



YOU'RE FIRED!

How to limit your liability when terminating with and without cause

BY CARISSA TANZOLA

There are two principal types of termination: “with cause” and “without cause.”

“With cause” is termination for a reason that could include, for example, misconduct, wrongdoing or poor performance. A “without cause” termination assumes the employee is not at fault, but the employer wishes to terminate the employment relationship nevertheless. For example, the termination may be required due to restructuring, insufficient demand for the employee’s skills or cutbacks.

In a non-unionized workplace, an employer can end an employment relationship for any reason whatsoever without having to justify its

decision. The only caveat is that the reason for the termination must not breach a contract or law such as the Human Rights Code or the Occupational Health and Safety Act.

Termination without Cause

Termination without cause comes with a price. In every employment contract, whether verbal or written, it is implied that the employer will provide “reasonable notice of termination.” This could be working notice or pay equal to the amount the employee would have earned during the reasonable notice period. Reasonable notice has two components: statutory and common law.

Statutory Notice

Provincial employment standards legislation sets out the minimum period of reasonable notice to which an employee is entitled upon termination without cause. This is often referred to as “notice” or “termination pay,” and it is based on an employee’s length of service. (In Ontario, for example, it is roughly one week for every year of service up to a maximum of eight weeks.)

A separate concept, often confused with notice or termination pay, is severance pay. Depending on the employer’s total number of employees, the size of its payroll and the employee’s length of service, severance pay may be owed in addition to »

termination pay. In Ontario, severance pay can be up to an additional 26 weeks. These statutory minimums cannot be contracted out of by the employer or the employee.

Common Law Notice

Without a valid and enforceable termination clause in a written employment contract, an employee is also entitled to common law reasonable notice. This is known as "common law notice" and is awarded by courts in wrongful dismissal claims.

The underlying purpose of common law notice is to give to the employee the time (or pay in lieu of time) to secure similar employment. Common law notice is assessed by considering the employee's length of service, availability of equivalent em-

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ployment, relevant education, training, experience and age.

There is no easy calculation to determine common law notice entitlement, and it can range from a low of a few weeks to a high of 24 months. This does not take into account additional damages which may be awarded as a result of the employer's poor behaviour during the termination process.

If the amount of common law notice to which the employee is entitled is greater than the statutory minimum notice entitlement, the common law notice prevails (the two are not added together).

Limiting Liability

An employer can limit its exposure to common law notice by ensuring that employees sign a written contract outlining the amount of reasonable notice he/she will receive if they are terminated without cause. A carefully worded termination clause usually provides for a notice period

which meets the minimum statutory requirements.

Securing a Release

Whenever possible, when the proposed settlement payment is above and beyond the contractual or statutory minimum(s), the employer should request in exchange for the payment that the employee execute a full and final release in favour of the employer. This can prevent an employee from bringing future claims against the employer, limit the employer's exposure and bring closure to the issue.

Termination with Cause

In both unionized and non-unionized workplaces, an employer can terminate an employee for cause. In this case, the employer is not required to provide either statutory or common law notice.

It is impossible to list all of the circumstances that could constitute just cause. However, generally speaking, the following are examples of just cause:

- **Serious misconduct**

Such as theft, dishonesty and assault.

- **Habitual neglect of duty or incompetence**

The employee must clearly understand the requirements of the job, the requirements must be reasonable and the employee must have been given the opportunity to improve.

- **Conduct incompatible with the employee's duties or prejudicial to the business**

Activity during working hours that interferes with the employee's employment obligations or is competitive with or damaging to the employer's business.

- **Wilful disobedience**

Onus of Proof

The onus is on the employer to prove just cause on a balance of probabilities. Just cause must be based on incompetence or misconduct rather than on mere dissatisfaction with performance or concern for potential misconduct. If an employer is unable to demonstrate just cause, the termination is considered to be without cause and the employee will be entitled to reasonable notice.

Securing a Release

Even in a case of just cause, an employer may want to secure a release for the reasons outlined above. Technically speaking, the release may be obtained for a payment less than the minimum statutory or contractual requirement. However, there is a risk to structuring the settlement in this way. If in the future the employee successfully challenges the allegation of cause it is open to an adjudicator to set aside the release on the basis it was secured for insufficient consideration. To avoid this possibility, it is advisable for an employer to pay an amount at least equal to the statutory minimum. Alternatively, an employer should ensure the release includes an agreement among the parties that the employee was terminated for cause.

Practice Tips

When terminating an employee, ask the following questions to assess and limit your liability:

- Is there an employment contract with the employee limiting notice to the statutory minimum?
- If the employment contract does not limit notice to the statutory minimum, does it address notice at all?
- Why is the employee being terminated?
- How long has the employee been employed?
- What is the employee's position, and how easy will it be for him/her to find similar employment?
- How senior in the company is the employee?
- How old is the employee?
- In the case of a with cause termination, does it make sense to offer some amount of notice in exchange for a full and final release? FBC

Carissa Tanzola is a lawyer with Sherrard Kuzz LLP, a management-side employment and labour law firm in Toronto. Contact her at 416-603-0700 or visit www.sherrardkuzz.com.

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