The Legal 500 & The In-House Lawyer
Comparative Legal Guide
Canada: Employment & Labour Law

This country-specific Q&A provides an overview to employment and labour law in Canada.

It will cover termination of employment, procedures, protection for workers, compensation as well as insight and opinion on the most common difficulties employers face and any upcoming legal changes planned..

This Q&A is part of the global guide to Employment & Labour. For a full list of jurisdictional Q&As visit http://www.inhouselawyer.co.uk/index.php/practice-areas/employment-labour-law/

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1. **Does an employer need a reason in order to lawfully terminate an employment relationship? If so, describe what reasons are lawful?**

General Rule and Qualifications

The general approach is that an employer may terminate an employee at any time without cause, as long as the required notice (or pay in lieu of notice) is provided, and the terms of any written employment contract are followed.

There are some important qualifiers to this general rule. For example:

- All jurisdictions have anti-discrimination or human rights legislation that prohibit termination for reasons because of a protected ground or characteristic. There are also anti-reprisal or 'whistle-blower' protection rules, for example, under employment standards legislation, securities legislation, labour standards legislation, the Criminal Code, and occupational health and safety legislation.
- In some jurisdictions, employers are subject to special scrutiny when terminating employees who have a certain amount of seniority. For example, employees of federally-regulated employers with one year of service, provincially-regulated employees in Quebec with two years of service, and provincially-regulated employees in Nova Scotia with 10 years of service can seek reinstatement if terminated without 'good and sufficient reason' or 'just' cause (as defined in applicable employment standards legislation). These rules are subject to various exceptions.
- Notwithstanding legal theory, typically employers in Canada do give reasons for the termination, even if described in broad, general terms, in order to avoid an inference of an improper motive and to reduce the risk of an employee claiming that the failure to give

reasons, coupled with various other unduly insensitive behaviours, entitles the employee to additional moral or other non-economic loss damages.

Termination for Just Cause

While an employer in most jurisdictions does not need a reason in order to lawfully terminate an employee if the required notice is (or pay in lieu of notice) provided, the employer may terminate an employee without notice if there is just cause for termination. Cause involves serious misconduct by the employee. Cause does not include redundancy as a result of a personnel reorganisation, a downturn in business, or a personality conflict. Mere dissatisfaction with an employee's job performance is not, by itself, sufficient cause for dismissal.

In general, 'just cause' is a difficult standard to meet. Whether just cause exists must be determined on a case by case basis, in the context of the overall employment relationship.

2. What, if any, additional considerations apply if large numbers of dismissals (redundancies) are planned?

Mass terminations may trigger enhanced statutory notice of termination and other requirements. Such requirements vary by jurisdiction. For example:

- Ontario: If 50 or more employees are terminated in any period of four weeks or less, then the group notice provisions of the Employment Standards Act, 2000 (the 'ESA') apply instead of the individual notice requirements. Where group notice applies, the employer must give notice to the employee of between eight and 16 weeks, depending on the number of employees terminated. The employer must also give notice to the Ministry of Labour. In addition, statutory severance pay requirements may apply (see Question 5).
- Federal: If 50 or more employees are terminated in a four week period, then in addition to the individual notice and statutory severance to which the employees may be entitled, notice of 16 weeks or more must be provided to the federal Ministry of Labour, and to other entities specified by statute.
- Québec: If an employer terminates 10 or more employees in the same establishment in a two month period, notice of between eight and 16 weeks must be provided to the Minister of Employment and Social Solidarity with copies posted in the workplace and provided to

the employment standards Commission.

- Alberta: If an employer intends to terminate the employment of 50 or more employees at a single location within a four-week period, the employer must give the Minister of Labour, the affected employees, and their unions(s) the following amount of written notice according to the number of employees affected:
  - 8 weeks - 50 or more employees but less than 100
  - 12 weeks - 100 or more employees but less than 300
  - 16 weeks - 300 or more employees

  Group termination notice must be provided directly to all affected employees as per the timelines above, regardless of how long the individual employees in the group have been working. The notice must specify the number of employees whose employment will be terminated, and the effective date of the terminations.

