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The Wrongful Dismissal Manual



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Fraser Milner Casgrain LLP

LEGAL GUIDE



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Introduction

The *Wrongful Dismissal Manual* is designed to provide employers with guidance on the general statutory and common law principles applicable whenever an employee's employment is terminated in Canada's four main business jurisdictions: British Columbia, Alberta, Ontario and Quebec.

Employment law is generally governed by the laws of the province in which an employee works. An employer with facilities in different provinces, therefore, may find itself subject to the laws of several jurisdictions. Only federal works, undertakings or businesses such as the federal government, inter-provincial transportation, banking, and telecommunications fall within the federal jurisdiction. We have prepared a separate guide designed specifically for employers who operate in federally regulated industries. The balance of this Manual addresses matters relevant only to provincially regulated employers.

In addition to the statutory obligations that may differ depending on the province in which the employee is located, employers must also comply with certain common law obligations or, in the case of Quebec operations, civil law obligations that operate simultaneously with the statutory requirements. Common law obligations are derived from court decisions and affect employers in every Canadian jurisdiction, except Quebec. In Quebec, the obligations imposed on employers are derived from the *Civil Code*. It is important to understand that an employer can meet its statutory obligations and still not satisfy its common law or civil law obligations (and vice versa).

Part II of the Manual outlines the statutory schemes relevant to employment terminations in British Columbia, Alberta, Ontario and Quebec. Part III sets out employer obligations arising under the common law applicable to employers in every Canadian province other than Quebec. Part IV addresses those obligations applicable to Quebec employers arising under the civil law. In Part V, we provide general strategies aimed at limiting employer liability in relation to employment terminations.

Situations will vary and cases that proceed to litigation are determined by the courts on their own facts and merits. Consequently, although this Manual provides general principles and guidance, we recommend that employers seek professional advice at the earliest possible opportunity, preferably before a termination of employment takes place.



Employment Standards Minimums

Relationship Between Statute and Common/Civil Law

Employment standards statutes in each Canadian province prescribe certain minimum standards with respect to which employers must comply. These minimum standards address many aspects of an employee's working conditions including wages, hours of work, overtime, pregnancy and parental leaves as well as entitlements triggered on the termination of an employee's employment.

An agreement between an employer and employee that purports to provide less than the statutory minimum will be found to be void under Canadian law. In the case of a termination provision that provided less than an employee's statutory entitlement, the courts have determined that such an employee is entitled to "reasonable notice" at common or civil law, not just the statutory entitlement. For this reason, American employers should take care to ensure that their employment agreements do not provide for "at will" employment. "At will" employment does not exist in Canada because of these minimum statutory entitlements triggered on the termination of any employee's employment.

As indicated, these are *minimum* standards. They apply to both unionized and non-unionized employees and they co-exist with an employer's obligations under the common law or civil law. The minimum standards are almost always exceeded by the courts in their determination of what constitutes "reasonable notice" in a wrongful dismissal case. Satisfying the statutory minimums, therefore, does not relieve an employer of its common law or civil law obligation to provide "reasonable notice" as will be discussed in Parts III and IV below. However, amounts paid by an employer pursuant to minimum standards legislation in respect of termination pay and severance pay, where applicable, are deductible from reasonable notice or the damages awarded by a court in a wrongful dismissal claim.

The statutory requirements applicable to Alberta, British Columbia, Ontario and Quebec employees respectively are set out below.

Individual Notices of Termination

Alberta

In Alberta, the *Employment Standards Code* provides that an employer may terminate the employment of an employee only by giving the employee a termination notice or termination pay or a combination of termination notice and termination pay calculated as follows:

- a. no notice is required if an employee has been employed for 3 months or less;
- b. **1 week**, if the employee has been employed by the employer for more than 3 months but less than 2 years;
- c. **2 weeks**, if the employee has been employed by the employer for 2 years or more but less than 4 years;
- d. **4 weeks**, if the employee has been employed by the employer for 4 years or more but less than 6 years;
- e. **5 weeks**, if the employee has been employed by the employer for 6 years or more but less than 8 years;
- f. **6 weeks**, if the employee has been employed by the employer for 8 years or more but less than 10 years;
- g. **8 weeks**, if the employee has been employed by the employer for 10 years or more.

If an employee continues to work after his termination date set out in the written notice, the termination will be void.

British Columbia

British Columbia's *Employment Standards Act* has similar requirements in that termination notice, termination pay or some combination thereof that must be provided whenever an employer wishes to terminate the employment of an employee. The quantum of the notice and/or pay differs from Alberta's requirements and is as follows:

- a. no notice is required if an employee has been employed for less than 3 consecutive months;
- b. **1 week**, if the employee has been employed by the employer for 3 consecutive months but less than 12 consecutive months;
- c. **2 weeks**, if the employee has been employed by the employer for 12 consecutive months but less than 3 consecutive years;
- d. **3 weeks**, if the employee has been employed by the employer for 3 consecutive years but less than 4 consecutive years;
- e. **4 weeks**, if the employee has been employed by the employer for 4 consecutive years but less than 5 consecutive years;
- f. **5 weeks**, if the employee has been employed by the employer for 5 consecutive years but less than 6 consecutive years;
- g. **6 weeks**, if the employee has been employed by the employer for 6 consecutive years but less than 7 consecutive years;
- h. **7 weeks**, if the employee has been employed by the employer for 7 consecutive years but less than 8 consecutive years;
- i. **8 weeks**, if the employee has been employed by the employer for 8 consecutive years or more.

Ontario

Ontario's *Employment Standards Act* provides that an employer shall not terminate an employee's employment unless it satisfies a minimum period of statutory notice or pays termination pay equal to the regular wages the employee would have earned during the statutory notice period. Where an employer provides termination pay in lieu of actual notice, for the purpose of entitlement to regular employment benefits, the employment is deemed to continue for the duration of the statutory notice period. In other words, the employer must continue to provide the employee's benefits, including pension, during the statutory notice period. Ontario's requirements closely mirror those applicable in British Columbia. They are as follows:

- a. no notice is required where an employee has been employed for under three months;
- b. **1 week's notice** in writing to the employee if his or her period of employment is less than 1 year;
- c. **2 weeks' notice** in writing to the employee if his or her period of employment is 1 year or more but less than 3 years;
- d. **3 weeks' notice** in writing to the employee if his or her period of employment is 3 years or more but less than 4 years;
- e. **4 weeks' notice** in writing to the employee if his or her period of employment is 4 years or more but less than 5 years;
- f. **5 weeks' notice** in writing to the employee if his or her period of employment is 5 years or more but less than 6 years;
- g. **6 weeks' notice** in writing to the employee if his or her period of employment is 6 years or more but less than seven years;

- h. **7 weeks' notice** in writing to the employee if his or her period of employment is 7 years or more but less than 8 years;
- i. **8 weeks' notice** in writing to the employee if his or her period of employment is 8 years or more.

