

Employer Webinar Series: How to Handle Employee Resignations and Dismissals

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Christine Ashton

Dan Condon

Overview

- Employee departures is the main source of HR issues and employment law litigation
- Employers must be careful to properly handle resignations and terminations
- This webinar will review how handle resignations and terminations
- This webinar should not be relied on in lieu of legal advice and you should always consult with your employment lawyer to understand your legal options and obligations

Agenda

1. The importance of written employment agreements
2. How to handle a resignation
3. How to handle a potential with cause termination
4. How to handle the termination and separation package

1) The Importance of a Written Employment Agreement

- The best time for an employer to prepare for the end of the employment relationship is at the outset of the relationship
- To properly protect its interests and to reduce its liabilities, employers should use written Employment Agreements for all its employees

1) The Importance of a Written Employment Agreement

- A written Agreement provides an employer with the following advantages:
 - It permits employers to change terms and conditions of employment without this potentially leading to a constructive dismissal claim;
 - By clearly outlining terms and conditions of employment, it can increase an employer's ability to terminate an employee on a with cause basis or based on wilful misconduct
 - It permits employers to limit its obligations in the event of a without cause termination; and
 - It can allow the employer to impose post-termination restrictions where appropriate

1) The Importance of a Written Employment Agreement

- The areas to be included in an Employment Agreement for an employer to be best placed to handle employee resignations and terminations include the following:
 - Compensation
 - Restrictive Covenants
 - Confidential Information/Intellectual Property
 - Termination
- By including all these terms in the Employment Agreement, an employer can reduce its risks and liabilities, both during the employment relationship and following its end

1) The Importance of a Written Employment Agreement

Compensation

- The agreement should clearly detail all components of the employee's compensation package, including any variable compensation
- If the agreement does not clearly define the basis for calculating an employee's compensation, a dispute and possibly litigation may arise over what the employee is entitled to, or when they are entitled to a payment, especially with respect to variable compensation such as bonuses and commissions

1) The Importance of a Written Employment Agreement

Restrictive Covenants

- An employer may wish to limit an employee's ability to work elsewhere both during the employment relationship and after the relationship comes to an end
- To do this, employers have normally relied on non-competition and non-solicitation covenants
- In December 2021, however, Ontario became the first Province in Canada to ban non-competition covenants for the vast majority of employees

1) The Importance of a Written Employment Agreement

- The only exceptions to the ban are for a person who sells a business and then remains on as an employee or any employee who holds an executive position within a business
- “Executive” has been defined as CEO, President, CAO, COO, CFO, CIO, Chief Legal Officer, Chief Human Resources Officer, Chief Corporate Officer or any other Chief Executive position
- Given the ban on non-competition covenants, non-solicitation covenants have become even more important

1) The Importance of a Written Employment Agreement

- A non-solicitation covenant precludes current employees as well as former employees from contacting the company's clients in order to offer to work for them or provide services directly or indirectly to them
- A non-solicitation covenant can also prevent a former employee from soliciting the company's employees and contractors
- As a non-solicitation covenant is not as restrictive as a non-competition covenant, Courts have always been more inclined to enforce it

1) The Importance of a Written Employment Agreement

- In the aftermath of the general prohibition of non-competition covenants, Pay-If-You-Compete provisions have become somewhat more popular. A Pay-If-You-Compete provision provides that the worker may compete, but if they do they then have to pay a predetermined fee
- The set fee cannot be seen to be a penalty
- The fee must be based on the employer's reasonable assessment of potential damages if the employee is lost or a reasonable assessment of unrecoverable training costs
- Including a non-solicitation or a Pay-If-You-Compete provision in an Employment Agreement can prevent an employer from having to “pay” for these protections by negotiating a longer severance package

