

laying off employees and deferring severance: practical considerations for Ontario employers

In the current economy, many employers are facing financial and operational challenges. One of the most common issues which employers struggle with is how to "buy time" on deciding whether or not an employee's separation from the company will be permanent. This document summarizes 10 key strategies which we encourage our employer clients to consider.

1. assess which employees are covered by the Employment Standards Act

The Ontario *Employment Standards Act* carves out a number of exceptions, including qualified professionals and those who work in specified industries. Further, certain employees perform federally-regulated work and are covered exclusively by the *Canada Labour Code*. So as a preliminary point, it is important to know which particular legal regime (if any) applies.

2. retain term or task employees where possible

Workers who have been retained as "term" or "task" employees (e.g. seasonal workers) have no right in Ontario to claim termination pay or severance pay. Thus, so long as the employee has signed an agreement with the employer or the nature of the engagement is properly documented, there will be no need to pay severance once the term or task has been completed.

3. make offers of reasonable alternative employment

By assigning reasonable alternative employment to an employee in lieu of immediate layoff, the employer can potentially avoid a severance claim. The *Employment Standards Act* rules specifically negate the right to claim statutory severance when the employer provides such an offer. While the exact nature of what constitutes the nature of a "reasonable alternative offer" may be subject to dispute, as a practical matter employees will often accept what is offered when the choice is to otherwise be laid off.

4. document any layoff or offer in writing

The employer will have the challenge of proving that an employee who is no longer working for the company does not have a right to claim any severance amounts. Best practice in this area is to be clear about the nature both about the employment that is offered and the circumstances giving rise to any subsequent layoff. A document which sets out the arrangements clearly will always be more powerful evidence than vague recollections of discussions which may have occurred years earlier.

5. consider adopting amended (i.e. non-Sunday start) work week

The specific rules which trigger an employee right to claim severance in Ontario are tied to the employee not being assigned any work during a "regular work week". The default approach is to use a work week which starts on a Sunday. If any employer's operation contemplates an irregular (i.e. not Sunday-Saturday) scheduling pattern, the triggering date for layoffs may be deferred by adopting a mid-week start date.

6. include right to layoff employee in offers or collective agreement

Including an express right to lay off employees in an offer of employment or collective agreement provides employers with an important protection against employees who may attempt to claim termination or severance pay. In the case of non-unionized employees, the risk of constructive dismissal claims is significantly reduced when the right to temporarily lay the employee off is confirmed in writing. In the unionized setting, employers should be mindful of retaining the right to determine if there will be layoffs.

7. consider bona fide return to work "mid-stream" to extend window

The relevant time periods set out under the Ontario employment standards rules dictate the frequency or amount of work that must be assigned to employees before the right to claim termination or severance is triggered. By assigning work "in the middle" of the layoff period, the employer may be able to reset the clock and postpone an employee's right to claim termination or severance pay.

8. provide substantial payments during layoff

An employer who makes substantial payments to an employee while that employee is on temporary layoff will delay the date for when a right to make a claim for termination or severance pay is triggered. More specifically, these payments extend the rolling window used to assess when the temporary period ends.

9. continue benefits during layoff

Under the relevant Ontario rules, an employer can postpone an employee's right to bring a termination or severance claim by continuing to make payments to a legitimate retirement or pension

plan or to group or employee insurance plans. However, this approach requires a detailed review of the plan provisions in order to assess whether coverage can in fact continue.

10. adopt a Supplementary Unemployment Benefits Plan

Supplementary Unemployment Benefits (SUB) Plans are being utilized by some employers in order to top up Employment Insurance benefits. SUB Plans can extend the layoff window and thus delay an employee's right to bring a claim for termination or severance pay.

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[a cautionary note](#)

The foregoing provides only a summary of the rules under the Ontario *Employment Standards Act* and does not constitute legal advice. The specific rules applicable to particular work or in a specific jurisdiction may be different. Any member of our [Employment and Labour Relations Group](#) would be pleased to discuss the impact of this decision.

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