

You Raise the Issue

KENT BROWN

Question: All of our employment contracts provide for 30 days notice of termination by either the employer or the employee. Are these provisions enforceable?

Many employment contracts provide for a set notice of termination period. These provisions are put in place to displace the notice periods the Courts would normally require the employer to provide. These provisions have generally been viewed as an appropriate contractual term between an employer and an employee.

However, a recent decision from the B.C. Supreme Court (the equivalent to the Court of Queen’s Bench in Alberta) has held that these provisions are not valid. In that case, the Court determined that the 30 day notice period was invalid because such a provision could have the effect of breaching employment standards provisions in the future.

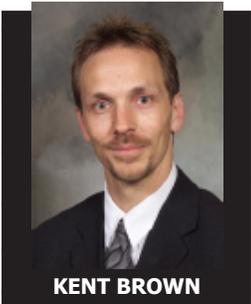
At the time the employment contract was signed, the 30 day notice period was a significant increase over the minimum notice requirements in the Employment Standards Code (“the Code”). However, under the Code, after 6 years of employment an employee is eligible to receive 5 weeks of notice or termination pay. Since 5 weeks of pay exceeds the amount provided for in the contract, the 30 day provision would be in violation of the Code. The B.C. Court found that the potential violation of the Code was sufficient to make the provision invalid and the Court determined that the employee should not be required to keep tabs on when the Code provisions outstrip the employment contract.

Although the reasoning in the B.C. decision may be open to challenge on the basis that it relies on a breach that had not yet occurred, there is always the possibility that the Alberta Courts may chose to adopt a similar analysis. For that reason you may wish to review your contract and provide for a notice period that allows for 30 days of notice or the minimum required by the Code, whichever is greater.

Question: We have an employee who wants to take a 1 year maternity leave and has requested that we keep her position open for her. Do we have to allow her 1 year of leave and keep her position open?

Under the current version of the Employment Standards Code (“the Code”) an employee that has been employed with the company for at least 52 weeks is entitled to take a combination of maternity leave and parental leave for a total of 52 weeks of leave. The Code provisions reflect changes to the Employment Insurance Act, which provide for payment of benefits to an eligible employee for a total of 52 weeks. An employee is not required to take 52 weeks, but she is entitled to do so if she chooses.

The Code also provides that an employer must reinstate an employee to her previous position, or a position of a comparable nature, upon her return. Therefore, if you are not able to keep the employee’s position open until her return, you can place the employee in a comparable position. The comparable position must involve similar work, and must also provide for the same salary and benefits as the position the employee left when she began her maternity leave.



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In order to provide the company with time to organize the workforce, the employee is required to provide the company with 4 weeks written notice setting out her return date. As an employer, the company could choose to waive the length of the notice period, if the failure to receive notice was not disruptive to the company's work. You can then assess your ability to return the employee to her former position, or to find a comparable alternative position.

You may wish to consult counsel with respect to the company's obligations under the Code with respect to maternity and other notice requirements.

DISCLAIMER this article should not be interpreted as providing legal advice. Consult your legal adviser before acting on any of the information contained in it. Questions, comments, suggestions and address updates are most appreciated and should be directed to:

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