

# **TERMINATION OF EMPLOYMENT IN THE DENTAL OFFICE**

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# STATUTORY OBLIGATIONS UPON TERMINATION

## NOTICE OF TERMINATION

- “Termination” occurs if,
  - i. employer dismisses employee or otherwise refuses or is unable to continue to employ;
  - ii. employer constructively dismisses employee and employee resigns from his/her employment in response within a reasonable period; or
  - iii. a lay-off of an employee for a longer period than the period of “temporary lay-off” as defined within the ESA Regulations (s.56) [Note that at common law, no concept of “lay-off” outside of unionized context]

- Notice of Termination must be in writing and served personally upon any employee continuously employed for three months or more (s.54)
- Minimum statutory notice of termination which must be provided (s.57) is:

<b>LENGTH OF EMPLOYMENT*</b> (based upon a <b>completed</b> year of service)	<b>NOTICE</b>
3 months to less than 1 year	1 week
1 year to less than 3 years	2 weeks
3 years to less than 4 years	3 weeks
4 years to less than 5 years	4 weeks
5 years to less than 6 years	5 weeks
6 years to less than 7 years	6 weeks
7 years to less than 8 years	7 weeks
8 years and longer	8 weeks (maximum <b>statutory</b> notice)

**\* for the purposes of the above calculation, two successive periods of employment that are not more than 13 weeks apart, shall be added together and treated as one period of employment**

- When calculating length of service, time spent by employee on leave (i.e. maternity or sick leave) or other inactive employment must be included, unless the inactive employment was due to a lay off (s.59)
- Notice of termination can be given as working notice with salary continuation, a lump sum payment in lieu of notice, or a combination thereof, at the employer's election (s.61)

- The period of notice is deemed to be active employment (s.62(1))
- During period of notice of termination, employer cannot alter terms and conditions of employment (s.60(a))
- During period of notice of termination (irrespective of whether working notice or pay in lieu thereof), employer must continue all benefit plan contributions which employer normally required to make (subject to employee contributing employee required premiums) and all vacation entitlement continues to accrue (s.60(c))

- Period of notice of termination shall not include any vacation time unless the employee, after receiving notice of termination, agrees to the inclusion of vacation time in the notice period. Upon termination, employee entitled to receive any unpaid vacation accrued until the end of the statutory notice of termination period

- Regulation O. Reg. 288/01 provides additional provisions regarding termination, and specifically exclusions to notice of termination provision.

Examples of exclusions:

- Employees hired on specific fixed term contract which is 12 months or less (unless employee's termination takes place prior to expiry of fixed term contract or unless employee's employment continued for three months or more after the expiry of fixed term contract)



- Employee whose employment terminated after refusing offer of reasonable alternate employment with employer
- Employee guilty of willful misconduct, disobedience or willful neglect of duty of a serious nature

- When 50 or more employees are being terminated at employer's establishment in same 4 week period, employer must give notice of termination in manner prescribed by *Employment Standards Act*, for prescribed periods which are different than set out above (s.58)

# EMPLOYEE RESIGNATION

- An employee to whom notice is given can resign upon providing:
  - (i) at least one weeks notice if employed for less than two years; and
  - (ii) at least two weeks notice if employed for two years or more

Unless the employee is constructively dismissed or the employer breaches the employment contract, in which case the employee is not obliged to provide notice of resignation

# SEVERANCE PAY

- In addition to notice of termination requirements, employer who has either:
  - effected the terminations because of a permanent discontinuance of all or part of the employer’s business at an establishment and the employee is one of 50 or more employees who have been terminated within a 6 month period as a result; or
  - an annual payroll of \$2.5 million or more

must pay severance pay to the employee as long as employee has been employed for 5 years or more (s.64(1))

- Payroll of employer will be deemed to be \$2.5 million or more if the total wages earned by all employees was \$2.5 or more:
  - a) In the 4 weeks ending with the last day of the last pay period completed prior to the termination, multiplied by 13; or
  - b) In the last or second-last fiscal year of the employer prior to the termination (s.64(2))

- All service, including inactive service, **whether continuous or not**, including the notice period (s.65(4)), is to be included in determining whether the employee is eligible to receive severance pay and in calculating severance pay (s.65(2))
- Calculation of severance pay derived by multiplying the employee's regular wages for a regular work week by the total number of years of service, or partial years of service, but in no event shall severance pay exceed an amount equal to the employee's regular wages multiplied by 26 weeks (i.e. 26 weeks, is maximum severance payment)(s.65(1) and (5))

- Severance pay is to be paid in addition to any other **statutory** entitlement or any entitlement under a contract of employment (s.65(7)) [but common law notice includes statutory notice of termination and severance pay entitlements]
- Severance pay must be paid as a lump sum payment unless employee agrees to accept it in installments, which cannot exceed 3 years. If default, all amounts become due immediately (s.66)

