

1. THE CONTRACT OF EMPLOYMENT

a. General

The contract of employment is a contract to which two (2) parties negotiate the content, namely the three (3) main characteristics of which are summarized as follows:

- ✓ Work performance;
- ✓ Remuneration; and
- ✓ Subordination.

The contract of employment is a named contract under the *Civil Code of Québec* and is governed by specific provisions contained in **art. 2085 to 2097**.

In addition, the contract of employment is subject to the general rules of the *Civil Code of Québec* applicable to all contracts.

In virtue of **art. 2085 of the *Civil Code of Québec***, the contract of employment contains three essential elements: a work performance provided by the employee, a remuneration paid by the employer in return for the work, and the subordination of the employee to the employer in the performance of the work.

The contract of employment is formed by the valid exchange of consent of the contracting parties with no further formalities required. The employee's main obligations under the contract of employment are set out in the *Civil Code of Québec* and include: performing work with prudence and diligence, acting faithfully and honestly, and prevent the use and disclosure of confidential information obtained in the performance or in the course of employment. As for the employer, not only is he bound to allow the performance of the work agreed upon and to pay the remuneration fixed, but the employer is also responsible to take any measures consistent with the nature of the work in order to protect the health, safety and dignity of the employees.

It is **ESSENTIAL**, for the protection of both the employee and the employer, to draft an extensive legally binding contract of employment, which clearly sets out the terms, conditions, and obligations herein to avoid misunderstandings and give both parties absolute clarity concerning their rights and obligations.

Therefore, if you are looking for a law firm to draft or revise a contract of employment, do not hesitate to contact Schneider Attorneyss at (514) 439-1322 ext. 112 or by email at: info@schneideravocat.com!

The contract also specifies the limits of the duration and the modalities of its termination.

b. IMPORTANT DISTINCTION WITH THE CONTRACT FOR SERVICES:

The distinguishing feature between the contract of employment and the contract for services is that the execution of the employee's work is subordinated to the control and direction of an employer.

- In a contract for services, the provider of services does not provide services under the direction of the employer; thus, there is no legal subordination. Any professional relationship is unique and therefore an analysis of the factual framework is required.

c. THE NATURE AND SCOPE OF THE CONTRACT OF EMPLOYMENT

The formation of the contract of employment **is not subject to any formalities**: the simple **agreement of will**, validly occurring **between two persons capable of contracting**, is sufficient to form the contract (**Art. 1385 and following of the *Civil Code of Québec***).

- It should be noted that a corporation cannot be considered an employee¹.

Although a contract of employment may be **oral or written**, the stipulation of a non-competition clause must be written (**Art. 2089 of the *Civil Code of Québec***).

¹ *Conseillers en informatique d'affaires CIA inc. c. 4108647 Canada inc.*, (C.A., 2012-03-22), **2012 QCCA 535**, SOQUIJ AZ-50841710, 2012EXP-1270, 2012EXPT-696, J.E. 2012-692, D.T.E. 2012T-221, EYB 2012-204061.

The contract of employment is therefore **subject to contractual freedom**. As soon as the two (2) parties come to an agreement, the contract will be presumed valid, including all of the obligations agreed upon by the parties in the course of negotiation.

DID YOU KNOW...

Can a **verbal offer of employment accepted** by the employee bind the parties? Yes, the job offer verbally accepted by the employee binds the parties, even if the parties foresee writing the terms of the contract. This step is not conditional to the validity of the contract, but is a mere formality.

d. THE EMPLOYER'S OBLIGATIONS

Remuneration and other obligations of the employer (Art. 2087 of the *Civil Code of Québec*)

Remuneration **includes salary and other monetary benefits**. It is the counterpart of the work performed by the employee. The form of remuneration and the manner in which it is paid do not constitute factors in determining whether or not there is a contract of employment (Art. 2087 of the *Civil Code of Québec*).

That being said, the remuneration aspect must be present, otherwise the task performed will be considered to be volunteer work, which is not governed by labour laws.

An employer is bound to allow the performance of the work agreed upon (Art. 2087 of the *Civil Code of Québec*). It is important to note that **the employer must provide work to the employee**, and the employee must be able to work. Therefore, suspending (with or without pay) someone without a legitimate reason is a violation of the contract.

