

Termination of Employment and Temporary Layoff

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Part 2, Division 8 of the *Employment Standards Code (Code)* provides the process required to terminate employment relationships, entitlements to termination notice and pay, temporary layoff and recall rights.

Division 8 also outlines circumstances in which an employer or an employee may not be required to provide termination notice under the *Code*.

Special rules apply with regard to termination of employment relationships where a business has been sold or where there are breaks in employment that are less than three months.

When an employer terminates employment

Termination notice

An employer must give an employee whose employment is being terminated written termination notice of at least:

- **one** week for employment of more than 3 months, but less than 2 years;
- **two** weeks for employment of 2 years or more, but less than 4 years;
- **four** weeks for employment of 4 years or more, but less than 6 years;
- **five** weeks for employment of 6 years or more, but less than 8 years;
- **six** weeks for employment of 8 years or more, but less than 10 years; and
- **eight** weeks for employment of 10 years or more.

Some employees may be entitled to a greater notice period by the courts than the minimum standards legislated by the *Code*.

Termination pay

Instead of providing an employee whose employment is about to be terminated with termination notice, an employer may choose to provide termination pay of an amount at least equal to the wages the employee would have earned if the employee had worked the regular hours of work for the applicable termination notice period. In short, termination pay will be based on the appropriate period of employment.

Alternatively, an employer may choose a combination of termination notice and termination pay. An employer who chooses this option must ensure that the termination pay is at least equal to the wages the employee would have earned for the applicable termination notice period that is not covered by the notice.

Where an employee's wages vary from one pay period to another, the employee's termination pay is calculated by taking the average of the employee's wages for the 3-month period immediately prior to termination of employment.

Employees who are not entitled to receive termination notice under the *Code*

Termination notice is not required for employees who:

- have been terminated for just cause;
- have been employed for three months or less;
- are employed for a definite term or task of less than 12 months (this 12-month limit does not apply to employees engaged in oilwell drilling);
- refuse reasonable alternate work;
- refuse work made available through a seniority system;
- are not provided with work by reason of a strike or lockout occurring at the employee's place of employment;
- are casual employees who may elect to work or not to work for a temporary period when requested to work by the employer;
- are employed on a seasonal basis, and on the completion of the season the employment is terminated;
- are subject to a contract of employment that is or has become impossible for the employer to perform by reason of unforeseeable or unpreventable causes beyond the control of the employer;
- are employed in the construction industry; or
- are employed in the cutting, removal, burning or other disposal of trees and brush or either of them for the primary purpose of clearing land.

It is important to remember that while the *Code* does not legislate the giving of termination notice for some employees, these employees may be entitled to notice under common law.

When the Code prohibits an employer from terminating an employee for certain reasons

An employer may not terminate an employee's employment because the employee:

- is entitled to or has started maternity or parental leave.
- is entitled to or has started reservist leave.
- is facing or might face garnishment action.
- has given or might give evidence at any inquiry or in any proceeding or prosecution under the *Code*.
- has requested or demanded anything to which the employee is entitled under the *Code*.
- has made or is about to make any statement or disclosure that may be required of the employee under the *Code*.

It is important to note that the *Alberta Human Rights Act*, which is located at www.qp.alberta.ca/574.cfm?page=A25P5.cfm&leg_type=Acts&isbncln=9780779744060, also prohibits terminating an employee's employment for certain reasons. Employers and employees are required to comply with this legislation as well. For more information, please visit the Human Rights Commission website at <http://www.albertahumanrights.ab.ca>.

Employer's responsibility when an employee is dismissed

Where notice is required, the employer must provide the employee with termination notice in writing or termination pay. A combination of notice and termination pay is allowed. Payment of all wages, overtime, general holiday pay and vacation pay owing to the date of termination is due within three days.

Where an employee is dismissed for just cause or for any other reason specified by the *Code* as not requiring notice, the employer must pay all wages, overtime, general holiday pay and vacation pay due to the employee within 10 days of the date of termination. Where an employer claims just cause as the basis for terminating an employee, the employer must be able to support the position that there was just cause for dismissal without notice.

An employer may not reduce an employee's wages, wage rate, or any other term or condition of employment during the period of termination notice. This remains true whether or not work is to be performed by the employee during the notice period.

If an employee continues to be employed by the same employer after the date specified for termination of employment, the notice of termination is of no effect. If the employer still intends to terminate the employee's employment subsequently, it will have to issue another termination notice or provide the employee with termination pay.

When an employee terminates employment

Termination notice

The *Code* requires the employee to give one week's written notice if the employee has been employed by the employer for more than 3 months but less than 2 years, and two weeks' written notice if the employee has been employed by the employer for 2 years or more.

An employee does not have to give notice if:

- there is an established custom or practice in the industry respecting termination of employment;
- the employee terminates employment because the employee's personal health or safety would be in danger if the employee continued to be employed by the employer;
- the contract of employment is or has become impossible for the employee to perform because of unforeseeable or unpreventable causes beyond the control of the employee;
- the employee has been employed by the employer for 3 months or less;
- the employee is temporarily laid off;
- the employee is laid off after refusing an offer by the employer of reasonable alternative work;
- the employee is not provided with work by the employer by reason of a strike or lockout occurring at the employee's place of employment;
- the employee is employed under an agreement by which the employee may elect either to work or not to work for a temporary period when requested to work by the employer; or
- the employee terminates the employment because of a reduction in wage rate, overtime rate, vacation pay, general holiday pay or termination pay.

Employer's responsibility when an employee quits

When a notice is required and the employee has provided the employer the required notice, the employer must pay all wages, overtime pay, general holiday pay and vacation pay due to the employee within three days following termination of employment.

