

The Employment Contract



QUESTION

Can I add a clause to our standard employment contract saying that employees waive their ESA right to termination notice?

– Name withheld

ANSWER

Absolutely not. But you can add a clause that limits employees to only ESA termination notice and nothing else.

EXPLANATION

There are 3 rules to keep in mind:

1. Employees' Right to ESA Termination Notice Cannot Be Waived

Termination notice under the ESA is a fundamental right that can't be waived.

2. Employees' Right to Additional Notice Can Be Waived

Employees can't get *less* termination notice than the ESA requires but they can get more—sometimes a lot more. That's because employees might also be entitled to termination notice under common-law, i.e., law made by judges in court cases as opposed to statutes and regulations. Common-law notice is typically more generous than ESA notice.

Accordingly, many employers include language in employment contracts saying that employees who are terminated without cause (and thus in line for ESA termination notice) get only the notice they're entitled to under the ESA and no more.

3. Waiver of Common Law Notice Must Be Enforceable

Historically, courts have been very reluctant to enforce contract provisions that purport to limit an employee's notice rights. So if you do add a waiver of common law notice, you need to ensure it will stand up to strict scrutiny:

Waiver Language Must Be Clear and Unambiguous: First of all, the waiver clause must be written clearly so that employees understand what they're agreeing to. The slightest ambiguity in the language is enough to make the waiver unenforceable.

Waiver Provision Can't Be Unconscionable: A court won't enforce your waiver if it thinks it's "unconscionable," i.e., so grossly unfair that it shocks the conscience. Waivers can be unconscionable when an employer takes advantage of an employee's lack of power, ignorance or other vulnerability to ensure he signs.

- **Employees Must Receive Consideration:** The third requirement is that you provide employees "consideration," i.e., something of value in exchange for agreeing to waive their common law notice rights.