Terminations, Layoffs & the Law: How to Minimize Legal Liability

an

HR Canada Compliance

Your Plain Language Guide to Hiring, Firing, Human Rights, Payroll & Privacy

Special Report
INTRODUCTION

Hello! As an HR professional, particularly in a struggling economy, you are often faced with the unpleasant task of guiding your company through individual and group terminations. There are a myriad of legal issues that you must deal with when terminating employees. We are here to help. This Special Report provides you with some practical advice for tackling some of those issues.

First, we address the all important termination notice. We’ve surveyed court cases to find what employers do wrong when they issue termination notices and compiled a summary of 6 common traps you should avoid when drafting your termination notice. To illustrate our point, we’ve created the termination notice “from hell” that shows what you don’t want to do in your termination notice.

Next, we explain the types of termination payments you’ll need to make when you terminate employees. We’ve also explained some common mistakes you’ll want to avoid in determining the appropriate amount and type of termination pay to give terminated employees.

You also need to be concerned about the ramifications of any changes to employee compensation, work hours or responsibilities that you may make in the wake of terminations or layoffs—or in an effort to restructure your workforce to avoid the need for layoffs. If your restructuring efforts unilaterally change key terms of the employment relationship, you may inadvertently be terminating the very employees you were trying to keep. That can mean liability for improperly terminating an employee. Our article on constructive dismissal highlights nine different changes that can lead to constructive dismissal liability.

In addition to the obvious legal obligations and liabilities that come with terminations, we’ve also included an article that highlights a hidden danger. HR professionals need to be sensitive to the additional stress and anxiety that terminations and layoffs can bring to the workplace environment. Such tensions can create an atmosphere ripe for workplace violence. The law requires employers provide a safe workplace—and that means you need to be alert to the potential for workplace violence. Our article will help you do that with a survey you can use to gain input from frontline supervisors to spot potential trouble spots.

Finally, we round out the report with an explanation of how your HR department programs and staff are critical to navigating the stormy waters of terminations and layoffs. This article can help you ward off any potential budget cuts your executives want to make to the HR budget by demonstrating the hidden costs those cuts could lead to—which can undo any cost savings achieved by the budget cuts.

This free special report is excerpted from an in-depth report focusing on the legal issues raised by layoffs, terminations, corporate restructuring and budget cuts. To find out how to obtain a copy of the longer version of this report, see: http://www.safetysmart.com/download/HRDownloadPremium.pdf.
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TERMINATION NOTICE TRAPS
How Not to Provide Notice of Termination

You generally can’t fire employees without giving them written notice letting them know that their employment is being terminated and listing the key information they need to seek employment insurance and a new job. It’s important to cross the “i’s” and dot the “t’s” when you prepare termination notices. That’s because failure to provide the proper form of written notice can invalidate the legal basis of the termination and make you liable for wrongful dismissal and other damages. The notice may also have to be delivered in an appropriate manner.

How can you tell if your termination notices and delivery methods are valid? The Insider looked at cases where a court or arbitrator struck down a termination on the basis of improper termination notice. We then put all of the mistakes into one Model Notice. In essence, we created the termination notice from hell that you can use to avoid mistakes in your own notice forms. So look at the Model Form below and see how many problems you can spot. Then make sure that you don’t make the same mistakes when delivering notice of termination to your own employees.

WHAT THE LAW REQUIRES

Under Canadian employment standards law, employees can’t be terminated without notice—unless you have “just cause” to terminate them. Although the right to notice differs slightly from province to province, it generally comes in the following form:

- Advance notification letting the employee know that his employment will be terminated at the end of the notice period;
- Wages in lieu of notice for the amount of time the notice period covers, e.g., three months of wages if the employee is entitled to three months’ notice; and/or
- A combination of the above.

In the first and third scenarios, the employers must prepare some kind of document notifying the employee that she’s being terminated, when the termination takes effect, what termination payments, e.g., wages in lieu of notice, severance, vacation pay and retiring allowances, the employee is entitled to receive and other information.

Defining Our Terms

Before we go any further, we need to explain what we mean by the word “notice” in this article and avoid confusing you. In employment law, the word “notice” typically refers to the amount of time and/or wages employees are due upon termination, as described above. But we’re using the word in a slightly different way in this article.

Even if the employee receives wages in lieu of notice rather than advance notification, the employer typically must provide written notification to employees to let them know that they’ve been terminated. When we mention “notice” in the article, we’re referring to this written notification of termination, rather than the amount of time and wages the employee is due.

Invalid Notice Undermines Termination

Termination notice must include certain kinds of information such as itemization of the different types of termination payments being made and how each was calculated. Employers might also have to furnish additional information in the notice under the terms of the contract or collective agreement. There may also be provincial requirements about how notice is delivered to the employee. Thus, even a well written notice may be invalid if you don’t deliver it the right way.

These requirements are important because if your notice is no good, the termination may be invalid. Result: Even if your reasons for termination are justifiable, the firing may be illegal and subject you to liability for improper dismissal. Thus proving proper notice is critical to avoiding damages. Moreover, employers bear the burden of proving that the notice was valid. “The onus of proving notice,” according to one court, “is on the employer seeking to use it as defense to wrongful dismissal” [Yaeger v R] Hastings Agencies Ltd.].

Example: An employer claimed he gave the employee six months’ notice in two separate conversations. The employee said the employer merely suggested he resign. Nothing happened for 17 months after the first discussion until the employer fired the employee. The court said the employer hadn’t given valid notice in the earlier discussions, noting that the parties disagreed about the substance of the discussions and the fact that no action to fire the employee was taken for 17 months after the first discussion took place [Yaeger v R] Hastings Agencies Ltd.].

The Rules of Termination Notices

In interpreting the employment laws, courts require termination notice to be:

- Specific—it must give sufficient detail to explain the termination and when it takes effect;
- Unequivocal—it must leave no doubt that the employee has been fired and can’t be wishy-washy or in any way give the employee the reasonable impression that he can keep on working; and
- Clearly communicated—it must actually be delivered to the employee.

The communication requirement is particularly important. Courts will ask: Did the notice “fairly communicate to the employee that the employment relationship would definitely end and when it would do so?” Another variant of this question: Would an employee reasonably
be expected to understand that the notice was notice of termination and know from the terms of the notice precisely when employment would end? If the answer to those questions isn’t a clear yes, you haven’t given proper notice and could be on the hook for damages for improper dismissal.