The employer is bound not only to allow the performance of the work agreed upon and to pay the remuneration fixed, but also to take any measures consistent with the nature of the work to **protect the health, safety and dignity of the employee** (Art. 2087 of the *Civil Code of Québec*).

A lack or absence of work can be considered a measure that impacts the employee's dignity. This aspect is so important that it is the subject of a specific law, titled the *Act respecting occupational health and safety*.

An employer is bound to make reparation for injury caused by the fault of his employees in the performance of their duties. It should be noted that this is an absolute liability, for which there is no possible means of exemption, insofar as the situation fits into the regime provided for in **Art. 1463 of the *Civil Code of Québec***. This implies that an employer cannot rely on the fact that his employee was negligent, or that he did not commit any fault in order to exempt himself from his liability.

e. THE EMPLOYEE'S OBLIGATIONS

i. The obligation to perform the work with prudence and diligence (Art. 2088 of the *Civil Code of Québec*)

Work performance does not have to be perfect for an employee to fulfill his contractual obligations provided for in Art. 2088 of the *Civil Code of Québec*. An employee must, however, be prudent and diligent when performing the work. It is when there is negligence on the part of the employee that an employer can intervene.

ii. Duty of obedience to the instructions of the employer as part of the execution of the work

An employee is under a duty of obedience towards their employer corollary to the legal subordination of the employee, which means that the employer can issue (mandatory) directives to frame the work of the employee. However, the employer cannot issue directives which are contrary to the employment contract, the law, or public order.

iii. Duty of loyalty and discretion (Art. 2088 of the *Civil Code of Québec*):

It is important to distinguish the duty of loyalty and the non-competition clause which are two very different concepts in labour law.

a. Definition and scope of the duty of loyalty

The duty of loyalty has been codified in the *Civil Code of Québec* in Art. 2088. This duty is much broader and less restrictive than the non-competition clause. In fact, the duty of loyalty is nothing more than an expression of good faith in employment contracts and in the exercise of civil rights.

Moreover, the duty of loyalty exists in all employer / employee relationships and survives the termination of the employment contract. Unlike the non-competition clause which must be written to be valid, the duty of loyalty does not need to be included in the contract to be effective.

Case law has interpreted this principle in a rather liberal manner, consequently allowing a former employee to compete with his former employer while prohibiting unfair and abusive competition.

When a current employee acts within the scope of his employment, the duty of loyalty is translated in different ways. Therefore, the employee must:

- Refrain from placing himself in a conflict of interest with his employer;
- Protect confidential information;
- Demonstrate good judgment and integrity in their role within the organization; and
- Stay honest with the employer.

b. Duration of the duty of loyalty

The duration of the duty of loyalty varies across different types employments according to different non-exhaustive criteria, such as:

- Degree of responsibilities bestowed upon the employee;
- Access to confidential and strategic information;
- Area of business;
- Reasons behind the termination of the employment contract; and
- Level of competition within the area of business.

- ❖ A 2012 Quebec Court of Appeal decision held that the duty of loyalty rarely survives a few months after the end of the employee / employer relationship. In fact, the court recognized the importance of competition in a capitalist society, provided that such competition is fair and normal.

DID YOU KNOW THAT...

The obligation of loyalty which arises during the contract of employment continues to have effects even after termination of said contract and can justify, if necessary, the **issue of an injunction** to put an end to acts of illegal competition.

The case of dual employment – does this violate the duty of loyalty? It depends, it is a question which depends on the facts of the situation. However, dual employment could potentially generate a conflict of interest.

Discussions with a future or prospective employer do not in themselves constitute a breach of the duty of loyalty. An employee has the right to contact other employers, but such contact is subject to compliance with the non-compete clause and the protection of confidential information.

The obligation of loyalty does not require that a former employee refuse to take on clients which decided to follow him/her. Clients are free to make their choice, therefore an injunction cannot be ordered to prohibit a former employee from rendering services to clients of his former employer who have retained his services, without solicitation on his behalf.

In addition, the former employee must not **use or disclose confidential information** acquired during the course of employment for a reasonable period of time after the termination of the contract of employment.

