

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 replacement worker should business improve during the recall period.

Under the Alberta *Employment Standards Code* (the "Alberta ESC") a temporary lay-off of non-union employees lasting 60 days or more is deemed to be a termination. If the employee is not recalled within the 59 day notice period for the temporary lay-off, termination pay is required to be paid on the 60th day (unless the employer continues to pay wages or benefits on behalf of the employee, in which case the termination pay is due when payment of wages or benefits ceases).

In order for a notice of temporary lay-off to be valid, it must:

- be in writing
- state that it is a temporary lay-off notice
- identify the effective date of the lay-off
- set out the text of sections 62, 63, and 64 of the Alberta ESC.

If the notice does not contain this required information, the employee will likely be deemed to have been wrongfully terminated or constructively dismissed.

An employer may recall the employee during the 59 day notice period on giving one week written notice of recall.

Although the *Alberta ESC* permits a temporary lay-off, it does not give an employer the right to unilaterally impose a temporary lay-off on any employee in all cases. Some courts have found that an employee subject to a temporary lay-off maintains the right to sue for wrongful termination or constructive dismissal unless the terms of employment are found to allow a temporary lay-off, either in an express agreement or by implication. Most employment agreements in a non-unionized workplace do not

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contain a lay-off provision. However, a temporary lay-off may still be possible if it is common in the employer's industry sector or if the employee 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 affect 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 February 2009, in response to the current economic downturn the government increased the duration of Employment Insurance benefits from 26 weeks to 52 weeks and agreed to provide an additional \$200 million to help fund the program. This increase in benefit duration remains in effect until April 1, 2010.

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

- the business has been in year-round operation for at least two complete years

- there is insufficient work for certain employees as a result of decreasing revenue (i.e., more than 10%) requiring work hours to be reduced
- the shortage of work is unexpected, temporary, not seasonal, and was caused by an economic downturn
- the employer is not involved in a labour dispute
- 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-Sharing 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 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
- actively recognize employees for performing good work and remaining positive during the implementation process

Employee recognition initiatives are often overlooked when they are needed most; at the time when an employer is faced with implementing cost reduction initiatives. Employees need to know when they are doing a good job, that the work they do is important to the company and that their extra effort and patience during the economic downturn is appreciated. This type of recognition takes time and effort, but does not need to be costly to implement.

Even with the best employer intentions, not every employee will react positively to cost reduction changes. An employer must therefore be ready to respond to resignations or possible claims of constructive dismissal. However, an employee that does remain positive throughout this process is likely one worth keeping.

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 to assist them with meeting their short-term cost reduction needs and position them for economic recovery. ○

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