



LABOUR + EMPLOYMENT LUNCH N' LEARN: HIRING AND FIRING – UPDATE ON BEST PRACTICES

Presented By:

Michael Watt, Partner

Iman Hosseini, Associate

May 11, 2022 | 11:00 AM PST



YOUR **PERSPECTIVE** OUR **FOCUS**™



Today we will cover –

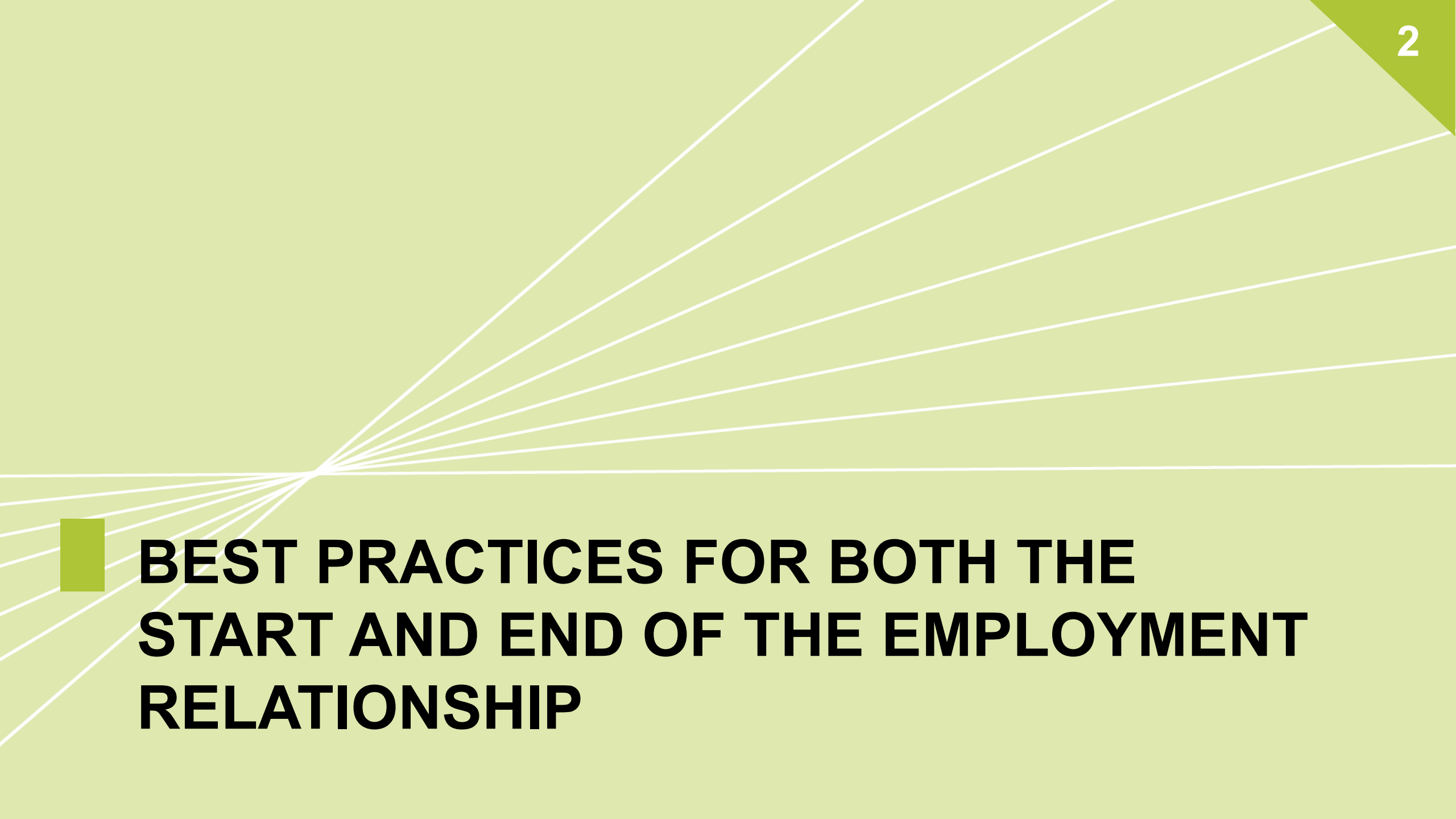
- 1 Brief update on legislative changes and COVID issues
- 2 Best Practices for both the Start and End of the Employment Relationship
- 3 Review of Current Case Law to Ensure Your Employment Agreements Are Comprehensive and Enforceable
- 4 Consider Enforceable Termination Clause Language, and Mid-Employment Contract Changes
- 5 Identifying Termination Options, Risk and Strategies



