EMPLOYMENT LAW & INSURANCE BENEFITS

SHARELAWYERS

SHARE
IS THERE

INDEX

Disclaimer: *The information in this booklet is provided for general information only. It aims to provide information and opinion, which will be subject to continual change. It does not attempt to set forth definitive practice standards or to provide legal advice. The information we have provided was compiled from research we have conducted and based upon our personal legal experience.*

UNION VS. NON-UNION EMPLOYMENT RIGHTS

Unionized employees are generally governed under a collective agreement that is negotiated by their employer and union. This collective agreement outlines the rights of employees within their union and a dispute resolution procedure on how to address breaches of employment terms. If an employee believes that an employer has breached a term of their employment or has failed to comply with the Ontario *Employment Standards Act,* 2000, generally the employee is not able to commence a lawsuit. Instead, the unionized employee must file a grievance through their union under the dispute resolution procedure in their collective agreement.

What does this mean practically for a unionized employee? Well, your union will ultimately decide whether to bring a grievance on your behalf. Generally, there is an exception if you have suffered harassment or discrimination based on a breach of the *Ontario Human Rights Code*. In that case, you can file an application with the Human Rights Tribunal of Ontario or you can approach your union and request that they file a grievance on your behalf.

Generally, the collective agreement will also have provisions detailing employee group benefits, such as extended health care, dental, life insurance, and disability. Courts have stated that the wording of the collective agreement will ultimately determine whether you can file a grievance or start a lawsuit when there has been a breach of your entitlement to group benefits.

The collective agreement will typically have provisions for employee rights, such as severance, notice, or pay instead of notice if an employee is terminated without cause. If

these provisions are not present in your agreement, then the *Employment Standards Act*, 2000 provisions apply (this is further explained below).

If, on the other hand, you are a **non-unionized** employee and you believe that your employer has breached a term of your employment or has failed to comply with the *Employment Standards Act*, 2000, you need to first determine which avenue to pursue.

A non-unionized employee may:

- bring a claim to the Ministry of Labour;
- file an application with the Human Rights Tribunal of Ontario if there has been a breach of the Ontario Human Rights Code; or
- commence a lawsuit against the employer.

Most employment contracts contain an implied provision that an employee can only be terminated for just cause, or upon providing reasonable notice if no cause is being asserted. Employers can also provide pay instead of notice if no actual notice of termination is provided.[13] If your employer does not provide reasonable notice or pay in lieu of notice, you have the right to sue your employer for damages.

The *Employment Standards Act*, 2000, prescribes minimum notice periods applicable to all employees who have worked continuously for at least 3 months.[14] Generally, each employee is entitled to one week of notice of termination pay per every one year of service with their employer.[15] Ontario courts have ruled that an employee should receive "reasonable notice", which is typically more than the minimum one week per year of service. If you are entitled to severance pay, it will be calculated by multiplying your weekly wages by the total number of years you worked for your employer.[16]

---

13 *Employment Standards Act*, 2000, S.O. 2000, c. 41, s 61(1).
14 *Ibid*, s 54.
15 *Ibid*, s 57.
16 *Ibid*, s. 65(1).

During the notice period, employees are "deemed" to be active employees for the purposes of interpreting the policy of insurance and establishing eligibility for benefits coverage through sections 61(1) and 62(1) of the *Employment Standards Act*, 2000. If your employer fails to continue your benefit coverage during the notice period, you can sue them.

ENTITLEMENT TO EXTENDED HEALTH, DENTAL & LIFE INSURANCE BENEFITS - GROUP POLICY

Upon approval of short-term or long-term disability benefits, most group insurance companies will waive the requirement for premium payments for life insurance and accidental death and dismemberment and will maintain these benefits throughout the approved disability leave.

The decision to maintain extended health and dental group benefits is up to the discretion of the employer, as long it follows the various legislative requirements. Some employers may err on the side of caution and maintain benefits for a longer period of time, so as not to discriminate the employee due to their disability and risk breaching the Human Rights Code. For example, employers can maintain benefits coverage up to 24 months to match the own occupation definition found in post group disability policies. You must also consider whether your employer has an internal Human Resources policy that dictates the length of time that benefits will continue.

If your employer agrees to maintain extended health and dental benefits, this means that they are agreeing to pay their portion of the premiums for your group benefits. If you normally pay a portion or all of the premiums for your group benefits, then you must continue to pay your cost of the group benefits. If you are unable to maintain payments on your portion of the cost, your group benefits will likely be discontinued, and you will no longer have benefits coverage.

DISABILITY INSURANCE - SETTLEMENT & IMPACT ON CONTINUING AVAILABILITY OF EMPLOYMENT

As part of the settlement of your disability, you will be asked by the insurance company to execute a release. The release typically includes wording that the insurance company will notify the policyholder (the employer) about the settlement and the potential ramifications to your ongoing employment. Generally speaking, an employer will maintain the employee's position for the own occupation period under the disability insurance policy. This is usually the first 24 months after the end of the elimination or qualifying period as described in the benefits booklet or insurance policy.