**MODEL NOTICE**

With these rules in mind, take a look at the following notice. Let’s assume the notice was posted on the breakroom bulletin board and shown as a slide during a presentation to the customer service response department explaining a corporate reorganization. Mary Mustgo, the customer service response manager, is suing the company claiming that she didn’t get adequate notice of termination:

**XYZ Marketing Associates**

123 Main Street
Busytown, BC

To: Customer Service Response Department
From: HR

XYZ Marketing Associates is undergoing a restructuring and has decided as part of a corporate reorganization to outsource our customer service response department. Therefore, the customer service department will no longer exist some time in early 2009.

We are grateful for your service with XYZ Marketing Associates. While we have made the decision to outsource customer service, our company continues to thrive. We hope perhaps you can work with our XYZ team in a different capacity in the future. In fact, there are positions opening up in our Vancouver office. You may submit an application to the HR department.

**What’s Wrong with This Termination Notice?**

There are six problems with the way this notice was written and delivered. How many can you spot?

1. **Not Addressed to the Employee**

The notice never identifies Mary by name. It simply addresses the members of the department to which Mary belongs. This might not constitute adequate termination notice under the law. Although not all provinces expressly require notice to be addressed to the specific employee, some—like Ontario and Nova Scotia—do. But experts say you should personally address all termination notices even if your province doesn’t expressly require it because general notices addressed to a group, department, etc. could be misunderstood or even ignored.

2. **Not Personally Delivered**

Some provinces require notice to be delivered to the employee either personally or by regular mail or some other means of delivery. Employees also must be allowed to keep a copy of the notice. Posting the notice on a bulletin board and showing it as a PowerPoint slide, the way XYZ did, doesn’t satisfy these requirements.

3. **Doesn’t Tell Employee She’s Been Fired**

One of the biggest problems with this notice is that it’s vague and never comes out and tells Mary or any of the other members of the department that they’ve been terminated. The notice just says Mary’s department and job position are being eliminated but doesn’t expressly say that all the employees in the department are losing their jobs as a result. This lack of clarity opens the door for Mary’s lawyer to argue that the notice could reasonably be understood as merely an explanation of changes within the company. In other words, employees who see such notice might come away thinking they’ll still be able to work for the company.

4. **Doesn’t Set a Termination Date**

The employee must, in the words of one court, have a “clear understanding that his or her employment is at an end as of some date certain in the future.” So you should always state clearly in the notice the date on which the termination takes effect. You can’t just give a general time frame. That’s why Donald Trump’s “You’re fired!” probably wouldn’t pass as proper termination notice in Canada.

**Example:** An employer informed an employee that it was closing an office and that his position would eventually be eliminated. The employee had also signed a letter agreement allowing him to continue in his job for a minimum of two years. “Telling an employee that his current role would be in place for a minimum of two years could not be construed as a notice that his employment would end on a certain date,” said the court. In other words, the combination of closed office and end of guaranteed minimum employment weren’t enough to serve as notice of a termination date. The employer had to send the employee a letter actually listing a specific termination date [Tucker v. Weyerhaeuser Co.].

Hopefully you noticed that the XYZ notice includes no specific date for when the termination will take effect. It only states that the restructuring will occur next month and that the department will be eliminated “early in 2009.” This isn’t specific enough to let Mary know when she’ll have to start pounding the pavement for a new job.

5. **Terminates the Position but Not the Employee**

As explained by a Nova Scotia court, “the employer must make it clear to the employee that he or she is being terminated from the employer and not simply from the employee’s current duties” [Bent v. Atlantic Shopping Centres Ltd.]. Simply eliminating the employee’s position isn’t
enough to convey this message. You must tell employees that they and not just their job are being terminated.

**Example:** An employer gave an employee a letter saying that his position was being terminated in six months on a specific date. But the same letter suggested future positions in the company might be available. The court said the notice wasn’t specific and unequivocal. It merely said the employee’s current position—not his entire relationship with the company—would terminate. By contrast, a second letter was more unequivocal and told the employee not to report to work after October 28, and made no mention of future work at the company. This letter, the court said, was “free of any taint of equivocation” and was valid notice of termination [Reynolds v. First City Trust Co.].

XYZ’s notice says that Mary’s department is being eliminated but never expressly says Mary or any other employee in the department is terminated. In fact, the notice suggests that there could be other positions in the company available. This is unlikely to be enough for XYZ to prove that a reasonable person would understand the notice to indicate that he’s been terminated from employment with the company.

### 6. Hints at the Prospect of Continued Employment in Another Position

To soften the blow of termination, many companies will include language in the termination notice suggesting that there might be other work with the company. But this can prove to be a costly legal mistake. Courts have held that talking about the possibility that the employee could stay with the company muddies the termination message and renders the notice unclear and equivocal. Employees are especially likely to seize on such language as a hint when the notice includes generous praise of the employees and their service to the company.

If you do want to mention there’s other job possibilities in the company—one court has warned that you make sure you’re clear that those opportunities don’t change the fact that you are issuing the employee notice that he’s been terminated [Kalaman v. Singer Valve Co.].

**Example:** A company gave an employee notice of termination but said it would make “every effort” to place the employee in another position and would revoke the notice of termination if those efforts proved successful. The court said the effect was that notice was only final if another position in the company didn’t materialize [Royster v. 3584747 Canada Inc (cob Kmart)].

**Example:** By contrast, an employer who issued notice of termination and indicated there was potential the employee could get a job with an affiliated company in another country provided appropriate and valid termination notice. The court said the employer had made it clear it would be a new contract of employment, not a continuation. Moreover, the fact that the employment was with a different company dispelled any confusion over whether the language in the notice was offering an extension of employment [Gregg v Freightliner Ltd.].

The XYZ notice mentions the possibility of other work at the company and praises the employees for their service to the company, a potentially lethal combination that is apt to render the notice invalid.

### Conclusion

The employment relationship is a lot like marriage—easy to make, hard to break. Like spouses, partners to an employment relationship are supposed to be open and frank in discussing the terms of their relationship. That’s never more true than when it’s time to break things off. The employer has a duty to let employees know that they’re being fired and when the firing takes effect. Sugarcoating the message to make it easier to swallow may result in clouding the message altogether. As a result, it might invalidate the legality of the termination and result in a lawsuit and liability for improper dismissal.

