

Reducing Employment Termination Exposures

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Firing an Employee Can be Costly

Every employer knows that a terminated employee may be able to sue for substantial damages. Everyone has read about the cases that awarded an employee two years pay. So has every employee. Firing an employee can be costly.

But it doesn't need to be. The law provides some very effective remedies if a company wants to control and reduce the potential economic consequences of terminating an employee's employment.

The key is advance planning. You need to take the right steps at the start of the relationship.

Legal Considerations

Assuming that the termination does not violate any statutory protections (such as Human Rights) and that no union is involved, most employees in Canada can only require that an employer firing them meet its obligation to give notice.¹

The obligation to give notice of termination is based on Statute Law (the law passed by Governments) and Common Law (the general law of the land as determined by the Courts). Both laws have separate requirements.

In most provinces, Statute Law requires that the employer provide the employee one week of notice (or pay in lieu of notice) per year of service to a maximum of eight weeks. Some jurisdictions require a more generous notice entitlement for employees with short (under four years) service. Manitoba requires one month notice in most circumstances. Newfoundland and Labrador, New Brunswick and Prince Edward Island have simplified, shorter notice requirements. Do check precise details with your jurisdiction's Employer/Labour Standards government offices.

Where more than 50 employees are being terminated a special amount of notice is required in Ontario, Newfoundland and Labrador and British Columbia. In Nova Scotia and Saskatchewan the trigger is 10 employees being fired. In such circumstances, advice should be obtained.

Ontario also requires severance pay when an employee with at least five years of service is being terminated without cause by a company with an annual payroll exceeding \$2.5 million. The amount of severance pay is 1 week/year of service for all employees with over 5 years service. There is a 26 week maximum.

Some employers upon learning of these government made Statutory requirements wrongly assume that is the extent of their obligations.

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¹ This paper does not cover Quebec. Employees in a very limited number of jurisdictions can seek reinstatement unless terminated for cause.

Common Law Notice Requirement Can Be Much Longer

The Common Law requires that employers provide reasonable notice of termination unless the termination is for just cause. Economic necessity is not just cause, which is limited to significant misdeeds or, sometimes, poor performance by the employee.

Depending on the circumstances of the employee (such as age, skills) and of the employment (position, salary, length of service) the Common Law notice requirement may be as short as the Statutory requirement or as long as two years.²

The main cause of cost exposure to the employer arises when the notice provided, or pay in lieu of notice, is less than the Common Law requires. Employers caught in such circumstances may be able to reduce what they eventually have to pay, but legal advice will almost certainly be required.

Plan Ahead On How To Avoid The Costly Termination Trap

The Common Law exposure arises from a legal principle that all employment relationships are contractual. The contract may be express (oral or written) or implied, but it always exists.

Furthermore, by law the employment contract always deals with how employment may be terminated.

Employers (and employees) who do not specifically address this contract issue are therefore presumed to have accepted what might be called the standard termination rule.

The implied standard termination rule is that the employment may be ended for just cause or upon giving reasonable notice. It is in deciding what constitutes reasonable notice that the Courts award up to two years.

But this result of allowing the standard rule to govern may be avoided by having an express (preferably written) agreement on the point. This also avoids needing legal advice when a termination does occur.

Written Contracts Can Be Very Simple or More Detailed

Such written agreement can take many formats. The selection of the format involves human resource, business culture and other legal considerations. Three levels of approach are common (a small employer may need only one).

First level, put a simple statement on your employment application form above the signature. It should say the employee agrees to a specified notice formula if ever terminated. For example: "I agree that if I am employed, my employment may be terminated with notice as required by the *Employment Standards Act* plus one week".

Second level, use an employment offer letter that sets out a termination formula. The employee must sign back the letter to accept employment (a sample is attached).

