Layoffs, Terminations & Restructuring Your Workforce: Avoiding the Cost of Non-Compliance
INTRODUCTION

Change is never easy. One of an HR manager’s most difficult tasks is shepherd­ing the company through layoffs, termina­tions and workforce restructuring. Smoo­thing over the tension in the workplace that comes with those types of changes can be hard enough—but on top of that you have to understand and manage multiple legal issues too. These issues are never more relevant than now as employers struggle to gain solid financial footing in a global economic crisis.

HR Compliance Insider is here to help, sponsoring this Special Report which provides you with some practical advice for tackling some of the many legal issues you face when your company is undertaking terminations, layoffs and work­force restructuring.

In Chapter One, our report focuses on termina­tions and layoffs, helping you:

- Avoid common mistakes employers make when issuing termination letters
- Calculate and process termination payments
- Understand and comply with notice and other requirements that apply when you lay­off or terminate large groups of employees
- Draft enforceable severance agree­ments with employees so the company can avoid getting sued by terminated employees
- Completing the ROE for terminated employees
- Avoiding Wallace damages by handling terminations the right way

Chapter Two shifts the focus to legal issues you encounter if you try to avoid or minimize layoffs by reorganizing workers’ responsibilities or cutting payroll. It may seem more appealing to cut pay rather than jobs or to consolidate duties so you can lay off fewer people. But whenever you make changes to key terms of the employment relationship, you risk constructive dismissals—which basically means you changed the employment terms significantly and unfavourably enough that you effectively terminated the employee. Chapter Two will help you avoid this risk. Additionally, we address other changes you might be considering such as:

- Variable pay arrangements
- Cutting post-retirement health and other benefits
- Switching from a defined benefit to defined contribution pension plan.

Finally, you need to be concerned about the collateral damage created by terminations, layoffs and restructuring. So Chapter 3 explains why the HR department is so important to your bottom line and how you can persuade administration not to make cuts in your department. We also address the side effects of layoffs and terminations—namely increased workloads, overworked employees and tension in the workplace and potential for violence and safety incidents.

With this Special Report you’ll have the resources you need to successfully navigate your company through layoffs, terminations and reorganizing the work force.
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CHAPTER 1:
Terminations & Layoffs
TERMINATION NOTICE TRAPS
How Not to Provide Notice of Termination

You generally can’t fire employees without giving them written notice letting them know that their employment is being terminated and listing the key information they need to seek employment insurance and a new job. It’s important to cross the “t’s” and dot the “i’s” when you prepare termination notices. That’s because failure to provide the proper form of written notice can invalidate the legal basis of the termination and make you liable for wrongful dismissal and other damages. The notice may also have to be delivered in an appropriate manner.

How can you tell if your termination notices and delivery methods are valid? The Insider looked at cases where a court or arbitrator struck down a termination on the basis of improper termination notice. We then put all of the mistakes into one Model Notice. In essence, we created the termination notice from hell that you can use to avoid mistakes in your own notice forms. So look at the Model Form below and the way it was delivered and see how many problems you can spot. Then make sure that you don’t make the same mistakes when delivering notice of termination to your own employees.

WHAT THE LAW REQUIRES

Under Canadian employment standards law, employees can’t be terminated without notice—unless you have “just cause” to terminate them. Although the right to notice differs slightly from province to province, it generally comes in the following form:

- Advance notification letting the employee know that his employment will be terminated at the end of the notice period;
- Wages in lieu of notice for the amount of time the notice period covers, e.g., three months of wages if the employee is entitled to three months’ notice; and/or
- A combination of the above.

In the first and third scenarios, the employers must prepare some kind of document notifying the employee that she’s being terminated, when the termination takes effect, what termination payments, e.g., wages in lieu of notice, severance, vacation pay and retiring allowances, the employee is entitled to receive and other information.

Invalid Notice Undermines Termination

Termination notice must include certain kinds of information such as itemization of the different types of termination payments being made and how each was calculated. Employers might also have to furnish additional information in the notice under the terms of the contract or collective agreement. There may also be provincial requirements about how notice is delivered to the employee. Thus, even a well written notice may be invalid if you don’t deliver it the right way.

These requirements are important because if your notice is no good, the termination may be invalid. Result: Even if your reasons for termination are justifiable, the firing may be illegal and subject you to liability for improper dismissal. Thus proving proper notice is critical to avoiding damages. Moreover, employers bear the burden of proving that the notice was valid. “The onus of proving notice,” according to one court, “is on the employer seeking to use it as defense to wrongful dismissal” [Yaeger v RJ Hastings Agencies Ltd.].

Example: An employer claimed he gave the employee six months’ notice in two separate conversations. The employee said the employer merely suggested he resign. Nothing happened for 17 months after the first discussion until the employer fired the employee. The court said the employer hadn’t given valid notice in the earlier discussions, noting that the parties disagreed about the substance of the discussions and the fact that no action to fire the employee was taken for 17 months after the first discussion took place [Yaeger v RJ Hastings Agencies Ltd.].

The Rules of Termination Notices

In interpreting the employment laws, courts require termination notice to be:

- Specific—it must give sufficient detail to explain the termination and when it takes effect;

Defining Our Terms

Before we go any further, we need to explain what we mean by the word “notice” in this article to avoid confusing you. In employment law, the word “notice” typically refers to the amount of time and/or wages employees are due upon termination, as described above. But we’re using the word in a slightly different way in this article.

Even if the employee receives wages in lieu of notice rather than advance notification, the employer typically must provide written notification to employees to let them know that they’ve been terminated. When we mention “notice” in the article, we’re referring to this written notification of termination, rather than the amount of time and wages the employee is due.
**TERMINATION TRAPS CONTINUED FROM PAGE 5**

- **Unequivocal**—it must leave no doubt that the employee has been fired and can’t be wishy-washy or in any way give the employee the reasonable impression that he can keep on working; and

- **Clearly communicated**—it must actually be delivered to the employee.

The communication requirement is particularly important. Courts will ask: Did the notice “fairly communicate to the employee that the employment relationship would definitely end and when it would do so?” Another variant of this question: Would an employee reasonably be expected to understand that the notice was notice of termination and know from the terms of the notice precisely when employment would end? If the answer to those questions isn’t a clear yes, you haven’t given proper notice and could be on the hook for damages for improper dismissal.

**MODEL NOTICE**

With these rules in mind, take a look at the following notice. Let’s assume the notice was posted on the breakroom bulletin board and shown as a slide during a presentation to the customer service response department explaining a corporate reorganization. Mary Mustgo, the customer service response manager, is suing the company claiming that she didn’t get adequate notice of termination:

**XYZ Marketing Associates**

123 Main Street

Busytown, BC

To: Customer Service Response Department

From: HR

XYZ Marketing Associates is undergoing a restructuring and has decided as part of a corporate reorganization to outsource our customer service response department. Therefore, the customer service department will no longer exist some time in early 2009.

We are grateful for your service with XYZ Marketing Associates. While we have made the decision to outsource customer service, our company continues to thrive. We hope perhaps you can work with our XYZ team in a different capacity in the future. In fact, there are positions opening up in our Vancouver office. You may submit an application to the HR department.

**What’s Wrong with This Termination Notice?**

There are six problems with the way this notice was written and delivered. How many can you spot?

1. **Not Addressed to the Employee**

The notice never identifies Mary by name. It simply addresses the members of the department to which Mary belongs. This might not constitute adequate termination notice under the law. Although not all provinces expressly require notice to be addressed to the specific employee, some—like Ontario and Nova Scotia—do. But experts say you should personally address all termination notices even if your province doesn’t expressly require it because general notices addressed to a group, department, etc. could be misunderstood or even ignored.

2. **Not Personally Delivered**

Some provinces require notice to be delivered to the employee either personally or by regular mail or some other means of delivery. Employees also must be allowed to keep a copy of the notice. Posting the notice on a bulletin board and showing it as a PowerPoint slide, the way XYZ did, doesn’t satisfy these requirements.

3. **Doesn’t Tell Employee She’s Been Fired**

One of the biggest problems with this notice is that it’s vague and never comes out and tells Mary or any of the other members of the department that they’ve been terminated. The notice just says Mary’s department and job position are being eliminated but doesn’t expressly say that all the employees in the department are losing their jobs as a result. This lack of clarity opens the door for Mary’s lawyer to argue that the notice could reasonably be understood as merely an explanation of changes within the company. In other words, employees who see such notice might come away thinking they’ll still be able to work for the company.

4. **Doesn’t Set a Termination Date**

The employee must, in the words of one court, have a “clear understanding that his or her employment is at an end as of some date certain in the future.” So you should always state clearly in the notice the date on which the termination takes effect. You can’t just give a general time frame. That’s why Donald Trump’s “You’re fired!” probably wouldn’t pass as proper termination notice in Canada.

**Example:** An employer informed an employee that it was closing an office and that his position would eventually be eliminated. The employee had also signed a letter agreement allowing him to continue in his job for a minimum of two years. “Telling an employee that his current role would be in place for a minimum of two years could not be construed as a notice that his employment would end on a certain date,” said the court. In other words, the combination of closed office and end of guaranteed minimum employment weren’t enough to serve as notice of a termination date. The employer had to send the employee a letter actually listing a specific termination date [Tucker v. Weyerhaeuser Co.].

Hopefully you noticed that the XYZ notice includes no specific date for when the termination will take effect. It only states that the restructuring will occur next month and that the department will be eliminated “early in 2009.” This isn’t specific enough to let Mary know when she’ll have to start pounding the pavement for a new job.
5. Terminates the Position but Not the Employee

As explained by a Nova Scotia court, “the employer must make it clear to the employee that he or she is being terminated from the employer and not simply from the employee’s current duties” [Bent v. Atlantic Shopping Centres Ltd.]. Simply eliminating the employee’s position isn’t enough to convey this message. You must tell employees that they and not just their job, are being terminated.

Example: An employer gave an employee a letter saying that his position was being terminated in six months on a specific date. But the same letter suggested future positions in the company might be available. The court said the notice wasn’t specific and unequivocal. It merely said the employee’s current position—not his entire relationship with the company—would terminate. By contrast, a second letter was more unequivocal and told the employee not to report to work after October 28, and made no mention of future work at the company. This letter, the court said, was “free of any taint of equivocation” and was valid notice of termination [Reynolds v. First City Trust Co.].

Example: XYZ’s notice says that Mary’s department is being eliminated but never expressly says Mary or any other employee in the department is terminated. In fact, the notice suggests that there could be other positions in the company available. This is unlikely to be enough for XYZ to prove that a reasonable person would understand the notice to indicate that he’s been terminated from employment with the company.

6. Hints at the Prospect of Continued Employment in Another Position

To soften the blow of termination, many companies will include language in the termination notice suggesting that there might be other work with the company. But this can prove to be a costly legal mistake. Courts have held that talking about the possibility that the employee could stay with the company muddies the termination message and renders the notice unclear and equivocal. Employees are especially likely to seize on such language as a hint when the notice includes generous praise of the employees and their service to the company.

