer, on the other hand, is governed solely by the terms of the contract the parties negotiate between them, and becomes a matter of contract law as opposed to employment law. Any dispute about the termination of employment that may arise is dealt with as a breach of contract, not as an employment matter. In the best scenario the existing contract will contain clear terms about termination and dismissal. In the worst case scenario involving a poorly drafted contract, the contract would contain no such provisions and the contractor would have little recourse for obtaining any notice that the contract is to be terminated.

## **2.2 Employee v. Contractor: Are You A Contractor?**

If your employer pays you regularly, withholds taxes and other deductions, provides benefits gives you paid holidays and issues you a T-4 income tax slip at the end of the year, you are probably an employee.

If you signed a written contract for services, receive an honorarium, stipend or other lump sum, and your employer does not withhold taxes and other payments such as EI or CPP you *may* be an independent contractor. You also may not be an independent contractor – you may, in fact, be an employee operating under the guise of an independent contractor. Not clearly establishing the legal status of an independent contractor can create serious problems for both the coach and the employer, as described in the case of the Flying Fins.

There are four tests typically used in law to determine whether an individual is an employee or self-employed. These are:

- the control test;
- the integration or organization test;
- the economic reality test; and
- the specific result test

No single test is definitive of the employee-employer relationship – instead, the tests are used in combination and are applied to the circumstances of each individual case.

### **The Case of the Flying Fins**

*The Moose Jaw Kinsmen Flying Fins were a small swimming club which engaged a head coach for an annual stipend of \$12,000. Both the Club and the coach believed that the relationship between them was one of independent contractor, not employer-employee. As a result, the coach was paid in lump sums and no deductions were withheld.*

*Revenue Canada eventually became aware of this arrangement and determined that the coach was really an employee and not a contractor, and demanded that tax, UIC and CPP be paid. This view was based on the Club's ownership of tools (whistles, stop watches, flutterboards), the absence of a chance of profit or risk of loss, and the extent to which the Club controlled and directed the activities of the coaches.*

*The Club went to court to appeal this decision, but lost, and in the end the Club's directors and the coach had to sort out who among them was responsible for paying the arrears, plus penalties and legal costs.*

*Moose Jaw Kinsmen Flying Fins Inc. v. Minister of National Revenue (1988), 88 DTC 6099.*

### **Control Test**

The greater the degree of control and independence the worker has in the work place, the more likely that person would be considered an independent contractor. The degree of control depends on the circumstances of the case and often varies with the type of work and skill of the worker. Several factors, such as the authority to make decisions, hire assistants, define the scope of the work, set one's own schedule, or terminate the working relationship will influence the degree of control which the individual has.

In the coaching context, control would also include the extent to which the coach has authority to determine coaching methods and to make coaching-related decisions. Control would be influenced by the lines of authority and accountability – for example, is the coach expected to “report” regularly to an individual such as the Technical Director or President? Does the coach need to obtain permission from the Executive to implement a certain training program? The more the employer dictates coaching activities, the less control the coach has.

### **Integration or Organization Test**

This test examines whether the tasks performed by an individual form an essential part of the organization's day-to-day business. If the tasks are “integral” to the business, it is likely that an employer-employee relationship exists. On the other hand, if the tasks are not integral to the regular daily operation of the business, that is a strong argument that an independent contractor relationship exists.

This test is also influenced by whether the contractor provides the same or similar services to other employers at the same time. If the contractor does provide similar services to others, this is evidence that the contractor is truly independent.

### **Economic Reality Test**

This test deals with the possibility of financial risk. It has several facets including control, ownership of tools or equipment, chance of profit and risk of loss.

The matter of control has already been discussed above. In the coaching situation, the second facet is particularly important: for example, does the coach supply his or her own whistles, stop watches, clipboards, first aid kit, or other training or coaching devices or supplies? Does the coach supply his or her own forms, documents, training logs? Or is the coach entirely reliant upon the employer to supply him or her with all of the equipment and supplies necessary for the task of coaching? A self-employed person would likely pay for their own equipment and supplies (and claim them as an expense against taxable income), whereas an employee would have these supplied by the employer.