### SHOW YOUR LAWYER (Cases in order cited)


**TERMINATION PAYMENTS**

**Calculation Traps to Avoid**

Terminating employees is an experience nobody relishes. After the termination notice is drafted and the bad news delivered to the employee, HR and payroll have to work together to prepare the final pay cheque, along with any termination, severance or other payments the employee is entitled to. And that’s no picnic. To properly calculate the different termination payments an employee may receive, you need to negotiate a set of complex legal requirements. That’s where this article will come in handy. We’ll explain the basic laws governing termination payments you need to know and how to avoid five common mistakes that can cause violations and overpayments. There’s also a chart on page 9 outlining the minimum termination notice and payment requirements of each province.

**Defining Our Terms**

When we refer to “terminated employees,” we mean employees who have been permanently terminated without cause, as opposed to employees who have been terminated for just cause, quit on their own initiative or been let go temporarily or as part of a mass layoff. The rules are different for such employees and beyond the scope of this article. The article also deals with employees in general industry. Many provinces have special rules for terminating employees in construction and other industries, such as shipbuilding (ON), firefighting, student nursing and teaching (BC) and fishing (BC and NS).

**WHAT THE LAW SAYS**

There are legal requirements that employers must be aware of when processing termination payments. While specifics vary, the laws of each province follow the same basic pattern:

**Notice Period:** Employees who have worked for the same employer for at least a stated period—typically three months—are entitled to minimum notice of termination. The longer employees work for the employer, the more notice they get. Generally, employees get one week’s notice for each year of service, but the rules vary. For example, an employee with five years of service would get six weeks’ notice in SK but only two weeks in NL. (See the chart on page 9 for the notice requirements in your jurisdiction.)

**Wages in Lieu of Notice:** Employers don’t necessarily have to let the terminated employee actually stay on the job during the notice period. In most cases, the employer buys out the employee by paying wages instead of, or in lieu of notice. In some provinces—such as AB, BC, MB and ON—notice/wages in lieu aren’t an either or proposition. Employers can split the notice period between work and wages in lieu. For example, a worker entitled to six weeks’ notice can be allowed to work four weeks and receive wages in lieu for two weeks.

**Other Termination Payments**

Employment standards notice is a minimum. Employers often grant more generous severance packages under the terms of the contract, collective agreement or termination settlement agreement they negotiate with the employer. Such payments may include:

- **Severance:** Certain employees are entitled to severance under Fed and ON employment standards laws. Of course, employees in other jurisdictions might also be due severance under their contract or termination settlement.

- **Overtime and Vacation Pay:** All jurisdictions require employers to reimburse employees for overtime and vacation previously earned but not yet paid. These additional payments are typically due immediately upon or shortly after termination.

- **Sick Pay:** Employees may be entitled to unused sick time.

- **Retiring Allowances:** Although it’s not required by law, employers often choose to make additional payments as a retiring allowance to compensate the employee for loss of employment and/or as recognition for past service.

**HOW TO COMPLY**

The termination payments a particular employee gets is determined by the law, contract and terms of the settlement negotiation. Once the types of payments due are determined, you must make sure you accurately calculate and pay these types of termination pay. Although you’re not a lawyer, to carry out this obligation, you need to be aware of the applicable legal requirements and the terms of the contract and/or settlement to properly calculate each form of termination payment and avoid breaches and overpayments.

This is where things can get dicey. Although each situation is different, there are some common patterns you’re likely to encounter when calculating termination payments. Here are five mistakes that employers commonly make and how to avoid making them:

1. **Miscalculating Wages in Lieu for Employees with Irregular Workweeks**

Calculating wages in lieu of notice is straightforward when the employee works a regular workweek: You pay the amount the employee would have received if notice hadn’t been given. This generally includes overtime, vacation and other types of pay the employee is entitled to under the law, contract and settlement. “So, if an employee would otherwise have worked overtime during the notice period, e.g., where the employee is senior and overtime is assigned on the basis of seniority, wages in lieu of notice must include what would otherwise have been paid,” explains Ontario consultant Alan McEwen.
But calculating wages in lieu of notice for employees with irregular workweeks is different. In most jurisdictions, including Fed, AB, BC, MB, ON and SK, wages in lieu of notice for such employees are based on an average of wages earned over a set time period. And certain types of pay, such as overtime, sick, holiday and vacation pay, are taken out of the equation. Failing to follow this rule will result in overpayments.

Example: An ON secretary fired after 4½ years of service is entitled to four weeks’ notice under the ESA. She makes $20 per hour, but doesn’t work the same number of hours each week. To calculate her wages in lieu of notice, the company must average her pay over the last 12 weeks. Suppose the company is unaware of this and bases her payment on actual earnings over the last 12 weeks rather than an average. Here’s what would happen (NOTE: In ON, overtime is due after 44 hours in a week):

<table>
<thead>
<tr>
<th>Previous Service</th>
<th>Hours</th>
<th>Earnings used to calculate wages in lieu of notice</th>
<th>Earnings employer should have used</th>
</tr>
</thead>
<tbody>
<tr>
<td>Week 1</td>
<td>44 regular</td>
<td>$880</td>
<td>$880*</td>
</tr>
<tr>
<td></td>
<td>4 overtime</td>
<td>$120</td>
<td></td>
</tr>
<tr>
<td>Week 2</td>
<td>36 regular</td>
<td>$720</td>
<td>$720*</td>
</tr>
<tr>
<td></td>
<td>8 sick</td>
<td>$160</td>
<td></td>
</tr>
<tr>
<td>Week 3</td>
<td>40</td>
<td>$800</td>
<td>$800</td>
</tr>
<tr>
<td>Week 4</td>
<td>40</td>
<td>$800</td>
<td>$800</td>
</tr>
<tr>
<td>Week 5</td>
<td>32 regular</td>
<td>$640</td>
<td>$640*</td>
</tr>
<tr>
<td></td>
<td>8 public holiday</td>
<td>$160</td>
<td></td>
</tr>
<tr>
<td>Week 6</td>
<td>44</td>
<td>$880</td>
<td>$880</td>
</tr>
<tr>
<td>Week 7</td>
<td>40</td>
<td>$800</td>
<td>$800</td>
</tr>
<tr>
<td>Week 8</td>
<td>40 vacation</td>
<td>$800</td>
<td>$0*</td>
</tr>
<tr>
<td>Week 9</td>
<td>40 vacation</td>
<td>$800</td>
<td>$0*</td>
</tr>
<tr>
<td>Week 10</td>
<td>32 regular</td>
<td>$640</td>
<td>$640*</td>
</tr>
<tr>
<td></td>
<td>8 public holiday</td>
<td>$160</td>
<td></td>
</tr>
<tr>
<td>Week 11</td>
<td>44 regular</td>
<td>$880</td>
<td>$880*</td>
</tr>
<tr>
<td></td>
<td>4 overtime</td>
<td>$120</td>
<td></td>
</tr>
<tr>
<td>Week 12</td>
<td>24 regular</td>
<td>$480</td>
<td>$480</td>
</tr>
<tr>
<td></td>
<td>16 sick</td>
<td>$320</td>
<td></td>
</tr>
<tr>
<td>TOTAL</td>
<td></td>
<td>$10,160</td>
<td>$7,520</td>
</tr>
</tbody>
</table>

