



# Comings & Goings: Tips for Hiring & Dismissing Employees

# Part 1: Hiring Right

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# Part 1, Recruiting

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## Recruiting

- Understand your needs
  - Know what qualifications you require
  - Refresh old job descriptions
  - Think of new ways to meet old needs
- Understand the candidate
  - Engage candidate with employer's values
  - Have multiple interviews
  - Ask behaviourally based questions
  - Follow up with people who worked directly with the candidate in the past.

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# Part 1, Questions

## Examples of Behaviourally Based Questions

- Tell me about your most challenging professional learning experience. How do you account for its success or failure? What did you take away from the experience and what would you do differently next time?
- Tell me about a time when things were not going too well on a team that you were on. What factors in your opinion contributed to those circumstances? What were you able to do to help improve the situation?
- Tell me about a time when you exceeded your manager's expectations. What were the circumstances? What motivated you to exceed those expectations?

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# Part 1, Tough Questions

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Get to tough questions sooner rather than later

Examples of tough questions:

- How do you think people at your last job would describe you as a colleague?
- What are some areas for improvement that I would hear about from checking your references?
- If I were to give you \$1,500 today and told you had to spend it on soft skills improvements, what courses would you spend the money on?

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# Part 1, Privacy Issues

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Only ask questions where there is a justifiable need to have the information for the purpose of making a hiring decision.

An Employer is required to:

- notify the applicant that it intends to contact previous employers or do a background check
- tell the applicant the purpose for which the information will be collected, used and, if relevant, disclosed
- ensure that the information is “reasonably required” for the establishment of the employment relationship

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# Part 1, Human Rights

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Every province in Canada has human rights legislation that prohibits discrimination in employment on certain grounds

Do not ask questions that might generate information about a prohibited ground, unless it is a *bona fide* occupation requirement (“BFOR”)

Examples of Prohibited Grounds:  
race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation

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# Part 1, Can't Ask

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Examples of questions you cannot ask:

- Do you have any disabilities?
- What is your age?
- What is your nationality?
- Are you married?
- Are you pregnant? If not, do you intend to have children in the near future?
- What is your religion?

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# Part 1, Can Ask

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Examples of questions you can ask

- Name, address and telephone number
- Are you legally able to work in Canada?
- Employment history (permissible to ask for full details)
- Are you able to perform XYZ duties? If not, what is the nature of accommodations you require?
- Are you available for shift work? If not, what accommodations would you require?

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# Part 1, Can You Ask?

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“Tell me about your  
Canadian work  
experience”

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# Part 1, Can You Ask?

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“Do you think you can handle this job?”

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# Part 1, Can You Ask?

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“What year did you graduate from university?”

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# Part 1, Caution

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Don't oversell the job

- Be candid
- No false/overreaching promises
- Be careful talking about job security or tenure

Enticement/Inducement

- Individuals enticed/induced away from one job to another
- Employer may face added liability if dismissed without cause

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# Part 1, Employment Contract

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The common law implies terms into every employment contract:

Every employee is required by law to:

- Provide service to the employer;
- Serve the employer with loyalty and good faith;
- Protect confidential information; and
- Give the employer the benefit of the employee's invention and ideas related to the employment.

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# Part 1, Employment Contract

The common law implies terms into every employment contract:

Every employer is required by law to:

- Provide work for the employee;
- Provide compensation;
- Meet minimum standards of employment legislation;
- Comply with human rights law, including the duty to accommodate; and
- Provide a safe workplace

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# Part 1, Employment Contract

Important Terms (non-exhaustive):

- **Term:** what is the employment period? Probation period? Definite or indefinite term? Any renewals?
- **Pre-Conditions:** criminal record check, a certificate of fitness, completion of a course of study etc.
- **Duties:** general and/or specific
- **Compensation:** what are the forms of compensation? Amount of salary? Frequency of payments? Procedure for increases? Overtime?

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# Part 1, Employment Contract

Important Terms Continued (non-exhaustive):

- **Benefits:** employee's entitlement, waiting period, amount of contribution; employer's ability to amend the group benefit plan.
- **Vacation:** what is the vacation entitlement? Carry over unused vacation to next year? Restrictions on when vacations can be taken?
- **Intellectual Property:** non-disclosure covenant? Patent, Copyright, Trademark, Industrial Design.

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# Part 1, Employment Contract

Important Terms Continued (non-exhaustive):

- **Non-competition Covenant:** must be reasonable in duration, scope of prohibited activity and geographic area.
- **Non-solicitation Covenant:** apply to customers, clients, suppliers, employees?
- **Termination (see discussion on termination later on):** How much notice or compensation in lieu of notice is required to terminate the contract without cause?  
**Must not violate minimum standards**; employee must fully understand the terms and agree voluntarily.

