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Managing employee dismissals in a downturn

WEBINAR SERIES
LEGAL UPDATES
FOR CANADIAN EMPLOYERS

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Terminations in Ontario

Colleen Hoey

Key considerations during terminations

Ontario terminations

- Enforceable termination clause?
- How much notice should be provided?
- Is the employee in receipt of benefits or other terms and conditions?
- Release & Consideration of additional risks?
- Mass Termination?
- Mitigation?

Is the Termination Clause enforceable?

Ontario perspective

If any part of the termination clause unenforceable – the remainder of the termination clause will be void

<u>Ways in which a termination clause may be found unenforceable:</u>

- Termination “for cause” provisions
- Undercut the minimum provisions of the ESA
- Probation clauses
- Imposes limits
- Failure to continue benefits
- Failure to continue terms and conditions
- Do not warn employees that they are foregoing potential common law notice
- Do not reference the proper legislation

Examples of Unenforceable Clauses

Example 1

If your employment is terminated without cause you will be provided remuneration as in accordance with the Employment Standards Act.

Problem: Language not specific enough to limit an employee's termination entitlements to *only* the ESA minimums

Unenforceable Termination Clause

Example 2

The employer will be entitled to terminate your employment at any time without cause by providing you with the two weeks Notice of Termination or pay in lieu thereof for each completed or partial year of employment with the company." "Payments and notice provided for in this paragraph are inclusive of your entitlements to notice, pay in lieu of notice and severance pay pursuant to the Employment Standards Act, 2000.

Problem: The clause did not expressly state that benefits will be continued through the ESA notice period

Unenforceable Termination Clause

Example 3

The employer may terminate your employment without cause at any time during the term of your employment upon providing you with notice or pay in lieu of notice, and severance, if applicable, pursuant to the Employment Standards Act, 2000 and subject to the continuation of your group benefits coverage, if applicable, for the minimum period required by the Employment Standards Act, 2000, as amended from time to time.

Problem: The contract did not warn the employee that they are foregoing their rights to common law notice.

How much Notice?

Notice periods in Ontario

ESA Notice

Period of Employment	Notice
>1 year	1 week
1 week > 3 yrs	2 weeks
3 yrs > 4 yrs	3 weeks
4 yrs > 5 yrs	4 weeks
5 yrs > 6 yrs	5 weeks
6 yrs > 7 yrs	6 weeks
7 yrs > 8 yrs	7 weeks
8+	8 weeks

ESA Severance

Two Preconditions:

Worked for 5 + years AND

The Employer:

- has global payroll of 2.5 million OR
- has severed the employment of 50 or more employees in a 6-month period because all or part of the business permanently closed.

Severance Pay:

Approx. 1 week of regular wages per year of service up to 26 weeks

Common Law Notice

- Presumptive entitlement
- Inclusive of ESA statutory amounts
- *Bardal Factors* – age, yrs of service, degree of specialization, etc. Key question: how long will it take to find comparable employment.
- Informal ceiling of 24 months but exceptions possible

Benefits & other terms and conditions

- Section 60 (1) of the ESA requires employers to continue to make whatever benefit plan contributions would be required to maintain the employee's benefits.
- Section 60 (1) of the ESA also prohibits employers from reducing the employees wage rate or *any other term or condition of employment.*
- "Term of condition" has been interpreted to mean anything that is of financial benefit to the employee
- Can include bonuses and commissions, car allowances, stock options etc.

Mass termination?

Threshold for a mass lay-off

Section 58 (1) of the *Employment Standards Act, 2000* (Ontario) (“ESA”) requires employers to give longer periods of notice in “mass termination” situations.

Mass terminations defined:

- Employment of 50 or more employees are terminated
- At the employer’s establishment
- Within a 4-week period

How much notice?

The amount of notice employees must receive in a mass termination is not based on the employees' length of employment, but on the number of employees who have been terminated.