**BRIEF UPDATE ON LEGISLATIVE
CHANGES AND COVID ISSUES**

Updates

- BC
 - ESA – 5 days of paid sick leave
 - LRC – no certification vote
- ONT
 - Working for Workers Act
 - Disconnecting from work policy (June 2)
 - No non-competes
- FED
 - 10 days of paid medical leave (by Dec 31)
- COVID-19
 - vaccination mandate litigation



**BEST PRACTICES FOR BOTH THE
START AND END OF THE EMPLOYMENT
RELATIONSHIP**

Getting off on the Right Foot – Update on the Law of Contracts

Drafting employment contracts is an important task HR routinely encounters. Steps taken at the outset of the employment relationship affect how the relationship will end. With care, parties can clarify expectations at the outset, minimizing strife and liability at the end.

This part of the presentation will hone in on the hiring phase of the employment relationship, ensuring that you leave with a strong grasp of:



- What should your employment contracts look like?



- Key terms to consider – duties, compensation, benefits, termination, restrictive covenants



- Common oversights that affect the enforceability of employment contracts



- The difference in approach between offering written employment contracts to new versus existing employees



- Drafting critical terms to limit termination costs and liability

What Should Your Employment Contracts Look Like?

1. Are formal contracts better than hiring letters?
2. What should go in the Contract vs. the Employee Policy Manual/Handbook?
3. Should business protection terms (confidentiality and intellectual property/restrictive covenants) be in a separate agreement?



