



**CURRENT TRENDS IN EMPLOYMENT LAW
WHAT ALL EMPLOYERS SHOULD KNOW**

1. TERMINATING AN EMPLOYEE – what factors need to be considered

STEP #1 – Is the termination “with cause” or “without cause”?

- What is “cause”?
- Can include such variables as:
 - ❖ Theft or fraud from workplace
 - ❖ Harassment and abuse of other employees, customers

- ❖ Continuous breach of company policies and directives (use of drugs, intoxicated at work, misuse of company vehicle)
- ❖ Illustrates complete incompetence for the position and fails to incorporate recommended improvements
- Is the conduct a breach of the Employee’s fundamental obligation to the Employer?

STEP #2 – If cause cannot be established – what are an Employer’s options?

- Rule of Thumb – must provide “reasonable notice” or “pay in lieu of notice”
 - Option A – Working notice – advantages and disadvantages
 - Option B – Pay in lieu of notice – advantages and disadvantages
- What is included within “pay in lieu”

- Creating an enforceable Release – Do’s and Don’ts
- Upfront payment (clean & simple) vs. Conditional payment (more complicated)
- An Employee’s obligation to mitigate damages
- Repayment obligations – Employees cannot double collect

STEP #3 – Calculating a notice period – no magic formula. Factors to consider include but may not be limited to the following:

- a) Length of service
- b) Age of Employee
- c) Position held
- d) Was the Employee induced away from a former position?



e) Did the Employee have to move to accept the position?

f) Had the Employee rejected other opportunities in favour of this current position?

g) Was the position replaced (or simply eliminated)?

h) Was the Employer under economic pressures (market or budgetary constraints)?

i) Was a letter of reference offered and/or refused?






2. **ESTABLISHING CAUSE** – the critical importance of performance reviews

- Generally speaking, an Employer in establishing cause must establish that the Employee received notice of any shortcomings. Often referred to as a “duty to warn”. Here, the Employer should clearly identify and communicate to the Employee, any problems that have arisen and ensure that:

a) The Employee has been provided with notice(s) in writing

b) Such notice should set out not only the deficiency, but also the recommended steps that need to be taken to remedy the deficiency






c) Such warnings should be consistently applied to all Employees, and in the ideal, should reference the Employee’s policies, directives and/or manuals

d) Should the offending conduct persist, the warnings should as well, but the disciplinary sanctions will likely increase

e) Ideally, the letters of warning should not simply be focused on discipline alone, but should include a genuine interest in bringing the Employee’s conduct into conform with the Employer’s expectations.

- Generally speaking, a single incident is often not sufficient to establish “cause”, barring a serious incident






3. Can you terminate an Employee for their actions while away from the job?

- The answer is YES, but only in limited circumstances.

4. Why all Employers should have a “Privacy Policy” that covers such things as computer equipment, electronic devices (laptops, cell phones, tablets, etc.), and what every Policy should contain



5. Why all Employers should have workplace policies that govern harassment, and what every harassment policy should contain

6. How can a properly drafted Employment Agreement solve many of the issues discussed above for Employers

7. What is “Constructive Dismissal” and how can Employers avoid claims based on constructive dismissal?

8. What factors need be considered when accommodating an Employee that is pregnant or an Employee that requires medical accommodations?

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