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LABOUR & EMPLOYMENT LAW NEWSLETTER

Did you know...



Employers can terminate employees without notice or termination pay if they have employed them for less than three months and if their employment contracts so provide.

An employment contract is usually invalid and unenforceable if signed after an employee has already started work (unless the employer can prove that the employee signed in return for new, valuable ‘consideration’ and without any pressure or ‘duress’)

Mandatory retirement was abolished in Ontario in 2006 and it is now a violation of the Human Rights Code to terminate workers simply because they reach or pass the normal retirement age.

Employees working for companies with more than 50 employees are entitled to 10 days of unpaid leave per year for personal and family emergencies. Employers, for their part, are entitled to ask for reasonable evidence to substantiate the need for such leave.

A fixed-term employment contract is for a specific period of time, event or project. Employers can terminate workers hired under such contracts without cause or reasonable notice, but may be required to pay them all wages owed for the balance of the contract.

Employees working in retail can refuse to work on Sundays or any statutory holidays so long as they give 48-hour notice (unless they work for businesses that sell “prepared food” or are open to the public to provide “education, recreation or amusement”).

Employers cannot unilaterally change a fundamental term of the employment contract if the employee expressly objects to the change. This is true, even if reasonable notice is provided to the employee. In these circumstances, employers must terminate the employee with notice and seek to rehire him on the new terms.

Employees are not entitled to Family Day as a paid holiday if they work in a private industry that is federally regulated.

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ABOUT US...

Soloway Wright LLP’s Employment Law Group provides legal advice on all issues of employment law, labour law and human rights

Soloway Wright LLP
427 Laurier Avenue West, Suite 900
Ottawa, ON K1R 7Y2
613-236-0111 office • 613-238-8507 fax
www.solowaywright.com

EMPLOYER OBLIGATIONS TO EMPLOYEES WHEN A BUSINESS IS PURCHASED/SOLD

Buying a business may come with hidden liabilities to employees of the purchased business. If the purchaser decides to keep the previous owner's employees, they are entitled to termination notice/pay and severance pay as if they had worked directly for the purchaser for their entire tenure with the previous owner.

Prior to employment standards legislation, the sale of a business triggered an automatic termination of all employees – even if they continued to work in the same job and at the same pay for the buyer. This meant that employees lost all accrued benefits, such as seniority, length of service and banked vacation even though they weren't laid off. Further, employers were only responsible for an employee's termination pay or notice and severance pay from the time that they purchased the business.

Currently under the Employment Standards Act ("ESA") employees have a "deemed continuity of employment" meaning that they aren't automatically terminated when their employer sells its business. Employees who are rehired or continue to work for the new employer no longer lose their years of service and other benefits when calculating termination pay or notice and severance pay. In fact, they're treated as if they have no break in employment and worked for a single employer the entire time.

Illustration 1: An employee works for five years for Employer A who then sells the business to Employer B. The employee continues to work for Employer B for 6 months before being terminated. What is the length of service for termination notice/pay and severance pay when Employer B terminates him?

Answer: It's 5 ½ years because the employee is deemed to have worked continually for both employers despite the sale.

It is important to note that the law doesn't require the purchaser to hire the seller's employees. It's up to the buyer to decide whether he wants to hire them or not. If the buyer chooses not to hire the seller's employees, it has no obligation to provide termination pay or notice or severance pay.

Purchase-and-sale agreements often contain clauses requiring previous owners to terminate all employees prior to the date of sale, but these clauses can often be ineffective. If the new owner hires them, the law deems those employees to have never been terminated. That means that even if the seller terminates all employees, with sufficient notice or pay in lieu of notice, if an employee remains working for or is rehired by the buyer, the buyer will still be liable for termination pay or notice based on the employee's tenure with both the previous owner and the buyer if the buyer decides to terminate that employee later. In such instances, employees can essentially "double dip" on termination notice/pay.

In other words, they are entitled to be paid twice for the termination pay owing to them for their years of service with the seller – once when terminated prior to the sale and once more when terminated by the buyer!

Illustration 2: Employer A is selling his business and the purchase-and-sale agreement includes a clause requiring him to terminate the same employee as in the previous example. Employer B rehires him, and then terminates him six months later. How much termination notice/pay would each employer have to provide?

