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**Dismissal**

**Introduction**

This document outlines important considerations for terminating employees in *non-unionized* workplaces for employees covered by the *Employment Standards Act* (“ESA”).

**Dismissal and Severance**

An employer has a right to dismiss an employee at any time for any reason (so long as there is no discrimination).

Where an employee has done nothing wrong, an employer must provide an employee with advance notice that their employment will be ending, or pay in lieu of such notice (i.e. severance pay). This type of termination is called “without cause”.

In certain situations, an employer may also terminate an employee with “just cause”, immediately and without advance notice or payment of severance.

**Without Cause Terminations**

Under the ESA, employers must comply with the minimum notice provision when terminating an employee without cause. The amount of written notice and/or pay is based on how long an employee has been employed:

|  |  |
| --- | --- |
| *Amount of written notice and/or pay required for termination of an individual[[1]](#footnote-1)* | |
| *Length of employment* | *Amount required* |
| Three months or less | No notice and/or pay |
| More than three months | One week of notice and/or pay |
| More than one year | Two weeks of notice and/or pay |
| More than three years | Three weeks of notice and/or pay, plus one week of notice/pay after each additional year of employment (to a maximum of eight weeks) |

If an employer and employee agree, e.g. in an employment contract, that upon termination the employee will be provided *more* than the ESA minimum amount of notice/pay in lieu, then that employer must honour that agreement.

A third situation arises where an employer and employee did not agree to limit the amount of notice or pay in lieu to the ESA minimums or the agreement between them is not legally enforceable otherwise. In this situation, that employee may be entitled to additional severance under common law.

The common law comes from decisions of judges. Important decisions from the courts become legal precedents for similar cases in the futures. Under common law, the amount of reasonable notice (or pay in lieu) an employee will be entitled to depends on the employee’s age, character of employment and availability of similar work, along with other factors.

Unlike under the ESA, common law notice is often in months rather than weeks.

This is one reason it is important for employers to use employment contracts that include well drafted and enforcable termination clauses.

**Termination for Just Cause**

If an employee does something awful at work, an employer may want to fire them immediately without payment of severance. This is allowed where an employer can prove that what the employee did was so terrible that it caused an irreparable breakdown of the employment relationship (i.e. just cause).

Where an employee has *significant performance issues*, if an employer wants to immediately fire the employee and not provide them notice (or pay severance in lieu), the employer has to prove that:

1. They established and communicated a reasonable objective standard of performance;
2. The employee failed to meet those standards;
3. The employee was warned that they weren’t meeting the employer’s expectations, and that their employment would be in jeopardy if they failed to improve; and
4. The employee was given a reasonable amount of time to correct the situation.

Following and documenting the above four steps can be time consuming and require an employer’s focused attention. However, if an employer fires an employee without taking the above four steps, they will likely owe the employee severance pay.

The four steps described above are required when an employee’s performance is poor.

However, *sometimes an employee does something so terrible that just that one act can be enough to justify just cause*. For example, if an employee were to physically attack one of their colleagues at work, steal from their employer, or lie to their employer about something really important, an employer may be above to prove that they have just cause to immediately fire their employee without providing them any notice (or paying severance in lieu).

Even where an employee does something terrible and the employee should be fired on the spot, the courts will look at the full context of what happened, and could still decide there wasn’t just cause, and that the employer actually owes the employee severance.

Ultimately, the punishment must fit the crime, and firing someone for just cause is the most severe punishment in Canadian employment law. For that reason, the courts will only allow employers to dismiss employees for just cause in the most egregious circumstances. **Based on this, employers should consider seeking legal advice before terminating an employee for just cause.**

**Release of Liability**

A release of liability is an agreement in which one party waives their right to make a legal claim against another party (“Release”).

When the employment relationship ends, an employer may want an employee to sign a Release, to have certainty that employee will not be able to make any employment related legal claims against the employer.

A Release is a contract. A contract between two parties requires each to exchange something of value. The legal term for this “something of value” is called “consideration”. For a contract to be valid and legally enforceable, the consideration needs to be “fresh” i.e. something of value that is *new*.

For a Release to be valid and legally enforecable, the employer needs to provide *something new of value to the employee* in exchange for the employee agreeing to waive their rights to sue the employer. For example, an additional payment that the employee would not otherwise be entitled to.

Importantly, ESA termination notice (or pay in lieu), is owed to an employee on a without cause termination. Therefore, providing ESA termination pay does not constitute “fresh consideration” for a Release and it is illegal to withhold ESA termination pay in exchange for a Release.

If an employer wants an employee to sign a Release then that employer will need to provide that employee with something of additional value e.g. an additional payment, for the Release to be legally enforceable.

**Practical Tips for Termination**

These practices will assist employers in terminating employees.

* Choose a private space where there is little traffic or presence from other staff. Conducting the dismissal meeting in person is the best practice, but not always possible depending on the nature of the employee’s work and the business. Video conference is better than phone.
* Conduct the dismissal meeting when the employee can leave the premise without a lot of attention from other staff (before the start of the work day, or at the end).
* Whenever possible, have two management representatives at the dismissal meeting, so there is more than one witness.
* During the dismissal meeting, use an employee’s Dismissal Letter as speaking notes and follow it.
* If the employee was generally a good performer, consider providing a positive reference letter and/or confirmation of employment letter.
* Immediately after the dismissal meeting, all management representatives at the meeting should take notes. This can be done on paper or digitally, but either way, should include the date, time and length of the meeting and a description of what was said and by whom.
* If the employee has personal belongings at their desk or around the workplace, ask whether they would prefer to gather those items now accompanied by a member of management, or have the items couriered to them later.
* Only “escort” the employee off the premises if the employee is in a heightened emotional state or you are concerned they will act out. Otherwise, have a member of management “accompany” them by instructing them it is time to go, and watch them leave (only interfering in the departure if the employee acts out). In the vast majority of cases, employees leave the workplace without a problem.
* If applicable, schedule cutting off employees from login access from laptop, phones etc. so they are cut off by the time the dismissal meeting ends.

1. Different notice periods apply for group terminations. [↑](#footnote-ref-1)