Example: A company gave an employee notice of termination but said it would make “every effort” to place the employee in another position and would revoke the notice of termination if those efforts proved successful. The court said the effect was that notice was only final if another position in the company didn’t materialize [Royster v. 3584747 Canada Inc (cob Kmart)].
Terminating employees is an experience nobody relishes. After the termination notice is drafted and the bad news delivered to the employee, HR and payroll have to work together to prepare the final pay cheque, along with any termination, severance or other payments the employee is entitled to. And that’s no picnic. To properly calculate the different termination payments an employee may receive, you need to negotiate a set of complex legal requirements. That’s where this article will come in handy. We’ll explain the basic laws governing termination payments you need to know and how to avoid five common mistakes that can cause violations and overpayments. There’s also a chart on page 9 outlining the minimum termination notice and payment requirements of each province.

Defining Our Terms
When we refer to “terminated employees,” we mean employees who have been permanently terminated without cause, as opposed to employees who have been terminated for just cause, quit on their own initiative or been let go temporarily or as part of a mass layoff. The rules are different for such employees and beyond the scope of this article. The article also deals with employees in general industry. Many provinces have special rules for terminating employees in construction and other industries, such as shipbuilding (ON), firefighting, student nursing and teaching (BC) and fishing (BC and NS).

WHAT THE LAW SAYS
There are legal requirements that employers must be aware of when processing termination payments. While specifics vary, the laws of each province follow the same basic pattern:

Notice Period: Employees who have worked for the same employer for at least a stated period—typically three months—are entitled to minimum notice of termination. The longer employees work for the employer, the more notice they get. Generally, employees get one week’s notice for each year of service, but the rules vary. For example, an employee with five years of service would get six weeks’ notice in SK but only two weeks in NL. (See the chart on page 10 for the notice requirements in your jurisdiction.).
Although you’re not a lawyer, to carry out this obligation, you need to be aware of the applicable legal requirements and the terms of the contract and/or settlement to properly calculate each form of termination payment and avoid breaches and overpayments.

This is where things can get dicey. Although each situation is different, there are some common patterns you’re likely to encounter when calculating termination payments. Here are five mistakes that employers commonly make and how to avoid making them:

**1. Miscalculating Wages in Lieu for Employees with Irregular Workweeks**

Calculating wages in lieu of notice is straightforward when the employee works a regular workweek: You pay the amount the employee would have received if notice hadn’t been given. This generally includes overtime, vacation and other types of pay the employee is entitled to under the law, contract and settlement. “So, if an employee would otherwise have worked overtime during the notice period, e.g., where the employee is senior and overtime is assigned on the basis of seniority, wages in lieu of notice must include what would otherwise have been paid,” explains Ontario consultant Alan McEwen.

But calculating wages in lieu of notice for employees with irregular workweeks is different. In most jurisdictions, including Fed, AB, BC, MB, ON and SK, wages in lieu of notice for such employees are based on an average of wages earned over a set time period. And certain types of pay, such as overtime, sick, holiday and vacation pay, are taken out of the equation. Failing to follow this rule will result in overpayments.

**EXAMPLE**

An ON secretary fired after 4½ years of service is entitled to four weeks’ notice under the ESA. She makes $20 per hour, but doesn’t work the same number of hours each week. To calculate her wages in lieu of notice, the company must average her pay over the last 12 weeks. Suppose the company is unaware of this and bases her payment on actual earnings over the last 12 weeks rather than an average. Here’s what would happen *(NOTE: In ON, overtime is due after 44 hours in a week):*

<table>
<thead>
<tr>
<th>Previous Service</th>
<th>Hours</th>
<th>Earnings used to calculate wages in lieu of notice</th>
<th>Earnings employer should have used</th>
</tr>
</thead>
<tbody>
<tr>
<td>Week 1</td>
<td>44 regular 4 overtime</td>
<td>$880</td>
<td>$880*</td>
</tr>
<tr>
<td>Week 2</td>
<td>36 regular 8 sick</td>
<td>$720</td>
<td>$720*</td>
</tr>
<tr>
<td>Week 3</td>
<td>40</td>
<td>$800</td>
<td>$800</td>
</tr>
<tr>
<td>Week 4</td>
<td>40</td>
<td>$800</td>
<td>$800</td>
</tr>
<tr>
<td>Week 5</td>
<td>32 regular 8 public holiday</td>
<td>$640</td>
<td>$640*</td>
</tr>
<tr>
<td>Week 6</td>
<td>44</td>
<td>$880</td>
<td>$880</td>
</tr>
<tr>
<td>Week 7</td>
<td>40</td>
<td>$800</td>
<td>$800</td>
</tr>
<tr>
<td>Week 8</td>
<td>40 vacation</td>
<td>$800</td>
<td>$0*</td>
</tr>
<tr>
<td>Week 9</td>
<td>40 vacation</td>
<td>$800</td>
<td>$0*</td>
</tr>
<tr>
<td>Week 10</td>
<td>32 regular 8 public holiday</td>
<td>$640</td>
<td>$640*</td>
</tr>
<tr>
<td>Week 11</td>
<td>44 regular 4 overtime</td>
<td>$880</td>
<td>$880*</td>
</tr>
<tr>
<td>Week 12</td>
<td>24 regular 16 sick</td>
<td>$480</td>
<td>$480</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td></td>
<td><strong>$10,160</strong></td>
<td><strong>$7,520</strong></td>
</tr>
<tr>
<td><strong>AVERAGE</strong></td>
<td></td>
<td><strong>$847/week</strong></td>
<td><strong>$627/week</strong></td>
</tr>
</tbody>
</table>

* Overtime, public holiday, sick and vacation time not included in calculation.

Amount employer paid secretary: $3,388 ($847/week x 4 weeks)
Amount employer should have paid: $2,508 ($627/week x 4 weeks)
Overpayment: $880

**INSIDER SAYS:** Average earnings used to calculate wages in lieu of notice of employees who work irregular workweeks don’t include vacation and sick pay. But in ON, the employee would be entitled to vacation pay during the notice period under the ESA even if she doesn’t work through the notice period. So if the secretary in the above example was entitled to 6% vacation pay, the employer would be required to pay her an additional $150.48 (6%
2. Confusing Wages In Lieu of Notice and Severance

Under Fed and ON law where severance is required, it’s in addition to and not a substitute for wages in lieu of notice. In other words, employees are entitled to both. One of the common mistakes that employers make is thinking that severance replaces wages in lieu of notice. It doesn’t.

Example: An Ontario University fires a computer programmer after 10 years of service. The University realizes it doesn’t have just cause so it offers to pay the programmer wages in lieu of notice. Assuming the programmer is caught up on holiday and vacation pay, the minimum amounts the University must pay him under the ESA are:

- 8 weeks’ wages in lieu of notice; plus
- Any sick time, vacation pay or other benefits that would have otherwise accrued during the notice period; plus
- 10 weeks’ statutory severance.

In other words, the University can’t use the programmer’s severance payment to satisfy its obligation to pay eight weeks’ wages in lieu of notice. Exception: If an employment or settlement agreement only specifies the amount that an employer must pay a terminated employee, the employer can apply the amount it owes under the agreement to offset the statutory wages due the employee in lieu of notice, unless the agreement says otherwise, says McEwen. Of course, any specific items—such as unpaid vacation pay—should also be carved out in the agreement. “It all depends on how the payment is described in the agreement,” McEwen explains.

### TERMINATION NOTICE AND SEVERANCE PAYMENTS

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Notice Period</th>
<th>Severance Pay</th>
<th>Severance Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
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<td></td>
</tr>
<tr>
<td><strong>Federal</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>&gt; 3 months</td>
<td>2 weeks</td>
<td>Yes, if t employee worked for same employer for 12 consecutive months</td>
<td>2 days wages per year of service (minimum 5 days)</td>
</tr>
<tr>
<td>Alberta</td>
<td>3 months – 2 yrs</td>
<td>2 weeks</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td>2 – 4 years</td>
<td>4 weeks</td>
<td>N/A</td>
</tr>
<tr>
<td></td>
<td>6 – 8 years</td>
<td>5 weeks</td>
<td>N/A</td>
</tr>
<tr>
<td></td>
<td>8 – 10 years</td>
<td>6 weeks</td>
<td>N/A</td>
</tr>
<tr>
<td></td>
<td>&gt; 10 years</td>
<td>8 weeks</td>
<td>N/A</td>
</tr>
<tr>
<td>British Columbia</td>
<td>3 months – 1 yr</td>
<td>1 week</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td>1 – 3 years</td>
<td>2 weeks</td>
<td>N/A</td>
</tr>
<tr>
<td></td>
<td>3 – 4 years</td>
<td>3 weeks</td>
<td>N/A</td>
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<tr>
<td></td>
<td>4 – 5 years</td>
<td>4 weeks</td>
<td>N/A</td>
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<td></td>
<td>6 – 7 years</td>
<td>5 weeks</td>
<td>N/A</td>
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<td></td>
<td>7 – 8 years</td>
<td>6 weeks</td>
<td>N/A</td>
</tr>
<tr>
<td></td>
<td>&gt; 8 years</td>
<td>8 weeks</td>
<td>N/A</td>
</tr>
<tr>
<td>Manitoba</td>
<td>&lt; 1 year</td>
<td>1 week</td>
<td>No</td>
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<td></td>
<td>1 – 3 years</td>
<td>2 weeks</td>
<td>N/A</td>
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<tr>
<td></td>
<td>3 – 5 years</td>
<td>3 weeks</td>
<td>N/A</td>
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<td></td>
<td>5 – 10 years</td>
<td>4 weeks</td>
<td>N/A</td>
</tr>
<tr>
<td></td>
<td>&gt; 10 years</td>
<td>6 weeks</td>
<td>N/A</td>
</tr>
<tr>
<td>New Brunswick</td>
<td>6 months – 5 years</td>
<td>2 weeks</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td>&gt; 3 years</td>
<td>4 weeks</td>
<td>N/A</td>
</tr>
<tr>
<td>Newfoundland &amp; Labrador</td>
<td>3 months – 2 yrs</td>
<td>1 week</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td>2 – 5 years</td>
<td>2 weeks</td>
<td>N/A</td>
</tr>
<tr>
<td></td>
<td>5 – 10 years</td>
<td>3 weeks</td>
<td>N/A</td>
</tr>
<tr>
<td></td>
<td>10 – 15 years</td>
<td>4 weeks</td>
<td>N/A</td>
</tr>
<tr>
<td></td>
<td>&gt; 15 years</td>
<td>6 weeks</td>
<td>N/A</td>
</tr>
<tr>
<td>Northwest Territories and Nunavut</td>
<td>90 days – 3 yrs</td>
<td>2 weeks</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td>3 – 4 years</td>
<td>3 weeks</td>
<td>N/A</td>
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<td>4 – 5 years</td>
<td>4 weeks</td>
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<td>5 – 6 years</td>
<td>5 weeks</td>
<td>N/A</td>
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<td>6 – 7 years</td>
<td>6 weeks</td>
<td>N/A</td>
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<td>7 – 8 years</td>
<td>7 weeks</td>
<td>N/A</td>
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<tr>
<td></td>
<td>&gt; 8 years</td>
<td>8 weeks</td>
<td>N/A</td>
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<tr>
<td>Nova Scotia</td>
<td>3 months - 2 yrs</td>
<td>1 week</td>
<td>No</td>
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<td>2 – 5 years</td>
<td>2 weeks</td>
<td>N/A</td>
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<tr>
<td></td>
<td>5 – 10 years</td>
<td>4 weeks</td>
<td>N/A</td>
</tr>
<tr>
<td></td>
<td>&gt; 10 years</td>
<td>8 weeks</td>
<td>N/A</td>
</tr>
<tr>
<td>Ontario</td>
<td>3 months – 1 yr</td>
<td>1 week</td>
<td>Yes, upon later of 7 days after termination or next pay day, if employee worked 5 or more years and; - Payroll &gt; $2.5 million or - At least 50 employees were terminated over 6-month period due to business closure</td>
</tr>
<tr>
<td></td>
<td>1 – 3 years</td>
<td>2 weeks</td>
<td>N/A</td>
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<td>7 – 8 years</td>
<td>6 weeks</td>
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<td>&gt; 8 years</td>
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<td>Prince Edward Island</td>
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</table>
3. Treating Retiring Allowances Like Wages in Lieu of Notice

A similar mistake is treating retiring allowances the same as wages in lieu of notice for purposes of source deductions and reporting. Different tax and deduction rules apply to retiring allowances. For example, wages in lieu of notice are subject to income tax, EI and CPP deductions. Retiring allowances are also subject to income tax, but are taxed at a flat rate, says McEwen. And no CPP or EI deductions apply to retiring allowances, although the payments still must be reported on the employee’s Record of Employment. In any event, you need to keep the two payments separate. Keep in mind that:

- Minimum notice required under the ESA is considered wages in lieu of notice;
- Amounts above the minimum are considered retiring allowances; and
- Additional severance under Fed and ON law is also a retiring allowance.

