

Frequently Asked Questions:

Employee Terminations:

Is there “at will” employment in Canada?

No. The concept of “at will” employees does not exist in Canada. Employees are either employed for a fixed period of time (e.g. a one year contract) or for an indefinite period of time. If employees are employed for an indefinite period of time, they will be entitled to notice (or pay in lieu of notice) if their employment is terminated without cause (explored below). Generally, the longer an employee has served, the longer the notice period will be. Employment law in Canada is governed by the statutory requirements of each province or territory and the common law. Each province and territory has a law dealing with employment standards, including minimum requirements for notice of termination.

Explaining the types of dismissal

Whether or not an employee is entitled to receive notice of termination and/or pay in lieu of notice of termination depends on how and why their employment is being terminated.

Without cause

Most dismissals are done without “cause” (a valid reason). This means that the dismissal is not because of any specific charge or problem in the employee’s performance or behaviour (e.g. theft or violence in the workplace) that would justify termination for “cause”. Most often this type of dismissal is simply a business decision.

An employee who is dismissed without cause is entitled to receive reasonable notice of termination or, alternatively, pay in lieu of notice.

Just cause

To be dismissed for cause, an employee must be guilty of significant misconduct that is not condoned by the employer. Where the dismissal is justified due to the employee’s actions, there is no entitlement to notice or compensation.

However, “just cause” for termination of employment must be clearly established and documented. This can be difficult because:

- what an employer may regard as just cause may not be viewed the same way by the court; and
- an employer’s failure to promptly discipline or reprimand an employee for his misconduct may be viewed as condoning the behaviour.

Employers in Canada must engage in “progressive discipline.” If an employee engages in particularly egregious behaviour, then his or her employment can be terminated immediately. However, if the employee commits minor misconduct (e.g. consistently arrives late for work), then an employer cannot immediately terminate that employee’s employment. The employee must be given a warning, and sometimes a short unpaid leave (if appropriate). The level of discipline can increase if the employee commits the misconduct again. If, however, an employee fails to correct his or her behaviour after he or she has been progressively disciplined, then his or her consistent misconduct may be just cause for termination.

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Employers should seek legal counsel before dismissing an employee when they believe there is cause for termination.

Constructive dismissal

An employer cannot unilaterally change a material term of a person's employment unless:

- the employee agrees to the change; or
- the change is specifically permitted by a written employment contract.

If an employee does not accept a material change, and the employer insists upon implementing it, then the law will treat this as a "constructive dismissal" of the employee.

A constructive dismissal usually occurs when an employer significantly reduces an employee's salary or changes the employee's work location, hours, authority, position or benefits (e.g. extended health insurance).

Constructive dismissal may also occur if an employer harasses or abuses an employee, condones such conduct by other employees, or gives an employee an unreasonable ultimatum. Constructively dismissed employees are entitled to the same notice (or pay in lieu of notice) and other compensation as if they were dismissed without cause.

Early dismissal

If an employee is hired for a fixed period of time and dismissed before the end of the term, the employer must pay the employee for the balance of the term, unless the employment contract provides otherwise or the employee was dismissed for cause.

An employee who agrees to a fixed employment period is not entitled to notice (or pay in lieu of notice) or other compensation which extends beyond that term. Accordingly, if the termination occurs at the end of the fixed term the employee is not entitled to any notice (or pay in lieu of notice).

An extension of a fixed contract must be made before the contract expires. If an employee continues to be employed after the fixed term has expired without a new or extended contract, he or she will become an employee for an indefinite term of employment, and will be entitled to notice (or pay in lieu of notice) if his or her employment is later terminated without cause.

What compensation are employees entitled to on dismissal?

The compensation an employee is entitled to receive on dismissal is established by the written employment contract between that person and the employer, and if there is no contract, then by common law and applicable employment standards legislation.

What are the minimum standards upon termination without cause?

If an employee is terminated without cause, the employer must meet minimum standards set out in the *Employment Standards Act, 2000* (Ontario) (the "Act"). All Canadian Provinces and Territories have legislation regulating employment standards.

The Act establishes **minimum standards** for notice of termination (or termination pay in lieu of notice) and for severance pay.

Termination notice is based on the length of an employee's service:

- employees having more than three months but less than one year of service are entitled to one week notice;
- employees with more than one year but less than three years of service are entitled to two weeks' notice.

Thereafter one additional week of notice is added per year of service, up to a maximum of eight weeks.

Employers can pay an employee in lieu of giving notice, and terminate the employee's employment immediately. The payment is equivalent to what the employee would have been paid if he or she had worked for the employer during the notice period.

Severance pay is in addition to the notice of termination or pay in lieu of notice minimums provided under the Act. It applies where an employee with five or more years of service is dismissed without cause, and:

- the employer's payroll in Ontario is \$2.5 million dollars or more; or
- the dismissal is in connection with the permanent discontinuance of all or part of the employer's business at an establishment, and 50 or more employees are terminated within six months.

The Act provides a formula for calculating severance pay, and the maximum severance pay in Ontario is currently 26 weeks.