Quebec

As a minimum, Quebec's *Labour Standards Act* provides that employers are required to provide employees the following notice before the termination of their employment or lay-off for six months or more (subject to certain exceptions) or payment in lieu thereof:

- a. no notice is required where an employee has been employed for under 3 consecutive months;
- b. **1 week's notice** if the employee's period of employment is 3 consecutive months or more and less than 12 consecutive months;
- c. **2 weeks' notice** if the employee's period of employment is 12 consecutive months or more but less than 5 consecutive years;
- d. **4 weeks' notice** if the employee's period of employment is 5 consecutive years or more but less than 10 consecutive years;
- e. **8 weeks' notice** if the employee's period of employment is 10 consecutive years or more.

All Jurisdictions

Notice must be provided in writing. It should also be noted that there are a number of exceptions to the requirement to provide termination notice or termination pay. In particular, each province excludes an employment termination for cause from the requirement to provide notice or payments on termination. In British Columbia and Alberta, the exception applies whenever an employee's employment is terminated for "just cause". In Ontario, the exception applies where an employee has been "guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer". Quebec uses the "serious fault" test. These exceptions have been interpreted in a more restrictive fashion than the common law or civil law "cause" requirement. As a result, a terminated employee may be precluded from recovering common law or civil law damages, but still be in a position to claim employment standards entitlements. Another exception from the requirement to provide notice or payment in lieu on termination in each province is where an employee is employed for a defined term or specific task.

Notice Applicable in Mass Terminations

Some provinces impose additional obligations on employers in the event of a mass termination. In B.C. and Ontario, a "group termination" or "mass termination" is defined as the termination of 50 or more employees in a specified period of time. In Quebec, the number of employees needed to trigger the "collective dismissal" obligations is 10 or more. Alberta does not have any mass termination requirements, such that individual notice is all that is required irrespective of the number of employees actually terminated.

British Columbia

In British Columbia, if the employment of 50 or more employees at a single location is to be terminated within any 2 month period, the employer must comply with the following notice requirements for all affected employees:

- a. **8 weeks' notice** if 50 to 100 employees will be affected;
- b. **12 weeks' notice** if 101 to 300 employees will be affected;
- c. **16 weeks' notice** if 301 or more employees will be affected.

If the affected employees are not unionized, the *Employment Standards Act* provides that these group termination requirements are in addition to (not in replacement of) the individual notice of termination requirements.

Ontario

The obligations under Ontario's *Employment Standards Act* that are triggered in the event that 50 or more employees are terminated in any period 4 weeks or less are as follows:

- a. **8 weeks' notice** if the employment of fifty or more persons and fewer than 200 persons is terminated at an establishment;
- b. **12 weeks' notice** if the employment of 200 or more persons and fewer than 500 persons is terminated at an establishment;
- c. **16 weeks' notice** if the employment of 500 or more persons is terminated at an establishment.

The mass termination requirements in Ontario are inclusive of (rather than in addition to) the individual notice of termination requirements in all cases. In addition, employers in mass termination situations must file a formal "Form 1" notifying the Ministry of Labour and post it conspicuously in the workplace. The information required by a Form 1 includes details of:

- the economic circumstances surrounding the intended terminations;
- consultations with employees;
- any proposed adjustment measures; and
- a statistical profile of the affected employees.

Any notice of termination provided to employees is ineffective until the Minister receives the Form 1. Employers who will be dismissing 50 or more employees should obtain a Form 1 from either the Ministry of Labour or our offices well in advance of announcing the terminations.

Quebec

Except in the case of a business of a seasonal or intermittent nature, any employer who, for technological or economic reasons, foresees having to make a collective dismissal must give notice thereof to the Minister of Labour within the following minimum periods:

- a. **2 months** when the number of dismissals contemplated is at least equal to 10 and less than 100;
- b. **3 months** when the number of dismissals contemplated is at least equal to 100 and less than 300;
- c. **4 months** when the number of dismissals contemplated is at least equal to 300.

The *Labour Standards Act* specifically details what the notice to the Minister must include. These notice periods are inclusive of (not in addition to) any individual notice of termination requirements. During these notice periods, an employer cannot proceed with the collective dismissal.

In the case of a fortuitous event or when an unforeseeable event prevents an employer from providing the requisite notice, the employer must inform the Minister as soon as it is in a position to do so. It should be

noted that the phrase “fortuitous or unforeseeable event” has been interpreted restrictively and will rarely apply in practice. In any case, the employer bears the burden of proving the impossibility of foreseeing the collective dismissal.

A reclassification committee composed of employer and employee representatives will have to be formed, if required by the Minister.

Severance Pay

Ontario

Ontario is the only Canadian province that imposes a statutory severance pay obligation on employers in addition to the notice of termination requirement.

Severance provisions under the *Employment Standards Act* apply to employers with an annual Ontario payroll of \$2.5 million or more. They also apply to employers, irrespective of annual payroll, who terminate 50 or more employees in a period of six months or less due to a permanent discontinuance of all or part of its business.

To be eligible for severance pay, an employee must have worked a minimum of five years with an employer. An employee’s severance pay entitlement is 1 week or part thereof of regular wages for each completed year of employment or part thereof up to a maximum of 26 weeks’ pay. Severance pay is prorated for completed months in any partial final year. For example, if an employee worked for 7 years and six months, the employee would be entitled to 7 weeks’ notice of termination or payment in lieu thereof and 7.5 weeks of severance pay under the *Employment Standards Act* on a termination of employment.

Employees are entitled to severance pay as a lump sum, unless the employee agrees to accept payment in installments. As a result, unless structured properly, a salary continuance in lieu of reasonable notice may not satisfy the severance pay requirement. In a case involving employment contracts with fairly generous notice periods, an employment standards referee held that the employees were entitled to statutory severance pay in addition to the notice which they had already received under the contract.

Where a laid off employee has a right of recall under a collective agreement, that employee may choose to either accept severance pay immediately and give up any recall rights or to retain recall rights and postpone the receipt of severance pay. If an employee elects to retain his or her recall rights, or fails to make an election, the employer is obliged to pay the severance pay to the Director of Employment Standards, in trust for the employee, unless the employee is unionized and another arrangement is negotiated successfully between the employer and the union. In either case, the employee will receive the money if he or she later renounces the right of recall. If the employee is recalled, the money is refunded to the employer.

