

It's Over: Terminations Done the Right Way Webinar Q&A

February 1, 2023

Please note that the following answers do not constitute legal advice and they are not a complete statement of the law. Every situation is unique and involves specific legal issues and seeking legal counsel may be beneficial. Additionally, this guidance is specific to Ontario-regulated employers terminating non-unionized, non-managerial individual employees.

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Terminations Without Cause

1. For termination without cause do you have to give a reason for the termination, including if it is during an employee's probation period?

You do not legally need to provide a reason for terminations without cause, including if you are terminating an employee during their probation period.

2. Is evidence needed to support a termination without cause? For example, if the reason is due to poor performance, does the employer need to illustrate they tried to performance manage the individual first?

No, generally speaking, evidence is not needed to support a termination without cause, including if the reason is due to poor performance – as long as the termination is not in bad faith (e.g. violation of ESA rights, Ontario Human Rights Code, etc.).

3. What is an employee being terminated without cause continues to ask for the reason they are being let go and/or for feedback?

This can be difficult to deal with. This is where being respectful, but succinct and straight forward with your language is important. Focusing your language on the future and moving forward rather than focusing on the past is important. Ensuring it is clear there is no reason that can be provided and staying firm in this while being supportive is helpful.

4. Does an employee have any recourse if a cause for termination was mentioned during a termination meeting, but the termination letter mentions it is without cause?

Employees always have the right to seek independent legal advice regarding their termination, regardless if a reason for termination is given or not. To avoid any potential confusion or legal claims for wrongful dismissal, it is generally a good idea not to provide a reason for termination during a meeting for terminations without cause.

5. If you have sufficient evidence and reason to terminate for cause, but choose to terminate without cause, could that backfire in anyway?

This would be a situation where consulting with your legal advisor might help you decide on the best strategy for the dismissal. Terminating without cause opens the door for notice and severance payments, so being sure what the options are given the individual circumstances and situation, the organization will need to determine the best path forward.

6. Can an employee be terminated without cause during maternity, paternity or pregnancy leave?

Employees on maternity, paternity or pregnancy leave could legally be terminated without cause, as long as it is not because they are on leave or any other discriminatory reason/reason that goes against the ESA and the *Ontario Human Rights Code*.

7. Service Canada will still want a reason for termination (without cause) for the purposes of EI applications, what is your advice there?

The best advice is always to be truthful and honest when reporting the reason for termination. There are several options offered from Service Canada – choose the option that best and accurately describes the situation.

Terminations with Cause

8. Do you need to give a reason for termination if it is with cause? Do I need evidence to support the termination, and if so, what is sufficient enough evidence?

Yes, you need to provide a reason and have sufficient evidence. It is usually best in these cases to work with legal counsel to ensure that you have enough sufficient evidence and that terminating with cause is the right decision.

9. Can you terminate with cause for minor infractions with evidence of progressive disciplinary processes? What about for recurrent poor performance that has been sufficiently documented?

Minor infractions, even if there is evidence of it, typically do **not** warrant termination with cause. Termination with cause are considered more rare circumstances and includes under the ESA, “wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer.”

Common law demonstrates that a just cause termination should only be carried through if there has been **significant violation(s)** of an organization's policies and/or they have presented a danger to other employees. Employers are required to meet a high threshold before they can successfully assert there is just cause for dismissal. Seeking legal counsel for advice in this area is strongly recommended.

Please also review HRP's [Practice Guideline: Termination Checklist](#) for more details.

10. What are examples of things that would warrant a just cause (or with cause) termination?

As mentioned above, common law demonstrates that there needs to be significant violations to warrant a just cause termination. Examples could include an employee committing fraud against the company, an employee presenting a danger to other employees or clients, etc.

It is important to note however, that if the employee's conduct or performance could be related to a protected ground under the *Ontario Human Rights Code* (e.g. workplace discrimination or harassment, an underlying medical condition, including psychological or mental disabilities) then termination should not proceed unless the employer has provided *Code*-related accommodation to the point of undue hardship and the basis of termination has been discussed with legal counsel.

