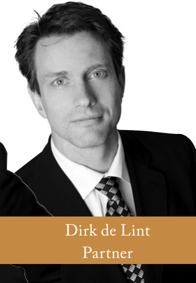
What You Don't Know Can Really Hurt You™

WHAT EVERY DOCTOR SHOULD KNOW ABOUT HR LAW™



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Long Notice for Short Service

Most readers know by now that long-service employees in Canada are dangerous in the sense that they represent an expensive contingent liability in the event their employment is terminated (or they quit and allege they were "constructively dismissed"). Does that mean we don't need to worry about short-service employees? According to a growing string of cases, short-service employees are entitled to a disproportionately greater notice period. This is yet another good reason to ensure every employee is hired (or transitioned properly) onto high quality, enforceable contracts with judicially approved termination provisions.

The factors that Courts assess to determine how much (pay in lieu of) reasonable notice to award an employee (commonly known as the Bardal factors) include: the age of the employee; the character or nature of the employment; the length of service to the employer; and the availability of similar employment; having regard to the experience, training and qualifications of the employee.

When calculating notice periods for employees at common law, the very rough rule of thumb is one month per year of service. What about short service employees? Courts have been awarding longer reasonable notice periods to short service employees because they increasingly feel that the rule of thumb places a disproportionate weight on length of service and underemphasizes other factors such as the nature of the employee's work or their age.

"A Practice Protection Package™ will pay for itself many times over and help you sleep at night. A must for any practice! Very professional people to work with."

Dr. Izchak Barzilay DDS, Cert. Prostho., MS, FRCD(C)

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In a recent case out of British Columbia, *Greenlees v. Starline Windows Ltd.*, the Court awarded Mr. Greenlees six months' reasonable notice after a mere six months of work. Mr. Greenlees was employed by Starline as a sales professional for six months when he was fired without cause and was paid one week's notice. Mr. Greenlees had not been actively looking for alternative employment when he received a call from Starline, and he had no experience selling windows but was hired on the basis that he had sales experience in the construction industry. It took Mr. Greenlees seven months to find another job after his employment at Starline was terminated.

The court ordered that Mr. Greenlees' job search was diligent and the factor of limited availability of alternate employment following termination warranted an increase in the notice period. There should be an upward adjustment to the notice period to take into account the limited availability of alternate employment and some degree of inducement. Mr. Greenlees was entitled to pay in lieu of six months' notice plus lost commission income, for total damages of $28,400.88. He was also awarded costs of approximately $8,000.

There have also been several recent cases out of Ontario which gave short service employees disproportionately longer reasonable notice periods.

In *Nemirovski v. Socast Inc.*, the Court awarded Mr. Nemirovski nine months' reasonable notice after just 19 months of work. Mr. Nemirovski worked for Socast Inc. as a product manager when he was terminated without cause. Mr. Nemirovski was 40 years old at the time of termination, and it took him over nine months to find alternative employment which paid less. Socast Inc. did not provide Mr. Nemirovski with a reference letter. There were two employment contracts that governed the employment relationship but neither of them contractually limited Mr. Nemirovski's entitlements on termination, and he was entitled to reasonable notice at common law. One employment contract subjected Mr. Nemirovski to an onerous non-competition clause, and there was evidence that Mr. Nemirovski lost a job opportunity as a direct result of the non-competition clause. Given the non-competition clause and Socast Inc's failure to provide Mr. Nemirovski with a reference letter, the Court concluded that he was entitled to notice at the high end of the range.

In *Bergeron v. Movati Athletic (Group) Inc.*, the Court awarded Ms. Bergeron three months' reasonable notice after a mere 16 months of work. Ms. Bergeron had become the general manager of one of Movati's health

"Since implementing a PPP™ in my practice a few years ago, I have obtained a **12 times return** on my investment thus far."

Jordan L Soll, BSc. (Hon), DDS, Dip. ABAD

Co Chairman, Editorial Board, Oral Health Journal
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Continued on pg. 2

Continued from pg. 1

and fitness facilities in August 2015 and managed 90 employees. Movati terminated Ms. Bergeron without cause in December 2016 when she was 38 years old. Within a month, Ms. Bergeron secured work as mortgage representative on a one-year contract basis with lower compensation. The Court took the following factors into consideration to determine Ms. Bergeron's reasonable notice period: she was 39 years old, had a Diploma in Hotel Management, was working in a middle to upper management position with Movati, was employed for a period of 16 months, was able to secure alternate work and mitigated her damages.