- 8 weeks' notice if the employment of 50 to 199 employees is to be terminated
- 12 weeks' notice if the employment of 200 to 499 employees is to be terminated
- 16 weeks' notice if the employment of 500 or more employees is to be terminated

Full and Final Release

- Benefits of a Release
  - Certainty
  - Addresses other potential claims including human rights
- Cannot request a release in exchange for ESA minimum entitlements
- Cannot request a release if the additional consideration already promised

Mitigation

- **Duty to mitigate**: a common law principle that requires employees who are terminated without (sufficient) notice to look for a new job. Any remuneration earned with the new employer reduces damages that can be recovered from the employee's former employer as a result of the wrongful dismissal.
- **Burden** is on the employer to show that the employee did not attempt to take reasonable steps and could be expected to have secured not just a position but a comparable one.
- **Low Threshold**: In assessing an employee's mitigation efforts, the courts are tolerant, and the employee need only act reasonably, not perfectly.

Québec termination law

Camille Paradis-Loiselle

Termination without cause

Reasonable Notice

- In the event of a termination without cause, the minimum notice provided by the *Act respecting Labour Standards* (the LSA) will not always be sufficient.
- Pursuant to the *Civil Code of Québec* (the CCQ), employers have to provide employees with a reasonable notice based on:
  - The length of service;
  - The salary;
  - The age;
  - The nature of the employment; and
  - The special circumstances in which it is carried out.
- A reasonable notice will range from 2 to 4 weeks' notice or indemnity in lieu thereof per year of service, with a usual maximum threshold of 24 months.

- The reasonable notice obligations are of public order.
  - The parties cannot contract out of these obligations

Termination without cause

Statutory notice

- The length of notice of termination provided by the LSA varies depending on the length of an employee's uninterrupted service.
  - Termination and lay off for six months or more: notice ranges from 1 to 8 weeks
  - Collective dismissal: notice ranges from 8 to 16 weeks
- Employers may cap the notice of termination to what is prescribed by the LSA, but they must be aware that the notice period may be overridden by a court if it is not deemed *reasonable* in light of the CCQ.
- The notice can be either a working notice or replaced by an indemnity in lieu of notice.

No renunciation in advance to the reasonable notice

- Employees may not renounce in advance (prior to the actual termination of employment) to their right to obtain a reasonable notice.

- In the event of a termination without cause, a provision of an employment agreement limiting the notice of termination to the entitlements of the LSA does not prevent a dismissed employee from seeking a reasonable notice or pay in lieu thereof.

Continuation of benefits and conditions of employment

Continuation of benefits

- If the notice of termination is being worked: Benefits have to be maintained.
- If an employee receives an indemnity in lieu of notice: there is no statutory obligation to maintain the benefits.
  - Except in the situation of collective dismissal.

The impact on restrictive covenants contained in the Employment Agreement

- In Quebec, pursuant to Section 2095 of the CCQ, an employer cannot invoke a non-competition clause in the event of termination of employment without cause, unless the employee reiterates his/her non-competition obligation in an agreement at the time of termination of employment.

- Some court decisions have extended the scope of Section 2095 CCQ to non-solicitation clauses. However, the case law is not unanimous in this regard.

Probationary Clauses

- Probationary provisions are common practice.
- A probation period of 3 months is standard and complies with the LSA.
- Pursuant to the LSA, employees with less than 3 months of uninterrupted service are not entitled to a notice of termination.
  - There may still be termination liability pursuant to the CCQ in the event of a termination without cause.

Termination without cause provision in Québec

- In Québec, employers can include alternative termination without cause provisions in their employment agreements, but must be aware that a court could intervene is the length of the termination notice is unreasonable.

- It is recommended that an employment agreement refer to the *Act respecting Labour Standards*, as it is Québec's governing legislation.

- Adapt employment agreements to suit the individual to whom it is addressed, as some categories of workers are not covered by the LSA

- For instance, senior managers are only covers by the labour standards relating to retirement, psychological or sexual harassment and family leave.

Recourse under Section 124 of the LSA

- Employees with 2 or more years of service (who are not senior managers) and who have been dismissed without just and sufficient cause can file a complaint with the Labour Standards Board (the “CNESST”).
  - Remedies : Reinstatement, payment of salary lost between the date of the dismissal and the date of the decision of the Administrative Labour Tribunal (the “Tribuanl”), indemnity for loss of employment and any other order the Tribunal believes fair and reasonable (for example, moral damages if the dismissal was conducted in an abusive manner).

- As such, prior to terminate an employee who has been with the company for at least 2 years, an employer needs to ensure it will be able to justify the termination by a just and sufficient cause. The fact that the employer gave a notice of termination (or offer an indemnity in lieu thereof) or paid a severance does not deprive an employee from his/her recourse under section 124 of the LSA.