Answer: Employer A will have to pay termination pay on 5 years of service before the sale and Employer B will have to pay termination pay on 5 ½ years of work.

This doesn't apply to severance pay. Employees can't "double dip" on severance pay because the ESA states that any severance pay which they received from the previous owner/employer is set off against any severance pay to be paid by the subsequent owner.

In summary, if your company is buying a business and wants to hire some or all of the current employees, a standard clause requiring the seller to terminate its employees before the sale will protect you from having to pay severance pay for past service but not from paying termination pay or giving notice.

There are two exceptions to this continuity of employment. First, only employees who have been terminated because of the sale can benefit from it. An employee fired by the original owner/employer for some other reason than the sale (e.g. terminated for cause) would have no continuity of employment if the new owner decided to hire and later terminate, the employee.

Second, there is also no continuity of employment if there is a gap of 13 weeks or more between the employee's last date of employment for the original owner/employer and the date he begins to work for the buyer. The 13 weeks is counted from the earlier of either (a) the date of the sale or (b) the last day that the employee worked for the vendor/employer (if terminated several days or weeks prior to the sale).

“We make a living by what we get, we make a life by what we give.” - Winston Churchill

NON-SOLICITATION AND NON-COMPETITION CLAUSES FOR NON-LAWYERS

Employers can include clauses in the employment contracts of key employees to protect their business interests should these employees leave to set up their own firms or join competitors. These clauses, or “restrictive covenants”, are written into employment contracts to limit an employee’s freedom to work for a competitor or solicit his former employers’ customers.

Some useful terminology which employers need to know:

- “Non-Solicitation Clauses” – These are aimed at stopping employees from contacting or soliciting clients of their previous employers – including referrals – for a period of time after they leave their employ. These clauses are most commonly used in employment contracts for sales staff.
- “Non-Competition Clauses” – These are more restrictive than non-solicitation clauses and are designed to prevent employees from working for a competitor in the same or similar field.
- “Fiduciary Duties” – These are the ongoing unwritten legal duties which employees owe their employers during, and after the termination of, their employment. If there is a finding that an employee owes a fiduciary duty to his or her employer, non-competition or non-solicitation clauses are usually more strictly enforced. Fiduciary duties are not only owed by high-level management employees who have the power to affect the business or make business decisions, but also by lower ranking employees who have developed close business relationships with clients and/or suppliers, or who have been exposed to important confidential know-how about the company’s business, its technology or its trade secrets.

An employer who seeks to enforce these restrictive covenants must show that they are reasonable and necessary to protect its legitimate business interests. The legal burden of proving this is always on the employer who is seeking to uphold the covenant.

In order to be enforceable, the language or wording of the restrictive covenant should be as specific as possible. The courts will interpret any vague or ambiguous wording against the employer. In enforcing these clauses, the courts will consider three factors – time, geography and the kind of business:

Time: This deals with how long the restriction should last. The time limits imposed by the non-competition and non-solicitation clauses should be reasonable, typically between a few months and a few years. What is a reasonable length of time will vary depending on the influence of the other factors.

Geography: The court will consider the distance between the employer and the employee’s new workplace. Depending on the size of the city, a reasonable restriction might range from five to 10 kilometers. What is reasonable in terms of geographic restriction will vary according to the type of business.

Type of Business: Some types of business and some types of jobs require more protection than others. For instance, employees in sales or service jobs who actively recruit clients may need greater restrictions on their ability to take existing customers should they leave. An employer who runs a highly specialized business may want safeguards to ensure that former employees don’t open the same or similar businesses in the same geographic markets.

ENFORCING A RESTRICTIVE COVENANT

Application for an Injunction: An employer who thinks an employee has breached one of these clauses or restrictive covenants can try to enforce it by seeking an injunction to stop the employee. The injunction can be a “cease and desist” order, which prevents the employee from further breaches by working for a competitor or recruiting former clients. The courts however don’t look favorably on covenants that are so restrictive that they altogether stop former employees from making a living in their line of work.

As a result, employers have to successfully demonstrate that an injunction is necessary by showing:

1. Strong evidence that an employee breached the restrictive covenant;
2. That the employee’s breach will likely cause irreparable harm to the employer’s business interests; and
3. The risks and hardships suffered by the employer, if the injunction is not granted, would outweigh those of the employee if it were granted.

