

## **A Guide to Termination:**



## **Northwest Territories and Nunavut**

# A Guide to Termination: NWT

## Contents

Executive Summary .....	3
A Guide to Effective Terminations .....	3
Terminations for Cause .....	4
Performance Issues .....	5
Progressive Discipline Process .....	6
Terminating the Poor Performer .....	7
Reduction in Workforce .....	8
The Termination Meeting .....	8
After the Termination Meeting .....	11
Administrative Details .....	11
Damage Control.....	12
Conducting Exit Interviews .....	12
Providing proper severance packages.....	13
Things to Avoid .....	13
Termination and the Law .....	14
Current Canadian Termination Legislation* .....	15
In Summary .....	18
Federal Termination Standards .....	20
Group / Collective Terminations - .....	22
Northwest Territories and Nunavut Termination Standards .....	25
Group / Collective Terminations .....	27

## **HRdownloads Guide to Effective Terminations**

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### **Executive Summary**

Terminating an employee, for any reason, can be a very stressful situation for both managers and human resources personnel. Job loss is a major event for an employee and the loss of an employee can have a significant impact on the team or department, as well.

Proper preparation prior to the termination can help to ensure it is done in a way that allows the employee(s) to leave with dignity, while mitigating risk to the organization. It is also important to maintain confidentiality about the reason for termination, while providing sufficient information to the staff to minimize disruptions internally. This requires preparation, and possibly scripting, to assist managers with dealing with awkward questions about the situation.

Sometimes, it is necessary to eliminate a position that has become redundant, or layoff employees due to business slowdowns. Other times, terminations may be due to poor performance or inappropriate conduct. Regardless of the reason, it is important to terminate the business relationship in a professional manner, with appropriate notice, and in a way that meets at least the minimum legislative requirements for your jurisdiction.

No matter how much preparation you do, or how many policies or procedures you put in place, terminating an employee is never a pleasant task. Even though there are many steps you can take to make the process more effective and efficient, and you may get better at handling these uncomfortable situations, most managers and human resources personnel still consider it to be one of the least liked parts of the job.

### **A Guide to Effective Terminations**

With every hire an employer makes there is the potential that the employer may have to terminate that hire in the future due to circumstances which may or may not be within the employer's control.

Such terminations can be very expensive and damaging to the organization if not managed properly.

The key to managing the risk of expensive and damaging terminations is not too dissimilar to managing certain insurance risks—it's about prevention and process.

The best prevention is to have a solid foundation in human resource practices:

- Enter into easy to understand written contracts with all of your employees before they start, which would include, in the context of this discussion, a defined job description and expectations, a probationary period and termination provisions, including a defined notice period in the event of a termination without cause. It is also very important that your employment contracts comply with the applicable employment standards legislation to ensure their enforceability. Use HRdownloads' [Sample Employment Contracts!](#)
- Have a clear and easy to understand employee Policies and Procedures Manual (including a performance improvement policy), require your employees to read it and understand it, and make it easily accessible to all. Where possible, the policy manual should be incorporated into the employment contract by reference. Use HRdownloads' [Employee Manual 2010.](#)
- Apply all policies in a fair and consistent manner to all staff. This also helps with keeping up staff morale and avoids condoning inappropriate behaviour, which may come back to haunt the firm at a later date.
- Perform regular performance appraisals, refer back to expectations set out in the contract, and, in particular, consult and interact with the staff in question on matters which may require improvement.
- Have a defined process for handling poor performance and inappropriate behaviour. This process should include meeting with staff in question, defining the corrective action to take, clearly outlining the future expectations, offering assistance for improvement, outlining the consequences for non-improvement and documenting your efforts. Establishing a paper trail will act as support for your corrective action, up to and including termination. Also, the act of documenting will force you to confront the issue(s) and deal with the consequences of the actions you are contemplating. That being said, build flexibility into policies and avoid lockstep procedures and hard to follow policies.
- Utilize HRdownloads' Corporate Policies when drafting policies and procedures that comply with applicable laws (see tables below for applicable provincial legislation).

Nevertheless, not all terminations can be prevented!

## **Terminations for Cause**

Every employment relationship is a contract—written, oral, and implied or some sort of combination. Unless indicated otherwise, the employment contract is deemed to be a contract of indefinite duration. The contract, and therefore the employment relationship, can be terminated by the employer either for “cause” or “without cause.”

Where the employment relationship is terminated without cause, the employer must provide the employee with working notice of termination, pay in lieu of notice of termination, or a combination of notice and pay in lieu of notice.



Some terminations result from matters beyond your control, i.e. serious breaches by the employee of his or her employment obligations. The law recognizes that employers have the right to summarily dismiss employees without notice or pay in lieu of notice where they have just cause (or “cause”).

“Cause” is narrowly defined and can include:

- gross insubordination;
- theft;
- conflict of interest;
- breach of company policy;
- breach of fiduciary duty;
- failure to act in the best interest of the company;
- poor job performance (once advised of the necessary standard and given the opportunity to achieve the standard);
- and similar sorts of conduct.

While there are various types of misconduct that may give rise to cause, in determining whether cause exists, the employer must consider the nature and extent of the misconduct, the surrounding circumstances and whether dismissal is warranted in those circumstances. Because cause is a high standard to establish, when faced with misconduct that may give rise to cause, immediate action is required, including:

- Determine if a termination for cause is supportable and how to carry out the termination properly.
- Investigate the circumstances/incident and collect the appropriate evidence independently.
- Conduct necessary interviews, including an interview with the employee in question - allow the employee an opportunity to respond to the circumstances/incident.
- Document the breach and the action to be taken in a letter to the employee.

