COVID-19 And Recalling Employees Back To Work From A Temporary Layoff

Many Canadian employers implemented temporary layoffs due to the devastating financial impact of the COVID-19 crisis. These employers are entitled to recall their employees back to work at any point in time prior to the expiry of the applicable statutory layoff period. With community transmission of COVID-19 beginning to slow down, Canada's federal and provincial governments are beginning to consider easing restrictions and gradually reopening certain businesses. In addition, it will not be long before the applicable layoff periods expire for some employers. Given these realities, some employers are now turning their minds to the recall of some or all of their employees and their physical return to the workplace. To assist employers that are contemplating recalls, we set out below the principal legal and practical considerations for federally and provincially regulated employers.

Legal Considerations

Recall prior to the end of the statutory layoff period

If an employee is recalled prior to the end of the applicable statutory layoff period, in most jurisdictions the employment relationship continues and the employee will not be entitled to anything they might have been entitled to on termination.

Failure to recall prior to the end of the statutory layoff period

If an employee is laid off and is not recalled prior to the end of the applicable statutory layoff period, the employment relationship is deemed to be terminated and anything owing to the employee on termination pursuant to statute, the employee's employment agreement, a workplace policy, or, if applicable, a collective agreement, will be owed.

Recall and the employment agreement, workplace policy, or collective agreement

If the employer and employee have entered into an employment agreement, the employer has a relevant workplace policy, or the employer's employees are

unionized and subject to a collective agreement, and any of these documents address employee recall rights, it is important to determine whether they offer the employee a “greater right or benefit” on recall than any statutory recall provisions that may exist. If they do, the greater right or benefit will prevail.

Statutory requirements

It is important for employers to consider whether applicable statute(s) have any recall requirements and to ensure that they conduct the recall process in accordance with the laws of the jurisdiction(s) in which they operate.

Recall notice requirements

Alberta is the only jurisdiction in Canada that has provisions in its employment standards legislation specifying procedural requirements relating to a recall notice. Its *Employment Standards Code* provides that a recall notice must (a) be in writing, (b) be served on the employee, and (c) state that the employee must return to work within seven days of the date the recall notice is served on the employee.[1] Ontario and Newfoundland require return to work “within a reasonable time after being requested to do so” by the employer.[2]

In Alberta, Ontario and Newfoundland, if another recall notice procedure is set out in employment agreements, a workplace policy or, if applicable, a collective agreement, the employer should follow that recall procedure, provided it offers the employee a “greater right or benefit” on recall than the statutory recall provision, as the greater right or benefit will prevail.

In all other jurisdictions, if another recall notice procedure is set out in employment agreements, a workplace policy or, if applicable, a collective agreement, the employer should follow that recall procedure. If no recall procedure is set out in these documents, the employer should require employees to return to work within a reasonable time after being requested to do so.

Notice of termination (or pay in lieu) for employees who do not return to work following a recall

Alberta,[3] Ontario,[4] and Newfoundland[5] exempt employers from providing notice of termination (or pay in lieu) for employees who do not return to work after a period of time following recall from layoff. Useful guidance is provided in Ontario’s *Employment Standards Act Policy and Interpretation Manual*:

Pursuant to s. 2(1) paragraph 7, an employee who is on a temporary lay-off and does not return to work within a reasonable time after being requested to do so by the employer is not entitled to notice of termination or pay in lieu.

As with other exemptions from minimum standards, the employer has the onus of showing that the exemption applies. In this case, the employer must show that the offer of recall was made to the employee and that the employee clearly understood its terms. From the point of view of proof, the employer will satisfy the onus if it can show that a written notice of recall was received by the employee and that the employee could read and understand it. If the employer alleges that it orally recalled the employee and the employee denies it, it

will, of course, be much more difficult for the employer to demonstrate that the employee was recalled. If the employee willfully structures their affairs so that it is impossible for the employer, using its best efforts, to contact the employee for recall purposes, an employer who uses its best efforts to recall the employee but fails to reach them will be relieved of its obligations to provide termination notice or pay in lieu.

The exemption only applies if the employee did not show up for work within a reasonable time after being recalled. This prevents the employer from recalling the employee with extremely short notice and then relying on the exemption when the employee is unable to respond so quickly. What is a reasonable time depends on the circumstances of each case, and will include factors such as where the employee was geographically when they received the recall.

