

Ertl Lawyers

UNDERSTANDING **YOUR** SEVERANCE PACKAGE



By Toronto Employment Lawyer David Ertl

TO REQUEST A FREE CALL BACK
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HAVE YOU BEEN WRONGFULLY DISMISSED?

When an employer fails to provide you with proper notice or pay in lieu (i.e. money), then the dismissal is “wrongful”. It is important to understand that the reason for your dismissal does not make it “wrongful”. Basically, it’s all about the amount of money.

THREE CATEGORIES OF WRONGFUL DISMISSAL: WHERE DO YOU FIT?

CATEGORY 1: WITHOUT CAUSE

An employer terminates you without cause (i.e. no fault of your own) and fails to provide adequate advanced notice of termination or pay in lieu.

CATEGORY 2: WITH CAUSE OR WITH “JUST” CAUSE

Here, your employer inappropriately alleges cause (for example, due to misconduct) and fails to pay you any compensation whatsoever.

“For more information about this category, download our guide “Help! I Have Been Fired With Cause”.



CATEGORY 3: CONSTRUCTIVE DISMISSAL

An employer makes a fundamental change to your employment relationship (e.g. reduced pay, fewer hours, demotion) without your consent. Usually this is done without proper advanced notice of the change. This is called constructive dismissal. For even more information about this category, download our guide “Constructive Dismissal”.

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MY SEVERANCE OFFER HAS A DEADLINE TO SIGN IT. WHAT DO I DO?

Don't panic. In the vast majority of cases, the employer's first offer is not its best, nor does it represent an employee's full entitlements at law. However, by adding the pressure of a deadline, a number of employees will sign out of fear.

If you sign it, you could be giving up significant entitlements.

Having said this, if you want more time to consider your severance package, then ask for more time! Any employer acting reasonably will give you more time. This one simple step should reduce your stress level and give you appropriate time to speak with us.

WHAT SHOULD I FIND IN A SEVERANCE PACKAGE?

1. THE AMOUNT OF NOTICE OR COMPENSATION IN LIEU OF NOTICE

- The termination letter should set out the employee's statutory or contractual entitlements, and clearly set out the additional amount the employer is offering to pay above the minimum entitlement in exchange for a Release.
- An employer can give you either working notice or pay in lieu (compensation) or a combination of both. Both count towards your overall notice period.
- If you are provided with compensation, it is usually expressed in increments of weeks or months.
- Often, commissions, incentives, or bonuses are important parts of an employee's overall compensation and should be addressed.

First, employees are often terminated after they have "earned" their commissions, incentives, or

bonuses (also called "variable compensation") but before the variable compensation is paid out. Barring clear contractual language to the contrary, an employee is generally entitled to the variable compensation that he or she has earned up to the date of termination.

Second, where an employer provides notice or pay in lieu upon termination, it generally should include the variable compensation that the employee would have earned had the employee continued to work for the employer for the notice period.

Third, a general rule of thumb, when determining the value of a bonus or other variable incentive over the notice period, the common law generally looks at an average of the last three years.

Important

When an employee is terminated, an employer usually takes the position that the employee is not entitled to a bonus if

the employee is not actively employed at the time the bonus is to be paid out. However, it takes clear, enforceable language to deny an employee his/her bonus – and many times, there is no such language (or it's too poorly worded to be enforceable). **We regularly defeat these types of provisions or clauses.**



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WHAT SHOULD I FIND IN A SEVERANCE PACKAGE? (CONT'D)

2. HOW COMPENSATION WILL BE PAID

If an employer is paying compensation instead of providing working notice, the compensation will usually be paid out as:

Lump Sum: employer gives you a sum of money all at once.

Salary Continuation: employer pays the severance in installments just like you were still working there (even though you do not actually show up for work).

Combination of Lump Sum and Salary Continuation.

Lump Sum – Advantages to Employee

- Once the employee is paid, the employee doesn't need to worry about the financial circumstances of the employer.
- May have certain tax advantages.
- If the employee starts at new job, normally the employee does not need to pay back any of the lump sum payment.

Lump Sum – Disadvantages to Employee

- Lump sum offers are typically less than salary continuation offers to account for the possibility of the employee finding a job during the salary continuation notice period.

- Normally, benefits are stopped earlier than with salary continuation.

Salary Continuation – Advantages to Employee

- A steady stream of income.
- Typically, benefits are continued.
- Usually E.I. and C.P.P. contributions continue to accrue.

Salary Continuation – Disadvantages to Employee

- Employee is dependent on the financial circumstances of the employer.
- Unwanted continued relationship with former employer.

3. TREATMENT OF BENEFITS

Certain benefits, like group health benefits, must automatically be continued for a certain minimum period of time according to employment legislation.

