

Terminating federally-regulated employees



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One of the most common questions I am asked is how to fire an employee without legal consequences. The answer is now more complex for federally-regulated employers since there is risk the terminated driver will be awarded his or her position back, along with back pay to the date of termination.

If you are a federally-regulated employer (i.e., with drivers who cross provincial borders), you must be wary of the recent Supreme Court of Canada (SCC) decision in *Wilson v. Atomic Energy of Canada Ltd.*, where the SCC ruled that Division XIV of the *Canada Labour Code* prevents federally-regulated employers from terminating non-managerial employees with more than 12 months of service without reason.

What does this mean? A driver who gets into a fist-fight with another employee, for example, employed by you for one year or more, cannot be terminated without fear of legal consequences if you cannot prove just cause for his or her termination.

Which employees can claim a job 'for life'?

The SCC ruled that non-unionized employees (managers are narrowly exempted and supervisors are not considered managers, so they are not exempt) can only be terminated with 'just cause.'

More importantly, an employer cannot offer termination pay in lieu of, or instead of, notice of termination. For employers in a unionized environment this is not new. However, non-unionized employers may be dismayed to learn that the SCC found that the 'unjust dismissal' provisions of the *Canada Labour Code*, which protect unionized employees, now also protect non-unionized employees.

Non-fixed term employees can literally be awarded job security 'for life' unless the employer can prove that the employee was terminated with just cause. Unfortunately, the test to prove that there was just cause to terminate a non-unionized employee in the federal jurisdiction is very difficult to meet.

Notice, Working Notice, Pay in Lieu of Notice: what's the difference?

Most employers in Ontario, who are provincially regulated, learn that you can terminate the employment of an employee at any time, without a reason for termination, as long as the employer gives reasonable notice of termination, or reasonable pay in lieu of (instead of) that notice. Essentially, if you decide an employee merits two months of notice of their termination, you give the employee advance notice that in two months the employee will work their last day. This is called 'working notice.' The employee works as usual (generally) until the date of termination.

In the alternative, to avoid having a terminated employee working amongst their colleagues with a known end date, an employer can terminate the employee and provide two months of pay on the day of termination. The employee is paid two months of pay instead of being provided with two months of notice prior to the termination day. This is where the phrase "pay in lieu of notice" comes from.

Proving 'Just Cause'

The next question is: how does an employer prove just cause? Proving just cause requires significant time, money and careful planning to build a case of just cause. It is impossible to review all of the issues of just cause in this article. The facts of each specific case will be evaluated and items to consider include the employer's employment and discipline policies, business practices, the employee's conduct, the employer's conduct, and the employee's position.

The employer must prove that the act or omission of the employee was so significant that it repudiated the contract of employment and disrupted the employment relationship to the point where it can no longer continue. This is a high standard, indeed.

Just cause has been proven in cases where an employee is guilty of serious misconduct, habitual neglect of duty, incompetence, conduct incompatible with the employee's



duties or prejudicial to his or her employer’s business. However, missing work, poor performance, and some acts of violence will not be considered to be just cause.

Often, when an employer tries to prove just cause, the Court scrutinizes the employer’s actions, considering issues such as whether the employer made the employee aware of the prohibited behavior, or whether the employee was given the chance to comply with the prohibition, and finally, whether the employer warned the employee that termination of employment was a likely consequence for that behavior.

Keep in mind that there are two specific exceptions: when the termination of employment is due to lack of work, and if a function is discontinued.

Ways to avoid providing a job for life to certain employees

First, federally regulated employers should conduct a performance review prior to the end of the first year of employment: if the employer has a concern then the employee should be terminated prior to the end of the first year of employment. If you miss that deadline, then the federally-regulated employee could acquire the protection of the *Canada Labour Code*.

Second, hire your employees on a fixed term contract for one year or less. However, make sure the employment contract must be actually renewed by both parties to commence a new contract. Avoid clauses that automatically renew the employment contract, which are referred to as “evergreen” clauses.

Finally, set up a policy of progressive discipline and follow it – “progressive discipline” means that for each subsequent infraction, there is more onerous discipline. Always document the details of each breach of the employment policy or standards very carefully because the employer bears the evidentiary burden of proving just cause. Consider requiring the employee to sign off on the discipline. It is most important that an employer consistently follow the progressive discipline policy without deviation. The paperwork generated for each breach of the employment conduct will be the evidence you rely upon to prove just cause.

I always recommend you work with a lawyer familiar with your industry to ensure that your progressive discipline policy is clear for both employer and employee from the outset, and has the steps required to assist the employer with proving just cause. Clarity of process for both employer and employee can promote a fair and open workplace, and potentially reduce claims for wrongful dismissal. 