

# Tricky Terminations

## EP 54

Wednesday, September 18, 2024  
10:30 a.m. E.S.T.



# Meet Your Presenters

## Lexa Cutler

Employment, Labour & Contracts Lawyer

&

## Lisa Stam

Employment, Labour & Contracts Lawyer |  
Managing Partner



# Land Acknowledgement

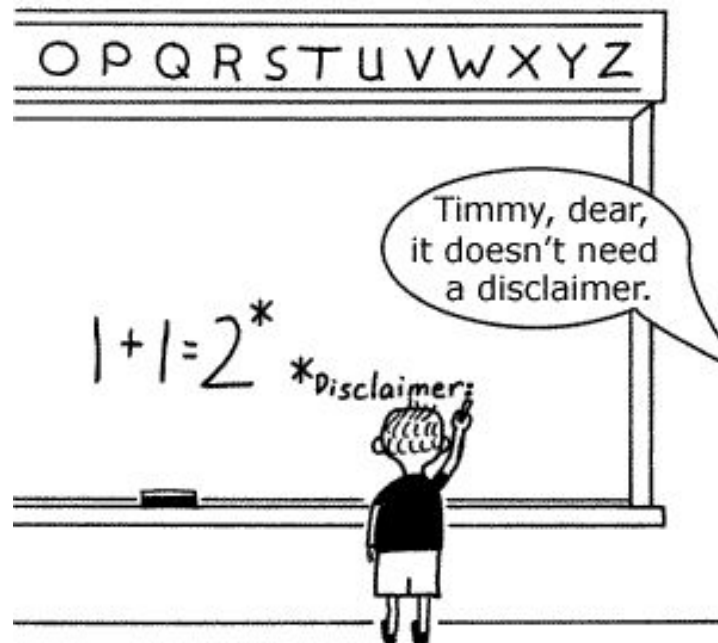
We acknowledge that the land on which we operate is the traditional territory of the Anishinaabe, Haudenosaunee, Huron-Wendat, and Mississaugas of the Credit First Nation, who have stewarded these lands for generations.

We recognize that Indigenous Peoples lived and thrived here long before the arrival of settlers, and we acknowledge the lasting impacts of colonialism. As part of our commitment to truth and reconciliation, we strive to learn, unlearn, and understand the history and effects of these wrongs.

We are grateful to live and work on this land.

# Legal Disclaimers

Timmy  
doesn't need  
a disclaimer  
but we do...



# Legal Disclaimers

We're lawyers and know that legal disclaimers are never fun to read, but sometimes necessary to have. To clarify the legal scope and intent of our webinars, here are our general legal disclaimers that apply to all SpringLaw videos, webinars and content on our YouTube channel:

- 1) The content of this webinar should not be relied upon as legal advice. If you require legal advice, please contact one of SpringLaw's lawyers, or you may wish to consult with the [Law Society of Ontario](#) for a listing of lawyers in Ontario.
- 2) Attending, accessing or viewing any SpringLaw webinars does not create a lawyer-client relationship with anyone at SpringLaw. That will only happen after you formally sign a Legal Services Agreement with us.
- 3) You should apply your own judgement in making any use of any content from our webinars, including the use of the information as the basis for any conclusions. Every case and set of facts is different and unique to you - our videos are informational only.
- 4) The law changes quickly in Canada. We do not guarantee that the content of our recorded webinar videos is accurate, complete or up-to-date given how quickly the law can change. SpringLaw assumes no obligation to update the content. We assume no responsibility for errors or omissions in the content or other documents that are referenced by or linked to in our videos. The content of this webinar may be changed without notice to you.

Please contact us at [info@springlaw.ca](mailto:info@springlaw.ca) if you have any questions about any of our content or your legal matter generally.

