

Member's Quarterly

Spring 2020 Edition

Feature

Those Employment Standards: They are Changing

Make sure your termination language is enforceable

With many provinces and territories undertaking reviews and enacting changes to Employment Standards legislation, it's essential for employers to anticipate and respond to upcoming legislative changes. While legislation with true *retroactive* effect is less common and must be specifically identified, most legislative changes will have an immediate effect, changing the law going forward. This can create implications for agreements which start under different legislative terms than they finish; contractual language which was compliant with Employment Standards legislation at the time the contract was entered into may not be compliant at a later date. While in many cases changes are relatively incremental and failure to respond to such changes will be easily addressed through provision of some retroactive pay or benefits, other changes, such as changes to entitlements on termination, can have more dire consequences if overlooked.

A properly drafted termination provision is a crucial element of an employment agreement or letter of hire. In the event of a termination without cause, which represents the vast majority of terminations given the high just cause standard, an employee will be entitled to reasonable notice of the termination, or pay in lieu of notice. The provision of pay in lieu of notice is much more commonly used by employers as compared to a period of working notice. In the absence of language in a letter of hire or employment agreement which specifies an employee's entitlement to notice or pay in lieu thereof upon termination, an employee will be entitled to reasonable notice or pay in lieu calculated in accordance with the common law. Common law entitlements are universally more generous than Employment Standards minimums; it is not uncommon for the common law to provide in *months* what the relevant code or act provides in weeks. As such, the inclusion of a well-drafted termination clause can *significantly* limit an employer's exposure for notice or pay in lieu thereof.

As most employers are aware, Employment Standards legislation provides the minimum entitlements for employees in each province or territory. These minimum standards are implied at law into every contract of employment. While employers are at liberty to provide greater benefits to employees, they are obligated to provide, at a minimum, those benefits and entitlements specified by the applicable code or act. In the event that the termination provisions of an employment agreement fail to provide the applicable statutory minimum entitlement, the *entire termination provision will be rendered unenforceable*, exposing the employer to providing common law notice. As such, careful attention should be paid to any changes to the statutory minimum entitlements on termination.

We provide below some key tips for assessing your existing termination language in letters of hire to best ensure effectiveness and enforceability in the long term:

- If your termination clause uses a formula for notice which increases by some increment based on the employee's years of service, ensure that the formula does not, at any time, provide or have the potential to provide less than the statutory minimum;
- If your termination clause uses the Employment Standards minimums "formula" for notice, instead of reproducing the current statutory formula into your letter of hire, refer instead to the provision of notice or pay in lieu of notice in accordance with the relevant Employment Standards minimums, *as amended, repealed or replaced from time to time*. Attach the current section of the code or act as a schedule to the offer, and refer to the schedule in the termination provision;



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- Make *abundantly clear* in the termination provisions that the notice or pay in lieu thereof provided pursuant to your termination clause completely satisfies your obligation to provide notice or pay in lieu thereof, and that no additional notice or pay in lieu of notice beyond the statutory minimums will be provided. Simply indicating that notice will be provided "in accordance with" or "as per" the employment standards legislation will *not* be enough to prevent the employee from pursuing their greater entitlement at common law;
- Ensure that your termination language clearly addresses whether pay in lieu of reasonable notice will be inclusive of benefits; in the absence of language clearly limiting the employer's obligation to provide base salary only, pay in lieu of reasonable notice will be read to be inclusive of all benefits (pension contributions, extended health, etc.) to which the employee is entitled to over the reasonable notice period;
- Further to the point above, if the provision of benefits is statutorily required over the legislated notice period, as is the case in some provinces, ensure that your termination language meets this obligation;
- Preserve your ability to offer either working notice or pay in lieu of notice; while working notice is less common and in many cases, impractical, in the event of a dissolution or restructuring, the ability to provide working notice will be valuable; and
- Include an explicit reference to the employer's right to terminate for just cause.

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