11. What kind of due processes should be followed for terminations with cause (e.g. warnings, performance improvement plans, etc.)?

This really depends on the individual circumstances and reason for planned terminations with cause. It is best to seek out legal counsel when working on terminations with cause to ensure that the termination is warranted and there is enough evidence.

Regarding performance improvement plans however, the intent of these plans is supposed to be to help employees improve on performance and should not be used with the intent to have documentation for termination or a step towards termination. This could open up your organization to the risk of bad faith allegations.

Termination Meetings

12. Who should be part of termination meetings (e.g. HR, the direct manager)?

We recommend at a minimum, there be at least two people conducting the termination meeting so there is a witness. It is usually best practice to include the direct manager as part of the termination meeting with HR.

13. What if the functional manager is the HR manager? Who supports the termination meeting in that circumstance?

If possible, another HR manager, HR Director or HR VP can attend the meeting along with the direct manager, who in this case is also HR. Alternatively, another member of the management team can attend as a third party witness. What you'd want to avoid is having a peer or co-worker of the terminated employee to attend the meeting as the second management rep.

14. What is the best way to handle situations where an employee starts to bargain and try to negotiate keeping their job when they are being terminated?

Getting to the point and delivering the message of the termination decision swiftly and respectfully can help to prevent these types of negotiations. Staying firm that the termination is final and non-negotiable, while of course still showing compassion and empathy is important. It is best to try to keep the conversation future focused and on any supports the terminated employee will receive, as applicable, to help them with next steps.

15. What if your business doesn't have a boardroom or any private spaces to conduct the termination meeting?

Ensuring that termination meetings are done in a private location is important. If you don't have a boardroom but there is a private office with a door available, that could be suitable. Meeting at a different, private location nearby the office could be also be an option. Wherever you decide, the point is to choose a location that is both private and respectful of the terminated employee's dignity.

16. Are there other considerations we should keep in mind if conducting the termination remotely? Can the termination be done just by email and mail?

The same sort of principles in the checklist and what we went through on the webinar would apply. Terminations, if not face-to-face, should be conducted by video call. During the video call, we recommend that those conducting the termination meeting have their cameras on, to show empathy and compassion. Using email to deliver news of dismissal is never recommended, and would only ever be an absolute last

resort after multiple attempts to meet either in person, via video call or by phone have proven unsuccessful.

17. When is the best time to terminate an employee (e.g. day of the week, time, before a scheduled vacation is starting or after)?

There is no golden standard for the best time to terminate an employee, including on a particular day of the week. Opinions vary in this area widely. Things to consider include avoiding any dates that could be of personal significance to the employee, such as birthdays or anniversaries. You may also want to ensure that if you are providing any outplacement assistance or support, it will be immediately or promptly available to the employee following the termination. This may mean, if feasible, waiting until after an employee has returned from a scheduled vacation. Similarly, terminating later in the week (Thursday or Friday) can also impede access to resources to the employee, forcing them to wait several days.

Privacy is crucial when conducting termination meetings and that is something to keep in mind when planning the timing of the meeting. For instance, it can be helpful to conduct the meeting when other employees are not around to potentially witness it.

18. Do you have advice for how HR professionals can handle their own emotions during a termination meeting of an employee?

Termination meetings can be difficult for everyone involved, including HR professionals who are there to support the process. While HR professionals work hard to keep any emotional responses in check, sometimes things happen. To avoid breaking down in the middle of the termination, prepare in advance. Consider the individual(s) being terminated, your relationship to them, and the circumstances leading to the termination decision. Be aware of your own emotional or personal interest in the situation, and either ask to be recused from the proceeding, or prepare and rehearse a script for the meeting itself. Role playing in advance can also help you prepare to handle any unexpected or sudden emotions.

19. What are best practices following the termination of an employee in regards to whether you should have them escorted out of the building or whether you should allow them to go back to their desk to collect their belongings first/say goodbyes?

There is no golden standard for this, however, we recommend conducting a risk assessment before the termination occurs – including a safety risk assessment. If there is reasonable risk that the employee may react aggressively or hostile, it likely makes sense to escort them out the building.