Similarly, a self-employed coach would likely include within their contract a certain amount for administrative expenses (including out-of-pocket expenses such as meals, travel, accommodation). An employee, on the other hand, would be reimbursed by the employer for out-of-pocket expenses.

Self-employed there usually creates the opportunity of profit and the risk of loss that is normally absent from the consideration of employees: for example, if the contractor performs competently he or she will be rewarded financially under the terms of the contract, and conversely, if the contractor's work does not satisfy the terms of the contract, contract payments may be withheld. Likewise, an independent contractor would not get paid if he or she were

unable to complete the work due to illness, adverse weather conditions or other factors beyond the contractor's control.

### **Specific Result Test**

This final test relates to whether the work is project-specific or ongoing. An employee-employer relationship generally exists where an individual provides services to an employer, over a period of time, without any reference to a specified result or task. If, however, an individual is hired under a contract for services for a specific time period, to achieve a specific result, or to do a specific task, the relationship may not be viewed as one of employee-employer. A short contract to coach a team to prepare for and compete at a certain event such as a major games could be construed as a contract which has as specific result in mind.

The four tests described above were initially developed by Canada Customs and Revenue Agency (formerly Revenue Canada) in the context of allocating responsibility to pay or deduct taxes. In a recent case, with broader implications, the Supreme Court of Canada validated these tests as proper factors to consider but the Court phrased the test more simply. The central inquiry should be whether the person engaged to perform the services is performing them as a person in business on his or her own account? If the answer is "no" then the person is an employee. If the answer is "yes" then the person is a contractor.

The primary consideration driving most requests by coaches to create a "contractor" relationship is the more favourable tax treatment accorded to independent contractors. However, the consequences of making a mistake regarding the correct interpretation of a coach's status can be quite serious for both the purported "contractor" and for the employer. For instance, the employer may have to pay all outstanding employment insurance and pension plan contributions, perhaps with a fine. The "employee" will have many, if not all, of the previously submitted expense deductions challenged and may have to pay additional amounts to the government as penalties and fines. Mistakes also impact workplace safety insurance as the calculation of premiums is dependent on the number of employees an employer engages. Importantly, most employment standards legislation specifies that the enumerated benefits accrue to every employee and thus "contractors" who are deemed to be employees after the fact are entitled to all the protections of this legislation..

In summary, the focus of all these legal tests is to discover the true nature of the relationship, regardless of what it might be called on paper or what the parties believe the relationship to be. Even a written contract that states that the relationship is one or the other will not conclusively establish that relationship if the nature of the work proves it to be otherwise. Set out below are some ideas to assist the coach who wants to be sure his or her claim to be a contractor will withstand serious scrutiny:

- Ensure the employer makes no statutory deductions and provides no benefits whatsoever such as health, dental, overtime, lieu days or paid vacations, etc.
- Hours of work should not be monitored.

- Be careful how the reporting/supervisory structure is designed. True contractors receive little direct supervision as they go about performing their tasks (they are the experts - which is the reason they were hired!) although they typically do report to some official of the organization that hired them.
- Avoid exclusivity clauses if at all possible.
- Structure the pay arrangement so there is some chance of profit (build in a commission or bonus scheme) and conversely some risk of a loss (perhaps tied to poor results or failure to finish a task on time).
- Have all termination rights mutual between the parties with no additional notice payable to the contractor if the contract is terminated.
- Where possible and sensible work away from the employer's business. Alternatively, structure some "rental" of the premises used by the contractor.
- Avoid stating general "duties" the coach should perform. Instead, list all the specific tasks the contractor is responsible to get done and the time frame in which he or she is to do them.
- Avoid job titles within the organization. Contractors should not serve as a volunteer or Director and must avoid business cards indicating an association with the employing organization – all these factors have been considered evidence of an employment relationship.
- To the extent the contractor is using the employer's equipment arrange a "rental" or some service fee paid back to the employer.
- Keep the term of the contract as short as possible to perform the required tasks. The longer the term the more it begins to look like an employment relationship.
- There should be no reimbursement for the contractor's normal business expenses. Such expenses should be built into the fee paid to the contractor. The contractor should submit an invoice each month for payment. The payment of wages without an invoice is a clear indication of an employee relationship.
- Contractors should arrange all their own insurance at their own expense.
- Consider having the contractor incorporate and have the corporation contract with the employer for the required coaching services.
- GST should be charged to the employer if the supplier (coach) is not exempt.