When a notice is not required, the employer must pay all wages, overtime pay, general holiday pay and vacation pay due to the employee not later than 10 days after the last day of employment.

When an employee quits without providing the employer the required notice, the employer must pay all wages, overtime pay, general holiday pay and vacation pay due to the employee within 10 days after the date on which the notice would have expired if it had been given.

Temporary layoff

Requirement of notice, content of notice and employer's responsibility

Under the *Code*, an employer who wishes to maintain the employment relationship may temporarily lay off an employee. However, the Alberta Court of Appeal has determined that a valid notice of temporary layoff must:

- be in writing,
- state that it is a temporary layoff notice and its effective date, and
- include sections 62, 63 and 64 of the *Code*.

If these conditions are not met, the employee may have been unjustly or constructively dismissed. Some courts have also held that while the *Code* permits an employer to temporarily lay off an employee in the absence of a collective agreement or contract allowing layoff, the employee maintains the right to sue for constructive or wrongful dismissal if laid off in those circumstances.

A temporary layoff cannot be more than 59 days in duration. On the 60th consecutive day of temporary layoff, the employee's employment terminates and the employer must pay the employee termination pay on that day, unless:

- wages or benefits continue to be paid on behalf of the employee; or
- there is a collective agreement that provides other recall rights that are longer than the 59 days.

During the 59-day period, an employer may recall the employee with one week written notice. Should the layoff extend past the 59 days, the employment terminates and termination pay appropriate to the length of service of the employee is required.

The employment of an employee may be terminated while on temporary layoff, however the employee is entitled to termination pay.

If an employer recalls an employee on a temporary layoff and requests the employee return to work and the employee fails to return within the time specified in the notice by the employer, the employee would not be entitled to any termination notice or termination pay, provided that the temporary layoff notice is valid. It is in the employer's best interest to retain a copy of the written request/notice.

Special layoff rules for school employees and school bus drivers

Because of the recognition that the summer break in the school year may exceed 59 days, section 63(1) of the *Code* which provides for the payment of termination pay on the 60th consecutive day of a temporary layoff does not apply to school employees, including school bus drivers. Section 5.1 of the Employment Standards Regulation permits a temporary layoff to exceed 59 days during the time between the end of a school year and the beginning of the next school year, if certain conditions are met.

Calculating length of employment where the employee has been employed by the same employer more than once

In determining the correct termination notice, the *Code* states that when an employee has been employed by an employer more than once, the periods of employment with that employer are considered to be one period of employment if not more than 3 months has elapsed between the periods of employment. For example, if an employee works for an employer for 6 months, then quits for a 2-month period, and then returns to work for another 18 months, the employee has worked for the employer for 24 months, or 2 years, and the notice period would be at least 2 weeks.

Effect of employment deemed continuous and termination of employment

Sometimes businesses change owners, yet the employees continue to work for that same business. Section 5 of the *Code* deems the employees' employment to be continuous despite such transactions. This ensures that the entitlements the employee has earned through long service with the business are not lost due to the change in ownership. This includes employees' entitlement to termination notice.

It is the employee's length of service with the business that determines entitlements, not length of service with any particular owner of that business. In other words, if the ownership of a business changes and the new owner continues to employ the employee in the business, the employee's previous length of service comes along with the employee.

Abuse of vulnerable individuals and just cause termination

In considering employment standards complaints for termination pay, abuse of vulnerable individuals will be considered "just cause" for termination of employment. If an employee's employment is terminated for just cause, written notice of termination, pay in place of notice, or a combination of notice and pay are not required.

Employment Standards relies on the Government of Alberta Persons with Developmental Disabilities (PDD) definition of abuse under the *Protection for Persons in Care Act*, located at http://www.qp.alberta.ca/574.cfm?page=P29P1.cfm&leg_type=Acts&isbncln=9780779742196, and in the "Abuse Prevention & Response Protocol" under section 6.1 of the PDD Program Policy, which is located at <http://humanservices.alberta.ca/pdd-online/>. To determine if abuse occurred, Employment Standards uses the following descriptions of abuse when investigating these complaints:

Physical abuse

Physical acts of assault such as hitting, punching, kicking, biting, throwing, burning or violent shaking that cause, or could cause physical injury.

Sexual abuse

Sexual assault, including the touching of a person's sexual features, without consent, and/or sexual harassment, including any conduct, comment, gesture, or contact of sexual nature, likely to cause offence or humiliation to an individual.

Physical negligence

A failure to provide or make available necessities to people, such as food, clothing, shelter, hygiene, medical care, protection from hazardous environments and support or supervision appropriate to the person's age, development or situation.

Emotional abuse

It may come in the nature of rejecting, ignoring, criticizing, insulting, threatening, harassing, degrading, humiliating, intimidating or terrorizing a person. These include acts or omissions that cause or are likely to cause conduct, cognitive, affective or other mental disorders, emotional stress or mental suffering.

Exploitation

This includes acts that take advantage of a person, including but not limited to money and material things, as well as persuasion to do things that are illegal or not in the individual's best interest.

Inappropriate use of restrictive procedures

These are acts that restrict rights, freedom, choices or self-determination of an individual. An example of this would be inappropriate use of medication.

Other things to establish are:

- Did the employee receive training on Abuse Prevention and Response Protocol?
- How long has the employee worked with this vulnerable population?
- Even though a personality conflict between the vulnerable individual and support staff precipitated the abuse, did the staff person demonstrate care, compassion and respect towards the vulnerable individual?

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