## **Performance Issues**

When you first hire an employee, it is important to set out your expectations so that the employee knows the standards to be met, and you have a standard of performance to measure against. Ongoing feedback is the key to ensuring the employee knows how they are doing, and has the opportunity to improve performance or seek additional training when performance is lacking.

Whether formal or informal performance reviews are conducted, it is important to document all reviews and provide a copy of your notes to the employee. For informal sessions, this can be done by a simple email summary of the discussion.



Upon the first signs of poor performance, you should take action. You can start with a conversation with the employee to determine if there is an underlying problem affecting work performance. However, you should review your company's policies to ensure that the steps you take are in line with such policies, as well as the employment offer letter or collective agreement.

Establish reasonable standards of conduct and clearly communicate this to the employee. These standards should be provided in writing, stated clearly, and should contain a place for the employee to sign as acknowledgement of receipt and understanding. Encourage the employee to ask questions if anything is unclear. These written standards should also include mention of the fact that failure to adhere to policies or uphold standards could eventually lead to termination. Signing such a document often helps the employee to recognize the severity of the situation and the commitment they are making to improve their performance or behaviour.

All communications with the employee should be documented, including the date and time of the discussion, and any feedback provided during the meeting. If you suspect a meeting will go badly, or just want moral support, it is a good idea to have someone else present in the meeting. However, since all discussions should remain confidential, it is not appropriate to include the employee's colleagues in the meeting, but possibly another manager or Human Resources representative.

## **Progressive Discipline Process**

In the event that an employee violates company policy, exhibits problematic behaviour, or underperforms as per expected standards, a system of progressive discipline should be utilized.

Generally, employees are provided three opportunities to correct the undesirable behaviours, with the final step being severance of the employment relationship. Reference to the progressive discipline process often occurs even before an employee joins your organization. Some employment contracts specifically state the steps to be included in the disciplinary process, and the obligations for both the potential employee and the employer when terminating the employment relationship. Similar information is often included in the employee handbook, provided to the employee either prior to joining the organization or during the orientation session. For more information about disciplinary procedures, refer to the HRdownloads [Progressive Discipline Policy](#).

In general, the steps in the disciplinary process include:

- Verbal Warnings;
- Written Warnings;
- Suspension With/Without Pay; and
- Termination.



The verbal warning is usually the first step in the disciplinary process. Although it is a verbal warning, you should document the date, time, and details of the conversation with the employee.

Make note of the incident or undesirable behaviour and any recommendations made during the discussion. This provides a paper trail for further disciplinary action.

The second step in the process is usually the written warning, implemented when the verbal warning did not achieve desired results or when the behaviour is of a more serious nature. In addition to documenting the information above, as used for the verbal warning, this also details the corrective actions to be taken and serves as a final notice that such behaviour cannot, and will not, be tolerated. It also states that further deterioration of performance, or incidence of undesirable behaviour, can result in termination of employment.

Some companies will use suspensions as a third step in the disciplinary process. Suspensions can be paid or unpaid time away from work to allow the employee to think about his or her behaviour and decide how to rectify the situation rather than face termination. You should always review local legislation regarding the impact of unpaid suspensions, as this can sometimes be viewed as constructive dismissal. Different rules are also applied depending on whether the workplace is a unionized, or non-unionized, environment.

## **Terminating the Poor Performer**

Despite a well-managed performance improvement process, sometimes termination is inevitable.

Poor performance should have been documented in performance appraisals, and the guidelines and reasons under which these appraisals are made should be open knowledge to the employee thus giving the employee an opportunity to improve performance.

If the employee's performance does not improve to company standards after documented discussion on the matter, formal disciplinary action should be taken. Ensure that procedures are fair and proportional with regards to the infraction and consult the HRdownloads Advisory Department if there is any doubt.

Terminating an employee for cause based upon poor performance should occur only after the employee has received adequate written warning clearly identifying that his or her employment is in jeopardy and has been given a reasonable chance to improve their job performance.



Even still, depending upon the circumstances, a termination for cause may not be supportable.

Even if cause does not exist, an employer can decide to terminate the poor performer without cause provided it complies with any statutory, contractual and/or common law obligations it may owe to the employee in relation to that termination. Sometimes terminating the poor performer prior to having cause is a necessary business decision.

## **Reduction in Workforce**

Reductions in Workforce (RIF) occur when employees are terminated through no fault of their own.

A RIF constitutes a without cause termination and therefore an employer is required to provide notice or pay in lieu of notice (and potentially severance pay) to employees.

Reasons for RIFs may include economic downturn; decreases in sales or production for reasons other than economic downturn, such as loss of market share; technological change rendering jobs obsolete; relocation of the business; sale, merger or takeover of the brokerage; or changes in the structure of the brokerage or the marketplace.

When a company is in the position of having to terminate employees as part of a RIF, careful advanced planning is required. Depending upon the province and the number of employees affected, employers may have additional statutory obligations.

Open communication with employees affected by a RIF will also act to decrease the risk associated with the terminations. Specifically, employees are more likely to accept the fact that they have been terminated when it is part of a RIF—employees will feel like they have been treated more fairly if they know that it is the job that has become redundant, not the employee. Open communication with those employees who remain following a RIF will also be important from an employee morale standpoint going forward.

