

## **The Basics of Workplace Law. Top 10 Hiring and Firing Tips. Part 2 – Top 10 Firing Tips**

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Last week we looked at hiring talent into our organization, this week we'll look at things to consider when letting go the talent from our organization.

### **Top 10 Firing Tips**

#### **1. Is it important to have an actual "reason" to terminate an employee?**

One of the often misunderstood legal principles applicable on termination of the employment relationship is the perceived requirement to provide a reason for the termination.

In fact, there is no legal requirement to provide a reason for the termination of employment.

That is not to suggest that in certain circumstances providing a reason for the termination is not advantageous. This is particularly true where there is a risk the employee may allege discrimination on the basis of one of the prohibited grounds of discrimination under provincial human rights codes.

Where the employer fails to include a reason for the termination of the employee's employment, the employee may take the position that the likely basis for the termination included some element of discrimination on the basis of a prohibited ground of discrimination under provincial human rights codes. Otherwise, the reason would have been identified.

Accordingly, although there is no requirement for the inclusion of a reason for the termination of an employee, certain circumstances may support its inclusion.

#### **2. What is the difference between 'with cause' and 'without cause' terminations?**

Upon termination of employment, and subject to any existing employment contract, the employer has two choices in law with respect to the termination of an employee.

The employee can either be terminated (i) 'with cause'; or (ii) 'without cause'.

The word 'cause' does not mean the employer is required to have a 'reason' for the termination of the employee's employment. The word 'cause' as used in the employment law context is a precise legal term which has the meaning identified below.

A termination 'with cause' is narrowly interpreted in law. Essentially, it means that the employee has engaged in a course of misconduct that is so egregious that a court will permit the employer to terminate the employee without providing the employee with reasonable notice of termination or compensation in lieu of notice. Such conduct includes breaches of the employee's duty of loyalty to the employer through such acts as competing against the employer while employed and communicating confidential employer information to competitors and others.

Depending on the circumstances, such conduct may also include sexual harassment of co-workers, assault of employees or supervisors and defrauding the employer.

It is not surprising that most cases before the courts on the issue of 'cause' are decided in the former employee's favour. This is particularly true in respect of claims by the employer where 'cause' is established on the basis of the former employee's poor performance. It is indeed rare for a court to accept poor performance by the employee as the basis for cause.

As a result, although an employer does have a theoretical choice to terminate for 'cause', the reality is that the vast majority of terminations will be conducted on a 'without cause' basis. As a 'without cause' termination, the employee is entitled to reasonable notice of termination or compensation in lieu of notice. The determination of reasonable notice is based on a variety of factors including the employee's age, years of service with the employer, position and employability in the marketplace given current market conditions.

### **3. What is the relationship between termination provisions under employment standards legislation and under common law?**

Every province has 'minimum standards legislation' which sets out minimum standards for various terms of the employment relationship including such terms as hours of work, overtime, vacation and public holidays. In addition to these types of terms, minimum standards legislation also includes minimum standards that apply in the event of a termination of employment.

These standards set out the minimum notice period employees are entitled to in the event of termination. In Ontario for example, the notice of termination available to an employee with four (4) years of service is four (4) weeks. From a legal perspective, however, compliance with this minimum standard is often not enough.

The courts apply the legal principle of an employee's common law entitlement to reasonable notice of termination or compensation in lieu of notice. What is considered 'reasonable' in any given situation is based on such factors as the employee's years of service with the employer, position, age and employability in the market given current market conditions.

The application of this 'common law' principle of reasonable notice invariably leads to a 'notice of termination' period that is in excess of the minimum standards. Using the example above, if the employee terminated was a manager, 55 years of age with four (4) years of service in a difficult market, the 'common law' reasonable notice period might be in excess of seven (7) months!

### **4. What does 'wrongful dismissal' mean?**

One of the most fundamental misconceptions surrounding an employee's entitlement on termination relates to the legal cause of action known as 'wrongful dismissal'.

'Wrongful dismissal' refers to whether or not the employee received compensation on termination that satisfies the employer's obligation to provide reasonable notice of termination or compensation in lieu of notice in the particular circumstances.

'Wrongful dismissal' does not represent an action available to a former employee seeking damages based on the fact that he or she did not think it was 'fair' that he or she was terminated. The 'wrongful dismissal' action relates only to the determination of what is 'reasonable notice'. It is this action that is referred to as 'wrongful dismissal'. It is 'wrongful' because the employer did not provide adequate notice of termination or compensation in lieu of notice.

The employer's action is not 'wrongful' from a legal perspective because the employee perceives the termination to be 'unfair'.

Wrongful dismissal claims, however, can be minimized by ensuring that an appropriate termination package is provided in all cases of 'without cause' terminations.

#### **5. Is it important to have two people in the room during a termination meeting?**

It is always prudent to have two (2) people present in the room when a termination of employment takes place. The second person can become extremely important in the event the former employee makes unwarranted allegations regarding the events that transpired during the termination meeting.

By way of example, the former employee may allege the person conducting the termination made racial or ethnic slurs with a view to making a claim of discrimination under provincial human rights legislation. Without the benefit of the second person in the room to corroborate that no such comments were made it becomes a game of 'he said/ she said'.

To the extent that the second person also takes notes from the meeting, those notes can subsequently be relied upon by the employer in defense of such allegations.

