

## Your Obligations When Terminating an Employee

*Non-unionized employees' rights are not determined by a collective bargaining agreement. Employers of non-unionized employees require a firm understanding of their obligations when terminating an employee, failing which employers can be exposed to time-consuming and costly litigation.*

The entitlements of non-unionized employees upon the termination of their employment arise through legislation called the Employment Standards Act, 2000 (the "ESA") and through the body of rules and principles resulting from the decisions of our courts known as the common law.

The ESA provides that an employee is entitled to notice prior to termination or payment in lieu ("notice pay") in an amount equal to one week per year of service up to a maximum of eight weeks. An employee may also be entitled to severance pay if their length of service is five years or more and they meet one of the two following criteria: (a) they are one of fifty or more employees whose employment has been terminated



by the employer within a six-month period, or (b) the employer has a payroll of \$2.5 million or more.

The Supreme Court has ruled that employers have an implied obligation to provide employees with reasonable notice prior to the termination of their employment. This is a common law principle that binds all employers with non-unionized employees.

Unlike notice pay under the ESA, there is no grid applicable

to determining common law reasonable notice. The period of reasonable notice applicable to an employee is determined on a case-by-case basis with regard to the employee's age, health, length of service, training and experience, and the availability of similar employment. The period of reasonable notice is generally longer than the ESA entitlement, which is included within it.

The failure to provide notice prior to termination is a breach of contract upon which an employee can bring an action for wrongful

dismissal. The damages payable to the employee consist of the amount of remuneration that the employee would have earned over the period of common law reasonable notice, including any payments such as commissions, bonuses, benefits and vacation pay. These damages are reduced by any income that the employee earns over that period through other sources, such as new employment.

There is no obligation on an employer to provide notice in cases where an employee is terminated for just cause. "Just cause" is a term with specific legal meanings. Not every act of misconduct or impropriety will qualify as just cause. Employers should be careful when asserting just cause, as the threshold of

proof is high and employers bear the onus of proving that just cause exists.

Whether or not an employee's behaviour amounts to just cause is determined on a case-by-case basis. The court will look at the employee's behaviour and determine if it is serious enough to be considered a breakdown in the employment relationship. Examples may include conduct which breaches a fundamental term of the employment relationship, which breaches the trust which exists in the employment relationship, or which is fundamentally or directly inconsistent with the employee's obligations to his or her employer.

There are a variety of ways

to structure an employment termination compensation package in order to fairly compensate the employee for lack of notice prior to termination. Packages can include working notice, a combination of working notice and an ESA notice payment, a salary continuation with an incentive for the employee to find new employment, or a lump sum payment. A release from the employee should be obtained in exchange for the payment.

If you have any questions concerning the termination of an employee or employment law in general, please do not hesitate to contact me directly 613.288.3203 or by email at [sveltri@tslawyers.ca](mailto:sveltri@tslawyers.ca)



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#### CALL TO THE BAR

Law Society of Upper Canada, 2009

#### EDUCATIONAL BACKGROUND

University of Ottawa, LL.B., 2008

University of Alberta, B.A. (Hons.), 2005

#### PRACTICE SUMMARY:

Sabina is an Associate in the Civil Litigation Practice Group. She attended law school at the University of Ottawa. Sabina articulated with Tierney Stauffer and joined the firm as an Associate in the Civil Litigation Practice Group after her call to the Ontario Bar in 2009.

Sabina practices in areas of personal injury, employment law, contract litigation and insurance litigation. Sabina has appeared on matters before the Ontario Superior Court of Justice, the Ontario Divisional Court and the Court of Appeal for Ontario. She also has experience negotiating the settlement of matters before tribunals such as the Ontario Human Rights Tribunal and the Ontario Labour Relations Board.

Sabina is a member of the Young Lawyers and Articling Students Planning Committee of the County of Carleton Law Association. She is also a volunteer with Law Help Ontario, a legal clinic operated by Pro Bono Law Ontario.