Fact pattern

Question: Marc-André left his executive job at a Montreal engineering firm a few weeks ago. He has just received a job offer from a competing company. Marc-André thinks he is very qualified for the position because he will be able to use some privileged information obtained through his former employment to advance the competing company's interests.

Is Marc-André acting legally in pursuing this course of action?

Answer: NO! It is important for him to mention that he is prohibited from using privileged information obtained through his former occupation to the benefit of the competing company. The duty of loyalty prohibits him from disclosing privileged information. Marc-André will have to find another way to be valued within the competing company in order to be hired.

Conclusion

In summary, the duty of loyalty applies to all current employees at all time, and former employees for a certain period of time. The non-competition clause however must be expressly written in the employment contract to for it to be valid and effective.

The duty of loyalty must be interpreted more restrictively than the non-competition clause due to its wide scope of application.

Ultimately, this duty aims to protect employers from former employees who, with ill-intent and dishonesty, could benefit from privileged information obtained during the course of their employment in order to further competing interests.

iv. Non- competition clause (Art. 2089 and 2095 of the Civil Code of Québec) .

Employers may find the **guarantee of loyalty under Art. 2088 of the Civil Code of Quebec insufficient** to protect their interests. Consequently, employers may include a non-competition clause in their contract of employment therefore preventing future

competition with the employer. The employee's consent on the inclusion of such a clause will render the agreement binding and will prevent competing with the employer, even after the termination of the employment relationship, subject to limitations provided by law.

a. Definition of the non-competition clause

Non-competition clauses represent an important and controversial aspect of employment contracts. Often disputed, this clause must respect certain essential legal elements, which are occasionally ignored, and other times neglected during the drafting and signing of contracts of employments.

The non-competition clause in a contract of employment is a provision by which an employee engages himself/herself not to compete, for example by starting a business in the same industry or working for a competitor, with his employer for a pre-determined amount of time after the end of the employment relationship.

First, it is important to distinguish between the non-competition clause in contracts of employment and the non-competition clause in commercial contracts. Each clause requires distinct formalities and operates differently. We will therefore focus on non-competition clauses in contracts of employment.

Non-competition clauses are the subject of special attention in Art. 2089 of the *Civil Code of Québec*, which enacts the following:

2089. *The parties may stipulate in writing and in express terms that, even after the termination of the contract, the employee may neither compete with his employer nor participate in any capacity whatsoever in an enterprise which would compete with him.*

However, the stipulation shall be limited as to time, place and type of employment, to what is necessary for the protection of the legitimate interests of the employer.

The burden of proof that the stipulation is valid is on the employer.

Case law dealt with this issue on numerous occasions and has established a rather exhaustive definition, presented by the Honorable Judge Letarte in the judgment (*SNC-Lavalin Group Inc. v. Leboeuf* [1994] JQ No. 1262, at p. 61) :

"The non-competition clause imposes itself on the person who has made an important limitation with regards to his freedom. It cannot be contrary to public order or morality, its application must be limited in time and space, the restrictions it imposes must be proportionate to the reasons justifying it; it must not prevent the debtor from earning a living. This non-exhaustive list of requirements justifies the restrictive interpretation that jurisprudence has given to its terms." (Translated from French)

It is important to note that due to the third paragraph of article 2089 of *the Civil Code of Québec*, the burden of proving the validity of a non-competition clause rests with the employer. This represents an additional responsibility for the employer as it is necessary to justify the extent of the restriction according to the four (4) requirements described above.

b. Evaluation criteria

- ❖ It is important to note that a non-compete clause is unenforceable against an employee if the employer terminates the employment contract without a serious reason or if the employee terminates the contract for a serious reason.

Five (5) factors must be analyzed to determine the validity of a non-competition clause. Indeed, the clause must be:

✓ **Written**

To be valid, a non-competition clause must be explicitly written within the employment contract.

✓ **Limited in duration**

An employer cannot restrict an employee's freedom for an excessive period of time. It is therefore necessary to establish a reasonable time limit that will be appropriate for both parties when signing the employment contract. Historically, courts have rejected non-competition clauses with a duration of more than two (2) years. Every professional relationship is unique and will require a case-by-case analysis of the factual framework to determine its validity, hence the importance of informing oneself with the aid of a competent lawyer!