| AVERAGE (TOTAL + 12) | $847/week | $627/week |

* Overtime, public holiday, sick and vacation time not included in calculation.

Amount employer paid secretary: $3,388 ($847/week x 4 weeks)
Amount employer should have paid: $2,508 ($627/week x 4 weeks)
Overpayment: $ 880

This Story Will Help You:
Accurately calculate termination payments and avoid ESA violations and overpayments

INSIDER SAYS: Average earnings used to calculate wages in lieu of notice of employees who work irregular workweeks don’t include vacation and sick pay. But in ON, the employee would be entitled to vacation pay during the notice period under the ESA even if she doesn’t work through the notice period. So if the secretary in the above example was entitled to 6% vacation pay, the employer would be required to pay her an additional $150.48 (6% of $2,508). The same is true of sick pay and any additional benefits the employee may have been entitled to under her employment contract. For example, if the secretary would have earned three sick days during her notice period, the employer must pay for those sick days in addition to other pay due the secretary upon termination.

2. Confusing Wages In Lieu of Notice and Severance
Under Fed and ON law where severance is required, it’s in addition to and not a substitute for wages in lieu of notice. In other words, employees are entitled to both. One of the common mistakes that employers make is thinking that severance replaces wages in lieu of notice. It doesn’t.

Example: An Ontario University fires a computer programmer after 10 years of service. The University realizes it doesn’t have just cause so it offers to pay the programmer wages in lieu. Assuming the programmer is caught up on holiday and vacation pay, the minimum amounts the University must pay him under the ESA are:

- 8 weeks’ wages in lieu of notice; plus
- Any sick time, vacation pay or other benefits that would have otherwise accrued during the notice period; plus
- 10 weeks’ statutory severance.

In other words, the University can’t use the programmer’s severance payment to satisfy its obligation to pay eight weeks’ wages in lieu of notice. Exception: If an employment or settlement agreement only specifies the amount that an employer must pay a terminated employee, the employer can apply the amount it owes under the agreement to offset the statutory wages due the employee in lieu of notice, unless the agreement says otherwise, says McEwen. Of course, any specific items—such as unpaid vacation pay—should also be carved out in the agreement. “It all depends on how the payment is described in the agreement,” McEwen explains.

3. Treating Retiring Allowances Like Wages In Lieu of Notice
A similar mistake is treating retiring allowances the same as wages in lieu of notice for purposes of source deductions and reporting. Different tax and deduction rules apply to retiring allowances. For example, wages
in lieu of notice are subject to income tax, EI and CPP deductions. Retiring allowances are also subject to income tax, but are taxed at a flat rate, says McEwen. And no CPP or EI deductions apply to retiring allowances, although the payments still must be reported on the employee’s Record of Employment. In any event, you need to keep the two payments separate. Keep in mind that:

❖ Minimum notice required under the ESA is considered wages in lieu of notice;
❖ Amounts above the minimum are considered retiring allowances; and
❖ Additional severance under Fed and ON law is also a retiring allowance.

Example: An ON employee who earns $1,000 per week is terminated without cause. Under the ESA, he gets two weeks’ notice and two weeks’ severance. But the employer gives him 10 weeks’ notice. Assume that there’s no vacation owing before termination and that the employee accrues vacation at 4%. The sides agree to a lump sum payment of $10,000. Of the $10,000 the employee receives:

❖ $2,000 is wages in lieu of notice;
❖ $2,000 is statutory severance;
❖ $160 is vacation pay; and
❖ $5,840, the balance, is a retiring allowance.

4. Omitting Pay for Statutory Holidays after Termination
Employees are entitled to pay for certain statutory holidays during the year. Because of the way the laws are written, in certain situations, an employee might also qualify for pay for holidays that occur after she’s terminated, notes McEwen. For example, an ON employee terminated on November 10, 2008 could be entitled to holiday pay for Remembrance Day on November 11, based on her service during the four work weeks leading up to the termination date.

5. Not Continuing Benefits Deductions during Notice Period
Another source of confusion stems from the fact that most employment standards laws require employers to keep offering particular types of benefits, such as pensions and healthcare, to terminated employees until the notice period expires, even if the employee has actually stopped
working. And, because benefits coverage continues through the notice period, so do deductions for premiums and contributions.

Example: A law firm fires a junior associate and escorts him to the door the same day the associate speaks his mind to the managing partner. The managing partner orders payroll to pay only the minimum amount of wages due in lieu of notice and to stop all benefits immediately. The payroll department can’t comply: It must continue benefits such as healthcare and pension contributions through the entire notice period, regardless of the fact that the associate no longer works there.

Conclusion
Sorting out the different kinds of termination payments and how much of each the employee is entitled to is just half the battle. The next step in the termination process is to ensure that the payments are processed appropriately. Unfortunately, what sounds like an exercise in routine paperwork and administration is often a source of major mistakes.

INSIDER SOURCE
Alan McEwen: Alan McEwen & Associates, 17 Catherine St., St. Catharines, ON L2R 5E4; (416) 949-5709.
TERMINATION PITFALLS
9 Ways to Commit Constructive Dismissal

Did the employee who just stormed out of your office quit? Or did you fire him? It may seem like a straightforward question, but the answer may surprise you. That’s because in Canada, your former and even current employees can claim that they’ve been “constructively dismissed.” The essence of the argument is that even if you never came out and told them they were fired, you made their job conditions so unfavourable that you practically forced them out the door. Lose a constructive dismissal lawsuit and you face the risk of damages including wages in lieu of notice and punitive damages if the court finds that you acted in bad faith.