# Presentation Roadmap

- 1) Terminations 101: Standard Process & Legal Entitlements
- 2) Just Cause Terminations
- 3) Leaves of Absence: Substantive Legal Issues
- 4) Leaves of Absence: Procedural Logistics
- 5) Harassment Complaints & Terminations
- 6) Senior Executives: Complex Terminations
- 7) Key Employees with Secret Sauce: IP & Client Relationships
- 8) Mass Layoffs: Legal Requirements

# 1) Terminations 101: Standard Process & Legal Entitlements



# Terminations 101: Standard Process & Legal Entitlements

1. **Review Employment Contract:** Check termination clauses, notice periods, and severance obligations.
2. **Three Sources of Termination Entitlements:**
  - a. *ESA:*
    - i. *Notice Period:* 1 week notice/pay per year of service (up to 8 weeks).
    - ii. *Severance:* 1 week/year if 5+ years and \$2.5M payroll, up to 26 weeks.
    - iii. *Continuation of benefits:* health benefits, RRSP/Pension should be continued for at least the ESA notice period
    - iv. *Other compensation:* Employees should be paid out unpaid wages, unused vacation time
  - b. *Contract:* Any negotiated specific entitlements on termination
  - c. *Common Law:* Higher entitlements based on age, position, and service length (typically 3-5 weeks per year of service)
3. **Follow Legal Requirements:** Comply with *ESA*, *Human Rights Code*, and common law obligations.

**Upstream Tip:** Regularly review and update contracts to align with current legal standards.



## 2) Just Cause Terminations



# Just Cause Terminations

1. **Should you terminate with cause?** With cause terminations almost always more contentious, sometimes best to terminate without cause even when misconduct is present.
2. **High Threshold for Just Cause:** Just cause terminations require no severance or notice, but the standard is high under both the common law and the *ESA*.
3. **Progressive Discipline (Where Applicable):** Verbal warnings, written warnings, suspensions or other forms of discipline prior to terminating with cause.

**Upstream Tip:** Ensure consistency in applying disciplinary measures across the organization. If similar misconduct has been handled less severely with other employees, treating one employee differently could lead to claims of unfair treatment or discrimination. Consistency also reinforces the employer's position that the termination is justified and not arbitrary.

### 3) Leaves of Absence: Substantive Legal Issues



# Leaves of Absence: Substantive Legal Issues

1. **Illegal Terminations:** terminations based on protected employee characteristics, or use of job-protected leaves such as parental leave
2. **Valid Business Reasons:** Ensure termination is due to valid business reasons (e.g., restructuring, role elimination) unrelated to the employee's leave status.
3. **Communication and Sensitivity:** Ensure discussions are handled with empathy and care, recognizing that the employee may be in a vulnerable position due to their leave status.

**Upstream Tip:** Keep detailed records of the reasons for the termination to show they are non-discriminatory. Important documents may include corporate records indicating the financial need for layoffs, internal communications about the decision, performance appraisals etc.

## 4) Leaves of Absence: Procedural Issues



# Leaves of Absence: Procedural Issues

1. **Timing, Timing, Timing!** WHEN you terminate an employee on a leave can be just as important as WHY.
2. **When Was the Decision Made?** Document when the decision to terminate was made- is often relevant.
3. **Don't Mess With EI Benefits:** Timing of termination and termination payments can ensure employee receives maximum benefit, and can generate goodwill.
4. **Obtain Release:** Consider offering the employee an enhanced severance package in exchange for a release. Provides additional financial security while protecting the employer from future legal action.