- Employers are strongly recommended to seek legal advice prior to terminating a Québec employee with more than 2 years of service on a “without cause” basis.

Recourse under Section 124 of the LSA

Permanent layoff

- Notwithstanding section 124 of the LSA, employers are allowed to terminate an employee “without cause” in the context of a reorganisation if it’s required due to financial difficulties.

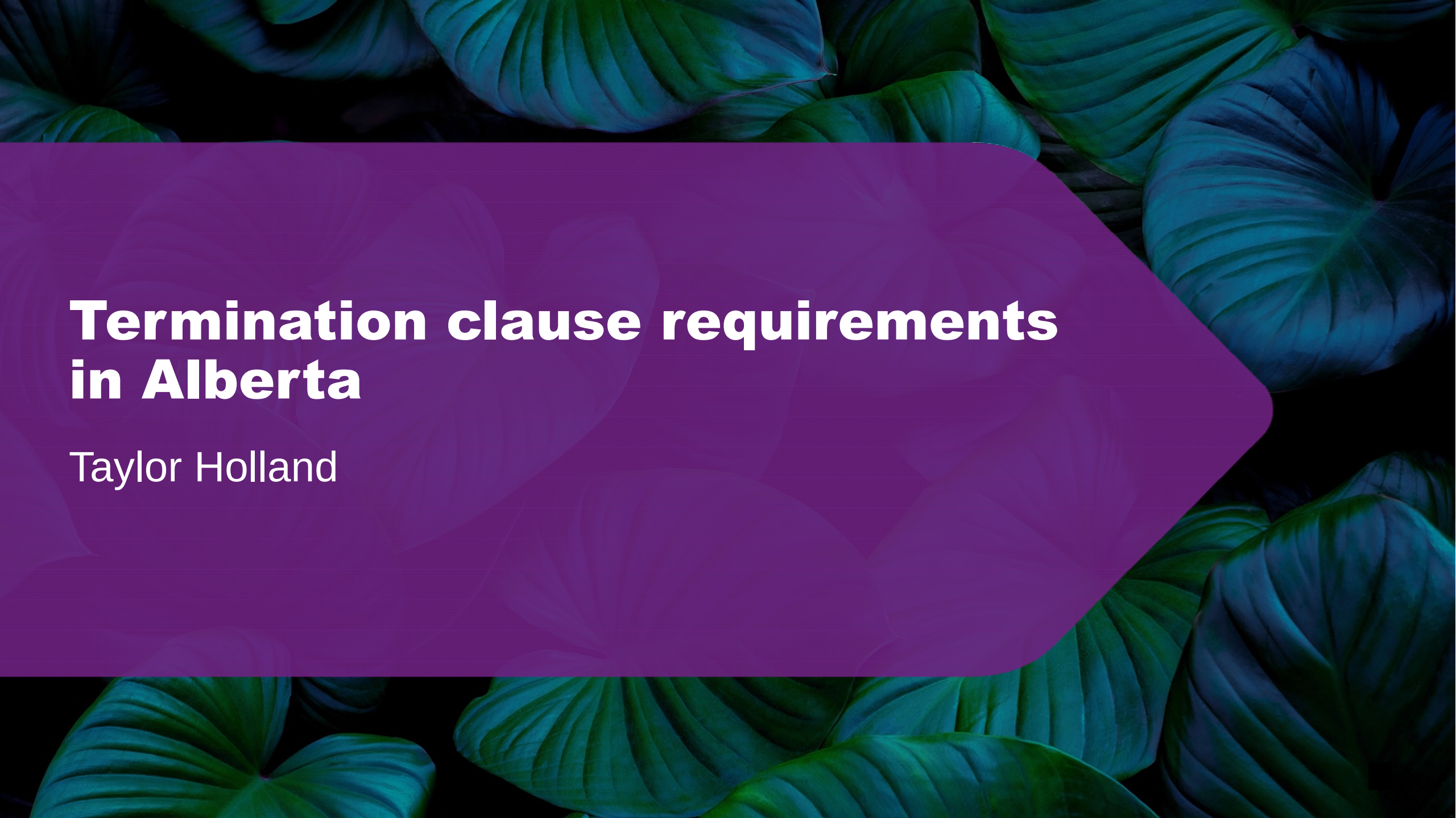
- In such a case, the employer will have the burden to prove the economic difficulties or the cause of the administrative reorganization.