In *Nogueira v. Second Cup*, the Court awarded Ms. Nogueira's four months reasonable notice after 8.5 months of work. Second Cup claimed the clause in the employment agreement displaced Ms. Mogueira's right to reasonable notice and limited her rights to compensation set out in the *Employment Standards Act, 2000* (the "*ESA*"). Ms. Nogueira, on the other hand, claimed the clause was merely confirmation that Second Cup would comply with the relevant law. The clause in the employment agreement was capable of two constructions as reflected in the positions of the parties. Second Cup was responsible for drafting the employment agreement, and to the extent that ambiguity existed in the interpretation, the agreement should be interpreted against Second Cup as the drafter. This is what we refer to in law as the doctrine of *contra proferentem* [literally, "against the profferor" i.e. against the interests of the party putting forward the agreement]. The words of the employment agreement were ambiguous at best, they did not convey the meaning Second Cup attached to them and they did not rebut the common law principle of reasonable notice.

This highlights a crucially important issue: ensure that your employment agreements are actually enforceable! At MBC, we are regularly asked to review "contracts" to provide a second opinion and over 90 per cent of the time, they are not worth the paper they are written on. If you have an employee depart, they are increasingly likely to consult an employee-side lawyer who will review their agreement to determine whether it is worth taking a run at you, so to speak. And when you get a demand letter from such a lawyer, you will likely wake up in the middle of the night and pray that your agreements are enforceable. Statistically, they are likely to be defeated. At a minimum, they are typically debatable enough to warrant challenging you in an attempt to get a settlement, using what at MBC we refer to as "litigation extortion" costing you well into the six figures. Ensure that everyone who works for you is hired, or transitioned properly, onto a legally enforceable agreement and a comprehensive set of workplace policies. MBC Legal's comprehensive package of contracts and policies, the trademarked Practice Protection Package ™ (the PPP ™) has not only been tested in Court on more than one occasion, it has always defeated the employees' claims, and even won significant costs awards against the employees. (If you appreciate how pro-employee Canadian Courts are, you will realize what an exceptional coup this is.)

No Excuses.

There is no excuse for not transitioning all staff to bullet-proof contracts and policies (unless you have a strong desire to inflict an expensive, stressful mess on yourself and your family). When you get a demand letter from an employee-side lawyer for several hundred thousand dollars, you will wake up in the middle of the night and pray that your contracts are enforceable. Statistically, your prayer is unlikely to be answered. When we are asked to provide a second opinion on other "contracts", over 90% of the time they are not worth the paper they are written on. Don't wait for an HR disaster before you call us. **Contact us today.**

Friends Don't Let Friends Suffer HR Disasters

For many professionals who are committed to excellence, one of the most gratifying things about practicing is the number of referrals we get from happy clients. So many of our delighted Practice Protection Package™ clients are helping to spread the important information to their friends and colleagues that having Court-approved contracts and policies with all staff is life changing. If you already have a PPP™, tell a friend or colleague how it has changed your practice life today. We thank you, and once your peers learn what every doctor should know about employment law, they will thank you too!

Know What Your Colleagues Know

To be included in our hugely popular monthly e-lert (with three times the industry average readership) send an email (saying: "Add me to the MBC Legal e-lert roster") to mbc@mbclegal.ca.

"My PPP™ saved me over **$100,000** I would have had to pay to employees who left or got fired. It happened on two occasions and MBC destroyed their lawyers with incredible back up and case law. Guess what: we never heard back from their lawyers. Pay a little now to save a ***t load later - not to mention the aggravation."

— Dr. Eric Rouah

Turnkey Workplace Programs & Training

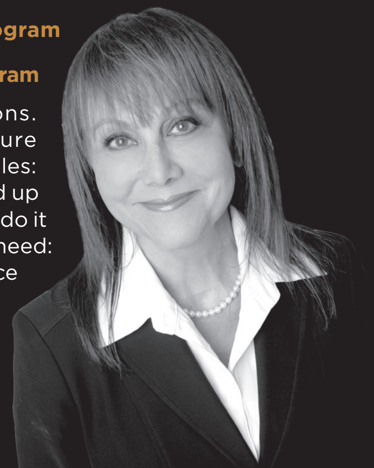
Most doctors have neither the time, nor the inclination, to develop workplace programs to train their staff on the myriad issues on which the law now requires that staff must be trained.