- Only certain specific deductions (set-off) can be made against severance pay:  
examples:
  - any amount paid to employer for loss of employment under an employment contract; if such amount is based upon length of service/employment/seniority
  - any previous severance pay paid to employee by virtue of a prior termination with same employer



- Regulation O. Reg 288/01 contains similar exemptions for payment of severance pay as apply to notice of termination

# GENERAL

- Notice of termination and severance pay must be paid no later than 7 days after the employment ends or the employee's next pay day, whichever is later and must set out written statement specifying gross payment paid for each, how calculated, and deductions therefrom
- Other than in unionized workplace, no stipulation for determining how employees are chosen for termination – within employer's discretion as long as reason for termination is not violation of law (i.e. discrimination under the Ontario Human Rights Code)

- Employees who file a Complaint under the *Employment Standards Act* for notice of termination (or pay in lieu thereof) or severance pay cannot then commence civil action for common law notice/wrongful dismissal damages relating to the same termination of employment, even if civil claim is in excess of statutory entitlements (and vice versa) (s.97(2) and (3), s.98(1) and (2))
- Employee can withdraw Complaint under *Employment Standards Act* within 2 weeks of filing (s.97(4))

- Maximum order which can be made by Employment Standards branch in respect to any one employee is \$10,000.00 in wages

# DIRECTOR'S LIABILITY

- Director of a corporation (other than certain specific exceptions), which definition includes a shareholder who is a party to a Unanimous Shareholder Agreement, is subject to joint and several **personal** liability for certain statutory obligations under *Employment Standards Act*, but are **not** personally liable for notice of termination or severance pay under *Employment Standards Act* or an employment contract
- Directors are personally liable, jointly and severally, for other amounts, plus interest, which are due upon termination (subject to maximum specified below) such as:

- a) unpaid wages if the employer is insolvent or an officer has made an Order for wages under *Employment Standards Act*;
- b) vacation pay (greater of the vacation pay provided under the *Employment Standards Act* and amount contractually agreed to);
- c) holiday pay (greater of holiday pay provided under the *Employment Standards Act* and amount contractually agreed to); and
- d) overtime pay (greater of overtime pay provided under *Employment Standards Act* and amount contractually agreed to)

- In no event are directors personally liable for amounts exceeding 6 months' wages that become payable while directors or for more than 12 months' accrued vacation pay

# COMMON LAW NOTICE (REASONABLE NOTICE)

- Not in a prescribed amount – determined by a Court, using its discretion
- Common law notice considers factors such as age; length of service; position/level of responsibility; income
- Generally speaking, common law entitlements will be in excess of statutory entitlements, and in many instances substantially more
- Common law notice which exceeds statutory notice of termination and severance pay is inclusive of same
- Mitigation obligation of terminated employees at common law – may reduce common law notice obligations (mitigation not required under *Employment Standards Act*)



# ONTARIO HUMAN RIGHTS CODE

## DISCRIMINATION

- Code requires, *inter alia*, equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, same-sex partnership status, family status or disability (s.5(1))
- Code also prohibits harassment in employment because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, record of offences, marital status, same-sex partnership status, family status or disability (s.5(2))
- “Sex” includes pregnancy (s.10(2))

- Code also prohibits harassment in the workplace because of sex by employer or by another employee and prohibits sexual solicitation or reprisal or threat of reprisal for rejection of sexual solicitation (s.7)

- Exemption for preference in employment where reasonable and *bona fide* qualification because of nature of employment (s.24(1))
- Qualification only *bona fide* after attempt to accommodate without undue hardship (s.24(2))
- A requirement, qualification or factor which is not discriminatory on its face may inadvertently operate in a manner which constructively discriminates (s.11(1))

# DISABILITY

- Defined as, *inter alia*:
  - a) any degree of physical disability, infirmity and includes lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment;
  - b) Mental impairment or developmental disability;
  - c) Learning disability;
  - d) Mental disorder; or
  - e) Any injury or disability for which benefits claimed or received under *Workplace Safety and Insurance Act, 1997 (s.10(1))*;

- Includes discrimination based upon a perceived disability or a past disability (s.10(3))
- Right of person **not** infringed if the person is incapable of performing or fulfilling the **essential** duties or requirements of the job because of disability (s.17(1) **but** must first attempt to accommodate (s.17(2))

# AGE AND MANDATORY RETIREMENT

- The Code currently defines “age” in s. 5(1) as 18 years or more and less than age 65
- Effective December 12, 2006, Bill 211 entitled the Ending Mandatory Retirement Statute Law Amendment Act, 2005, comes into effect, prohibiting mandatory retirement at age 65
- Employers no longer allowed to rely upon mandatory retirement policies to force employees out of the workplace

