

# WHAT TO CONSIDER WHEN TERMINATING AN EMPLOYEE

*CFIB adaptation of a paper by M. Christine O'Donohue and David Tsai, Miller Thomson LLP<sup>1</sup>*

Firing an employee, whether for bad fit or gross incompetence, can be tricky. If you're not careful, you can expose your business to substantial liability when terminating. By complying with legislation and drafting contracts, you can reduce your chances of winding up in court.

## THERE ARE TWO WAYS FOR AN EMPLOYER TO TERMINATE EMPLOYMENT:

### 1. TERMINATION 'FOR JUST CAUSE' (OFTEN CALLED 'FOR CAUSE')

'Cause' refers to your right to summarily dismiss someone who has been guilty of any of the following:

- serious misconduct
- habitual neglect of duty
- incompetence
- conduct incompatible with his or her duties
- conduct prejudicial to the business
- willful disobedience

However, proving cause is extremely difficult in court, no matter how much evidence you have.



**CFIB recommends never to terminate for cause except on the advice of a lawyer.**

### 2. TERMINATION WITHOUT CAUSE

Employers are free to dismiss employees at any time, except for reasons protected by law. When you dismiss an employee without cause, you must provide notice of termination, or pay in lieu of notice. A valid contract can establish the amount of notice required, but you must comply with your province's legislation.

**CFIB recommends not to give notice but rather pay in lieu of notice.** It is generally less costly to pay in lieu than assume the risk associated with keeping an unfit or incompetent employee on the job who is in the middle of being let go.

#### (a) Statutory Notice or Pay In Lieu Requirements

In each jurisdiction, there is legislation to determine the minimum amount of required notice, or pay in lieu of notice, with the amount of notice generally increasing based on how long an employee has worked for you. These minimums usually range from one to eight weeks and are significantly lower in common law provinces and territories than in Quebec where the Civil Code forms the basis of employment law. Some jurisdictions also require severance pay in certain circumstances.

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**(b) Common Law Jurisdiction Requirements**

Common law (which does not generally apply in Quebec) suggests that every contract will provide for “reasonable notice” of termination, or pay in lieu, when someone is terminated without cause. Here, “reasonable notice” is almost always more than it is according to provincial laws. There are no hard and fast rules when determining what is reasonable, which means that if you get sued, it is difficult to predict what the courts will decide.

Some of the factors used to determine what is “reasonable” include position and nature of employment; employee’s length of service, age, availability of other employment, special skills, inducement to leave a former secure job for the one being terminated.

**(c) Civil Code Jurisdiction Requirements**

The Civil Code forms the basis for most employment law issues in the province of Quebec. Generally, employees are treated more favourably than employers under the Civil Code when termination is at stake. If an employer is considering termination in Quebec, it is first highly advisable to understand what steps need to be taken. There can be significant differences in how the law of employment is treated in Quebec compared to other Canadian jurisdictions.

**NOTICE OF TERMINATION VERSUS PAY IN LIEU**

Federal and provincial legislation generally gives you the choice of providing either notice or payment in lieu of notice. Notice involves a period during which the employee continues to work until a particular date. If you go this route, you’re obligated to provide reasonable opportunity for the employee to seek new employment during this period, including attending interviews. If you give notice, you are generally required to continue to provide all remuneration, including salary, bonuses, commissions and benefits.

**FREE CONTRACT TEMPLATE TO HELP PROTECT YOUR BUSINESS**

Employment contracts strengthen your relationship with your employees by maintaining expectations and minimizing misunderstanding. We strongly recommend a written contract to form the basis of any hiring decision.

We have developed a basic contract template to help you gain and retain good employees.



**Download it for free at [cfib.ca/contracts](http://cfib.ca/contracts)**

*(The template does not include specific legislated requirements that may be found in your jurisdiction. Before introducing it to your workplace, have it reviewed by your lawyer to confirm whether anything needs to be added or deleted.)*



**TERMINATING AN EMPLOYEE CAN BE HAZARDOUS TO YOUR BUSINESS**

Never hire an employee without a signed, written employment contract and never terminate for cause without the explicit advice of an employment lawyer. The survival of your business could be at stake.



**Get in touch.**

**We’re here to help.**

*Any questions? Call our business counsellors today.*

**1-888-234-2232 or [cfib@cfib.ca](mailto:cfib@cfib.ca)**

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