Enforcement of Employment Standards Minimums

Employment standards legislation in Alberta, British Columbia, Ontario and Quebec provides a complaint procedure to employees free of charge. In Quebec, if an employee lodges a complaint, the applicable Ministry of Labour or Labour Standards Commission will investigate and, if a violation is found, order the employer to pay. In Ontario, an employer may apply for review of an order to the Ontario Labour Relations Board only after paying the full amount specified in the order to the Director of Employment Standards in trust. If the appeal succeeds, the funds are reimbursed to the employer; if it fails, they are paid to the

employee. The procedure in Alberta is similar, except that appeals are to an Employment Standards Umpire. Similarly, in British Columbia, an employer who wishes to appeal an order made by the Director of Employment Standards is required to pay the full amount of the order to the Director, in trust. Exceptions to this request are made, on application, but there has to be compelling reasons to do so. In Quebec, if the employer does not pay following the receipt of a formal notice, the Labour Standards Commission will be substituted for the employee. The Commission may then institute a court action against the employer.

In jurisdictions other than Ontario it may be possible for an employee to bring a claim against an employer both to the applicable Ministry of Labour and the courts. For example, an employee could make a claim to the Ministry of Labour for termination pay while at the same time making a claim to the courts for wrongful dismissal damages. As a result, employers may have to defend similar or identical claims in multiple forums resulting in significant expense and duplication of adjudicative resources. In British Columbia, the Director of Employment Standards may refuse to investigate a complaint if a proceeding relating to the same subject matter has been commenced in another forum.

In Ontario, an employee must choose in which forum to proceed. Ontario employees cannot commence a civil action in the courts for wrongful dismissal where a complaint has been filed under the *Employment Standards Act* for termination pay or severance pay, unless the employee withdraws the employment standards complaint within two weeks of filing. As well, unionized employees in Ontario are not entitled to file a complaint under the *Employment Standards Act*. Instead, unionized employees must seek recourse under the collective agreement, by filing a grievance to be pursued by the union through to arbitration before an arbitrator empowered to make the same orders as Employment Standards Officers and the Ontario Labour Relations Board.

There is another significant restriction on employees bringing employment standards claims in Ontario. The maximum award that may be made under Ontario's *Employment Standards Act* is \$10,000. There are some exceptions, the most notable being where an employee has been fired in violation of the pregnancy and parental leave protections of the Act. This \$10,000 restriction has significant implications since it essentially forces employees who have claims in excess of that amount to (a) bring a civil claim for wrongful dismissal in the courts, or (b) forego the amount of their claim in excess of \$10,000 and file a complaint for termination and severance pay, if applicable, under the *Employment Standards Act*.

Mitigation and Statutory Minimums

The failure of an employee to mitigate his or her damages does not affect the entitlement to the minimum statutory termination and severance pay requirements. While some employment standards legislation provides that an employee who is laid off and refuses an offer of reasonable alternate employment from his or her employer is not entitled to statutory notice or severance pay, these exceptions have been narrowly construed. As a result, employees are almost always entitled to the benefit of the notice and severance provisions, where applicable. Employers should also note that employees are entitled to their statutory entitlements even if they find another job during the notice period.



Common Law

Basic Principle

The basic common law principle that underlies a common law action for wrongful dismissal is as follows:

Where cause exists, an employee can be dismissed summarily and without any further financial obligation on the part of the employer. However, in the absence of cause, there is an implied term in the employment relationship that the employee will only be dismissed on the giving of reasonable notice or upon payment in lieu of reasonable notice.

In the event that just cause is alleged as the basis for termination, the onus rests on the employer to satisfy the court that the employee has engaged in conduct that amounts to a repudiation of the employment contract. Cause may be established through proof of either (a) serious misconduct such as gross insubordination, theft or fraud on the job, or (b) documented performance problems and a clear final warning. Canadian courts presume that an employee is entitled to reasonable notice and hold employers to a very high standard when asserting cause. For example, the Ontario Court of Appeal recently determined that an employer did not have cause to dismiss a long-term employee who had assaulted a client. Similarly, the British Columbia Supreme Court recently found that an employee's verbal attacks and intimidating conduct towards his supervisor did not, in itself, amount to just cause.

Often employers have very good reasons for wanting to terminate an employee's employment, but these reasons do not meet the threshold of just cause. These reasons are often referred to as "near cause". Near cause is irrelevant and does not reduce the amount of reasonable notice to which an employee is entitled.

It is worth noting that unionized employees who are covered by a collective agreement generally cannot bring court actions for wrongful dismissal. Disputes arising under a collective agreement, such as a termination of employment, must be dealt with through the grievance arbitration procedure under a collective agreement.

Factors Considered by the Courts in Determining Reasonable Notice

If a signed contract of employment specifies the amount of notice an employee will be entitled to in the event of termination, its terms will normally govern the amount of notice required such that the employee will not be entitled to reasonable notice. The employee will be limited to the contractual notice period, provided it meets or exceeds the minimum statutory requirements.

An express written notice provision may not be enforced, however, if an employee has been promoted or has changed jobs since the original date of hire, if the employee signed the contract under duress or if the contract was not kept alive in that the employee and employer are no longer complying with it. To be enforceable, an employment contract usually must be introduced during the hiring process such that the employment contract comprises, or is at least part of, the offer of employment made to the employee. An employer may also introduce an employment contract during the employment relationship, as long as it provides consideration for the contract, such as a promotional increase or a bonus payment. If an employer

attempts to unilaterally impose an employment contract during the employment relationship, the employee may take the position that the contract is unenforceable due to a lack of consideration or that he or she has been constructively dismissed. For this reason, we recommend that employers make their offers of employment conditional on the employee entering into the employment contract.

When an employee is hired for an indefinite period and there is no express contractual provision for the amount of notice to be given, the employee is entitled to reasonable notice of termination. Unlike the statutory employment standards schemes discussed earlier, there is no precise formula to determine what period of notice would be reasonable in any given case. The courts have consistently taken into account the following factors in assessing reasonable notice:

- the character of the employment (such as the position performed, the level of responsibility and income, etc.);
- the length of service of the employee (the purchaser of a business who rehires the vendor's employees should be aware that courts tend to find continuity of employment and generally consider the employee's past service with the previous owner);
- the age of the employee;
- the availability of similar employment having regard to the experience, training and qualifications of the employee;
- whether or not the employee was lured away from other secure employment (this factor generally becomes less relevant with each year of service with the new employer).