Example: An ON employee who earns $1,000 per week is terminated without cause. Under the ESA, he gets two weeks’ notice and two weeks’ severance. But the employer gives him 10 weeks’ notice. Assume that there’s no vacation owing before termination and that the employee accrues vacation at 4%. The sides agree to a lump sum payment of $10,000. Of the $10,000 the employee receives:

- $2,000 is wages in lieu of notice;
- $2,000 is statutory severance;
- $160 is vacation pay; and
- $5,840, the balance, is a retiring allowance.

4. Omitting Pay for Statutory Holidays after Termination

Employees are entitled to pay for certain statutory holidays during the year. Because of the way the laws are written, in certain situations, an employee might also qualify for pay for holidays that occur after she’s terminated, notes McEwen. For example, an ON employee terminated on November 10, 2008 could be entitled to holiday pay for Remembrance Day on November 11, based on her service during the four work weeks leading up to the termination date.

5. Not Continuing Benefits Deductions during Notice Period

Another source of confusion stems from the fact that most employment standards laws require employers to keep offering particular types of benefits, such as pensions and healthcare, to terminated employees until the notice period expires, even if the employee has actually stopped working. And, because benefits coverage continues through the notice period, so do deductions for premiums and contributions.

Example: A law firm fires a junior associate and escorts him to the door the same day the associate speaks his mind to the managing partner. The managing partner orders payroll to pay only the minimum amount of wages due in lieu of notice and to stop all benefits immediately. The payroll department can’t comply: It must continue benefits such as healthcare and pension contributions through the entire notice period, regardless of the fact that the associate no longer works there.

Conclusion

Sorting out the different kinds of termination payments and how much of each the employee is entitled to is just half the battle. The next step in the termination process is to ensure that the payments are processed appropriately. Unfortunately, what sounds like an exercise in routine paperwork and administration is often a source of major mistakes.

INSIDER SOURCE

Alan McEwen: Alan McEwen & Associates, 17 Catherine St., St. Catharines, ON L2R 5E4; (416) 949-5709.
The worst part of terminating an employee is wielding the axe. The second worst part is settling accounts with the employee after the axe has fallen. For HR professionals and the payroll department, the chief challenge is to determine how much the employee should receive in termination payments. We explained how to calculate termination payments in Part One of this series. But the calculation is just half the battle. Once totals are added up, payments must be properly processed and transmitted. And often that’s not as simple and straightforward as it sounds. This article explains the legal requirements that you must follow when going through this process. There’s also a Model Policy on processing termination payments, as well as a chart listing the deadlines in each province for making termination payments.

**Step 1: Get Key Termination Info from HR**

Employers are required to notify employees of termination in writing. (Although in some provinces, including AB, BC and ON, written notice isn’t necessary if the employee is offered wages in lieu of notice.) Even if you don’t prepare the written notice, you must get a copy of it. “The termination notice often includes the basics about the termination, including termination date and, if you’re lucky, all termination and other payments due the employee,” explains Ontario payroll consultant Alan McEwen.

Unfortunately, termination notices typically leave out the key information needed to calculate and process payments. For example, it’s common for a notice to state that an employee is due earned overtime but not list the actual amount owed. Another common omission is an explanation of how earned commissions are to be paid after termination.

That means HR, payroll and any other departments or personnel involved in the termination process need to coordinate their activity and share information. The best way to avoid problems is to let create a policy for all HR personnel (and other departments) that lists the information needed to process termination payments, the way our Model Policy does. Like our Model, yours should require that payroll be notified of termination within one day that notice is provided to the employee. The policy should also explain how basic payments, such as wages in lieu of notice, overtime, statutory holiday pay, vacation pay and retiring allowances are processed upon termination and stipulate the information required for processing each, including:

- Last date of employment;
- Wages in lieu of notice;
- Overtime, call-in, vacation, statutory holiday and sick pay;
- Severance pay and retiring allowances;
- Pension options;
- Commissions due upon and after termination;
- Payments in exchange for a promise not to compete; and
- Amounts forgiven on an employee’s debt.

**Step 2: Fully Document Payments Due Upon Termination**

Most provinces require employers to list the different types of payments the employee is entitled to upon termination. For example, in Saskatchewan, wages in lieu of notice must be broken out from statutory holiday and vacation pay. Others, like Ontario, require employers to include an explanation of how payments were calculated. Experts cite at least two good reasons to document all payments due the terminated employee and the method you used to calculate them, even if itemization isn’t required by your province’s law:

- **Ensure Proper Withholding:** Different payments get different tax treatment. For example, unlike retiring allowances, wages in lieu of notice are taxable as employment income. Proper documentation can help ensure that proper withholdings and remittances are made on each listed amount.

- **Prevent Disputes:** Proper documentation can also head off potential disputes with terminated employees. “If you clearly separate each type of payment due upon termination and explain how it was calculated, you make it harder for terminated employees to later claim that they weren’t paid for something,” explains McEwen.

**Insider Says:** Most payroll software isn’t designed to provide on the paystub the level of detail required for full documentation of
Chapter 1: Termination and Layoffs

Employers must complete a Record of Employment ("ROE") when an employee is terminated (or his earnings are otherwise interrupted). Unfortunately, Service Canada's instructions about reporting of termination payments are somewhat confusing. One problem is that they don't make it clear that certain termination payments, such as wages in lieu of notice, must be reported in not one but two places:

- Block 15, which requires employers to report total insurable earnings and insurable earnings by pay period; and
- Block 17, which requires employers to report all payments or benefits paid upon, in anticipation of and after termination.

“Anything that’s insurable for the purposes of taking an EI premium belongs in Block 15,” says McEwen. Examples include wages, statutory holiday pay, vacation pay and banked overtime. If there’s been a pay period with no insurable earnings and the employer must complete Block 15(c), any payments on termination that are insurable should be added to the first pay period in Block 15(c), since the pay periods are reported in reverse order.

Conversely, Block 17 is used only for payments that result from the termination itself, such as wages in lieu of notice, statutory severance pay and retiring allowances.

Each payment due the terminated employee. That’s why many employers itemize all payments due upon termination and the method they used to calculate them in the employee’s termination letter or an attachment, says McEwen.

Step 3: Report All Termination Payments in ROE

It’s essential for employers to understand the requirements for reporting termination payments in ROE. The information required by the payroll department to process payments due upon an employee’s termination includes:

- Wages in lieu of notice;
- Banked overtime;
- Unused vacation pay or payment in lieu of vacation;
- Statutory holiday pay;
- Sick leave;
- Call-in pay;
- Severance pay and retiring allowances;
- Pension options;
- Benefit coverage;
- Commissions due upon and after termination;
- Expense advances;
- The cost of any equipment or other materials for which reimbursement is sought from the employee;
- Payments in exchange for a promise not to compete; and
- Amounts forgiven on an employee’s debt.

The following documents should be attached to the notification:

- Employee time sheets;
- Employee absence requests during the notice period; and
- Employment, non-compete and other agreements between the Company and terminated employee.

Information Required by the Payroll Department to Process Payments Due Upon an Employee’s Termination

I. Purpose
This policy was created to clarify the information that the payroll department needs from HR (and other departments) to process amounts due employees of ABC Company (the “Company”) upon termination.

II. Policy
A. Notice of Termination
1. Notification of an employee’s termination must be provided to payroll within one day of the date the Company provides notice to the employee.
2. Notification must include the employee’s last date of employment and the amount of any of the following payment types due the employee:
   - Wages in lieu of notice;
   - Banked overtime;
   - Unused vacation pay or payment in lieu of vacation;
   - Statutory holiday pay;
   - Sick leave;
   - Call-in pay;
   - Severance pay and retiring allowances;
   - Pension options;
   - Benefit coverage;
   - Commissions due upon and after termination;
   - Expense advances;
   - The cost of any equipment or other materials for which reimbursement is sought from the employee;
   - Payments in exchange for a promise not to compete; and
   - Amounts forgiven on an employee’s debt.
3. The following documents should be attached to the notification:
   - Employee time sheets;
   - Employee absence requests during the notice period; and
   - Employment, non-compete and other agreements between the Company and terminated employee.

B. Payment Dates
1. If an employee resigns without notice, final wages due shall be paid within 10 days of the last date of employment.
2. If an employee is terminated or laid-off, final wages due shall be paid within three days of the last date of employment.
3. All other amounts due upon termination, including retiring allowances, shall be paid in accordance with Company policies and applicable employment or collective agreements.

This policy is based on employment standards laws in Alberta but can be adapted to meet the rules of any part of Canada. As always, we remind you that there’s no such thing as a one-size-fits-all policy and that you must tailor the model to meet your particular situation and province’s laws.
allowances. “In other words, routine payments not affected by the termination, including regular wages from the last pay period are not reportable in Block 17,” explains McEwen. So while a retiring allowance would be reportable only in Block 17, regular wages would be reportable only in Block 15 and wages in lieu of notice would be reportable in both Blocks, McEwen says.

Step 4: Ensure Each Payment Is Made On Time
Employers must pay certain amounts due terminated employees, such as earned wages, wages in lieu of notice and statutory severance pay (if any), within a time period set by law. Although deadlines vary by province, they follow three common patterns:

- Payment due no later than date of termination (QC and NU);
- Payment due within set time period, usually less than 10 days after effective date of termination or last day worked (AB, BC, MB, NL, NS, NT, SK and YT); and
- Payment due on or before next regular pay period or set time period (Fed, NB, ON and PEI).

In some provinces, the time required for paying earned wages is different from the time for reimbursing unused vacation leave. For example, in NS, wages (including earned holiday pay) must be paid on or before the last day of the notice period, regardless of whether the employee received pay in lieu of notice. But unused vacation leave is due within 10 days of the employee’s actual termination date.