✓ **Limited in territory**

Territorial restrictions must not exceed the legitimate interests of the employer, in which case the clause could be declared unreasonable and therefore invalid. For example, an employer operating strictly in the city of Montreal could not impose a non-competition clause preventing an employee from working elsewhere in the province of Quebec in the event of his departure.

The intended territorial limits must be stated precisely and explicitly. To illustrate this point, the courts have rejected phrases such as "and in the vicinity", "metropolitan Montreal" and "the agglomeration of the city of Vancouver", the latter decision coming straight from the Supreme Court of Canada.

✓ **Limited as to the specificity of the work / position**

Art. 2089 of the *Civil Code of Québec* states that the non-competition clause must be reasonable with regards to the type of prohibited work. Limitation must be to pursue a legitimate purpose, for example, to protect trade secrets or confidential information. However, an employer cannot prevent an employee from using his/her skills, knowledge and experience for the benefit of another company.

For example, a non-competition clause preventing a restaurant server from working in the food industry would be overbroad and unreasonable, therefore the clause could be struck down in its entirety.

✓ **Proportionality**

Finally, limitations imposed in accordance to Art. 2089 of the *Civil Code of Québec* must be proportional to the purpose sought by the inclusion of a non-competition clause in the employment contract. Indeed, this criterion is implicit in the analysis of the factors of time, territory, and type of work.

Indeed, the importance and severity of the grounds underlying a non-competition clause will affect the court's tolerance vis-à-vis the limitations imposed on the employees of a company.

We only need to look at the pharmaceutical field, where the cost of research and development can be in the billions of dollars, to get an insight on the motives underlying the inclusion of a non-competition clause and the proportionality of the limitations sought. It is essential to protect the knowledge and the intellectual property so dearly acquired. Such circumstances will result in greater tolerance on behalf of various courts, who will then adapt their evaluation according to the context, the area of business in which the litigious parties are operating, and the importance of the position held by the employee concerned.

Criteria for Assessing Reasonability

Here are some of the factors that courts will take into account when assessing the reasonableness of a disputed non-competition clause:

- The position held by the former employee;
- The importance of his position within the company;
- The duration of his employment;
- The circumstances under which he started his job;
- The field of activity in which the company evolves; and

- The skills acquired, and contacts developed by the former employee during the duration of his employment with the company.

An ambiguous non-competition clause will be interpreted in favor of the employee.

Conclusion

In conclusion, when a non-competition clause is challenged, courts must strike the proper balance between the interests of both parties. On one hand, it is important to allow the employee to have a certain mobility within the labour market, and, on the other, the importance of preserving freedom of contract which allows the inclusion of a non-competition clause within the employment contract.

v. *Non-solicitation clause*

A. Definition of the non-solicitation clause

Non-solicitation clauses are the last of the three (3) main restrictive methods used by an employer to protect its clientele from dishonest employees.

As for its scope and limits, the non-solicitation clause falls between the non-competition clause, which can be much more restrictive towards former employees, and the duty of loyalty, which is intended to be a general obligation of good faith and conduct which extends to a few months after the end of the contract of employment.

It is important to define the term “solicitation” correctly in order to understand this legal concept and distinguish it from the non-competition clause and the duty of loyalty.

Conventional dictionary definitions of the term “solicitation” have been referred to in applicable case law as the conduct of someone being reproached much more than simply occasionally or casually.

B. Scope, duration and extent of the non-solicitation clause

A non-solicitation clause must be written explicitly in the contract of employment for it to be valid, enforceable and imposed on an employee or former employee. Its limits lie in the protection of the employer’s interests.

Therefore, advertising which is addressed to the general public cannot be considered solicitation.

To recognize a breach of a non-solicitation clause, an employer will have the burden of proving in court that a former employee has actively and insistently solicited a client from the company. The threshold to meet this burden is high and it is therefore difficult for employers to rely on such a clause.