Whether your employment will continue to be available after a settlement of your long-term disability benefits claim will be up to your employer. A number of factors may be considered by the Employer, including the timeframe the disability settlement represents in determining whether there will be an opportunity available to return to work.

For example, if your settlement includes a Full and Final Release under your group policy, including payment of some future disability benefits, your employer may be less inclined to consider allowing you to return to work. If, on the other hand, the settlement was time limited (ie., two years into the future), only releasing coverage up to a given date, then an Employer may be more inclined to consider offering a position to return to work after that date.

The ultimate question that an employer tries to answer is whether your disability appears permanent such that return to work is highly unlikely. If there is no reasonable likelihood that you will be able to return to work within a reasonable period

of time, then your employer can terminate your position based on the "doctrine of frustration".

"Doctrine of frustration" means that the employment contract ended due to unforeseen circumstances – in this case a permanent sickness/injury, and could not be completed. In Ontario, if a contract is frustrated due to an employee's disability, the employer must continue statutory obligations owed to the employee under the *Employment Standards Act*, 2000.

WHAT IF EMPLOYMENT TERMINATES DURING LTD CASE

No law protects an employee from being fired while on disability for reasons unrelated to his or her disability. For example, an employee on disability can be terminated due to business shutdown, retrenchment or restructuring, or because the employee failed to abide by the employer's code of ethics. An employer can terminate an employee who failed to provide medical documentation as prescribed by the employer's policy; however, the reason that employee did not provide the documentation cannot be as a result of the employee's disability.

The Ontario Human Rights Code protects employees from discrimination based on their disability if it was a factor at all in the decision to terminate the employee. Furthermore, an employer must accommodate a disabled employee to the point of undue hardship.[13] If there is a breach of the above, you can sue your employer.

In our many years of experience, we have found that most employers will not immediately attempt to terminate an employee who is on sick/disability leave. While the employer has the right to do so, it can ultimately be a difficult decision to defend. The employer risks having to prove that the termination was not related to discrimination based on disability and in breach of the Ontario Human Rights Code. Most cautious employers will allow employees to remain employed on sick leave for up to two years. After two years, some employers will terminate the employee after concluding that they are permanently incapable of returning to work in any capacity. This is, in effect, a use of the "doctrine of frustration."

13 *Ibid*, s 2.

As long as you were actively or "deemed" to be employed at the time you became disabled, then your termination of employment should not affect your entitlement to long-term disability benefits. However, termination and/or severance payments may be deducted from your long-term disability benefits.

SEVERANCE AND WHETHER IT CAN BE OFFSET

Whether severance pay, termination pay, or payment instead of notice will be deducted from long-term disability benefits depends on the wording in the policy. If the wording is clear and unambiguous, the policy will dictate whether or not a severance package (i.e., severance, termination, or pay instead of notice) is deductible from any payment of disability benefits. If written in the policy, the expected disability benefit will be reduced by deducting the employee's severance payments (i.e., income).

If it is not specifically written in the policy, the courts generally decide whether severance should be considered an offset by reviewing whether the employer or employee paid for the disability plan, the terms of the employment contract, and the intentions of the parties regarding employees potentially receiving both disability benefits and severance pay.

Court decisions have indicated that absent specific wording in the policy about severance, statutory severance payments and termination payments will not be deducted from disability benefits. The main reason behind these holdings is that statutory severance and termination pay are not the same as salary continuation.

EMPLOYMENT RELEASES & LANGUAGE TO PROTECT A POTENTIAL CLAIM FOR DISABILITY BENEFITS

If you are being terminated and you are asked to sign a full and final release from your employer in exchange for termination and severance pay, you should first make sure to seek independent legal advice. You will want to discuss with your employment law lawyer whether you have any health issues that may result in total disability during the reasonable notice period. If you do believe you may have significant health issues, request the opinion of a physician. This is important. You must remember that executing a full and final release during the reasonable notice period means you are releasing any future claims to benefits, including benefits that you would otherwise be entitled to if you were to become totally disabled.

EMPLOYMENT RELEASES & LANGUAGE TO PROTECT ONGOING CLAIM FOR DISABILITY BENEFITS.

We have four simple tips to protect your ongoing claim for disability benefits if you have been terminated and are subsequently asked by your employer to sign a release:

1. At a minimum, you should ensure that you have adequate time and opportunity to seek independent legal advice before signing a release with your employer while you have an ongoing claim for disability benefits.

2. Where legal action has already been commenced by the employee, check to ensure there is no specific reference in the release barring your lawsuit.

3. Ensure that the wording of the release does not include language that terminates your coverage under the group policy that governs your entitlement to short-term and long-term benefits.

4. Best practice is to ensure that disability benefits, along with extended health care/dental/life insurance benefits continue throughout the reasonable notice period.

Visit **www.ShareLawyers.com**
to join our online communities!

416-488-9000
1-888-777-1109

legal@sharelawyers.com
www.ShareLawyers.com

3442 Yonge Street, Toronto, ON M4N 2M9