Example: An NS employee terminated on March 1 gets four weeks’ pay in lieu of notice. Wages would be due by March 29 (the last day of the notice period) and vacation pay on March 11 (10 days after the last date worked). (See “Know the Laws” below for what your province requires.)

Insider Says: The legal deadlines for payment generally apply when the employer gives notice of termination. Some provinces give the employer extra time to pay wages and other payments when it’s the employee who provides notice. Also, these requirements don’t apply to the various forms of retiring allowances, such as non-statutory severance pay or settlement amounts that have been agreed to by the employer and terminated employee.

**MINIMUM TIME REQUIREMENTS FOR PAY DUE UPON TERMINATION**

**FEDERAL:** a. Wages due on next regular pay-day or within 30 days of date of entitlement; and b. Vacation pay due “forthwith” when employment ceases [Canada Labour Code, Sections 188 and 247].

**ALBERTA:** All amounts due within 3 days of last date of employment [Employment Standards Code, Section 9].

**BRITISH COLUMBIA:** All amounts due within 48 hours of effective date of termination [Employment Standards Act, Section 18].

**MANITOBA:** All amounts due within 10 working days after termination, unless employer has been following a different practice since 1976 [Employment Standards Code, Section 86].

**NEW BRUNSWICK:** All amounts due upon earlier of 21 days after termination or next pay period [Employment Standards Act, Section 37].

**NEWFOUNDLAND & LABRADOR:** All amounts due within 1 week of termination date [Labour Standards Act, Sections 9(2) and 33(2)].

**NORTHWEST TERRITORIES:** All amounts due within 10 days after termination [Employment Standards Act, Section 13(3)].

**NUNAVUT:** All amounts due within 10 days after termination [Labour Standards Act, Section 50(3)].

**NOVA SCOTIA:** a. Wages due on or before expiration of notice period; and b. Vacation pay due within 10 days after employment terminates [Labour Standards Code, Sections 34 and 74(b)].

**ONTARIO:** All amounts due within 7 days after last date of employment or on next regular payday, whichever is later [Employment Standards Act, Section 11(5)].

**PRINCE EDWARD ISLAND:** All amounts due by last day of next regular pay period [Employment Standards Act, Sections 11(2) and 30(5)].

**QUÉBEC:** All amounts due at time employment is terminated [An Act respecting labour standards, Sections 55 and 83].

**SASKATCHEWAN:** All amounts due within 14 days after effective date of termination [Labour Standards Act, Section 48].

**YUKON:** a. All wages, including vacation pay, due within 7 days after date of termination; and b. Termination pay due within 10 days of expiration of pay period or in installments equal to normal pay on regular paydays [Employment Standards Act, Sections 25(1) and 65(2)].
Step 5: Complete T4 and T4A Tax Slips Properly

Be extra careful when you prepare and file year-end T4 and T4A tax slips with CRA for the terminated employee at the end of the year. Remember that separate T4 tax slips, which list all EI-insurable payments such as wages, vacation pay, statutory holiday pay and wages in lieu of notice, must be filed for each province of employment. So you might have to prepare more than one T4 tax slip for a terminated employee, depending on when the employee stops working and how payments are made after termination.

Example 1: John is an engineering manager for a pharmaceutical equipment manufacturer that processes payroll at its Ontario headquarters. He lives in Saskatchewan and reports to work each day at the manufacturer’s Alberta facility. On July 1, John receives notice of termination. His employer gives him six months’ salary continuance and 12 months’ retiring allowance, each beginning July 1, and he’s no longer required to report for work. John’s payments up to June 30 must be taxed in accordance with Alberta provincial income tax rates and reported on a T4 showing Alberta in Box 10. His salary continuance, however, must be taxed according to Ontario’s tax rates and filed on a separate T4 listing Ontario in Box 10.

On the other hand, T4A tax slips, which list non-insurable payments such as retiring allowances and statutory severance pay, are based on tax rates of the province where the employee resides at the time of payment. In the above example, John’s employer must prepare a T4A tax slip for John’s retiring allowance using Saskatchewan as the basis. But that would change if John moved into or out of Québec because Québec has different income tax rates.

Example 2: While still receiving his retiring allowance, John moves to Montréal. Since Québec has a different tax rate, withholdings on the retiring allowance will be different from what it would be if John was still living in Saskatchewan. And if his previous employer also does business in Québec, it must prepare a Relevé 2 for John in addition to the T4A—even if John never worked in the employer’s Québec location.

Step 6: Make Sure Employees Don’t Work Past Effective Notice Date

The employment laws in many provinces—including AB, BC, NL, NS, NT, NU and YT—specify that a termination notice is no longer valid if the employee works past the effective date of the notice.

Thus, if the notice lists May 1 as the termination date and the employee is still working on May 2, the employer must prepare a new notice with a new notice period to terminate the employee. Result: Payroll must process termination payments all over again, since the amount the employee earned after the first notice could have an impact on the amounts due after the second notice. So, once you give notice of termination, make sure the employee doesn’t continue to work past the effective date.

Be aware that there are also three jurisdictions where you don’t necessarily have to create a new notice for employees who work for a limited period after the effective date of the original termination notice:

- **Federal:** Employees may work two weeks after notice period expires;
- **New Brunswick:** Employees may work for one month after notice period expires;
- **Ontario:** Employees may work 13 weeks past effective date of termination, provided that the continued employment is considered “temporary.”

Conclusion

Calculating and processing termination payments is among the most challenging tasks you face. As with so many other payroll operations, the devil is in the details, especially the legal details. Termination payments come in different varieties, each of which is subject to its own particular set of rules. This article and Part One should enable you to spot the pitfalls and steer a course that ensures payment accuracy and legal compliance.

**INSIDER SOURCE**

Alan McEwen: Alan McEwen & Associates, 17 Catherine St., St. Catharines, ON L2R 5E4; (416) 949-5709; armcewen@cogeco.ca.
Layoffs aren’t simply a business issue. They trigger special legal obligations under employment standards laws for so-called “group terminations.” Such rules may apply not only to mass layoffs but to more modest workforce reductions. As few as three terminations per month over a four-month period could bring the rules into play. HR managers must be prepared to deal with the group termination rules to keep your company from committing employment standards violations. This article will explain what you need to know.

### Defining Our Terms

This article will use the term “group termination” rather than the colloquial “lay off” to refer to the permanent termination of a group of employees because that’s how such transactions are typically labeled in the employment standards laws.

### WHAT THE LAW SAYS

The employment standard requirements kick in when group terminations occur. So the first thing you must be able to do is recognize when your company is engaging in a group termination covered by the law. That’s not as simple as it sounds. One problem is that the definition of group termination varies from province to province. In general, whether a termination is a group termination under the ESA depends on five factors:

1. **Number of Employees Terminated.** Group termination requirements are typically based on the number of employees terminated. In AB, Fed, BC, MB, NL and ON, the threshold is 50 employees. In other words, group termination rules apply if 50 or more employees are terminated. In NB, NS, QC and SK, the threshold is only 10.

2. **Which Employees to Count.** To calculate the number of employees terminated you also need to know who to count. Most jurisdictions exclude:
   - Employees who’ve worked less than three months;
   - Seasonal employees and those employed for a definite period or task; and/or
   - Employees who’ve refused “reasonable” alternative employment.

3. **Length of Time Over Which Terminations Occur.** To determine if the group termination rules apply, you also need to determine the appropriate time period. That’s because group termination requirements can apply even if all the terminations don’t happen in one fell swoop. In 11 jurisdictions (Fed, AB, MB, NB, NL, NT, NU, NS, ON, SK and YT), the number of terminated employees is determined over four weeks. For example, in AB, group termination requirements apply if 50 or more employees are terminated over a four-week period. In BC and QC, employees terminated are calculated over a two-month period.

4. **Whether Terminations Are Counted Business-Wide or By Facility.** Calculating terminations gets tricky when terminations are spread out among different facilities. Fed, NS, ON, QC and SK law count all employees within the employer’s “establishment,” which could include multiple facilities. Thus, employers in these jurisdictions may be unable to avoid reaching the group termination threshold by spreading out terminations among different facilities. However, in AB and BC, the group termination number applies to terminations occurring within a single location. Thus, for example, a BC employer who lays off 140 employees over a two-month period can remain under the 50-employee threshold by spreading the lay offs out evenly among three different facilities. The other provinces and territories don’t say whether the number is based on the whole business or separate facilities. But, according to experts, since they don’t mention geography, these laws presumably would count terminations on a company-wide basis.

5. **Whether Any Exceptions Apply.** Employment standards lay out exceptions when the group termination rules don’t apply. For example, in SK, employers aren’t required to follow the group termination provisions for terminations caused by “unforeseeable events.” BC exempts certain industries, such as construction, fishing and fire fighting, from group termination rules. In ON, the group termination rules don’t apply regardless of how many employees are terminated as long as at least 90% of the workforce continues to work and the termination isn’t the result of a permanent shutdown of all or part of the employer’s business.

This Story Will Help You:

Ensure that your company carries out group terminations without committing employment standards violations.

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HOW TO COMPLY

The rules for group terminations are different than those for individual terminations. Here are the key requirements.

**Rule 1: Give Extra Notice or Wages in Lieu of Notice**

Unlike termination of individuals where notice is based on length of service, in a group termination notice depends on the number of employees terminated. Required notice for group termination is generally longer than notice for individual terminations—ranging anywhere from 4 to 18 weeks. (See the chart on page 19 for the notice requirements in your jurisdiction).

In most provinces, including SK, employers are allowed to overlap notice periods. In other words, individual and group notice don’t count separately and employees get whichever notice is longer. But in at least one province—BC—the notice period for group terminations is in addition to the notice the individual is entitled to based on length of employment. In other words, the two notice periods are counted separately and don’t overlap.

**Example:** A BC machine operator with two years of service is let go as part of a group termination involving 150 employees:

- **Individual Notice:** 2 weeks;
- **Group Notice:** 12 weeks;
- **Total Notice:** 14 weeks.

In a province where the notice periods overlap (and employees with two years of service get two weeks of notice), e.g., SK, the same machine operator would get 12 weeks notice.

Another twist: For staggered terminations, two jurisdictions—BC and MB—require employers to give notice of termination to all terminated employees before the date the first employee is terminated. So if a company initiates rolling lay offs, it must give the appropriate amount of notice in advance of the first wave. Thus, employees in the second wave will actually get more than the minimum notice required by law.

**Example:** A BC company announces that it will permanently lay off 500 employees over a two-month period. The first wave will be let go on March 31; the rest will be terminated on May 31. The company must give all 500 employees notice of termination in mid-December (16 weeks before the first wave). So employees in the first wave get 16 weeks notice and employees in the second wave 25.

**Rule 2. Give Employees Written Notice**

Although not all jurisdictions require it, written notice of group termination is something you should probably do anyway and it’s required by law in Fed, BC, MB, ON, QC and SK. Written notice must also include specific information, such as:

- The effective date of termination (or terminations, if they’re staggered);
- The reasons for termination: and
- The total number of employees terminated.

Some jurisdictions require even more detailed information. For example, in MB, notice of group termination must include the names of at least two people who may be the employer’s representatives on a joint planning committee (which we’ll talk more about later). Regardless of what your jurisdiction requires, if the notice isn’t written properly, it won’t be effective. And if notice isn’t effective, employees will continue to earn wages until proper notice is provided and the additional service time they accrue after improper notice is served will have to be factored into the determination of how much notice they get.