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# Part 1, Employment Contract

Important Terms Continued (non-exhaustive):

- **Employer Policies:** define employer's right to amend the policies.
- **Resolution of Disputes:** which jurisdiction's law applies? Will disputes be resolved through arbitration or courts? If courts, which jurisdiction? If arbitration, specify the process.

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# Part 1, Employment Contract

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Termination clauses often try to reduce/eliminate common law entitlements:

- May try to limit to employee to the minimum statutory amounts of notice or pay in lieu of notice (and statutory severance in Ontario). Disadvantage is that an employer cannot receive an enforceable release
- May offer the employee something more than the statutory minimums in exchange for a release

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# Part 1, Enforceable?

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Employment with [Employer] is voluntarily entered into, and the employee is free to resign at will at any time, with or without cause. Similarly, [Employer] may terminate the employment relationship at will at any time, with or without notice or cause, so long as there is no violation of applicable law.

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# Part 1, Enforceable?

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In the event that your employment is terminated without cause you will receive your statutory entitlements under the Alberta *Employment Standards Code* to notice or pay in lieu of notice (or a combination thereof).

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# Part 1, Enforceable?

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# Part 2: Firing Right

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# Part 2, Why Sweat it?

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# Part 2, Why Sweat it?

Firing wrong can cost you in damage claims:

- **Punitive Damages:** malicious conduct in breach of contractual duty of good faith.
- ***Honda v. Keays*: Damages for intentional infliction of mental distress:** possible in some situations.
- **Increased costs awards:** an unproven allegation of cause can lead to an increased costs award.

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# Part 2, Bad Practice

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Additional damages could be awarded in the following situations:

- The employee was blind-sided by a termination which in turn was communicated in a cold and callous manner.
- The employee was fired on maternity or disability leave.
- The termination occurred in front of the employee's colleagues causing the employee unnecessary embarrassment and humiliation.

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# Part 2, Bad Practice

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- The termination was based on trumped-up charges of misconduct and especially where the employee's reputation in the industry was negatively affected by those charges.
- The employer failed to undertake an investigation to determine cause.
- The employer engaged in hardball tactics.
- The employee was escorted out of the building in a public display without justification.
- The employee was prevented from collecting his personal belongings without justification.

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# Part 2, Bad Practice

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- The employer unreasonably withheld a letter of reference.
- The employer persisted in false allegations against the employee until time of trial.
- The employer refused to cooperate with the employee post termination with regards to monies owing to the employee.

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# Part 2, Types of Termination

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**Termination for Cause:** an employee can be terminated for cause without notice or pay in lieu of notice.

**Termination Without Cause:** an employer can terminate an employee without cause if employer provides reasonable notice or pay in lieu of notice.

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# Part 2, Preparation

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- Avoid impulsive dismissals
- Gather pertinent information in advance (i.e. employee's length of service and statutory entitlements)
- Prepare a written notice of termination
  - Reasons for dismissal (be succinct)
  - Payment of monies owed to employee
  - When benefits will terminate and conversion
  - Consider severance package above statutory entitlements

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# Part 2, Preparation

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- If severance package is offered:
  - The terms and conditions should be clearly outlined.
  - The severance offer should be made conditional on the employee signing a comprehensive release.
  - The employee should be informed both verbally and in writing that he/she is free to have the package reviewed by a lawyer.
  - Give the employee more than a week to seek independent legal advice.

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# Part 2, Preparation

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- If the employer is laying off a number of employees within a short period of time, the employer should review the relevant statutory provisions relating to “mass terminations.”

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# Part 2, The Meeting

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- Prepare talking points and rehearse the conversation ahead of time.
- Have 2 members of the management team at the termination meeting. One person do the talking and the other take careful notes.
- In the event of mass dismissal, consider holding meetings with groups of employees.
- The employer may wish to have an out-placement counsellor available.

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# Part 2, The Meeting

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- You may want to conduct the meeting towards the end of the day to avoid causing the employee any unnecessary embarrassment when vacating the premises.
- If possible, avoid terminating the employee on her birthday, wedding anniversary or other significant date.
- Pick a neutral site for the meeting, such as a conference room and not the manager's office.
- Conduct the meeting in a location away from the eyes and ears of other employees.

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# Part 2, The Meeting

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- Don't terminate the employee in a different city where the employee doesn't have family, friends or professional advisors available for immediate support.
- Review the details of the termination letter with the employee and provide the employee with the original and a copy of the termination letter.
- Consider offering employee assistance program or career counselling support. The meeting itself should usually not last longer than 5-10 minutes.

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# Part 2, Things to Avoid

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Avoid saying the following things in a Termination Meeting:

- “How’s the family?”
- “I know how you feel” or “I’m sorry to have to do this.”
- “Let me know how I can help.”
- “Take all the time you need.”