The Act also requires that in addition to notice of termination (and severance pay, if applicable), employees must be paid accrued and unpaid vacation pay. Vacation pay will vary depending on how much annual vacation the employee receives. Minimum vacation pay under the Act is four percent of gross wages.

Payment of wages on termination

Under the Act, all wages owing to an employee to the date of termination, including accrued and unpaid vacation pay, and pay in lieu of notice, must be paid by the later of:

- the next regular pay date; or
- seven days from the date of termination.

Wages cannot be withheld for any reason. Severance pay can be paid in instalments, but only with the employee's or Director of Employment Standards' consent.

What wages and benefits must be given to an employee during the notice period?

Under the Act, if an employee works during his or her notice period, the employer may not alter the employee's rate of wages, benefits, or any other term or condition of employment.

Wages in lieu of notice

Under the Act, if an employee is paid instead of working during the notice period, the employee must receive his or her usual wages for the notice period. The employee's benefits must also be maintained during the notice period.

What is reasonable notice?

It is very important to note that in the Employment Standards Act notice or pay in lieu of notice requirements referred to above are only minimum requirements. **Employment contracts cannot provide lower standards than would be given to an employee under the Act. Ontario courts typically award longer notice periods than those provided for under the Act based on established common law requirements or reasonable notice of termination of employment.** Therefore, when an employer is considering how much notice to give an employee, the employer should be aware of common law entitlement.

Ontario common law requires an employer to give an employee “reasonable notice” of termination (or pay in lieu of reasonable notice), unless the employee is dismissed for just cause. If termination pay is given instead of notice or if a combination of notice and termination pay is given, the total amount of pay received must be equal to the total amount that the employee would have received had full notice been given.

The purpose of a notice period is to give an employee a reasonable period of time to find another comparable job (usually with comparable pay). The amount of notice required depends on various factors, which include:

- the character or nature of the employment (e.g. was the employee a manager or a lower-level employee?);
- the length of the employee’s service;
- the employee’s age;
- the availability of similar employment, having regard to the experience, training, qualifications and the responsibilities of the employee;
- the circumstances surrounding the hiring of the employee; and
- any written employment contract between the employee and employer.

Employees are typically given pay instead of notice since dismissal is likely to affect the employee’s productivity and morale, and may have an adverse effect on the workplace in general if he or she were to continue working.

At common law, the compensation payable is based on the employee’s total compensation. If the employee’s compensation includes commission, bonus and benefits, these will be factors in determining the pay in lieu of notice. All of these factors can be varied by a written employment contract.

The courts have generally interpreted reasonable notice for employees to be substantially more than the minimum requirement under employment standards legislation. For long service employees with senior management positions, this can be up to a maximum of 24 months.

Employers should consult their legal counsel to ascertain the reasonable notice in each particular circumstance.

Can an employer force an older employee to retire?

“Mandatory retirement” no longer exists in Ontario. An employer cannot force an older employee to retire at a particular age. Employers cannot discriminate against employees on the basis of age. If they do so, they could face allegations that they have violated Ontario’s human rights legislation (see the similar discussion involving disabled employees below).

What if I want to terminate the employment of a disabled employee?

Disabled employees are protected under human rights legislation in Ontario. As such, employers cannot discriminate against employees on the basis of their disability. It should be noted that in certain circumstances, alcoholism or drug addiction may be considered a disability.

If an employer terminates the employment of a disabled employee, that employee may allege that the employer terminated his or her employment due to his or her disability. If this happens, the employee could bring a claim against the employer (at no cost to the employee) under Ontario's Human Rights laws. Defending against this claim could be timely and expensive for the employer, even if the employer is successful. The Ontario Human Rights Tribunal has the authority to demand significant compensation to employees who have been subject to discrimination based on their disability.

An employer should avoid terminating the employment of a disabled employee without first obtaining legal advice about all of the obligations the employer may owe that employee.

Practical suggestions regarding terminations

- **Be well prepared.** Carefully review the facts of the situation and any contracts. Make sure that all required documentation is prepared in advance of your meeting with the employee.
- **Be clear and succinct.** Make certain the employee understands that he is being dismissed. Give only general reasons and avoid being drawn into a debate.
- **Time it appropriately.** Meet with the employee in a private room at the office towards the end of the day. Try to avoid meeting on Friday afternoons, dates of significance to the employee (e.g. birthday, anniversary, etc.), or immediately before a public holiday.
- **Never do it alone.** Always have another manager present at the meeting.
- **Confirm it in writing.** Give the employee a letter confirming the termination and summarizing what the employer is offering. Do not ask the employee to accept an offer or sign anything at the meeting. Allow the employee reasonable time to consider it. Suggest that the employee obtain legal advice regarding your offer.
- **Get a release.** If the employer is offering more than what is required by the Act, make the offer conditional on receiving a full and final release of all the employee's claims against the employer.

Terminations should be planned: Dismissing an employee should be done carefully and calmly. The right documentation must be prepared and the employer must ensure that all obligations under the Act are observed. Employers should consult with their legal advisor(s) well in advance of actually terminating an employee's employment.

**The information in this article only relates to Ontario law and the termination of non-union employees. If you would like more information about this or any other area of employment law, or if you would like to discuss your particular situation, please contact Houser Henry & Syron.*

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