

# Termination Quiz



## **QUESTION**

What is the difference between common law severance pay and minimum statutory severance pay?

## **ANSWER**

Unlike common law severance, minimum statutory severance uses a formula according to legislated [employment standards](#). The formula in Ontario is as follows: one week of severance per year of service up to a maximum of 26 weeks.

Common law severance is, essentially, the pay an employer must give an employee to compensate him/her for the time it will reasonably take him to find comparable work. There is no formula. In this regard, common law severance is far more lucrative than minimum statutory severance. However, in most circumstances, only a lawyer can negotiate or sue to achieve maximum common law severance. The [Ministry of Labour](#) cannot get common law severance. The Ministry of Labour can only [get](#) an employee minimum statutory severance.

The only time employees are not entitled to common law severance is if they have an employment contract that says they get some different kind of severance, such as minimum statutory severance only or some other formula contained in a termination clause (i.e. 3 weeks per year of service).

## **WHY IS IT RIGHT**

### **PREAMBLE**

**What notice or payment in lieu of notice must be given to an employee whose employment is being terminated?**

An employer must provide an employee with at least two weeks written notice of their intention to terminate the employment of an employee. In lieu of written notice, the employer must pay two weeks wages at the regular rate to the employee.

**Does the requirement for written notice or pay in lieu apply to all employees?**

This requirement applies to any employee whose employment is being terminated except

as follows:

- a. an employee who has not completed three consecutive months of continuous employment;
- b. an employee who terminates their own employment;
- c. an employee who is dismissed for just cause;
- d. an employee who is on a lay-off that does not constitute a termination of employment (see question 6);
- e. where the contract provides an end and that the work ends on that date.

## **Canada Labour**

**Does the Code require an employee to give notice to their employer when ending their own employment?**

No. However, if there is an employment contract that contains a requirement to do so, an employee may be required to provide notice to their employer.

### **1. Severance pay**

#### **Employee Qualification for Severance Pay**

An employee who has completed at least 12 consecutive months of continuous employment qualifies for severance pay.

#### **Severance Pay Calculation**

Severance pay is two days' pay at the employee's regular rate of wages for each full year of employment, with a minimum of five days' pay.

#### **Absences from employment that do not interrupt the continuity of employment**

Yes. Absences that do not interrupt the continuity of employment are lay-offs that are not a termination of employment under the *Code* (see question 4) and absences permitted or condoned by the employer.

**An employer is required to pay severance pay in all circumstances except as follows:**

- a. when a lay-off does not result in a termination of employment;
- b. when an employment contract contains an end date and the contract ends;
- c. when an employee is dismissed for just cause; and
- d. when an employee quits or terminates their own employment.

### **2. Lay-off**

#### **Is a lay-off a termination of employment?**

No. Certain types of lay-off do not constitute a termination of employment such as when:

- a. a lay-off is a result of a strike or lockout;
- b. the duration of the lay-off is three months or less;
- c. the duration of the lay-off is for more than 3 months but not more than 12 months, and the employee maintains recall rights pursuant to a collective agreement.

#### **What happens if an employer is unable to recall an employee to work during a lay-off?**

The lay-off becomes a termination of employment, and the employer must pay severance

pay to the employee. In addition, if written notice of termination of employment was not provided, pay in lieu of notice must be paid.

### **An employee who does not return to work when recalled while on a lay-off**

If the employee does not return to work, the employee has ended their employment and is not entitled to severance pay and termination pay.

## **3. Unjust dismissal**

Part III of the *Canada Labour Code* provides a procedure for making complaints against a dismissal that an employee considers to be unjust.

### **Protection from Unjust Dismissal**

All employees, managers excluded, who have completed at least 12 months of continuous employment with the same employer and who are not covered by a collective agreement.

### **Severance Pay/Termination Pay/Reasonable Notice**

#### **Severance Pay Entitlement**

Generally, everyone in Canada (except [construction workers](#)) are entitled to severance pay regardless of how long they worked or how big their employer is. This is because all Canadian employees are entitled to [common law severance](#), which provides a range of around two and half months' severance up to thirty-six months' severance depending on several factors.

The only time employees are not entitled to common law severance is if they have an employment contract which contains a [termination clause](#) that says they get some different kind of severance, such as "minimum statutory severance" only or some other formula contained in a termination clause.

#### **Employers Requirement to give Severance Pay**

Yes, employers are required to give severance pay to their employees regardless of the amount of time worked or how big the company is etc. The only exception to paying any severance is if the employer and employee have agreed to a valid and enforceable [probationary clause](#) in the employment contract which provides for no severance in the first three months of employment, and the employee is terminated in those first three months.

#### **Termination Pay**

Termination pay in Ontario is money awarded to an employee by their employer for loss of employment. The amount of termination pay awarded is the amount of income which the employee would have earned from his employer during the period of required "reasonable notice". The amount owed as termination pay is based on the "common law" not statutory minimums.