In conclusion, all of the above tests are used to determine if an individual is an employee or a contractor. The focus of these tests is the true nature of the relationship, regardless of what it might be called on paper or what the parties believe the relationship to be. Even a written contract that states that the relationship is one or the other will not conclusively establish that relationship if the nature of the work proves it to be otherwise, according to above tests.

Understanding the significant differences between these two models of employment gives the coach a clearer idea of the risks which they face as

**Comments from a coach ...**

*Many coaches are so thrilled to get the coaching job in the first place that they pay little attention to the matter of negotiating the contract, or assume that the contractual details will be taken care of. They end up not being properly protected.*

independent contractors. Understanding these risks will help you to negotiate more effectively for a contract that is legally and personally beneficial.

### **Part 3. ELEMENTS OF THE COACHING CONTRACT**

This section of the handbook explains some of the basic components that should be in a coaching contract. Clearly, a written contract is essential if the coach is self-employed as an independent contractor. A written employment contract is strongly recommended if the coach is an employee as defined by the tests set out above.

The following information is presented in very general terms and would be applicable to all types of employment contracts. Specific recommendations to the coach who is negotiating their own contract are presented in Section 4 of this handbook.

#### **Obligations of the Parties to Contract in Good Faith**

Both parties have an obligation not to mislead the other. In an employment situation, the employer must be clear in representing the availability of work, the nature of the work, the wage and the conditions of employment. The employee likewise must accurately represent skills, qualifications and history of past employment. The same honesty is required of parties entering into a contract for services. A contract can be voided if it is shown that one party substantially misled the other.

#### **A Word About Criminal Records**

*Other than in federally-regulated businesses and activities (which do not include sport), no law in Canada precludes an employer from asking a prospective employee whether he or she has a criminal record - even where that record is unrelated to the work to be performed. However, both provincial and federal human rights legislation prohibits employers from dismissing, refusing to hire or otherwise penalizing a person simply because he or she has been convicted of a criminal offense which is not connected with the employment.*

#### **Enforceability of the Contract**

In all cases, the contract should be reviewed and signed prior to commencing the work. The contract is enforceable only if both parties agree freely and voluntarily to be bound by its terms. Thus, if one party misrepresents important conditions to the other party, uses its power to impose unfair or unreasonable provisions on the other party or commits a fraud on the other, the contract may not be valid.

However, this does not preclude one party from being in a stronger bargaining position than the other, thus enabling them to obtain more favourable terms in the contract. In fact, it is a rare contract that arises between two parties who are completely balanced in power and strength.

A contract can be voided on this basis only if there is a blatant and coercive imbalance between the parties.

## **Defining the Parties**

An employee is hired in his or her own personal capacity. An independent contractor may choose to enter into a contract in his or her own personal capacity or as an incorporated company. Incorporation provides certain tax advantages as mentioned in Part 2 of this handbook, as well as liability advantages. However, incorporation also involves additional costs, inconveniences and paper work. A coach considering incorporation should consult with a lawyer and accountant to obtain an accurate picture of the costs and relative advantages and disadvantages of incorporation.

The other party to the employment contract is usually the incorporated sport organization, club or institution, although the president, member of the executive committee or executive director will sign the contract on behalf of the organization.

Before entering into a contract for services, the contractor should be satisfied that the organization is stable and operating on a sound financial basis. This can be done by talking with other suppliers or contractors. The contractor-to-be can also ask to see financial statements and an annual report, although the organization is not obliged to supply them.

