

Tidy Terminations

Best practices for
employee exits &
a swift sign-off

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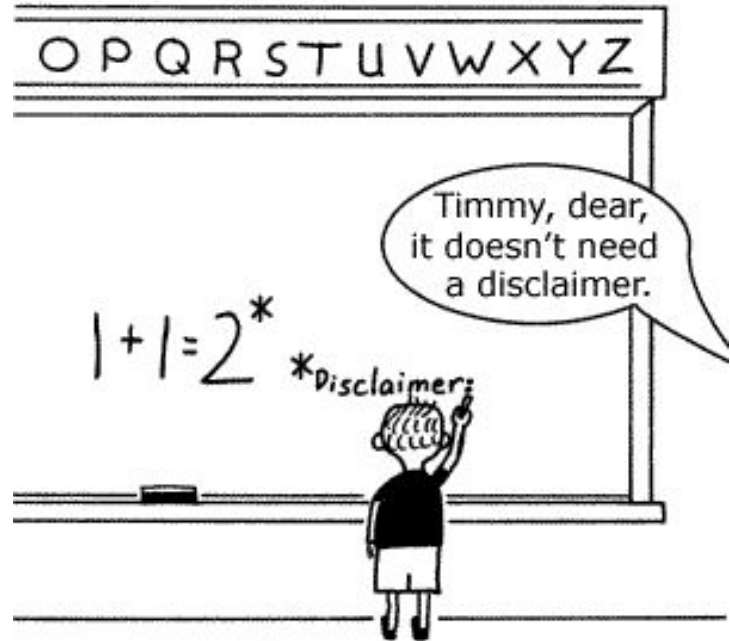
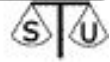


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Timmy
doesn't need
a disclaimer
but we do...



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Presentation Roadmap

1. Early considerations: employment contracts & other relevant factors
2. Reviewing the contract: is there a problem?
3. Tidy 'without cause' terminations
4. Challenging employees: a practical approach to potential 'cause'
5. Termination packages: legal obligations and practical structuring
6. Responding to the demand letter from employee counsel
7. More best practices for a swift sign-off

Early Considerations: The Employment Contract & Other Relevant Factors

- Dig up all contracts and plan documents applicable to that employee
 - Signed? Unsigned?
 - Which documents apply?
 - Identify the termination-related provisions
 - Review by employment law counsel is recommended given recent changes in employment law



Early Considerations: The Employment Contract & Other Relevant Factors

- **Prepare employment chronology / 'employee bio'**
 - Inducement?
 - Relocation for the role?
 - Promotions?
 - Detail the employment history up to proposed termination date
- **Sets the stage for a tidier termination process**



Reviewing the Contract: Is There a Problem?

- **Seismic shift in Ontario employment law in 2020**
- **As a consequence:**
 - If the with cause provision of the contract is unenforceable, the entire termination provision is treated as unenforceable
 - An unenforceable termination provision entitles the employee to common law reasonable notice
 - Expect the entire contract and related plan documents and policies to be scrutinized by counsel for the employee



No *Waksdale* Problem? The Tidiest Terminations

- **ESA-only on termination**
 - Celebrate your updated & enforceable termination provision
 - Simple termination letter; no sign back required
 - No signed release required



Potential *Waksdale* Problem?

- ***Potential issues?***

- Consider a more generous offer than ESA-only
- Offer XYZ ‘on a gratuitous and good faith basis’ in exchange for signed release
- What is “consideration”?
- Understand the *potential* employee response to make the best business decision at termination



Tidy Without Cause Terminations

- No reason necessary (but no illegal reasons)
- How much termination notice?!
 - ESA vs. contract vs. common law/court award
- How many weeks/months of *what*?
- Interchangeable (and confusing) terms:
 - Termination notice/notice period/severance package/ESA severance pay, etc.
 - Key issue:
 - Capped at ESA or common law?
 - How many weeks/months?