If the employer recalls the employee for a very brief period of time, such as a few hours, it may be that the offer was not bona fide in that the employer made it for the sole purpose of attempting to disentitle the employee to termination notice or pay in lieu. In such a case, the employee who refuses such an offer may not be disentitled to notice or pay. See *Highland Cove Marina v Van Velden and Babcock (December 22, 1983), ESC 1531 (Sheppard)*, a decision under the former *Employment Standards Act*.

Occupational Health and Safety Law Requirements

Employer's duty to protect the worker

Occupational health and safety laws generally require employers to take every precaution reasonable in the circumstances for the protection of the worker.

Work refusals

As some employees may refuse to return to work when they are recalled because they fear they might contract COVID-19 in the workplace, employers should become familiar with the occupational health and safety laws pertaining to work refusals in the jurisdiction(s) in which they operate. Generally, these laws permit an employee to exercise their right to refuse to perform work when they have reason to believe there is "a danger" (in Quebec and Ontario) or "undue hazard" (in British Columbia) to their health, or the health of others. Although the exact details of the work refusal procedure may differ by jurisdiction, the general steps that must be followed involve: the worker advising the employer that they believe the work is unsafe and providing an explanation for why they refuse to work; the employer advising a health and safety representative, a union representative and/or a health and safety committee of the refusal; the employer investigating the situation, deciding whether the employee's work refusal is justified, and advising the employee (and any others who must be advised) of its decision and its reasons for their decision (in some jurisdictions, in writing); the employee or other party contacting the health and safety officer if they disagree with the employer's decision, and the health and safety officer conducting an investigation; the employee, employer or third party appealing the decision of the health and safety officer to a Board or Tribunal if they disagree with the health and safety officer's decision.

Practical Considerations

Set out below are practical considerations that employers should consider when they intend to recall employees following a temporary layoff:

Employment agreements, workplace policies, and collective agreements

The employer should review employment agreements, workplace policies, and, if applicable, collective agreements to determine whether they include rights and obligations relevant to the recall of employees from a layoff.

Employee contact information

In order to make it possible for the employer to effectively communicate with employees about a recall, the employer should ensure that it has current contact information for each employee who was laid off.

Recall language

In its recall notice, the employer should follow the recall language used in any applicable employment agreements, workplace policies, and collective agreement.

Return to pre-layoff position

In its recall notice, the employer should state that the work available to recalled employees is in the same positions they held prior to being placed on temporary layoff.

Return to work schedules

In its recall notice, the employer should identify the employees who will be recalled, determine their recall dates, and indicate their intention to publish work schedules for employees who will be returning to work. Some employers may not recall all employees laid off, and/or stagger recall dates for employees who will be recalled. If recall dates will be staggered and the layoff dates were also staggered, the employer should consider recalling employees in the reverse order of their layoff dates so that employees laid off first will be recalled first; however, in some cases, such a recall schedule may not be practical because the nature of the work required first may not align with the layoff schedule.

Hours and payment terms upon return to work

In its recall notice, the employer may notify employees that upon their return to work they will be paid on the same terms as when they were laid off and in accordance with the law and any employment agreement, workplace policy, or collective agreement that may apply. However, if the employer is proposing to recall any employees with reduced hours and a corresponding cut in pay in the short term with the intention of returning these employees to their pre-layoff hours and pay at a later date, the employer should make this clear and provide details of the applicable timeline, if it is known.

Duration of the recall

As it is impossible for an employer to predict how the COVID-19 pandemic might evolve following a recall (*e.g.*, will there be a second wave'), in its recall notice the employer should clarify that due to the fluidity of the situation it cannot predict how long the recall will last and that employees' work schedules and the employer's pay obligations may be impacted if the employer's business cannot continue in the normal course. The employer should also clarify that if an employee is later required to return to layoff status, the terms of their original layoff notice will apply.

Employees' obligation to notify the federal government of their change in status

In its recall notice, the employer should remind recalled employees that if they are collecting the Canada Emergency Response Benefit (CERB) or Employment Insurance (EI), they are required to inform the federal government of their recall, and that income they receive upon being recalled may impact their ability to continue to receive CERB or EI.

Status of employees who are not recalled

In its recall notice, the employer should state that the employment of employees who are not recalled will remain subject to the layoff letters they received, and specify the date of receipt.