The simplest way to avoid a constructive dismissal claim: Refrain from doing things that makes the employment relationship so unfavourable that the employee feels compelled to leave. But what exactly are you supposed to refrain from? The best way to answer this question is to look at cases where employers were found liable for constructive dismissal. Here are some typical cases illustrating the common mistakes that get employers into trouble.

WHAT THE LAW SAYS
What employer conduct can give rise to a “constructive dismissal” claim? There’s no simple answer to this question. Typically, it’s when an employer unilaterally changes an essential term of an employee’s employment agreement, such as the employee’s:
- Salary, bonus structure or other remuneration;
- Job responsibilities;
- Status in the company; and
- Work location.

But it can also include engaging in or allowing others to engage in abuse, harassment or other forms of misconduct towards the employee.

Patterns of Constructive Dismissal: Lessons from Cases
Here are nine forms of conduct that have been found to constitute constructive dismissal. Some of these examples are obvious; others may surprise you.

1. Demoting the Employee
Although employees can be demoted for poor performance, misconduct or even as part of a corporate restructuring, demotion can also be used as a tactic to harass, retaliate against or otherwise victimize an employee. Most constructive dismissal cases involving demotions fall somewhere in the middle; that leaves it up to a court or arbitrator to decide if the demotion was a constructive dismissal.

Example: As part of its modernization strategy, a clothing business demoted a supervisor to order marking clerk. Although he lost his managerial responsibility, his salary remained the same. But later, he was further demoted to a position where all he did was sew on garment buttons. He resigned and sued for constructive dismissal. Demoting the employee to such a lowly position was constructive dismissal, the BC court ruled [Dynes v. Jonah Apparel Group Ltd.].

2. Forcing an Employee to Accept a Promotion
A promotion can also be a form of constructive dismissal if it’s forced on an employee. An employee may also argue that the new position is actually a demotion disguised as a promotion.

Example: As part of a reorganization, an airline employee was promoted to Shift Manager. Instead of a fixed salary, he was to receive performance-based compensation. When the employee turned down the new position, his supervisor gave him a letter accepting his “resignation.” The employee said he hadn’t resigned, but he was escorted out of the building. The BC court ruled that he had been constructively dismissed [Parks v. Vancouver International Airport Authority].

3. Cutting the Employee’s Pay
Reducing an employee’s pay—for example, by reducing base salary, lowering commission percentage or cancelling a bonus—can constitute constructive dismissal.

Example: In 1995, a store manager earned $92,000, including $33,000 in base salary, a personal bonus and a bonus tied to the profitability of the store. The employer decided to merge salaries with personal bonuses. To make up for the lost bonus opportunity, the store adjusted the manager’s base salary to $64,000. The manager claimed that this was really a pay cut and resigned. The BC court ruled that...
the manager had been constructively dismissed. The store bonus was a fundamental term of the employment contract and eliminating it resulted in a significant salary reduction [Wood v. Owen De Bathe Ltd. (c.o.b. Canadian Tire)].

4. Changing the Employee’s Work Hours
Unilaterally making substantial changes to an employee’s hours may constitute constructive dismissal. Merely increasing or decreasing by an hour or so probably won’t put you in jeopardy. But reducing an employee from full- to part-time status is more problematic; and so, surprisingly, is “upgrading” an employee from part-time to full-time.

Example: A full-time manager returning from maternity leave requested a part-time bookkeeper position so she’d have time to care for her child. Her supervisor granted the request. But later that year, the bookkeeper position was changed to five days per week and the start of the workday was pushed back to 8 a.m. The bookkeeper objected and eventually left the company. The Ontario court ruled that changing the bookkeeper from part- to full-time was constructive dismissal [Corey v. Dell Chemists].

5. Suspending the Employee
Suspending an employee is justifiable only if you have a contractual right to do so and you follow the suspension procedure set out in your company’s policies and procedures. And, of course, the employee must commit an offence that justifies suspension.

Example: A marketing executive was suspended without pay for failing to deliver advertising materials to a trade show on time. The Ontario court ruled that the employee had been constructively dismissed. Even though company policy laid out an intricate progressive discipline process, it didn’t say anything about and thus didn’t authorize suspensions without pay [Carscallen v. FRI Corp.].

6. Undermining the Employee’s Authority
Undermining an employee’s authority, like humiliating him in front of colleagues or cutting him out of key decisions, can be a form of constructive dismissal if it makes it difficult or impossible for him to do his job.

Example: While out of town at a trade show, the company president learned that the CEO had fired six employees without consulting him. Frustrated and angry, the president took a paid leave of absence and never returned. He sued the company for constructive dismissal, claiming that the company had been gradually stripping away his responsibilities and that firing the six employees was the “straw that broke the camel’s back.” The Alberta court ruled that the CEO’s failure to consult the president eroded and insulted the president’s position and was a constructive dismissal [Larson v. Galvanic Applied Sciences Inc.].

7. Subjecting the Employee to a Poisonous Work Environment
Creating a poisonous work environment for the employee is grounds for constructive dismissal. Employers can also be liable for letting others—like supervisors or co-workers—harass the employee, even if they don’t participate in the conduct themselves.

Example: A parking garage employee claimed that his supervisor was rude and abusive and called him names. The Alberta court ruled that the employee had been constructively dismissed. The employee’s interaction with the manager went beyond a mere personality clash; it was, according to the court, a calculated pattern of behaviour that constituted a fundamental breach by the employer of a major implied term of the employment relationship that the employer would treat an employee with civility, decency, respect and dignity [Lloyd v. Imperial Parking].

Example: An insurance company claims adjudicator was subjected to a torrent of sexist remarks and verbal abuse by a co-worker. She complained but the owner did nothing to support her—other than advise her to stay away from the abusive co-worker. The situation got so bad that the adjudicator called the police. She then resigned and sued for constructive dismissal. The Ontario court ruled that the employer’s failure to prevent the harassment of an employee by a co-worker amounted to constructive dismissal. The company had a duty to see that the work atmosphere was conducive to the well being of its employees, the court explained [Stamos v. Annuity Research & Marketing Service Ltd.].

8. Making It Hard for an Employee to Return after Leave
Employment laws let employees take leave for a variety of reasons ranging from pregnancy to bereavement. Employers have to accommodate employees and let them return after the leave ends. That may involve letting employees reclaim their old position at the same rate of pay. If the employer doesn’t make accommodations and the employee can’t return, the employer may be liable for constructive dismissal.