The duration and scope of a non-solicitation clause depends on the field of business in which the company operates and its type of clientele. Depending on the employment contract, it may remain in force up to one (1) year after the end of the employment

Mise en situation

Question : Joey is starting a new management job with a company. When signing the contract of employment, he realizes that it prohibits him from contacting, in any way, large customers once the contract of employment has come to an end. According to Joey this clause is illegal since its scope is far too broad. The company responds that it has all the rights to include a non-solicitation clause of this kind in the contract to protect its customers from new employees who might be in bad faith. Is Joey's challenge valid?

Answer: Yes! This non-solicitation clause is far too broad and cannot meet the definition of "solicitation". Therefore, it is possible for the employer to include such a clause in the employment contract, but it must comply with the scope and duration criteria developed in the jurisprudence.

relationship and may apply nationwide.

Conclusion

In view of the foregoing, it is important to remember that to benefit from optimal protection, an employer ought to resort to all the abovementioned restrictive measures within reasonable limits. Absent thereof could result in an endangerment of intangible assets and expose oneself to possible complex legal disputes.

If you are looking for a competent lawyer in this field, please contact our law firm and inquire about your rights!

At Schneider Attorneys, we understand the needs and concerns of our clients and we are committed to providing a tailored service that meets the unique needs of each client.

f. ENDING THE WORK CONTRACT

The employment contract may end for several reasons. While some are valid, others are not.

i. Definitions - Termination, Dismissal and Suspension - what's the difference?

First, it is important to distinguish between the concepts of termination, dismissal and suspension to avoid confusion regarding subsequent procedures and remedies.

- a) **Termination** = Unilateral and definitive decision by an employer for various (non-exhaustive) reasons to terminate the employment relationship:

It is important to note that termination can occur as a result of a single serious breach (i.e. stealing money from the cash register), or a number of repetitive breaches (i.e. frequently arriving late for work).

Termination means that the employer still requires an individual to fulfill the tasks of the person dismissed, but that the former employee is no longer required within the organization.

Please see the section Termination ([Hyperlink](#)) for more information.

- b) **Dismissal** = Definitive termination of the contractual relationship for reasons related to the internal or economic situation of the company, which may include:

- Decline in business;
- Restructuration;
- Bankruptcy; and
- Loss of contracts.

Dismissal means that an employer, despite his/her satisfaction of his/her employees, no longer need their services and is now unable to meet his/her contractual obligations owed to them.

In order to qualify the dismissal of employees as a collective dismissal, the employees concerned must belong to a group which:

- 1) Consists of at least ten (10) employees of the same establishment;
- 2) Are on sick leave or has been laid off for at least six (6) months; and
- 3) Each dismissed within two (2) consecutive months.

- c) **Suspension** = Temporary suspension of the employment contract. The employee can be recalled at any time, depending on the economic situation of the company. It is important to mention that during a layoff, an employee retains his status as an employee and his contractual relationship with the employer is preserved.

- ❖ Layoff is often resorted to in production centers, when production is slowed down due to a decline in customer demand, for an indefinite period of time. It is also the preferred legal apparatus in the context of seasonal jobs.

According to section 82 of the *Act respecting labor standards*, an employee must receive a notice to that effect if the layoff is intended to last for a period of six (6) months or more.

The notice:

The layoff notice must be given within a period which will vary according to the duration of the employee's continuous service:

<i>Continuous service</i>	<i>Deadline for notice</i>
<i>Less than 3 months</i>	No
<i>Less than a year</i>	1 week
<i>1 to 5 years</i>	2 weeks
<i>5 to 10 years</i>	4 weeks
<i>10 years or more</i>	8 weeks

Fact Pattern

Question: Max has been working in a factory for seven (7) years. He was laid off four (4) months ago. Today, he received a letter from his employer in the mail advising him that his employment contract will end in four (4) weeks.

Is this notice legal?

Answer: No, a layoff notice which is given while the employee is already off work is void and of no effect. Based on the table above, the employer must pay him a compensatory indemnity equal to four (4) weeks of work.

ii. Agreement between the parties

An agreement between the parties is the most common way of terminating a contract of employment.

