

14 PRE-TERMINATION TIPS FOR EMPLOYERS [of non-unionized employees in Ontario]

1. Always seek legal advice before moving forward with a dismissal, a suspension (even with pay), or changing an employee's duties, role, compensation, supervisor, or location of work if you do not have an enforceable contractual right to do any of the above unilaterally. Otherwise, doing so can result in an unintentional constructive dismissal and corresponding severance obligations.

☞ Before you make a move to terminate, ask about our *Employer Pre-Termination Questionnaire*. This best practice helps to ensure you supply us with all relevant facts to assess your situation and present strategies for moving forward.

2. A properly worded and presented employment contract can often limit the amount of pay in lieu of notice (severance) and other amounts an employer must provide, as opposed to what the common law automatically mandates (which is usually greater). Such contracts can also provide greater flexibility in terms of making unilateral changes to an employee's terms of employment without it constituting constructive dismissal.

However, the law concerning employment contracts is increasingly complex. The language in many contracts may not be legally enforceable today even if it was once enforceable, and the employer may not have presented the contract to the employee in a manner that makes it legally enforceable. Therefore, while you should check your contract language to see how much severance you may need to provide, you should still check with an employment lawyer to ensure that the language is still legally enforceable (assuming it was legally enforceable to begin with).

3. Regardless of whether you have an enforceable contract, avoid only offering your employee statutory minimums (what is owing upon termination under the *Employment Standards Act, 2000*) or the amounts set out in the contract (which may or may not be higher) if you are requiring the employee to first sign and return a full and final release. This can expose you to additional legal fees and

damages. You need to offer something more than statutory and contractual entitlements if you want a release.

4. Prior to terminating an independent contractor, stop and obtain legal advice before moving ahead. Depending on the work arrangements and any written contract, the independent contractor may be deemed an employee or a dependent contractor for employment law purposes (even if the contractor was content with the arrangement, and regardless of CRA's views). This means you could owe them additional amounts when ending the relationship.
5. Proceed with extreme caution—and call a lawyer first—if the employee you are planning to dismiss:
 - is on a leave of absence, or just returned from one (or they are planning to go on one) for any reason.
 - has any health issues or disabilities, including known or suspected drug and alcohol problems.
 - was hurt on the job.
 - has alleged or insinuated that they were subjected to discrimination, harassment, or bullying.
 - have reason to suspect or believe that that they have been subjected to discrimination, harassment, bullying, even if they haven't complained (and even if you don't have that suspicion or belief but know the employee's supervisor can be a bully, or acts at times in an angry, aggressive, or rude manner).
 - has made a complaint to someone about their legal entitlements, or unsafe working conditions.
 - is a “whistleblower”.
 - is pregnant or trying to become pregnant.
 - Has recently adopted a child or they are trying to do so.
 - is having child-care or other caregiving challenges.
 - has recently suffered a loss in their family.
6. Be prepared that, in most cases, it is necessary to continue group insurance and other benefits for at least the statutory notice period and beyond if the employee still has common law rights or contractual entitlements in this regard (or to provide pay in lieu of benefits if they cannot be extended beyond the statutory period).
7. If you intend to terminate the employee's employment for poor performance or a breach of any policy or inappropriate behaviour, provide your lawyer with full details including written warnings, performance improvement plans, workplace

investigation particulars, disciplinary actions, policies and proof that the policies were communicated to the employee. Do not assume that you can dismiss the employee with cause (without notice or severance), and, even if your lawyer thinks you can, it may not be advisable, and you may still owe minimum statutory amounts.