## **The Termination Meeting**

### **Preparation Time**

It is important to take time to review the personnel file and any previously documented meetings before the actual termination meeting. Think carefully about what would be appropriate to say and try to avoid anything that may be considered inappropriate. You may think that the employee is lazy, for instance, but that would not be appropriate to say during this discussion. Stick to the facts, avoid personal or character attacks, keep your emotions in check, and try to keep the meeting as brief as possible. When an



employee is being released from a middle management or senior management position you may wish to consider having an “Outplacement Councilor” on site to assist in this transition.

Since termination meetings can be very emotional, be prepared with a checklist of company property that must be obtained from the employee such as desk keys, cell phone, and security pass. You don't want to forget any of these important items if the discussion does not go as well as expected.

A terminated employee will go through a range of emotions. You should be prepared with a box of tissues, a glass of water, and even money for a taxi home if the individual is too shaken up to drive. Even extending such an offer can go a long way to showing support for the employee.

## Treatment of the Employee during the Termination Process

Termination meetings should be carefully thought out and planned. In most cases, the disciplinary process has been carried out, or previous discussions have taken place, and the employee should be very aware of the circumstances leading to the termination. A termination checklist can help to ensure that all steps are carried out in the proper sequence, and nothing gets overlooked during the emotional part of the process. Consider using the HRdownloads' [Checklist for Employee Departure](#).

The meeting should take place in a private office or meeting room that is free of distraction. If you feel that the meeting will be very difficult, or the employee has been known to demonstrate violent behaviour, security staff should be on guard or available to offer assistance, as required. You may also want another manager or human resources representative to be present for morale support.

The timing of the meeting is also important. It is often advisable to avoid terminations on Fridays because it can be difficult for the employee to seek legal advice or support services over the weekend. Terminations should be conducted at the beginning of the shift so that the employee doesn't later feel resentful for having worked a full day and then being terminated at the end of the shift. It is also easier for those involved in delivering the termination letter as you don't have to spend the day stressing about how the meeting will go, and it also allows time throughout the day to address the remaining employees.

The written termination letter should be prepared before the meeting and provided to the employee promptly. The discussion should start by stating that the decision is final and you are not here to discuss it. Clearly state the effective date of the termination, whether immediate or at some later date, and the reasons for this decision. There is no need to go into a detailed description of the reasons, or rehash previous discussions – if the disciplinary process was carried out effectively, then this discussion should not



come as a surprise to the employee. You should, however, be willing to answer any questions about the process as the employee reacts to the termination. This reaction is often based on fear and anxiety, so show empathy towards the situation. Termination can be detrimental to an employee's financial circumstances, and significantly impact their family and even their health.

If the reasons for termination are based on economic decisions, it is important to reassure the employee that it has nothing to do with their performance. Offer to provide a reference, or even prepare a reference letter, to assist with future job searches.

An effective termination meeting allows the employee to preserve dignity, while providing as smooth a transition out of the organization as possible. Even the most experienced managers find termination meetings to be a source of stress and anxiety, but planning for the meeting and following a well-designed process can help to alleviate costly mistakes. It is also recommended that you keep the meeting as brief as possible, to reaffirm that the decision has been made and talking about it will not change your mind. Be very cautious to avoid saying anything that can be used against you in any future legal proceedings.

After the meeting has ended, you will want to document how the meeting went for your records and retain these notes for reference should the former employee take legal action.

## Employee Questions

Employees may be overwhelmed by the situation and may not be thinking clearly. Be prepared to answer a number of questions. The employee may be concerned about tying up loose ends for work in progress, may want an opportunity to say good-bye to colleagues, and will want to collect their personal belongings. You should have a plan for how to address these aspects of the situation before the termination meeting begins.

Other questions the employee will have will be about the financial consequences of your decision. The amount of the final payment, including vacation pay, severance pay, payment in lieu of notice, and accumulated sick time should be available to discuss with the employee, if payment is not enclosed with the termination letter. Also, provide a copy of the Record of Employment (ROE), or commit to the date it will be available and agree on how you will provide the ROE to the employee.

The employee may be concerned about future references from the company. Again, depending on the circumstances, you may want to provide a reference letter, or offer to provide a reference to assist with the employee's job search.



## **After the Termination Meeting**

### **Outplacement Services**

One way that employers try to assist employees impacted by involuntary job loss is by providing outplacement services. Such services typically include onsite termination support, career counseling, skills analyses, resume and interview preparation, job search and job placement assistance. The intent is to help the former employee transition from their previous job into the next phase of their career. The employer will generally offer such services as part of a severance package and pay all resulting costs.

Often, the outplacement counselor is invited to be present, or onsite, at the time of the termination meeting to offer support to the employee and ensure the employee has safe transportation home. At this time, the counselor will set up a next meeting with the employee to offer continued support for their job search. In assessing the individual's skills, it is possible to help the former employee seek out positions better suited to their abilities and build a successful career.

### **Appropriate Communication Strategies**

Once the termination meeting has concluded, the next step is to advise staff, and possibly clients, of the employee's departure. It is critical that details regarding employee discipline and terminations are discussed only with those who absolutely need to be aware of the situation and the information shared must be limited to what that individual needs to know. Conversations with other department personnel and clients should never disclose facts about the reasons for termination, or that the former employee was in fact terminated. Simply state that the employee is no longer with the company and provide information about who to contact for tasks previously completed by that individual.

