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EMPLOYEE TERMINATION "DOS" AND "DON'TS"

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A. INTRODUCTION

Terminating employees is one of the most difficult decisions that employers can make. Boards and managers of charities and not-for-profits need to consider the effects of the termination on the employee, staff, donors and members along with the potential effect the termination may have on the reputation of the organization, should the organization be sued for wrongful dismissal.

As well, when terminating an employee, charities and not-for-profits need to consider the cost to terminate the employee and whether or not they have the financial resources to pay the employee his/her legal entitlements. They must also ensure that they have provided legally adequate notice or compensation in lieu of notice, to the employee. In situations where a termination for "just cause" is being considered, employers must be aware that this form of termination is only reserved for instances of serious misconduct.

There are right ways and wrong ways to carry out a termination and how you handle a termination makes a huge difference in the legal risk. In most cases, employees are legally entitled to a fair and reasonable termination package, either in accordance with their employment contract or with their rights at common law. Carrying out a termination in a proper, fair and professional manner will save an organization the aggravation, stress and embarrassment of having to deal with a wrongful dismissal lawsuit. The purpose of this Bulletin is to provide practical guidance for charities and not-for-profits as to the basics of employee terminations and to discuss some of the important "dos" and "don'ts" of the termination process.

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B. ONTARIO LEGAL FRAMEWORK

Most federally and provincially incorporated charities and not-for-profits are governed by the Ontario *Employment Standards Act, 2000* (the "ESA").[1] The ESA sets out the minimum employment standards which cannot be lessened, even by an agreement between an employer and an employee. These minimum obligations touch on a number of issues, including minimum wage, overtime pay, vacation entitlements, statutory holidays, job protected leaves of absence (such as pregnancy and parental leave) and termination obligations. Only certain types of federal incorporations are covered under the *Canada Labour Code*[2] (e.g. banks, airlines, television and radio stations, interprovincial shipping companies). The *Canada Labour Code* does not apply to federally incorporated charities or not-for-profits, unless the organization falls under the list of enterprises listed in the Code (e.g. a religious radio station).

The ESA requires employers to provide termination notice or pay in lieu of notice, which is calculated based on the employee's length of service as follows:

Length of Employment	Notice Required
Less than 3 months	None
3 months but less than 1 year	1 week
1 year but less than 3 years	2 weeks
3 years but less than 4 years	3 weeks
4 years but less than 5 years	4 weeks
5 years but less than 6 years	5 weeks
6 years but less than 7 years	6 weeks
7 years but less than 8 years	7 weeks
8 years or more	8 weeks

Severance pay is an additional statutory obligation, which is also regulated by the ESA, but only applies to employees who have been employed with the same employer for five or more years and if the employer has an Ontario payroll of at least $2.5 million per year. Severance pay is based upon the number of years and

[1] S.O. 2000, CHAPTER 41
[2] R.S.C., 1985, c. L-2

months of service and may substantially exceed termination pay. The maximum amount of severance pay is equal to 26 weeks of pay, much greater than the maximum amount of ESA termination pay of 8 weeks.

C. EMPLOYMENT CONTRACTS AND TERMINATION PROVISIONS

In drafting employment contracts, organizations must ensure that the terms of the contract do not violate any of the minimum standards set out in the ESA. Employment contracts should have termination clauses that are clearly worded and enforceable and set out termination pay (upon termination on a without cause basis) in order to limit the organization's potential liability. Contractual termination provisions are legally enforceable so long as they meet the minimum statutory requirements of the ESA and are not in violation of any other law, such as the Ontario *Human Rights Code*.[3]

If there is no written employment contract (or the contract does not have a termination clause), then the employee is entitled to common law "reasonable notice" (or compensation in lieu of that notice). Employers must provide reasonable notice, or pay in lieu of notice of termination, when termination is without cause. If a contract does not specify the notice to which the employee is entitled, then a court will determine how much is "reasonable" under the circumstances. A court will review such factors as the employee's age, education, skills, length of service and seniority of their position within the organization and estimate how long it will take the employee to find a comparable new job. This is known as the "reasonable notice period", and these common law notice periods are usually significantly greater than the minimum standards mandated by the ESA.

It is important to note that compensation is not limited to an employee's regular pay. It also includes anything of value the employee would have been entitled to receive during the reasonable notice period including cash bonuses, incentives and commissions; pension plan contributions; group RRSP contributions; group benefits; car allowances; tuition subsidises; club or membership dues; and any other items of value which the employee was receiving while employed.

[3] R.S.O. 1990, CHAPTER H.19

D. THE "DON'TS" OF THE TERMINATION PROCESS

1. Be Careful in Alleging Just Cause

Just cause is the "capital punishment" of employment law. Employers should only allege this if they are quite certain that they will be able to prove that just cause existed in a court of law. The employer has the burden of proof in court, and must prove that reasonable grounds existed to terminate the employee with no notice or compensation.

Only very serious misconduct will be considered just cause (e.g. theft, fraud, assault or sexual harassment, excessive unexplained absences, serious insubordination, conflict of interest). Dissatisfaction with the employee's performance is rarely considered by courts to be just cause for dismissal. Prior to alleging cause, managers and boards of charities and not-for-profits need to carefully assess whether they want to take that position, as terminating for cause substantially increases the likelihood of litigation.

2. ESA Entitlements Do Not Require a Signed Release

Termination pay and severance pay are statutory obligations on an employer. It is not appropriate to require an employee (being dismissed without cause) to sign a full and final release as a condition of being paid the minimum ESA entitlements. If offering more to the employee than the minimum ESA entitlements, then the employer is justified in asking the employee to sign a release, but only for those amounts in excess of the ESA minimums. There are rare occasions when it is appropriate for the employer to require the employee to sign a release in exchange for receiving ESA entitlements, such as when an employer discovers serious employee misconduct that it was not aware of at the time of termination.