If the termination is well-received (as can be in this type of situation) by the employee and there does not appear to be any risk associated with letting them go back to their desk to collect their belongings and say goodbye, then this may be an option.

Ultimately, it depends on the individual circumstances and how the employee reacts to the termination.

Reasonable Notice and Pay in Lieu

20. What is considered reasonable notice for a termination? What about pay in lieu?

Please review HRPAs' [*Practice Guideline: Termination Checklist*](#) for details in this area, including a breakdown of minimum ESA and *Canada Labour Code* (CLC) requirements.

21. When terminating part-time staff, temporary staff, and/or students, are there any differences with notice or pay in lieu?

Generally speaking, no there aren't any differences. The same notice is required as a regular employee, following ESA requirements, as long as the employee has been employed for three months or more.

22. Can you blend a combination of pay in lieu of notice (severance) and notice when putting together a termination package?

Under the ESA, an employer can provide the employee with a combination of written notice and termination pay, as long as the notice and number of weeks of termination pay together equal the length of notice the employee is entitled to receive.

23. Is it true that under the ESA there are special exemptions for construction employees where they do not have rights to reasonable notice or severance?

Yes, under the ESA, the notice of termination and termination pay requirements do not apply to those employed in construction.

24. If an employee is only entitled to ESA minimums as noted in their employment agreement, must they still sign off and accept the termination package?

Employees are not obligated to sign off on termination packages. If they are being asked to do so, ample time should be given to the employee to seek out legal advice, and you'd also want to offer some consideration for them to do so. Typically such sign

offs relate to releases of liability, which employees are not obligated to sign in any event.

Dealing with Difficult Employees

1. What if the employee being terminated might react violently and/or aggressively? Additionally, what if they refuse to attend the termination meeting?

Planning before a termination meeting is important, including conducting a safety risk assessment. If there is reasonable risk of the employee reacting violently and/or aggressively, you may wish to mitigate such risks by having security attend the termination meeting and escort the employee following the termination meeting.

If an employee is resisting meeting, or flat out refuses to attend the termination meeting, even after several attempts, you may need to deliver the decision via email or registered mail. In such a case, we recommend seeking legal counsel to help determine the best next steps.

2. What if a terminated employee refuses to return company property?

To start, all companies should have clear policies in place around employees' obligations around company property and the return of it in good working order upon termination or resignation. If an employee is refusing to return company property following being terminated, the employer may wish to sue the employee and/or contact the police to bring charges against an employee for theft of company property. Employers cannot withhold statutory payments for notice or severance on condition of receipt of company property, but return of company property can be included as a condition of the settlement in excess of legal minimums.

Constructive Dismissal

25. Could any of the following scenarios constitute constructive dismissal?: Salary decreases, working hour decreases, temporary layoffs, permanent layoffs, an employee quitting due to behaviour of another colleague, altering a commission plan, change in role that an employee doesn't want, or mandatory COVID vaccination policies?

Generally speaking and depending on the individual context and circumstances, the following scenarios may constitute constructive dismissal in Ontario (please note this list is not exhaustive):

- Significant reduction in salary
- Significant decrease in hours of work
- Toxic work environments, such as an employee being discriminated against or harassed, bullied, receiving unjustified discipline, etc.
- Significant changes to the terms of an employee's employment agreement (which could potentially include commission plans or major unwanted changes to the employee's position)

Case law is not as clear when it comes to layoffs. In some Ontario court cases, when an employee was laid off but there were no layoff provisions in the employment contract, the employee was able to successfully claim constructive dismissal. However, there have been other cases where this was not successful, such as a recent case where an employee was laid off during the COVID-19 pandemic. It may be best to seek legal counsel around this topic if you have any concerns.

In regards to mandatory COVID vaccination policies, case law continues to evolve. However, major Ontario Court decisions in this area since the pandemic have recognized that employers with such policies in the midst of the pandemic were acting in good faith in order to reduce the risk of spread of the COVID-19 virus. Of course, decisions in this area can vary on a case-by-case basis and depend on individual context.