Working conditions upon return to work

Upon issuing a recall notice, employers may encounter employees who are hesitant to return to work due to fears related to the COVID-19 pandemic. Such fears are likely to be most prevalent among employees who: are of advanced age; suffer from underlying health conditions; live with individuals who are of advanced age or suffer from underlying health conditions; or are pregnant. In its recall notice, the employer should assure employees that every effort will be made to mitigate the risk of COVID-19 transmission in the workplace in accordance with applicable occupational health and safety laws, and the recommendations of the Public Health Agency of Canada and provincial and local authorities.

Furthermore, the employer should assure employees that the health and safety of employees is the employer's top priority. The employer should provide examples of risk mitigation protocols that it will implement in the workplace to reduce transmission of COVID-19 to employees, such as, for example: providing detailed COVID-19 health and safety information to all employees, contractors and visitors to the workplace; requiring employees, contractors, and visitors who have symptoms of COVID-19 to remain at home; requiring employees, contractors, and visitors to respond to a questionnaire designed to ensure that they are well and have not had close recent contact with a person who is infected with COVID-19 before permitting them to enter the workplace; conducting daily employee, contractor, and visitor temperature screening before permitting them to enter the workplace, or at least requiring them to self-test their temperature daily at home before entering the workplace; requiring respiratory etiquette in the workplace; requiring employees, contractors, and visitors to maintain six feet of distance with others in the workplace; requiring all employees, contractors, and visitors to wear masks in the workplace, and

ensuring that a sufficient supply of masks is always available to make this possible; requiring all employees, contractors and visitors to use alcohol-based hand sanitizers before entering the workplace, and ensuring the availability of multiple alcohol-based hand sanitizer stations at the workplace entrance and throughout the workplace; increasing the frequency of workplace cleaning by professional cleaners, especially of high touch services; imposing strict limits on the size of meetings and events (no more than 10 people) and the number of people permitted in cafeterias, kitchens, lounges, and boardrooms; staggering arrivals and breaks; limiting non-essential business and personal employee travel; and developing a thorough plan for how to respond should an employee, contractor, or visitor become infected with COVID-19. The name and contact information of a member of the employer's Human Resources (HR) department should be provided for those who would like to discuss any concerns they may have about returning to work.

Use of public transit to travel to work

Upon issuing a recall notice, employers may encounter employees who are hesitant to use public transit to travel to work due to fears related to the COVID-19 pandemic. Again, such fears are likely to be most prevalent among employees who: are of advanced age; suffer from underlying health conditions; live with individuals who are of advanced age or suffer from underlying health conditions; or are pregnant. Employers to whom such fears are expressed should encourage employees to practice careful risk mitigation strategies while on public transit such as, for example: wearing a mask; wearing gloves; and maintaining social distance from other commuters. Furthermore, since public transit is often crowded during the rush hour, employers may consider allowing their employees to alter their arrival and departure times to avoid rush hour congestion on public transit.

Employees who are unavailable to return to work

During the layoff, some employees may have secured other work or left the area. Presumably, the layoff notice indicated that employees were required to notify the HR department if they became unavailable for recall. However, it is possible that employees who are unavailable for recall neglected to follow this notification procedure. Therefore, in their recall notices, employers should indicate that any employees who are unavailable for recall must advise them that this is the case within a specific period of time (*e.g.*, 24 hours). Furthermore, the employer may consider allowing employees to decline a recall once, or to fail to respond to the employer's contact within a specific period of time (*e.g.*, 24 hours) once, without resorting to terminating the employee's employment. However, the employer may notify employees that if they are unavailable for work because they have accepted other work, or if the employee declines a recall twice, the employee will be considered to have abandoned their employment with the employer and their layoff status and associated benefits will be discontinued.

When employees are unionized

If the employees are unionized, the employer will be required to refer to the applicable collective agreement and will probably have to enter into negotiations with the union and develop appropriate Letters of Understanding.

Personal circumstances preventing the employee from returning to work on the recall date

Some employees may be experiencing personal circumstances that prevent them from returning to work when they are recalled. For example, they may: be ill due to infection with COVID-19; be caring for another person who is infected with COVID-19; have been in recent close contact with a person who is infected with COVID-19; or caring for children who are at home because their daycare, school, or camp is not operating due to the COVID-19 pandemic. The recall notice should encourage these employees to contact a member of the HR department to discuss their situation and appropriate next steps.

Bottom Line for Employers

It is unprecedented for employees to be temporarily laid off in Canada due to a global crisis such as the COVID-19 pandemic. Employers will face complex issues upon recalling employees in this context and it is vital that they manage the recall process strategically from the outset. Employers are encouraged to consult counsel during this process.

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