**Rule 3. Notify Third Parties**

Upon group termination, employers must provide prior notice to not just the employees but third parties such as:

- **The Government.** In every province except PEI, employers must alert the government about the group termination. In many cases, notice to the government is required even before the employer notifies the employees. For example, ON requires employers to complete a specific form and forward it to the Director of Employment Standards before giving notice to the affected employees.

- **Trade Unions.** Eight jurisdictions—Fed, BC, MB, NB, NT, NU, QC and SK—require employers to notify the terminated employees’ trade unions or bargaining agents. And even if you’re not located in one of these jurisdictions, such notice is likely to be required under the terms of your collective agreements.

**Rule 4. Post Notice**

In addition to giving notice directly to trade union and employees, some jurisdictions, including Fed, MB, NB, ON and QC, require employers to post the termination notice in a conspicuous place where affected employees are likely to see it.
Rule 5. Form a Committee

Some jurisdictions also require employers to form a committee (usually called a joint planning or reclassification assistance committee) once they determine that a group termination is necessary. The purpose of the committee, which usually has an equal number of employer and employee representatives, is to determine whether terminations can be avoided. If the committee agrees that there are no realistic alternatives and that termination is necessary, it must establish methods for helping terminated employees obtain other employment. Some provinces, including BC, MB, ON and QC, don’t automatically require a joint planning committee but authorize the government to order the employer to form one at any time.

Rule 6. Consider Trying to Get a Waiver

Employment standards laws typically give employers the right to request a waiver exempting them from having to follow the group termination rules under certain conditions, e.g., because terminated employees are adequately protected by their collective agreement. But experts say that waivers are rarely granted and aren’t usually a viable option. For example, Air Canada recently requested a waiver of the joint committee requirements in connection with its flight attendants layoff based on the protections provided in the affected employees’ collective agreement. But the request was shot down by the federal Labour Minister.

How Group Terminations Affect HR

The HR functions that group termination requirements affect include:

Calculating Notice. The correct notice period must be calculated and the appropriate amount of wages paid in lieu of notice to terminated employees.

Coordinating with Joint Committee. HR must stay informed regarding any decisions of a joint committee with regard to the necessity of each termination before and ensure coordination with payroll and other departments involved in calculating and paying the amount due in each employee’s final paycheque. For example, a committee may recommend rolling lay offs, which would then affect notice calculations.

Making Sure Notice Is Paid Even to Employees Who Get New Jobs. Wages in lieu of notice for group terminations are due regardless of whether a terminated employee finds another job. But employers may think that when the company helps an employee find a new job, that employee doesn’t get the extra pay in lieu of notice. That’s simply not true. In both group and individual terminations, the right to receive statutory notice isn’t affected by whether an employee finds a new job, although that might affect how much notice the employee gets.

Completing ROEs. One of the biggest administrative challenges of group terminations is to process a Record of Employment (ROE) for each terminated employee. You may need to work directly with Service Canada on this task. Service Canada can also provide other forms of support. “For massive terminations, such as a plant closure, Service Canada will come in and speak to employees, providing assistance on-site,” says a Service Canada representative.

Conclusion

In sum, for HR, complying with group termination requirements is a three-part process:

- Determine whether your company’s termination of a group of employees triggers the group termination requirements of your province’s employment standards laws.
- If it does, ensure that you provide appropriate notice or wages in lieu of notice to each employee, notify all of the affected parties and take any other administrative measures required by your province’s law; and
- Calculate the wages in lieu of notice and process an ROE for laid off employees.

This article and the chart below should make it much easier for you to carry out these tasks.
### KNOW THE LAWS OF YOUR PROVINCE

**Notice Requirements for Group Termination**

Amount of notice required for employees who are terminated as part of a group termination.

Note: The requirements set forth below are the minimum required by law; collective bargaining agreements and other contracts may contain additional notice requirements. Additionally, different rules may apply depending on the type of employment or industry involved.

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Applies to Employees Terminated Within...</th>
<th>Number of Employees Terminated</th>
<th>Notice Required</th>
<th>Recipient of Notice</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>FEDERAL</strong></td>
<td>4 week period</td>
<td>50 or more</td>
<td>16 weeks</td>
<td>Minister of Labour, with copy to:</td>
</tr>
<tr>
<td>Canada Labour Code, Section 212</td>
<td></td>
<td></td>
<td></td>
<td>Minister of Human Resources and Social Development</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Canada Employment Insurance Commission</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Individual employees not represented by union</td>
</tr>
<tr>
<td><strong>ALBERTA</strong></td>
<td>4 weeks</td>
<td>50 or more</td>
<td>4 weeks</td>
<td>Minister of Employment</td>
</tr>
<tr>
<td>Employment Standards Code, Sections 56 and 137</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>BRITISH COLUMBIA</strong>*</td>
<td>2 month period</td>
<td>50-100</td>
<td>8 weeks</td>
<td>Minister of Labour and Citizens’ Services</td>
</tr>
<tr>
<td>Employment Standards Act, Section 64</td>
<td>101-300</td>
<td>12 weeks</td>
<td></td>
<td>Each terminated employee</td>
</tr>
<tr>
<td></td>
<td>Over 300</td>
<td>16 weeks</td>
<td></td>
<td>Trade union</td>
</tr>
<tr>
<td><strong>MANITOBA</strong></td>
<td>4 week period</td>
<td>50-100</td>
<td>10 weeks</td>
<td>Minister of Labour, with copy to:</td>
</tr>
<tr>
<td>Employment Standards Code, Section 67</td>
<td>101-300</td>
<td>14 weeks</td>
<td></td>
<td>Each terminated employee</td>
</tr>
<tr>
<td></td>
<td>Over 300</td>
<td>18 weeks</td>
<td></td>
<td>Trade union</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Individual employees not represented by union</td>
</tr>
<tr>
<td><strong>NEW BRUNSWICK</strong></td>
<td>4 week period</td>
<td>10 or more, if they represent 25% of employer’s workforce</td>
<td>6 weeks</td>
<td>Minister of Post-Secondary Education, Training and Labour</td>
</tr>
<tr>
<td>Employment Standards Act, Section 32</td>
<td></td>
<td></td>
<td></td>
<td>Bargaining agent</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Affected employees</td>
</tr>
<tr>
<td><strong>NEWFOUNDLAND AND LABRADOR</strong></td>
<td>4 week period</td>
<td>50-199</td>
<td>8 weeks</td>
<td>Minister of Environment and Labour</td>
</tr>
<tr>
<td>Labour Standards Act, Section 57</td>
<td>200-499</td>
<td>12 weeks</td>
<td></td>
<td>Each terminated employee</td>
</tr>
<tr>
<td></td>
<td>500 or more</td>
<td>16 weeks</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>NORTHWEST TERRITORIES/ NUNAVUT</strong></td>
<td>4 week period</td>
<td>25-49</td>
<td>4 weeks</td>
<td>Employment Standards Officer</td>
</tr>
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<td>NT Employment Standards Act, Section 41; NU Labour Standards Act, Section 14.07</td>
<td>50-99</td>
<td>8 weeks</td>
<td></td>
<td>Trade union</td>
</tr>
<tr>
<td></td>
<td>100-299</td>
<td>12 weeks</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>300 or more</td>
<td>16 weeks</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>NOVA SCOTIA</strong></td>
<td>4 weeks</td>
<td>10-99</td>
<td>8 weeks</td>
<td>Minister of Labour</td>
</tr>
<tr>
<td>Labour Standards Code, Section 72</td>
<td>100-299</td>
<td>12 weeks</td>
<td></td>
<td>Each affected employee</td>
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<td></td>
<td>300 or more</td>
<td>16 weeks</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>ONTARIO</strong></td>
<td>4 weeks</td>
<td>50-199</td>
<td>8 weeks</td>
<td>Director of Employment Standards</td>
</tr>
<tr>
<td>Employment Standards Act, 2000, Section 58; Termination of Employment Regulation, Section 3</td>
<td>200-499</td>
<td>12 weeks</td>
<td></td>
<td>Each terminated employee</td>
</tr>
<tr>
<td></td>
<td>500 or more</td>
<td>16 weeks</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>PRINCE EDWARD ISLAND</strong></td>
<td>Not specified</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>QUEBEC</strong></td>
<td>2 months</td>
<td>10-99</td>
<td>4 weeks</td>
<td>Minister of Employment and Social Solidarity, with copy to:</td>
</tr>
<tr>
<td>An Act respecting labour standards, Section 84.01</td>
<td>100-299</td>
<td>12 weeks</td>
<td></td>
<td>Labour Standards Commission</td>
</tr>
<tr>
<td></td>
<td>300 or more</td>
<td>16 weeks</td>
<td></td>
<td>Trade union</td>
</tr>
<tr>
<td><strong>SASKATCHEWAN</strong></td>
<td>4 weeks</td>
<td>10-49</td>
<td>4 weeks</td>
<td>Minister of Labour</td>
</tr>
<tr>
<td>Labour Standards Act, Section 44.1; Labour Standards Regs, Section 22</td>
<td>50-99</td>
<td>8 weeks</td>
<td></td>
<td>Each terminated employee</td>
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<td></td>
<td>100 or more</td>
<td>12 weeks</td>
<td></td>
<td>Trade union</td>
</tr>
<tr>
<td><strong>YUKON</strong></td>
<td>4 weeks</td>
<td>25-49</td>
<td>4 weeks</td>
<td>Director of Employment Standards</td>
</tr>
<tr>
<td>Employment Standards Act, Section 58</td>
<td>50-99</td>
<td>8 weeks</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>100-299</td>
<td>12 weeks</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>300 or more</td>
<td>16 weeks</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

* British Columbia’s notice requirements are in addition to the amount of notice required for individual terminations.

** Ontario’s group termination provisions apply only where the employer terminates more than ten percent of the number of employees who have worked for at least three months, unless the termination is the result of a permanent closure of part of the employer’s business.
Like most employers, you may use a legal document called a release to head off wrongful dismissal claims by employees you terminate without cause. In return for a severance package, the employee must sign an agreement promising not to sue you. The release is supposed to settle all claims and ensure everlasting peace. But it doesn’t always work out that way. Sometimes employees have second thoughts and end up suing you anyway. That’s when some employers learn a costly lesson: Signed releases aren’t always enforceable.

One way for employees to get around a signed release is to persuade the court that the agreement is unconscionable—that is, so grossly unfair that no reasonable or informed person would have ever agreed to it. Whether you’re involved in drawing up the release or simply present it to employees to sign, payroll managers need to understand the danger and how to guard against it. This article will show you how.

