

# Can Employers Be Liable for Employees' Loss of Disability Benefits Coverage?

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The answer is "yes". This risk mainly arises when an employer who offers disability plan coverage to its employees, terminates the employment of an employee and the disability benefits coverage is not continued for the entire period required by law. There are ways for employers to address this risk, both pre-employment and pre-termination.

## The "Make Whole" Requirement

Subject to province-specific exceptions and enforceable contractual provisions, a provincially-regulated employer is entitled to terminate an employee's employment without cause upon providing reasonable notice. Such notice can be provided as working notice, pay in lieu of notice or a combination of the two. Where pay in lieu is provided, the employer must nevertheless "make the employee whole" for the entire reasonable notice period.

If the employee becomes disabled during the notice period and disability benefits coverage has not been continued for the entire reasonable notice period, can an employer be liable for the loss of disability benefits coverage? The answer is yes, as was seen in a case which was affirmed by the Ontario Court of Appeal.

In the Ontario case of *Brito v. Canac Kitchens*, Luis Olguin, a team leader employed with Canac Kitchens for 24 years and who was 55 at the time of dismissal, had his employment terminated on a without cause basis. The Court assessed his common law reasonable notice period to be 22 months, for which the employer had an obligation to "make the employee whole".

While employed at Canac, Mr. Olguin was covered by a disability benefits plan. Canac continued his disability benefits coverage only for the eight weeks required by Ontario's minimum employment standards statute, and not for the entire 22-month reasonable notice period.

After that eight week period, but still within the 22-month reasonable notice period, Mr. Olguin underwent multiple surgeries for cancer, received chemoradiation treatment and a tracheostomy procedure. He claimed, among other things, damages for disability benefits against Canac.

The main issue at Court was how the law deals with the period from the disability date (in this case, one day after his first surgery date) to the end of the 22-month notice period. Ultimately, the Court concluded that Canac was responsible to pay for 17 weeks of short-term disability coverage and long-term disability coverage all the way until his 65<sup>th</sup> birthday.

For perspective, the damages for loss of salary were approximately \$95,000 (less statutory amounts provided and mitigation earnings) and disability damages were more than \$200,000.

## Proactively Addressing this Risk

Some steps that employers can take to address this risk, other than not offering disability benefits plans to its employees, include the following:

1. Before employment commences, ensure that employees sign employment agreements that have enforceable termination provisions. The enforceable terminations should, among other things, limit the continuation of benefits (including disability benefits) to only the requirements of applicable minimum employment standards legislation or some other period in which the employer is comfortable that it can continue benefits coverage.
2. Upon termination of employment and any settlement relating to such termination, the employer should obtain an enforceable full and final release from departing employees. The full and final release should, among other things, release the employer from any liability for loss of disability benefits.
3. Discuss with insurance providers options, if any, to continue disability benefits post-termination date, including coverage during a working notice period and any pay in lieu of notice. This can be done when setting up the plans, on an ongoing basis, and on a case-by-case basis when terminating an employee's employment. Employers may also wish to try arranging for alternate disability coverage with another insurer for the reasonable notice period if the current insurer will not continue disability benefits for the reasonable notice period.

Each employer's risk tolerance is different and each termination should be considered on a case-by-case basis. Depending on the circumstance, the risk might be minimal or appreciable. *Brito* is a good reminder of the value of a well-drafted employment agreement and an enforceable full and final release.

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