- British Columbia: If 50 or more employees are terminated in a single location during a two month period, then the employer must give the Ministry of Labour, the affected employees, and their union(s) between eight and 16 weeks' written notice, depending on the number of employees terminated.

The mass/group notice of termination provisions in applicable legislation are subject to specified exceptions.

3. What, if any, additional considerations apply if a worker's employment is terminated in the context of a business sale?

Overview

If an employee is terminated in the context of a business sale, the applicable considerations depend on whether the sale is occurring as a share transaction or asset transaction.

Share Transaction

In a share transaction, there is no change in the identity of the employer for employment law purposes and thus the status of all employees, whether union or non-

union, remains the same. If the seller terminates employees prior to the sale of a business, the regular rules relating to termination would apply and the seller would be responsible for the costs. Likewise, if the buyer terminates employees following the sale of a business, it would be responsible for the termination costs.

Asset Transaction

In an asset transaction, there is a change in the identity of the employer. Therefore, for non-unionised employees, an offer of employment is required in most jurisdictions in order for employment to be continued. If such offers are accepted and the employees commence working for the buyer post-closing, then their employment is deemed continuous under applicable employment standards legislation. If employees refuse offers of employment with the buyer and are then terminated by the seller, the seller is responsible for statutory termination costs. The employees' common law entitlement to reasonable notice, however, may be effectively lost because of their failure to mitigate their losses by accepting employment with the buyer, provided that the buyer offers employment on substantially similar terms as the employee enjoyed with the seller. Hence, the form and content of the buyer's offer of employment is often described in the agreement of purchase and sale between the buyer and seller. Special considerations apply to employees who have contractual termination entitlements, because Canadian common law courts have held that contractual termination provisions are generally not subject to mitigation, subject of course to the wording of the contract.

Québec

In Québec, the Civil Code of Québec deems employment contracts to be binding on the purchaser of a business, regardless of whether the transaction is structured as an asset or share sale.

4. What, if any, is the minimum notice period to terminate employment?

Overview

The U.S. concept of 'at will employment' does not exist in Canada. In Canada, both employment standards legislation and the common law combine to require an

employer who terminates an employee without just cause to provide working notice or compensation instead of notice. No notice is required if an employee is terminated for just cause.

Legislation

Under federal and provincial employment standards legislation, an employer must provide an employee with statutory notice of termination of employment or pay in lieu of notice. Unless the employee is terminated for willful misconduct, disobedience or willful neglect of duty, statutory notice is typically equal to one week per year of service to a maximum of eight weeks; however, more notice is required for group terminations in certain jurisdictions (see Question 2).

Common law

If there is a clear, enforceable agreement specifying a period of notice that complies with applicable employment standards legislation, the employee is entitled to the period of notice specified by the agreement.

If there is no enforceable agreement containing termination entitlements, the common law requires that an employer provide an employee with 'reasonable' notice of termination or pay in lieu of notice. It can be difficult to assess what constitutes reasonable notice because there is no set formula. The length of notice must be determined on a case-by-case basis, with reference to the applicable factors in each individual case, such as character of employment, length of service, age, and availability of similar employment.

In claims for wrongful dismissal, the courts have awarded employees notice pay of up to 24 months, and in rare circumstances more than 24 months. Typically, the more lengthy awards have been for long-service employees in very senior positions. However, some decisions have awarded significant notice periods in excess of 12 months to long service employees in relatively junior, non-managerial positions.

Québec

Like the common law, the Civil Code of Québec provides that employees are entitled to 'reasonable' notice of termination or an indemnity in lieu thereof. However, unlike the common law, the entitlement to 'reasonable' notice in Québec is a public order

provision. As a result, contractual termination provisions purportedly to limit an employee's entitlements upon termination will not be binding on Québec courts.

5. **Is it possible to pay monies out to a worker to end the employment relationship instead of giving notice?**

   Yes. Legislative and common law (and, in Québec, civil law) notice periods can be satisfied by providing the employee with wages, compensation and benefits continuation instead of the applicable advance working notice.