## **Administrative Details**

Upon terminating an employee, it is important to ensure that everything is secure—office premises, IT network, staff, and the terminated employee. Maintain security of your physical premises by obtaining any passwords and keys that were handed over to the employee. Lock out their user name and change any passwords they may have had to ensure security of your IT system.

In order to ensure security of your HR staff, have two people in the termination meeting.

If there is any question as to the security of the terminated employee as they leave the premises, arrange a ride home for them.



Other things to remember to take back: company credit cards, company car keys, company ID, business cards, equipment (laptop, cell phone), and material (handbook, brochures).

## **Damage Control**

Now that you've terminated an employee, take precautionary steps to uphold your company's reputation and employee morale. When the front desk takes messages, make sure that they avoid long pauses and poor explanations—perhaps have a standard phrase used whenever an employee leaves the company.

Other employees who will be taking over the terminated employee's duties or files should be informed immediately so that they are aware of the situation when clients call.

In some cases, subject to maintaining the confidentiality of the termination, it may be prudent to contact clients to let them know of the staffing change (who, when, how).

Lastly, take into account the possibility of harm to other employees' morale that the termination may cause and take steps to counteract that, such as open communication about the situation (while respecting confidentiality) and taking feedback from other employees about the situation.

## **Conducting Exit Interviews**

Voluntary terminations can become very expensive for an employer so it is important to identify the reasons employees are leaving the organization. Exit interviews are a great way to obtain feedback from employees at a time when they are willing to be very honest and feel they have nothing to lose from a candid discussion about their perception of the organization, management, and their position. Such interviews are often conducted when employees voluntarily terminate employment, but some organizations conduct exit interviews with all departing personnel regardless of the circumstances.

Although some employees may be bitter upon leaving the organization, exit interviews can identify trends such as poor management, ineffective compensation strategies, or undesirable working conditions that result in higher turnover. Such information can help human resources personnel to review and revise policies, work with management to improve performance, or revise job descriptions or working conditions to help reduce turnover rates.

## Providing proper severance packages

An employer has the right to terminate employment at any time, for any reason, as long as it does not breach an employment contract or collective agreement, and is done within legislated parameters. When an employee is being terminated without “just cause”, non-unionized employees are eligible to receive reasonable notice of termination or payment in lieu of notice.

Please reference provincial employment standards legislation with respect to the requirement to maintain benefit coverage during required Notice periods.

In cases where the employee has engaged in behaviour that can be considered “cause” for dismissal, employers are generally not required to provide payment in lieu of notice. It is important to know, and understand, the employer’s obligations under the Employment Standards Act. If the minimum payment is not provided, the employer can face further damages over and above the legislated payment for “in lieu of notice”.

Under the employment standards legislation, the minimum notice ranges from one week to eight weeks. The notice period, or amount of compensation in lieu of notice, is based primarily on the service period with the employer. Some jurisdictions also require individual severance pay for employees who meet specific criteria. Other factors such as the age of the terminated employee and the position held can become a critical part of the equation, especially if challenged for wrongful dismissal.

Sometimes, the savings on salary expenses from the termination is lost when legal costs are escalated, so it may be in your best interest to pay slightly more than the required amount up front and avoid legal action. You can refer to the HRdownloads [Severance Policy](#) for more information.

## Things to Avoid

In the course of terminations, know what to avoid in order to make the process run as smoothly as possible:

- Steer clear of emotional reactions by management;
- Don’t overreact to unverified information;
- Don’t get into an argument with the employee;
- Don’t allow someone without authority to act;
- Avoid rushing into things—take time to prepare for the interaction but interact. Don’t “chicken out”—stick to process;



- Don't bypass your written policies, this creates a bad precedent and possible grounds for legal action by the terminated employee, so make sure you follow your own rules;

Always treat the employee with dignity and respect.

## **Termination and the Law**

Termination of employment has always constituted an important part of labour law. "Damage actions by salaried employees alleging wrongful dismissal account for the vast majority of reported court decisions dealing with the individual employment relationship."

The statutory provisions of notice of termination of employment take their origins in the breach of contract rules in common law or in very similar rules of Quebec civil law. A person who is employed for an indefinite term, and whose employment is terminated for reasons other than disciplinary, is entitled under common law to a period of reasonable notice prior to termination, or to an amount of pay that he or she would have received if he or she had worked for that period. The courts have determined the period of notice that would have reasonably been required on the facts of each case. In doing so, they have considered the nature of the work, the length of service of the employee, age, experience and training and on an assessment of how long a person in the plaintiff's line of work and with the same attributes would need in order to find another suitable job. Employees doing work requiring little skill or responsibility have been considered to be entitled to shorter notices, while professional and managerial employees usually command longer periods.

The advent of employment standards legislation altered and expanded the protection afforded to blue collar and low-skilled workers. While the statutory notice periods are to be treated as minimal, and do not pre-empt the right to longer reasonable notice periods, they have more relevance for the vast majority of employees than any rights they may have at common law.

When an employee has been dismissed without notice or without pay in lieu of notice, he or she becomes a creditor with a claim for wages against his or her employer. The employee may, in most jurisdictions, initiate an ordinary civil action to recover the amount due. To do this he will have to seek out legal advice and wait out the time required to get to trial, to obtain a judgment, and to execute on the judgment, before receiving his money. Since the costs recovered in a successful action do not cover all the costs of the action, it is uneconomical to bring a civil action for amounts not measured in the thousands of dollars. Because the amounts involved are usually much smaller in the case of an employee with little skill or responsibility, a civil action to recover them is not a practical solution. An action in a small claims court may mitigate some of these difficulties, but there may still be a need for legal advice and the delays to



settle the matter would be lengthy. Above all, the process of execution would be just as cumbersome.