3. Do Not Require Employee to Sign a Release for Termination Package on the Day of Termination

A terminated employee should be allowed at least a full week to consider a termination package, as this gives the employee an opportunity to review the package with his or her lawyer and/or financial advisor. Not doing so, could result in a court ruling that the employer put undue and improper pressure on the employee to sign a release, thereby holding that the release and the settlement is not binding on the employee.

4. Do Not Misinform Employees About Their Termination Entitlements

Employers need to ensure that the information they provide to their employees (e.g. group benefit extension or conversion, pension options, accrued but unused vacation) is accurate. Not doing so could result in a court setting aside the agreement on the basis of misrepresentation (i.e. if the employee signed off on a termination package based on incorrect information).

5. Do Not Discuss Matters Regarding the Former Employee

After terminating a troublesome employee, an employer may be tempted to engage in gossip (internally or externally, verbally or online). Discussing the termination of an employee could imply that the employee was dishonest, incompetent or had other negative qualities. If this comes to the former employee's attention, the organization may face defamation claims as well as a wrongful dismissal suit. It is important that employers control the flow of information regarding the departed employee - the less said the better.

6. Do not Refuse to Give the Employee a Positive Reference

Positive (but accurate) references are better than neutral references, which only confirm dates of employment, position, title and duties without further comment. Employers are reminded that a reference may help the employee find a new position more quickly, and thereby limit the organization's legal obligation if a settlement cannot be reached with respect to a termination package.

E. THE "DOS" OF THE TERMINATION PROCESS

1. Do Terminate as Kindly and Respectfully as Possible

It is important that employers avoid saying or doing anything that would give the employee any ammunition in a future legal dispute.

2. Do Consider Giving Working Notice

It is not always necessary (or desirable) to terminate an employee immediately and provide pay-in-lieu of notice. A preferable option may be to have an employer provide an employee working notice (i.e. that their employment will end at some future date). The benefit to the employer is that they have an employee actively working for the duration of the notice period; however, employers need to consider on a case by case basis, whether working notice will be appropriate. An employee who is on working notice may not put

forth the expected effort as he/she may be more concerned with finding a new job than carrying out his/her duties. Also, employers may want the process to end quickly as they may not want an employee negatively affecting the moral of the workplace.

3. Do Consider "Salary Continuation"

Salary continuation is when an employee does not come to work, but continues to receive his/her regular salary and benefits for the duration of the reasonable notice period. The benefit to the employer is that the cost of termination is spread over several weeks or months, compared to an upfront lump sum payment. Salary continuation terminations are quite common, especially with longer term employees with long notice periods.

4. Do Have All the Paperwork Ready

It is important that employers have all the termination paperwork ready for the meeting with the employee. The paperwork should include a termination letter (which will set out the package to be offered) and a full and final release.

5. Do Ensure that Only Those who Need to Know of Termination are Informed

News of an impending termination should not be leaked to the affected employee or any other employees in the organization.

6. Do Select the Right People to Meet with the Employee

When terminating an employee, it is always preferable to have two people meeting with the individual, including their immediate supervisor, unless there is serious conflict between the two. Doing so helps prevent any "he said, she said" situations.

7. Do Hold the Meeting in Private

Meetings should be held in a boardroom or manager's office.

8. Do Be Professional

When terminating an employee it is important to remain professional. Employers should be direct and to the point without engaging in excessive small talk; rehearsing the meeting in advance can aide in a more focused and calm termination meeting. An employee may react negatively and wish to argue his or her case, and if the employee does get very agitated, end the termination meeting gently but firmly.

9. Do Consider Security Issues

Make advance arrangements where necessary. Employers should avoid the "security march to the door" scenario, unless there are serious trust issues with the employee. It is reasonable to ask for a return of all keys and pass cards and to cancel access to all building facilities and equipment (i.e. computer, phone, email).

10. Do Allow Employee to Pack Up Belongings in Privacy

Employers should arrange for a trusted manager or human resources staff person to meet the employee after hours. Do not force the employee to pack up his or her belongings in front of other staff members.

11. Do Exercise Judgment on Whether Employee may Say Goodbye to Co-Workers

Each termination is different and employers should base their decision on the situation and the personalities involved.

12. Do Create a Communications Plan in Advance for Terminations of High Profile Employees

Employers need to cover off how the termination will be announced internally, externally and (if applicable) in the media, if there is the chance that the termination will attract media interest. Do not announce the departure internally or externally until after the employee has been informed.

13. Do Be Conscientious and Responsible About Follow-up Items

Employers need to ensure that any promised payments or termination related documents (i.e. Records of Employment) are issued on time. Ensure the payroll department double checks its calculations for accuracy.

F. CONCLUSION

The termination process requires advance planning and professional implementation. Given this, employers should handle terminations in a very discreet and compassionate manner in order to reduce the risk of litigation. Even so, it is important to remember that an employee may still not be satisfied with their termination package and may retain a lawyer. The vast majority of employee claims however, settle without litigation and those that end up in litigation rarely go all the way to trial (most settle prior to trial).

It is important for charities and not-for-profits to be aware of Ontario employment standards laws and to have a carefully drafted employment contracts, which include termination clauses. It is imperative to have certainty around an employee's entitlements on termination, as it reduces the risk of legal disputes. If there is any question relating to the termination, charities and not-for-profits should seek legal advice beforehand. Employers should ensure that their termination letters and full and final releases are carefully drafted, and that, if an employee accepts a termination package, the settlement is final. Remember, legal disputes can most often be avoided by offering a fair termination package in exchange for the employee signing a full and final release of claims, which in the end helps protect staff members, donor moral and the reputation of the organization.