



CARSCALLEN LLP

Termination of Employment in Alberta

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This Information Bulletin focuses on the requirements of the majority of Alberta workplaces regulated by provincial employment legislation. Employees working on or in connection with federal works, undertakings or business are subject to the federal legislation, including the *Canada Labour Code* and the *Canadian Human Rights Act*. If your workplace is federally regulated, please contact us for more information.

I. Introduction

Generally, an employer can terminate the employment of an employee at any point in the employment relationship, even if there is not just cause for the employee's dismissal. However, in the absence of just cause, an employer generally must provide an employee with either notice of termination, pay in lieu of notice, or a combination of the two.

The amount of notice that an employer must provide a terminated employee, as well as other employer obligations on termination, is informed by the Alberta *Employment Standards Code* (RSA 2000, c E-9) (the "**Code**"), the common law and an employee's contract of employment.

II. Termination under the Code

a. **Notice of termination and termination pay**

The Code sets out the minimum employment standards that an employer must follow. An agreement that attempts to avoid those minimum standards is not enforceable. Pursuant to the Code, most employees will be entitled to notice of termination, or pay in lieu of notice.

Specifically, section 55 of the Code states that where an employee has been employed for three months or more, that employee's employment can only be terminated with written notice of termination (i.e. working notice), "termination pay" in lieu of written notice (i.e. the wages that would have otherwise been earned during the applicable notice period), or a combination of notice and termination pay that equals the total notice period to which the employee is entitled.

Only in select situations is notice, or termination pay in lieu thereof, not required. These situations include where:

- there is just cause for termination;

- the employee refuses reasonable, alternative work;
- the employment contract has become impossible to perform, for unforeseeable or unpreventable causes that are beyond the employer's control;
- the employee is employed in the construction industry;
- the employee is employed for a definite term or task not exceeding 12 months and the employment ends upon such completion;
- the employee is employed on a seasonal basis and the employment ends upon the completion of the season; or
- the employee is on "temporary layoff", as defined by the Code. An employer can temporarily lay off an employee for up to 59 consecutive days without terminating the employment relationship, so long as the relevant Code provisions are followed. Thereafter, the employee's employment is treated as terminated and termination pay is generally required.

The Code precludes the termination, or the temporary layoff, of employees who have started, or are entitled to start, maternity or paternal leave; who have started reservist leave; or, who have started a compassionate care leave.

Unlike other Canadian jurisdictions, the Alberta Code does not contemplate the payment of "severance pay" in addition to "termination pay". An employer is only statutorily obligated to pay the latter (in the absence of providing working notice).

b. Calculation of notice period

The length of notice to which an employee is entitled under the Code is dependent on the duration of the employee's employment. Section 56 of the Code sets out the requisite notice periods as follows:

- (a) 1 week, if the employee has been employed by the employer for more than 3 months but less than 2 years;
- (b) 2 weeks, if the employee has been employed by the employer for 2 years or more but less than 4 years;
- (c) 4 weeks, if the employee has been employed by the employer for 4 years or more but less than 6 years;
- (d) 5 weeks, if the employee has been employed by the employer for 6 years or more but less than 8 years;
- (e) 6 weeks, if the employee has been employed by the employer for 8 years or more but less than 10 years; or
- (f) 8 weeks, if the employee has been employed by the employer for 10 years or more.

If an employer intends to terminate more than 50 employees at a single location within a 4 week period, the employer must, in addition to complying with the Code's notice provisions, give the Minister of Labour 4 weeks' written notice of its intention to do so, specifying the number of employees whose employment will be terminated and the effective date of the terminations.

c. What is included in "termination pay"

Termination pay is the "wages" that an employee would have earned had the employee worked his or her regular hours of work for the applicable notice period. Wages, as defined by the Code, include salary, pay, money paid for time off instead of overtime pay, commission or remuneration for work, however calculated, but do not include:

- overtime pay, vacation pay, or general holiday pay;
- a payment made as a gift or bonus that is dependent on the discretion of an employer and that is not related to hours of work, production or efficiency;
- expenses or an allowance provided instead of expenses; or
- tips or other gratuities.