Third level, use a full blown Employment Contract. Such a document allows employers to address other issues in the relationship that are important to it, such as limiting what other activities the employee may engage in while employed. Confidentiality clauses are also commonly included. Typically, such contracts are used only for executive level hires.³

Any one of these specific forms of agreement should satisfy the Common Law requirement. The Agreement, however, cannot be for less than required by the Statutory Law, and should be for at least a little more.

² More in very rare cases.

³ For more about such contracts see "The Employment Contracts Handbook". This book is written for the businessperson. It is available from Canada Law Book.

BASIC EMPLOYMENT CONTRACT – LETTER FORM

On Company Letterhead

Private & Confidential

Hand Delivered

Date

Name and Address of Employee

Dear _____:

We are pleased to offer you employment with **[insert name of company]** in the position of **[insert appropriate title]**.

As we discussed with you, your employment with the company will commence on **[insert date]**. As noted earlier, you will be employed with us as an **[insert title]** and will report to **[insert name]**. In your capacity as **[insert title]** you will be responsible for **[describe duties and responsibilities]**.

The hours of work in your position will be from **[____ a.m. to ____ p.m.]** Monday to Friday. **[Insert name of company]** provides a **[one (1)]** hour **[unpaid]** lunch break to its employees. In your case, your lunch break must be taken between the hour of **[____ to ____]**.⁼

Your salary will be **[_____ Dollars and _____ Cents per annum]** or **[calculated at an hourly rate of _____ for a normal work week of 40 hours]**. From time to time, you may be asked to work overtime. If this is required, you will be paid at the rate of **[one and a half (1.5) times]** your regular hourly rate of pay for all hours worked in excess of **[your regular weekly hours] or [forty four (44)* hours per week]**.

You agree that you will adhere to all company policies, rules, systems and procedures which are in place at the company. The company reserves the right to change the provisions of any of these at any time.

You will be entitled to participate in any and all of the Company's group insurance plans, retirement or pension plans, and other benefit programs (the "Employee Benefits") which may be in effect for all employees of the Company during your employment after the completion of **[three (3)]** full months of employment with the Company. You understand and agree that the Company reserves the right to unilaterally revise the terms of the Employee Benefits or to eliminate any Employee Benefits thereunder altogether. Please note that benefits will be provided in accordance with the formal plan documents or policies and any issues with respect to entitlement or payment of benefits under any of the Employee Benefits will be governed by the terms of such documents or policies establishing the benefit in issue. In the case of insured benefits any dispute about entitlement is with the insurer.

You will accrue vacation pay at the rate of **[4%]** per annum. You will be entitled to **[__]** days of vacation per year. In addition, you will be entitled to be paid for all public holidays in accordance with the provisions of the **[refer to Provincial Employment or Labour Standards Legislation by name]**.

⁼ An example, not required.

* In British Columbia, Manitoba, Saskatchewan, 8 hours per day or 40 hours per week; Alberta, Ontario and New Brunswick 44 hours per week; Nova Scotia and Prince Edward Island 48 hours per week.

If we must terminate your employment with us, we will provide you with that length of notice or pay in lieu of notice, and severance pay if any**, to which you are entitled under the [refer to Provincial Employment or Labour Standards Legislation by name], plus [one (1)] additional week of notice or pay in lieu [for each completed full year of employment,] unless you are terminated for cause. If you are terminated for cause, you will not receive any notice or pay in lieu or severance pay. Cause for this purpose includes, but is not limited to, such things as unsatisfactory performance, dishonesty, insubordination and serious misconduct, all as determined in the sole discretion of the Company. We will also continue your employee benefits for that period of time required by the [refer to Provincial Employment or Labour Standards Legislation by name].

We enclose our standard agreement regarding confidential information. If you are prepared to accept employment with [insert name of company] in accordance with the terms and conditions outlined above, please sign both the Confidentiality Agreement and this letter and return them to me. The extra copy is for your own personal files.

We are delighted to have you join [insert name of company] and look forward to your acceptance of this offer.

Yours truly,

[Insert full legal name of Company]

Per: _____

Name and Title

**Use reference to severance pay only in Ontario.