

## You Raise the Issue

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**Question: One of my key employees resigned without providing advance notice or working during the statutory notice period. This is going to create dislocation in my business. Can I sue her for any damages?**

It is commonly understood that if an employer were to let an employee go with no advance notice or severance, the employee could sue for a 'severance'. The reason for this is that where an employee is let go without 'just cause', it is the employer who is choosing to "terminate" the employment relationship and release the employee. The law holds that the employer, as the party ending the contract, must provide a severance to assist the employee in transitioning to a new position.

However, a new trend is beginning to appear in the wrongful dismissal area: courts are now being asked more regularly to consider the impact upon an employer where the employee chooses to summarily leave his or her employment. A spate of recent cases has reaffirmed that where an employer suffers a business disruption or dislocation due to the employee's decision to leave absent due notice, it has the ability to sue the employee for compensation for such losses. In one example, three employees dissatisfied with their employer resigned simultaneously to start their own business. They were successfully sued for \$75K based on their failure to give reasonable notice, together with their breach of 'fiduciary' duties in setting up a competing business. In another case an employee resigned from her position, with "no good reason" (the court's language). Because she did not meet her employer's reasonable expectations in providing advance notice of her intent to leave, damages of \$10K were awarded against her.

The principle that an employee who leaves employment absent proper notice can be sued is not a new one. What is new, however, is the fact that some employers are actually taking the initiative to pursue these claims. As training becomes more specialized, skilled employees become more difficult to find, and employers spend more time investing in employees' intellectual capital, the impetus to sue increases where a dislocation to the employer's business occurs. Though traditionally employers did not sue their former employees, that thinking is now changing. As such, employees should exercise caution before they decide to "up and quit", particularly where they have a reasonable idea that doing so will have an impact on their employer's operations.

**Question 2: I gave an employee 6 weeks working notice that her position was ending. Since then she has attended work only sporadically. Sometimes she has gone to job interviews; others she simply does not show up. Do I have any recourse for her non-attendance?**

When an employer provides an employee with working notice, interesting questions arise surrounding the reasonable expectations concerning work

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performance. Can the employee take time off to pursue other job opportunities? Can the employer expect full attendance? These are practical issues which arise during what is usually an awkward (or worse) period following a decision to end the employment relationship. In a recent decision one court stated that “working notice is difficult on both employer and employee and can lead to problems in the employment relationship. However, the employer is entitled to require full attendance and to impose reasonable conditions to ensure full attendance.”

This statement likely has to be viewed with some degree of caution. To suggest that full attendance is required in every instance is going to be found to be an unreasonable expectation. The very purpose of providing advance notice of termination is to provide the employee with a period of time to find other work, without suffering a financial loss. In essence, the notice period (or a payment of severance in lieu) provides a cushion while the employee attempts to secure re-employment. Another court has described it as follows: “the primary objective of notice is to provide a dismissed employee with a fair opportunity to find similar or comparable employment.... As such a finding that the employee could not seek work during the notice period deprives the concept of “notice” of any value to that employee.”

Accordingly, the most appropriate approach for an employer during a notice period is to expect the employee’s attendance, but to allow the employee reasonable opportunities to pursue other work. Therefore some absenteeism related to that goal must be tolerated. Excessive absenteeism however remains a cause for discipline (or potentially even dismissal) during the notice period if it is unrelated to seeking new employment.

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