Where an employee's wages vary from one pay period to the next, termination pay is to be determined on basis of the average of the employee's wages for the 3 month period immediately preceding the date of termination of employment.

d. Other obligations on termination

Earnings must not change

The Code precludes employers from reducing wages or other "earnings", or any other term of or condition of employment, between the time that a termination notice is given and the date the employment terminates, whether or not work is required to be performed during that period. Earnings, as defined by the Code, means wages, overtime pay, vacation pay, general holiday pay and termination pay.

Treatment of benefits

Unlike other jurisdictions, the Alberta Code does not expressly require employers to pay an employee's benefits during the statutory notice period. However, as mentioned above, the employer is precluded from reducing the terms and conditions of employment between the time that a termination notice is given and the date the employment terminates. This means that, where an employee is on working notice and benefits have been paid by the employer to that point, the employer must continue to pay the employee's benefits until the employee's employment terminates.

In any event, and subject to the terms of the employee's benefits plan, it may be prudent for an employer to continue benefit coverage where available, or to provide an allowance for the employee to

obtain comparable coverage, for the duration of the notice period even when termination pay is given instead of working notice. Otherwise, an uninsured employee who becomes ill or is injured during the notice period may look to hold the employer liable for losses that might otherwise have been covered by the benefits.

Payment of earnings upon last day of employment

When an employer terminates an employee's employment with notice, termination pay, or a combination thereof, the employer must pay out that employee's "earnings" no later than 3 consecutive days after his or her last day of employment.

When an employee's employment is terminated and no notice or termination pay is required under the Code, the employer must pay out that employee's "earnings" no later than 10 consecutive days after his or her last day of employment.

A Record of Employment must also be issued within the time limits required by the federal government.

III. Termination under the Common Law

a. Calculation of "reasonable notice" on termination

Code entitlements do not preclude an employee from also seeking civil remedies or common law rights. Often times, an employee's entitlements to notice under the common law will be greater than those available to an employee under the Code. Even in situations where the Code does not require termination notice (e.g. construction employees), the common law may still require that reasonable notice be provided.

This is because in determining "reasonable notice", the common law considers contextual factors beyond just the duration of an employee's service. Alberta courts have adopted those factors set out by the Ontario Superior Court in *Bardal v. Globe & Mail Ltd.* (1960 CanLII 294 ONSC) when assessing common law notice periods. These factors include:

- the character of the services rendered (such as the employee's responsibilities or seniority);
- the length of the employee's service;
- age of the employee; and
- availability of comparable employment, taking into account the employee's experience, training and qualifications.

The contextual and fact-driven nature of the Bardal factor analysis can make common law periods difficult to predict. Where it has been observed that "reasonable notice" is often roughly calculated as one month notice per year of service, Alberta courts have been quick to dismiss any such formulaic approach. Consideration of the above contextual factors will often increase - or decrease - the one month per year hypothesis.

b. What is included in "pay in lieu of reasonable notice"

Generally, an employee is entitled to his or her "total compensation" for the duration of the common law notice period. Total compensation is akin to what the employee would have received for that same period had he or she not been dismissed, so in addition to salary can include compensation for the loss of benefits, savings plans, bonuses and other incentive compensation, unless there are clear contractual terms in the respective plan, or in the employment agreement, that state otherwise.

c. Contracting out of the common law

As stated above, an employer cannot contract out of the Code's minimum requirements, including with respect to notice and termination pay. However, an employment agreement can preclude employees from receiving notice entitlements in addition to those provided for in the Code (including common law "reasonable notice"), so long as the employment agreement does not violate Code minimums, and provides clear and unambiguous language that expressly limits the employee to the notice periods provided for in the Code. An employment agreement can also incorporate terms limiting termination notice to pre-determined set amounts (typically based on years of service) exceeding the minimum Code notice amounts.

IV. Human rights considerations on termination

In addition to considering its Code, common law and contractual obligations on termination, an employer must also ensure that it is acting in accordance with its obligations under the Alberta *Human Rights Act*. Employers must ensure that their reasons for terminating an employee are not motivated, in whole or in part, by employee characteristics that are protected under the *Human Rights Act*. Employers must also ensure that the manner with which the termination is conducted has regard to an employee's protected characteristics.

The contents of this Information Bulletin were prepared as a joint effort between Carscallen LLP (Calgary) and Emery Jamieson LLP (Edmonton) to inform our clients and friends of important provisions in the field of employment law. The content is for information purposes only and is not legal advice.

Please contact our office if you have specific questions or concerns relating to any of the topics covered in this Bulletin.

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