Example: A senior administrative manager who had been an excellent employee had a nervous breakdown after a death in her family and had to go on sick leave. The manager’s condition got worse and she ended up in a psychiatric ward for several months. The employer wrote to inform her that her job no longer existed as her position had been abolished. The Alberta court ruled that the employer had constructively dismissed the manager [McGarry v. Bosco Homes Edmonton].
Example: A service advisor took stress leave from her car dealership job. The company promised to let her return to her previous position. But when she returned, she was assigned to different tasks. The company told her there was no service advisor position available but promised to assign her to one if any of the current advisors left the company or new advisors positions were created. The employee claimed—and an Ontario court agreed—that the company’s failure to assign her to her old job was a constructive dismissal. The company unilaterally made a substantive alteration to the essential terms of her contract of employment when it didn’t return her to her former position [Blondeau v. Holiday Ford Sales (1980) Ltd.].

9. Transferring Employee to a New Office

Transferring an employee to a different worksite or office can give rise to a constructive dismissal complaint. Courts and arbitrators consider how the pay and terms of the new position compare to the previous one. If the post-transfer position is inferior and it was forced on the employee unilaterally, the employee has a strong claim for constructive dismissal.

Example: A VP of a packaging manufacturer worked in the head office located in Mississauga, Ontario. His job required frequent travel to plants in Eastern Canada and the U.S. After the company was taken over, he was offered the same position for the new company. The catch: He’d have to move to Vancouver and give up his “parachute” benefits. After the two sides failed to reach agreement, the VP accepted another job. The Ontario court found that the VP had been constructively dismissed. Transferring an employee isn’t necessarily constructive dismissal. But in this case it was, the court explained. The VP had lived in the Mississauga area all his life; moving to the Pacific Coast meant he’d have to travel much more to do his job; and, adding insult to injury, he had to give up his parachute benefits. According to the court, the package offered to the VP was very meagre, compared to what he was being asked to give up as a result of the transfer [Reynolds v. Innopac Inc.].

Conclusion

Bottom line: Think twice before changing any aspect of an employee’s employment arrangement—whether it’s pay, responsibility, job qualification or position in the company. It doesn’t necessarily matter if you increase or decrease responsibility or title or merely restructure an employee’s pay. You could still be found liable for constructive dismissal.

SHOW YOUR LAWYER

WORKPLACE VIOLENCE

Using Risks Assessment to Manage Your Liability Risks

Canada’s problem with workplace violence has been well documented and there’s no point wasting your time rehashing the statistics. But while recognition of the danger is nothing new, the heightened risk created by the current economic situation most decidedly is. If workplace violence can erupt in times of prosperity, imagine what can happen in a climate of downsizing and mass layoffs—where even employees who are fortunate enough to keep their jobs experience high levels of anxiety and angst.

And then there’s this to consider: All employers, no matter what part of Canada they’re in, are required by law to implement measures to prevent violence in the workplace. It’s not just the safety manager who must be concerned. HR managers must also understand the legal obligation to prevent workplace violence and what’s necessary to comply with the law. That’s no simple task. Workplace violence laws are complex and requirements vary from jurisdiction to jurisdiction. We’ll explain what you need to know to keep your company in compliance. More importantly, we’ll give you a proactive strategy for preventing violence along with a Model Assessment Form (on page 16) to execute it.

Defining Our Terms

Workplace “violence” means more than just physical acts like slapping, punching, shooting and stabbing. It also includes threats of such acts and other forms of intimidation, harassment, bullying and abusive conduct that doesn’t involve actual physical contact.

WHAT THE LAW SAYS

Where in the law does it say that employers must prevent violence in the workplace? The answer, at least in most of Canada, is within Occupational Health & Safety (OHS) laws. The OHS laws impose that duty in two different ways:

The Specific Duty Jurisdictions

The OHS laws of seven jurisdictions—Fed, AB, BC, MB, NS, PEI and SK—specifically say that employers must take certain steps to address workplace violence. Federally regulated companies are the most recent ones to incur such a duty; new workplace violence regulations, Part XX, Section 20.1 et seq. of the Canada OHS Regulations took effect on June 17, 2008. The workplace violence section in SK and NS apply only to employers in certain high-risk sectors, such as schools, healthcare facilities, banks, retail stores and correctional facilities. But the NS regulations specifically state that all workplaces must recognize violence as a workplace hazard in carrying out their duties under the OHS laws [Sec. 3].

In Québec, the workplace violence duty isn’t in the OHS law but the Labour Standards Act. Employers are required to prevent “workplace psychological harassment.” defined as unwanted conduct, verbal comments, actions or gestures that affect a worker’s “physical integrity.” Presumably, QC employers must also prevent acts of physical violence.

Insider Says: In December 2007, a bill that would amend the Ontario OHS Act to expressly require employers to take steps to address workplace violence (Bill 29) passed first reading.

The General Duty Jurisdictions

Six jurisdictions—NB, NL, NT, NU, ON and YT—don’t specifically say in their OHS laws that employers must address workplace violence. But that doesn’t mean that employers in those jurisdictions are off the hook. For those employers, the duty is implied.

Explanation: The OHS laws list the risks employers must protect against, including electrical, chemical, machine, etc. But when the lawmakers adopted the OHS laws, they realized that they might have overlooked—or deliberately decided not to include—certain hazards. So, as a backstop, the OHS statute—or act—of each jurisdiction contains what’s called a “general duty clause” that requires employers to provide a reasonably safe workplace and protect workers from foreseeable hazards that can cause serious injury or death, even if those hazards aren’t mentioned in the laws.

The general duty clause of the OHS laws almost surely requires employers to protect against workplace violence. How do we know? Some jurisdictions have come out and said so. For example, the Ontario Ministry of Labour says on its website, “Under the Occupational Health and Safety Act, all employers must take every precaution reasonable in the circumstances to protect the health and safety of their workers in the workplace. This includes protecting them against the risk of workplace violence.”

Example: A union filed a grievance against an employer in Ontario for failing to meet its duty under the OHS Act to provide a safe work environment when it allowed a foreman to bully a worker. The arbitrator concluded that the foreman had publicly humiliated the worker on a regular and continual basis, noting that “[t]his form of humiliation was akin to placing him in the public stocks.” The arbitrator ruled that the employer violated the general duty clause and fined it $25,000 [Toronto Transit Commission v. Amalgamated Transit Union].