These remarks may feed the employee’s resentment. They could also undermine the finality of the decision.

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# Part 2, Things to Avoid

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- Don't negotiate with the employee or engage in a debate – the decision is made.
- Don't become angry or hostile. (May increase your chances of getting sued.)
- Avoid interruptions during the termination meeting. Turn off your cell phone.

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# Part 2, Returning Properties

- Require the employee to return any company property including credit cards, access cards and keys.
- If the employee does not comply with instructions to return company property, the employer may be able to obtain an *Anton Piller Order*.
- Allow the employee to return to his or her office to retrieve her personal belongings. Have security staff accompany the employee only if there is a valid reason for doing so.
- The employee should be blocked from computer and system access immediately following notice of termination.

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# Part 2, After the Meeting

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- Place notes of what transpired at the meeting in the employee's file, including all comments made by the employee during the meeting.
- Ensure that payroll staff has properly prepared and provided the employee with her Record of Employment.
- Ensure that employment benefits are continued or discontinued in accordance with the termination letter.
- Ensure that the employee is advised in writing of conversion privileges for group insurance benefits.

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# Part 2, After the Meeting

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## Announcing the Employee's Departure:

- Any public announcement should be made shortly after the employee's departure.
- Issue a neutral announcement without stating reasons unless an announcement has been agreed to with the employee.
- Do not disclose any personal information beyond what is necessary.
- In response to questions from other employees, give answers that are consistent with the announcement.

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# Part 2, After the Meeting

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## Reference Letters:

- If the termination is without cause, it is in the employer's interest to help the employee to find other employment.
- Obtain agreement from the departing employee as to the contents of reference letter and the details of what will be communicated to potential employers.
- Reference letters should be truthful.
- Avoid defamatory statements or misrepresentations.

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## Part 2, Human Rights Risks with Terminations

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To minimize the chance of the employee making a human rights complaint, the employer must be able to demonstrate that the termination was in no way related to the employee's disability, age, sex or any other grounds of discrimination.

Proper and complete documentation is essential here. The employer should have a paper trail demonstrating the employee's poor performance record if performance was the issue.

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# Part 3: Case Studies

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# Part 3, Fact Scenario #1

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John, Bill, Elaine and Jack work in the packaging department.

Occasionally, John, Bill, Elaine or Jack will have to use a fork lift to move completed pallets out of their work area.

Susan, their supervisor, saw John, Bill and Elaine standing in a small circle outside. She could see Elaine holding something in her hand and moving her hand toward John. She also noticed the smell of marijuana.

Susan reported her observations to the Plant Manager.

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## Part 3, Fact Scenario #1

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In 10 minutes, Susan and the manager went to the work area and saw all four employees working.

Susan asked the John, Bill and Elaine why they weren't on the floor when she had been there a few minutes earlier. They said work was slow, so they went outside for a smoke.

Susan and the Plant Manager then met with each of the three employees individually. Each admitted to taking an unauthorized break, but vehemently denied smoking marijuana or any impairment.

They each returned to work after their interviews.

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## Part 3, Fact Scenario #1

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An hour later, the three employees were called back to the Plant Manager's office and terminated for smoking marijuana at work contrary to company policy.

Can John, Bill and Elaine be terminated for cause? What could the management have done better?

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## Part 3, Fact Scenario #2

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Henry was in his late 50's when he applied for a new job that involved customer interaction, some physical activity and some technical troubleshooting.

In the interview process, there were concerns about Henry's ability to grasp instructions, but he generally did all right in testing and had good demeanour with customers.

The employer was desperate to fill the position and hired Henry.

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## Part 3, Fact Scenario #2

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Henry had some difficulty with training and orientation, but he did successfully complete the tests that were required.

Shortly after starting active service on the job, there was an incident to which he responded in violation of safety rules. No harm was done, but Henry was reminded of the applicable safety rules and a note was placed in his file.

Henry successfully completed his probationary period and achieved full time employment status.

Shortly after, there was another incident where he was not able to troubleshoot on a routine technical matter about which he had been trained.

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## Part 3, Fact Scenario #2

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Henry's difficulties caused service delays. Henry's duties were temporarily restricted while he was sent for re-training. He completed the training and passed the tests.

The employer is concerned that Henry can succeed in a controlled environment such as training and testing, but that he has difficulty dealing with real-life situations on the job.

Can he be terminated for cause? If not, what must the employer do before it can make a case for cause?

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# Conclusion

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Hiring properly and with all the important terms in place will make termination easier and reduce liability.

The termination itself can be less difficult if you make sure that you're informed about legal requirements and prepare appropriately.

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# Questions?