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Hiring: Getting it Right Before it Goes Wrong

Severance/Notice Clauses

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The Basics of Severance Liability on Termination of Employment



The Basics

- Non-union employees can be terminated without cause by providing advance notice or severance pay in lieu of notice
- In the absence of an express employment agreement at the time employment is offered and accepted on how much this notice or severance will be, the Courts imply their own view of reasonable notice or payment in lieu (common law liability)
- An Employer can make it an express condition at the time of the employment offer that the employee agree to a specified amount of termination notice or payment in lieu of notice



Options for Severance Clauses

- The minimum statutory requirements of the *Alberta Employment Standards Code*
- As long as it complies with the minimums of the *Employment Standards Code*, any amount of lump sum or formula can be applied
- Ensure wording is clear in terms whether it is base wages/salary or there is a component for benefits, and if there is a benefits component, how such is calculated



Use of Fixed-Term Contracts

- Typical problems:
 - Costly absence of a termination clause
 - Working past the end of the Term
 - Renewal clause confusion
- Weighing the potential advantages of a Fixed-Term Contract with the potential problems above
- Consider if you really need to use Fixed-Term Contracts from year to year if you are properly implementing a severance clause allowing termination without cause pursuant to the minimums of the *Employment Standards Code*



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Classic Ways Employers Invalidate Their Severance Limitation Clauses



Classic Errors to Avoid

- Employee offered and accepted employment prior to being given their Letter of Hire or Contract with the severance clause
- A general reference to the Employment Standards without referring expressly to the minimum standards, and ideally express reference to sections 56 and 57 of the *Employment Standards Code*
- Letting the employee start work prior to signing the Letter of Hire or Contract with the severance clause
- Lack of independent legal advice warning in the Letter of Hire or Contract
- Imposing probationary status and probationary no notice or severance clause, on an employee already employed for more than 90 days with the Employer, being hired into/transferring to a new position



New or Complex Invalidation Risks for Severance Clauses

- Employee changes position without express prior agreement to apply prior severance clause to a new job
- Attempting to expand the definition of “just cause” termination in your hiring terms
- Any wording that could be argued, in any potential circumstance, to violate any statutory legal requirement (*Conflicting Ontario Case Law*)
 - “any reason”
 - “at any time”
 - “Employer’s sole discretion”



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Refresher on Key Teacher Contract Issues



Teacher Probationary Contracts What They Are

- Section 206 Probationary Contract for teacher not employed by the Board in the prior school year
- Exception for prior employment as Substitute or Temporary Teacher
- Automatic termination on June 30 following commencement date
- Option to extend up to one further year if evaluations indicate



Teacher Probationary Contracts How To Use Them

- General rule, use for all new-hires to be employed to the end of the school year for which they are hired
- Ensure the contract is clearly identified as a Probationary Contract and noted to automatically expire with no further obligations on June 30 of the school year



Teacher Probationary Contracts Performance Management and Dismissal Implications

- Documented evaluation of concerns necessary for Second Year Probationary Contract
- Automatic termination/expiry on June 30:
 - Warning** – do not take steps or make representations inconsistent with automatic expiry/conclusion of employment, until you are certain that employment will be continued
- Just cause is required to terminate prior to the end of the fixed term





Teacher Probationary Contracts What They Are

- Section 209 Temporary Contract for a teacher employed for the purpose of replacing a teacher who is absent for a period of 20 or more consecutive teaching days. If this applies - Use It
- Such employment is for a fixed term to the date provided in the contract or June 30 of the year in which the contract commenced, whichever is earlier



Teacher Temporary Contracts Performance Management and Dismissal Implications

- This form of contract offers significant flexibility and far less restrictions on the Board than do the other forms of contract
- Contract can be terminated at any time for any reason (absent Human Rights) by giving 30 days' notice – No Appeal to Board of Reference
- **However, still right to be heard by decision maker prior to termination (Pembina Hills Case)**



Teacher Interim Contracts

What They Are

- Section 210 contract for not more than 360 teaching days for a teacher not employed by the Board in a prior school year
- Exception for prior employment as a Substitute or Temporary Teacher
- Automatic termination on June 30th following commencement date unless otherwise specified in the Contract



Teacher Interim Contracts Performance Management and Dismissal Implications

- Ensure the contract is clearly identified as an Interim Contract and noted to automatically expire at the end of its stated fixed term with no further obligations
- Can span more than one school year so long as does not exceed the 360 teaching days
- Can be extended by agreement so long as does not exceed the 360 teaching days
- Need Just Cause to terminate prior to end of agreed Term



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Take Away Tips



Take Away Tips

- If you aren't using a clear notice/severance clause for your non-union hires, we strongly recommend you seek legal advice to do so with your hires moving forward
- Even if you have been using terms of hire which have such a clause, if you have not received specific advice or review of that clause within the last year, we recommend you do so to potentially update the wording due to quickly evolving caselaw
- This is a very important tool in every employer's toolbox and when used correctly can save any employer hundreds of thousands of dollars in severance over the coming years
- Understand when and how Teacher Contracts should be used to maximize flexibility and minimize legal issues and disputes
- Setting this up properly means you will have more time and money to spend on your good employees rather than spending too much money on walking poor employees out the door



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QUESTIONS?

Let's talk.

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