An additional factor that seems to be becoming increasingly relevant is the employer's good faith and fair dealing in carrying out the termination of employment. For example, an employer who harshly communicates the decision to discharge may be liable for an increase in the notice period for the terminated employee, regardless of whether or not its conduct actually harms the employee in his or her attempts to find alternative employment.

The employer's obligation to provide reasonable notice can be satisfied either by payment in lieu of notice or by continuing to employ the employee until the end of the notice period. Since few employers wish to continue to employ an employee during a lengthy notice period, most employers prefer to offer a separation package in lieu of notice.

Historically, the courts have required that actual notice of dismissal be extremely clear, in writing, and with an effective date of termination. While this is still the advisable course to follow, the courts will also consider a forewarning of termination such that reasonable notice may be determined to be less than it would have been had there been no prior warning.

The estimate of reasonable notice is one of the most difficult and frequently litigated issues in wrongful dismissal cases. Employees with relatively short-term employment may be entitled to significant notice periods where they were actively recruited from another job. As well, in considering the character of employment, the courts have generally awarded senior executive employees longer periods of notice than non-managerial or non-supervisory employees in recognition of their specialized skills. The influence of the character of employment on the determination of reasonable notice is, however, the matter of some debate in courts across the country. The New Brunswick Court of Appeal, for example, has held that this

factor should not be heavily weighted in determining reasonable notice. This contrasts with a decision of the Ontario Court of Appeal that seemed to set an upper limit of 12 months' notice for entry-level clerical and administrative employees who do not exercise supervisory or managerial duties. There has been much disagreement as to the correct application of this decision and the influence of the character of employment on the determination of reasonable notice is by no means settled.

The courts have also recently rejected the "rule of thumb" approach of one month per year of service and a number of recent decisions have broken the unofficial ceiling of 24 months' notice. The principle of reasonableness, as opposed to an arbitrary ceiling, has been endorsed as the determinative factor in assessing reasonable notice.

The courts generally do not attach much significance to what the employer unilaterally determined to be the appropriate notice period and offered at the time of termination. The courts strive to make an objective determination in accordance with the established factors.

Constructive Dismissal

An employer may effectively terminate employment without formally "firing" the employee. Constructive dismissal may be alleged where, in the absence of reasonable notice, a fundamental term or condition of employment is unilaterally altered by the employer in a way which is detrimental to the affected employee. Actions of an employer that could amount to grounds for an employee to claim constructive dismissal, include the following:

- a reduction in wages or benefits;
- an alteration in the manner of compensation (from salary to commission, for example);
- employer behaviour creating a workplace environment that makes continued employment intolerable (such as vague and unsubstantiated negative performance reviews, unjustified and non-specific warning letters and the unwarranted imposition of probation or the toleration of sexual harassment);
- retraction of significant perquisites such as club memberships or company vehicles;
- a demotion in position, reorganization resulting in a reduction in responsibility or lower reporting level;
- transfer to another geographic location.

The simple strategy to avoid a claim of constructive dismissal is to give the employee reasonable notice of the change. The employee can then decide during that notice period whether or not to continue working under the revised terms and conditions of employment.

Not every unilateral change will be treated as a constructive dismissal. An employer is allowed "reasonable leeway" in which to alter an employee's duties, as the employer may deem necessary for legitimate business reasons.

Even where an employee has been constructively dismissed, the employee generally has a duty to minimize the damages he or she suffers by continuing to work for the employer while looking for another job. Only where the changes imposed are humiliating and embarrassing to the employee or the workplace environment created by the employer is intolerable, will the employee be relieved of the duty to mitigate damages by remaining with the employer.

Damages

Generally, when an employee is dismissed without cause, and absent an express provision governing notice in any employment contract, the employee is entitled to the damages that flow reasonably from the breach of his or her contract of employment. Not only salary, but all other benefits and special allowances are considered terms of the employment contract and must be taken into account in determining the cost of termination. The basic principle applied by the courts is that the employee is entitled to be “kept whole”, that is, to suffer no loss during the period of reasonable notice.

The following items should be considered when assessing liability:

Salary

The employee is entitled to all remuneration and increases that would normally have been received during the notice period, including special cost-of-living and relocation supplements.

The issue of providing both long-term disability (LTD) benefits and pay in lieu of reasonable notice to a terminated employee who is receiving LTD benefits at the time of termination has recently been the subject of much controversy. Although the Supreme Court of Canada held that LTD benefits received as a condition of employment and contracted to represent salary replacement can reduce wrongful dismissal damages, the Ontario Court of Appeal found that an employee was entitled to both LTD benefits and salary during the notice period where, at the outset of the employment relationship, this is what the parties intended. Any reduction in salary paid in lieu of reasonable notice as a result of LTD benefits will depend on the terms of the employment contract and how the employee becomes eligible for LTD benefits.

Commissions

As long as there is sufficient evidence to demonstrate the amount of the commissions that would have been earned during the notice period, the employee will be entitled to that amount. An averaging of commissions paid in previous years is often used as the basis to project the commissions to which the employee would have been entitled during the notice period.

Bonuses

If there is a contractual obligation to pay the terminated employee a bonus, both a pro-rata share of bonus earned to the date notice of termination is provided and the bonus that would have otherwise been earned during the notice period will be included in the employee’s damages. Only in rare instances will a court agree with an employer’s argument that a particular bonus was purely discretionary and should not be included in the damage award. Even where a bonus is considered purely discretionary, it may be included in damages where the employee has received the bonus in the past such that he or she has come to expect the bonus as a “matter of course”. There is a considerable amount of litigation over bonuses and employers should consider clarifying the nature of their bonuses by way of written policy. It can be useful to set out in the written policy a requirement that employees be actively at work on the bonus payout date in order to be entitled to the bonus.

Medical, Dental, Disability and Life Insurance Coverage

The loss of such benefits may be recouped by an award of the court. Accordingly, many termination settlements provide for a benefit continuation package. Employees may claim damages equal to the cost to the employer of benefits lost during the notice period or expenses incurred by the employee in securing personal medical insurance coverage or services.

