

Practical Law Canada – Transcript

Employment: Structuring a Termination Package for a Departing Employee

Welcome to the Practical Law Canada tutorial on creating a termination package for a departing employee. The purpose of this tutorial is to show you how you can use Practical Law Canada resources to help you complete this task.

When you access our site you can see a list of all Practical Law Canada's practice areas. Practical Law Canada covers a wide variety of subjects all of which can be accessed from this page.

A termination package is the offer an employer makes to a terminated employee in exchange for a release of employment claims.

As creating a termination package for a departing employee is an employment matter, let's start by selecting the Employment practice area, and then selecting the Termination subtopic.

By selecting the subtopic you can see a list of all the termination resources. We have organized our resources this way to make them easy to browse. The resources fall into various categories.

These categories include Practice Notes, which are straightforward "how-to" guides. Practice Notes help you get up to speed quickly and include broad overviews as well as detailed notes on particular issues.

We also have Standard Documents including template termination letters, releases, and a variety of other documents that may be needed in the course of building an effective termination package.

All Standard Documents contain drafting notes to explain legal, drafting and negotiating points. The drafting notes are great time savers and can be particularly helpful at crunch time.

Next we have Checklists. The Employment module has two types of checklists. The first are Reference Charts, which include jurisdiction-specific information necessary for determining minimum standards the employer must observe when employment ends.

The second type of checklist is a workflow checklist that includes a concise list of steps that should be taken in completing a particular task. In this case, we have created a workflow checklist for the release of a termination package that has been agreed to by the departing employee.

We also have Toolkits, which aggregate most of the available resources on a topic. They are often the most valuable to a lawyer who is new to an area of law and wants to study it.

We also have Legal Updates. Our editors are constantly researching new sources and will promptly alert you to important developments.

Our core resources are maintained by our editors so you don't have to worry about whether or not the resource you are reading is up to date and reflects changes in the law.

Now let's look at a hypothetical scenario and see how Practical Law Canada's resources can help you create a termination package.

Suppose corporate counsel has been asked by human resources to assist in the termination of an employee.

The employee has been with the company for decades, but the position has become redundant.

Counsel has been asked to draft a letter to the employee explaining the termination, and providing any details regarding a package that the company will provide.

Counsel's goals are to:

- Determine the company's potential liability, and reduce that liability as much as possible.
- Secure a settlement agreement and an executed release with the employee to avoid litigation. And...
- Complete the work quickly, efficiently, accurately and strategically using in-house resources to eliminate the cost of external counsel.

Counsel needs help.

To begin with, she does not have an employment law background and has never participated in a termination before. She does not know what the company owes to the employee upon termination, and does not have a standard release of employment claims in-house. She needs to quickly obtain familiarity with these concepts, draft a letter to the employee proposing a termination package, and secure the employee's execution of a release.

So let's see what Practical Law Canada resources are available to help counsel complete her task.

As mentioned previously, counsel can browse through the employment resources to locate those relating to terminations. Counsel can also access Practical Law Canada's terminations resources by conducting a keyword search. The keyword search works the same as a WestlawNext Canada search.

To limit her search results, counsel can put her search phrase in quotes. Search results are listed by relevancy. Searching the phrase "termination letter" in quotes will easily access the most relevant resources for this project.

A great place to start this task is with the Termination Letter Toolkit. This resource provides counsel with links to the key documents (including Practice Notes, Standard Document and Checklists) counsel will need in order to create a termination package.

If we select the Termination Letter Toolkit, we can see a brief introduction to the topic, then a list of Practical Law Canada resources. The resources are categorized by type.

Counsel's goal is to create a termination package that minimizes the company's liability and obtains an executed release. We can use the first Practice Note in the Termination Letter Toolkit, Structuring the Termination Package, to help. This Practice Note discusses the various ways that the employee's termination package may be structured.

Depending upon the reasons for dismissal, the amount of potential liability, and the terms of the employment contract, the employer may structure a termination package in a number of ways, including working notice, a lump sum payment or as salary continuance.

Counsel's first task is to determine the reason for termination. To review this section, we can select Reason for Termination under Table of Contents. This practice note explains the different reasons that employment might end. Counsel can review a practical explanation of each type of termination to determine which applies in this scenario.

In this scenario, we will assume that the termination is Without Cause, like the majority of terminations initiated by employers.

Knowing the type of termination she is dealing with, counsel moves on to determining the company's liabilities.

To do this, she can either continue reading to reach the Determining Liability section, or select that section in the Table of Contents. We can review the Table of Contents to see what topics are covered. Each of these topics is an important element in determining an employer's liability in a termination.

Each topic is explained in the Practice Note with enough detail to assess liability and move forward in creating a termination package appropriate to the liability risks the employer faces. In our scenario, counsel has reviewed the terms of the employment contract and found no agreement on the employee's termination entitlements.

As a result the company owes the employee reasonable notice. Let's select that link.

Counsel now knows that the company owes the employee reasonable notice, or, if that notice is not provided, the compensation the employee would have received during the notice period.

In our scenario, the employee is being terminated immediately.

Counsel must determine the employee's period of reasonable notice to know how much compensation the employee is owed. This is done by applying the factors set out in this excerpt.

More information on how to apply these factors is provided in the detailed Practice Note, Reasonable Notice of Termination: Overview. Let's select that link.

Practice Note, Reasonable Notice of Termination: Overview provides counsel with the necessary detail to make a determination of the length of an employee's reasonable notice period.

A lawyer without experience in employment law may want to review the entire note.

In this scenario, counsel will want to pay particular attention to the sections on length of service and age, because the employee has been employed by the company for many years.