Ensuring that the employer is solvent is particularly important for the independent contractor coach, because he or she will have limited recourse in the event the organization becomes bankrupt and is unable to make the necessary payments to fulfill the contract. This is somewhat less important for the employee-coach, because the law imposes an obligation on directors of organizations to *personally* fulfill payroll and certain related obligations.

## **Job Duties**

One of the first clauses a contract should establish is a description of the position and the scope of the job. The contract should identify the job title and should describe *in detail* and as broadly as possible the responsibilities and duties of the position. This job description is a key part of the contract upon which many other sections of the contract will depend.

Legally, a job description is important because it defines the scope of employment duties for the purposes of assigning responsibility, or liability for actions. An employer is only liable for the actions of employees that fall within their defined scope of duties. It is for this reason that the job description must be accurate and broadly worded.

## **Authority of the Coach**

Following closely on the description of duties, the contract should also define the coach's scope of authority. Does the individual have the authority to make and implement decisions, or only to implement decisions made by others? Does the individual have the authority to hire his or

her assistants? What is the coach's role in developing and applying selection criteria, implementing discipline, designing and scheduling training programs? The contract should clearly set out what the coach is authorized to do, and where this authority comes from.

### **Key Items in the Coach's Job Description**

*Employers and coaches should be as detailed as possible in documenting the coach's job responsibilities. Key areas to be covered include the tasks that are integral to coaching such as instruction, scheduling, athlete evaluation and supervision of competitive events (both at home and away). Areas that should not be overlooked include general supervision during training events, staffing (if the coach has assistants), coordination of equipment, and maintenance of coaching certification. If the coach's responsibilities include an administrative role (which might be the case in a smaller club), then these tasks should be identified (for example, registration, budgeting, negotiating with facilities, attending meetings, promotion and publicity, fund-raising). If your responsibilities will include traveling with and supervising the team at competitions, include this in the list of duties. As a general rule, the job description should outline specific tasks to be performed -- avoid general statements such as "the coach shall abide by rules of the association", "implement the policies and regulations of the club" or "carry out duties in a professional manner".*

### **Exclusivity**

To avoid potential conflicts of interests, some contracts will contain clauses that prevent the employee from offering coaching services to other clients. Such clauses may be legitimate where the coach's position is clearly full-time, but otherwise no coach should agree to any restrictions on their ability to coach elsewhere if it does not affect his or her job performance. It is important for contractors to retain the right to work for any third parties during the term of a contract – even if they have no intention of actually doing so.

### **Reporting Relationship**

The contract should specify who the coach communicates with and reports to in the organization, as well as how often and in what format (written or verbal). Ideally, this person or (group) will be someone who understands the technical aspects of coaching, and will also have a formal role in the coach's evaluation and in any decisions about the coach's continuing relationship with the organization.

#### **Comments from a coach ...**

*Part of being "political" involves knowing who has the power within an organization. Some organizations are driven by the Board, others are driven by staff, and still others (usually local clubs) are controlled by parents. In terms of your coaching contract, look for a direct link with those who control the organization.*

### **Compensation**

This part of the contract deals with much more than simply the pay that the individual has negotiated. In an employment situation, it should include all forms of compensation that have been negotiated with the employer including regular salary, overtime salary, benefits (extended medical and dental coverage and disability insurance), car and per diem allowances, holiday

structure and pay, the employer's contribution to a pension, the employer's contribution to professional development and coaching accreditation, future salary increments (whether fixed in advance or performance based), and bonus structure. The contract should also specify the schedule for payments (weekly, biweekly, monthly) and the method of calculating payments.

A contract between the independent contractor and the client should specify the amount of payment which has been negotiated, the frequency of payment, and compensation for out-of-pocket expenses such as gas, mileage, parking, travel, accommodation, supplies and materials. The contractor may also wish to negotiate a bonus package or other reward for achieving certain performance objectives.

### **Duration of the Contract**

An employment contract is typically open-ended in its duration, while making reference to the "anniversary date" of employment for purposes of performance reviews, review of the contract or review of salary.