The employer may also be held primarily responsible for the loss of the proceeds of a life insurance policy, long-term disability benefits or other similar benefits, if the employee dies or becomes disabled during the notice period. For example, in a British Columbia court decision, a former employee who became disabled during the reasonable notice period following his dismissal, was held to be entitled to both short-term salary continuation and long-term disability benefits where the plan, by its terms, was available to the employee until his "termination". The Court found that the lawful termination of the employee should take effect at the end of the period of reasonable notice. Thus, if at all possible, employers should maintain coverage under the various plans for employees during the notice period. (In fact, employers are required, by employment standards legislation in some provinces to maintain benefits for the statutory notice period during which employment is deemed to continue.) However, if a lump sum notice payment, rather than salary continuance, is given to an employee, it may be difficult to continue benefit coverage for the entire reasonable notice period. Employers should check their insurance policies in this regard.

If continued coverage is not possible (i.e. the insurance policy does not permit coverage for "non-active" employees), the employer should point this out to the employee, in writing and recommend that the employee obtain his or her own coverage. The employer should also advise the employee of the general options contained in the life insurance and most disability insurance policies, to the effect that such policies might be converted into privately paid policies.

Pension Plans

An employee is entitled to claim damages for pension loss in respect of the reasonable notice period. The damages in respect of pension loss are generally calculated on the basis of the difference between the pension benefit the employee would have been entitled to receive at the end of the reasonable notice period, if the employee was not terminated, and the pension benefit accrued to the actual date of termination. In respect of defined benefit plans, employers should pay particular attention when dismissing employees who would have been entitled to retire early with an unreduced pension (or an otherwise enhanced pension) during the reasonable notice period, since these entitlements could serve to increase the amount of damages. It has generally been held by the courts that an employer cannot deprive an employee of the advantage of an early retirement or enhanced pension by dismissing the employee without notice. On the other hand, the courts have also held that if an employee retires early and receives pension payments during the reasonable notice period, such payments should be taken into account in determining the pension loss suffered. Early commencement of pension benefits under a defined benefit pension plan can enhance an employee's overall pension package, since benefit payments are going to be made over a longer period of time.

Employers also should be aware that the operation of the *Income Tax Act* only permits an individual to accrue pension benefits under an employer pension plan if an employee/employer relationship continues to exist. As a result, following a termination of employment, an employee must cease accruing pension

benefits under the employer's pension plan (other than during the statutory notice period when employment is deemed to continue). The amount determined as damages in respect of the pension loss during the reasonable notice period will, therefore, be payable from the employer's own funds, not from the employer's pension plan. Depending on the age and service of the employee and the generosity of the pension plan benefit formula, the cost of these damages to the employer could be significant. This cost may be amplified, if an employee can successfully argue that the pension loss amount should be increased or "grossed up" to take into account tax payable on that amount. It is sometimes argued that such an increase is required in order to make an employee whole, since it serves to replicate the tax deferred status the pension loss amount would have enjoyed if it had been accrued under the employer's pension plan during the reasonable notice period.

Company Vehicles

When the employer has provided a company car, court decisions have recognized the fact that companies generally provide a car to benefit the employee personally, and have awarded damages accordingly. For this reason, termination compensation packages often include amounts equivalent to car lease and insurance expenses, but not other operating costs. Only if the employer provided the company car strictly as a tool to the employee or restricted its use to business purposes, would a court not include it or its value in calculation of damages.

Vacation Pay

The employer is under a statutory obligation to pay to the employee the amount of vacation pay owing and unpaid at the time of termination plus any vacation pay which would have accrued during the statutory notice period. An employee is not entitled to compensation for the vacation pay that would have accrued during the period of reasonable notice beyond the statutory notice period.

Profit Sharing

If a profit-sharing arrangement is an express or implied term of the employee's contract, damages may be awarded for the loss of the benefit the employee would have received during the notice period.

Stock Option Plan

Each case will depend on the interpretation of the agreement involved. Damages for a lost opportunity to buy shares under a stock option plan, or for a forced resale of shares to the company on termination, are generally allowed. The Ontario Court of Appeal recently held that a stock option plan's provisions should be read as only contemplating a lawful termination, such that the employee's entitlement to vest and exercise stock will not be triggered until the end of the reasonable notice period, rather than the date on which the employee receives notice of the termination of employment.

A court's assessment of damages generally will take into account the loss of the employee's right to sell the shares. The courts have been inconsistent, however, in terms of valuing the stock price. At least two approaches have been used: valuing the stock at the date of judgment and averaging the stock price during the notice period. Even the employee's investment habits have been considered.

Moving Expenses and the Cost of the New Job Search

Reasonable expenses incurred by the employee who is searching for new employment will generally be compensable as expenses incurred in mitigation of damages. Similarly, expenses sustained in moving to a new location to accept other employment may be included in an award of damages.

Aggravated Damages/Mental Distress

Aggravated damages, including damages for mental distress, may be awarded in an action for wrongful dismissal; however, such awards will be very rare. Damages for mental distress are only appropriate where the employee is able to prove actual mental distress and that it flows from an independently actionable wrong separate from the termination of employment. If such an independently actionable wrong cannot be proven, the courts seem to compensate an employee who suffered because of the dismissal, not through an award of aggravated damages, but through an increase in the notice period on account of a breach of the duty of good faith and fair dealing.

In a recent Ontario decision, aggravated damages were awarded for an employer's misleading statements to the Workers' Compensation Board. The employer's statements prevented the employee from exercising his right to re-employment and, as such, he was limited to common law recovery (which does not allow for reinstatement). The loss of this potential remedy was sufficient to allow for an award of aggravated damages. As a result, aggravated damages may also be awarded when an employer's actions prevent the employee from pursuing some other remedy.

Punitive Damages

Awards of punitive (or "exemplary") damages are intended to dissuade an employer from repeating certain conduct and also to deter other employers from engaging in similar conduct. Punitive damages are distinct from all of the other damages discussed in this Part, as they are not compensatory in nature. An award of punitive damages is unusual and will only be warranted where (a) the conduct of the employer is harsh, vindictive, reprehensible and malicious, and (b) an independently actionable wrong exists separate and apart from the claim for wrongful dismissal. In other words, the act of wrongfully dismissing an employee will not justify an award for punitive damages; something more is necessary. Often, the separate cause of action alleged is the tort of intentional infliction of mental suffering, the tort of inducing breach of contract, negligence or defamation.

Where punitive damages are deemed to be appropriate the awards may be significant. The Ontario Court of Appeal has issued decisions increasing awards of punitive damages from \$10,000 to \$50,000 in one case and from \$15,000 to \$40,000 in another. Both of these decisions involved dismissals based on reckless and, in fact, baseless allegations of fraud. Employers should avoid making any such accusations that impeach an employee's character without considerable proof. One of the most effective means of ensuring that the termination is not viewed as "callous" or "malicious" is to employ the services of a relocation counselling agency, and to have the counsellor available at the time of termination in order to provide support and guidance to the terminated employee.