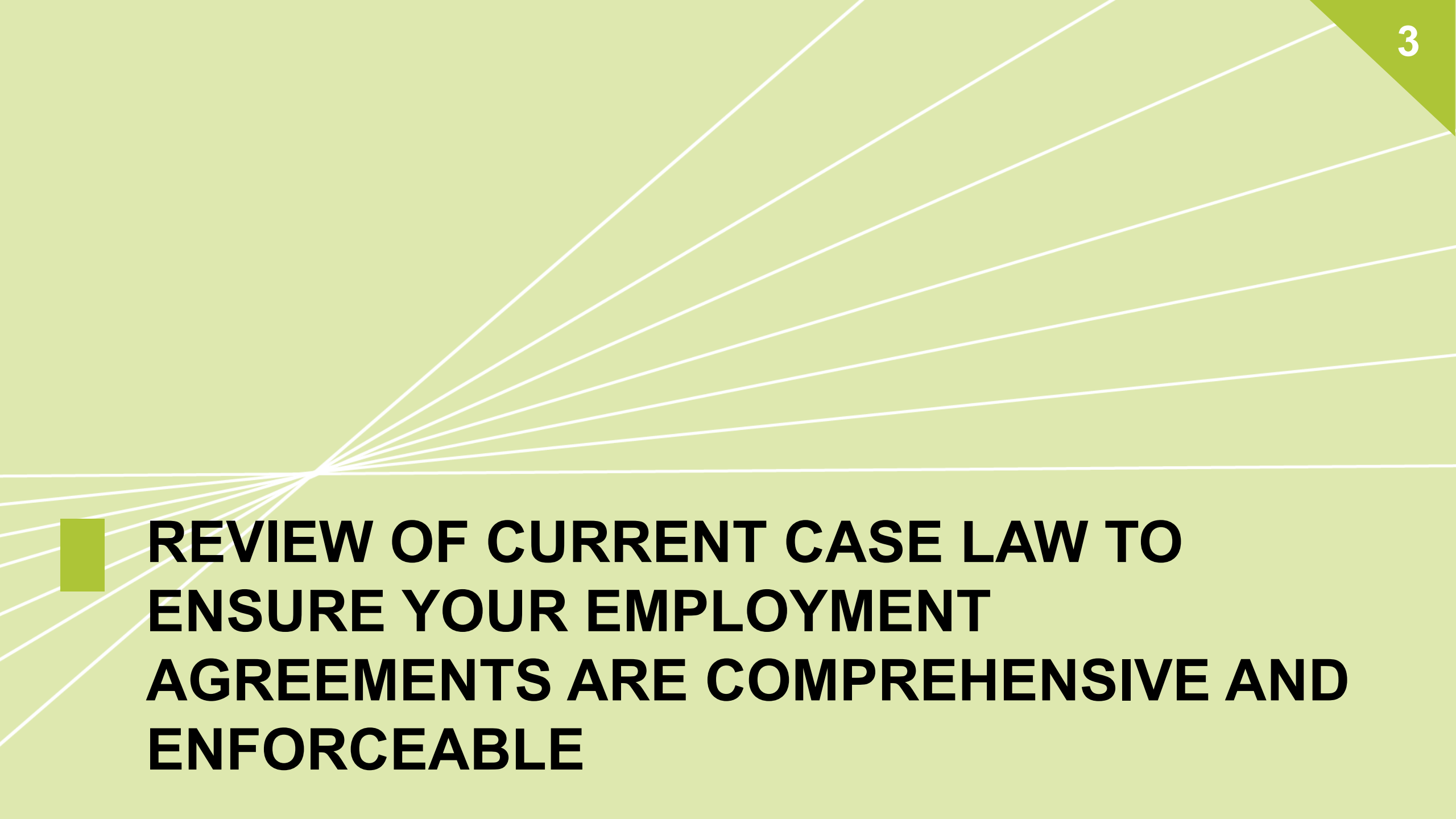
Use of Pre-conditions

- Should you make conditional offer of employment?
- Typical conditions:
 - work authorization – citizen or work permit
 - criminal records check
 - drug testing
 - character references
 - credentials verification



Key Terms To Consider – Duties, Compensation, Benefits, Termination, Restrictive Covenants

- **The “Employer”** – which corporation is or should be the employer?
- **Length of employment** – indefinite vs. fixed term
- **Use of Job Description** – defining the duties and responsibilities
- **Benefits** – coverage, premium sharing
- **Incentive and other pay** – commissions, bonuses, stock options, share purchase plans
- **Restrictive Covenants** – non-solicit (employees and customers), non-compete
- **Information Protection** – Confidential Information and Work Product



**REVIEW OF CURRENT CASE LAW TO
ENSURE YOUR EMPLOYMENT
AGREEMENTS ARE COMPREHENSIVE AND
ENFORCEABLE**

Common Oversights That Affect the Enforceability of Employment Contracts

- Offer and acceptance – reaching oral agreement before signing written agreement
- Signing agreement after start of employment
- Adding terms or agreements after the start of employment

- Case Law:
 - *Francis v. CIBC* 1994 Ont. C.A. – document invalid because there was no consideration for variation of original contract
 - *Gaudio v. Banca Commerciale* 1999 Ont. S.C.J. – subsequent formal agreement limiting reasonable notice not binding where basic terms already agreed upon prior to starting work
 - *Holland v. Hostopia.com Inc.* 2015 ONCA 762 – offer letter may constitute terms and not subsequent contract
 - *Wood v. Fred Deeley Imports Ltd.* 2017 Ont. C.A. 158 – if terms known prior to signing, then may be enforceable if signed after started work

Offering Written Employment Contracts to New Versus Existing Employees – Consideration



- Requirement for “fresh” consideration
 - what will be sufficient?
 - exclude promised wage or benefit increases



- Timing offer and acceptance of new contract with payment of consideration



- How significant are amendments?



- Do you have a backup plan if employee(s) refuses new terms?



**CONSIDER ENFORCEABLE TERMINATION
CLAUSE LANGUAGE, AND MID-
EMPLOYMENT CONTRACT CHANGES**

Drafting Terms to Limit Termination Costs



- Compliance with statutory minimum – at all times



- Ensuring appropriate for specific jurisdiction (province or federal)



- Clear language



- Statement that notice or pay in lieu represents complete entitlement on termination

Drafting Terms to Limit Termination Costs

STATUTORY MINIMUM EXAMPLES:

An employee terminated during the probationary period for reasons other than just cause shall receive notice or pay in lieu of notice in accordance with the provisions of the *Employment Standards Act*.