A contract for services is rarely open-ended, if ever. Such contracts are most often for a fixed term of less than one year or terminate when the specified tasks are completed. It is possible for a contract for services to, and may contain clauses relating to the renewal of the contract for an additional period. The renewal option usually does not require that the whole contract be opened up, but only that certain limited aspects of it be reconsidered, such as the term, additional tasks or compensation.

#### **Comments from a coach ...**

*The higher up you go, the more important your communication skills will become. You will need these skills to communicate with athletes on the one hand, and with members of the Board on the other. Good communication and people skills will help you resolve many contractual issues and potential disputes.*

### **Renewal of the Contract**

The contract should be specific about how the renewal process will occur if applicable: for example, is the decision to renew a joint decision of the two parties or solely at the discretion of the employer? Is the decision to renew formally linked with the review of the contractor's performance? Ideally, the contract should set out timelines so that the decision to renew (or not renew) is not left to the last moment. Instead, the contractor should have ample notification if the contract is not being renewed, so that he or she can pursue other opportunities.

### **Performance Review**

Performance review is often overlooked, both in policy and in practice. The contract should be specific as to how the individual's performance is going to be evaluated. It should specify not only what criteria will be used in the evaluation and how they will be weighted, but who will carry it out, at what times and in what format (i.e. written or verbal). Does the performance review process provide the coach with an opportunity for input or feedback? Performance reviews are critical because they form the basis upon which major decisions are

made, including decisions to penalize or terminate employees or contractors, as well as decisions to reward them.

## Place of Work

The contract should specify where the work is going to take place. If travel is a requirement of the position the contract should specify how travel costs are to be compensated. If temporary relocation to another area is a requirement of the position, the contract should clearly specify what relocation expenses will be covered and how.

## Non-Competition Clause

This type of clause protects the employer from a former employee or contractor using knowledge and experience acquired during the course of employment to compete unfairly against the employer. While such clauses are legitimate, they should only target those employees or contractors whose knowledge of the employer's business could damage the employer's place in the market or relationship with its clients. Generally, the more specialized and complex the services, and the more an employee or contractor is in a position to influence or solicit the employer's clients, the more likely a non-competition clause will be upheld by a court, provided it otherwise reasonable.

### **Comments from a coach ...**

*The sport organization will try to sign you up to a one or two year contract. This isn't long enough to develop a team and bring about significant improvements in performance. To get the job done, the coach needs four or five years.*

## Confidentiality Provisions

Confidentiality provisions are common in contracts and are designed for two purposes: one is to ensure that the employee or contractor having access to the employer's confidential information keeps it confidential both during and after the contract, and the second is to prevent the parties from discussing details of the contract once the contract is terminated. A contract can also stipulate confidentiality about the details of a dispute between the two parties, the reasons for dismissal, the terms of any settlement or the amount of severance pay. Confidentiality provisions work both ways and can be beneficial to both the employer and the employee.

## Termination

In order to avoid future misunderstandings both parties should agree upon and identify what grounds will justify a termination of the contract (in the case of an independent contractor) or are cause for dismissal (in the case of employees). Remember that an *employee* terminated for cause is not entitled to notice or pay in lieu of notice. However, an employee dismissed without cause is entitled to a receive notice of the pending dismissal or a lump sum payment in lieu of such notice. The amount of notice to be given on termination should be negotiated by the parties and clearly specified in the contract.

Where an employee is terminated without cause, and therefore with notice, both parties should know the length of that notice period well in advance. The best strategy is to include it as part of the contract. Unless there is a prior agreement between the parties, accepting a longer notice period, often called “reasonable notice”, the employer may try to insist that the employee is entitled to only the minimum notice period set out. (In the provincial or territorial this is one week’s notice for each year of service up to a capped amount).

The statutory provision represents a minimum period of notice, but this may not be reasonable in certain circumstances. Seniority, complexity of the job and inducement to leave a previous position of long standing are just some of the factors that should encourage the employee to negotiate in advance for a longer period of notice. However, if the contract calls for the minimum statutory period, and the employee has agreed to this, these other factors will not be considered.