Duty to Mitigate

On termination, the employee has a legal obligation to mitigate his or her loss by diligently seeking substantially equivalent employment as quickly as possible. It is, however, up to the employer to prove that an employee has failed to satisfy his or her duty to mitigate. Therefore it is prudent for the employer to keep track of job opportunities and even to make such opportunities known to the terminated employee in appropriate circumstances.

When an employee has been dismissed without cause, it is in the employer's best interest to assist the employee in finding alternative work quickly, thereby reducing its potential liability. Any income earned by the dismissed employee from other sources during the notice period, will be deducted from the amount in lieu of notice payable by the employer. An employee is not entitled to "double dip".

Relocation Counselling and References

Depending on the employee concerned, the use of relocation counselling can be cost-effective from the employer's perspective.

A letter of recommendation from the employer may assist the employee in his or her job search. However, if a claim is likely to be asserted, the letter of recommendation should be provided only after consulting with a lawyer. It is always safe to provide an objective letter of employment that confirms service and the duties and responsibilities of the position held by the employee.

"In-House" Mitigation

An employee's obligation to mitigate damages may also impose an obligation on the employee to consider job offers from his or her employer. Where an employee unreasonably refuses an offer of alternate employment from the employer, the employee may be found to have failed to mitigate his or her damages. However, if the employee perceives the alternate offer to be demeaning, embarrassing or involving a loss of status or prestige, it may be perfectly reasonable to decline the offer without breaching his or her duty to mitigate damages. More and more often courts are allowing employees to reject alternate offers from their employers without any adverse consequences. However, it remains advisable for employers to consider whether there are alternate positions available within their organization, as this may reduce their exposure to damages for wrongful dismissal. In determining whether an employee has acted unreasonably, all of the circumstances (including whether the employer/employee relationship is still viable) will be considered. The employee's conduct must be unreasonable in all the circumstances before he or she will be found to have failed to mitigate his or her damages.



Civil Law (Quebec Only)

Quebec is the only Canadian provinces whose laws are based, not on common law, but on a Civil Code. With respect to the termination of an employee's employment, articles 2091 and 2094 of the *Civil Code of Quebec* read as follows:

2091. Either party to a contract with an indeterminate term may terminate it by giving notice of termination to the other party. The notice of termination shall be given in reasonable time, taking into account, in particular, the nature of the employment, the special circumstances in which it is carried on and the duration of the period of work.

2094. One of the parties may, for a serious reason, unilaterally resiliate the contract of employment without prior notice.

Before the coming into force of the *Civil Code of Quebec* in 1994, civil law courts used the term "just cause" as common law courts do. Article 2094 of the *Civil Code of Quebec* introduced the notice of "serious reasons" although the courts have since used both terms without distinction.

Although the principles governing contracts of employment in Quebec are derived from a different source, they are substantially similar to those derived from common law. Consequently, except for the distinctions discussed below, most of the principles discussed under Part III of the Manual also apply in the province of Quebec.

Factors Considered by the Courts in Determining Reasonable Notice

Unlike the common law, the *Civil Code of Quebec* specifically provides in its Article 2092 that an employee cannot renounce his right to reasonable notice. Article 2092 reads as follows:

2092. The employee may not renounce his right to obtain compensation for any injury he suffers where insufficient notice of termination is given or where the manner of resiliation is abusive.

This article of the *Civil Code of Quebec* as well as all other articles dealing with contracts of employment are of public order and cannot be set aside in a contract. Consequently, any provision of a contract of employment providing for a notice of termination that would be less than what a court would normally award will be unenforceable.

Further, a recent trend in Quebec's civil court decisions has also done away with a predetermined ceiling in awarding damages representing a reasonable notice of termination. The ceiling, until this recent trend, was for 12 months' salary. Although this ceiling has been set aside by many decisions, Quebec civil courts still tend to be less generous than common law courts in awarding damages representing reasonable notice of termination.

Termination Without Cause and Specific Recourses

In Quebec, employees with three years or more of continuous service who believe that they were dismissed without just or sufficient cause may file a complaint with the Labour Standards Commission seeking, among other remedies, reinstatement. The complaint must be filed within 45 days of the dismissal. Senior management cannot file such complaint. Unionized employees having access to a grievance procedure are also generally precluded from filing this type of complaint. Other, less common exceptions, also apply.

The ability to seek reinstatement is an important right and gives Quebec employees significant leverage in negotiating termination packages. Once a complaint is filed, the Commission attempts to settle the file amicably by proposing mediation services. If mediation fails, the complaint is submitted to a Labour Commissioner who has broad powers to study the complaint and issue a ruling. It is the Labour Standards Commission's current practice to offer the employee the benefits of a lawyer, free of charge.

Once before the Labour Commissioner, it is the employer who bears the onus of proving that the dismissal was justified. If this is proven to the Commissioner's satisfaction, the complaint will be dismissed. However, if the Commissioner determines that the employee was dismissed without just or sufficient cause, his remedial powers may prompt him to order the employer to reinstate the employee with full compensation for all earnings lost since the dismissal. As a matter of fact, reinstatement orders are the rule, not the exception.

A recent trend has developed where, if a Labour Commissioner finds that reinstatement is not warranted, a severance indemnity will be awarded, in addition to back pay for the period between the date of the dismissal and that of the award. A rule of thumb generally used by Labour Commissioners is one month of salary per year of continuous service. As a result, Labour Commissioners can award significant monetary awards. The employer is faced, if a Labour Commissioner finds in favour of an employee, with either reinstating the employee with back pay or not reinstating the employee but having to pay for a substantial severance indemnity in addition to any back pay that might have been ordered if the employee had been reinstated.

Consequently, there is no such thing in Quebec as the termination of an employee of three or more years of service without cause by simply giving the employee reasonable notice of termination.

Furthermore, the *Labour Standards Act* also identifies specific situations in which an employer will be *presumed* to have improperly dismissed an employee or to have taken retaliatory measures against an employee, including the following.

- **Sections 84.1 and 122.1:** Compulsory retirement;
- **Section 122(1):** Termination after an employee avails himself of a statutory right;
- **Section 122(2):** Termination after an employee supplies information to the Commission regarding the application of labour standards or testifies in an action relating thereto;
- **Section 122(3):** Termination following a seizure by garnishment against the employee;
- **Section 122(4):** Termination related to an employee's pregnancy;
- **Section 122(5):** Termination to avoid application of the Act or one of its regulations;

- **Section 122(6):** Termination because an employee refused to work beyond his normal working hours because of obligations related to the custody, health or education of his minor child, provided he took all reasonable steps available to fulfill such obligations in another manner;
- **Section 122.2:** Termination related to an absence due to illness or accident for a period not exceeding seventeen weeks over the twelve preceding months for an employee who has three months or more of uninterrupted service with his employer.