Termination pay is just another word for "common law severance" or "reasonable notice". They are all the same thing. Thus, termination pay is not deducted from severance pay, which is a question we sometimes get asked. However, you cannot get common law severance / termination pay / reasonable notice and statutory minimum notice and statutory minimum severance. Statutory notice and statutory severance is just a floor – it is the minimum amount of notice and severance employers have to give employees. Nevertheless, employees shouldn't want statutory notice or severance, they should want common law severance (also called termination pay, reasonable

notice, etc.), which is the ceiling and therefore worth far more than statutory entitlements. Think of it this way: employees who make \$50 dollars an hour do not get statutory minimum wage too. The statutory minimum is only there to prevent employers from paying anything less.

## **Reasonable Notice**

At common law, an employee is entitled to, in the absence of express agreement in a [termination clause](#) in an employment contract, “notice” of the loss of the job that is “reasonable” in all the circumstances because such notice is an implied term of the employment relationship.

Reasonable notice is the amount of time, or “notice”, an employer must give an employee in warning them they are losing their job. An employer can give working notice for the job loss for some number of weeks or months, or it can provide “termination pay” immediately in lieu of such working notice in the form of a payment of any number of weeks or months’ pay that the employee would have earned had the employer provided a working notice period.

## **Reasons for termination?**

An employer does not need to provide a reason for termination. All the employer has to provide is reasonable notice. In Ontario your job is not protected, only your right to notice of termination is protected. On the other hand, an employer does have to give a reason for termination in case the employer is terminating the employee for [just cause](#), in which case the employer does not need to give the employee any notice. However, just cause is difficult to prove. An employer must show the employee is guilty of serious misconduct that has not been condoned in the past.

## **Entitlement to termination pay**

Generally, everyone in Ontario is entitled to termination pay regardless of how long they worked or the size of their employer. This is because, as discussed above, most Canadian employees are entitled to “reasonable notice”. Termination pay is essentially pay in lieu of reasonable notice.

## **Entitlement to termination pay when fired**

If you do not have an employment contract, then you are entitled to reasonable notice by default. If you are entitled to reasonable notice, we will advise over the phone how much termination pay you may be entitled to.

## **Employers required to give termination pay**

Employers are required to give termination pay (or working notice) to their employees regardless of the amount of time worked or how large the employer is. The one exception to paying any termination pay is if the employer and employee have agreed to a valid and enforceable [probationary clause](#) in the employment contract which provides for no termination pay in the first three months of employment, and the employee is terminated in those first three months. Alternatively, as discussed above in this paragraph, an employer does not need to provide termination pay if the employer provided reasonable “working notice”.

## **The difference between common law termination pay and minimum statutory termination pay**

Common law termination pay is the termination pay we are talking about in this blog

post, which is, again, pay in lieu of reasonable notice. Unlike common law termination pay (where there is no formula), minimum statutory termination pay uses a formula according to statutory legislation called the *Employment Standards Act*. The minimum statutory formula for termination pay in Ontario is as follows: one week of termination pay per year of service up to a maximum of 8 weeks. In addition, some employees in Ontario with 5 years or more years of tenure at big company are entitled to statutory severance pay, which is a formula as follows: one week of statutory severance per year of service up to a maximum of 26 weeks.

Conversely, common law termination pay is, essentially, the pay an employer must give an employee to compensate him for the time it will reasonably take him to find comparable work. There is no formula or rule of thumb. Common law termination pay is far more lucrative than minimum statutory termination pay.

However, in most circumstances, a lawyer can negotiate or sue to achieve maximum common law termination pay. The [Ministry of Labour](#) cannot get an employee common law termination pay. The Ministry of Labour can only get an employee minimum statutory termination pay and severance pay.

The only time employees are not entitled to common law termination pay is if they have an employment contract that says they get some different kind of termination pay, such as minimum statutory termination pay only or some other formula contained in a termination clause (i.e. 3 weeks' termination pay per year of service).

## **The difference between termination pay and severance pay**

Practically, under the common law, there is no difference between termination pay and severance pay. They mean the same thing. You don't get both. They are synonyms of each other. When someone speaks about termination pay, they are speaking about severance pay.

However, technically, there is a difference between termination pay and severance pay in Ontario only. As discussed above, as a bare minimum, an employee in Ontario is entitled to both minimum statutory termination pay, and minimum statutory severance pay in some circumstances. However, minimum standards do not apply in most cases because smart employees know they want common law termination pay or severance pay (which is the same thing), not minimum standards termination or severance pay. Thus, in conclusion, there is no difference between common law severance pay and common law termination pay, but there is a difference between statutory severance pay and statutory termination pay. In most circumstances when you are hiring a lawyer, you will only be concerned with common law termination pay which is the same thing as common law severance pay.

## **Calculation of termination pay**

Calculating common law termination pay is an art, not a science. There is no formula and no two cases are the same. Nevertheless, the primary criteria used to examine how to calculate termination pay in Ontario are these:

- Employee's age at termination;
- Employee's length of service;
- Employee's salary;
- Employee's character of employment; and
- The availability of similar employment with regard to the employee's experience, training and qualifications.