**MAKE SURE RELEASES AREN’T ‘UNCONSCIONABLE’**

1. **DO** make sure severance benefits meet legal minimum
2. **DO** treat employees with dignity, respect and kindness, especially those who lack business sophistication, formal education or have a disability
3. **DON’T** threaten employees with no severance if they don’t sign release (unless you have just cause)
4. **DON’T** condition references on employee’s willingness to sign release
5. **DO** give employees at least 3 business days to review and decide whether to sign
6. **DON’T** offer employees personal advice about whether to sign release
7. **DO** spell out in the agreement that employees have the right to seek counsel
8. **DO** verbally remind employees of their rights to counsel
9. **DON’T** lard the agreement with boilerplate and fine print
10. **DO** make yourself available to answer employees’ questions

**WHAT THE LAW REQUIRES**

Ordinarily, individuals must abide by the terms of the contracts they sign. But there are exceptions. For example, a signed contract isn’t binding on children, mentally incapacitated individuals and others who lack “legal capacity.” Sometimes a person can get out of a contract because something wasn’t kosher about how it was made. For example, contracts made under duress or as a result of coercion are unenforceable.

The idea of not enforcing a contract because it’s “unconscionable” dates back to a 1965 U.S. case in which a furniture store extended credit to a customer. For four and a half years, the customer made all payments. But when he was late on one payment, the store tried to repossess all of the furniture. The store had the right to repossess under the terms of the agreement, which said that none of the furniture could be paid off until all of it was. But the judge was appalled at how one-sided and unfair the contract was and ruled that courts don’t have to enforce a contract that’s “unreasonable or unconscionable” [Williams v. Walker-Thomas Furniture Co.].

The concept of letting persons out of unconscionable contracts caught on quickly in Canada. A leading case occurred in 1978 when a member of a First Nations band agreed to sell his boat and fishing licence for a pittance to an experienced businessman. The boat was worthless; but the licence was worth a fortune. The BC Court of Appeal ruled that the businessman took unfair advantage of the seller’s lack of sophistication and knowledge and set aside the contract as “divergent from community standards of commercial morality” [Harry v. Kreutzinger].

**When Is a Release Unconscionable?**

A court may find that a release in which an employee agrees to waive legal claims against the employer in exchange for a severance package is unconscionable. The natural sympathy of courts for the “little guy” who gets laid off makes unconscionability a serious concern for employers. And don’t think that you’re okay just because you’re using a release that your lawyer prepared. Courts consider not simply what the release says but how you get the employee to sign
it. Thus, a boilerplate release that has worked for other employers (or for you on other occasions) might still be unconscionable if you use coercion or deception to get the employee to sign it.

Still, the threat shouldn’t be overstated. It’s very hard for employees to prove that a release is unconscionable, notes BC lawyer Robert Smithson. The standards employees must meet come not from statutes but cases where courts, arbitrators, labour boards and other tribunals (which, for simplicity’s sake, we’ll refer to collectively as “courts”) decided if a release was unconscionable. Here’s what payroll managers need to know to ensure that their release forms and practices are legally sound.

**General Standard of Unconscionability**
The clearest expression of the standard that courts in Canada use to determine if a release is unconscionable comes from a 2007 Ontario case called *Titus v. William F. Cooke Enterprises, Inc.* For a release (or other kind of employer-employee agreement) to be unconscionable, said the court:

- The transaction must be grossly unfair and improvident;
- There must be an overwhelming imbalance in bargaining power between the employer and employee;
- The employer must knowingly take advantage of the employee’s vulnerability; and
- The employee must not have had independent legal advice.

The principles sound straightforward. But what do they mean in real life? Let’s go through them one by one.

**1. When Are Terms of Severance Grossly Unfair?**
If you’re involved in negotiating the terms of severance packages and releases, you need to understand what “grossly unfair” means. Bad deals—even foolhardy and onerous ones—are not necessarily grossly unfair. “To set aside the release, a court really must conclude that the disparity in value each side got from the deal was so gross or that it shocks the conscience,” explains Smithson. Courts typically look at what employees of similar age, years of service and responsibilities in similar industries receive as severance. But statistics and comparisons aren’t definitive benchmarks. In fact, there are no bright line rules defining when the terms of a severance package are grossly unfair.

**Practical Guidance:** But one thing is clear: If termination is without cause, you can’t pay less than the minimum benefits guaranteed by employment standards law. Thus, for example, a release is invalid if it provides less than statutorily required notice or deprives the employee of vacation accrued under the ESA. However, striking a hard bargain is okay as long as the terms of the release are clearly spelled out, the employee isn’t coerced or taken advantage of and he gets the chance to talk to his lawyer before signing.

Generally, Smithson says that offering just the statutory minimum in exchange for a release isn’t advisable. “Contracts aren’t enforceable unless both sides pay consideration, i.e., something of value, to the other,” Smithson explains. “Agreeing to pay the legal minimum may not be considered consideration since it’s something the employer would have to do anyway.”

**Exception:** Offering to pay the minimum might count as consideration if the employer has previously taken the position that the termination is a summary dismissal for just cause. “Employers don’t have to pay notice or wages in lieu of notice if they really do have just cause,” Smithson explains. “So if the employer backs off its position that it has just cause and provides some pay in lieu of notice, a court might rule that the employee did receive something of value even if the amount of notice is only the minimum required by statute.” If you’re in this situation, make sure the release spells out that the employer compromised its “just cause” position in exchange for the employee’s signing the release, adds Smithson.

**Insider Says:** In practice, it may be advisable to offer more generous severance not just to prove consideration but to induce employees to sign the release and allay the bad feelings that can generate second thoughts and legal claims.

**2. When Is There an Overwhelming Imbalance in Bargaining Power?**
“Overwhelming imbalance in bargaining power” is a more stringent standard than you might expect. Courts recognize that employees generally don’t have much leverage over employers, especially at layoff. Even the emotional and financial vulnerability that layoffs entail aren’t enough to make the imbalance overwhelming. For an overwhelming imbalance to exist, the employee’s inherent lack of leverage must be heightened by an additional disadvantage such as:

- Ignorance of business;
- Illiteracy; or
- Blindness, deafness, illness, senility or similar disability.

**Example:** One of the factors that a Newfoundland court cited...
in finding an agreement paying a manager who had been with the company about one-third of the severance she would have been entitled to under the contract (albeit above ESA minimums) unconscionable was the imbalance in bargaining power between the two sides. The manager wasn’t simply upset and financially vulnerable but 59-years-old, unsophisticated and had only a 10th grade education [Howell v. Reitmans (Canada) Ltd.].

Example: By contrast, in Titus, a bad severance deal accepted by a laid off lawyer wasn’t unconscionable. The lawyer was under stress—his father had died and he was up to his eyeballs in debt. But the court said there was no overwhelming imbalance in bargaining power noting that the employee was a “senior lawyer with extensive experience in contract and employment law” [Titus v. William F. Cooke Enterprises, Inc.].

Practical Guidance: All employees should be treated with dignity and respect during the layoff process. But employees who are unsophisticated, uneducated, disabled or otherwise abnormally vulnerable require especially sensitive treatment. The tough negotiating stance that might wash with employees of normal capabilities is likely to come across as bullying and coercive with such employees. You might also have to exert extra effort to ensure that these employees fully understand the terms of the severance package before they sign the release.

3. What Does Taking Advantage of an Employee’s Vulnerability Mean?

Unconscionability isn’t only about the terms of the agreement but the circumstances in which it’s presented to employees for signing. A court may set aside a release if it determines that the employer used unacceptable methods to get it signed. There are several different ways employers can take knowing advantage:

Coercion. A release isn’t valid if employees feel like they have no real choice about signing it. For example, one reason the release in Howell was unconscionable was that the company official who presented it to the unsophisticated and uneducated manager gave her the impression that if she didn’t sign it then and there the severance offer would be withdrawn. However, you can condition payment of the severance package on signing the release as long as the severance terms are more generous than legal requirements. But if the termination is without cause, you have to pay the legal minimums. So you can’t give the employee a choice of “sign or you don’t get any severance.” Exception: This tactic may be acceptable if the termination is for just cause and the employee isn’t entitled to any statutory notice.

Undue Influence. Another way to take unfair advantage of an employee’s vulnerability is to exploit her trust to get her to sign what you know to be a deal that’s against her best interests.

Example: In his 30 years with the company, an executive has developed a close friendship with his CEO. One day, he meets with the CEO for what he thinks is a routine performance review. But instead, the CEO tells him he’s been laid off. The executive is stunned and can hardly speak. The CEO then asks him to sign a release. “John,” says the CEO, “we’ve been friends for years. Trust me when I say this is a great deal and you need to sign it before the company wises up.” In fact, the CEO knows full well that the severance deal is highly unfavorable to the executive. But the executive trusts the CEO and signs the release. The executive would have a strong claim that the release is unconscionable because the company exercised undue influence.

Deception: The third way to take advantage is to give employees false, misleading or incomplete information about the terms of the severance package.

Example: In Titus, the court ruled that the employer didn’t take unfair advantage of the lawyer. He was well aware of his options and chose “with his eyes open,” the court said.

Practical Guidance: There are several things payroll managers can do to ensure that the company’s release procedures are legally sound:

- Make it clear that the employee won’t be punished for not signing, e.g., by not getting a reference;
- Don’t overstate the generosity of the severance terms you’re offering;
- Don’t advise employees to sign or offer any other advice—even if you think you’re acting in their best interests;
- Tell employees to ask a lawyer for advice;
- Don’t require employees to sign on the spot. Give them time to read the agreement, ask questions and consult a lawyer;
- Give employees a private and quiet place to review and sign the agreement; and
- If you’re involved in writing the agreement, make sure the terms are clearly stated, easy to understand and not buried in boilerplate or fine print.
4. What Does Lack of Counsel Mean?
The mere fact that an employee doesn’t talk to a lawyer before signing a release isn’t enough. “Lack of counsel” essentially means forcing or tricking employees into signing the agreement without giving them a chance to run it by their lawyers.

Example: A BC court ruled that a release wasn’t unconscionable even though an IT consultant signed it without running it by a lawyer. The court noted that the company gave the consultant a chance to have a lawyer review the agreement and he didn’t take advantage. “It is sufficient,” said the court. “that an employee is given time to review [a release] . . . and the opportunity to seek out advice” [Finlan v. Richie Bros. Auctioneers (Canada) Ltd.].

Practical Guidance: Don’t ask employees to sign a release on the spot. Give them time—Smithson generally recommends three business days—to talk to a lawyer. Make it a point to tell employees that they can and should talk to their lawyer first. The agreement itself should also include clear and bold faced language to this effect:

Sample Language: It is agreed and understood that the Releasor/Employee has had an opportunity to consult and be advised by a solicitor before entering into this Release, has read the Release and understands its contents, and signs this Release as a free act.

Final caveat: The employee must be allowed to talk not just to any lawyer but one who’s objective and independent. Thus, don’t direct employees to talk to the company’s lawyer.

Conclusion
The risk that a court will refuse to enforce your release agreements as unconscionable exists. But it shouldn’t be overstated. Unconscionability isn’t about leveling the playing field. “There will always be some inequality of bargaining position between a large commercial concern and an individual,” according to one court. Nor is it about ensuring that employees get a good severance deal. Unconscionability’s purpose is to give courts a way to step in when companies abuse their power and take unfair advantage. As long as you treat your employees with dignity and respect, clearly spell out the terms of the release and give employees a fair chance to review and get advice about signing it, you have little to fear from unconscionability.
As if layoffs weren’t miserable enough, when employees get let go it creates extra work for payroll. And the worst part of the paperwork burden is completing the hated Record of Employment (ROE). Mistakes in the ROE can cost your employees EI eligibility or, worse, cause them to receive benefits they don’t qualify for and ultimately must pay back. And if you deliberately include false information in the ROE, you risk fines, triple damages and even six months in jail.