   Some jurisdictions also require an employer to pay statutory severance pay in addition to providing notice of termination. For example:

   - Ontario: Employers with an annual Ontario payroll of at least $2.5 million must provide employees who have five or more years of service with statutory severance pay equal to one week's pay per year of service, up to a maximum of 26 weeks.
   - Federal: Employers must provide employees who have at least 12 months of service with statutory severance pay equal to the greater of (a) two days' pay for each completed year of service or (b) five days' pay.

6. **Can an employer require a worker to be on garden leave, that is, continue to employ and pay a worker during his notice period but require him to say at home and not participate in any work?**

   While Canadian case law on the permissibility of 'garden leave' arrangements remains underdeveloped, there are indications that, at least in Ontario, a clearly drafted, reasonable garden leave clause may be enforceable.

   However, in the absence of a contractual provision expressly permitting an employer to remove some or all of an employee's job duties, there is a risk that requiring the employee to stay at home and not participate in work would constitute a substantial change to a fundamental term of the employee's contract of employment, and thereby

amount to constructive dismissal. Subject to the terms of the employment agreement, an employee who has been constructively dismissed can treat the contract as terminated and leave. In such circumstances, the employee can demand notice and/or severance pay and immediately begin seeking other employment.

7. Does an employer have to follow a prescribed procedure to achieve an effective termination of the employment relationship? If yes, describe the requirements of that procedure or procedures.

procedure or procedures.
Overview
Although an employer must provide an employee with his or her statutory and contractual entitlements upon termination of employment, the employer generally does not, except in the case of mass terminations (see Question 2), have to follow a prescribed procedure to effectively dismiss an employee.

Best Practices
While there is no prescribed procedure, the manner in which an employer terminates an employee—including the employer's conduct both before and after the termination meeting—can result in an adverse award of aggravated damages or punitive damages. As such, there are a number of 'best practices' that can mitigate an employer's risks in terminating employment.

While such practices may vary depending on the employer's relationship with the employee and the context of his or her termination, employers should, at minimum, carefully plan the day of termination and aim to hold the termination meeting in a manner that minimises the employee's embarrassment and distress, optimises privacy, and avoids any behaviour that could be characterised as harsh, vindictive, malicious, dishonest, or in bad faith. The employer should take notes at or immediately after the meeting. The termination letter should be provided to the employee at the time of the termination meeting. If the employer is offering a separation package in exchange for the execution of a release, the employer should not require the employee to sign the release on the same date as he or she receives it, since a court may find that the

employer put undue pressure on the employee to sign and thereby conclude that the release is unenforceable. In Québec, employees can require that the termination letter, and other relevant documents, be drafted in French.

Prescribed Documents
While not a 'prescribed procedure' per se, an employer must provide various government documents to an employee upon termination, pursuant to unemployment legislation and other applicable statutes.

8. If the employer does not follow any prescribed procedure as described in response to question 7, what are the consequences for the employer?

If an employee does not accept the severance package, if any, offered by the employer in exchange for a release, the employee may bring a civil action claiming damages for wrongful dismissal. If an employer dismisses an employee in a vindictive, dishonest, or otherwise harsh manner, the employee may also assert entitlements beyond the "economic" wrongful dismissal damages, and claim aggravated, punitive or mental distress damages.

9. How, if at all, are collective agreements relevant to the termination of employment?

Collective agreements covering an employer and union set out the terms and conditions of employment for employees in the relevant bargaining unit, including the terms related to termination of employment. In all jurisdictions, collective agreements are subject to the applicable employment standards legislation, including the provisions of such legislation related to notice of termination (or pay in lieu) and severance pay. The common law principle of 'reasonable notice' upon termination of employment does not apply to employees covered by collective agreements.

Typically, collective agreements provide that employees may be discharged for cause

or as a result of permanent lay-off (subject to any applicable recall rights during the period of lay-off). Other non-disciplinary bases for discharge may be specified in collective agreements, including discharge for innocent absenteeism or due to an inability to do the job. Collective agreements may also contain obligations to pay additional severance (beyond that specified by the applicable employment standards legislation) and/or provide for other obligations or entitlements concerning termination of employment.

