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ADVICE FOR BRITISH COLUMBIA EMPLOYERS ON LAYOFFS RESULTING FROM COVID-19

This memo will outline the law in British Columbia relating to layoffs of employees due to business or operations closures and/or reductions in work due to COVID-19, as well as our recommendations for best practices for provincially regulated employers dealing with these issues.

A. NON-UNION EMPLOYEES

There are two sources of law relating to layoffs and/or termination of employment of non-union employees in British Columbia – the *Employment Standards Act* ("ESA") and the common law (judge-made law).

(i) *Employment Standards Act*

Under the *ESA*, a temporary layoff of more than 13 weeks in a 20-week period is considered a "termination", which gives rise to an entitlement on the part of the employee to individual notice of termination or pay in lieu thereof under the *ESA*. A "week of layoff" for *ESA* purposes is a week in which the employee's compensation is less than 50% of his/her average compensation over the preceding eight (8) weeks.

The notice of termination or pay in lieu required under the *ESA* for an individual termination of employment is: one week's notice/pay for more than three months but less than one year's service; two weeks for one year to less than three years' service; one week per year of service thereafter to a maximum of eight weeks. Note, however, that this notice provision is not applicable to construction industry employees who normally work on a construction site or to casual employees (and there are other exemptions as well).

In addition, if there are more than 50 employees terminated from a single location in a two month period (i.e. laid off and not recalled within 13 weeks), the group termination provisions apply. The group termination provisions require additional advance notice to the Minister of Labour and the affected employees of eight to 16 weeks, depending on the number of employees laid off. The threshold number for this provision to apply is 50 employees terminated from a single local in a two month period. In determining if the "50 employees terminated in two months" threshold is reached, the calculation includes managers, non-union employees and unionized employees. However, unionized employees are only deemed to be "terminated" when their recall rights under the collective agreement have expired (this is generally longer than 13 weeks), or if it is clear they will not be recalled (e.g. the business has permanently closed).

However, for both the group and individual termination provisions in the *ESA*, there is an exemption for "unforeseen circumstances" other than a receivership or insolvency. There is a strong argument that this exemption would apply in the COVID-19 circumstances, especially in

light of the public health crisis aspect of this and the directions of the government to everyone to "stay home" as much as possible. Employers should that their layoff notices to employees explain that the layoffs result from the impacts of the COVID-19 virus and that they will be recalling employees as soon as possible.

(ii) Common Law

In addition to the *ESA* provisions, there is also liability for terminated employees at common law. This is judge made law. Under the common law, employment relationships are a contract, which are deemed to include a provision that they can only be terminated (other than for cause) upon the provision of "reasonable notice". If reasonable advance working notice is not provided, then pay in lieu of notice (often referred to as "severance pay") is required. The amount of notice required depends upon the employee's position and length of service, the nature of the industry, and how difficult it would be to obtain alternate employment. However, a very general rule is roughly three weeks to a month per year of service. Common law reasonable notice can be altered through express provisions in a written employment contract.

Because employment relationships are a contract, the contract can be considered to be breached if one party makes a "material change" to the terms of a contract. Unless the written employment contract expressly provides for periods of temporary layoff or reductions in the hours of work from time to time (and most do not provide for this), a temporary layoff or any significant reduction in the hours of work would likely be considered a "material change" and thus could be a "constructive dismissal" of the employee. Employees can, as a matter of law, take the position that they are constructively dismissed, resign, and sue for damages for the failure to provide reasonable notice of termination.

However, employees also have an obligation to "mitigate their damages" from the breach of the contract, including in cases of constructive dismissal or material change to the contract, by looking for alternate work, which can include continuing to remain employed with the same employer despite the change to the contract. The test is whether the employee has acted "reasonably" in quitting and claiming constructive dismissal.

In the circumstances of COVID-19 and the widespread business reductions and shut-downs that are resulting, an employee who resigns and claims a constructive dismissal as a result of a temporary layoff due to COVID 19 is unlikely to have much sympathy from a court or to be found to be acting reasonably. Such employees will likely be found not to have mitigated their damages by waiting to be recalled to work following the end of the crisis, and thus they may be disentitled to any (or at least most) damages beyond *ESA* entitlements.

Thus, while it is technically a material change, and thus a "constructive dismissal", to temporarily lay off a non-union employee and/or reduce his/her usual hours of work, employees who quit and claim constructive dismissal due a layoff resulting from COVID -19 will likely have a minimal claim, if any, for damages. In addition, of course, such employees would be out of a job in the end if they quit rather than wait to be recalled to work.