Likewise, if a contractor coach is terminated, it may be appropriate for the contract to include a short notice period, which is rarely shorter than 30 days.

What happens on termination for an employee with a fixed term contract is more complex. The amount of the termination package should be identified in the contract whether it is (i) a set period of notice or (ii) a pay out of the remaining contract term. Ideally, the termination payment should be the remaining amount of the contract paid out in full but this is not always possible to negotiate. It could be based on salary at the time of termination, and could include a pro-rated share of any bonus that may have been earned. The termination package might also include any statutory entitlements, such as a continuation of health care premiums during the contracts terms. The most important thing is to negotiate and agree in advance how any termination situation will be handled.

**Comments from a coach ...**

*Your contract should contain communication and dispute resolution mechanism to handle situations of conflict between athletes and the coach. Such a mechanism would outline how and where athletes could make complaints ...If they complain directly to the Board, the coach may be doomed.*

Whether the notice of termination is actually given or a payment is made in lieu is usually up to the employer. Most employees prefer that their entitlement to notice take the form of a lump sum payment or a series of structured payments. A lump sum payment is preferred as it allows a clean break from a situation that, if extended, may be difficult for both parties.

## **Indemnification and Insurance**

Employees are indemnified by their employers for legal costs and damages that they might incur, where such losses arise from the employee properly performing their job duties. Typically, an employment contract does not make reference to this because it is a clear entitlement under the law.

Independent contractors are typically not indemnified by the organizations with which they have a contract. It is not in the organization's best interest to indemnify a person over whom they do not exercise control. However, it is not uncommon for the employer to seek an indemnification back from the coach who is an independent contractor.

## **Arbitration**

Arbitration is a process whereby the parties submit a dispute to an impartial third party for decision after hearing from both sides. The parties agree in advance which disputes may be arbitrated (termination decisions that effect employees are usually not arbitrated) and agree to be bound by the decision of the arbitrator. Arbitration is intended to avoid the delay, expense and the formalities of ordinary litigation in resolving common disputes.

An arbitration clause is recommended in all contracts, for several reasons. One of these is that it enables the dispute to be settled outside the organization and away from personalities that may have clashed with yours, and views which have become entrenched. Arbitration is also a cost effective way to resolve disputes – particularly if it appears that the parties are headed towards litigation.

Two critical aspects of the arbitration clause are that arbitration shall be compulsory, not optional for certain disputes and that the arbitrator's decision shall be final and binding on the parties.

## **Severability**

This is a minor, housekeeping item. Generally, where one clause in a contract is found to be void, it has the effect of voiding the whole contract unless the parties agree otherwise. Thus, most contracts have a "severability provision" which results in any illegal, or void, clause being severed from the remainder of the contract and ensures the whole agreement is not struck down.

## **Part 4. RECOMMENDATIONS FOR THE COACH NEGOTIATING A CONTRACT**

The following points are intended to help the coach (whether an employee or contractor) negotiate the best possible contract for themselves. These points do not necessarily represent a complete list, nor are they presented in order of priority. As well, these points must be read in conjunction with the previous section that explained some general elements of a contract.

As mentioned in the Overview to this Guide, we strongly recommend that the coach negotiate the terms of the contract, have the organization prepare a draft contract, revise this draft as appropriate, and have a lawyer review the final product.

**Don't start the job until the contract is in place**

The beginning of the relationship between a coach and his or her employer is a time when the relationship is at its most positive and the coach is viewed most favourably. This gives the coach considerable influence and it is clearly the best time to negotiate and execute the contract. Take advantage of this time to negotiate the best deal for yourself! Don't simply accept a contract which is presented to you – negotiate for what you consider is in your best interests. Also, don't put off the contract in the interest of getting started on the coaching job, with the idea that the details and paperwork can be sorted out later on – all too often, this leads to misunderstandings and disputes. As well, resist pressure to sign the contract in a rush, for whatever reasons.