- Bill 211 actually amends the Ontario Human Rights Code's definition of "age" to remove the age 65 cap on discrimination – cannot contract out of the Code
- Bill 211 maintains the existing provisions under The Workplace Safety and Insurance Act which makes distinctions based upon age (i.e. loss of earning replacement benefits for workers who are injured before turning age 63 cease when they turn age 65; employer's re-employment obligations under this Act will cease upon the employee reaching age 65)

- Will now be required to provide notice to all employees terminated without cause, irrespective of age
- Aging employees still subject to performance criteria – they must be able to perform the essential duties of their job; however arguably if performance declines due to age, in addition to progressive management, an employer is required to accommodate in accordance with Ontario Human Rights Code provisions prior to termination for performance reasons (i.e. must apply undue hardship and bona fide occupational requirement tests)



- Benefit Plans: Bill 211 provides wording intended to clarify that “insurance policies do not need to provide insurance coverage beyond age 65 however, consider that:
  - (1) Employment Standards Act, 2000 provides that all benefit plans are to be continued during termination pay period;
  - (2) Part XIII of the Employment Standards Act, 2000 prohibits age discrimination in benefit plans unless permitted by Regulation 286/01 (which defines age as between 18 and 65);  
and

(3) now, the amended age discrimination provisions of the Code.

Therefore employers are arguably at risk if they cease employees' benefit plan coverage at age 65 – at the very least, if going to terminate benefits, try to reduce risk by providing reasonable notice of the termination of benefits at age 65 to avoid constructive dismissal claim

# ACCOMMODATION

- Commission will not find person incapable as per s.17(1) unless Commission satisfied that the needs of the person cannot be accommodated without undue hardship on the person accommodating, considering the cost, outside source of funding, if any, and health and safety requirements, if any

- Undue hardship defined by Courts as impossibility, serious risk or excessive cost – employers required to consider all available options and make every reasonable effort to accommodate employees with disability
- Undue hardship will vary in each case
- Factors to consider include:
  - financial cost
  - employee morale
  - interchangeability of workplace and facilities
  - safety

- Undue hardship does not require employer to create a new job within the workplace which was previously non-existent but employer may be required to pull together tasks from different positions
- Undue hardship does not require employer to maintain employee in position which is not useful or productive but employer may be required to modify a position
- An employer not required to accommodate employee absent sufficient information as to employee's limitations and capabilities

# FAMILY STATUS ACCOMMODATION

- New emerging area of law
- Recent British Columbia Court of Appeal decision (2004) suggests:
  - “family status” goes beyond the status of being a parent per se but will depend on each individual case
  - discrimination based upon family status will be made out when a change in a term or condition of employment imposed by an employer results in a serious interference with a substantial parental or other family duty or obligation of the employee

# TERMINATION IN SALE OF A DENTAL PRACTICE

- *Employment Standards Act* provides that if an employer sells a business **or part of a business** and the purchaser employs an employee of the seller, the employment of the employee is deemed to continue **for the purpose of the *Employment Standards Act*** and the employee's employment with the seller shall be deemed to have been employment with the purchaser for any subsequent calculation of the employee's length of employment (s.9(1)) [this deeming provision does not apply at common law]

- Exception if day on which purchaser hires employee is more than 13 weeks after the **earlier of** the employee's last date of employment with seller and the day of sale (s.9(2))
- Sale includes lease, transfer or disposition but is not necessarily the same as a sale of the assets
- Section 9(1) has no application to a sale of the shares of a corporation as in that case, the employer remains unchanged



# THEREFORE

- If **seller** wishes to comply with **statutory** obligations for notice of termination and severance pay, **must** issue written notice of termination and Record of Employment and satisfy notice of termination and severance pay obligations under *Employment Standards Act*
- If **seller** wishes to satisfy **common law** obligations, must ensure satisfaction of common law notice (reasonable notice) to terminated employee
- Mitigation by employee by accepting employment with purchaser or any other employer after effective termination (sale date) will reduce or may discharge in full seller's **common law** obligations but not **statutory obligations**

- Degree of mitigation by employee upon termination will depend upon terms of employment offered by purchaser (or other employer) i.e. are terms comparable

- Conflicting legal decisions as to whether, if **seller** properly discharges statutory obligations for notice of termination and severance pay, **purchaser** still remains liable for satisfaction of, *inter alia*, termination pay and severance pay for the totality of employee's employment with purchaser **and seller** when **purchaser** ultimately discharges employee
- Section 65(8) of *Employment Standards Act* specifically permits the offset of **severance pay** that was previously paid to an employee under the *Act*, a predecessor of the *Act*, or under a contractual provision of employment based upon length of employment, service or seniority, thus **purchaser** would only be liable for any further **severance pay** liability which accrued post closing based upon employee's service post closing
- Issue of liability of **purchaser** for **termination pay** which accrued to employee pre closing is still under debate