#### **6. Does it make a difference when, where and how the actual termination meeting occurs?**

There is never a 'right' time to conduct a termination. That said, there are a number of 'wrong' times to conduct such a meeting. Some 'wrong' times would include significant dates that are of importance to the employee such as the employee's birthday, a time of sickness within his or her family or a religious holiday.

Despite the widely held view that a meeting should not be on a Monday or a Friday, there is no evidence to support that view.

What is of significance, however, is that the meeting be conducted in a private place (e.g. an office or meeting room), and that the employee is treated with dignity and respect before, during and after the meeting.

By way of example, before the termination meeting is conducted, it is critical that the decision to terminate be kept confidential. It is imperative that the employee not learn about his or her pending termination by way of 'the grapevine'. In addition, and as stated above, it is important the meeting be conducted in such a way as to preserve the employee's dignity, and minimize the employee's potential feelings of humiliation. Lastly, that sense of dignity and respect must be carried through to any post-termination communications both within the organization as well as to any external customers or suppliers.

Where an organization fails to show a terminated employee the appropriate level of respect, the employee may successfully claim damages for what the courts refer to as 'bad faith damages'.

### **7. Is a written letter of termination required?**

Most provincial minimum employment standards statutes provide for the requirement that an employee be provided with a written letter of termination upon termination of employment.

In addition to compliance with minimum standards legislation, however, the practice of providing employees with a written letter of termination is beneficial in that it removes the possibility of confusion regarding the terms of severance. It is often the case that an employee being advised of his/her termination of employment is emotionally charged, and as a result is not disposed to being attentive to the explanation of the specifics of the severance package at the time of termination.

A letter of termination setting out the specifics of the severance package permits the employee an opportunity to review the package at his or her convenience away from the workplace.

By preparing a letter of termination the employer is also in a position to seek a release from the former employee wherein the employee agrees, in exchange for the severance package, to waive any and all claims against the employer.

### **8. Should a terminated employee be required to sign a release, and if so, when?**

To the extent an employer does not request that a terminated employee sign a release in exchange for the payment of severance funds, the employer runs the risk that the former employee will simply accept the funds, and then subsequently commence legal proceedings seeking damages in excess of what was paid.

By requiring the former employee to sign a release, the employer is protected against future claims by the former employee. In addition, the employer will not be 'funding' litigation against itself.

Of particular note, however, is that unless the severance package offered by the employer exceeds the minimum requirements under minimum standards legislation, a release cannot be required.

Given the importance of a release and its consequences to the former employee, the courts will always carefully scrutinize the circumstances surrounding the signing of the release. If the court determines that the signing of the release was not done voluntarily, the court will not enforce the release.

A release signed at the time of termination is signed in an emotionally charged environment, and will generally be seen by the court to not represent a voluntary desire by the former employee to be bound by the terms of the release.

### **9. Is it prudent for organizations to have a policy that provides for 'no letters of reference' for former employees?**

Although an employer policy providing for no reference letters for departing employees may appear relatively innocuous, it has an inherent risk. The risk generally occurs in the context of a dispute regarding the former employee's entitlement to severance compensation. In this circumstance, it is always in the employer's best interest that the former employee secures alternate employment as soon as possible in order to minimize the employer's exposure to damages.

Without the benefit of a letter of reference, however, the employee may be unable to secure alternate employment or it may take a longer period of time to obtain new employment. Since the employer could have assisted the former employee in this regard, a court will often 'penalize' the employer for failing to provide a letter of reference.

Similarly, courts are generally not favourably disposed to employers that use the reference letter as leverage to secure the former employee's consent to the terms of a severance package. Accordingly, a letter of reference should not be made conditional upon the execution of a release.

In addition, it is generally recommended that the severance package identify that the employee will receive a letter of reference regardless of whether he or she agrees to the terms of the severance package.

#### **10. Can any portion of a termination package be paid on a tax free basis?**

Generally stated, an employer is responsible for withholding and remitting the appropriate rate of income tax to the Canada Revenue Agency ("CRA") on the applicable components of the termination package. Failure to do so can lead to an order to pay by the CRA against the employer for the amount that ought to have been withheld together with penalties and interest thereon.

An employer can however assist a terminated employee in minimizing the tax payable.

Generally speaking, an employer can directly transfer from the settlement funds to a terminated employee's RRSP the amount of \$2000 per year for all years of service after 1988 and prior to 1996. For all years of service prior to 1989, the annual limit is \$2000 for each year of service plus \$1500 for each year of service in which none of the employer contributions to a company pension plan vests in the taxpayer.

In addition, where the departing employee has contribution room to his or her RRSP, the employer can directly transfer a portion of the settlement funds without attracting withholding tax.

#### **CONCLUSION**

Hiring and firing represents a fundamental component of human resources management. It is of vital importance to the organization to ensure that human resources management is carried out in compliance with the myriad of ever changing statutory and common law requirements and obligations. Successful compliance represents a major contributor to the "bottom line" of any organization.

*The information contained in this paper is general information meant to provide an introduction to the topics covered. To find out how this information applies in practice to any specific situation, readers are advised to*

*seek a consultation with a qualified employment law lawyer. Readers should not rely on this information as a substitute for obtaining appropriate legal advice.*

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