8. If you are located outside of Ontario, or outside of Canada, don't assume that the laws and customs of your home jurisdiction (and any contracts or policies created according to that law, such as "at-will" employment) have any application to an employee whose employment is governed by local provincial and federal laws applicable to an Ontario workplace. In some circumstances, Ontario and other Canadian laws can also apply where the employee works outside of Ontario.
9. Except in extreme or unwarranted cases that your lawyer can discuss with you, be prepared to:
 - provide a truthful and positive reference letter.
 - pay some amount towards the employee's legal expenses.
 - provide career counselling / outplacement services, or pay in lieu, for long-standing managerial or professional employees.
 - make any payments in an income tax efficient but legal manner, if appropriate.
 - provide outstanding commissions, bonuses and allowances, and to provide them for some period beyond the termination date.
10. With rare exceptions, mandatory retirement does not exist in Ontario. Even if an employee has voiced interest in the past in retiring in the future, do not assume that they were serious or that this relieves you from legal obligations (including under Human Rights legislation) if you now wish to raise the issue with them, or if you are planning on terminating an older employee. Be careful and seek legal advice before using the "R" (retirement) word.
11. If your organization is a non-profit, remember that the same employment laws apply to your organization as apply to businesses when it comes to terminations, even if it does not seem fair to you. Given that non-profits often have limited funds for severance payments, they must exercise caution.
12. Check your emotions. How you feel about your employee in terms of how much severance they will receive is legally irrelevant and will lead to additional costs thrown away in terms of time and money. It will also create more aggravation for you. Judges tend to side with employees, and they will not necessarily share your feelings about your ex-employee as you do.

13. Give at least seven to ten days for an employee to review a termination letter and release and encourage the employee to take the time to review it and give extensions of time limits if asked. Don't pressure the employee to sign on the spot. And assume your soon to be ex-employee will go to a lawyer and try to seek additional severance and more. These days, employees are more likely to seek legal advice about their rights (plus there is a lot of free information available on the internet) and to enforce those rights. It doesn't matter how kind and generous you have been in the past, or what struggles you may be facing as an employer. Once you have terminated an employee's employment, "all bets are off".
14. Termination meetings or calls need to be handled with care. Here are some suggestions:
- You do not need to give advance prior notice of the meeting. If you feel you must, then limit it to 24 hours in most cases. You do not need to indicate what the meeting will be about (and it may be best if you don't).
 - The best (or least bad) day of the week or time of day depends on the employee and the workplace. Discuss this in advance with a lawyer, including how to approach calls and meetings when you are dealing with an employee working remotely during COVID.
 - In non-pandemic times, it should be in-person except for rare situations.
 - Unless working notice is being provided, alert IT ahead of time so that they can take care of ending access to networks promptly after the meeting. And if the employee is working remotely, alert Shipping & Receiving for arranging return of company property.
 - Do not meet or speak with the employee alone. Have an HR professional or the employee's supervisor attend with you. If no one is available for this purpose, your lawyer may be able to arrange for an outside HR professional to sit in, or they can make other suggestions.
 - The person sitting in should take careful notes.
 - Doors should be closed whether it is a meeting or a call.
 - Keep it brief. It is not a discussion, argument or a debate. It is a communication session.
 - Be clear and to the point about what is taking place. Letting an employee go is a difficult situation for any manager or supervisor. A prepared script can be helpful for preparation. For in-person meetings, hand the termination letter (which usually will include a severance package offer) prepared in advance to the employee, and explain that their employment is being terminated effective immediately. Discuss with your lawyer in advance what reasons are being given, or if reasons should be given. For-

- cause terminations require additional considerations so always seek legal advice first.
- If it is a termination call (phone or video), email the termination documentation to the employee immediately after and send another copy by commercial courier.
 - Do not argue with the employee or engage in bargaining, or a discussion of what is being offered for severance.
 - If they get louder, you get quieter—and proceed to promptly end the meeting or call.
 - Consider having a professional from a career counselling / outplacement company present to speak to the employee after you are done.
 - Thank them for their service and apologize (“I’m sorry that things didn’t work out” or “I’m sorry that we needed to eliminate your position”).
 - If this meeting takes place in person, the employee should leave the premises immediately. Offer to pay for a taxi or Uber home, or to help them in any other way.
 - It is best if the employee does not collect their belongings on the termination date. Instead, they should be carefully and promptly returned to them by courier (unless the employee is supervised). Ensure all company property is returned to you ASAP.
 - If you are providing some or all working notice instead of an immediate termination with pay, then additional considerations apply.
 - Be kind. Be dignified. Remember the immortal words of Maya Angelou: “People will never forget how you made them feel.”

These Employer Tips are for educational purposes only and do not constitute legal advice. Use of these Tips and the Tip Sheet does not create a lawyer-client relationship. If you need legal advice, please contact and retain an employment lawyer.

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