- The choice of the employee to be terminated is based on objective and impartial considerations, and not on elements specific to the employee in question.

- The employer cannot use the pretext of a permanent layoff to get rid of an employee that he deems undesirable.

Releases

- A transaction under which an employee would receive less than the LSA minimum would not be valid.
- Employees cannot waive their right to an indemnity in lieu of reasonable notice in advance, but can do so after the acquisition of the right.
  - The waiver can be done through a transaction and release agreement.



Termination clause requirements in Alberta

Taylor Holland

Termination clause considerations

- Any ambiguities in termination clauses will be resolved in an employee's favour pursuant to the principle of *contra proferentum.*
- Termination clauses should be clear, concise and simple to the extent possible.
- Termination clauses that undercut, or attempt to contract out of, the minimum provisions of the Alberta *Employment Standards Code,* RSA 2000, c E-9 (the "*Code*") will be void and unenforceable.
- If an employer wishes to limit an employee's entitlements to the minimum termination requirements under the Code, such limits must be clearly and unambiguously expressed.
- If a termination clause is unenforceable, then common law will generally apply. However, in some cases, ambiguous fixed-term contracts may result in the employee receiving the benefit of the fixed-term if it is more advantageous to the employee.

Holm v AGAT Laboratories Ltd., 2018 ABCA 23

- The following termination clause was held to be unenforceable:

> 2(2) In the event we wish to terminate your employment without just cause, we agree that we will give you notice of the termination of your employment, or at our absolute discretion, we will pay you, in lieu of such notice, a severance payment equal to the wages only that you would have received during the applicable notice period. **This will be in accordance with the provincial legislation for the province of employment**.

- The Court considered the impact of Section 3 of the Code on the above-provision. Section 3 states:

> 3(1) Nothing in this Act affects
>
> (a) any civil remedy of an employee or an employer;
>
> (b) an agreement, a right at common law or a custom that
>
> (i) provides to an employee earnings, maternity and parental leave, reservist leave, compassionate care leave or other benefits that are at least equal to those under this Act, or
>
> (ii) imposes on an employer an obligation or duty greater than that under this Act.

Holm v AGAT Laboratories Ltd., 2018 ABCA 23

- As Section 57 of the Code requires notice or pay in lieu of notice to be “at least” the prescribed amounts, the Court of Appeal held that the Code sets a “floor” for the amount of notice to be paid rather than a “ceiling.”
- Therefore, termination provisions must clearly and unambiguously indicate that an employee will receive their “minimum” statutory entitlements as prescribed by the Code. Without express reference to the statutory “minimums,” a termination provision will be unenforceable.

Bryant v Parkland School Division, 2022 ABCA 220

- The Court of Appeal held the following termination language was unenforceable:

> This contract may be terminated by the Employee by giving to the Board thirty (30) days or more prior written notice, and by the Board upon giving the Employee sixty (60) days or more written notice.

- The trial judge determined that, since 60 days was greater than the largest possible minimum requirement of 8 weeks under the Code, the language was enforceable because it was in excess of the minimum Code requirements.
- The Court of Appeal, in allowing the employee's appeal, first considered whether the clause unambiguously limited or removed the presumption of reasonable notice at common law.
- While the Court of Appeal held that language referring to 60 days would have been clear and unambiguous, the inclusion of the phrase "or more" created ambiguity in the amount of notice the employee would receive upon termination.
- As the clause was ambiguous, the employee's claim for common law reasonable notice was allowed.

Rice v Shell Global Solutions Canada Inc., 2021 ABCA 408

- The Court of Appeal upheld a fixed term contract based upon the following language

  Your Assignment Length will be: 4 years

- The dissenting opinion followed a more traditional approach by finding that the term “Assignment Length” was ambiguous. Thus, the principle of common law reasonable notice should apply in the event of a termination before the end of the four-year assignment.
- However, the majority accepted that the interpretation giving the greatest benefit to the employee should be upheld, which in this case was the four-year fixed-term.
- Leave to appeal to the Supreme Court of Canada was refused.

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