(iii) Additional Steps Employers can Take to Avoid Termination of Employment

That said, there are some additional steps employers can take to reduce the likelihood that laid off employees would be found to have been terminated if the layoff lasts beyond 13 weeks, or that they have been constructively dismissed at common law. These steps will also help employers maintain the employment of trained and experienced employees.

First, employers should consider whether there is any productive work that employees can do from home, such as reviewing training manuals, updating documentation, etc., for which the employer could justifiably continue to pay for and thus continue to provide some level of income to employees for a period of time.

Second, employers should look into the Service Canada and CRA programs that have been introduced that allow for work-sharing programs (with EI payments for the lost hours), EI top-up programs where employers top up EI payments to some degree (these are called Supplementary Unemployment Benefits ("SUB") Plans), and the new CRA wage subsidy program.

Third, if there is a full layoff of some or all employees, employers who able to continue some benefits coverage during some or all of the layoff period should consider doing so. This will assist in maintaining the employment relationship. However, employers should careful not to promise indefinite continuation of benefits regardless of the length of the layoff, as it not currently possible to predict how long the impacts of COVID-19 will continue. We recommend that if benefits are extended during layoff, it is initially for a fixed period of time (e.g. two months), after which it can be revisited and further information provided to employees at that time.

In summary, an employer who is forced to do layoffs or reductions of work for employees as a result of COVID-19 should make clear that they have no option but to do this at this time, and they will be recalling people to work as soon as is realistically possible.

B. UNIONIZED EMPLOYEES

For unionized employees covered by a collective agreement, the common law relating to termination of employment does not apply. Thus, there is no concept of "constructive dismissal" as a result of a temporary layoff or reduction of work.

Instead, the provisions of the collective agreement (if any) dealing with reductions in hours of work and/or layoffs apply to individual terminations of employment. These provisions could include advance notice requirements, notification of the union, recall rights, and outcomes if employees are not recalled to work prior to the expiry of their recall rights. Some collective agreements also have provisions governing the continuation of benefits coverage during some or all of the layoff period.

In all cases where employees are represented by a union, the employer should provide notice of upcoming layoffs to the union no later than when the notices are provided to the affected employees and preferably beforehand, so that the union can prepared for the questions they will likely receive from their members. And, if the employer is seeking to deviate from the provisions

of the collective agreement with respect to layoffs relating to COVID-19 (even to the benefit of affected employees), the union should be notified of these intentions and its agreement sought (or at least confirmation that there are no objections) prior to the actions being implemented.

In some cases, union may seek to negotiate additional protections for employees who are affected by these layoffs or reductions in work. Employers have an obligation to consider those requests and respond to them in good faith, but are not obliged to agree to any particular variations to the collective agreement provisions during the term of the collective agreement.

For collective agreements which were in effect prior to May 30, 2019, so long as there are any provisions in a collective agreement dealing with individual layoffs or terminations of employment, the *ESA* provision dealing with individual layoffs (s. 63) does not apply to employees covered by the collective agreement.

For collective agreements that only came into effect after May 30, 2019, the collective agreement provisions dealing with layoffs and terminations of employment must "meet or exceed" the applicable provisions of the *ESA*. If not, then the *ESA* provisions dealing with individual layoffs or terminations will apply in place of the collective agreement provisions. In almost all cases, collective agreements will "meet or exceed" the *ESA* provisions on individual layoffs and terminations, but if there is any doubt about this, advice should be sought.

The group termination provision in the *ESA* (s. 64) does apply to unionized employees covered by a collective agreement, as well as to non-union employees. See the discussion of this provision in the section above dealing with non-union employees. Note that in addition to the notices of group termination to the Minister of Labour and the affected employees, notice must also be given to the union.

As discussed above, there is good reason to expect that these provisions will be held not to apply to layoffs resulting from COVID-19, at least so long as employees are eventually recalled to work. However, if the layoff extends such that employees' recall rights under the collective agreement are coming close to expiring, and it is unclear whether employees can be recalled before their recall rights expire, employers should discuss with their unions how to deal with this – for example, by further extending the recall rights periods -- so that terminations are avoided and employees can maintain their employment.

NOTE: This memorandum is intended to provide general advice only and should not be relied upon or quoted. For advice or questions about particular situations, or for additional clarification of any points in this memorandum, please contact Andrea Zwack or Melanie Vipond, any of our lawyers. The contact information for all of our lawyers can be found at www.glgzlaw.com

Wishing everyone safety and good health.

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