The Employer may terminate the employment of the Employee without cause or notice in accordance of [sic] the *Employment Standards Act* of British Columbia...

Drafting Terms to Limit Termination Costs

STATUTORY MINIMUM EXAMPLES (cont'd):

Should you be terminated for reasons other [than] cause then you will be entitled to advance notice or severance pay thereof in accordance with the *Employment Standards Act [sic] of Alberta*.

Termination Without Cause. The Company may terminate your employment at any time in its sole discretion, for any reason, without cause or serious reason, upon providing to you:

- a. that minimum amount of advance notice (or pay in lieu) to which you are entitled on termination of employment under the applicable employment or labour standards statute or law in the province where you are assigned to work for the Company at the time your employment is terminated (the "Act"), and
- b. any other minimum amounts or entitlements to which you are entitled on termination of employment under [the Act](#), including: (A) statutory severance pay; and/or (B) for that minimum period required by [the Act](#), continuation of any benefits in which you are enrolled as of the date you receive notice of termination.

Drafting Terms to Limit Termination Costs

FIXED NOTICE PERIODS ENFORCEABLE?



“Firm policy dictates your employment to be probationary for the first 6 months during which employment may be terminated at the sole discretion of the Firm without cause. Notice period within and after the probation period to be 30 days by either party.”

Shore v. Ladner Downs, 1998 CanLII 5755 (BC CA)

Drafting Terms to Limit Termination Costs

“ The Society may terminate this Agreement and the Teacher/Employee’s employment upon giving the Employee two week’s prior notice or two week’s salary in lieu of notice.

”

Virk v. Satnam Education Society of B.C., 2020 BCSC 149 (CanLII)

Drafting Terms to Limit Termination Costs

CLEAR ENOUGH?

☞☞ Should it be necessary, Lifestyle may end the employment relationship by providing you with a minimum of two (2) weeks notice, or pay in lieu of notice, or such that is required by the *Employment Standards Act*, whichever is greater. In any event, we guarantee that you will be provided with compensation upon the severance of the employment relationship, on a without cause basis, which shall not be less than two (2) weeks per year of service. This payment will include any statutory obligations Lifestyle may have under the *Employment Standards Act*.

☞☞

Dodich v. Leisure Care Canada, 2006 BCSC 93

Drafting Terms to Limit Termination Costs

CLEAR ENOUGH/STATUTORY COMPLIANCE?

“ Abridean may terminate your employment at any time without cause by giving you the following written notice, or pay in lieu of notice, according to your length of employment service in accordance with the following table (based on a start date of August 28, 2000):

<u>Service</u>	<u>Notice</u>
Up to 2 years	4 weeks
Every year thereafter	2 additional weeks of notice to a maximum of 26 weeks all inclusive

”

Abridean International Inc. v. Bigood, 2017 NSCA 65

Drafting Terms to Limit Termination Costs

- Can you contract out of the minimum requirements of employment standards legislation?

Nowak v. Biocomposites Inc., 2018 BCSC 785

- The service agreement said the employment was “at will”, but it provided for two weeks’ notice or a minimum of two weeks’ pay in lieu of notice for termination without cause. No notice or pay in lieu of notice was required for a dismissal with cause.
- Contract language:

““ *This Agreement is governed by and shall be construed in accordance with the laws of North Carolina, USA.*


The parties to this Agreement submit to the exclusive jurisdiction of the courts located in New Hanover County, North Carolina, USA. ””

- Should you include ESA compliant termination provision in independent contractor/consultant agreement?

Drafting Terms to Limit Termination Costs

Example (for use in BC only):

- a) You may terminate your employment with the Company by giving not less than two weeks' written notice of termination to the Company.
- b) The Company may terminate your employment at any time without cause by providing you with notice or payment in lieu of notice according to and not exceeding the obligations pursuant to the *Employment Standards Act*, RSBC 1996, c.113 (the "Act"). Such notice or payment in lieu of notice constitutes your complete entitlement upon termination of employment without cause whether pursuant to statute, contract or common law.
- c) Notwithstanding any other provision of this clause, the Company may terminate your employment at any time for just cause, without notice or payment in lieu of notice.



