

How to handle benefits during the notice period

What are an employer's options when an insurer refuses to extend coverage?



By Anja Kohlman Sawa

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An employer that fails to maintain benefit contributions during an employee's notice period may be responsible for costs incurred by the employee due to loss of coverage. This exposure can add up quickly if the worst happens - for example, an employee becomes disabled or passes away during an uninsured period.

Practically speaking, most insurers will continue benefit coverage during the statutory notice period. However, they will not continue certain benefits (such as life and disability insurance) beyond the statutory notice period (such as during the common law reasonable notice period). If an employment agreement does not limit an employee's termination entitlements to the statutory notice period, the employer may be required to provide benefit coverage by stepping into the shoes of the insurer.

For example, in *Brito v. Canac Kitchens*, 2011 ONSC 1011, the Ontario Superior Court of Justice held the employer responsible to pay the employee's short-term and long-term disability benefits as if the employer had not cancelled coverage at the end of the statutory notice period. The employee became disabled after he was treated for cancer 16 months into his 22-month common law notice period. The court ordered the employer to pay the employee an amount equal to the long-term disability benefits he would have received up until age 65 - more than \$200,000.

How might an employer minimize this risk of exposure?

The underlying principle of the notice period

An employer may contractually vary an employee's entitlements during the common law notice period. However, an employer may not contract out of its obligation to continue benefit contributions during the statutory notice period. For example, Ontario's Employment Standards Act, 2000 (ESA) requires an employer to make "whatever benefit plan contributions would be required to be made in order to maintain the employee's benefits under the plan until the end of the notice period." Under s. 61(1) of the Alberta Employment Standards Code no "term or condition of employment may be reduced by an employer" during the statutory notice period. Under s. 67(b)(2) of the British Columbia Employment Standards Act an "employee's wage rate, or any other condition of employment, must not be altered" without the employee's written consent.

If an employer fails to contribute to a benefit plan contrary to the prevailing law, a court may remedy this breach in one of several ways. In some cases, a court will award an employee an amount equal to the amount the employer should have contributed during the notice period. In other cases, a court will award an employee the cost to replace the plan or the expenses incurred by the employee during the uninsured period.

Amrika Ramotar v. Trader Corporation, Court File No. SC-23-00002856-0000, is a recent decision of the Ontario Superior Court of Justice in which the court found the termination provision in the employment contract unenforceable because, among other reasons, it promised benefit coverage during the notice period only if "available from the insurer." The court held this language could violate the ESA because an employee is entitled to all benefits during the statutory notice period, regardless of whether such coverage is available under a group benefit plan.

The trial proceeded by way of an agreed statement of facts in which the value of the employee's pension and benefits was set at 10 per cent of her salary, three per cent of which was contributed by the employee. As such, the court set the value of the outstanding pension and benefits at seven per cent of compensation over the course of the applicable notice period. Note that the employee did not become disabled during the notice period and the payment of disability benefits under the benefit plan was not at issue. Had the employee become disabled, the employer's liability could have increased exponentially.

Employer options to minimize liability

There are a few options an employer might consider to minimize the risk of exposure:

- Understand and comply with statutory notice requirements, including benefit contributions during the statutory notice period.
- If the goal is to limit risk during the common law reasonable notice period (a prudent approach):
- At the start of the relationship, have an enforceable employment agreement that

limits some or all benefit entitlement to the minimum statutory notice period.

- Upon termination, offer an employee more than their minimum statutory termination entitlements in exchange for a comprehensive release. The added cost will be more than offset by the reduction in the risk of exposure.
- If a release is not possible and there is a heightened risk of death or disability, consider providing the employee working notice through which benefits continue in the ordinary course, if possible.
- Proactively purchase extended coverage for the period of common law reasonable notice (if available and not cost prohibitive). Many insurers do not offer disability coverage during this period, so an insurance broker may be required.

Anja Kohlman Sawa is a lawyer with Sherrard Kuzz LLP, a management-side labour and employment law firm in Toronto. Anja can be reached at 416.603.0700 (Main), 416.420.0738 (24 Hour) or by visiting www.sherrardkuzz.com.