However, the common law says that the employer is supposed to continue all forms of compensation (which includes benefits) for the entire notice period, which is often much longer than what employment legislation provides.

Important

The degree to which your benefits must be extended during the notice period is a very important

consideration and can be a complex area of law (involving legislation, contract terms, and the common law) – particularly with non-health related benefits like pensions, RRSP, stock ownership, etc. Speak with an experienced employment lawyer.

Important

Employers cannot typically continue your life insurance coverage beyond what is stated in the life insurance policy documents. Normally, the policy must be converted to an individual policy within a certain time period after your termination date. Often this period is 30 days. It can be more (but not usually less). Call the life insurance provider as

soon as you know that you are being terminated to clearly understand your rights and obligations. If you let the insurance lapse, you will lose your existing coverage and you may not be able to obtain that (or maybe any other) life insurance again. Do not take any chances. After you convert your policy, you can then seek reimbursement for the premiums you are paying.



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WHAT SHOULD I FIND IN A SEVERANCE PACKAGE? (CONT'D)

4. CAREER COUNSELING

An employer may offer career counseling to departing employees.

Typically, the employer offers this because they want the employee to begin job searching as quickly as possible. The faster an employee finds a job, the less the employer may have to pay the departing employee.

Career counseling is provided, typically, for 2-3 months.

If it is offered, there is no harm in taking it. It is a good way to brush up on your resume writing skills.

5. NON-COMPETITION AND NON-SOLICIT AGREEMENTS

Sometimes an employer might ask you to sign a non-competition agreement or a non-solicitation agreement in order to get your severance package.

Important

A severance package is meant to address the notice period you are entitled to, not to impose additional terms you did not agree to at the outset of your employment. If the employer wants to saddle you with future obligations, it is not fair, and you should be seeking legal representation.

6. LETTER OF REFERENCE / LETTER OF EMPLOYMENT

Generally, an employer will not offer a true letter of reference. Employers frequently say "it's not our policy to provide letters of reference".

Instead, an employer might offer a letter of employment. It's typically not very robust or useful. It usually states the employee's name, start date, and termination date. We call that letter a "tombstone letter".

We frequently negotiate for a letter of reference, or at least, a useful letter of employment.

7. A RELEASE

The employer will almost always include a "Release" with the severance offer. Basically, in order to get the severance package, you will need to sign the Release. For the most part, by signing a Release you are agreeing that you can no longer make any claims against your employer for anything.

Caution!

Never, ever sign a release without understanding what rights you are giving up.

IS MY SEVERANCE PACKAGE FAIR?

Your severance entitlements depend on 3 factors:

SOURCE	HOW THEY AFFECT YOUR ENTITLEMENTS
1. Employment Legislation	Provides automatic minimum amounts of termination pay and benefit continuation.
2. Written Contractual Terms	If they exist, might limit your entitlements to a certain amount.
3. The Common Law	In the absence of written, valid contractual terms, results in the most generous entitlements of all.

Continued on next page...

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IS MY SEVERANCE PACKAGE FAIR? (CONT'D)

1. EMPLOYMENT LEGISLATION

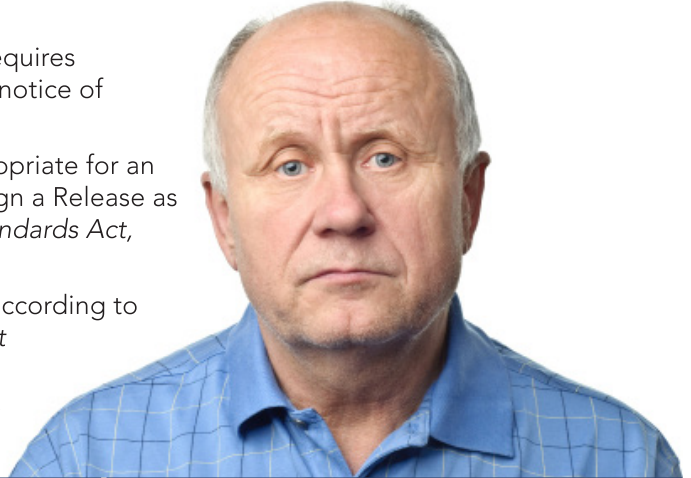
For Provincially Regulated Employees

With few exceptions, the *Employment Standards Act, 2000* requires employers to provide employees with a minimum amount of notice of termination or pay in lieu of notice.

Because these entitlements are minimums only, it is not appropriate for an employer to ask an employee (dismissed without cause) to sign a Release as a condition of being provided the minimum *Employment Standards Act, 2000* entitlements.

