

Termination Provisions 101

February 15, 2023

spring LAW

A close-up photograph of a document titled "TERMINATION OF EMPLOYMENT" in large, bold, black capital letters. A red and black pen with gold accents lies diagonally across the bottom of the page. The document is on a wooden clipboard. At the bottom left, the text "that you" is partially visible.

TERMINATION OF
EMPLOYMENT

that you

Presented by

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and
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Spring LAW

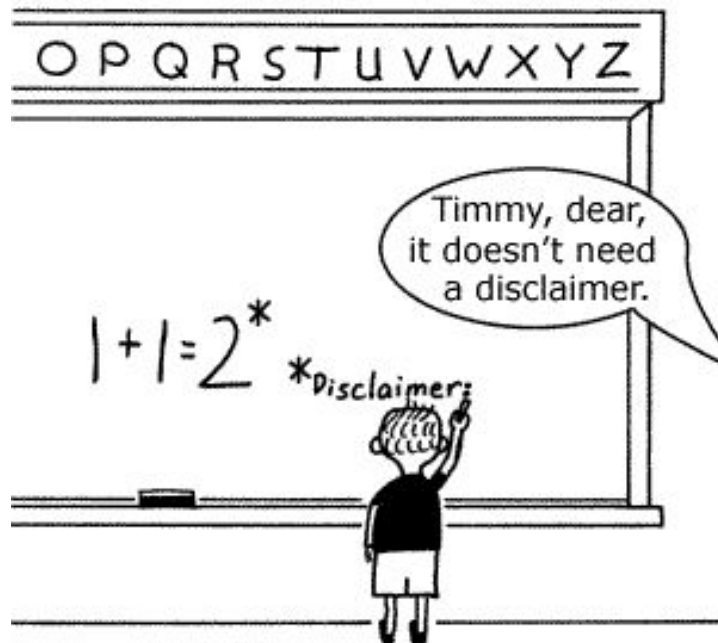


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Timmy
doesn't need
a disclaimer
but we do...



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Presentation Roadmap

- Termination Provisions
- Headaches & Costs
- Practice Tips

Termination Provisions

TERMINATION OF EMPLOYMENT

To: John Smith

We regret to
to

What happens when an employee gets terminated?

- Sources of an employee's entitlements
 - Statute
 - Minimum standards legislation such as Ontario's *Employment Standards Act, 2000*
 - Contract
 - Common law

Why should you care about termination provisions?

- Purpose of termination provisions
 - Certainty
 - Protection
 - Leverage in post-termination negotiations

What do employers usually include in termination provisions?

- Statutory minimums
- Greater than statutory minimums
 - For higher-level employees
 - For retention purposes

Do termination provisions actually work?

- Requires legal analysis
- Caselaw is ever-evolving
- Many termination provisions are unenforceable
 - Resulting in:
 - 1) common law notice or
 - 2) balance of fixed-term contract
 - More details later on!

Common Termination Clause Red Flags

- Termination provisions trying to contract out of minimum standards legislation in:
 - With cause termination provisions
 - Without cause termination provisions
 - Other termination-related provisions, such as Resignation Notice, Probation Period terms, etc

Common Termination Clause Red Flags

- *With cause* section contracts out of minimum standards legislation because:
 - It attempts to eliminate entitlements “for cause” or “for just cause” or “with cause”
 - “Cause” is not defined OR
 - Definition of “cause” is expanded
 - And more

Common Termination Clause Red Flags

- **Without cause** section contract out of minimum standards legislation because:
 - No benefits during notice period
 - Total payment cap below minimum standards legislation maximum
 - No reference to severance (Ontario)
 - And more

Common Termination Clause Red Flags

- ***Some other notes*** on termination provisions:
 - Do savings provisions work?
 - Not really.
 - Termination language can appear anywhere!
 - Probationary clauses
 - Resignation section
 - Conflict of interest clauses
 - Confidentiality clauses
 - And more

Headaches & Costs



What happens when termination provisions are invalid?

- Indefinite term contracts
 - Common law notice
 - Can be up to 24 months!
- Fixed-term contracts
 - Balance of term
 - Can be up to multiple years!

What do liabilities actually include?

- Base salary
- Group & Disability Benefits
- RRSP & pension contributions
- Earned and Accrued Vacation
- Commissions
- Non-discretionary bonuses
- Equity? Regular salary increases? Discretionary Bonuses? Unfulfilled verbal promises?
- Other entitlements

Practice Tips



Practice Tips

- Review contracts (if any) with a lawyer
- Roll out contracts with enforceable termination provisions
 - Easy for new hires
 - Try to time existing employee contracts with promotions, raises, etc (legal “consideration”)

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The logo for Spring LAW, with 'Spring' in blue and 'LAW' in green.

THANK YOU!