26. If you change the location of where an employee works, could this be seen as constructive dismissal?

Depending on the context, it is possible that changing the location of where an employee works, if it is a significant change, could be constructive dismissal. For example, if an employee was working at an office in Vancouver for several years and are suddenly asked to relocate to Quebec City, and their employment contract did not state anything about location changes. Conversely, if the employer changes the work location within the same metropolitan area, for example moving from downtown Toronto to Mississauga, and provides ample and reasonable notice of the change, this may not constitute constructive dismissal, even if the employee's daily commute becomes longer.

27. Can an employer ask for resignation from an employee when they are being transferred to another division?

Resignations should be entirely voluntary by an employee and not forced by an employer.

Dealing with Legal Cases

1. If a termination without cause ends up in a legal situation, does the employer then have to provide the cause of the termination to the court/legal system?

This may vary on a case-by-case basis. Generally, if the employer has stated that the termination was without cause, then the issue in the courts would be focused on the matters of notice, severance, and damages.

Policies, Protocols, Resources, Training, etc.

1. Should organizations have a policy on terminations?

Yes, we recommend that every organization has a policy and/or clear code of conduct/standards explaining the potential consequences for breaches of company policies and/or procedures, which employees sign off on. Policies around workplace equipment/property should also be in place, including what happens with it upon termination. Additionally, every employment agreement should include termination provisions.

Standardized protocols should also be in place and followed consistently for areas such as dealing with performance issues, including how this will be documented and how/when warnings will be provided.

2. How can you ensure a psychologically safe working environment? Are there any tips you can share?

The HSPA has an entire [Practice Guideline on Fostering Mental Health in the Workplace](#) dedicated to this topic for your review. There are also additional resources provided in this guideline for further learning.

3. How much time should you give terminated employees to review the terms, seek legal advice, etc.?

There is no golden standard for this. However, we recommend giving an employee at least seven days to review the terms and seek legal advice. The idea is that they have reasonable and ample time to consult with their legal counsel.

4. How much information should I share with employees following someone's termination? Should announcements be made company-wide?

Keep information short and succinct, without revealing any confidential information such as the reason for an employee's termination. Whether or not the announcement is made company-wide can vary based on your organization. Be sure to stick to the main message that the employee is no longer at the company and who, if applicable, will be handling the responsibilities of that employee in the interim. Announcements and communications, both internally and externally, should be prepared for during the termination planning process.

5. How do I handle questions and rumours surrounding the terminated employee?

Handling questions and rumours can be tough. It is important to emphasize to all employees that this type of information is strictly confidential and will not be shared. Additionally, employees should be reminded of any company policies related to negative gossip/rumour spreading and the consequences of such.

6. Are there things to lookout for in regards to employment agreement practices to make sure the terms in the agreement are legally valid? (e.g. what if the agreement is old, or wasn't signed by the employee until after they started the position)?

Employment agreements should always be agreed upon by the employee before they start their position. To ensure the terms in the agreement are legally valid and continue to be relevant, employers should update the agreements when needed, such as when there is changing legislation, internal changes, etc. and have the employee sign off on the agreement. Having employment agreement templates periodically reviewed by employment counsel is also a good practice.

7. Is it best to wait to complete an ROE until the terminated employee has signed the termination settlement or release, especially if a termination payment will be made upon receipt of the signed offer?

A record of employment, or ROE, must be submitted to Service Canada with a copy issued to the employee within 5-days of the final payment of regular earnings. If there is an ongoing negotiation on the termination settlement, the ROE must still be issued, and a subsequent updated ROE submitted once the negotiations are complete.

8. Do you have any suggested resources, training and/or courses related to terminations, including mass terminations, scripts/templates, constructive dismissals? Can you sit in on terminations to gain experience?

Please review HRPAs' [Practice Guideline: Termination Checklist](#) for additional guidance and suggested resources related to terminations.

Sitting in on a termination meeting to gain experience could be beneficial, however, it depends on the situation and context. If there is a concern that the termination meeting could end up being contentious or very emotional, it would not be a good idea. It is important to be mindful of the human behind the employee being terminated and to show compassion. We recommend working with your manager to help determine if/when it makes sense to join a termination meeting to gain experience.