goodfellow & schuettlaw

BARRISTERS & SOLICITORS

GFSLaw Report March 20, 2020

QUESTIONS AND ANSWERS FOR EMPLOYERS:

COVID-19 UPDATE

CONSTRUCTION | REAL ESTATE | CORPORATE | LITIGATION | CIVIL

SUITE 200, 602 11th AVENUE SW CALGARY, ALBERTA T2R 1J8 | TEL: (403) 705-1261 | FAX: (403) 705-1265

An employer's obligations to their employees during the COVID-19 pandemic are governed by the employment contract and the governing legislation in Alberta which includes: (1) the Alberta Employment Standards Code("ESC"), (2) the Occupational Health and Safety Act ("OHSA"), and (3) the Alberta Human Rights Act ("AHRA"). The legislation sets minimum standards for employment relations between employers and employees, workplace safety and prohibits any discrimination against the employee in relation to numerous protected grounds, including the termination of employees.

Q1: CAN MY EMPLOYEES BE LAID OFF DURING THE COVID-19 PANDEMIC?

The first thing to discuss is the difference between the termination of a contract and a layoff, as the terms are often used interchangeably.

A contract termination is the end of the employment relationship between an employer and an employee. The termination can be for cause or without cause (for budgetary or other reasons). Typically, in a without cause termination, the employee is entitled to severance or pay in lieu of notice. The minimum pay in lieu of notice is set by the Employment Standards Code and is based on the length of time that an employee has been working for the employer. However, the Common Law in Canada typically requires employers to provide significantly more pay in lieu of notice than is required by legislation but this can be limited by termination provisions in the employment contract. The main thing to remember is that a termination of employment is permanent and, aside from pay in lieu of notice, the employer will have no further obligations to the employee.

A lay-off is a temporary interruption of an employee's employment where the employer intends to recall the employee.

A lay-off is a temporary interruption of an employee's employment where the employer intends to recall the employee. During a layoff, employers ceased to pay the employee and the employee is entitled to collect employment insurance payments. Sections 62-64 of the ESC specifically allow that an employer may lay employees off for not more than 59 days without it being deemed a termination of the contract.

However, the law in Alberta is unclear as to whether an employee is precluded from suing for wrongful dismissal even if an employer complies with all the notice and recall requirements in the ESC. Alberta Courts have found that a layoff given with proper notice only exempts the employer from the requirement to pay statutory termination pay in accordance with sections 54-56 of the ESC. It does not exempt the employee from treating the layoff as a constructive dismissal at Common Law and seeking pay in lieu of notice at Common Law. While the issue has not been canvassed in Alberta, other Canadian jurisdictions have found that where an employment contract or collective bargaining agreement specifically allows for temporary layoffs, then a temporary layoff will not be deemed to be constructive dismissal at Common Law.

1. Employees can only be laid off if given appropriate notice as required by sections 62-64 of the ESC.
2. A layoff will limit an employee's right to claim pay in lieu of notice under sections 24-56 of the ESC.
3. A temporary layoff can be treated as a constructive dismissal at Common Law, unless the employment contract specifically contemplates that the employee may be paid off temporarily but not for a period longer than 59 days.

Q2: HAS COVID-19 CHANGED ANYTHING RELATED TO LAYOFFS AND CAN I LAYOFF A GROUP OF EMPLOYEES FOR ECONOMIC REASONS?

Proper notice is generally fundamental to a layoff being effective and requires employers to provide:

- One week notice prior to the commencement of a layoff for employees that have been employed for less than two years, and
- Two weeks' notice prior to the commencement of a layoff for employees that have been employed for two years or more.

However, the ESC does allow for the layoffs to be effected without proper notice. if unforeseeable circumstances prevent the employer from doing so. Where a workplace is ordered to be shut down immediately due to COVID-19 related issues by any level of government, then this would likely constitute unforeseeable circumstances under the ESC. However, where a workplace voluntarily shuts down or shuts down due to a lack of work related to COVID-19, this may not constitute "unforeseeable circumstances" necessary to enable the employer to lay employees off without notice. Employers should proceed with caution and obtain legal advice prior to laying employees off without notice due to unforeseeable circumstances.