TERMINATION OPTIONS, RISK AND STRATEGIES

Termination – Best Practices



Don't delay



Termination letter



Investigate



Termination Meeting



Document

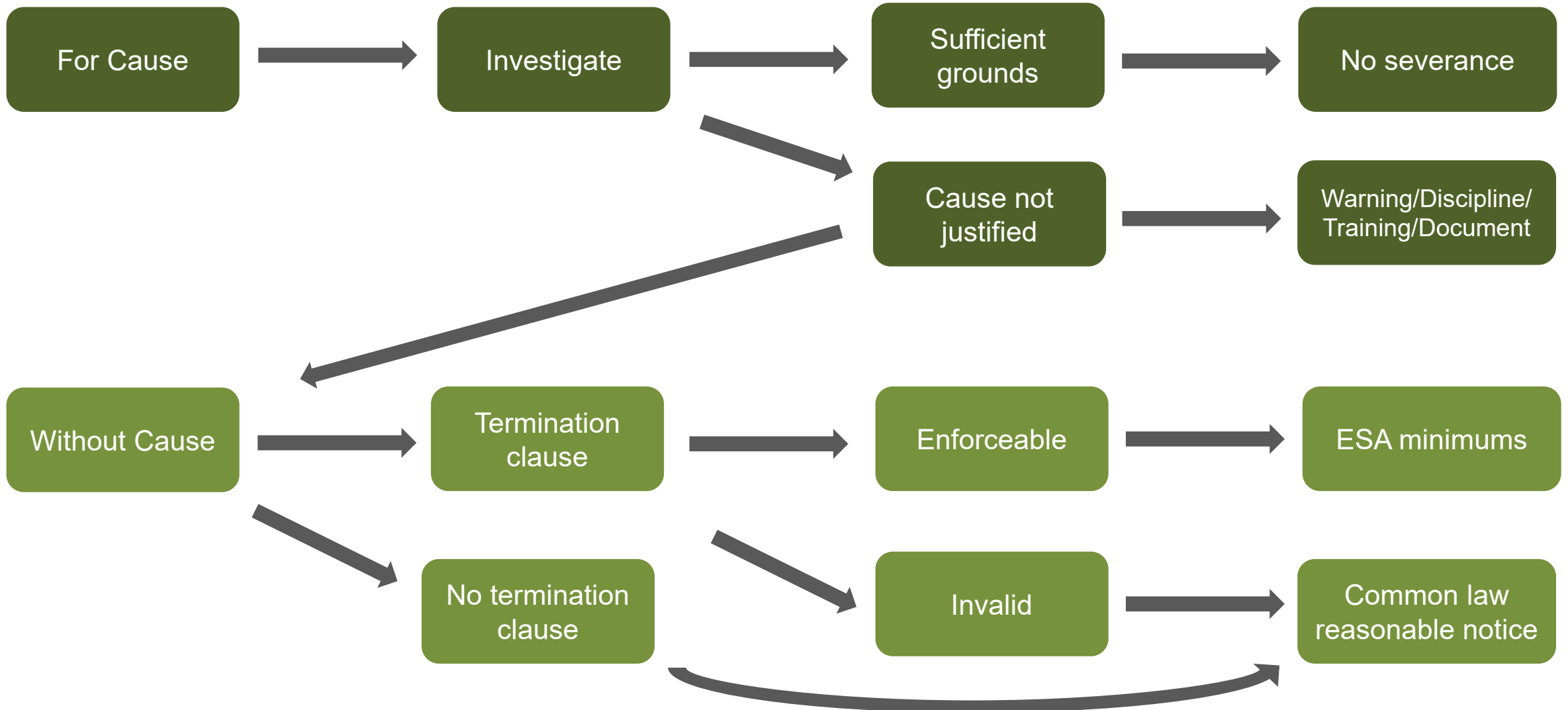


Release



Reference letter

Cause/Without Cause



Just Cause Termination – a refresher

- Summary dismissal
- Onus and burden of proof
- Single incident vs. cumulative incidents
- Duty to warn/progressive discipline
- Condonation

When and why to investigate?

