

EMPLOYMENT MATTERS

April 2013

LIMIT YOUR LIABILITY ON TERMINATION

Sources of Entitlement: When an employer decides to terminate an employee's employment, without cause, the employee's rights flow from three primary sources: (i) their employment agreement, (ii) the *Employment Standards Act* and (iii) the common law.

Employment Agreements: A properly drafted employment agreement will contain a termination clause that stipulates exactly what the employee is entitled to receive upon termination of employment. Employment agreements provide employers with a degree of certainty when they terminate employment. Termination clauses must provide for (at least) the minimum legal requirements under the Act (defined below).

Employment Standards Act: The minimum an employer can pay an employee upon termination of employment is set out in the *Employment Standards Act*, 2000 of Ontario (the "**Act**"). Under the *Act*, employees are entitled to receive one week of notice or pay in lieu of notice if the period of employment is three months to one year, two weeks of notice if the period of employment is between one year and three years, and anything above three years of service requires notice or pay in lieu of notice of one week per year of service to a maximum of eight weeks. Where the employer's payroll exceeds 2.5 million and the employee has been employed for over five years, he/she is also entitled to severance pay, which is one week per year of service up to a maximum of 26 weeks.

The minimum standards under the Act are not subject to mitigation. This means that if my employer terminates my employment on Monday, and I get a new job on Tuesday, the employer still has to pay me the minimum standards.

Common Law: This is typically where the employer's exposure is the highest. Common law notice refers to the notice periods granted by the Courts, typically as a result of wrongful dismissal actions. In considering the range of appropriate notice, the Courts consider the following factors: age, length of employment, compensation, position, chances of re-employment and other relevant factors. The Courts analyze the facts of each case to determine the appropriate notice period for each employee, based on those factors. While there is no "rule of thumb", an employer can expect to pay anywhere from 2 to 6 weeks per year of service, depending on the facts.

Common law notice is subject to mitigation. This means that if the employer provides an employee with 3 months notice and he/she obtains employment after 1 month, the employer can take credit for the amounts the employee receives from a new employer (as long as all minimum requirements are met).

How can the employer best limit its liability? The answer to this question is simple: Employers should enter into employment agreements before they hire new employees. Such agreements should clearly and succinctly set out what the employee will receive by way of notice when his/her employment is terminated. A properly drafted employment agreement, with a reasonable termination clause, will afford an employer predictability and certainty when it terminates employment.



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