The ESC does not contain any limit on the number of employees that can be laid off. So long as all termination notices are validly issued with the appropriate amount of notice, multiple employees can be laid off (subject to the effectiveness of the lay off as discussed above). However, if more than 50 employees will be laid off, and the employer is uncertain that the employees can be recalled within 60 days of the date of commencement of the lay off, the employer may be required to give notice of group termination to the Minister of Labour and Immigration on the date the layoff commences or earlier.

The reason for this is that if an employee is not recalled from a layoff within 60 days, their employment is deemed to be terminated and Section 135 of the ESC requires that any employer give notice of group termination of 8 weeks for 50-99 employees, 12 weeks for 100-299 employees and 16 weeks for 300 or more employees.

Again, COVID-19 does not specifically affect group layoff except for as above, it would affect the notice required to be given if an employer is required to shutdown their workplace, immediately and without notice by order of any level of government.

Q3: CAN I FIRE SOMEONE WHO HAS COVID-19 OR IS SELF-ISOLATING?

The AHRA prevents discrimination against employees in regard to their continued employment for a variety of reasons, including physical and mental disability. Physical disability is defined under the AHRA as including illness and would include COVID-19. This means that termination of the employment of an employee for inadvertently contracting COVID-19 is a violation of that employee's human rights and the employer risks receiving and defending a human rights complaint. This would also apply to an employee who is self-isolating because while the employee may or may not have the COVID-19 virus, the AHRA prevents terminations due in whole or in part to a protected ground, such as illness. So, if an employee is terminated due to a suspicion that they might have the COVID-19 virus or due to factors associated with the possibility that they have the COVID-19 virus, this termination would be in part due to an illness and prohibited by the AHRA.

Further, section 53.97 of the ESC prohibits the termination of any employee who has been employed for 90 days due to the employee taking unpaid leave for the purposes of quarantine. An employer terminating an employee who has contracted COVID-19 and is subsequently quarantined or asked to self-isolate would be in violation of the ESC. The Government of Canada is offering coverage to employees required to be quarantined or asked to self-isolate. Please refer to our other updates for further information.

Q4: CAN I FIRE SOMEONE WHO REFUSES TO WORK DUE TO CONCERNS ABOUT COVID-19?

The OHSA requires that all employers ensure the safety of their workers and people present at the worksite and workplace operated by an employer. It also allows employees to refuse to carry out work if there exist an imminent danger to the employees or other employees, that is not normally present at the worksite or workplace. The employee is required to give written notice of the imminent danger to the employer, who is then obligated to investigate the danger and produce a report to be given to the employee. During the investigation, the employer may reassign the employee to another assignment that does not include the imminent danger and must continue paying the employee. If an employee disagrees with the report prepared by the employer, they are entitled to file a complaint with an occupational health and safety officer. An employer is prohibited from taking any disciplinary action against an employee for exercising their rights under the OHSA.

As it relates to COVID-19, Occupational Health and Safety has not yet published any guidelines on how COVID-19 relates to workplaces. However, under the OHSA, employees who give notice of their refusal to work in a workplace due to concerns about COVID-19 would not be required to report to the workplace (but could be required to telecommute). It is likely that if the workplace does not include any workers with risk factors (e.g. recent international travel, contact with person with COVID-19 diagnosis, COVID-19 symptoms), it would not present an imminent danger and the employee could be compelled to return to work despite their concerns or face termination. However, if any employees presenting risk factors for the spread of COVID-19 are in the workplace, the employee's refusal to attend the workplace could be deemed to be justified based on an imminent danger not normally present at the workplace.

PLEASE NOTE: THIS ADVICE DOES NOT RELATE TO ANY WORKPLACES OR OCCUPATIONS THAT ARE DEEMED CRITICAL OR ESSENTIAL SERVICES BY ANY LEVEL OF GOVERNMENT AND HAVE BEEN DIRECTED TO REMAIN OPEN AND CONTINUE WORKING DESPITE THE COVID-19 PANDEMIC.