Legislation generally empowers an Employment Standards Officer to investigate employee claims and encourages an amiable settlement between the parties involved. Failing such a resolution, the director of employment standards can issue a certificate of unpaid wages, which, once registered with the clerk of the court of first instance of the province in question, becomes enforceable as a judgment of that court.

Large scale group terminations create special economic problems in the regions affected and government authorities must be sufficiently warned so they may attempt to alleviate the negative consequences of mass layoffs through cooperation with the parties involved.

## **Current Canadian Termination Legislation\***

\*(for specific regulations, please refer to the provincial regulations)

All Canadian jurisdictions have legislation requiring an employer to give notice to the workers whose employment is to be terminated for operational or other economic reasons. However, with regard to large scale group terminations, Prince Edward Island is the only jurisdiction in Canada which does not require a minimum notice period of at least four weeks prior to any permanent layoff of a group of employees.

In general, employment standards legislation requires that notice of termination be given to workers who have been employed for three months or more. Most jurisdictions have included exceptions in the legislation from the requirement to give notice of termination, for example, to employees hired for a definite term or task, employees who have been temporarily laid off or dismissed for just cause, employees who have refused reasonable alternate work, or those who are employed under a contract that has become impossible to perform or is frustrated by a fortuitous or unforeseeable events. Additionally, certain categories of employees, such as agricultural workers, domestics, professionals and managerial employees are often excluded from the application of these provisions.

In the cases of both individual and group termination, the employer may give pay in lieu of notice equivalent to the wages the employee would have received during the period of notice he or she would have been entitled to.

### **Individual Terminations**

Normally, the legislation provides for increases in the individual notice of termination period based on the years of service of the employee. For example, the provisions may require one week's notice for an employee who has been employed for three months or



more but less than two years; two weeks' notice where employed for two years or more but less than five; four weeks' notice where employed five years or more but less than 10; and eight weeks' notice where employed 10 years or more.

It is usually prohibited for an employer to make the period of notice coincide with an employee's vacation.

### **Group Terminations**

Notice of group termination of employment is usually served upon the employees involved, and/or upon the trade union, and on the government authorities. The length of the notice period usually increases with the number of redundant employees involved, and can range from four to eighteen weeks.

The legislation usually contains a number of technicalities which may affect the calculation of the number of redundant employees and, consequently, may preclude the application of these provisions. For example, an employee must, in many cases, have been employed for a minimum of three months or more to be counted, and cannot have been employed for a definite term or task. The group of employees must have been employed in the same establishment (usually defined in terms of regional or local operations), and have been terminated within a specified period (usually four weeks).

The legislation usually distinguishes between a temporary layoff and a permanent termination. Generally, a layoff not exceeding 13 weeks, or one exceeding 13 weeks if the employer has advised that it intends to recall the employees within a specified time as approved by the director of employment standards, is not deemed to be a termination of employment. Some jurisdictions nevertheless do not make that distinction and require an employer to give a notice in cases of mass layoffs.

The federal, Manitoba and Quebec legislation requires that the employer must cooperate with the Minister responsible for labour and, under the Canada Labour Code, with the Canada Employment Insurance Commission (CEIC) officials. Alberta, British Columbia, Ontario, New Brunswick, Newfoundland, Nova Scotia, Saskatchewan, the Yukon, the Northwest Territories and Nunavut are jurisdictions that have group termination legislation and, although they do not specifically require cooperation between the employer and the Minister responsible for labour, they nevertheless require that notice of the projected layoff be given to that Minister or to another government official.

In the federal jurisdiction, employer and employee representatives are required, with some exceptions, and in British Columbia, Manitoba and Quebec, employer and employee representatives may be required by the Minister responsible for labour to participate in a joint planning committee whose mandate generally is to eliminate the necessity for the terminations or to minimize their impact on the redundant employees

as well as to assist the terminated employees in obtaining other employment. The adjustment program prepared by the committee would normally tap into early retirement and work sharing schemes offered through various government programs. Such a committee would also work in close cooperation with CEIC and other governmental officials.

### **Other Related Provisions**

The Canada Labour Code also provides for severance pay to employees who have 12 months service or more. Ontario has a similar provision covering employees with five years service or more. In both jurisdictions, severance pay is payable in cases of both group and individual termination of employment provided the eligibility requirements are met.

In addition to the various termination of employment provisions, employment standards legislation in Canada usually makes it illegal to dismiss employees ("illegal dismissal") contrary to human rights legislation, or because of pregnancy, trade union activities, participation in proceedings under industrial relations, employment standards or occupational health and safety legislation, or for garnishment or attachment of wages.

"Unjust Dismissal" clauses must also be added to these "illegal dismissal" provisions, according to the labour standards laws of Nova Scotia, Quebec and the Parliament of Canada.

An "unjust dismissal" provision is a: "...departure from the status quo, both statutory and at common law, in Canada because, (...), it entitles the employee to reinstatement. It gives a right not just to due notice but to the job; a right similar to that enjoyed by employees governed by collective agreements".

The courts had never before recognized reinstatement as being a possible remedy for a dismissal without just cause. The only available remedy, once the employment relationship had been severed by one of the parties, was appropriate compensation for damages, including the remuneration that would, but for the dismissal, have been earned by the employee. The reason invoked by the courts for refusing to consider reinstatement as a possible remedy was simply that the court could not substitute its judgment for that of either party. The reinstatement of an employee to his or her previous position, after the employer/employee trust had been affected to the point of the severance of the relationship, was considered to be beyond the court's ambit.