Employment Law Case Update

“Sobeys’ crackdown on absenteeism unfairly hits disabled workers”

United Food and Commercial Workers Canada, Local 175 v. Sobeys Milton Retail Support Centre (2010): An arbitrator recently found that a new attendance policy introduced by the grocery retail chain Sobeys’ to reduce absenteeism among employees went too far because it failed to exclude absences that could result from an employee’s disability.

In February 2009 Sobeys introduced a new attendance policy that applied to employees in Ontario and superseded a previous policy which had been in effect since late 2004. The union filed a grievance against the new policy, which was much more stringent than the previous one.

In particular, the disability provision provided that “[i]n the event that the employees have a disability that prevents them from attending work, and identify that disability to Sobeys, their absences directly attributable to their disability will be addressed separately. In most cases, the accommodation process will be initiated, and consideration will be given to modifying the work that they perform to allow them to attend work regularly. In any event, employees in this situation will be accommodated pursuant to the Ontario Human Rights Code.”

The arbitrator ruled that although most of the new policy’s tougher measures weren’t unreasonable, the impact of the disability provision on employees who may suffer from a disability could potentially violate the Human Rights Code. This is because the policy does not indicate how the absences due to disability will be “treated separately” and provides that only in “most cases” of such absences will the accommodation process be initiated. In other words, it left open the possibility that certain absences due to disability might not be accommodated, contrary to the Human Rights Code. Sobeys was ordered to amend the policy.

“Air Canada Pilots fight mandatory retirement – and win reinstatement”

Vilven v. Air Canada (2010): The Canadian Human Rights Tribunal recently ordered Air Canada to reinstate and pay lost wages to two pilots who challenged the airline’s mandatory retirement age as discriminatory.

The tribunal had previously upheld the pilots’ complaint that forcing them to retire at age 60 was age discrimination and violated the Canadian Human Rights Act. The tribunal also determined that, in this particular case, the exception in section 15(1)(c) of the Act which allows the termination of employees when they reach “normal age of retirement” contravened the Charter of Rights and Freedoms.

“Independent truck drivers are ‘workers’ under Ontario’s Occupational Health and Safety Act”

Ontario (Labour) v. United Independent Operators Limited (2011): The Ontario Court of Appeal recently ruled that truck drivers, who are independent contractors but “regularly employed” by a company, must be counted when determining whether a company meets the mandatory threshold for creating a joint health and safety committee under Ontario’s Occupational Health and Safety Act.

United Independent Operators Ltd. was a transportation load broker which contracted truck drivers who own and operate their own vehicles to transport gravel to construction sites. This case arose when a driver was injured and the Ontario Ministry of Labour found that the employer had contravened the Occupational Health and Safety Act (“OHSA”) because it didn’t have a joint workplace safety committee in place. The employer’s excuse for not having this committee in place as required by the law, was that all of its truck drivers were independent contractors and not employees.



The court found that since the Act is aimed at ensuring a minimum level of health and safety protection for workers, it would undermine that purpose to exclude independent contractors. As a result, the court concluded that the truck drivers should be counted for the purpose of calculating the threshold for creating mandatory joint health and safety committees.

The court’s ruling on the meaning of “regularly employed” workers could have implications for the growing number of companies which rely on independent contractors. Those companies may now have to count their independent contractors when determining whether they meet the threshold of “20 or more workers” requiring the creation of a joint health and safety committee. Failure to comply with this can potentially result in a hefty fine, among other penalties.

Ontario Ministry of Labour Update

As of January 19, 2011, there is a new Claim Form for filing an employment standards complaint. The Ministry will no longer accept the previous version for any new complaints. Information can be found at <http://www.labour.gov.on.ca/english/es/forms/claim.php>

SOLOWAY WRIGHT LLP EMPLOYMENT LAW GROUP

Alan Riddell	613-782-3243	riddella@solowaywright.com
Stephen Shaddock	613-782-3211	shaddock@solowaywright.com
Gillian Bilton, Law Student	613-236-0111	gbilton@solowaywright.com
Krystal Moore (Employment Law Clerk & Newsletter Co-editor)	613-782-3248	kmoore@solowaywright.com
Catherine Davis (Law Clerk & Legal Assistant)	613-782-3235	davisc@solowaywright.com



SolowayWright^{LLP}
Barristers & Solicitors / Avocats

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