

LAYOFF: The landscape in British Columbia

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In British Columbia, B.C. *Employment Standards Act*¹ (“**B.C. ESA**”) governs the relationship between employers and employees with respect to their rights governing the practice of administrative suspension for economic reasons, commonly known as temporary layoffs. B.C. ESA, however, only provides a part of the picture and to complete that picture, one must look at the decisions of the courts and tribunals to help clarify the practice of temporary layoff.

In this bulletin, we aim to provide guidance to both employers and employees in British Columbia to navigate their way through the murky landscape of temporary layoff:

A. Guidance for Employers:

First, the B.C. ESA alone does not give the employers a general right to temporarily lay off employees.

Any layoff, including a temporary layoff, constitutes fundamental breach of the contract of employment, unless the possibility of temporary layoff:

- a) is expressly provided for in the contract of employment;
- b) is implied by well-known industry-wide practice (e.g. logging, where work cannot be performed during “break-up”); or
- c) is agreed to by the employee either expressly or impliedly.

Where a layoff is not expressly authorized by the employment contract, a careful analysis should be conducted as to whether the layoff is impliedly authorized or consented to by the employee – if not, the employer runs the risk of having constructively dismissed the employee and must face increased damages and costs for the mistake. It should also be noted that employers’ “mistaken belief” that they had the statutory right to impose temporary layoff is irrelevant and will not be a defence to a claim for constructive dismissal.

Where the employment contract does not afford the employer the right to impose temporary layoffs, the employer should consider approaching the employee with a view of obtaining the employee’s written consent to a temporary layoff. Some employees might agree to a temporary layoff rather than risk termination of employment.

Second, even where there is consent, employees cannot be laid off for more than 13 weeks in a period of 20 consecutive weeks, pursuant to the B.C. ESA. This time period may be extended if

¹ RSBC 1996, c.113

employers and employees jointly apply for a variance to extend the time period, where, for example, the employee will be laid off for a period exceeding 13 weeks, but the employer still has definite plans to recall the employee by a specific date.

Regardless of whether or not the temporary layoff period is extended pursuant to a variance, the effective termination date of an employee who is laid off for more than a temporary layoff is the first day of the layoff.

Third, under the B.C. ESA, employers are not expressly required to provide employees with a written notice of temporary layoff. However, where there is explicit or implicit consent, it is good practice to provide a written notice of layoff to employees and to include the following information in the notice:

- i. the effective date of the temporary layoff;
- ii. sound business reasons for the layoff (economic hardship, downturn in business or the like);
- iii. the applicable provisions from the employment standards legislation; and
- iv. any direction to the fact sheets issued by the B.C. government on temporary layoff, if available from the relevant employment standards branch or board in the province.

Giving such a notice could assist the employer by creating a clear record of what has transpired, and why.

B. Guidance for Employees

First, employees should read their employment contract and the workplace policies to instruct themselves whether their employer has a contractual right to lay them off. Where the employment contract is silent on the right to layoff, employers cannot lay off employees without their consent. However, employees are advised to carefully consider the employers' offer to temporarily lay them off because the consequences of the alternative, termination of employment contract, might be more severe. Where the employer has not provided any reasons for the temporary layoff, the employee can request reasons.

Second, where the contract permits the employer to temporarily lay off the employee, the duration of any such layoff cannot exceed more than 13 weeks in any period of 20 consecutive weeks. Otherwise, the employer will be in non-compliance with the B.C. ESA. An employee who is laid off for more than 13 weeks when the temporary layoff period is not extended pursuant to a variance, may be deemed to be terminated. The effective termination date of an employee who is laid off for more than the permitted time is the first day of the layoff.

Third, pursuant to the B.C. ESA, employers are not required to pay an employee's wages and pension and benefits contribution during the layoff period. Employees are therefore encouraged to read their employment contract and, if appropriate, to take legal advice, to instruct themselves whether they have a contractual right to receive any payments during the layoff period.

Lastly, employees should be mindful that if they refuse the recall to work, opting instead to treat the temporary layoff as termination of their employment contract, they will have a positive duty to mitigate their damages by looking for and finding alternative employment.

Layoff period in the Employment Standards Act extended for COVID-19 related reasons

On May 4, 2020, by way of Order in Council No. 219, the government of British Columbia, amended the *Employment Standards Regulation*, B.C. Reg 365/95, to extend the temporary layoff period to 16 weeks.

More particularly, before the amendment, under the *Employment Standards Act* (“ESA”), a temporary layoff longer than 13 weeks in any 20-week period was considered a permanent layoff or a termination of an employee’s employment requiring the employer to provide the employee with a written working notice of termination and/or severance pay based on the employee’s length of service. As a result of the amendment, temporary layoffs relating to the COVID-19 pandemic can be extended to 16 weeks in a 20-week period, provided of course the employee consents to a layoff or the employee’s written contract of employment provides a layoff provision.

The extension of layoff to a 16-week period is to align BC’s temporary layoff provision with the federal Canada Emergency Response Benefit (“CERB”) period and allow employees to keep their jobs, even if they are not working, for 16 weeks of temporary layoff.

Disclaimer: This bulletin is provided for general information purposes only and does not constitute legal advice or legal opinion of any kind. The law in this area is rapidly evolving and the readers are advised to seek specific legal advice from our employment lawyers, or their own legal counsel, regarding any legal issues arising from temporary layoffs.