

Termination Pay Considerations for Commissioned Employees in Canada

Figuring out an employee's entitlements upon termination can be tricky in Canada. It can be an even trickier exercise for commissioned employees. For example, are employers required to pay employees commissions for deals that close after they are terminated? Unless the employment contract explicitly states otherwise, the answer is probably.

Employers have a choice when they decide to terminate an employee in Canada: They can provide "working notice" or they can pay termination pay in lieu of notice. If payment is made in lieu of notice, the general rule is that an employer must provide the terminated employee an amount at least equal to the wages the employee would have earned if that employee had worked during the notice period.

So the first step in figuring out what commissions an employee is entitled to after termination is to determine the length of the "applicable termination notice period." The statutory notice period set out in Canadian legislation is a good starting point. However, Canadian courts go further and protect the salary and benefits that the terminated employee would have received if he or she had remained employed during the period of *reasonable* notice. The reasonable notice period (also referred to as common law notice) will exceed statutory notice requirements in all jurisdictions and varies depending on factors such as:

- the character of the employment;
- the length of service;
- the age of the employee; and
- the availability of similar employment "having regard to the experience, training, and qualifications" of the employee.

It comes as no surprise then that reasonable notice obligations can be difficult to predict as judges have broad discretion in setting out the period of reasonable notice. This variability can increase an employer's exposure to the payment of commissions as part of an employee's termination pay.

The second step is to determine what wages an employee would have earned if he or she had not been terminated. Commissions are generally included in the definition of "wages" under provincial employment legislation in Canada.

As a general rule, if the employee would have become eligible for commissions during the applicable statutory and common law reasonable notice period, the employer will be required to pay them notwithstanding the termination.

In fact, even if the employee would have become eligible for commissions *after* the reasonable notice period, the employee may still be entitled to commissions. In this circumstance, the court will ask whether the employee is the "effective cause" of the sale.

Determining whether an employee is the "effective cause" of a sale includes a review of:

- the nature of the sale;
- the degree of involvement of the employee in the sale;
- the necessity of that individual in making the sale happen; and
- what work was completed on the sale by the employee's replacement.



Broad language that states that commission payments are made at the employer's unfettered discretion is probably not sufficient to contract out of the obligation to pay commissions after the employee has been terminated. This is because employees will usually be entitled to fair compensation when they have provided a benefit to the employer.

The good news is that employers *can* contract out of the obligation to pay amounts beyond the statutory notice period. You can limit termination notice or pay in the contract of employment to the minimum statutory notice period. So although commissions caught under the statutory definition of wages and earned during the statutory notice period will be payable, no further commissions will be owed beyond that time.

To do so, the key is to be explicit and unambiguous. Courts have held that the "magic language" required includes a statement in the employment contract that the employee must be employed on the day that he or she would otherwise become eligible for a commission to receive commissions on that transaction.

The primary lesson for employers with Canadian employees who are paid on commission is to ensure that the employment contract is explicit enough to limit termination notice to the statutory minimum and override the common law rule that commissions are to be included in termination pay. This way, when a business makes the difficult decision to downsize its commissioned workforce, the benefit of that decision is not undermined by excessive and onerous termination pay obligations.

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