Other “implied duty” jurisdictions have made similar pronouncements. Moreover, the threat of workplace violence is universally acknowledged. Thus, in the words of one lawyer, “it’s unimaginable” that any prosecutor, regulator or court would find that an employer doesn’t have to safeguard employees against violence.
CONDUCTING A WORKPLACE VIOLENCE ASSESSMENT

Having a duty is one thing. What must employers do to comply? Some provinces’ OHS laws set out specific steps. Although requirements vary, they follow the same basic approach. One common requirement is to conduct a workplace violence risk assessment. For example, Part 20.5(1) of the new federal workplace violence section of the OHS Regulations requires employers to assess:

- The nature of the work activities;
- The working conditions;
- The design of the work activities and surrounding environment;
- The frequency of situations that present a risk of workplace violence;
- The severity of the adverse consequences to the employee exposed to a risk of workplace violence;
- The observations and recommendations of the workplace violence policy committee or joint health and safety committee (JHSC) and employees; and
- The measures already in place to prevent workplace violence.

Some provinces and territories, including, of course, the six “implied duty” jurisdictions don’t set out specific measures. What should employers in these places do? Lawyers suggest doing a workplace violence assessment patterned after those required by the OHS laws of the other jurisdictions since the obligation to do assessments represents the current legal standard for workplace violence prevention. Accordingly, courts and prosecutors in other jurisdictions are likely to look to those requirements to determine if your company’s response to violence is reasonable.

Survey Supervisors as Part of Assessment

The purpose of a violence risk assessment is to identify which employees may be at risk of violence, the kinds of violence they may face, the degree of risk and the measures necessary to protect against those risks. Nova Scotia guidelines recommend regular review of the assessment at least every five years. (Ask your company’s lawyer if more frequent reviews are necessary.) You should also review your assessment when incidents occur or circumstances change, causing the risk of violence to increase. Get your JHSC involved in the process, not just because the law requires it (Fed, MB and NS) but to make assessments more effective.

A key aspect of the assessment is to get information from supervisors. After all, they’re on the front line and have uniquely valuable insight into violence risks. A good way to secure supervisor input is to have them complete a survey like the one on page 16 that’s based on a violence hazard assessment form from the Education Safety Association of Ontario. The survey covers the following:

- A description of the department or area the supervisor is in charge of;
- Any history of violence in the department;
- Activities in the department that could expose workers to violence;
- Factors that might increase the risk of violence in the department;
- Measures in place to address violence; and
- Additional measures recommended and resources needed to implement them.

Conclusion

The best reason to undertake a risk assessment and other measures to prevent workplace violence isn’t because the law requires it. The real reason to act is that the danger is real and growing worse by the day. At the end of the day, if anyone at your company is ever unfortunate enough to be involved in violence at the workplace, the liability you’ll incur will be the least of your problems.

SHOW YOUR LAWYER

# SUPERVISOR WORKPLACE VIOLENCE SURVEY

## Part 1: Work Department/Area
Please describe your department/area and the types of activities/functions performed by workers in the department.

## Part 2: History
Have there been incidents when workers in your department have experienced or been threatened with physical violence?  
- [ ] NO  
- [ ] YES, please describe incidents.

Have there been incidents when workers in your department have experienced verbal abuse i.e. been shouted at or subjected to obscene language, threats or obscene phone calls?  
- [ ] NO  
- [ ] YES, please describe incidents.

## Part 3: Activities Which Might Expose Workers to Risk of Violence
Do workers in your department handle money or other valuables?  
- [ ] NO  
- [ ] YES

Do workers in your department deliver or collect items of value?  
- [ ] NO  
- [ ] YES, please describe.

Do workers in your department deal with people who may be under the influence of drugs or alcohol?  
- [ ] NO  
- [ ] YES

Do workers in your department deal with people who are deeply troubled or distressed?  
- [ ] NO  
- [ ] YES

Do workers in your department monitor or regulate the activity of others or carry out procedures or make decisions which adversely affect others?  
- [ ] NO  
- [ ] YES, please describe.

Are workers in your department involved with activities that may elicit a negative or confrontational response?  
- [ ] NO  
- [ ] YES, please describe.

Are there other aspects of the work in your department that might spark a violent response?  
- [ ] NO  
- [ ] YES, please describe.

## Part 4: Factors That Increase the Risk of Violence
Do any of your workers work alone—that is, out of sight and out of hearing of other workers—during normal working hours?  
- [ ] NO  
- [ ] YES, please describe.

Do any of your workers work alone after normal working hours?  
- [ ] NO  
- [ ] YES, please describe.

Please describe any precautions already taken to safeguard workers in your department who work alone.

Please describe other factors which you feel might increase the risk of violence.

## Part 5: Reducing the Risk of Violence
Please describe policies or procedures already in place to reduce the risk of violence in your department.

In light of your responses to the questions in this assessment:  
- [ ] NO  
- [ ] YES

What further steps would you recommend?

What assistance do you need to accomplish any of the above steps?  
 Specify:

---

**Name:**__________________  
**Date:**__________________  
**Department:**__________________

Thank you for your cooperation and input!
THE BUSINESS CASE FOR HR

How Strong HR Department and Programs Can Minimize the Downside of Downsizing

When the economy is suffering, corporate budgets are strained and all parts of an organization are being called on to justify their existence in terms of the economic value they bring to the table. HR is no exception. The traditional perception of HR as a cost center has long made the HR program a tempting target for budget cuts for companies under financial stress. “Companies are always trying to cut unproductive staff,” notes BC employment lawyer Robert Smithson. “And the perception of HR as nonproductive staff is one HR people are forever battling,” he adds.

Of course, the current global economic situation is intensifying the scrutiny on HR programs. But HR budgets are not the place to get skimpier. Here’s why you need to emphasize to your CEO and CFO the importance of your HR department staff and programs, particularly when you are in a phase of terminating employees.

HOW HR PROGRAMS SAVE COMPANIES MONEY

A priority for most companies right now is to save money. But CEOs and CFOs understand that budget cuts need to be made judiciously and can’t be penny wise and pound foolish. Thus, programs that have a demonstrated capacity to enable the company to achieve long-term cost savings are among those most likely to survive.

And this is precisely what HR does. One key value of HR programs is that they enable companies to avoid potentially devastating costs, Smithson explains. Some of the costs HR activities save companies are direct costs—for example the cost of hiring outside consultants to perform HR tasks such as recruiting, likely at a higher rate and without inside knowledge of the company’s workforce, he adds.