**Upstream Tip:** Take real-time notes of important conversations about employee terminations.

## 5) Harassment Complaints & Terminations



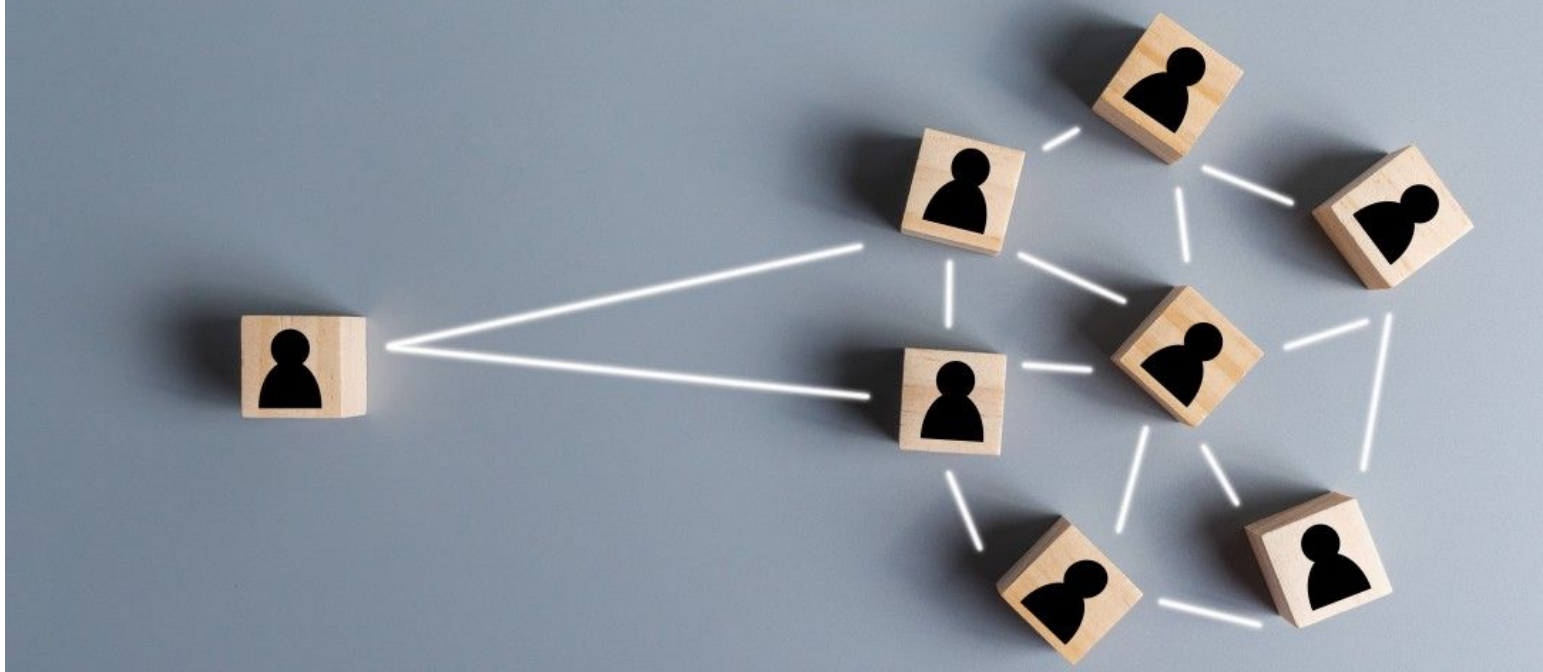
# Harassment Complaints & Terminations

1. **Retaliation Risk:** Terminating employees who raised complaints can result in reprisal claims under *OHSA* or the *ESA*, or *retaliation* under human rights law.
2. **Solid Documentation:** Keep thorough documentation of performance issues and non-discriminatory reasons for termination.
3. **Be Mindful of Timing:** Terminating an employee shortly after they make a complaint can look like retaliation.

**Upstream Tip:** Maintain separate processes and a clear distinction between complaint investigations and termination decisions.



## 6) High-Level Executives: Complex Terminations



# Senior Executives: Complex Terminations

## Why Tricky?

1. **Awareness** of entitlements, can afford to fight, big \$ at stake
2. **Longer notice** and/or enhanced severance beyond *ESA* minimums
3. **Nexus** with corporate law around equity, director & officer roles, Board positions
4. **[Secret Sauces & Equity** in next slides]

**HOW to terminate an Exec:** Scope, Gather, Timing, Context, Math

**Upstream Tip:** Focus on non-base salary comp issues in executive contracts and sync up any side agreements / policies re: bonuses, commissions, equity and other perks

# Senior Executives: Equity & Termination

**Starting point:** All equity rights continue during notice period UNLESS contract language to restrict rights

## **Steps for Analysis:**

- 1) Is this equity and what are the terms that govern?
- 2) Would exec have earned the equity during the notice period?
- 3) Do any terms/events trigger or end entitlements (e.g. Change in Control? Accelerated vesting? Unvested options forfeited on termination?)?
- 4) WHEN do equity rights end as per contract docs? (very active area of law)

**Upstream Tip:** tighten up your equity docs and **share** the plan docs with the employee early on

## 7) Key Employees with Secret Sauce: IP & Client Relationships



# Key Employees with Secret Sauce: IP & Client Relationships

1. **Contracts!!** #SorryHindsightIs2020
2. **If Ship has Sailed:**
  - a. Up termination package to add non-solicit and confidentiality terms
  - b. During termination meeting: remind employee, retrieve data
  - c. Post termination agreement if critical secret sauce
  - d. Injunction to enforce common law rights
  - e. Go hug your key customers & monitor allied employees