This would be a lot easier to accept if the ROE wasn’t one of the most confusing forms ever invented by a civilized government. ROEs get extra confusing when employees get laid off. One of the things employers must list is total payments other than salary made to the employee as a result of the layoff. The problem is that payments like retiring allowances, salary continuances and even statutory severance often don’t get worked out until after the ROE filing deadline has passed. This article will explain how to process the ROE for employees in this situation.

**WHAT THE LAW REQUIRES**

Section 19 of the *Employment Insurance Regulations* requires employers to complete a ROE for any employee in insurable employment and deliver it to the employee within five days of an interruption in earnings, including a layoff. There’s a common misperception that employees need the ROE before they can apply for EI benefits. “That’s not exactly true,” says Ontario payroll consultant Alan McEwen. According to HRSDC, employees don’t need their ROE to apply. But employers that haven’t prepared one are certain to be asked for it because it’s necessary for calculating any EI benefits payable to the employee. How much the employee is entitled to receive each week, i.e., the “benefit rate,” is based on earnings, which include not just salary but post-termination payments like retiring allowances and lump sum severance payments made as a result of termination.

**The ROE Challenge**

Block 17 is the part of the ROE to list amounts other than regular pay made to the employee as a result of a layoff or separation. Block 17A and 17B are for vacation and statutory holiday pay, respectively. Block 17C is for other kinds of non-salary payments, including:

- Pension payments;
- Lump sum and ongoing severance payments or retiring allowances;
- Bonuses; and
- Wages in lieu of notice.

For simplicity’s sake, we’ll use the generic term “post-termination payments” to describe the kinds of payments listed in Block 17C.

**6 ROE POINTERS**

Filling out Block 17C is obviously much simpler when the employee’s termination package has been finalized and the various post-termination payments are in place. But that isn’t always the case. Here are six key rules to keep in mind when processing ROEs that are due before all post-termination payments have been worked out.

1. **Complete the ROE Even If Negotiations Are Still Taking Place**

   If the five-day deadline has passed and negotiations are still taking place, why not simply put the ROE aside and fill it out after the negotiations end and all post-termination payments are agreed upon?

   Bad idea. Not filling out the ROE of an employee within five days of an interruption in earnings isn’t an option. If post-termination payments haven’t been agreed to, complete the rest of the form and leave 17C blank. Then, once you reach a deal with the employee, prepare an amended ROE listing the post-termination payments in Block 17C. When you deliver the initial ROE to employees (with 17C left blank), attach a notice letting them know that you might have to amend the form later once all amounts due after termination have been agreed to and that the post-termination payments might affect their EI eligibility. (See the Model Notice below.)

**MODEL NOTICE**

Warn employees that you might have to amend their ROE once severance negotiations are over and that the changes you make could affect their eligibility for EI benefits. Here’s notice you can adapt to fit your needs:

Attached is your Record of Employment detailing your insurable earnings. We are required by law to deliver this document to you within 5 days of your last day of work.

Please note that if there are payments due to you that are still being calculated, we are obligated to revise this document and provide you with an amended Record of Employment once those payments have been determined. The full amount of these payments will be shown on the amended Record of Employment, and your ability to receive EI benefits may be delayed or reduced as a result of these payments.

Regardless of whether the amount of any payments due to you is still being calculated, you should apply for EI benefits as soon as possible after your last day of work. Failure to file promptly could result in a reduction in or an inability to qualify for EI benefits.

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Chapter 1: Termination and Layoffs
2. Don’t Treat the ROE as a Bargaining Chip
A more baneful variation on holding back the ROE until negotiations end is to deliberately use the ROE as a bargaining chip and refuse to provide it to the employee unless and until they agree to post-termination payments and sign a release promising not to sue or bring any legal claims against the company. Such bargaining tactics can make you liable for fines under the EI Regulations as well as punitive. Wallace and other “exemplary” damages for acting in bad faith during the termination process.

Example: A HR consulting firm wooed a new director away from another job and then fired her within a year. The firm refused to pay the $80,000 in commissions it acknowledged owing her and delayed giving her an ROE for several months. The court considered the firm’s delay tactics to be exactly the kind of “hard ball” that Wallace damages were intended to punish and required the company to pay the director an extra three months’ wages [Marshall v. Watson Wyatt & Co.].

3. Properly Amend ROE after Post-Terminations Payments Are Due
Remember that once post-termination payments become due, you must go back and amend the ROE. The I7C that you left blank must now be updated to include the post-termination payments agreed to. You must complete all blocks of the ROE any time you change or correct information in the original, especially information affecting earnings and post-termination payments. When amending the ROE to incorporate post-termination payments, some blocks will have the same information as before. But many will be different, especially:

- **Block 2** (Serial Number of ROE Amended or Replaced), which must always be completed in an amended ROE;
- **Blocks 11 and 12** (Last Day for Which Paid and Final Pay Period Ending Date), if the post-termination payments have been structured as a salary continuance after termination;
- **Block 15** (Insurable Earnings and Hours), if the employee’s post-termination payments can be considered insurable earnings (e.g., wages in lieu of notice or a salary continuance);
- **Block 16** (Reason for Issuing ROE), if the employer used the wrong code on the initial ROE; and
- **Block 17** (Payments of Benefits Other Than Regular Pay), if the pay was negotiated or modified after the initial ROE.

Example: George is close to retirement when he is laid off in March. His employer prepares an initial ROE within five days, but later agrees to pay George a salary continuance through September. Because of the salary continuance, all of George’s earnings and hourly information must be changed throughout the entire ROE, not just in one block. For example, in addition to the new earnings and hourly information required in Block 15, Block 11 must be amended to state the end of the salary continuance period; and Block 12 (which is driven by Block 11) will also need to be amended.

4. Report Agreed-to, Not Paid Amount in Amended ROE
Once negotiations end and a post-termination amount is agreed upon, employers may amend the ROE to include only those amounts that have actually been paid and omit payments that the employer has agreed to pay the employee in the future. Employers must report the entire amount agreed upon in one amended ROE. This is true regardless of whether the post-termination payment is payable in a lump sum or in installments over a period of months. “Box 17 is for all amounts that are paid or payable, whether in lump sum or installments,” explains McEwen.

Example: After he’s terminated, Max negotiates a severance package under which he receives an initial lump sum of $5,000, plus an additional $1,000 per month for the next six months. Payroll should amend Max’s ROE to include not only the initial lump sum payment but the remaining amounts that haven’t yet been paid.

5. Deduct EI Benefits from Post-Termination Payments
Terminated employees may have already begun to collect EI benefits before severance negotiations end. Thus, when agreement is reached and the employer begins actually paying the post-termination amounts, the employee’s earnings increase and he actually receives an overpayment of EI benefits. What most employers don’t realize, says McEwen, is that they must collect and remit those overpayments to the Receiver General under Sections 45 and 46 of the Employment Insurance Act.

Example: Mary is terminated in January when her employer files for bankruptcy. Not knowing whether she’ll ever see a dime of the wages she’s owed, Mary files a claim for EI benefits and begins receiving benefits in February. In April, her employer settles all outstanding employee claims and begins making payments to Mary for unpaid wages and three months’ severance pay. After applying the three months’ severance period, Service Canada determines that Mary isn’t entitled to receive EI benefits until May. Since she’s been receiving benefits since February, her employer must withhold the EI benefits Mary has already received from her severance payments and remit the withholdings to the Receiver General.

The Lesson: Once you agree to make post-termination payments, you must figure out if deductions are required because the employee has been receiving EI benefits. Service Canada may send you a notice that an employee has applied for EI benefits. But the notice will state only whether the employee qualifies for benefits and won’t list the benefit amount. So you’ll need to contact the regional Service Canada office...
listed on the notice to determine whether to deduct overpayments from post-termination payments and remit them to the Receiver General. When contacting Service Canada, make sure you have the following information handy:

- Employer’s name;
- Employee’s name and full address (with province);
- Employee’s Social Insurance Number (SIN);
- Serial number for initial and any amended ROE;
- Reason for payment;
- Total amount of payment;
- Employee’s salary earned during last week worked; and
- Employee’s last day worked.

6. Amend ROE If Payments Stop Early

Some employers condition post-termination payments upon the employee’s inability to find new work and stop paying when the employee begins working within the post-termination period. In such a situation, the ROE must be amended. In fact, payroll may have to amend an ROE multiple times after an employee is terminated.

A good way to remember to amend the ROE is to clearly mark the hard and electronic payroll file of all employees receiving conditional post-termination payments with a note that alerts the payroll clerk that the payments are conditioned upon a failure to find new employment. The note should also state that if payments are terminated early, the ROE must be amended.

Example: After getting laid off, John tells his employer he’s going to sue for wrongful dismissal. His employer issues an ROE and later amends it after agreeing to pay severance until the earlier of one year or the date John is re-employed. Three months later when John finds a new job, the employer stops making severance payments. Payroll has to amend John’s ROE to reflect the nine months of severance that he never received.

Conclusion

The ROE is a minefield even when you know all the information you think you need to fill it out. But when the ROE becomes due before the terms of the severance package are worked out, it takes on an added dimension of confusion. If nothing else, take away from this article the point that the ROE must be completed within the five days of interruption of earnings with Block 17C left blank. Then, once the post-termination payments become due, amend the ROE. Following the pointers set out in this article should enable you to avoid the kinds of common ROE mistakes that trip up so many employers.

INSIDER SOURCE

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every HR manager is aware of the danger of so-called *Wallace* damages and that employers have an obligation of good faith and fair dealing when firing an employee. It’s also clear that failing to meet that obligation can result in additional notice and extensive damages. The problem is that it’s hard for employers to know exactly what constitutes the line between good and bad faith. And, understanding that is never more crucial than now when companies are facing a declining economy and an increase in employee terminations.

To test your understanding of what you should do—and not do—when firing an employee to avoid getting hit with *Wallace* damages, we’ve created a hypothetical termination scenario with help from Toronto employment lawyer Natalie C. MacDonald. The employer in our scenario is about to commit seven mistakes that could form the basis for an award of *Wallace* damages. Read the scenario and see how many of the seven mistakes you can spot.

**WHAT’S WRONG WITH THIS TERMINATION?**

**The Scenario**

An employer invites a group of people to work for him as part of a team. The team is given various projects to complete and evaluated on how well it performed each week. But the exercise is part of a contest. Although they work together, the employees on the team are competing for one high-profile position in the company. Only one employee can win—and those that don’t win get fired.

Each week, all the employees are brought into a boardroom before the employer and two of his advisors, where they’re grilled about their team’s performance. Everyone knows that at the end of the meeting, someone on the team is going to be fired. Employees are excused from the boardroom while the employer and his advisors decide which one must go. The employer recites a litany of everything the team did wrong. The meeting culminates with the employer’s placing the blame for the team’s performance on one employee’s shoulders and then firing him. The fired employee is immediately escorted out of the boardroom—and the building—in front of his teammates.