The parties, by mutual agreement, may terminate the contract of employment at any time, regardless of their initial agreement concerning the duration, if any, of the employment period.

iii. The death of the employee

The death of an employee always terminates the employment contract. (**Art. 2093 of the *Civil Code of Québec***).

Two (2) examples:

- (1) In the case of domestic work, if the employer dies, the employment contract will most likely end, being in a situation referred to in Art. 2093 of the *Civil Code of Québec*;
- (2) However, the owner of a small grocery store may continue to operate through their heirs. Death of the employer will not necessarily terminate the employment contract.

iv. “Superior force”

According to the general rule set out in **Art. 1470 of the *Civil Code of Québec***, superior force **releases the debtor** from its contractual obligations, unless explicitly stipulated otherwise. Superior force is an unforeseeable and irresistible event, including external causes with the same characteristics.

For example, if a company’s physical establishment experiences a sudden flood, and the employer cannot provide work during the renovation period, such circumstances could be held to be superior force.

It is only in exceptional circumstances that economic difficulties faced by an employer will be considered a case of “superior force”.

v. The dismissal

A. Criteria for dismissal (according to Art. 2094 of the *Civil Code of Québec*)

Art. 2094 of the *Civil Code of Québec* enacts the following with regards to the termination of the employment contract:

“One of the parties may, for a serious reason, unilaterally resiliate the contract of employment without prior notice.”

The employer must therefore ensure that the dismissal complies with the laws in effect. For example, an employee may be fired for one of the following reasons (these causes are non-exhaustive):

- Misbehavior;
- Bad attitude;
- Lack of aptitude;
- Low performance; and
- Lack of skills.

If an employer wishes to dismiss an employee without providing a notice of dismissal within the appropriate time limit, the employer in question will have to justify his motives.

It is important to note that **economic reasons** are not serious grounds within the ambit of Art. 2094 of the *Civil Code of Quebec* [5] .

Serious motives can be grounded in a single serious and isolated breach (i.e. theft of money from the cash register), but can also come from several accumulated shortcomings (i.e. repeated absences) following a series of sanctions.

❖ The Supreme Court enunciated the following criteria in the *Farber v. Royal Trust* decision **in order to define the term "constructive dismissal"**:

- 1) Unilateral decision of the employer;
- 2) Substantial modification of the essential elements of the contract of employment;
- 3) Refusal by the employee of the modifications made; and
- 4) The departure of the employee.

Fact Pattern

Double Sanction

Louis, who has been a laborer in a furniture manufacturing plant for five months, made a mistake in his daily tasks. In response, his employer decided to suspend him for one week. This is the first time that Louis has been subjected to disciplinary measures from his employer. However, during his suspension, Louis received a notice of dismissal effective within a week.

This notice of dismissal is illegal because it is a double sanction without just and sufficient cause.

- ❖ **Recommendation to employers:** In a situation such as this one, the employer could issue a written notice to the employee stating that if the mistake is repeated, the employee may be dismissed.

Constructive dismissal

Valerie has been working 40 hours per week, Monday to Friday from 8 am to 17 pm at the hourly rate of \$ 18 for two (2) years as a receptionist. Overnight, her employer tells her that she will now work 20 hours a week, Monday to Friday from 8 am to 12 pm at an hourly rate of \$ 10.

This could be considered a case of constructive dismissal, since the employer indirectly pushed the employee to find another job to maintain her working conditions.

Finally, the court must consider whether, in the same situations, a reasonable person would have believed that such modifications were substantial changes to his employment contract.

- ❖ The Supreme Court held in the *Potter c. New Brunswick Legal Aid Services Commission* decision that **constructive dismissal can take two forms** :

- 1) A single unilateral act that involves a substantial breach of an essential express or implied condition of the employment contract; or
- 2) A series of acts which, taken together, show the intention of the employer to no longer be bound by the contract and renders the situation intolerable for the employee.

This decision discusses the administrative suspension with pay of an employee and specifies that it must be justified and reasonable, because otherwise it would constitute a constructive dismissal.

For more information on constructive dismissal, please consult the blog [5 things to know about wrongful dismissal](#).

Significant Distinction: Dismissal and Termination

Annie has been working as a waitress for the same employer for seven years. Her employer dismissed her under the pretext of a decline in sales, and financial difficulties. One week after her dismissal, Annie learns that her former employer hired another person to perform the same tasks at the same hourly rate.

