Legal Considerations for Terminations and Restructurings in the Canadian Labour Market

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The Canadian labour market remains relatively tight due to low unemployment. It has not been spared, however, from a rise in inflation that has also affected many other economies. Concerns about a potential recession remain.

Restructuring a workforce is often a difficult but necessary part of adapting to a slowing economy. Absent careful planning at the frontend, employers can sometimes find themselves confronted with a potential claim for "wrongful dismissal" by disgruntled former employees. Importantly, employers are entitled to dismiss any non-unionized employee at any time for any reason – no justification or business case is required. Only narrow exceptions, such as discriminatory dismissals, interfere with an employer's right to determine its workforce. The "wrongful" in a wrongful dismissal claim refers only to the amount of notice (or pay provided to the employee in lieu thereof) that was provided to the employee – not the reason for the dismissal. Employers can mitigate against the risk successful wrongful dismissal claims by ensuring that employment agreements, as well as the process of termination itself, are carefully crafted and implemented.

How Much Is Owed?

Unless an employee has signed an enforceable contract with an enforceable termination provision, they will be entitled to common law reasonable notice for any dismissal that is "without cause" (that is, in the absence of serious and egregious misconduct). Courts will assess the applicable common law notice period based on a number of factors, such as age, length of service and position, among others. An employee's performance is not a factor for determining the applicable notice period. Courts have formally rejected any "rule of thumb" for assessing common law notice periods, but assuming approximately one month per year of service provides for a general benchmark. There can still be fluctuations in this approach, as senior employees with short tenure at the employer, for example, tend to skew on the higher end.

Fortunately, Courts permit termination provisions that limit entitlements to only those minimums provided by statute. These are much more modest compared to common law notice periods. As these clauses can drastically alter an employee's potential entitlements upon termination, they can be prone to attacks by employees. As these clauses are scrutinized by the Court in the event of a wrongful dismissal claim, the best investment an employer can make is developing strong employment agreements prepared by experienced employment law counsel. Periodically auditing and reviewing such agreements is strongly encouraged given the pace at which employment law evolves.

Immediate Next Steps

Before a business implements a restructuring, understanding termination liabilities in general terms is critical. In addition, prior to issuing termination letters, employers are encouraged to assess, on an employee by employee basis, the resulting liability flowing from each dismissal. Doing so is not just important for planning purposes, but it creates tactical opportunities to defuse costly and acrimonious legal claims by offering strategic termination offers at the outset. Mass terminations require even more careful planning, as they trigger distinct statutory obligations, but they can also be avoided altogether with strategic pacing of dismissals across time.

In short, careful planning can help avoid some of the pitfalls that may arise from dismissals, whether on an individual scale or a larger basis.

Disclaimer: This article offers general comments on legal developments of concern to business organizations and individuals and is not intended to provide legal advice. Readers should seek professional legal advice on the particular issues that concern them.

Contacts

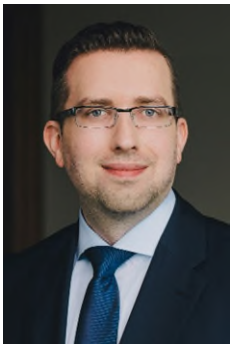


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Fiona has extensive experience advising international businesses entering the Canadian market. To date, she has advised more than 100 companies expanding into Canada. Fiona advises clients in this space all day, every day. She has been practising for more than a decade and is a regular speaker and writer on market expansion matters. Fiona is proud to have been recognized by *The Best Lawyers in Canada, The Canadian Legal Lexpert Directory* and *Benchmark Canada.*

A proactive and comprehensive approach is required to succeed in a new market. Fiona manages teams of other lawyers and patent agents to provide her clients with a full range of legal services to help their businesses grow. She acts as project manager to ensure her clients receive seamless legal services in all relevant areas.

Fiona takes great care to understand her clients' businesses and deliver advice that is tailored to meeting their specific needs. Her responsiveness, dedication to clear communication and hands-on approach show that she is personally invested in the success of her clients.

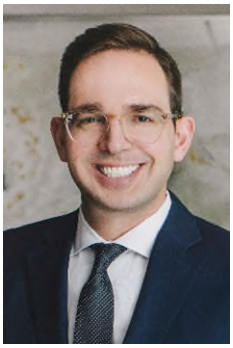


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Patrick is a dedicated litigator who has been repeatedly recognized in *The Best Lawyers in Canada* in the field of Corporate and Commercial Litigation. He is a vigorous advocate who is driven to deliver exceptional results.

Patrick has significant experience in all aspects of commercial litigation, including contractual disputes, shareholder disputes, class actions, employment and labour matters and intellectual property law. He has acted as counsel in trials, applications, appeals, arbitrations and various types of motions, including for urgent injunctive relief. Patrick also has particular expertise in professional discipline proceedings having previously acted as Discipline Counsel for the Law Society of Ontario.

Patrick has argued before the Supreme Court of Canada, and has appeared at every level of court in Ontario as well as every level of the Federal Court, in addition to various administrative boards and tribunals.



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As a litigator and member of the firm's Workplace Law Group, Alex assists employers in defending a variety of employment and labour claims. Alex also works closely with clients to identify strategic vulnerabilities with the goal of resolving issues before litigation arises. In addition to diligent advocacy, Alex leverages his experience conducting workplace investigations as well as drafting and implementing employment agreements and various workplace policies.

Alex prides himself on identifying practical solutions for complex employment issues. Prior to law school, Alex had a career in marketing and advertising and developed original brand strategy for some of the country's largest businesses and not-for-profit organizations. He appreciates that the modern workplace is increasingly fluid and the only constant is change.