

THE EMPLOYERS' GUIDE TO TERMINATION LAW IN ONTARIO

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Termination Payments

There are two important laws that apply to terminations when the employer is governed under Ontario law: the Employment Standards Act ("ESA") and the common law.

Employment Standards Act

Notice of Termination

The ESA sets out the minimum standards to which employees are entitled. These are minimums only and if you offer a greater benefit than what is in the ESA, that greater benefit will apply.

The ESA outlines the minimum amount of notice you must give to an employee on termination. The length of notice is tied to how long the employee worked for you.

This period of notice can be given as advance notice of termination, during which time the employee must continue to report to work. Alternatively, you may simply provide the employee with pay in lieu of notice, which must be paid within the later of seven days after termination or on the next pay period.

The minimum notice periods are:

Years of Employment	Notice Required
less than 3 months	none required
3 months to less than 1 year	1 week
1 year to less than 3 years	2 weeks
3 years to less than 4 years	3 weeks
4 years to less than 5 years	4 weeks
5 years to less than 6 years	5 weeks
6 years to less than 7 years	6 weeks
7 years to less than 8 years	7 weeks
8 or more years	8 weeks

¹ A sample termination script is included in the Appendix.

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Severance Payments

Severance pay is an additional amount to which some employees are entitled. To be eligible, the employee must have worked for a minimum of five years and:

1. the employer has a payroll of \$2.5 million or more; or
2. the severance was due to a permanent discontinuance of all or part of the business and the employee is one of 50 or more employees being terminated within a six month period as a result.

Severance pay is one week per year of service to a maximum of 26 weeks. It includes a prorated amount for partial years of service (e.g., if they have worked 10 ½ years, they get 10 ½ weeks of severance pay).

Unless the employee agrees to receive the payments in instalments, it must be paid within the later of seven days after termination or on the next pay period.

Common Law

The notice period set out in the ESA is only a minimum. The courts have stated that, in most circumstances, employees are entitled to notice of termination in excess of the minimum standard.

In determining the notice to which employees are entitled, courts look at several factors:

- *How long the employee worked for you:* long term employees tend to receive more notice and, surprisingly, short service employees also tend to receive a disproportionately longer notice period.
- *The employee's age:* employees who are older or close to retirement age get more notice.
- *The level of the position:* higher positions, such as management positions, attract more notice.
- *Salary:* the more money a person makes the more notice he or she gets.
- *Inducement:* if an employee was aggressively recruited to leave secure employment and is terminated from the new job after a fairly short period of time, he or she may get more notice.
- *Bad faith:* if you acted in bad faith at the time of termination such as by falsely accusing the employee of wrongdoing the employee may be entitled to additional notice, often in the neighbourhood of three to six months on top of what they would otherwise receive.

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Many people believe that there is a standard amount of notice, such as one month per year of service, but the courts have said that isn't true. They look at each case individually and consider all of the facts. The courts will often apply a maximum of 12 months notice for lower level positions (e.g., clerical and general labour), with a maximum of 24 months notice for upper level positions (e.g., senior management).

The common law notice period is not in addition to ESA notice and severance – they are combined.

Just Cause for Termination

In some circumstances, you may have legal cause to dismiss an employee. Legal cause should not be confused with business reasons for termination of an individual's employment. The standard for cause is a high one: the courts and Ministry of Labour are reluctant to deny termination payments to employees except in the most serious of circumstances.

The standard for cause under the Employment Standards Act is slightly different than at common law. The differences are outlined below.

The ESA: Wilful Misconduct, Disobedience and Wilful Neglect of Duty

Under the ESA, firing an employee with cause is limited to situations in which there has been **wilful misconduct, disobedience or wilful neglect of duty** that is not trivial and that has not been condoned by the employer.

The following is an overview of the Ministry of Labour's interpretation of the standard for cause under the ESA.

a) The employee's conduct must be wilful.