In most of the above cases, should the tribunal find in favour of the employee, reinstatement with back pay will be awarded.

Finally, a number of other statutes also protect employees from termination of employment for discriminatory reasons, such as where an employee has filed for a claim or otherwise exercised a right under the *Industrial Accidents and Occupational Diseases Act*.

As a result of all of the above statutory recourses available to employees in Quebec, it is strongly recommended that an employer seek legal advice before proceeding with the termination of an employee's employment, especially when said termination is without cause.



Limiting Employer Liability

Strategies Available

When an employer has dismissed an employee for cause, the courts will scrutinize carefully the incidents relied upon by the employer to substantiate the allegation. They also consider any warnings given to the employee. In addition, the courts will examine the entire history of the employment relationship, including increases in remuneration, changes in responsibility by way of promotions or reorganizations, and annual performance evaluations. It is therefore essential that employers follow proper human resource management practices. The best way for an employer to avoid liability is to establish and maintain effective human resource management practices, through written employee evaluations, job descriptions, company policies and employment contracts. Careful thought should be given to how any decision concerning the operation of the business will affect the employees at each level of operation.

The following steps can be taken at the outset of the employment relationship, and should reduce the employer's exposure to wrongful dismissal liability.

The Probationary Period

It is generally accepted that an employer has greater latitude in dismissing an employee during a probationary period than the employer will have after the employment relationship has become "permanent". In order to secure that initial flexibility there are two basic requirements that the employer must satisfy:

- (a) The employee must be told, at the outset of the employment relationship, that there is a probationary period of a specified number of months, during which the employee will be evaluated, and during which the employee will have a reasonable opportunity to demonstrate his or her ability to meet the employer's standards. The employee should be told in writing that if, during the probationary period, the employer concludes that the employee is not suitable, the employment relationship will be terminated, without notice;
- (b) The employer must engage in an objective written evaluation of the employee's performance during the probationary period, against standards that the employer could reasonably expect of an individual performing the particular function assigned to the employee. In most cases, this obligation will require notification to the employee, during the early stages of the probationary period, of the areas in which improvement is expected. This obligation includes the provision of a reasonable opportunity for improvement following that notification, but within the bounds of the probationary period.

Under employment standards legislation an employer is not required to provide notice, or pay in lieu of notice, to an individual let go during the first three months of employment. This does not necessarily mean that such an employee has no common law right to notice. However, if the probationary period is firmly entrenched as part of the employer's policies and the employee's contract of employment and it satisfies the basic requirements described above, then a court would have difficulty awarding damages to that employee.

It goes without saying that proper utilization of a probationary period, and the termination of unsuitable employees during that period, can save the employer time, money and irritation.

Allegations of Cause

Once the employment relationship has survived the probationary period, the employer must maintain good human resource records, in case it is necessary to show cause for termination some time in the future. These records should include annual appraisals that honestly and accurately reflect the employee's performance over the past year, as well as any other letters, memos or other materials sent to the employee regarding performance or attendance at work, and notes from any oral counselling sessions that were held with the employee during the employment relationship.

Except in cases of extreme misconduct, an employer will not generally be able to dismiss an employee for cause without having given some prior notification that the employee's conduct does not meet the employer's standards. If the employee's job performance is substandard, or if the employee's attendance, punctuality and attitude are not in keeping with the normal expectations of the employment relationship, then the employee should be advised immediately - preferably in writing. Employees should receive prompt written confirmation of verbal warnings.

Warnings are for the employee's benefit and should not be a form of harassment. The employee should be made aware that certain conduct or performance will not be condoned by the employer, so that the employee does not slip into a false sense of security. From the employer's perspective, it is in keeping with good management practices to let employees know, in a consistent manner, what falls outside the acceptable limits of behaviour or objective performance standards. Memos to file, which are not given to the employee, are of no value. The employee must be made aware of conduct that is unacceptable to the employer.

The appropriate number and the severity of warnings will depend on the individual circumstances. When a final warning is necessary, the employer should unequivocally notify the employee in writing, recalling previous incidents and warnings, and advising that, if such behaviour recurs, the employer will terminate the employment relationship without further notice. The final warning should establish a reasonable period during which the employee will be expected to modify his or her behaviour to conform to acceptable standards.

If, after the final warning and after a reasonable improvement period, it becomes necessary to terminate the employment relationship for cause, the employee is not entitled to any notice period or pay in lieu thereof. In fact, offering or making a payment in lieu of notice could prejudice the employer's ability to defend a wrongful dismissal action on the basis of cause.

In the case of a termination without notice where the employer alleges cause, but has failed to provide warnings in the manner described above, the dismissed employee will likely succeed in an action for wrongful dismissal. In such a case, the employer may face additional damages as unproven allegations of cause have been linked to a breach of the duty of good faith and fair dealing, as set out below. On the other hand, if the employee's file is well documented, the employer may be able to substantiate the allegation of dismissal for cause.

Good Faith and Fair Dealing at Termination

As previously mentioned, the Supreme Court of Canada has now defined a principle it calls “good faith and fair dealing”. This principle translates into a duty owed by the employer to the employee at the time of termination. Therefore, employers should not act inappropriately when terminating employees, especially those employees being let go without cause. A breach of this duty will increase the length of the notice period awarded by a court.

For strategic reasons, employers sometimes wish to allege cause for termination in situations where legal cause does not exist (i.e., it does not meet the high standard for some reason, be it a lack of disciplinary history or failure to warn the employee of potential termination, etc.). The Supreme Court has clearly stated that such strategies will not be tolerated and may, in fact, lead to increased damages.

The Supreme Court has given a loose definition of good faith and fair dealing that encapsulates many actions of employers it feels are improper. The Supreme Court of Canada did, however, give some indication as to what it feels is improper conduct by providing the following examples:

- employer maintained accusation that terminated employee was involved in theft and communicated this wrongful accusation to prospective employers;
- unfounded accusations of theft coupled with a refusal to provide a reference letter;
- management decided to eliminate a position; however, the employee was told that a transfer was going to occur. The employee was only informed of termination after he had sold his house and was prepared to move to accept the transfer;
- firing an employee after a return from disability leave for depression when the decision to fire occurred during the leave of absence;
- a bartender was laid off for three months while the bar was closed. The bartender was not informed of any change of status until he read in the newspaper that his position was being advertised at half the salary.