This is a dismissal without just and sufficient cause, since the employer cannot invoke the dismissal here because he replaced Annie.

For more information on the differences between dismissal and termination, please consult the blog [3 things to know about the differences between a dismissal and a termination of an employment contract](#).

B. Issuing a written notice of termination of employment

The employer must issue a written notice to the employee before terminating the employment contract between the parties. The amount of time between issuing the notice and the employee's departure varies depending on the duration of the continuous services provided for by the dismissed employee.

The law imposes:

Continuous service life	Time between notice and departure
3 months to 1 year	1 week
1 to 5 years	2 weeks
5 to 10 years	4 weeks
10 years or more	8 weeks

An employer may terminate an employee's contract without notice if the employee has accumulated less than three (3) months of continuous services.

The notice must contain the following information:

- Name and address of the employer;
- Area of business;
- Name of the employee concerned;
- Reason for dismissal; and
- Expected date of dismissal;

If an employer fails to issue a termination notice to the employee or if the employer does not comply with the statutory deadlines, the employer will be required to compensate the employee.

An employee who believes to be entitled to a minimum leave period, or compensation in accordance with Art. 2092 of *the Civil Code of Québec* may make a demand to his employer.

Calculation of the notice of severance pay (general rate employee)

- Determine the duration of the notice based on the number of years of continuous service;
- Determine the weekly salary of the former employee, excluding overtime;

- iii. Calculate the compensation from this information; and
- iv. Payment of compensation (if applicable). In cases where compensation is payable, the employer must pay it at the time of the dismissal

C. Notice of termination

- ❖ It is important to understand that in the context of a contract of indefinite duration, by providing reasonable notice of termination, the employer may dismiss his employee whether he has serious grounds or not.

Art. 2091 of the Civil Code of Québec states:

“Either party to a contract for an indeterminate term may terminate it by giving notice of termination to the other party.

The notice of termination shall be given in reasonable time, taking into account, in particular, the nature of the employment, the specific circumstances in which it is carried on and the duration of the period of work.”

- ❖ Quebec law recognizes that bonuses and stock options are part of the total compensation and are generally due as part of the leave period. [6]

Art. 2092 of the Civil Code of Québec states:

“The employee may not renounce his right to obtain an indemnity for any injury he suffers where insufficient notice of termination is given or where the manner of resiliation is abusive.”

- ❖ **Recommendation to employees:** Note that an employee is also required to provide reasonable notice to the employer before leaving. However, case law recognizes that this period is shorter than that of the employer, in particular because of the power imbalance between both parties.

It is worth mentioning that a clause providing for the notice period required concerning the termination of the employment contract does not bind the parties since Art. 2091 and Art. 2092 of the *Civil Code of Québec* states that the length of notice must consider the circumstances surrounding the termination. Since it is impossible to foresee the circumstances surrounding the termination of a contract at the time of its formation, a contract of employment cannot include such a clause.

It is also noteworthy that the contract of employment ends at the end of the notice period and not when a party gives notice of its unilateral termination. This ensures that the **work contract continues to exist** during the notice period. The only thing that changes is that it is known when the contract will end. Therefore, mutual obligations which exists between both parties remain in force until the end of the notice period.

Remedies: In the event of a work contract of indefinite duration, the party who is a victim of a unilateral termination which does not meet the conditions of Art. 2091 of the *Civil Code of Quebec* may complain to the courts of common law. The employee usually will get **damages** equivalent to the salary he would have received during the notice period prescribed under Art. 2091 of the *Civil Code of Québec*

Under the doctrine of abuse of rights, the employer who decides to unilaterally terminate a contract in an **abusive, malicious or excessive** manner may **be held liable for moral damages**.

This would be particularly true if a party commits an unintentional error which causes a prejudice that goes beyond what normally arises from a unilateral termination, for example, damage to reputation, or humiliation suffered by the employee.

Could the employee also claim moral damages, following the pain and/or suffering he has suffered?