When doctors delegate the task to an employee, they find almost invariably that the end product is not sufficient to meet legislative requirements. Everyone is then frustrated that all that staff time and effort (and the wasted payroll) was all for naught. The regulatory requirements are complex so it is understandable that a medical or dental office employee will extremely rarely have the requisite knowledge, training or experience to produce a program and training that is legally compliant.

We can help. If your staff have not been trained on Health and Safety, IPAC, Accessibility or Anti-Violence, we have programs that will do it all for you:

I. Workplace Infection Control Program

ii. Workplace Health and Safety Program



Both programs are turnkey solutions. When shopping for programs, ensure that you are comparing apples to apples: how much of the program will you end up having to do yourself? MBC programs do it all for you and include everything you need: assessments, posters, forms, compliance checklists, comprehensive manuals and training of your staff.

For more information or to reserve one of the remaining spots in our roster, contact Maria at 905-464-2545 or mct@mbclegal.ca.

Love MBC Legal? Flip over for our Brokerage Division...

Continued from pg. 1

1. The Contractor is registered with the CRA with a business and (where applicable) HST numbers, and charges HST to the principal.
2. The independent contractor agreement is clear that the principal is free to stop assigning further work at any time, as is the contractor free to refuse jobs from the principal.
3. The contractor is entitled to determine who actually performs the work and can hire its own employees independently of the principal's hiring standards.
4. The contractor has separate office premises and pays all associated costs.
5. The contractor is free to perform work for other principals, and actually does.
6. The contractor is not integrated into the principal's work environment and provides their own tools and equipment.
7. The contractor meets the principal's deadlines, but chooses their own actual working hours.
8. The contractor does not get an hourly rate or a salary, but rather sets a flat price for jobs, and pays all their own costs associated with each job.

The above eight points are only a small window into the areas examined when deciding whether an associate is an independent contractor, or an employee. (To learn more, see the checklist, "Employee or Contractor" on the Articles and Videos page at www.mbclegal.ca.) The more checks you can place under one of the two columns (independent contractor or employee), the more confident you can be in the way the courts and CRA will likely rule.

This is not a matter to be taken lightly. If the CRA rules in favor of an "employer and employee" relationship, as principal, you could be ordered to pay retroactively for many years all the uncollected EI and CPP premiums, unwithheld taxes, plus the penalties and the interest. With the extremely high number of women entering the industry every year, issues also tend to arise when an associate becomes pregnant. Often, the push to characterize the relationship as one of "independent contractor" and principal (vs employer and employee) was driven by the associate him- or herself. The associate understandably wishes to be able to receive favourable tax treatment from being allowed to deduct expenses against their income. As you can imagine, however, when the designation between independent contractor and employee is blurred, and there is significant economic incentive to "switch sides" (for example, because an associate may find herself pregnant and may wish to derive the benefit of employment insurance benefits,) the result is all-too-often a demand letter to the practice owner (from the CRA or an employee-side lawyer, or the Ministry of Labour) demanding many tens of thousands of dollars. Do not allow this to happen to you!

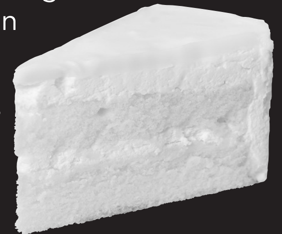
Before hiring an independent contractor, or to ensure you have actually hired an independent contractor, seek professional help by contacting an employment lawyer specializing in the medical professional industries. (Our Legal Division would love to hear from you!) With proper guidance, as the principal, you can accurately set out the terms and conditions of your working relationship in a written contract, helping to reduce the risk this individual instills on your practice. Not only will this protect you from extremely costly legal problems during your ownership, it will also increase the saleability, sale price, and the overall transferability of your practice and legacy.

Have your cake and eat it too!

Enhance your practice value while solidifying the transfer of your legacy with the help of our expert team. Contact us for an appraisal now.

MBC Brokerage, the progressive, full service appraisal, legacy preservation and brokerage team is dedicated to standing by you, every step of the way.

