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Using Employment Contracts to Minimize Severance Liability

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Two Sources of Law

1. Statutes—government legislation
2. *Common law of contract*

Statutory Regulations

1. Employment standards legislation sets out minimum notice and severance for termination
2. *Employment Standards Act, 2000* (Ontario) (ESA)

Minimum ESA Notice Required

Service	Notice Period
3 months, but less than 1 year	One week
1 year but less than 3 years	2 weeks
3 years or more	1 week per year up to 8 weeks maximum

Statutory Regulation

- May pay in lieu of statutory notice
- Called “termination pay”
- All benefits must continue over statutory notice period
- Employee deemed to be actively working for benefits purposes

Statutory Severance Pay

- Under Ontario ESA:
 - if Ontario payroll greater than \$2.5 million annually, or
 - if 50 or more employees terminated within 6 months due to permanent discontinuance of all or part of business

Statutory Severance Pay

- Employees with 5+ years service:
 - One week severance pay per year of service (+1/12 week per month for part years)
 - Maximum of 26 weeks
- Must be paid, can't require work in return
- No requirement to continue benefits

Statutory Exemptions

- Wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned, nil
- 3 month probationary period, nil
- Completion of fixed term contract (less than 12 month term), nil
- Completion of definite task, nil

Statutory Exemptions

- Where contract frustrated (other than by illness or disability), nil
- After refusing reasonable alternative job
- If does not return following a temporary layoff
- Terminated as a result of strike or lockout
- If entitled to unreduced pension

Common Law Notice

- Statutory notice and severance are minimum entitlements
- Superimposed on these are the common law entitlements (not additive)
- Judge-made law, contract

Common Law

- Enforced via action for wrongful dismissal
- Court looks first to the employment contract
- Is there an express termination clause?
- If so, is it enforceable?

Binding Notice Terms

- Must be consideration
 - Timing
 - Offer stage vs. current employees
 - Value

Binding Notice Terms

- Cannot be less than employment standards minimums
- Cannot contract out of the ESA
- Can be equal to the ESA minimums
- Consider:
 - Period of notice
 - Benefits continuation
 - Statutory severance not satisfied by notice

Binding Notice Terms

- Cannot be unconscionable
- Cannot be coercion
- Should not be stale-dated
- Must be properly drafted to cap notice obligation

No Express Termination Clause

- Either no written employment contract, or contract is silent on termination
- Courts will imply obligation to provide “reasonable notice” of termination
- What is “reasonable”?

Factors in Assessing Reasonable Notice

- a) character of employment
- b) length of service
- c) age
- d) availability of similar employment

...having regard to the experience, training and qualifications of the employee

-*Bardal v. The Globe and Mail Ltd.*, (1960) 24 D.L.R. (2d) 140 (O.H.C.) at p. 145

Caselaw on Notice

- *Love v. Acuity Investment Management Inc.*, 2011 ONCA 130 (Ontario Court of Appeal)

Facts:

- Love was a Senior Vice President of Acuity
- He owned 2% of the equity
- He was a chartered accountant
- Dismissed without cause after 2 ½ years service

Love Decision (continued)

- Trial judge awarded **5 months** based on short service
- Court of Appeal awarded 9 months, found 3 errors:
 1. Over-emphasized length of service
 2. Under-emphasized character of employment
 3. Failed to consider availability of similar employment

Recent Notice Trends

- High-level employees will rely on *Love* decision to obtain longer notice periods based on character of employment
- Crown Packaging 2012—Ontario Court of Appeal overturns *Cronk* decision—no more 12 month cap on notice for non-managerial or specialized technical employees

Common Law Notice

- Generally accepted 24 month cap on reasonable notice
- Longer obligations can be provided for in express contract provisions—notice, severance, or early termination of fixed term contracts

Duty to Mitigate

- At common law, dismissed employees have a duty to mitigate their damages
- Must take reasonable efforts to find comparable employment
- Must accept comparable offer

Duty to Mitigate

- Failure to make reasonable efforts or accept a comparable position can to reduced damages
- Refusal of offer of comparable employment with employer can also be failure to mitigate

Duty to Mitigate

- Where contract provides for severance pay or pay in lieu of notice, especially where it's payable in lump sum, may not be duty to mitigate
- Recent Ontario Court of Appeal case challenging this rule

Duty to Mitigate

- *Bowes v. Goss Power Products (2012 Ont CA)*
- Express termination provision in contract requiring 6 months notice or pay in lieu
- Didn't say anything about mitigation
- Court found no duty to mitigate because express notice provision, said mitigation only applies where "reasonable notice" implied

Duty to Mitigate

- *Bowes v. Goss Power Products (Ont CA)*
- Don't strictly agree, as duty to mitigate applies to all types of breach of contract cases
- To be extra safe, recommend adding duty to mitigate to express contract provisions, especially where you refer to pay in lieu

Minimizing Severance

- Standard employment contract templates
- Simple offer letter or formal contract
- Express termination provisions key
 - ESA or greater
 - Formula based on service or flat amount
 - Never less than ESA minimums
 - Include mitigation language for any amount greater than ESA

Questions?

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Thank you!