



# DEVRY, SMITH & FRANK *LLP*



Since 1964, Devry, Smith & Frank LLP has been a trusted advisor and advocate for corporations, individuals and small businesses. These enduring relationships form the cornerstone on which the firm is built. We have grown in recent years and are now a group of 30 lawyers, 5 licensed paralegals, 15 law clerks, and 50 support staff.

We have expertise in most areas of corporate and personal law. We pride ourselves on providing approachable, professional and affordable client-tailored service. We work as a team to provide you with the expertise and resources required to achieve the best possible legal result.

**DSF**

95 Barber Greene Rd,  
Ste. 100  
Toronto, Ontario M3C 3E9  
416-449-1400

[www.devrylaw.ca](http://www.devrylaw.ca)

## (SOME OF THE) COMMON MISTAKES EMPLOYERS MAKE WHEN HIRING AND FIRING

### 1. THEY FAIL TO GET LEGAL ADVICE BEFORE FIRING:

- Emotional
- A lot of misconceptions
- A lot of gray areas
- Tactics
- Documentation and Proof

### 2. THEY PAY A LUMP SUM AMOUNT OF MONEY AS PART OF THE TERMINATION PACKAGE:

- Notice
- Wait and see approach
- Bi-weekly
- Mitigation Concept

### 3. THEY GIVE *EMPLOYMENT STANDARDS ACT* NOTICE ONLY

- What is the *Employment Standard Act*?
- What is severance?

### 4. THEY DON'T READ THEIR OWN CONTRACTS OR THEY HAVE POOR CONTRACTS:

- Employers can contract out of (or limit) a notice obligation
- ILA

## 5. THEY ATTEMPT TO FIRE FOR “CAUSE”

- What is “Cause”
- Terminating for:
  - a) Poor Performance
  - b) Insubordination
  - c) Dishonesty at the time of hiring
  - d) Dishonesty in the course of employment
  - e) Alcohol Use
  - f) Sexual harassment
  - g) Theft
  - h) Criminal Act
  - i) Drug Use/Possession

### But be careful:

- ◆ *Bell v. General Motors of Canada*, 37 C.C.E.L. 110 (Ont. SC HCJ)
- ◆ *Ward v. McDonald’s Restaurants of Canada Ltd.*, 39 D.L.R. (4th) 469, (BCSC)
  
- ◆ *Obeng v. Canada Safeway Ltd.*, 2009 BCSC 8 [2009] B.C.W.L.D. 934, 70 C.C.E.L. (3d) 212
- ◆ *Day v. Walmart Canada Inc.* 2000NSCA 127, 4 C.C.E.L. (3D) 226, 188 N.S.R. (2D) 69, 587 A.P.R. 69, C.L.L.C. 210-016
  
- ◆ *Soplet v. Bank of Nova Scotia*, 57 C.C.E.L. (3d) 269, (CAB)
- ◆ *Islip v. Coldmatic Refrigeration of Canada Ltd.*, 2002 BCCA 255, 100 B.L.R. (3d) 234, 2002 C.L.L.C. 210-025, 17 C.C.E.L. (3d) 169, [2002] B.C.W.L.D. 427, 167 B.C.a.C. 259, 274 W.A.C. 259
- ◆ *Shiels v. Saskatchewan Government Insurance*, 20 C.C.E.L. 55, 67 Sask R. 200, 51 D.L.R. (4<sup>th</sup>) 28 (SCQBA)
- ◆ *Skidd v. Canada Post Corp.* [1997] O.J. No. 712 (Ont.C.A.)
- ◆ *Wiebe v. Central Transport Refrigeration (Man.) Ltd.*, [1994] 6 W.W.R. 305, 3 C.C.E.L. (2d) 1, 95 Man. R. (2d) 65, 70 W.A.C. 65

**6. THEY ATTEMPT TO “SQUEEZE” AN EMPLOYEE OUT INSTEAD OF TERMINATING:**

- Unilateral Change to the Employment terms
- Constructive Dismissal

**7. THE MANNER OF FIRING IS DONE IMPROPERLY**

- It ought to be planned and documented
- Good Faith and Fair Dealing in the Manner of a Dismissal
  - (a) Withholding *Employment Standards Act* pay, severance pay or letter of reference
  - (b) Alleging cause without any grounds
  - (c) Misrepresenting the reason for the termination
  - (d) Conduct which embarrasses or demeans the employee

*Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701  
*Honda Canada Inc. v. Keays*, [2008] 2 S.C.R. 362, 2008 SCC 39

**8. THEY DON'T PROTECT THEIR CONFIDENTIAL INFORMATION**

- Duty of Fidelity
- Confidentiality
- Non-competition, non-solicitation clauses
- Computers as evidence

Larry W. Keown  
Co-Managing Partner/  
Commercial Litigation  
**DEVRY, SMITH & FRANK LLP**

95 Barber Greene Road,  
Suite 100  
Toronto, Ontario M3C 3E9

Tel: (416) 446-5815  
Fax: (416) 449-7071  
larry.keown@devrylaw.ca

[www.devrylaw.ca](http://www.devrylaw.ca)