**Make the contract as detailed as possible**

In all respects, the more detailed the contract is, the better. Even if things are rosy at the outset and it doesn't appear that anything could possibly go wrong, continually ask yourself what *could* go wrong, and negotiate the contract to anticipate as many situations as you can reasonably foresee. While signed at the beginning of a relationship, the contract must be especially detailed and clear about how the relationship will end, because this is when most of the disputes will arise.

The title of the contract should be “*A Contract for the Provision of Coaching Services*” or something similar, in the case of the independent contractor coach. The employee coach may wish to title the agreement something like “*Employment Contract*”.

**Use an appropriate title for the contract**

**Be political – find out about the organizational culture of the organization you are about to work for**

Enter into your new working relationship with eyes and ears open. The organizational culture of an organization will depend very much on the personalities involved. Over time these personalities may change, and in the future you may find yourself dealing with people who have different styles and agendas. Recognize that the Board of Directors is likely to support their Executive Director and Technical Director, or other Board member, and not the coach, in the event of a dispute. Be particularly wary of finding yourself striving to achieve goals and objectives which have ceased to be a priority for the organization. If the focus is changing (for example, from elite competition to developmental programs) it may be appropriate to revisit your contract and re-negotiate certain terms, particularly those related to your performance review.

The contract should spell out very clearly the lines of reporting. Do you, the coach, report to the Technical Director, High Performance Chair, Executive Director, or Executive Committee? In the case of a small club, you may be expected to report to the President. Does the person you are reporting to have a sufficient grasp of the technical aspects of coaching? If you are not completely satisfied with the reporting arrangement which is being proposed, suggest some alternatives. If at all possible, arrange it so that you report to individuals who will be involved in your evaluation and who will be making the decisions about continuation of your contract.

**Be clear about lines of “reporting”**

Also, sort out what, how, and how often you will report. Keep in mind the practical and logistical aspects of reporting – if you are with a national organization and are expected to report to someone who lives on the other side of the country, how realistic and how expensive will it be to report on a regular basis? If you are expected to supply a detailed written report at regular intervals, be sure that this report can be prepared within the time allotted to you, in addition to all of your regular coaching duties. If the Board is responsible for the key decisions which affect coaches and coaching, be sure that you have opportunities to respond directly to the Board, rather than having your input filtered through a staff person.

**Seek a contract with a long duration**

The duration of the contract will depend on the coach's personal situation and on the needs of the sport organization. If you are leaving stable employment to take up a new coaching position should seek the longest term possible or insist on open-ended employment. As well, the coach should be sure that the tasks he or she has been contracted to provide are realistic and consistent with the duration of the contract. For example, if the team that the individual is contracting to coach is in a building phase, high performance goals may be unrealistic in a short period of time. The coach may need a longer period, perhaps four or five years, to accomplish the task. The contract term must give the coach the opportunity to do the job properly. If a longer fixed term has been negotiated, make sure that the inclusion of a termination clause, which may allow for early termination without compensation only in the event of "cause" does not preclude a full payout of the contract if termination is without caused.

**Be specific about how your performance will be evaluated**

The contract should be very specific about how the coach's performance will be evaluated. The coach should insist that all performance reviews be conducted in writing, on the basis of agreed-upon criteria at agreed upon intervals (usually once per season). These criteria should relate directly back to the job description set out in the contract, and to the mission and objectives of the organization. You should also ensure that there is a mechanism for your feedback to be incorporated into the results of your evaluation.

The contract should also specify who will be involved in the evaluation. Will the review be conducted by a single individual (Technical Director, High Performance Director) or by a larger group such as the Executive or the Board of Directors? Will athletes play a prominent role in evaluating the coach? Generally this approach is not recommended because it puts the athletes in an awkward position and the results of the evaluation may represent personality differences more than performance according to pre-determined criteria. The timing of your evaluation will also be important. Psychologically, the worst time to evaluate a coach may immediately following a competitive season, because the evaluation may reflect judgments about how well the athletes performed as opposed to how well the coach performed.