Because of the fact that the unjust dismissal provisions create a right to the job, the courts reserve this clause for long-standing, loyal employees. An employee in Nova Scotia acquires it only after 10 years of continuous service with the same employer; in Quebec, an employee acquires this right after two years; and under the Canada Labour Code, the unjust dismissal provisions are available to employees who have worked for



twelve consecutive months. In the three cases, these provisions do not apply to employees covered by a collective agreement.

A relatively recent development has been the extension of this legislated direction to the courts (or other authority) to consider the option of reinstating an employee when ruling on a complaint concerning an "illegal dismissal" in contravention of employment standards legislation. The legislation of certain jurisdictions provides that the employment standards officer, the director, or a magistrate ruling on such a complaint may order, among other remedies he or she may impose, the reinstatement of an employee, and the payment of lost wages and benefits.

This direction is often restricted to the violation of specific provisions of the legislation, for example, the maternity or parental leave provisions, contravention of which is deemed to be particularly serious in nature.

Finally, any portion of unused vacation must be paid upon termination of employment during a working year.

## **In Summary**

1. Have written contracts;
2. Document performance standards;
3. Document HR policies;
4. Document workflow standards;
5. Follow a process for performance appraisal, discipline and termination;
6. Comply with all applicable legislation regarding termination, severance and notice.

Not all employment relationships are severed on a voluntary basis which can be very costly for an employer and strategies should be implemented to minimize the loss of valued employees.

Understanding the reasons why employees are leaving your organization, can help to identify changes necessary to improve the overall working environment and retain those top performers that you spend so much time recruiting. The success of hiring a great employee can be short-lived unless the necessary steps are taken to retain this talent.

Terminations caused by poor performance can be disruptive to the department, but are often required to preserve employee morale. Some employers will avoid conflict situations as long as possible, including putting up with inappropriate conduct or poor performance from an employee, rather than starting the disciplinary process. Unfortunately, a disruptive employee, or one that does not seem to pull their weight, can have a negative effect on the rest of the staff.



When employees see that an underperforming colleague is allowed to continue down such a path, the top performers may become resentful and the result can be lower productivity or higher turnover.

Poor performance or inappropriate conduct should be addressed as soon after the incident as possible, or upon noticing deteriorating performance. In some cases, working with the employee can help to turn things around without having to take further disciplinary action. However, if the results are still not acceptable it is critical to act quickly, document all discussions and adhere to legislated requirements for your jurisdiction before terminating employment.

As stated above, terminating employees, regardless of the reason, is not an easy task. However, it is a situation that all managers, and human resources representatives, must deal with from time to time. Avoiding costly legal mistakes, and allowing employees to leave with dignity to pursue the next phase of their career, is the best possible outcome for all involved.

## Federal Termination Standards

Compliant as of March 1, 2010

### Federal –

*Canada Labour Code* (Code) and *Canada Labour Standards Regulations* (Regulation.)

<b>Minimum Written Notice Required (from the Employer)</b>
Two weeks' notice or two weeks' wages in lieu, at regular rate for regular hours. (s. 230, ss. 31, 32 of the Regulation)
<b>Minimum Written Notice Required (from the Employee)</b>
None
<b>Expiration of Notice</b>
Notice expires when an employee continues to be employed more than two weeks after the date specified for termination, except if the employee agrees otherwise in writing. Employment may still be terminated for just cause. (s. 232)
<b>Deadline for Payment of Amounts Owed</b>
Any wages or other amounts to which the employee is entitled under the CLC must be paid within 30 days from the time entitlement arose. Any vacation pay owed to employee must be paid "forthwith" when employment ceases. (ss. 247, 188)
<b>Eligibility Requirements / Exclusions</b>
<b><i>An employer is not required to give notice (or pay in lieu) to an employee who:</i></b> <ul style="list-style-type: none"> <li>• has completed less than three consecutive months of continuous employment; or</li> <li>• is dismissed for just cause. (s. 230)</li> </ul>
<b>Severance Pay</b>
An employee who has completed 12 consecutive months of employment is entitled, in addition to notice of termination or pay in lieu of notice, to either two days' wages for each completed year of employment or to a total of five days' wages (at the regular rate for regular hours), whichever is greater.  However, an employer is not required to provide severance pay to an employee who has been dismissed for just cause or who, on ceasing to be employed or before that time, is entitled to a pension under a registered pension plan contributed to by the employer, or to a pension under the <i>Old Age Security Act</i> , the <i>Canada Pension Plan</i> or the <i>Quebec Pension Plan</i> . (s. 235)
<b>Unjust Dismissal</b>
An employee who has completed twelve consecutive months of continuous employment with an employer and who is not a manager or a member of a group of employees covered by a collective agreement may make a complaint in writing to an inspector if he/she has been dismissed and considers the dismissal to be unjust.



Subject to certain exceptions, the complaint must be made within 90 days of the date of dismissal. On receipt of a complaint, an inspector is assigned to assist the parties in trying to reach a settlement. Should a complaint not be settled within a reasonable period of time, the complainant may request in writing to have it referred to an adjudicator appointed by the Minister of Labour. However, no complaint may be considered by an adjudicator where a procedure for redress is provided elsewhere in any Act of Parliament, or where the cause of the complaint is a layoff because of lack of work or the discontinuance of a function.