This minimum amount of notice (or pay in lieu) is calculated according to the following formula (found at section 57 of the *Employment Standards Act, 2000*):

[But remember: these are your **minimum** entitlements. Under common law you might be entitled to significantly more].



PERIOD OF EMPLOYMENT	MINIMUM STATUTORY NOTICE
More than 3 months but less than 1 year	1 week
1 year or more but less than 3 years	2 weeks
3 years or more but less than 4 years	3 weeks
4 years or more but less than 5 years	4 weeks
5 years or more but less than 6 years	5 weeks
6 years or more but less than 7 years	6 weeks
7 years or more but less than 8 years	7 weeks
8 or more years	8 weeks

Key: The employer can provide the statutory notice as either working notice or pay in lieu (called statutory termination pay) or a combination of both.

Key: The maximum available notice or pay in lieu under the *Employment Standards Act, 2000* is 8 weeks.

Key: Benefits and vacation pay must be continued during this statutory notice period.

Key: Some employees are also entitled to additional compensation (i.e. statutory severance pay) at the rate of 1 weeks' pay per each year of completed service (max. 26 weeks) if:

- they have been employed for five years or more; and either
- the employer has a payroll in Ontario of at least \$2.5 million; or
- the employer severed the employment of 50 or more

employees in a six-month period because all or a part of the business closed.

Key: These amounts under the *Employment Standards Act, 2000* must be paid to an employee either seven days after the employee is terminated or on the employee's next regular pay date, whichever is later. Only with the employee's consent can the employer pay these amounts by way of installments.

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IS MY SEVERANCE PACKAGE FAIR? (CONT'D)

Key: With statutory severance pay, it is calculated based on all of the time the employee works for the employer, not just continuous time. For example, if you worked for an employer at a few different times – with gaps in your employment – all of the time you worked would count.

For Federally Regulated Employees

Federally regulated employees are governed by the *Canada Labour Code*. The *Code* sets out minimum standards for two types of potential termination entitlements: notice of termination and severance pay.

All employees who have completed three consecutive months of continuous employment or more are entitled to two weeks of notice.

Severance pay is payable at the greater of:

- i) two days wages at the employee's regular rate of wages for regular hours of work in respect of each completed year of employment that is within the term of the employee's continuous employment by the employer; and
- ii) five days wages at the employee's regular rate of wages for his/her regular hours of work.

Important

Certain federally regulated employees (i.e. all employees, managers excluded, who have completed at least 12 consecutive months of continuous employment with the same employer and who are not covered by a collective agreement) may have further rights (e.g. job reinstatement) under

the unjust dismissal provisions of the *Canada Labour Code*. These provisions are available to employees who allege dismissals were unjust because they were motivated by improper considerations (e.g. reprisal, discrimination, arbitrariness, etc.).

2. WRITTEN CONTRACTUAL TERMS

If the notice provisions of a contract are properly drafted and satisfy at least the minimum requirements under the *Employment Standards Act, 2000*, the employment contract may generally be terminated in accordance with such provision. In other words, your contract might spell out your full entitlements.

Major Caution

For a variety of reasons – including technical “loophole” type reasons, terminations provisions are often unenforceable. Therefore, it is critical that you have an employment lawyer review your employment agreement. **We regularly defeat termination provisions in employment contracts to ensure you get common law notice.**

3. THE COMMON LAW

The common law refers to a body of law that was created by judges through years and years of legal decisions. The common law provides that, in the absence of enforceable



contractual termination provisions, terminated employees are entitled to “reasonable notice” of their dismissal (or pay in lieu).

Generally, the “reasonable notice” period equates to how long it will take you to find comparable employment after you are terminated.

In the vast majority of cases, “reasonable notice” is greater than the automatic amounts under the employment legislation – often much, much greater.

For example:

Jane is an accounts receivable clerk. She is 42 and has been employed at ABC Company for less than 3 years. Under the *Employment Standards Act, 2000*, she would be entitled to just 2 weeks' notice or pay in lieu. Under the common law, she could be entitled to between 3 and 6 months of notice or pay in lieu!

What is “reasonable” is different for every terminated employee, and depends on things like your age, length of service, type of job you had, and availability of comparable jobs in the marketplace.

Important

If you have a fixed-term employment agreement, the concept of “reasonable notice” is generally not applicable. In such a case, the normal measure of damages is the balance of the unexpired portion of the term unless the contract expressly permits the employer to terminate the agreement early and not pay out the balance of the contract (i.e. an “escape clause”).

HOW MUCH AM I ENTITLED TO?

1. If you are entitled to common law notice (or pay in lieu), the amount depends on a variety of factors. The top factors are your age, your length of employment, the character of your employment, and the availability of similar employment, having regard to your experience, training, and qualifications.