Q5: CAN I FIRE AN EMPLOYEE WITH RISK FACTORS WHO REFUSES TO SELF-ISOLATE?

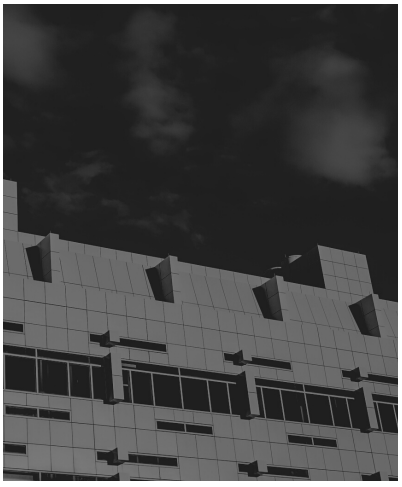
The OHSA also requires that workers take reasonable care to protect their own health and safety, the health and safety of other workers and the health and safety of other persons attending their worksite or workplace. Employers have an obligation to ensure that workers are aware of their responsibilities and duties under the OHSA. To the extent that an employee is deemed a health and safety risk due to their exposure to COVID-19, an employer is entitled to remind the worker of their responsibility to protect the health and safety of their coworkers and require them to work from home. Any employee who fails to work from home when directed, due to the danger they present to their co-workers' health and safety, would be insubordinate and could likely be dismissed for cause.

The AHRA would not apply to a termination of an employee who fails to self isolate due to the reason for the termination. The AHRA prevents discrimination in employment, including termination due in whole or in part to an employee's illness. Where an employee is refusing to self-isolate, the termination is not related to their risk of having the COVID-1 virus, but rather their refusal to take the employer's direction and their endangering the health and safety of their co-workers.

Q6: CAN I FIRE EMPLOYEES THAT HAVE COVID-19 OR ARE SELF-ISOLATING AS PART OF THE TERMINATION OF A LARGE NUMBER OF EMPLOYEES?

The AHRA only prohibits termination of employees due in whole or in part to a protected ground such as illness. This does not prevent an employer from terminating an employee due to economic factors, restructuring that eliminated the employee's position or other reasons unrelated to COVID-19. However, employers cannot simply cite the economy as an issue and then proceed to terminate every single employee currently out of the office due to COVID-19. Even if an employer terminates employees due to economic reasons, if they use economic reasons as an excuse to terminate employees who have or are at risk of having COVID-19, they are still making their decision to terminate those specific employees at least in part due to that employee having or self-isolating due to the risk of having COVID-19

Where an employer is terminating a large number of employees due to economic factors, they must provide a rationale for why specific employees are being terminated, which cannot include COVID-19 as a factor. Therefore, if an employer is cutting salary and terminating employees at the higher end of the pay spectrum, this may be justified if all employees terminated are higher paid employees, whether they have COVID-19/are self-isolating or not. However, if an employer is cutting salary but disproportionately terminates the employment of employees at home with COVID-19 or self-isolating, this will appear to be termination due in part to COVID-19, and the employer would be setting themselves up for one (or multiple) human rights complaints.



Q7: IF I FIRE EMPLOYEES DURING THE COVID-19 PANDEMIC, WHAT DO I NEED TO PAY THEM?

Employment length	Amount of Notice
90 days to less than two years	1 week
2 years to less than 4 years	2 weeks
4 years to less than 6 years	4 weeks
6 years to less than 8 years	5 weeks
8 years to less than 10 years	6 weeks
10 years or more	8 weeks

COVID-19 does not affect an employer's requirement to give the minimum notice required by section 56 of the ESA.

Depending on the terms of the employment contract, an employee may be entitled to pay in lieu of reasonable notice at common law. This is fact dependent and based on the employee's age, length of employment, education and training and the availability of similar employment in the region. As COVID-19 is causing many businesses and sectors of the economy to shut down, it will likely affect employee's ability to find similar employment, at least in the short term, and may require increased amount of pay in lieu of notice to be provided to employees.