

You Make the Call: Is Contractual Limit on Termination Notice Enforceable?



The High Cost of Termination Notice

Unlike south of the border where employment is at will, you can't terminate employees in Canada without cause unless you pay them termination notice based on their years of service. How much termination notice you have to pay depends on which law applies:

- Employment standards laws (ESA) require notice ranging from 1 to 8 weeks;
- Common law notice can run as high as 24 months or even more in extraordinary circumstances.

Contractual Termination Notice Limits

If you're an employer, you'd obviously rather provide ESA than common law notice. That's why many employers include language in their employment contract in which employees purport to give up their right to common law notice and accept only the minimum notice required by the ESA in the event they're terminated without cause.

While that solution obviously makes economic sense, it's not as simple as it sounds. The problem is that notice limitations clauses are notoriously hard to enforce. The clause must be 100% clear and unambiguous and courts and arbitrators will seize upon even the slightest of ambiguities as an excuse not to enforce them.

You Make the Call—Which Clause Is Ambiguous?

To demonstrate this, let's look at 2 actual cases where a court had to decide whether a notice limitations clause was clear enough to enforce. Both clauses sound pretty clear that the employee gets only the ESA notice. But only one of them was found to be enforceable; the other was rejected for being ambiguous. Can you tell which one of the clauses was found ambiguous and why?

Clause 1

The employer may terminate your employment without cause at any time during the term upon providing you with notice or pay in lieu of notice, and severance, if applicable, pursuant to the Employment Standards Act. . . .

Clause 2

The Company's policy with respect to termination is that employment may be terminated by either party with notice in writing. The notice period shall be limited to the notice required by the applicable labour legislation.

Answer & Explanation

The answer is Clause 1. The employer obviously intended the clause to limit the employee to the required ESA notice *and only* the required ESA notice. The problem is that the clause doesn't say that. All it says is that the employee would get notice "pursuant to the ESA" without indicating that this is the limit. Consequently, the "pursuant to" language creates only a floor and not a ceiling on termination notice.

Clause 2, by contrast, states that notice "is limited to" the notice required by the ESA. This was enough to create an unambiguous limitation on notice and make the clause enforceable.