

Member's Quarterly

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Feature

The Mutually Agreeable Departure

How to end the employment relationship on amicable terms

While there are several ways to go about concluding an employment relationship, one method that is often overlooked is an agreement to mutually conclude employment. Whether the reason for termination is performance based, restructuring or overall fit in the workplace, a mutual agreement to end employment can provide a dignified exit for the employee, while limiting exposure and costs to the employer that might otherwise arise from termination.

More specifically, a mutual agreement allows the employee to participate in crafting the terms of their departure without the animosity and hurt feelings that can result from a unilateral termination. For employers, a mutual agreement allows for necessary changes to the workforce while avoiding the cost of litigation arising from wrongful dismissal allegations.

Generally speaking, a mutual agreement may be appropriate in the following circumstances:

- The employer does not have just cause to terminate;
- The employment contract does not contain a termination clause that already outlines the severance owed for a without cause termination; and
- The employer and employee are on good enough terms that such an agreement would be genuinely considered by the employee.

Other factors that may weigh in favour of attempting a mutual agreement include the employee's years of service and whether the reasons for concluding employment require that action be taken sooner than later.

Employers will, generally speaking, face more exposure and uncertainty in litigation with long-term employees and therefore a mutual agreement offers certainty and finality. Further, a mutual agreement allows employers to recognize the contributions and service of long-term employees, even though moving in a new direction is necessary.

Further, the reasons for concluding employment may motivate an expedited departure. For example, an employee who is consistently underperforming will eventually be at risk for termination for cause, however, if the nature of the performance concerns is negatively impacting operations and/or workplace culture, an employer may prefer to end the relationship earlier via mutual agreement rather than continue with performance management measures.

If proposing a mutual conclusion to employment seems like it could be a viable option, employers must take care to approach the discussion with the Employee in a manner that is respectful and allows for the Employee to fully consider their options. Moreover, the employee must understand that their participation is



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completely voluntary and if they refuse the proposal, their employment will continue. To do otherwise, would risk allegations of constructive dismissal.

Where appropriate, we recommend the following practical tips for approaching this discussion with the employee:

- The discussion should proceed on a completely "without prejudice" basis. Employers should explain to the employee that "without prejudice" means that the contents of the discussion cannot be held against either party. It should be further explained to the employee that the proposal itself is also "without prejudice".
- Depending on the precise circumstances, it may be helpful to have the agreement prepared ahead of the meeting so that the employee is clear on the terms being offered.
- Explain the reasons for considering conclusion of employment to the employee.
- Offer the opportunity to characterize, or communicate, the employee's end of employment as a resignation so that the employee's reputation remains intact.
- Allow the employee to ask questions and/or propose revisions to the terms proposed, which can be taken back for consideration after the meeting.
- Allow the employee ample time to seek independent legal advice on the agreement and keep in mind that the employee will remain employed during this period.

While a mutual conclusion of employment can offer a unique approach to ending the employment relationship, we caution that there are risks that must also be considered. In particular, given the employee remains employed while they consider the terms offered to them, should negotiations become protracted and/or contentious, this may negatively impact the employee's performance/attitude in the workplace. Additionally, when faced with the potential of termination, some employees may respond by taking a stress/sick leave, which can delay the process.

Accordingly, employers should be sure to assess whether the employee would be likely to consider a reasonable deal. If an employer expects that an employee may not be receptive to the proposal, they may be better served to terminate and address any necessary negotiations after the fact. Ultimately, each circumstance must be evaluated on a case-by-case basis and we encourage employers to seek legal advice on the appropriate options for ending an employee's employment prior to proceeding.

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