Our many years of experience in finance, management, on-site professional practice consultation and business-system management allow our team to provide expert advice and guidance during the performance of professional practice appraisals and custom brokerage services tailored to your specific practice and goals. We pride ourselves on providing an invaluable service, every step of the way, to professionals looking to improve, plan and prepare their legacy for an eventual transition from ownership for any reason.



Call us to learn why so many of your colleagues love and trust us.

How can we help you?

- Professional practice appraisal
- Professional practice sales and legacy preservation and transfer
- Practice purchasing preparation and advice
- Business, financial and day-to-day practice consulting

Want to get the latest news and new practice purchase opportunities? Visit www.mbcbrokerage.ca and click on the "register now" button.

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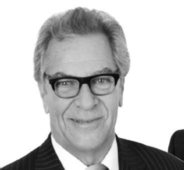
What You Don't Know Can Really Hurt You™

WHAT EVERY DOCTOR SHOULD KNOW ABOUT APPRAISING AND SELLING PRACTICES™

Jon Walton
General Manager
Sales Representative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Did you give in to the temptation to treat your associate as an "Independent Contractor"?

Do you have an associate? Are you hiring one soon? Is your associate on an employment agreement? Or did you make it an "independent contractor" agreement? Whether you treat your associate as an employee or an independent contractor will not only affect you during your practice ownership but also when you prepare to sell your practice.

There is a temptation to treat associates as independent contractors, which is understandable. But it should not be done hastily. In our experience, most owners fail to measure carefully enough the pros and the cons of the issue because they do not understand the full ramifications.

There is no one decisive test to determine whether an individual is an independent contractor or an employee; a number of factors must be carefully considered. That being said, we have seen successful treatment of associates as independent contractors, as well as some failed occurrences that have led to detrimental results to the practice owner (both during ownership, and during the sale of their practice).

There is no one decisive test to determine whether an individual is an independent contractor or an employee; a number of factors must be carefully considered. We have seen associates being successfully treated as independent contractors, as well as failed attempts that have cost the practice owner many tens of thousands of dollars, either during ownership, or during the sale of their practice.

As specialized health-care-practice business valuators, consultants and brokers, we view associates being independent contractors and employees quite similarly with respect to practice value and marketability. Both are considered a risk to your business. The magnitude of this risk is determined by the actions you take as principal to protect yourself from future issues that could arise. Is the associate a major earner for the practice? Is the associate on a high-quality, written and signed agreement clearly stating terms and expectations? Well-advised buyers (and buyers are increasingly surrounded by a team of competent advisors—bankers, accountants, employment lawyers, corporate lawyers—and therefore very well advised) will also ask whether this associate is actually an independent contractor, or will the CRA and the courts rule them to be an employee? Bear in mind that over 90% of the time that the CRA investigates independent contractor designations, they determine that the individual was actually an employee.

Another problematic area is doctors using serial, one-year contracts, renewed over and over again. Many doctors feel a false sense of security that they are protected through this yearly contract renewal. Courts tend to see this as a way of circumventing common-law termination entitlements and readily disallow it.

The following are some of the indicators that the CRA, the Courts, or other tribunals will look for to determine that an individual is truly an independent contractor:

continued on pg. 2

Finding a good professional appraiser specializing in a specific health care industry is not easy, and optometry is certainly no exception. Jon Walton at MBC Brokerage has a tremendous experience in appraisals, specifically in the optometric field. Him and his team at MBC are professional, courteous and thorough. I have personally reviewed many of his appraisals over the years and I can say with confidence that their quality of work and attention to details are second to none.

Dr. Sam Baraam, H.B.Sc., O.D.

360 Eyecare, President and Owner
Metro Eye Care, President and Principle Partner
OLIB Marketing and Consulting, Practice Management Consultant

I was introduced to Irv Handler in 2009 by my trusted accountant/advisor and friend when I was looking for financing for a practice I was opening. I met with several bankers from various institutions during the process. Irv was better prepared, more knowledgeable about my profession/industry and more willing to work to understand my particular unique situation to get me the best deal he could. He was honest and did not just tell me what I wanted to hear, it was also genuine. I don't think there are too many people in the financial world with as good an understanding of optometry as Irv. Most tend to compare us to other professions like dentistry, which is not an equal profession in terms of revenue streams with respect to balance of services and products.

Integrity, knowledge and reliability would be the three words I would use to characterize him. Not to mention he is a nice guy and a pleasure to deal with.

Mike Rotholz

View Eye Care