But direct costs are just the tip of the iceberg. Most of the savings HR produces result from enabling companies to avoid indirect costs and liabilities down the road. For example, every dollar spent on HR salary enables a company to avoid having to spend $10—or more—in litigation costs and wrongful dismissal liabilities in the months or even years ahead. Similarly, money spent on programs to retain and educate staff is an investment that yields major dividends later by enabling the company to retain key talent and avoid the considerable costs of recruiting and retraining new staff.

These indirect cost savings more than offset any short-term savings achieved by cutting or outsourcing HR staff, programs and functions. But those savings may be harder for CEOs to see on the financial statements and attribute directly to HR investments. So it’s essential for HR directors to educate their CEOs about the impact of HR cuts on indirect costs.

Cost Savings of HR during Downsizing and Restructuring

The equation: HR investment = long-term cost avoidance applies in any and all business climates. But it takes on a special significance in down times. Explanation: When companies engage in downsizing and restructuring, they think they’re saving money. But the price tag for these activities is often greater than companies anticipate. The good news is that the hidden costs associated with downsizing and restructuring are precisely those that HR is best suited to help the company avoid. But it’s imperative for HR directors to understand these costs and demonstrate how the HR function enables the company to minimize or even avoid those costs altogether. Here are four key indirect costs to point to in making your case:

Indirect Cost # 1: Legal Liabilities Resulting from Downsizing.

Downsizing and restructuring aren’t just business challenges but major liability risks. Affected employees are desperate and apt to fight back with grievances and lawsuits. Regulators are also paying close attention. Thus, Smithson says that since the economy started going south in the past couple of months, he’s observed a notable increase in the volume of work for lawyers relating to individual and group terminations.

It’s precisely at these times that companies most need experienced HR staff and programs to navigate the legal minefields of downsizing. “Companies that choose to make cuts in HR may be shooting themselves in the foot in the sense that they will derive short term payroll savings by eliminating HR positions but are likely to end up squandering those savings in terms of the greater cost of dealing inappropriately with terminating other employees,” warns Smithson. HR is especially integral to keeping the company in compliance with:

❖ Group termination requirements under employment standards laws;
❖ Notice and severance requirements;
❖ Employment Insurance and ROE filings;
❖ Discrimination laws to the extent terminated employees are covered by human rights laws; and
❖ The terms of individually negotiated and collectively bargained employment agreements of affected employees.

Indirect Cost #2: Administrative Costs of Downsizing:

HR is essential not just to carrying out terminations but helping the company make financially sound termination decisions in the first place. The HR staff’s understanding of notice requirements is particularly crucial for companies to consider in their business plans. The costs in notice that a company incurs in terminating large numbers of employees can be substantially more than management realizes and offset the financial gains of layoffs, Smithson explains.

Explanation:

HR is

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For example, in BC, if an employer terminates 50 or more employees from a single location in a two-month period, it incurs very substantial “group” notice/pay obligations in addition to the usual individual termination notice obligations. HR can enable the company to avoid those significant, additional obligations for group terminations by spreading layoffs over a period of time, says Smithson. But the strategy won’t work if it is unduly rushed or is managed by people unfamiliar with complicated employment standards rules. It requires long term planning and careful implementation. A critical element to the strategy’s success is the continuity of knowledge and awareness of what the employer has been doing and seeking to do—and that continuity comes through the HR personnel, he explains. “Without consistent HR leadership and management of the downsizing, the chances of stumbling over these onerous group termination obligations skyrockets,” warns Smithson.

**Indirect Cost #3: Losses of Morale and Productivity.** Another significant indirect cost of layoffs and restructuring that HR helps avoid are the adverse impact on productivity and morale, says Ontario-based HR consultant Dr. David S. Cohen. How you let staff go or handle other changes sends a message to employees who survive the layoffs and affects their productivity, efficiency and loyalty, explains Cohen. If you let employees go in the most economical way possible, he explains, you’ll scare the remaining employees you’re counting on to keep the company afloat and competitive. The same is true of how you handle changes to the workforce and operations. Your HR staff knows this all too well and can anticipate bumps associated with layoffs, reorganizations and other changes and help smooth the way for those changes—keeping employees committed, loyal and productive, says Cohen.

**Indirect Cost # 4: Loss of Competitiveness in the Labour Market.** Cutting recruitment and retention resources is one of those penny-wise, pound-foolish decisions that companies may come to rue later when the economy turns around. Although things seem bleak now, the economy will recover and hiring will resume in the future. It always does. And the fundamental importance of attracting and retaining talent will remain a key factor of business success.

In fact, the costs of neglecting recruitment and retention might come home to roost much sooner than some employers think. That’s because there are organizations that are actually growing during this economic downturn, advises Cohen. For example, radio and cell phone businesses are in a growth period and government investment in infrastructure will create new jobs at the time other businesses are failing, he explains. These new ventures will need talent and could be stealing yours if you don’t keep some HR resources devoted to retention.

Hiring and training a new employee costs more than retaining existing employees. “One of the most common missteps by management is the philosophy that it’s an employer’s market and people won’t leave. That’s not true because the competition might see this as an opportunity to make an offer to your best employees, at less than it would have taken before, and hire them out from under you because of your inaction in their development,” explains Cohen. For that reason, you can’t neglect or abandon your recruitment and retention efforts even in a downturn.

By the same token, it’s during downturns that companies should not only look to keep existing talent but also step up their recruitment efforts. “Recessionary economies create an opportunity to get good people—it’s during volatile times that opportunities to sign up key employees can arise,” sometimes at a fraction of the normal costs, explains Smithson. Cutting recruitment budgets is thus an opportunity lost.

**Conclusion**
Maintaining your HR programs and staff help your company avoid potentially devastating costs that can lower your bottom line—in the form of lost productivity, litigation costs and liabilities for mishandled terminations. So neglecting your HR program, or cutting too deeply into the HR budget doesn’t really provide the savings you might think. Use this article to convince corporate leadership of the importance of your HR programs and staff to the financial well-being of the company.

**Editor’s Note:** This article is excerpted from a longer version of this article published in “Layoffs, Terminations & Restructuring Your Workforce: Avoiding the Cost of Non-Compliance” and in HR Compliance Insider, Vol. 5, Issue 5.

**INSIDER SOURCES**

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