1) The Importance of a Written Employment Agreement

Confidential Information/Inventions

- Even if an Employment Agreement does not contain any restrictive covenants, Confidential Information and Inventions provisions can still protect an employer's interests when an employment relationship ends
- A confidentiality covenant precludes current and former employees from inappropriately using the employer's confidential and/or proprietary information at any time
- To be enforceable, a confidentiality clause must clearly and reasonably define what information is considered to be confidential

1) The Importance of a Written Employment Agreement

- For example, a confidentiality clause normally protects all information related to developments, inventions, enhancements, financial, scientific, technical, manufacturing, process know-how and marketing information and all the names of or lists of customers and suppliers
- Employers should also have written agreements regarding the protection of its intellectual property and inventions
- This can include provisions where the employee agrees to waive their rights to all inventions

1) The Importance of a Written Employment Agreement

Termination

- It is important that employers address the possible termination of the employment at the outset of the relationship
- This should not only include what the employer's obligations are in the event of a without cause termination but also how much notice an employee must provide if they are resigning
- By not addressing termination at the onset of the employment relationship, an employer can become exposed to significant termination liabilities
- As such, companies should be mindful to ensure that they have a properly drafted termination provision in their agreements

2) How to Handle a Resignation

- When an employee resigns, they will normally have no termination entitlements
- However, an employee can resign and have termination entitlement if they were constructively dismissed (i.e. a fundamental term of employment was changed without their consent)
- Further, a resignation can trigger termination entitlements if the employer refuses the employee's resignation notice period and instead immediately end the employment
- To avoid this accidental termination, an employer can accept the resignation, pay the employee during their resignation notice period, but not require them to work

2) How to Handle a Resignation

- If an employee resigns, the resignation should be confirmed in writing
- The resignation letter should confirm:
 - that they resigned
 - when the end date will be
 - whether they need to work during any resignation notice period
 - the need to return and not destroy company property a
 - their ongoing responsibilities (e.g. confidentiality)

2) How to Handle a Resignation

- Further to the resignation, the employee will need to be issued their Record of Employment
- The Record of Employment should have a Reason Code – E, confirming that they resigned
- However, employers should be mindful that if they speak to Service Canada about the resignation and Service Canada decides the employee was dismissed, this decision can be used against the employer

3) How to Handle a Potential With Cause Termination

- Under the common law, if the employer can establish that it has just cause, then the employee will have no termination entitlements
- Under the ESA, if the employer can establish that the employee engaged in a non-trivial wilful misconduct, wilful disobedience, or wilful neglect of duty, which has not been condoned by the employer, then the employee will have no termination entitlements under the ESA
- As such, there are two different tests for eliminating an employee's termination entitlements
- It is possible that an employer will be able to establish just cause at common law, but will not be able to establish the wilful misconduct required by the ESA

3) How to Handle a Potential With Cause Termination

- In any event, it is difficult for employers to successfully terminate either on a with just cause basis at common law and/or based on wilful misconduct pursuant to the ESA
- Needless to say, employee actions or behaviours which can amount to cause/wilful misconduct by definition must be serious in nature; they cannot be trivial
- The best way for an employer to be able to successfully terminate for just cause/wilful misconduct is to be proactive and to address employee performance and behaviour issues as they arise

3) How to Handle a Potential With Cause Termination

- Examples of actions or behaviours which can amount to just cause/wilful misconduct include the following:
 - Gross misconduct: serious improper acts such as theft, fraud, violence, workplace harassment or intentional damage to company property;
 - Violations of Company policies (depending on the nature of the policy and the severity of employee's breach)
 - Insubordination: refusal to follow proper and reasonable instructions from supervisors and/or managers;
 - Misuse of Confidential Information;
 - Failure to follow workplace health and safety rules which result in the safety of the employee and/or others being placed at risk; and
 - Falsification of company records such as employee timesheets or expense reports.

