



DUPUIS LANGEN
FINANCIAL MANAGEMENT

The benefit brief

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RETIREMENT AGREEMENTS: THE EVOLUTION OF EMPLOYMENT CONTRACTS



210 – 13900 Maycrest Way
Richmond, BC V6V 3E2
Phone: (604) 270-1142
Fax: (604) 270-3662

Web: www.dupuislangen.com
Email: info@dupuislangen.com

We have updated our website.
Please come take a look!

Thank you for your referrals

Business is great but new
clients are always
welcome!

If you know of others who
may like to receive our
newsletter or who would
appreciate an audit of their
group benefits plan, please
let us know!

Words of Wisdom

"In the end, it's not the years
in your life that count. It's
the life in your years."

~Abraham Lincoln

With the recent elimination of mandatory retirement (B.C. on January 1, 2008) employers cannot require retirement at age 65, nor compel their employees to make decisions on retirement. Employers will be looking to bring certainty to human resource planning. A solution could be through the use of retirement agreements.

RETIREMENT AGREEMENTS

Employment contracts are important as a way to ensure clarity of important terms in the employment relationship and to limit an employer's liability for notice or pay in lieu of notice in the event that the employer decides to terminate an employee without cause. Similarly, provided they are *truly voluntary*, retirement agreements can be used to confirm a fixed date an employee will retire, and/or change in employment terms and conditions leading up to a retirement date.

Given the conflict between the rights of the employees to choose their retirement dates, and the need for employers to have some certainty regarding their employees' plans, retirement agreements can help.

TIPS FOR A RETIREMENT AGREEMENT

Consideration

There must be some real consideration flowing to the employee in order to make the agreement enforceable. It will not be enough to promise 'status quo' in employment terms and conditions in exchange for an employee's promise to retire on a certain date. Employers who want to actively encourage retirement (or retention) of their older work force will need to consider incentives to encourage the desired result by offering such things as phased-in retirement, financial bonuses, new benefits or other perquisites designed to appeal to older workers.

Communication

Given the unequal bargaining power of employers and employees, employers should carefully consider their communications to employees regarding retirement agreements, so there is no doubt that employees *freely* entered into the agreement to fix their retirement date. The goal is easing the employees into thinking about retirement and equipping them with the knowledge to make sound decisions.

BE AWARE OF:

Claims of Constructive Dismissals

Employers must be aware that unilateral changes to the employment relationship can expose an employer to a claim of constructive dismissal. Document in writing an employee's agreement to any changes to title, work responsibilities or hours of work. What may seem like an attractive decrease in workload or stress to a senior employee may result in a loss of influence or prestige that an employee did not anticipate. Employers will want to ensure their employees have faced up to these possible consequences at the outset and (preferably) documented their agreement in the retirement agreement itself.

Making Accommodations

As the average age of employees increases, it is expected that requests for accommodation will increase. While 'age' is not considered a disability, employers will be expected to accommodate reasonable age-based limitations on performance and productivity, provided employers can do so without undue hardship. Retirement Agreements which provide for changed or phase reduction in work responsibilities, can be a way for an employer to meet its duty to accommodate these employees.

Group life and health plans * Registered pension plans * Group RSPs * Critical illness plans
Long term disability plans * Integrated benefit solutions * Private Health Services Plans (PHSPs)

TERMINATION OF EMPLOYEES ON DISABILITY LEAVE

Human rights laws ban employers from discriminating against employees because they have a disability. They also require employers to make efforts to accommodate an employee's disability. But the employer doesn't have to make accommodations that would impose *undue hardship* on the company.

Case study: An employee gets in a serious car accident and goes on disability leave. After 6 months, she has severe brain damage and her prognosis is bleak. The doctors don't think she'll ever be able to return to work. The employee is a union member and the collective agreement allows the employer to dismiss the employees who've been on leave for more than two years, provided they have no reasonable prospects of returning to work.

(Facts loosely based on the Supreme Court Case McGill University Health Centre v. Syndicat des Employes de l'Hopital General de Montreal.)

Given the above situation when can the employer terminate the employee?

A. An employer can never fire a person on disability because it is automatic disability discrimination.

Wrong - An employee on disability leave does not give them the right to keep the job forever. The right to accommodation is subject to limitations. Once holding the job open becomes undue hardship, the employer's duty to accommodate ends and it can fire the employee.

B. Employer can fire an employee based on the employment contract or collective agreement terms. In this case it would be 2 years.

Wrong - The effort to accommodate a disabled employee must be based on the individual's particular needs and circumstances. Blanket policies that purport to treat all employees the same are invalid. Consequently, a per se deadline on how long disability leave can last before the employee can be fired is unenforceable, no matter how generous the deadline is. However in a Supreme Court ruling the judge had said that "the fact that such a period has been negotiated and included in the collective agreement indicates that the employer and union considered the characteristics of the enterprise and agreed that beyond this period, the employer would be entitled to terminate" the disabled employee. Courts and arbitrators should treat such a deadline as evidence in deciding how long an employer must give a disabled employee to return.

C. After 2 years, provided the employer can show that retaining the employee would be an undue hardship.

Correct - The basic rule is that the employer must give the employee *reasonable* time to recover. If there are no reasonable prospects of a return to work after that, the employer can terminate employment. However the issue is how to figure out the amount of time considered as 'reasonable'. The answer will depend on circumstances, including the position and the employee's condition. In this situation, given the employee's poor prognosis, it would likely be reasonable for the employer in this case to fire the employee after the two-year limit stipulated in the collective agreement passes.

PARAMEDICAL CREDENTIALS

The Regulated Health Professions Act specifies for each province or territory which health professions are or are not regulated. Insurance carriers must adjudicate claims according to the specific credentials and/or levels of education and training that this legislation requires for each regulated profession. In many instances the initials used to signify a practitioner's designation are registered trademarks of the provincial regulatory bodies governing that profession (called Colleges).

Below we have given a list of practitioners that we are frequently asked about and the designations or credentials in British Columbia that the insurance carrier will look for in the adjudication of claims.

Acupuncture: R. TCMP (Registered Traditional Chinese Medicine Practitioner)

Must be a member of the College of Traditional Chinese Medicine Practitioners and Acupuncturists of BC

Chiropodists & Podiatrists: D. CH and DPM

Must be a current member in good standing with the regulatory body in the province where they are providing services.

Chiropractor: DC

Must be registered with the BC college of chiropractors.

Clinical Psychologists: PhD

Practitioners must be registered with the College of Psychologists

Massage Therapists: RMT

Must be registered with The College of Massage Therapists of British Columbia

Naturopath: ND

Must be registered with the college of Naturopathic Physicians of BC

Physiotherapist: RPT or PT

The College of Physical Therapists of British Columbia

Social Worker: Masters in Social Work (MSW) or be a Registered Social Worker (RSW)

ADMINISTRATOR'S CORNER

We would like to remind plan administrators to ensure that you've provided us with accurate salary information for your plan members. It's important that we maintain the most current information for your employees so as not to have an adverse effect on any potential disability and life claims. If the information we have isn't correct, it will affect any salary-based benefits and also affect the accuracy of your billing statements. If you have updated salaries and not notified us or the insurance carrier please notify us as soon as possible. If you are unsure of the salaries you had reported for your employees, you can request an employee listing from our office to confirm we have the correct salary information.