To the extent that the employer has exercised the right to terminate employment unilaterally, he cannot be blamed. The fact remains that the employee has the option to unilaterally terminate the contract at any time without cause. One cannot complain by claiming moral damages.

v. Changes in ownership or administration of the company

According to Art. 2097 of the *Civil Code of Québec*, the sale of a company does not terminate a contract of employment. The new employer (purchaser) is bound by the contract in the same function as the previous employer (seller)

For Art. 2097 of the *Civil Code of Québec* to apply, there must be a change in ownership, or in other words, a legal link between the two employers. In addition, the new employer must continue the same business operated by the former employer.

1. LABOR STANDARDS

a. Who is subjected to the *Act Respecting Labour Standards*?

▪APPLICATION OF PUT LNT CHART

b. Labor standards

The *Act Respecting Labour Standards* sets **minimum standards** in relation to:

- ✓ **Duration** of work;
- ✓ **Salary**, including the frequency, terms of payment, gratuities, permitted deductions, etc.;
- ✓ **Mandatory breaks and lunch periods**;
- ✓ **Statutory holidays**;
- ✓ **Annual leave and holidays**;
- ✓ **Parental leave**;
- ✓ **Sick leave** or for the **death of a family member**;
- ✓ etc.

If you are looking for a competent attorney in this matter, please contact our firm and learn about your rights!

At Schneider Attorneys, we understand the needs and concerns of our clients and we are committed to providing a service tailored to the particular needs of each client.

2. REMEDY

a. ADMINISTRATIVE AND CIVIL PROCEEDINGS

An important feature of employment law is **the applicable jurisdiction** with regards to the remedies available. It is important to draw a procedural distinction between seeking a remedy through an administrative tribunal, that is to say before the *Commission des normes, de l'équité, de la santé et de la sécurité* (hereinafter the "**CNESST**"), and an appeal to a court of common law, including the **Court of Québec** or before the **superior Court** depending on the amount in dispute. There will thus be various legal procedures which will apply depending on the type of proceedings. Note that the time within which an action must be brought differ across different type of tribunals.

What is interesting in this regard is that the same conflict can be brought before the CNESST AND before a court of law **simultaneously**, subject to *res judicata*. Therefore, a civil remedy cannot question the findings of a CNESST decision, but could be valid if for example, a just cause is established which gives way to a dispute before a court of law for damages.

In practice, in most cases, interested parties will address a court of law in the event that one party involved in the dispute is excluded from the *Act Regulating Labour Standards*.

b. AGAINST DISMISSAL WITHOUT SUFFICIENT AND JUST CAUSE

PUT CHART

c. AGAINST PROHIBITED PRACTICES

PUT CHART

d. PECUNIARY CLAIMS

The *Act Regulating Labour Standards* provides a remedy for an employee if an employer fails to pay an employee **wages** owed to him. Indeed, CNESST may, on behalf of an employee, claim from the employer unpaid wages or **other monetary benefits** offered under the *Act Regulating Labour Standards*.

Consult one of our attorneys to discuss your particular situation if you believe that your employer has not paid all monies owed to you.

e. PSYCHOLOGICAL HARASSMENT AT WORK

All employees are entitled to a workplace free from psychological harassment. **It is up to the employer** to take reasonable action to **prevent** psychological harassment and, when the phenomenon is brought to its attention, to make it **stop**. It should be noted that harassment **violates the dignity** of the employee.

The notion of " psychological harassment " is defined by the *Act Regulating Labour Standards* as:

"Any vexatious behavior in the form of repeated and hostile or unwanted conduct, verbal comments, actions or gestures, that affects an employee's dignity or psychological or physical integrity and that results in a harmful work environment for the employee."

Harassment is generally perceived as either an aggregate of gestures or a serious single gesture. It should be noted that sexual harassment is included in the concept of psychological harassment.

Psychological harassment could come from the employer, colleagues or even a customer. With that said, the employer could be held liable **regardless of the source of harassment**. This is a heavy responsibility.

An employee who believes he/she has been subjected to psychological harassment must submit his/her complaint in writing to the CNESST within two(2) years of the last incidence of the behavior.

If you believe you have been the victim of conduct that could be considered harassment, do not wait to contact our office to consult one of our lawyers!