By law, collective agreements must contain a dispute resolution process for grievances that arise in a unionised workplace, including grievances related to termination of employment. The traditional grievance and arbitration process involves a grievance procedure, followed by a procedure for referral to arbitration. If an employee grieves his or her termination and the union refers it to arbitration, the arbitrator may award a broad range of remedies in favour of the employee, including reinstatement.

10. Does the employer have to obtain the permission of or inform a third party (eg local labour authorities or court) before being able to validly terminate the employment relationship? If yes, what are the sanctions for breach of this requirement?

The employer does not, in general, have to obtain the permission of or inform a third party before being able to validly terminate the employment relationship.

However, in all jurisdictions except Prince Edward Island, there are specific notice provisions under the relevant employment standards legislation that apply to ‘mass’ or ‘group’ terminations (see Question 2). Pursuant to these provisions, notice to the applicable Ministry of Labour of an upcoming mass termination is often required. Failure to do so may invalidate notice given to employees and/or result in fines or penalties, as specified in applicable labour standards legislation. Also, a collective agreement may contain requirements concerning notification to the union or certain union officials.

11. What protection from discrimination or harassment are workers entitled to in respect of the termination of employment?

Discrimination

All Canadian jurisdictions have human rights legislation prohibiting discrimination in employment based on certain prohibited grounds, such as race, national or ethnic origin, colour, religion or creed, marital status, disability, sex, sexual orientation and age. Such legislation applies to prevent employees from being terminated on the basis of a statutorily prohibited ground. Various defences may be available depending upon the legislation and the context of the discrimination claim.

Harassment

All Canadian jurisdictions address and prohibit harassment and violence in the workplace through a combination of human rights legislation, employment standards legislation and/or health and safety legislation.

Under the human rights laws applicable in every jurisdiction, harassment related to any statutorily prohibited ground of discrimination is prohibited at all stages of the employment relationship, including the context of termination of employment. Certain jurisdictions also protect against specific types of harassment. For example, 'psychological harassment' is prohibited under the Québec Act Respecting Labour Standards, and 'sexual harassment' is prohibited under the Ontario Human Rights Code.

Health and safety legislation in most jurisdictions specifically addresses harassment and/or violence in the workplace, and typically requires employers to prepare workplace violence and/or harassment policies, including complaint/incident and investigation procedures. Such legislation prohibits reprisals against employees who initiate a complaint of harassment and/or violence, or otherwise seek to enforce their rights under the applicable legislation.

12. What are the possible consequences for the employer if a

worker has suffered discrimination or harassment in the context of termination of employment?

Overview

The possible consequences for the employer if a worker has suffered discrimination or harassment in the context of termination of employment vary depending on a number of factors, including the applicable jurisdiction, the nature of the discrimination/harassment suffered, and the type of remedy sought.

Remedies under Human Rights Legislation

In every jurisdiction, if a worker has suffered discrimination or harassment in the context of dismissal, the worker can bring a complaint under applicable human rights legislation, which is investigated and adjudicated in accordance with the administrative procedures set out in the legislation. Human rights tribunals generally have broad remedial jurisdiction, though the available remedies – and thus the possible consequences for the employer – vary from jurisdiction to jurisdiction. Remedies awarded in cases of discrimination or harassment in the context of termination can range from damages to the full reinstatement of the complainant.

In some jurisdictions, including Ontario, not only tribunals but also courts have jurisdiction to award monetary damages and other remedies available under applicable human rights legislation if they find that a violation of the legislation has taken place.

In addition to being liable for damages and other remedies in favour of the employee, an employer that violates human rights statutes in certain jurisdictions may be subject to prosecution. For example, and while criminal prosecutions against employers for alleged violations of employment legislation are rare (except for alleged health and safety violations as outlined below), in Ontario, every person who infringes a right under the discrimination and harassment provisions of the Ontario Human Rights Code is, upon conviction, guilty of an offence punishable by a fine of up to $25,000.

Remedies under Health and Safety Legislation

If an employer terminates an employee in reprisal for initiating a workplace violence or harassment complaint, or otherwise contravenes applicable health and safety legislation, the employee may file a complaint. Procedures and remedies vary by

jurisdiction, and may include awards of damages or reinstatement. In addition, depending on the jurisdiction, the employer may be found guilty of an offence punishable by fine or imprisonment. In Ontario, for example, the Ministry of Labour vigorously enforces the health and safety legislation and reports that for 2015/16 it obtained 1,045 health and safety convictions, with fines totalling almost $10 million.