Wilful means that the employee intended the result that came to pass. It will also exist where an employee is reckless in his or her conduct and knew or should have known that the conduct would create that result that came to pass.

b) Misconduct

Misconduct includes things like:

- fraud or theft
- alcohol or drug use at work (subject to the duty to accommodate alcoholism)
- failure to follow company policy
- recklessness
- conflict of interest or breach of trust; and
- off-duty misconduct that prevents the employee from carrying out his or her duties

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c) Disobedience

For disobedience to exist:

- The order or rule must have been clear and unequivocal
- The order or rule must not be minor (unless there is a history of lesser offences for which the employee has been disciplined).
- The order or rule must have been communicated to the employee
- The employee must know (or should know) in advance that the disobedience could result in terminations; and
- The order or rule must not require the employee to do anything that is illegal or unsafe.

d) Neglect of Duty

Neglect of duty is similar to disobedience except that it involves the failure to do something. Typically neglect of duty will exist in cases where an employee refused to report for work (e.g., after having been denied a vacation).

e) Not Trivial

If the employee's conduct is unimportant or insignificant, no cause will exist.

f) Not Condoned by the Employer

An employer will be deemed to have condoned the behaviour if it knows about it but does not act on it, thereby giving the employee the impression that the behaviour is not serious enough to warrant termination. To avoid an argument that you condoned the behaviour, you must act as quickly as reasonably possible in the circumstances.

If you have previously disciplined an employee for the behaviour (in other words, you have not condoned it) you can rely on the final incident as the "culminating incident", justifying a termination of cause.

The Common Law: Contextual Approach

At common law, cause will exist where the employee has committed acts amounting to a repudiation of the employment relationship that are not condoned by you. This is also very difficult to prove.

In the case of *McKinley v. B.C. Tel.*, The Supreme Court of Canada said that a termination for cause **must be proportionate to the offence** and that each cause must be determined in context.

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The Ontario Court of Appeal elaborated on the contextual approach in the case of *Dowling v. Ontario (WSIB)*. The court said that in determining whether or not cause exists, employers must:

1. determine the nature and extent of the misconduct
2. consider the surrounding circumstances; and
3. decide whether dismissal is warranted (i.e. proportionate to the offence).

In the *Dowling* case, the court found that the employee was justifiably dismissed for cause for breach of WSIB's conflict of interest guidelines and for having lied during the investigation.

One of the factors the courts will take into account is whether the employee was given an opportunity to respond to the allegations against him or her. This means conducting a proper investigation and providing the employee with a full opportunity to be heard. Only after considering the employee's defence and all the other factors should you determine the course of action appropriate to the circumstances. In other words, don't meet with the employee to hear his or her version of events with a prepared termination letter in hand.

It is also important to be candid about the reasons for termination. If you are planning on asserting cause for termination then you should advise the employee of this decision during the termination meeting and then ensure that all subsequent communications support this (i.e., the termination letter, Record of Employment, etc.).

After Acquired Cause

Both at common law and under ESA, employers can rely on information obtained after the employment is severed as grounds for termination with cause. This may occur, for example, where the employee was in a position to prevent the employer from finding out about his or her misdeed while employed, such as a bookkeeper who limits access to financial information.

Damages

Salary and Benefits

Severance should include all compensation the employee would have received if he or she had continued working during the notice period. This includes salary, bonuses and non-discretionary salary increases.

Please note, employee medical benefits must be continued during the ESA notice period (but not the ESA severance period).

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Mitigating Damages

The amount of an employee's overall severance payment will be reduced by any salary or self-employment income earned during the period of notice (with the proviso that he or she must receive at least the ESA notice and severance period). Finding another job would not, however, limit any bad faith damages awarded by a court.

You can structure the severance package such that if the employee finds a job between the end of the ESA notice and severance period, but before the end of the common law notice period, you will give them half of what is left.

Income Tax

Some long service employees may be able to take advantage of certain RRSP and income tax benefits. For example, there is a special RRSP retiring allowance provision for those employees who earned income with the employer prior to 1995. The termination letter should make reference to this fact and offer to tax structure the severance payments to the extent legally possible and if desired by the employee.

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About Lauren Bernardi

Lauren is a lawyer and human resource advisor with the Mississauga firm of Bernardi Human Resource Law. Lauren's advisory, training and educational services help managers direct their human resources in a strategically sound and legally appropriate manner. She is an accomplished and entertaining speaker on management and human resource issues.

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