

# Employment Practices Liability

Society of Public Insurance

Administrators of Ontario (SPIAO)

CHUBB®

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# Agenda

① Employment Law Basics

② Employment Practices Liability-  
Coverage Part

③ Employment Claim Example

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# Frequently Encountered Claims

## Contract Claims

- Just Cause
- Constructive Dismissal
- Wrongful Dismissal

## Statutory Claims

- Human Rights Claims

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## Two basic questions to consider



Is there liability?

If so, what are the damages?

## Just Cause

- employee-wrongdoing whose severity is such as to fundamentally undermine the employment relationship
- dishonesty (theft, fraud, etc)
- insubordination
- incompetence
  - hardest to prove

## Constructive Dismissal

- unilateral change to a fundamental term of the employment contract that shows an intention no longer to be bound by the contract
  - reduction in remuneration, responsibilities, or title
  - harassment, bullying, poisoned workplace
- intensely fact bound determination
- catch-all cause of action

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# Wrongful Dismissal

- implied right to reasonable notice of termination, if no cause alleged
  - assessed based on the employee age, length of service, character of employment, and availability of alternate employment
  - usually amounts to 1 month per year of service
  - up to a maximum of 24 months but this limit is not rigidly upheld
  - the employee must actively seek to obtain alternate employment
  - any income from alternate employment reduces damages owed
- Employee is entitled to all compensation that they would have earned had they remained employed for the duration of the notice period

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# Wrongful Dismissal

- implied right can be modified by express terms of the contract
  - a termination clause must provide at the very least for minimum entitlements under the ESA
    - termination pay
    - severance pay
    - benefits
  - courts are reluctant to uphold ESA termination clauses
  - unless the termination clause expressly specifies otherwise, an employee is not required to mitigate during any notice period defined in a written contract



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# Human Rights Violations

- Every jurisdiction (federal and provincial) has enacted statutes that protect against discrimination that arises in the private sphere
  - In Ontario, it's the *Human Rights Code*
  - Federally, it's the *Canadian Human Rights Act*
- There is also the *Charter of Rights and Freedoms* which specifically protects against discrimination that arises from government conduct

## Protected Spheres:

- employment
- services
- accommodation
- contracts

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# Human Rights Violations

## Protected Grounds:

- race
- ancestry
- place of origin
- colour
- ethnic origin
- citizenship
- creed
- sex
- sexual orientation
- gender identity
- gender expression
- age
- record of offences
- marital status
- family status
- disability

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# Human Rights Violations

- discrimination is direct or indirect differential treatment based on a protected ground
- harassment a single incident or course of vexatious conduct or comment that is known or ought to be known as unwelcome
- a finding differential treatment triggers the duty to accommodate up to the point of undue hardship
- but differential treatment in employment cases can be justified as non-discriminatory if it is a *bona fide occupational requirement*
  - the rule is adopted for a purpose that is rationally connected to the demands of the job
  - it is adopted in good faith; and
  - the employer cannot provide accommodation without undue hardship

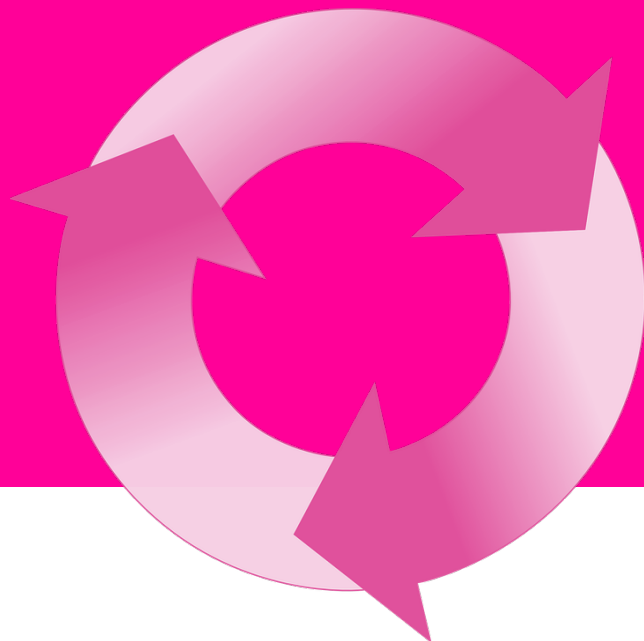
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# Human Rights Violations

- Remedies
  - general damages for injury to dignity, feelings and self-respect
  - special damages
    - lost income/wages
    - lost benefits
    - out-of-pocket expenses
  - public interest remedies
    - develop anti-discrimination and anti-harassment policies and procedures
    - education and training programs
    - implementing complaint reporting and investigation procedures

2

## Employment Practices Liability Coverage Part



- Coverage Highlights
- Wrongful Act Definition
- New Canadian Termination Coverage



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# Employment Practices Liability Coverage

## Part - Highlights

### Coverage:

- Insuring Clause (A): Employment Practices Liability Coverage
- Insuring Clause (B): Third Party Liability Coverage
- Canadian Termination Coverage

### Key Definitions:

- **Employment Practices Wrongful Act** – defined terminology for each act



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# Employment Practices Liability Coverage