To minimize the potential liability for a failure to exercise good faith and fair dealing, employers may wish to consider taking some of the following steps:

- provide employees with as much advance notice of termination as possible;
- provide letters of reference, except in special circumstances;
- advise employees directly, honestly and sensitively that they are being dismissed and why;
- do not make false promises to employees;
- do not dismiss employees while they are dealing with a personal trauma;
- assist the employee when possible with relocation counselling.

Employment Policies

A court may consider a company’s policies to form part of a written employment contract. The policy manual can be used to spell out rules and regulations of the workplace and to alert the employee as to what is an acceptable standard of behaviour and performance. By consistently applying the policies as set out, the employer puts the employee on notice that failure to measure up to the standard may result in termination. A court will not ignore a clear and consistently applied employment policy of which the employee was aware.

Employment Contracts

It is desirable to have employees sign a written employment contract. A written employment contract, specifying what will constitute cause for discharge and what will be the notice period in the event of a termination without cause, can substantially reduce the employer's exposure to liability in the event that a termination becomes necessary. A court will generally give considerable weight to the terms of a valid employment contract, and will normally award compensation on the basis of the notice period specified in the contract. In Quebec, however, an employee may not renounce the benefit of either statutory notice or reasonable notice under civil law in an employment contract.

The provision setting out the notice period in the event of termination should be clear and unequivocal. It should be directly drawn to the attention of the employee. The notice periods should be progressively graduated, with longer notice periods required after longer periods of employment, and after promotions. They should be reviewed periodically. Alternatively, termination provisions should be reviewed and reaffirmed with each promotion, or each change in job responsibility, or form of remuneration. The amount of notice to be given must always meet or exceed the minimum requirements of the applicable employment standards legislation. In Ontario, where a contract does not expressly state that it includes severance pay, and few do, as a result of a referee decision under the *Employment Standards Act*, the employee can still be entitled to the statutory severance amount since it represents an additional entitlement not covered by the employment contract. It is also advisable for the employment contract to specifically state that the employee has a duty to mitigate his or her damages and that any monies received by way of mitigation will be offset against monies owing under the contract.

By carefully explaining the notice provision to the employee and allowing the employee sufficient time to read the document carefully and to seek independent legal advice, an employer can effectively pre-empt any future allegation that the contract is harsh, unfair or signed under duress. An employment contract should be introduced to the job applicant before hiring. Then, upon the termination of employment, an employer should not extend separation pay beyond the amount provided for in the written agreement.

Termination Interview

The manner in which a termination interview is conducted can have a significant impact on the extent of the employer's liability (as discussed in the section on Good Faith and Fair Dealing). If a relocation counselling agency has been retained, a counsellor should be available to meet with the employee immediately following the interview. At this meeting, or as soon as possible thereafter, the employee should be given a letter of termination. When no cause is alleged, the letter should contain a reasonable offer of payment in lieu of notice. It is important to note that in Quebec, if an employee has three years or more of continuous service, he may file a complaint for unjust dismissal with the Labour Standards Commission and seek reinstatement. Thus, an employer in Quebec should not simply state that the termination of employment is without cause.

The employee should be given sufficient time to review the termination letter and seek independent advice. If the employee accepts the offer, he or she should generally be required to sign a legal release after a reasonable period for review.

Employment Insurance documents must be promptly delivered. A failure to do so may be viewed as a form of harassment. It should be noted that the *Employment Insurance Act* prevents employees who either quit their jobs without just cause or are terminated due to their own wilful misconduct from collecting Employment Insurance benefits.

If cause for termination is not alleged, the employee may be provided with a letter of reference to aid in the search for another job. In addition, an employer may offer the employee the use of the company's clerical services for the typing of job inquiries, resumes, and applications.

The methods of structuring payments made in lieu of notice of termination will vary with the circumstances and may require professional advice. There are two basic options: lump sum payment or salary continuance. Employers often prefer to pay salary continuation since it spreads out the cash outflow and delays payment. It also allows the employer to structure the severance package such that the salary continuance ceases when the employee finds alternative employment. A bonus for finding alternative employment also may be offered. Conversely, the employee often prefers a lump sum payment since it provides him or her with the severance package up front. It may also allow the employee to limit the amount of statutory withholding tax by having a portion deposited as a retiring allowance directly into his or her registered retirement savings plan.

Relocation Counselling

It can be beneficial to both the employer and employee to engage a relocation counselling service. The relocation counselling programme will help to prevent employee distress and depression by motivating the employee to embark on a job search. This search reduces the chances of the employee sitting at home, becoming despondent, and later complicating the dispute with a claim for damages for mental distress.

The use of a relocation counselling agency also further reduces the likelihood of an award for punitive damages or damages for breach of the duty of good faith and fair dealing. An employer who has gone to the trouble of hiring a counsellor to be present at the time of termination, will probably not appear to have treated the employee in a harsh or callous manner.

In addition, the employee will be more likely to find another job. Furthermore, the counsellor may be a continuing source of information to the employer regarding the employee's progress in obtaining a new job, which information can be useful during settlement negotiations. In the event that the dispute proceeds to trial, the relocation counsellor may be able to testify that the employee has failed to take immediate steps to mitigate, or to follow the counsellor's advice.

In a recent Ontario Court of Appeal decision the Court found that at the time of termination of a long-term employee (27 years), the employer had an obligation to provide additional support (such as counselling). The failure to provide this additional support was found to be an independent wrong for which damages for mental distress were granted. This decision highlights the fact that relocation counselling can be extremely important, especially for long-term employees.

Release

Generally, when an employer agrees on a severance package with an employee, the employer should require the employee to sign a release. The release should protect the employer from any future claims that the employee may have arising from his or her termination. The employer should seek to obtain as comprehensive a release as possible. However, it is important to know that a release may not be binding in some circumstances with respect to claims under human rights or employment standards legislation. In light of this, an employer should seek professional advice before asking an employee to execute a release.

The manner in which the release is presented is as important as its contents. The courts will not enforce a release if it was signed under duress. It is advisable not to insist on execution of the release at the time of the termination interview. Instead, have the individual take the form away with him/her and allow a period of one to two weeks before it needs to be returned.

While this manual explains a number of procedures and practices that can effectively reduce an employer's liability for wrongful dismissal, it should not be construed as specific legal advice. Each case is dealt with by the courts on its own facts and merits. For this reason, we recommend that employers seek professional advice at the earliest possible opportunity, preferably before a termination of employment takes place.



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