2. However, there are many other factors than can be considered. The following factors can **INCREASE** how much you are entitled to:

- if you are older than 45
- if you are a specialist
- if you were induced to leave secure employment
- the manner of your dismissal
- bad economic climate
- employee's health
- importance of employee's role to employer's operations
- lack of fluency in English
- length of service in same field
- limited formal education and skills

3. WANT TO ESTIMATE YOUR SEVERANCE PAY?

Go to SeverancePayOntario.com (our free wrongful dismissal tool.)

Try out our severance pay estimator to get a basic idea of your entitlements.



ARE YOU A SHORT SERVICE EMPLOYEE (0–5 years)?

Many people believe that because they have only been with their employer for a shorter period of time, they are not entitled to much severance. As a result, many of these employees might accept a sub-standard severance package.

Short service employees are generally entitled to a disproportionately lengthy notice period. Therefore, it is imperative that you consult with a lawyer before you make any decision to sign a release.

Success Story: **Summerfield v. Staples Canada (2016)**

Our client Ms. Summerfield was terminated from her sales position after less than five years on the job. We were able to get her six months of severance

(more than one month per year of service).



ARE YOU AN OLDER EMPLOYEE (45 YEARS AND OLDER)?

Many of our clients are older employees. Considerable weight will be given to an employee's age when determining the reasonable notice period. Courts clearly recognize that an older employee will often have a difficult time in finding alternative employment.

Success Story: **Drysdale v. Panasonic Canada (2015)**

Our client Mr. Drysdale was terminated from his job as a shipper / receiver after 23 years of loyal service.

He was 58 years old. We were able to get Mr. Drysdale 22 months of pay.

Here is what the court said:

"The plaintiff is 58 years old. Generally, a longer notice period will be justified for older, long term employees who may be at a competitive disadvantage in securing new employment because of their age."

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WHAT IS A RECORD OF EMPLOYMENT? WHEN DO I GET IT?

The Record of Employment (ROE) is the form that employers complete when an employee stops working and experiences an interruption of earnings,

such as a termination of employment. Basically, it gets submitted to Service Canada, so that you can make an application for employment insurance benefits.

When you get the ROE depends on whether your employer submits the ROE electronically or by paper. You can expect the ROE within 5 to 15 days after you were terminated.



WHAT DO I NEED TO KNOW ABOUT E.I. BENEFITS?

After you are terminated, you should apply for E.I. benefits. Service Canada will need your Record of Employment. If you delay in applying for E.I. benefits beyond 4 weeks after your last day of work, you may lose benefits.

If you were terminated for "cause" you should still apply for EI Benefits. If you were terminated "with cause", the employer is taking the position that you are guilty of some type of misconduct and you should get zero notice or pay in lieu of notice.

Generally, if you are terminated "with cause", you are also not entitled E.I. benefits. However, do not let the fact that you were terminated "with cause" prevent you from applying for E.I. benefits. Remember, at this stage, it is only the employer's opinion that it had cause to terminate you. Service Canada has its own test for deciding whether the employer had cause to fire you.

WHAT ARE SOME MISTAKES I SHOULD AVOID?

- Don't panic. The information you need to get started is in this guide or at SeverancePay.ca. Call us. We will walk you through the process.



- Do not accept a severance package and sign a release without speaking to a lawyer. You could be giving up significant entitlements.
- Even if your contract of employment has a termination provision, do not assume it is clear and enforceable. We can often get around these clauses.
- Do not make a complaint with the Ministry of Labour without speaking to a lawyer. If you make a complaint with the Ministry of Labour (with respect to your entitlements upon termination)

you will be barred from pursuing a wrongful dismissal claim unless your complaint is withdrawn within two weeks. A wrongful dismissal claim will often get you more money.

- If you think you have a human rights complaint as a result of your termination, you should speak with a lawyer before you file a complaint with the Human Rights Tribunal. It often makes more sense to combine a wrongful dismissal action with a human rights complaint into one proceeding.

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WHAT INFORMATION SHOULD I GATHER BEFORE MY FREE CALL BACK WITH ERTL LAWYERS?

KEY DETAILS	WRITE YOUR COMMENTS HERE
Name of employer	
Your most recent job title	
Your length of employment (i.e. start date and termination date)	
If there were any gaps in your employment with your employer	
Your compensation (e.g. salary, bonuses, commissions)	
Your benefits (e.g. health benefits, insurance, RRSP, pension, car allowance, stock purchase plans, etc.)	
Did you sign an employment agreement or job offer letter? If so, do you have a copy of it?	
Your letter of termination and / or severance package details (i.e. what is the employer offering?)	

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Disclaimer:

This guide is intended to provide basic information to help you better understand your severance package.

It is not legal advice.

For legal advice, please contact:



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Leaders in Employment and Disability Law

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