Even still, there are many more criteria used to calculate termination pay in

Ontario. Termination pay is often referred to as the period it should reasonably take the terminated employee to find comparable employment. Accordingly, any factor that affects the amount of time it will take an employee to find comparable employment must be considered in calculating termination pay in Ontario. For example, if an employee was disabled with an illness at the time of termination, he will be entitled to additional termination pay because it will take him that much longer to find comparable employment.

## OTHER CRITERIA:

- if the employee was solicited away from stable employment to work for the employer before the termination;
- if the employer made grand promises to the employee about secure, stable employment at the interview and in promotion meetings;
- if the employee has a non-competition clause; and
- if the employee worked in a remote community where there are few comparable employment opportunities.

## WHY IS EVERYTHING ELSE WRONG

### Calculating a severance package

There is no formula and no two cases are the same. The primary criteria used to examine how to calculate severance in Canada is the following:

- **Employee's age at termination.** The older an employee, the more severance he is entitled to.
- **Employee's length of service.** The longer an employee has worked for the same employer, the more severance he is entitled to.
- **Employee's salary.** The more salary an employee earned, the more severance he is entitled to.
- **Employee's character of employment.** The more senior the employee's position, the more severance he is entitled to.
- **The availability of similar employment with regard to the employee's experience, training and qualifications.** The more niche the employee's profession is, the more severance he is entitled.

Even still, there are potentially thousands of other criteria used to examine how to calculate severance pay in Canada. Severance is often referred to as the period it should reasonably take the terminated employee to find comparable employment.

Accordingly, any factor that affects the amount of time it will take an employee to find comparable employment must be considered. For example, if an employee was pregnant at the time of termination, she will be entitled to additional severance because it will take her that much longer to find comparable employment. Some of the other oft used criteria include:

- if the employee was induced or solicited away from stable employment to work for the employer;
- if the employee was promised long term, secure employment;
- if the employee is prevented from competing against the employer due to a non-competition clause;
- if there is a downturn in the employee's industry;
- if the employee did not have a university education and she was trained on the job earning a series of promotions, but any new job at the same level would require university education.

Because there are thousands of potential factors going into the calculation of

severance, it is no wonder that no two cases are the same. Click [here](#) to read more about calculating severance.

## Normal Severance Pay

There is no normal amount of severance pay. No two cases are the same. The one-month of severance per year of service rule is bogus. Some employees may be entitled to more than 12 months of severance after one year of service. Likewise, in rarer cases, some employees may only be entitled to less than one-month of severance per year of service.

However, all employees' regardless if they worked only one hour before they were terminated must be provided around at least two and a half months' severance. The courts recognize that it will take all people at least that long for them to find comparable work.

There is however a relatively normal amount of severance for [older, long-standing employees](#). [Older, long-standing](#) employees are generally entitled to a minimum of twenty-four months' severance. Nonetheless, recent case law suggests that some older employees with exceptionally lengthy years' of service could be entitled to over 36 months' severance.

Click [here](#) to view our infographic on average severance. Or read our [guide](#) to average severance pay for long-tenured managers and executives.

## Severance paid over time

The employer has the right to pay severance over time as usual or as a lump sum. It is the employer's choice. However, in most cases, the employee's lawyer will work to settle the appropriate method of payment of severance in favour of the employee. For instance, lawyers can negotiate tax-friendly solutions for the payment of severance such as requiring the employer to pay two lumps sums (one in the year of termination and the other the following year).

# IMPORTANT COLLATERAL SEVERANCE ISSUES

## Working while collecting severance pay

Yes, severance must be paid regardless of whether the employee is working again. However, working again could impact the amount of severance the employee is entitled to if the employee sues after they get a new job. If the employee has [mitigated their damages](#) by finding new comparable employment that pays about the same, their period of severance will be reduced somewhat by the court. Accordingly, in most cases, it is best to settle severance before the employee returns to work. In that case, working would have no impact on the severance signed settlement/judgment unless the release/judgement had a clawback provision.

## Severance Package and unemployment insurance (EI)

Not really. When an employee fills out their [EI](#) application online, they are asked if they got a severance package. If the employee already agreed to a severance package, they have to tell Service Canada how many weeks of severance they accepted. Accordingly, if the employee accepted for example 10 weeks severance, then Service Canada would only approve their EI claim to begin in 10 weeks instead of immediately.

## **Tax deducted from severance pay**

Severance pay in Canada is taxable just the same as wages and is subject to a withholding tax. Most lump-sum payments made by employers withhold 30% for income taxes. Employees may also have to pay additional income taxes when they file their taxes at the end of the year.

Employees can structure a severance package to be paid as a lump sum over two years to save on income taxes. We also advise our clients to dump as much of their severance as possible into an RRSP to avoid withholding taxes.

In addition, [general damages](#), such as punitive damages or human rights damage are non-taxable. Therefore, in wrongful dismissal cases where *bona fide* punitive damages or human rights damages were alleged, the lawyers should structure the deal so that a percentage of the severance is paid as general damages.

Likewise, legal fees paid to a lawyer are not taxable and may be eligible for a tax credit.

It is best to speak to an accountant nonetheless to maximize tax savings or get an opinion on the allocation of monies in a severance settlement.