Let's look first at commentary on how a reasonable notice period is calculated overall.

As this excerpt suggests, counsel must review the Bardal factors and apply them to the employee in question to determine the length of the reasonable notice period.

To arrive at an appropriate range of months, counsel may decide to research case law to find notice periods granted to similar employees, or use an online notice period calculator. Practice Note, Reasonable Notice of Termination: Overview provides suggestions for online notice period databases that counsel may use.

Once counsel has established a range of potential notice periods, she must calculate the compensation the employee would have earned during that range, running from the date of termination. For an employee whose only compensation is a salary, this task is simple.

If the employee has many varied forms of compensation, including benefits, commissions, bonuses or fringe benefits like a company car, this task is more difficult. Counsel can review Practice Note, Calculating Wrongful Dismissal Notice Damages for assistance. Let's visit that note.

This practice note helps counsel work through the types of compensation that should be included in the employee's reasonable notice period.

Once counsel has calculated the potential range of compensation owed to the employee, she knows the company's range of liability arising from the termination.

She can use this information to create a termination package suited to the company's risk tolerance. For this, she turns to the related content and selects Practice Note, Structuring the Termination Package and moves on to the next section, Method of Structuring the Notice Period.

In this scenario the employee is being terminated immediately.

A review of the Practice Note tells counsel that working notice is not an option. Counsel also now knows that offering no notice or compensation in a termination without cause is unlawful, and an obvious litigation risk.

Counsel can review the other options, including a lump sum package and salary continuance, to determine what will work best for the company in this termination.

In our scenario, counsel has chosen to offer the employee a lump sum package because she feels it is the company's best chance to persuade the employee to accept a settlement, and to execute a release to that effect.

Now that the method of providing compensation for the notice period has been selected, counsel has to draft the termination letter to the employee. For this, we return to the Termination Letter Toolkit.

In the Termination Letter Toolkit counsel will find a link to Practice Note, Drafting the Termination Letter. This is a step by step summary of important stages in translating the company's chosen notice period and notice period structure into an offered package to the employee.

Practice Note, Drafting the Termination Letter examines all common issues that might arise in notifying an employee of a termination and offering a termination settlement package. If counsel has concerns about any of these issues, she can review the relevant sections for more detail. However, she does not have to draft the letter from scratch.

As the related content at the bottom of the document shows, Practical Law Canada's resources include standard termination letters customized for different compensation scenarios. In this case, counsel can use Termination Letter: Lump Sum Payment. Let's select that link.

Like all standard termination letters available on Practical Law Canada, Termination Letter: Lump Sum Payment explains at its outset when the letter should be used.

If counsel were to select this resource first, she would be directed to other resources to obtain the information necessary to use this letter. Counsel has that information in hand and is ready to complete the letter.

The letter is drafted to allow counsel to fill in the prompted provisions with required information. It is downloadable in a Word format so this can be done easily.

Each provision is paired with a collapsible drafting note that explains the importance of the provision. Let's look at a few examples.

The letter opens by notifying the employee of the termination and providing an effective termination date. Counsel has the option to provide brief reasons for the termination. The drafting note explains the importance of this information, and provides links to further treatment of the topics.

The letter then moves into the company's offered termination package.

The letter distinguishes between amounts that the company has a statutory obligation to provide (like statutory termination pay, severance pay, vacation pay, and outstanding wages), and the amounts the company is offering in exchange for an executed release of employment claims. Let's move down to that second section.

The letter's drafting notes explain the type of notice period compensation the employee is being offered in the letter, and explains any options counsel may have in drafting the letter.

Let's look at the text of the letter.

Counsel can complete the letter by filling in the required elements such as the amount to be paid, and how much notice the amount is meant to cover. There are also optional paragraphs that address additional forms of compensation the employee may have received, such as benefits, commissions, fringe benefits, etc.

The drafting note for this section explains these optional paragraphs, and contains links to practice notes that further explain these forms of compensation.

A critical portion of the termination letter is the explanation to the employee that the termination package is in exchange for a release of employment claims. This release will minimize the risk of any future claims arising from employment. The drafting notes for this portion of the termination letter provides a link to an explanation of drafting the release, and a draft release. Let's select the link to Standard Document, Release (Lump Sum).

As with the sample termination letters, this standard release of employment claims contains drafting notes to assist counsel in completing the release. This release is tailored for the type of lump sum termination package being offered in our scenario.

Once the release has been completed, counsel will have completed the documents needed to inform the employee of the termination, offer a termination package as settlement, and obtain an executed release if the employee accepts the package. Counsel can now provide these documents to the employee, terminating employment.

If the employee accepts the termination package and returns an executed release, Practical Law Canada has one final resource counsel can use: the Releasing Termination Funds Checklist.

A link to this checklist can be found in the Termination Letter Toolkit, or by using the keyword search and filtering by checklists. Let's select that link.

The Releasing Termination Funds Checklist provides counsel with a step-by-step summary of the common issues that arise in releasing settlement funds to an employee, and additional steps counsel may need to take after delivering those funds.

For example, the employee will often want settlement funds allocated in a way that maximizes the employee's tax advantage. This note explains common allocations, which are allowed, and the consequences of each type.

After working through this checklist, counsel will have completed the termination and settlement process.

With Practical Law Canada's help, counsel has created her first termination package, and has worked through the termination process to settlement and an executed release. We hope that you have found this tutorial helpful.

Of course we have resources to assist with many other projects. We encourage you to take a few minutes to search our site and see how practical Practical Law Canada can be to you. Thanks for joining us today.