13. Are any categories of worker (for example, fixed-term workers or workers on family leave) entitled to specific protection, other than protection from discrimination or harassment, on the termination of employment?

Statutory Leaves of Absence and the Right to Reinstatement

Broadly speaking, employees who take a statutory leave of absence cannot be terminated for reasons related to the leave. Employees returning from a statutory leave of absence must be reinstated to the position they most recently held before the leave began. Even if another person is doing the job, the returning employee is entitled to be reinstated to that position so long as the work is still being done and the job still exists. If the position no longer exists, the returning employee must be reinstated to a comparable position. Exceptions may be available where the employee's employment is ended solely for reasons unrelated to the leave.

Fixed Term Contracts

At common law, fixed-term employees are not entitled to reasonable notice of termination or pay in lieu of notice upon the expiry of their fixed term contract. Under employment standards legislation, fixed term employees may be entitled to notice of termination or pay in lieu upon the expiry of the term, subject to the terms of applicable legislation. For example, in Ontario, the ESA provides that employees are not entitled to notice of termination or pay in lieu upon the expiry of a fixed-term contract that is less than 12 months (but are so entitled if the term is greater than 12 months).

In common law Canada, employers may terminate an employee during the fixed term so long as the contract contains a clear termination provision and such provision complies with the applicable employment standards requirements for notice or pay in

lieu. However, in the absence of an enforceable early termination provision in a fixed term contract, a court may award the employee damages equivalent to the compensation that they would have received for the remainder of the term.

14. Are workers who have made disclosures in the public interest (whistleblowers) entitled to any special protection from termination of employment?

Overview

Employees who report organisational wrongdoing or illegal activities have various protections related to their jobs.

Common Law

At common law, there is whistle-blowing protection available to public sector employees who publicly express opposition to the government or its policies in certain instances, for example where, (i) the government is engaged in illegal acts; (ii) government policies jeopardise the life, health, or safety of the public; or (iii) speaking out has no impact on the employee's ability to perform his or her duties. Where these whistle-blowing exceptions apply, an employee's conduct in 'speaking out' will not constitute a breach of the employee's duty of loyalty which is owed to his or her employer, and the employer may thereby be prevented from asserting that it had just cause for the dismissal of the whistle-blowing employee.

Legislation

Canada's criminal legislation, the Criminal Code, deems it an offence for an employer to either threaten or retaliate against an employee who provides information to a person whose duties include the enforcement of federal or provincial law regarding an actual or potential breach of the law by the employer.

The Public Servants Disclosure Protection Act (the 'PSDPA') protects federal public sector employees who divulge wrongdoing by their employer against reprisal. Wrongdoing under the PSDPA may involve illegal conduct, misuse of public funds or assets, or gross mismanagement. In order for whistle-blowing to be protected under

the PSDPA, the employee must adhere to the statutory requirements for disclosure which includes, among others, the requirement that the public servant provide no more information than is reasonably necessary to make the disclosure.

Provincial employment standards legislation, human rights legislation, and health and safety legislation in Canada generally contain protections against reprisals in respect of employees who inquire about and seek to enforce their rights under the law. Violation of reprisal provisions may lead to various consequences including damages, penalties, fines or imprisonment.

In Ontario, the Securities Act prohibits retaliation by Ontario employers against employees for reporting securities violations (as well as against employees who express their intention to report such violations).

15. What financial compensation is required under law or custom to terminate the employment relationship? How do employers usually decide how much compensation is to be paid?

Overview

As described in Question 4, an employer that terminates an employee without cause must provide statutory notice (or pay in lieu) and, where applicable, statutory severance pay. In addition, employers are, at common law, required to provide an employee with ‘reasonable’ notice of termination or pay in lieu of notice unless there is a clear and enforceable agreement with a termination clause that displaces the common law and complies with the minimum requirements of applicable employment standards legislation. Based on these requirements, there are a number of ways in which a termination may be handled, each of which impact the financial compensation required by law.