3) How to Handle a Potential With Cause Termination

- When faced with behaviour or conduct which an employer feels renders the continued employment relationship incompatible, the employer must determine whether the termination is justified based on the one-off event or, instead, whether the employer must first engage in a process of progressive discipline

3) How to Handle a Potential With Cause Termination

- Progressive discipline involves a step-by-step process for addressing improper employee conduct or behaviour and consists of the following:
 - Coaching
 - Verbal warning
 - Written warnings/Performance Improvement Plans
 - Suspensions
 - Final written warning

3) How to Handle a Potential With Cause Termination

- It is important that employers do not “cry wolf” when it comes to final written warnings
- If an employer states in a warning letter that this is the employee’s final warning and does not then terminate in the aftermath of further improper behaviour or performance, the employer can then lose the ability to terminate for cause on the basis that they have now condoned the behaviour
- As terminations for cause/wilful misconduct will often times lead to litigation, it is very important that the employer maintains proper, detailed written records of the progressive discipline process

3) How to Handle a Potential With Cause Termination

- The dates that any coaching sessions and verbal warnings were provided and copies of all written warning letters and Performance Improvement Plans should be saved in the employee file
- Before an employer terminates for cause/wilful misconduct it must properly investigate the matter(s) in question
- If an employer fails to conduct a proper investigation and instead immediately proceeds to terminate for cause/wilful misconduct, it can invalidate the for cause/wilful misconduct termination, even if the underlying actions or events could have justified the termination

3) How to Handle a Potential With Cause Termination

- Furthermore, before dismissing an employee for cause/wilful misconduct, the employee should be given an opportunity to explain the conduct, especially if there could be doubt as to what occurred or an explanation to justify the conduct
- When an employee is dismissed for cause/wilful misconduct, the grounds for the dismissal should be outlined in the written termination letter
- Terminating for cause/wilful misconduct improperly can have significant negative repercussions for an employer
- This can include an extension to the notice period a terminated employee would otherwise may have been awarded at common law
- It can also lead to the awarding of bad faith damages

3) How to Handle a Potential With Cause Termination

- If an employee is terminated for cause/wilful misconduct, Code M should be used on the Record of Employment
- When an employee is terminated for cause/wilful misconduct, an employer may still choose to offer the employee a without prejudice severance package conditional on a release being signed back
- This is sometimes done in order to attempt to avoid litigation
- It is important, though, not to baselessly claim you are firing an employee for cause/wilful misconduct in order to pressure an employee to accept a separation package and sign a release
- The Court has, in several cases, awarded additional damages to employees when the employer baselessly claimed cause/wilful misconduct

4) How to Handle the Termination and Separation Package

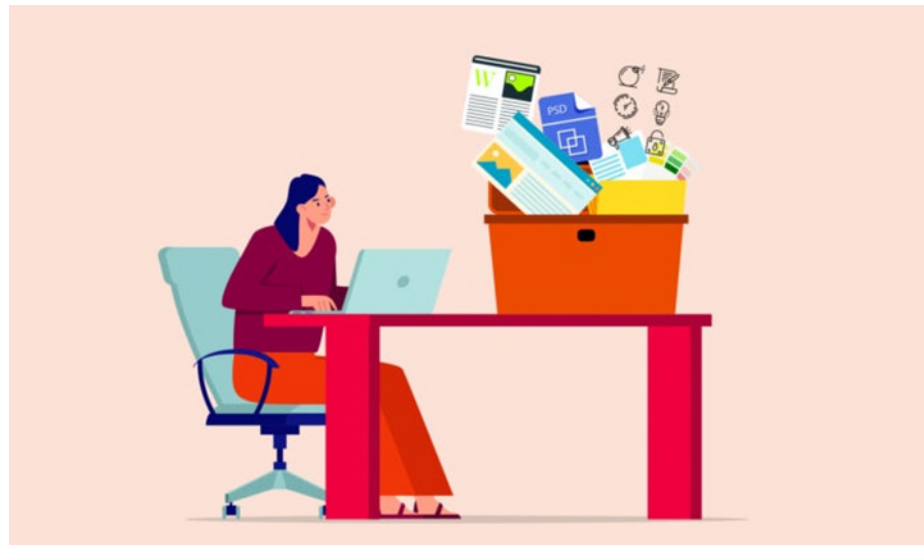
- When preparing to terminate an employment relationship, the employer must determine what the employee's termination entitlements are
- For example, you should confirm:
 - what alternatives are available;
 - what the employee's statutory entitlements are;
 - whether the employee is limited to their minimum statutory entitlements by way of a written employment agreement;
 - whether the employment relationship is coming to an end due to frustration; and
 - what the employee's entitlements at common law are or would be (if it was determined they were entitled to notice at common law)
- In addition, you should also review the company's current cash flow and economic forecast