Elements of Termination Packages

- **Without Cause Termination Package**

- Updated & enforceable termination provision?
 - If flawed, then what?
- ESA requirements (notice, severance, vacation)
- Benefits continuation (calendar important dates)
- Pay attention to ROE and payment timelines
- Would *working notice* be workable? Retention bonus?
- Would a 'mitigation clawback' lead to quicker re-employment and reduce employer costs?
- Bonuses, commissions & other stuff



Severance Pay

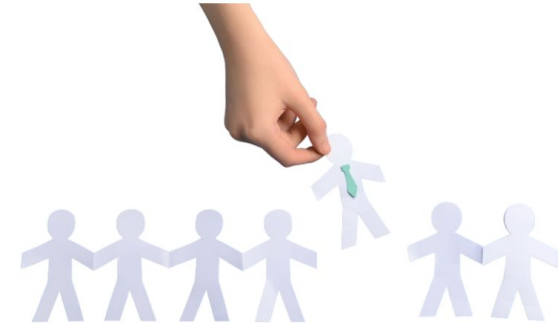
Tidy Without Cause Terminations: The Termination Letter

- **Align the termination letter with the written employment contract/offer letter (if one exists)**
 - Review contract entitlements (again)
 - Remind the employee of specific post-employment obligations
 - Draft termination letter as a list for quick reference by the employee, HR and payroll
 - Where possible include exact amounts and payment timelines
 - Calendar important dates



Challenging Employees: A Practical Approach to Potential 'Cause'

- **Termination packages can be a tough pill to swallow when terminating challenging employees**
 - E.g. misconduct or sustained poor performance
- **Cause is often hard and arduous to establish**
- **A progressive discipline process can be:**
 - Time-consuming
 - Expensive
 - Disruptive to your workplace
- **Will a without cause termination be tidier?**
 - Even where misconduct is severe
- **2-letter termination: an option to discuss with legal counsel**



Termination Packages: Legal Obligations & Practical Structuring

- **Employer toolkit for a smoother transition**
- **Preparing**
 - Termination letter
 - Script for the termination meeting
- **Facilitating re-employment**
 - Reference letter
 - Outplacement services
 - Monitoring the job market
- **Seeking advice**
 - Understanding what's important to your former employee can help with a succinct and tidier exit



Severance Pay

Untidy Terminations

- **Pitfalls leading to employee questions, more work for HR and payroll, and increased employer costs**
 - Failing to account for all ESA minimum entitlements
 - Extending only base salary without considering other entitlements
 - Benefits?
 - Bonuses? (review plan language)
 - Pension?
 - Other perks?
 - Failing to confirm no re-employment or pending offers when negotiating settlement terms
 - Unclear or no termination letter
- **Flag items that are offered on a gratuitous basis (for a swifter sign-off)**



Timing the Termination

- **No perfect time, but some bad or even illegal timing**
 - During or following a sick leave or other protected leave
 - At any time, if the termination decision could be viewed as relating to a protected ground under human rights legislation
 - Following a complaint made by the employee
 - Before the holidays or during vacation
 - On the heels of a major negative life event
 - Before a milestone money moment for the employee (bonuses, vesting cliff etc.)



Responding to the Demand Letter

- **Take a deep breath**
 - The tone and content of demand letters can unnecessarily escalate matters
 - Counsel (or employer): send placeholder email to author of letter/email prior to response deadline
- **Is it a narrow notice period dispute?**
 - Review your initial notice period analysis
 - Strategic legal *and business* analysis: increase the offer or hold firm?
- **Other allegations?**
 - Bad faith in the manner of dismissal
 - Reprisal
 - Discrimination / breach of human rights legislation

More Best Practices For A Swift Sign-Off

- **Plan ahead when termination is a possibility**
 - Written performance assessments help support the legitimate business reasons for terminations, if needed
 - Document cautiously
- **Create and use termination checklists**
- **Prepare talking points for termination meeting**
 - Tailor where applicable
- **If questioning your termination-related provisions**
 - Seek advice before terminating
- **Avoid actions that could be viewed as ‘bad faith in the manner of dismissal’**
- **Plan to roll out new contracts for new (and maybe existing) employees!**



Takeaways

- Termination-related provisions in contracts, plan documents and policies matter!
- ‘Without cause’ may be more efficient and cheaper than ‘with cause’ route
- Consider the decision carefully, thoughtfully and understand the employee’s entitlements and the risks involved in termination
- Seek strategic legal advice, especially for terminations that are not straightforward

Questions?

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