Determining Compensation

In order to determine the compensation to be provided to an employee upon termination, it is important to review any termination provisions in the employee’s contract to determine the employee’s entitlements under the contract. Employers must

also consider any applicable qualifications to the right to terminate employees without cause that apply in their jurisdiction (see Question 1).

As a general proposition, an employee is entitled to receive the total compensation and benefits (for example salary, projected incentive compensation, and the monetary value of benefits) that the employee would otherwise have received during the applicable notice period (for a discussion of applicable notice, see Questions 2 and 4). If an employee rejects a separation package and commences litigation for wrongful dismissal, the court may award additional damages to the extent that the employer did not offer items in the package which the employee would have earned or received during the notice period. The issue of whether an employee would have received certain items – including bonuses, stock option vesting, and other incentive compensation – during the applicable notice period, and is therefore entitled to receive those items upon termination, is the subject of a complex and growing body of case law.

Methods of Handling Termination

Having regard to an employee's termination entitlements, three methods of handling termination are often used by employers:

- Working notice: The employer may give notice to the employee and require the employee to work the notice period, but perhaps with reasonable time off to attend job interviews. However, it is often undesirable to have employees working under notice for practical reasons. In addition, working notice cannot be provided instead of the statutory severance pay to which Ontario and federal employees may be entitled.
- Lump Sum Payment: The employer may terminate the employee immediately and provide a lump sum payment. This lump sum payment may be somewhat less than the employee would receive working under notice, based on the rationale that the employee may succeed in obtaining employment within the proper notice period and receive the benefit of a lump sum payment in advance. It is generally advisable to obtain a release from the employee prior to paying any amount beyond the statutory requirements.
- Salary Continuance: The employer may terminate the employee immediately but continue the employee's salary payments for the duration of the reasonable notice period. These payments are usually paid on the basis that they will stop when the employee finds other employment, or after the specified period of time, whichever occurs first. Usually there is an incentive, based upon a percentage of the outstanding payments payable to the employee once the employee finds a job, to encourage the employee to exert best efforts

to find a job quickly. These arrangements are typically memorialised in a written agreement that includes a release.

The three methods outlined above are the most common, but there are other methods as well as variations or combinations of these three methods.

16. **Can an employer reach agreement with a worker on the termination of employment in which the employee validly waives his rights in return for a payment? If yes, describe any limitations that apply.**

If an employee signs a release in exchange for a separation package upon termination of employment, common law claims can be waived. However, in order for the release to be effective, there must be valid consideration. A separation package will not be valid consideration unless the employer provides the employee with amounts exceeding those that he or she is already entitled to under contract or statute. A payment that simply meets the requirements of employment standards legislation is not valid consideration.

Even if there is valid consideration, a settlement agreement may be deemed by a court to be unconscionable if the four elements of unconscionability are present in the circumstances of the case:

1. a grossly unfair and improvident transaction;
2. the victim's lack of independent legal advice or other suitable advice;
3. an overwhelming imbalance in bargaining power caused by the victim's ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or similar disability; and
4. the other party's knowingly taking advantage of this vulnerability.

A court may, for example, conclude that a separation package and release is unconscionable if an employee signs under duress and without a genuine opportunity to obtain independent legal advice.

17. **Is it possible to restrict a worker from working for competitors after the termination of employment? If yes, describe any relevant requirements or limitations.**

Non-Competition Clauses

It is possible to restrict a worker from working for competitors post-termination, but certain limitations apply. Canadian courts generally consider non-competition covenants to be in restraint of trade and prima facie unenforceable unless an employer can establish that the covenant:

- Goes no further than is necessary to protect the rights that the employer is entitled to protect;
- Does not unduly restrain the employee from making use of his or her skills and talent; and
- Is not contrary to the public interest.

The clause must be reasonable in duration, geographic scope and all other aspects (such as scope of activity covered) in light of the interest that the employer is seeking to protect. The clause must also be sufficiently clear and certain; ambiguous or vague clauses will likely be voided for uncertainty.

The employer is not entitled to use a non-competition clause to protect its competitive position, but only to protect proprietary interests, which, under the circumstances, reasonably need protection. The courts will not enforce a non-competition clause unless the employer can demonstrate that a non-solicitation clause is insufficient to protect the employer's proprietary interest.