- Determine the facts
- Respond to report of misconduct or harassment
- Discover employee involvement
- To be able to defend a lawsuit, grievance, or complaint
- Statutory obligations
 - Employer duty to ensure health and safety of workers
 - Duty to ensure workplace free of discrimination
- Comply with policy
- Workplace morale

Who should conduct the investigation?

Independent
and
non-biased

- Does not decide outcome
- Confront employee with details of allegations or complaint
- Give employee opportunity to respond

Experience
with process

- Interviewing witnesses
- Making findings and reporting
- Follow statutory obligations and policies



Internal

- HR
- Manager/supervisor
- Guidance from counsel



External

- Professional investigator
- Scope and terms of reference



Legal counsel

- Ideally not employer's usual employment counsel

Investigations – Best Practices

- Purpose: determine if factual allegations correct
- Consider privacy and security concerns of witnesses and parties
- Consider seriousness, complexity of complaint, and the need for external assistance
- Ensure appropriate terms of reference for investigator
- Must be fair process
- Duty of good faith and fair dealing
- Interim measures – leave? pay?

Reports – Preparation and Disclosure Considerations

- Maintaining confidentiality
- Factual findings – whether allegation is substantiated
- Recommended actions
- Workplace measures, training, reorganization

Timing Considerations



**REASONABLE
PERIOD OF TIME**



**RISKS WITH
DELAY**



**EMPLOYEE ON
LEAVE**



**MANNER OF
DISMISSAL**

Ojanen v. Acumen Law Corporation, 2021 BCCA 189

- Employee had some performance and misconduct issues during her articling term
- Employer discovered that the employee had been posting articles to a blog, which had similar content and topics to employer's website
- Employer did not have a meeting to warn the employee, ask about the posts, or get context
- Terminated without severance for “deceitful conduct and dishonesty” and served a theft claim on her in front of her PLTC classmates
- The court and court of appeal found that the performance and misconduct issues were not significant enough alone or collectively to amount to just cause for dismissal
- The court of appeal awarded \$118,000 in general damages for loss of earning capacity, and \$25,000 in punitive damages to punish the employee

After the investigation

- Decide complaint unfounded or only requires warning
- Termination meeting
 - Duty of good faith, vulnerability of employee
 - Private, short, witness to take notes
 - Avoid intimidation, argument, debate
- Termination letter
 - Termination clear, end date, payment of outstanding compensation, benefit conversion options, ROE
 - Provide reasons – description of misconduct, review of investigation, disciplinary record
 - Post-termination obligations, confidentiality, post-employment assistance
 - Candid, accurate, reasonable
 - Not overstated, misleading, unclear
 - Release?
- Announcing departure
- Reference letter?



Q&A

HOUSEKEEPING



Join our mailing list to receive updates from the Labour + Employment group by clicking [here](#).



CPD credit claim information, webinar recording, and presentation materials will be **emailed** to attendees after the presentation.

- If you dialed in today via phone (and did not join online with your email) and would like to receive the materials mentioned above, please contact Sara at shabibovic@ahbl.ca after the presentation with your email address.

THANK YOU

Contact



Michael A. Watt

Partner

T: 604 484 1733

mwatt@ahbl.ca



Iman Hosseini

Associate

T: 604 484 1725

ihosseini@ahbl.ca



DISCLAIMER

*This presentation is for educational purposes only.
Please seek legal advice if you have a particular
situation. Use of these materials does not create a
solicitor client relationship.*

OFFICES

Vancouver

TD Tower
2700 – 700 West Georgia Street
Vancouver, BC V7Y 1B8
Canada

T: 604 484 1700

Toronto

TD Canada Trust Tower
2700 – 161 Bay Street, PO Box 508
Toronto, ON M5J 2S1
Canada

T: 416 639 9060

LEARN MORE AT AHBL.CA

FOLLOW US ON SOCIAL MEDIA:



YOUR **PERSPECTIVE** OUR **FOCUS**™