

Legal Considerations for Employers in the Face of Tariffs and Economic Uncertainty

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The recent tariffs announced by Canada, the US and other countries have caused economic uncertainty around the world. Some Canadian employers have already begun to experience the impact of the current economic climate, while others have yet to feel the impact but are evaluating how they will weather the storm. For many employers, a reduction in their workforce may be an unfortunate necessity. Below are some high-level employment issues that employers should be aware of when considering steps to address the current economic climate.

Temporary Layoffs

Although temporary layoffs are permitted under most employment standards legislation in Canada, including in Ontario under the *Employment Standards Act, 2000* ("ESA"), courts have held that in certain circumstances, a temporary layoff can amount to a constructive dismissal, enabling the employee to claim their termination entitlements against the employer. Employers may reserve the right to temporarily layoff in their employment agreements, however absent a clear term in the agreement, temporary layoffs introduce the risk of constructive dismissal.

Furthermore, even where the right to layoff an employee is reserved by contract, the layoff must be conducted in accordance with statutory requirements. In most provinces, there is a maximum time period for a temporary layoff, after which it will be considered a termination. In Ontario for example, a layoff that is longer than 13 weeks within a rolling 20-week period or more than 35 weeks within a rolling 52-week period in certain circumstances will be considered a termination of employment. In some jurisdictions such as Saskatchewan, Newfoundland and Labrador, and Prince Edward Island, employers are subject to minimum notice requirements before implementing a temporary layoff.

Prior to implementing temporary layoffs, employers should ensure that the employment agreement for the impacted employees have an express term permitting layoffs, and should be familiar with the applicable statutory requirements.

Changes to Terms of Employment

During times of economic uncertainty or challenges, employers may consider making changes to their operations that impact an employee's conditions of employment. Unilateral changes to a fundamental term of an employee's employment, such as reducing or altering hours of work (e.g. reducing hours of work, moving shifts or implementing night shifts), reducing group benefit coverage, reduction in wages or altering or terminating incentive payment structures (e.g. bonus or commission plans), may create risks of constructive dismissal where the employer unilaterally imposes the change without the employee's agreement or a contractual right to make such change. In the absence of the employee's agreement or a contractual right to make such change, there are certain options available to an employer to introduce the changes in way that reduce or avoid a constructive dismissal risk.

Unenforceable Termination Provisions

The common law jurisprudence on employment termination provisions has significantly evolved in the past few years resulting in the unenforceability of termination provisions in existing employment agreements. Where an employee's employment agreement contains a termination provision that is interpreted to contract below the minimum standards of applicable employment standards legislation, all termination provisions in the agreement may be considered legally unenforceable.

The practical result of an unenforceable termination provision is that the employer's liability upon termination of the employee may be greater than what was originally intended in the employee's employment agreement. For example, many employment agreements provide that the employer may terminate employment by only providing the employee with their minimum entitlements under the applicable employment standards legislation. However, if the termination provision in an employee's employment agreement is unenforceable, the employee may be entitled to common law reasonable notice, which generally is a much greater entitlement than what is minimally provided for under the employment standards legislation.

Employers who are considering workforce reductions should consult with legal counsel and have legal counsel review the relevant employment agreements to determine the available options for the workforce reduction in light of their termination obligations to the affected employees.

Protected Grounds

Employers should be aware of the risk of liability under the applicable human rights legislation if any layoffs or termination are, or appear to be, influenced by a protected ground under human rights legislation. Under provincial and federal human rights legislation, employees are generally protected from discrimination in employment related to protected grounds such as race, gender, disability or age. If a layoff or termination is influenced by a protected ground, the employer may be subject to liability for remedies for breach of the human rights legislation beyond the employee's strict legal termination entitlements.

Mass Terminations Rules

Employers should be aware that they have additional legal obligations if a workforce reduction constitutes a mass termination. Mass termination rules vary by province. For example in Ontario, the ESA defines a mass termination as the termination of 50 or more employees at its establishment within a four-week period, resulting in additional notification and posting requirements for employers, as well as increased minimum statutory notice obligations. However in other provinces, mass termination entitlements are triggered much faster: for example, in Saskatchewan, Quebec, New Brunswick and Nova Scotia, a mass termination occurs when 10 or more employees are terminated within a prescribed period.

Generally, the amount of notice employees must receive of a mass termination is not based on their length of service, but on the number of employees included in the mass termination. Employers must ensure to comply with the legislative requirements in each applicable jurisdiction regarding notice.

Key Takeaway – Consult with Legal Counsel

While the full impact the current economic climate will have on Canadian employers has yet to be determined, it is clear that it will cause hardship for many employers, and will require other employers to make hard decisions. It is therefore important for employers to be aware of the relevant legal issues and risks as they consider and implement decisions that impact their employees, and to consult with an experienced employment lawyer who can assist and advise them through these uncertain and challenging times.

The information and comments herein are for the general information of the reader and are not intended as advice or

opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

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