In Québec, an employer cannot rely on a non-competition covenant if the employer terminated the employment relationship without 'serious reason' (i.e. just cause). An employer can rely on an otherwise valid non-competition provision if the employee resigns or if the employee is terminated for 'serious reason'.

Golden Handcuffs

Another method for deterring departing employees from competing is the concept of

‘golden handcuffs’. Golden Handcuffs are essentially a financial punishment if the former employee competes. In Ontario, payments which are conditional upon compliance with non-competition covenants are generally not viewed as being in restraint of trade and therefore do not have to satisfy the rigorous ‘reasonable’ analysis to which Canadian courts will subject traditional restrictive covenants. Québec courts have rejected the Ontario approach, which British Columbia courts have sought to carve out a middle ground by holding that a conditional benefit clause may be in restraint of trade if it effectively prevents the employee from working in his or her chosen field.

18. Can an employer require a worker to keep information relating to the employer confidential after the termination of employment?

Yes. At common law, as a general rule, an employee may leave employment and lawfully compete against his or her employer (unless the employee is a fiduciary or is bound by a non-competition agreement), but the employee may not take or use against the employer any of the employer’s trade secrets, confidential information or customer lists, whether during or after employment.

Further, employment agreements often contain covenants with respect to the employer’s confidential information and intellectual property that apply post-employment. Separate confidentiality agreements may also be entered into between the employer and employee which serve the same purpose.

19. Are employers obliged to provide references to new employers if these are requested?

Employers are not obliged to provide references to new employers. However, a reference should be provided except where cause is being alleged or where the employer cannot in good conscience provide a reference since it is to the employer’s advantage for the former employee to find a job as soon as possible.

20. **What, in your opinion, are the most common difficulties faced by employers when terminating employment and how do you consider employers can mitigate these?**

Changes Leading to Constructive Dismissal Claims

A common difficulty faced by employers is the risk that in making changes to work assignments, compensation structure, work location, or other terms of employment, the changes may amount to a constructive dismissal such that the employee can refuse and demand notice and/or severance pay. Courts have held that the tests for constructive dismissal may take one of two forms:

- A Breach of Contract: Under one test, there will be a constructive dismissal if (1) the employer breaches a (written or implied) term of the employment agreement and (2) a reasonable person in the same situation would have felt that the essential terms of the employment contract were being substantially changed.
- Employer's Conduct, but no Specific Breach of Contract: An employer's conduct may also constitute constructive dismissal if it more generally shows that the employer no longer intends to be bound by the contract. Courts have held that an employee can be found to have been constructively dismissed without identifying a specific term that was breached if the employer's treatment of the employee made continued employment intolerable. This approach is necessarily retrospective, as it requires consideration of the cumulative effect of past acts by the employer and the determination of whether those acts would lead a reasonable person to conclude that the employer no longer intended to be bound by the terms of the contract. The employee is not required to point to an actual specific substantial change in compensation, work assignments, or so on, that on its own constitutes a substantial breach.

Employers can mitigate the risk of a constructive dismissal claim by including in the employment contract clearly drafted clauses that expressly permit specific changes – e.g. changes in job duties or job location – to be made. The risk of a constructive dismissal claim can also be reduced by providing the employee with reasonable notice of any changes. More generally, employers can limit their potential liability in respect of constructive dismissal claims by ensuring that the employment agreement contains a clearly drafted and statutorily compliant termination clause that specifies an employee's termination entitlements.

Disputes Regarding the Reasonable Notice Period

A second common difficulty faced by employers when terminating employment is the risk of disputes between the employer and employee regarding the length of the common law reasonable notice period. Such disputes are frequent because, as noted elsewhere in this guide, there is no set formula for determining what reasonable notice of termination is in any given case.

The difficulties associated with determining reasonable notice may be mitigated by using a clearly drafted and statutorily compliant termination clause to contract out of the common law obligation to give reasonable notice of termination, such that only statutory notice must be provided. Alternatively (or in addition), employers can offer the employee 'working notice' rather than a payment in lieu of notice, which may, if sufficient notice is given, satisfy the employer's common law and statutory notice obligations (but not its statutory severance obligations, if any).