**Upstream Tip:** Protective terms for key employees; use promotion to beef up contracts

## 8) Mass Layoffs: Legal Requirements



# Mass Layoffs: Legal Requirements

1. **Notice to Government:** Large layoffs require notice to the Ministry of Labour (50+ in AB, BC, MB, NF, ON; 25+ in NT, NU, YT; 10+ in NS, NB, PEI, PQ, SK)
2. **Budget for Mandatory Payments:** Enhanced notice periods or severance may apply based on employee count and length of service.
3. **Communications:** Important step to balance employee morale with business realities / trade secrets

**Upstream Tip:** Add weeks of planning and up your budget

# Wrap Up

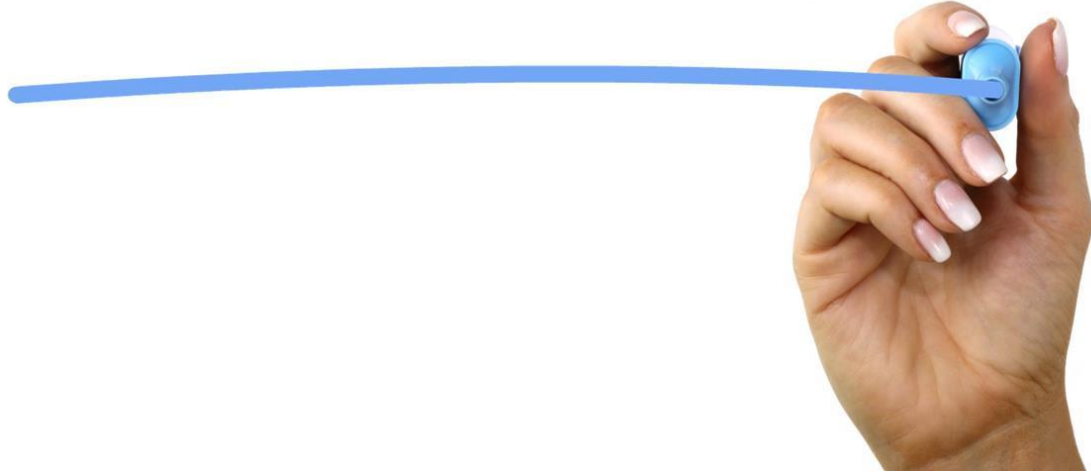




# Wrap Up

- For tricky terminations, plan, plan, plan (and budget, budget, budget!)
- Know the overall contractual and legal entitlements to inform the business decisions (not the other way around)
- Budget for the higher costs of these settlements

# QUESTIONS



# Thank you!

To learn more about our team:

<https://springlaw.ca/our-team/>

To connect with our legal team:

- Lisa Stam - [lstam@springlaw.ca](mailto:lstam@springlaw.ca)
- Marnie Baizley - [mbaizley@springlaw.ca](mailto:mbaizley@springlaw.ca)
- Heather Power - [hpower@springlaw.ca](mailto:hpower@springlaw.ca)
- Tiffany Thomas - [tthomas@spring.ca](mailto:tthomas@spring.ca)
- Lexa Cutler - [lcutler@springlaw.ca](mailto:lcutler@springlaw.ca)
- Filip Szadurski - [fszadurski@springlaw.ca](mailto:fszadurski@springlaw.ca)
- Jessica Paglia - [jpaglia@springlaw.ca](mailto:jpaglia@springlaw.ca)
- Gaya Murti - [gmurti@springlaw.ca](mailto:gmurti@springlaw.ca)
- Maureen Cruz - [macruz@springlaw.ca](mailto:macruz@springlaw.ca)

Sign up for future **SpringForward Legal Updates**:

[springlaw.ca/employers/springforward-legal-updates/](https://springlaw.ca/employers/springforward-legal-updates/)

Sign up for our monthly **Newsletter**:

[www.springlaw.ca](https://www.springlaw.ca)

*We are SpringLaw!*



Lisa Stam  
Lawyer, Managing  
Partner



Marnie Baizley  
Partner, Lawyer



Heather Power  
Lawyer



Tiffany Thomas  
Lawyer



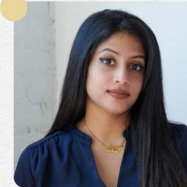
Lexa Cutler  
Lawyer



Filip Szadurski  
Lawyer



Jessica Paglia  
Lawyer



Gaya Murti  
Paralegal



Maureen Cruz  
Legal Assistant