An adjudicator who decides that a dismissal was unjust may order the payment of compensation (equivalent to no more than the amount of remuneration that would have been paid to the person, but for the dismissal), order a reinstatement, or order to “do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal”. Any order is final and may not be questioned or reviewed in any court. (ss. 167(3), 240-243)

### **Illegal Termination**

An employer may not dismiss, suspend, lay-off, demote or discipline an employee who exercises his/her rights under the Code’s reassignment, maternity leave, parental leave or sick leave provisions. Nor may an employee be dismissed or laid off because of pregnancy or on the ground that garnishment proceedings may be or have been taken. (ss. 209.3, 238, 239)

### **Continuity of Employment (Transfer of Establishment)**

Where any particular federal work, undertaking or business, or part thereof is transferred from one employer to another by sale, lease, merger or otherwise, the employment of the employee, before and after the transfer, is deemed to be continuous with one employer, notwithstanding the transfer. (ss. 189, 234)

Moreover, an employee’s continuity of employment is deemed uninterrupted by a layoff that is not a termination or by an absence from employment permitted or condoned by the employer. (s. 29 of the Regulation)

### **Other**

#### ***A layoff is deemed to be a termination unless:***

- it is a result of a strike or lockout;
- it is for a term of twelve months or less and the layoff is mandatory by virtue of a minimum work guarantee in a collective agreement;
- it is for a term of three months or less;
- it is for more than three months but the employee is given notice at or before the time of layoff that he/she will be recalled within six months of the layoff’s start;
- it is for a term of more than three months and the employee continues to receive payments from the employer, the employer continues to make payments regarding a registered pension benefits plan or a group or employee insurance plan, the employee receives supplementary unemployment benefits, or the



employee would be entitled to receive such benefits but is disqualified under the *Employment Insurance Act*, or

- the layoff is for a term of more than three months but not more than 12 months and the employee maintains recall rights in accordance with a collective agreement. (s. 230(3); s. 30 of the Regulation)

**Notice to trade union:** where an employee bound by a collective agreement and whose position becomes redundant is authorized to displace an employee with less seniority, the employer must give at least two weeks' notice in writing to the trade union and the employee whose position becomes redundant and post a copy of the notice in a conspicuous place within the industrial establishment in which the employee is employed. Alternately, the employer may, as a result of the redundancy of the position, terminate the employment, if the employee is paid two weeks' wages at his/her regular rate of wages. (s. 230(2))

**Conditions of employment:** an employer may not reduce the rate of wages or alter any other term or condition of employment of an employee to whom a notice of termination has been given, except with his/her written consent. Furthermore, the employer must, between the time when the notice is given and the date of termination, pay to the employee his/her regular rate of wages for his/her regular hours of work. (s. 231)

## Group / Collective Terminations -

<b>Number of Employees Terminated</b>	50 or more employees in an industrial establishment within 4 weeks
<b>Minimum Notice</b>	16 weeks before termination date of first employee in group whose employment is to be terminated
<b>Person(s) to whom Notice Must be Given</b>	Minister of Labour  <i>Copy of any notice</i> given to Minister must be given immediately to: <ul style="list-style-type: none"><li>• Minister of Human Resources Development</li><li>• Canada Employment Insurance Commission</li><li>• Trade union representing a redundant employee</li><li>• Where redundant employee not represented by trade union:</li></ul>



	<ul style="list-style-type: none"><li>• to employee; or</li><li>• immediately posted in conspicuous place in industrial establishment where employee is employed</li></ul>
<b>Content of Notice</b>	<ul style="list-style-type: none"><li>• Employer's name</li><li>• Location(s) of terminations</li><li>• Nature of employer's industry</li><li>• Date(s) on which terminations are to occur</li><li>• Estimated number of employees in each occupational classification whose employment will be terminated</li><li>• Name of any trade union certified or recognized as affected employees' bargaining agent</li><li>• Reason for termination</li></ul>
<b>Establishment of Joint Planning Committee</b>	Required after employer gives notice to Minister Exceptions exist for certain unionized employees
<b>Other</b>	<p><i>Other Notices:</i> A written statement to each redundant employee, no later than two weeks before the termination date, setting out, as at that date, vacation benefits, wages, severance pay and any other benefits and pay arising from the employment.</p> <p><i>Waiver of Group Termination Provisions:</i> On the submission of any person, the Minister may, in specified circumstances, waive any or all group termination provisions with respect to any industrial establishment or any class of employees therein.</p> <p><i>Exemption from Termination Provisions:</i> Employers are exempt from the application of all group termination provisions with respect to employees employed on a seasonal basis or on an irregular basis under an arrangement whereby they may elect to work or not when requested to do so.</p> <p><i>Layoff:</i> A layoff is deemed to be a termination, except in specific circumstances.</p> <p><i>Severance Pay:</i> An employee who has completed 12 consecutive months of employment with an employer is entitled, in addition to notice of termination or pay in lieu of notice, to the greater of:</p> <ul style="list-style-type: none"><li>• 2 days' wages (at the regular rate for regular hours of work) for each completed year of employment; or</li></ul>



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- 5 days' wages (at the regular rate for regular hours of work)

## Northwest Territories and Nunavut Termination Standards

Compliant as of March 1, 2010

### Northwest Territories and Nunavut-

*Labour Standards Act (LSA) and Notice of Termination Exemption Regulations*

#### **Minimum Written Notice Required (from the Employer)**

Where an employee has been employed for:

- 90 days or more, but less than three years: two weeks;
- Three years or more but less than four: three weeks;
- Four years or more but less than five: four weeks;
- Five years or more but less than six: five weeks;
- Six years or more but less than seven: six weeks;
- Seven years or more but less than eight: seven weeks;
- Eight years or more: eight weeks. (s. 14.03(2))

Instead of giving notice, an employer may pay termination pay to the employee. The amount of termination pay must be equal to the wages and benefits to which the employee would have been entitled had he/she worked his/her usual hours of work for each week of the required notice period. (ss. 14.03(1),(4))

The period of notice may not coincide with the annual leave of the employee whose employment is being terminated. (s. 14.03(3))

#### **Minimum Written Notice Required (from the Employee)**

None

#### **Expiration of Notice**

Notice of termination is void and of no effect if an employee continues to be employed by his/her employer after the date of termination specified in the notice of termination. (s. 14.09)

#### **Deadline for Payment of Amounts Owed**



The employer must, within ten days after termination of employment, pay to the employee all wages owed. Any vacation pay must be paid to the employee without delay. (ss. 19, 50(3))

## **Eligibility Requirements / Exclusions**

***The following are excluded from coverage under the LSA:***

- trappers;
- persons engaged in commercial fisheries;
- members or students of designated professions.

Furthermore, the LSA's notice of individual termination provisions do not apply to employees employed:

- in the construction industry;
- for less than 180 days in a year, seasonally or intermittently;
- for less than 25 hours a week; or
- for a definite term or task not exceeding 365 days at the end of which employment is terminated. (s. 2(3), s. 1 of the Regulation)

***No notice of termination (or pay in lieu) is required where an employee:***

- has been employed by his/her employer for a period of less than 90 days;
- is temporarily laid off;
- is terminated for just cause;
- has refused an offer by the employer of reasonable alternative work;
- following a temporary layoff, does not return to work within seven days after being requested in writing to do so by the employer. (ss. 14.03(1), 14.04)

## **Severance Pay**

N/A

## **Illegal Termination**

An employer may not terminate or unilaterally change a condition of employment of the employee because of the employee's pregnancy or because the employee has requested, is on or has taken pregnancy or parental leave in accordance with the LSA. (s. 38)

An employer or any other person may not terminate, threaten to terminate or restrict the employment of a person or discriminate in any way against a person because the person, either on his or her own behalf or on behalf of another employee, has made a complaint under the LSA, has given evidence or may give evidence at any inquiry or any proceedings or prosecution under the LSA, requests anything to which he/she or another employee is entitled under the LSA, or has made or is about to make any statement or disclosure that may be required of the employee under the LSA.



(s. 67.1(1))

## **Continuity of Employment (Transfer of Establishment)**

For the purpose of the LSA's annual vacation provisions, where any industrial establishment in which an employee is employed is sold, leased, merged or otherwise transferred to another employer, the employment of the employee is deemed to be continuous with one employer, despite the transfer. (s. 20)

For the purpose of the LSA's termination of employment provisions, where an employee has been employed by the same employer more than once, those periods of employment are deemed to be one period of employment if not more than 90 days have elapsed between each period of employment. (s. 14.02)

## **Other**

**Constructive termination:** a Labour Standards Officer may declare that an employer has terminated the employment of an employee if satisfied that the employer has substantially altered a condition of employment to discourage the employee from continuing his/her employment. (s. 14.08(2))

**A layoff is deemed to be temporary if:** it does not exceed 45 days in a period of 60 consecutive days; it exceeds 45 days, but the employer recalls the employee to employment within a time fixed by the Labour Standards Officer. (s. 14.01)

**A layoff is deemed to be a termination if:** the employer has not given a written notice of temporary layoff, indicating the expected date of return to work, to the laid off employee; or the layoff exceeds the maximum duration for a temporary layoff. In the latter case, the employee's employment is deemed to have been terminated on the *last* day of temporary layoff and termination pay must be paid by the employer. (ss. 14.05(2), 14.06)

**Conditions of employment:** once notice of termination is given, the employer may not reduce the wages or rate of wages or alter any term or condition of employment of the employee concerned. The employer must also pay the wages and benefits to which the employee is entitled, between the date notice is given and the date of termination. (s. 14.08(1))

## **Group / Collective Terminations**

<b>Number of Employees Terminated</b>	25 employees or more within 4 weeks
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<b>Minimum Notice</b>	25-49 employees: 4 weeks 50-99 employees: 8 weeks 100-299 employees: 12 weeks 300 employees or more: 16 weeks
<b>Person(s) to whom Notice Must be Given</b>	Labour Standards Officer
<b>Content of Notice</b>	<i>Not specified</i>
<b>Establishment of Joint Planning Committee<sup>1</sup></b>	<i>Not specified</i>
<b>Other</b>	<p><i>Individual Notice of Termination:</i> Individual notice of termination, under the LSA, must also be given to each affected employee.</p> <p><i>Employment Continued After Expiry of Notice Period:</i> Notice of termination is without effect if the employee's employment continues beyond the expiry of the notice period.</p> <p><i>Expiry of Notice:</i> No termination may take effect until the required notice period has been completed.</p> <p><i>Maintaining Working Conditions:</i> Once notice of termination is given, the employer must maintain the working conditions.</p> <p><i>Layoff:</i> If the employer fails to give the employee notice of temporary layoff, the employee is deemed to have his/her employment terminated.</p>