## part -Wrongful Act

**Employment Practices Wrongful Act** means any actual or alleged:

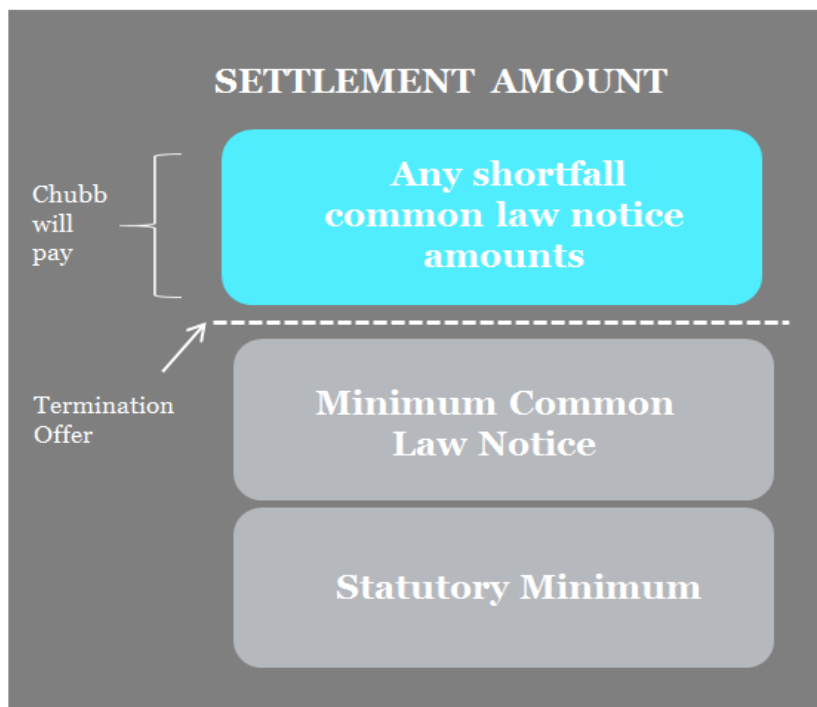
- (A) **Breach of Employment Contract;**
- (B) **Employment Discrimination;**
- (C) **Employment Harassment (Including Workplace Bullying);**
- (D) **Retaliation;**
- (E) **Termination;**
- (F) **Workplace Tort;** or
- (G) **Wrongful Employment Decision;**

committed, attempted, or allegedly committed or attempted by an **Organization** or by an **Insured Person** while acting in his or her capacity as such.

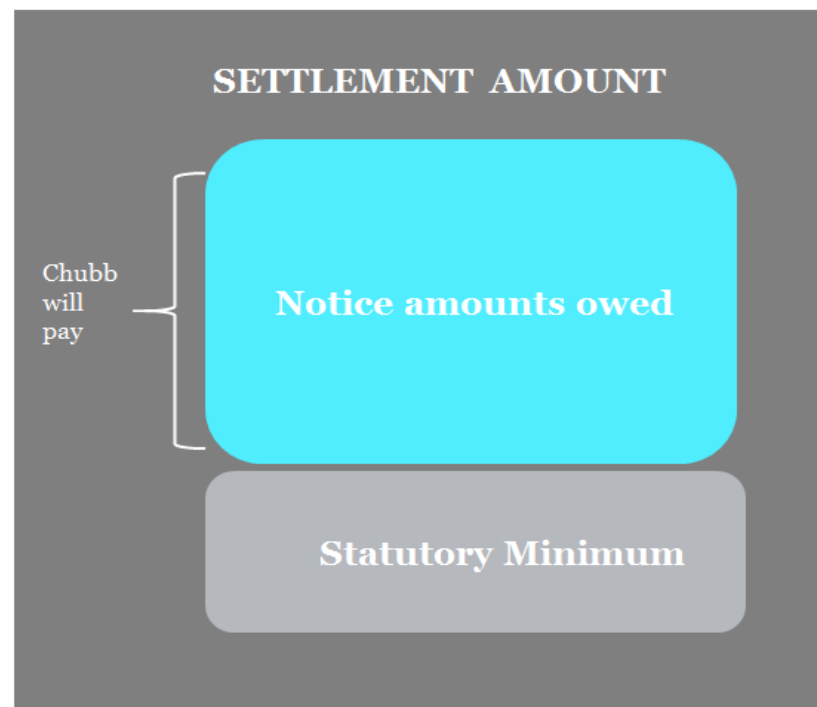
# Employment Practices (EPL) New Canadian Termination Coverage

- New affirmative coverage for termination shortfall
- Coverage is separated into With Cause and With out Case Termination
- In a with cause termination Insured is required to obtain a legal opinion confirming grounds for termination

## Without Cause Termination:



## With Cause Termination:





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3

## Employment Claim Example



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# Employment Practices Liability Coverage part - Claims Example

## Human Rights

- Employee Count: 120
- Annual Revenue \$20,000,000

This matter was brought before the Human Rights Tribunal of Ontario. The applicant, a 21 year employee alleged that she was the victim of retaliation in the form of wrongful termination. The applicant felt that her termination was the result of her previous allegation related to discrimination and harassment on the basis of her disability (depression). She sought \$430,000 in damages.

The matter settled for \$75,000 representing common law notice and mental anguish damages. Defence costs of \$10,000 were incurred.

Chubb. Insured.