Disputes Regarding the Compensation to be Included in a Separation Package

A third common difficulty faced by employers when terminating employment is the risk of disputes about whether an employee is entitled to items of compensation in addition to salary. In particular, employers and employees often disagree about whether the employee is entitled to a bonus that the employee would otherwise have received if his or her employment had continued during the notice period. There are also frequent disagreements about whether an employee's stock options continue to vest post-termination.

These difficulties can, in some cases, be mitigated by express language in the employment contract or applicable plans/policies that specifies the treatment of bonuses and equity upon termination of employment. However, courts will closely scrutinise any terms and conditions that purport to limit an employee's entitlements with respect to incentive compensation or equity during the applicable notice period.

21. Are any legal changes planned that are likely to impact on the

way employers approach termination of employment? If so, please describe what impact you foresee from such changes and how employers can prepare for them?

Ontario's Employment and Labour Law Statutes

In 2015, the Ontario government announced the largest review of its labour and employment legislation in decades, which culminated in a Final Report released in May 2017. The government responded to the report by passing a bill to amend Ontario's core labour and employment legislation: the Employment Standards Act, 2000 and the Labour Relations Act, 1995. While these changes are significant in many ways, they are unlikely to impact the way most employers approach termination of employment.

One exception is for employers of temporary help agency staff, who are now required to give one week's notice or pay in lieu when an assignment is terminated in certain circumstances.

The new law will also shield unionized employees from termination without just cause during the period between certification and the date on which a first contract is entered into, and also during the period between the date the employees are in a legal strike or lock-out and the date the new collective agreement is entered into.

The Ontario government has indicated that their review of Ontario's labour and employment law is still ongoing. As such, employers should keep apprised of any changes to legislation that may be forthcoming.

Alberta' Employment and Labour Law Statutes

The employment and labour landscape in Alberta has recently undergone significant legislative changes. The Fair and Family-Friendly Workplaces Act changes came into effect on January 1, 2018, and the Employment Standards Amendment Regulation came into force on December 6, 2017. These changes collectively modify the Employment Standards Code of Alberta (the Code), which applies to 85% of employers in Alberta.

- Minimum wage did not change on January 1, 2018, as it increased to $13.60/hr on October 1, 2017, and it will increase again to $15/hr on October 1, 2018.

- Employers are no longer to be allowed to pay employees with disabilities less than the minimum wage.
- Employers can only take deductions from an employee's earnings if the deduction is: required by law, authorized by a collective agreement or authorized in writing by an employee.
- On commencement of employment, employees can agree in writing to deductions for: company pension plans, dental plans, social funds, and registered retirement savings plans.
- Overtime agreements will allow time to be banked for six months rather than three.
- Overtime banking will be calculated at 1.5x for all overtime hours worked (currently hour-for-hour).

The following new unpaid job protected leaves are created by the legislation (in each case they are maximum amounts allowed per year):

- Long-term illness and injury leave – up to 16 weeks for long-term personal sickness or injury.
- Personal and family responsibility leave – up to five days for personal sickness or short-term care of an immediate family member.
- Bereavement leave – up to three days for bereavement of an immediate family member.
- Domestic violence leave – up to 10 days for employees addressing a situation of domestic violence.
- Citizenship ceremony leave – up to a half-day for employees attending a citizenship ceremony.
- Critical illness of an adult family member – up to 16 weeks for employees who take time off to care for an ill or injured adult family member.
- Critical illness of a child – up to 36 weeks for parents of critically ill or injured children.
- Death or disappearance of a child – up to 52 weeks for employees whose child disappeared as a result of a crime, or up to 104 weeks if a child died as a result of a crime.

Erratic Case Law Regarding Contractual Termination Clauses

It is settled law that an employer and employee can contract out of the common law requirement to provide reasonable notice of termination by means of a termination clause that clearly displaces the common law and is in compliance with employment standards legislation. However, the case law in many jurisdictions is inconsistent as to

precisely when a contract in fact displaces the common law and in fact complies with minimum employment standards.