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
## Minimum ESA Notice Required

<table>
<thead>
<tr>
<th>Service</th>
<th>Notice Period</th>
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</thead>
<tbody>
<tr>
<td>3 months, but less than 1 year</td>
<td>One week</td>
</tr>
<tr>
<td>1 year but less than 3 years</td>
<td>2 weeks</td>
</tr>
<tr>
<td>3 years or more</td>
<td>1 week per year up to 8 weeks maximum</td>
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</tbody>
</table>
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

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 reduce 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!