4) How to Handle the Termination and Separation Package

- In review of matters, including employee's actual or potential termination entitlements, you should decide which path makes the most the sense:
 - 1) an alternative to a dismissal (e.g. a layoff);
 - 2) an offer of a mutual separation package;
 - 3) a layoff with an offer of a mutual separation package;
 - 4) a termination without any entitlements (e.g. a frustration or with cause dismissal)
 - 5) a termination with only statutory entitlements; OR
 - 6) a termination with an offer beyond minimum statutory entitlements.

4) How to Handle the Termination and Separation Package

- In addition, when dismissing an employee, you will need to decide whether the employee will be provided with all or some of their entitlements as working notice



4) How to Handle the Termination and Separation Package

- If the employee is being provided with a separation package offer beyond minimum statutory entitlements, then it should be conditional on the employee executing a full and final release
- In order for the Release to be enforceable, the employee must be offered compensation in excess of what they are statutorily entitled to
- It should also be made clear that if they do not accept the offered separation package they will then still receive their statutory entitlements



4) How to Handle the Termination and Separation Package

- There are many different types of termination packages which can be offered to employees
- For example,
 - the package may offer an additional salary continuance or a lump sum payment
 - the package may give working notice, but let the employee take a small lump sum payment instead
 - the package may be a salary continuance with a partial clawback in the event of re-employment
 - the package may let the employee pick between a smaller lump sum payment and a more substantial salary continuance with a partial clawback in the event of re-employment
 - the package may let the employee pick between a smaller lump sum payment and new position with reduced compensation
 - the package may offer to treat the dismissal as without cause, even though there is cause

4) How to Handle the Termination and Separation Package

- If you are proceeding with a dismissal, the employee should be informed (in person, via telephone, or via video conference) and after the meeting the employee should be provided via email with a termination letter
- There are various matters to be addressed by the termination letter, including:
 - in certain instances, the reason for the dismissal (e.g. if it is for cause or for frustration);
 - the employee's last day of work;
 - the offer (if any); and
 - the employee's benefits and insurance entitlements.
- You should also be mindful to address the other implications as a result of the dismissal (e.g. return of company property, issuance of the Record of Employment, ongoing legal obligations, etc.)

4) How to Handle Negotiating a Separation Package

- If a negotiated severance settlement is not secured, then the employee will need to decide whether or not to proceed with litigation
- The terminated employee must still be provided with their statutory entitlements, as otherwise additional damages may be awarded to the employee
- The employer may still wish to provide the employee with a severance package beyond their statutory entitlements (a decision which can offer strategic advantages)



4) How to Handle the Termination and Separation Package

- Even if no settlement is reached, the employer should still provide, when requested, a letter of reference (when no cause is alleged) or a letter confirming employment (when cause is alleged)
- In addition, until a settlement is reached or judgment rendered, the employer should also strongly consider continuing any disability and insurance coverage



Managing your HR Issues

Wilson Vukelich LLP can help ensure that your employment and labour law matters are handled effectively and efficiently, and in a manner that is reflective of new legal developments and obligations. If you have any questions or require further information, please contact:

Dan Condon

905.940.5505

dcondon@wvllp.ca

Christine Ashton

905.940.0526

cashton@wvllp.ca