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Surviving Tough Economic Times:

Alternatives to Terminations

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Historically non-unionized employers facing tough economic times have responded with employee terminations as a means of reducing workforce costs. While terminations can certainly be effective in reducing ongoing payroll obligations, they do not necessarily offer the best long-term solution to surviving an economic downturn because they do not help position the employer for eventual economic recovery. This article looks at some creative alternatives designed to help employers not only reduce costs in tough economic times, but also prepare for economic recovery.

Temporary Lay-off

A lay-off, although not often used in a non-unionized workplace, can be a useful alternative to a termination where a short-term workforce reduction is required. Unlike a termination, a temporary lay-off, where permitted, allows an employer to recall an employee to return to work at or before the end of the lay-off period. This accomplishes the employer's immediate goal of reducing payroll obligations while at the same time avoiding unnecessary costs of hiring and training a new replacement worker should business improve during the recall period.

The *Employment Standards Act* (the "*Act*") defines a short-term lay-off as a lay-off of not more than 13 weeks in any 20 week period. This period can be extended to not more than 35 weeks in any 52 week period if the employer meets one of the conditions listed in s.56(2)(b) of the *Act*. These conditions include making substantial payments to the employee, paying supplementary unemployment benefits to the employee, or continuing to make payments on behalf of the employee under a retirement or pension plan, or under a group or employee insurance plan throughout the period of lay-off. Employers seeking to

extend the temporary lay-off period to 35 weeks in any 52 week period commonly choose to continue an employee's insurance benefits. However, before the lay-off commences, the employer should make sure the existing insurance policy permits continued coverage for all benefits during the entire period of lay-off. Some group insurance policies restrict the duration of coverage of all or some benefits to an employee during a lay-off. Any lay-off exceeding the time periods or not meeting the conditions required for the extended 35 week period set out in the *Act* is automatically considered to be a termination.

Although the *Act* defines what a temporary lay-off is, it does not grant an employer the right to unilaterally impose a temporary lay-off on an employee unless the terms of employment are found to permit a lay-off, either in an express agreement or by implication. Although most employment agreements in a non-unionized workplace do not contain a lay-off provision, a lay-off may still be possible if it is common in the employer's industry sector or if the worker subject to the lay-off expressly consents. Faced with the prospect of unemployment at a time when jobs are scarce, an employee may be willing to accept a temporary lay-off if it means avoiding possible termination.

Federal Work-Sharing Program

Another way to reduce payroll costs and retain employees is for an employer to apply to participate in the Work-Sharing program funded by the federal government. This program allows an eligible employer to reduce the regular work week for an approved employee by up to three days per week. If accepted to participate in the program, the employer is required to maintain the employee's benefits and to pay the employee for the days worked. The employee then collects Employment Insurance benefits for the days not worked. Employment Insurance benefits received under this program are not subject to the usual two week waiting period and do not effect eligibility for regular Employment Insurance benefits in the event the employee is terminated after the program ends.

This is not a new program. However, in response to the current economic downtown the government has recently increased the duration of Employment

Insurance benefits from twenty-six weeks to fifty-two weeks and agreed to provide an additional $200 million to help fund the program throughout the next two years.

To be eligible for the program an employer must submit an application demonstrating certain specific requirements, including:

- that the business has been in operation for at least two complete years
- that there is insufficient work for certain employees as a result of decreasing revenue (i.e., more than 10%) requiring work hours to be reduced
- that the shortage of work is unexpected, temporary, not seasonal, and was caused by an economic downturn
- that the employer is not involved in a labour dispute
- that the affected employee consents to participate in the program

The application must also include a recovery plan showing measures already taken by the employer to remain viable during the economic downturn and what the employer plans to do during the Work-Sharing program to enhance its business so that it can return to normal business levels in the future.

Reducing Hours, Wages and/or Benefits

An employer that is not able to meet the requirements for the Work-Share program may still be able to reduce workforce costs by implementing reduced working hours, wage decreases and/or benefit reductions. By doing this there is always a risk that affected employees will refuse to accept such changes and sue for constructive dismissal. However, here are some steps employers can take to minimize this risk:

- keep the combined total of all reductions to below 10%

- apply the reduction to all employees or a particular department or group (i.e., don't single out individual employees)
- give affected employees as much notice of the change as possible (ideally the amount of notice required for notice of termination)

Implementing the Change

Employees know these are difficult economic times for employers and that some change may be necessary. However, timely communication with employees throughout the process of change is critical to minimize disruption in the workplace and foster positive employee morale. Where possible:

- explain why changes are necessary
- involve employees in the decision making process about what changes to make
- ask employees how they might help the company reduce costs in other areas
- tell remaining employees when the changes are finally over

No matter which alternative is chosen, be sure to treat employees with decency and compassion throughout the process. At the end of the day, employee morale is a key component of economic recovery.

In summary, there is no miraculous cure for tough economic times. However, before resorting to employee terminations, employers should consider these alternatives which meet both short-term cost reduction needs and position for economic recovery.

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