**Be sure the contract says who will be involved in the evaluation**

**How will out-of-pocket expenses be covered?**

The contract should specify how out-of-pocket expenses are to be covered. One approach is to have the coach subject to the travel and expense policies of the organization as they apply to

other employees, directors and volunteers (for example, the same modes of travel, quality of hotel and daily per diems). Another approach is for the coach to include an administrative expense allowance within their contract payment to cover all expenses. If the coaching position requires relocation for extended periods of time such as for a centralized training camp, it should specify how relocation expenses are to be covered. As much as possible, the contract should clearly set out the competitions and events in which the coach is expected to participate, and how the costs of this participation will be covered.

**Who will pay for the coach's ongoing professional development?**

The coach may wish to negotiate professional development opportunities, such as continued NCCP theory or practical training and/or coaching workshop/conference attendance, as part of the contract. If the position *requires* that the coach satisfy certain training and licensing requirements (First Aid, CPR, certain NCCP levels, other requirements of international federations) then this should be stated in the contract and the coach should expect the employer to cover the costs of maintaining these qualifications.

**What if the employer wants a non-competition clause?**

Non-competition clauses are uncommon in coaching and the few that do exist are designed to prevent ex-coaches from drawing athletes away from existing or new club coaches not from coaches not working at all. In the rare event that the coach encounters a contract containing a non-competition clause and cannot negotiate its removal, he or she will want to make sure it is for as short a period as possible -- anything less than one year is usually considered reasonable. The geographic territory covered by the clause should be clearly defined, should be as localized as possible and certainly no wider than necessary to protect the employer's legitimate interests. Finally, the clause should go no further than preventing the employee from soliciting current clients (i.e. athletes) of the employer.

**The contract should be specific about what constitutes cause for dismissal or termination**

Be as specific as possible in your discussions with the employer about what will constitute cause for *dismissal* (in an employment situation) or cause for *termination of the contract* (in an independent contractor situation). It is very important to realize that any employee may be terminated at any time, with or without cause, provided the employer satisfies its legal obligation regarding termination notice that exist as law or are specified in the contract. For this reason termination provisions in the contract are critical to protecting the employee's interests.

The contract should specify what notice period is required for termination of the contract without cause. As an employee you may wish to negotiate a sliding scale of notice which increases with years of service with the organization. This suggestion applies to both employment and independent contractor situation. Years of service should be accurately defined – a common error in many agreements is that they do not address whether previous part-time work or contract work should be considered in calculating years with the organization. The contract should be

**The contract should identify notice periods for dismissal and termination**

quite specific in identifying what types of previous service will be considered in determining potential entitlement to termination notice.

**Define details of severance entitlement in the contract**

The contract should set out circumstances of termination that would not normally amount to cause (such as termination following a reorganization within the organization or elimination of the coaching position), and specify a termination package for such circumstances. For a fixed contract you should insist that termination for any reason short of “cause” will trigger a termination package or will require a pay-out of the remaining term of the contract in full. A simple clause could be interested in term contracts that states that dismissal for any reasons other than cause will give rise to a payment representing the full amount of the contract outstanding.

**Independent contractor wording**

For the coach who is an independent contractor and who derives no insurance coverage through the organization, the contract should obtain a provision as follows: “ *The coach is an independent contractor and should not for any purpose be deemed to be an employee, agent, servant or representative of the [employer/organization]* ”. This reinforces the coach’s status as an independent contractor rather than an employee (although it is not determinative of such status). Such a clause is not advised if the contractor coach is named as an “insured” on the organization’s insurance policy, as this may void whatever insurance was to have been provided.

**Comments from a Coach**

*Your contract should contain a communication and dispute resolution mechanism to handle situation of conflict between athletes and the coach. Such as mechanism would outline how and where athletes could make complaints. If they complain directly to the board, the coach may be doomed, because he or she has just lost every opportunity to resolve the dispute internally. Matters should go to the board only as final recourse.*