Does the scenario sound familiar? If you watch TV, it should. After all, it’s modeled on the reality TV show *The Apprentice*, starring Donald Trump. At the end of each show, Trump terminates a contestant with the dramatic phrase “You’re fired.” If Donald Trump was Canadian and he ran his business this way, he’d be in a lot of legal trouble. But technically, the contestants on the TV show aren’t employees. And nobody—not even Trump—operates this way in the real world. Still, looking at the Trump scenario is a useful exercise because it showcases many of the things an employer can do to incur liability for *Wallace* damages.

**The Seven Mistakes**

Donald Trump and the employer in our scenario make seven mistakes that could lead to *Wallace* damages if the fired employee sued for wrongful dismissal:

1. **The Termination Was Public**

Firing an employee isn’t a spectator sport. It should be done in private—and not in front of the employee’s colleagues or peers, says MacDonald. Here, the employee was fired in front of his co-workers. Although this behavior may make for entertaining TV, it’s unnecessarily humiliating, legally inappropriate and grounds for *Wallace* damages.

**Example:** A pawn broker in Ontario eliminated an employee’s job as part of the company’s restructuring. The employee was brought into the management office, where she was fired. She was escorted to the counter where she’d worked to get her personal belongings and then paraded out of the store in front of co-workers and customers. A court awarded the employee *Wallace* damages, ruling that the termination was humiliating and compared it to a “perp walk” (that is, the police’s parading of an arrested person before the press on their way to the courtroom or police station) [*Therrien v. Hock Shop Canada*].

The only people who should be present when an employee is fired are the employer and one other senior manager as a witness, advises MacDonald. In the hypothetical, the employee was fired in front of not only his co-workers, but also the employer and two senior advisors. And firing an employee before a group of supervisors or senior management creates a firing-squad like atmosphere, and is inappropriate, she says.

2. **The Termination Wasn’t Secret**

The fact an employee is going to be fired shouldn’t be common knowledge, says MacDonald. Rather, it should be a secret. In fact, only those people who are involved in the decision to fire an employee or who will participate in the termination should know, she advises. In our hypothetical, everyone on the team knows a head is going to roll; they just don’t know whose it will be.
3. The Team Member Didn’t Get a Warning or Chance to Remedy the Problem

A number of Wallace cases have found an employer’s failure to warn the employee before firing him for cause to constitute bad faith. Firing an employee out of the blue and without giving him a chance to correct the problem is likely to be seen as unfair. In our scenario, the fired employee never gets a warning. Although the boss tells him all the things he did wrong, he never gives the employee an opportunity to improve his behavior or job performance, provides assistance to help him improve or warns him that if he doesn’t improve, he may be fired for cause, says MacDonald.

4. The Employer Falsely Implied that Termination Was for Cause

In the scenario, the employer implies that the employee is being fired for cause. After all, he lists all the things the employee did wrong presumably to justify the termination. But in fact, the reasons he lists are not likely to constitute just cause for termination, notes MacDonald. What’s more, the employer probably knows that. After all, somebody is automatically going to get fired each week. The point is that it’s wrong to say or imply that an employee is being fired because of conduct or poor performance when that’s not actually true, she warns. Bottom line: If you don’t have cause for firing an employee, don’t pretend that you do.

5. The Employee Was Terminated Without Notice or Compensation

In Canada, you can’t simply fire an employee without cause. For example, in Ontario, if an employer fires an employee without cause, the employee is entitled to either notice or compensation in lieu of notice, explains MacDonald. As noted above, the employee in the scenario wasn’t really fired for cause. Nonetheless, he was treated like somebody who was fired for cause; he wasn’t given any notice or compensation.

6. The Employer Didn’t Help the Fired Employee Get a New Job

Actions by an employer that hurt the fired employee’s prospects of landing a new job, such as bad mouthing the employee or unreasonably refusing to provide a letter of reference are grounds for Wallace damages. So, some employers help fired employees find a new job, especially if the employee wasn’t fired for cause. For example, the employer may provide a letter of reference or outplacement counseling to assist the employee in finding a new job, says MacDonald. But here, the fired employee got no help from the employer at all—and that could be a problem. For example, in a NB case, one factor the court considered in awarding an accountant Wallace damages was that after he was fired his employer didn’t give him a letter of reference or any assistance in finding a new job [McFadden v. Brookville Carriers Inc.]. And in a recent ON case, the court imposed Wallace damages on an employer solely because it failed to provide a reference letter for a fired employee as was promised in his contract [Manoni v. Powell].

7. The Termination Was Done in a Humiliating and Degrading Manner

Maybe the biggest mistake the employer in our scenario made was to fire the employee in a humiliating and degrading manner. The employee is fired in front of both colleagues and supervisors after having his performance compared to his teammates and torn apart. Then he’s escorted out of the room and the building. The employer shows no sensitivity and makes no effort to cushion the blow. In fact, when Trump fires the contestant at the end of The Apprentice, he revels in the experience and seems to enjoy the contestant’s humiliation. And that’s a big part of the show’s appeal.

But while turning a termination into a spectacle makes for good TV, as a business practice, it’s a horrible example to follow. Being fired is one of the most difficult things that can happen to a person. So employers should keep that in mind and be sensitive when delivering the bad news, says MacDonald.

Conclusion

Bottom line: when firing an employee, handle the termination with discretion, treat the employee with respect, and be honest, advises MacDonald. As the court said in Wallace: at the time of termination employees are at their most vulnerable and employers must be “candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive.”

Treating an employee at this delicate time with “simple decency” should be an easy concept to grasp, says MacDonald. Unfortunately, it takes getting socked with hefty Wallace damages for some employers to get the point.

INSIDER SOURCE

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SHOW YOUR LAWYER

Gismondi v. Toronto (City of), 2003 CanLII 52143 (ON C.A.), April 29, 2003


CHAPTER 2: Restructuring
ough economic times are forcing employers to winnow down the workforce and reshuffle remaining employees into new positions. As an HR director, you don’t need to be told that layoffs expose your company to liability risks. But what you might not realize is that risks arise during both the layoff and restructuring processes. It’s not just the employees you lay off but the ones you keep who could end up suing you for wrongful dismissal. How can you be liable for wrongfully dismissing employees you don’t actually dismiss? The answer has to do with a legal rule known as “constructive dismissal.” We’ll explain how restructuring decisions can lead to constructive dismissal claims and what you can do to minimize your liability risks.

WHAT THE LAW SAYS

The employment standards laws of Canada ban employers from dismissing employees without notice or just cause. Wrongfully dismissed employees may be entitled to an array of damages including wages in lieu of notice, vacation pay, benefits and severance. And if the employer’s conduct is particularly egregious, employees may also collect Wallace and other punitive damages.

Most wrongful dismissals are “actual dismissals” where an employer tells an employee that he’s fired. But there’s also a more subtle form of wrongful dismissal: changing the terms of employment so unfavourably that employees feel compelled to leave. This is called constructive dismissal. And what makes it so dangerous is that an employer can be liable for constructive dismissal even if it didn’t actually intend to force the employee out. To commit constructive dismissal, employers must make unilateral, substantial and unfavourable changes to the fundamental terms of an employment arrangement, typically including:

- Work hours;
- Job responsibilities;
- Title or status within the company; and
- Compensation and benefits.

Constructive Dismissal & Restructuring

The needle on the constructive dismissal risk meter, if such a thing existed, would point to high during restructuring. That’s because after employees get laid off, the people who remain typically get assigned to new positions, supervisors and/or locations. Sometimes their compensation and work hours get cut or restructured. If these changes are substantial and unfavourable enough, the affected employees might have grounds to leave and file a constructive dismissal claim.

Contrary to what some employers think, the usual rules against committing constructive dismissal aren’t suspended merely because a company is experiencing financial problems. So, if you’re restructuring, make sure the changes you’re making don’t cross the line. How do you know when you’ve gone too far? Unfortunately, there are no bright line rules. Courts and arbitrators (“courts” for simplicity) decide the question one case at a time. For guidance, you need to look up and analyze the actual cases. That’s what we did and here’s what we found.

Insider Says: Be aware that small changes which by themselves wouldn’t amount to constructive dismissal may cross the line when combined with other unilateral and unfavourable changes. In other words, it’s not just big changes but the cumulative effect of several small changes that can result in constructive dismissal.

Patterns of Constructive Dismissal: Lessons from Cases

The Insider found five patterns of constructive dismissal that can come into play when a company restructures:

1. Cutting Compensation

The one employment term that goes most to the heart of the employment relationship is compensation. So when restructuring involves cutting salary and benefits, you’re in the danger zone. How deeply can you cut before committing constructive dismissal? That’s impossible to answer. But based on our research, we found two patterns. Barring unfavourable changes to other terms of employment:

- A cut of 10% or less generally wasn’t enough to cross the line; and
- A cut of 20% or more almost always was.

But it’s not simply about the amount of the cut. Restructuring salary (or benefits), e.g., by replacing guaranteed salary with conditional bonuses and other contingent arrangements, can be just as harmful as a direct pay cut.

Example: A corporate reorganization eliminated regional manager positions and reassigned a former regional manager to one of the company’s poorest performing branches. What made this change so tough to take was that the company also replaced the former manager’s guaranteed base salary with commissions based on how well the branch performed. The court said this was constructive dismissal [Farber v. Royal Trust Co.].
**Insider Says:** The question of cutting salary and benefits without committing constructive dismissal is a very complex topic covered in depth in the next article.

2. Cutting Hours

Another way to commit constructive dismissal is to cut an employee’s hours. What’s the magic number? As with pay cuts, cuts in hours have to be considered in light of the entire situation. But in the cases, we found that the odds of a cut in a full-timer’s hours constituting constructive dismissal increased if:

- The number of hours cut was at least five hours per week; and
- Some other unfavourable factor was present, such as making remaining hours less predictable or paying less for those hours.

**Example:** Due to a decline in business, an optometrist cut an employee’s hours from 40 to 35; he also cut her salary and duties. The court found that all these changes amounted to constructive dismissal [Pimenta v Boermans].

**Example:** Cutting a security guard’s hours from 32 to 28 and not guaranteeing him a regular schedule was constructive dismissal [Kelly v. Primary Response Inc].

Employers probably have more leeway to reduce hours if those cuts are clearly temporary.

**Example:** An employee whose hours were cut from 30 to 22 ½ due to the company’s funding problems claimed constructive dismissal. But the court disagreed, noting that the cut was temporary and the employer had in fact restored some of her hours after she protested the schedule change [Duggan v. Cowichan Family Life Association].

In fact, some provinces’ employment standards laws specifically allow for temporary hour reductions in certain circumstances, through what are called “temporary layoffs.”

**Example:** A restaurant temporarily cut the hours of an employee significantly—up to 35% reduction—but the ON labour relations board said the change wasn’t constructive dismissal because it was allowed under the ESA’s temporary layoff exemption [Peiris v. 1176902 Ontario Limited o/a Il Fornello].

3. Increasing Hours

Asking an employee to work additional hours can also be constructive dismissal if the schedule change is significant enough. One likely example of going too far would be asking a part-time employee to work full-time after restructuring. But courts look not just at the number of added hours but when those hours are scheduled. Thus, even modest increases can cross the line if they require employees to work weekends or extremely early in the morning when they didn’t have to before.

**Example:** A store required a part time bookkeeper to increase her hours to full time at 30 hours a week, start her days one hour earlier and work a five-day instead of four-day work week. The court found these changes amounted to constructive dismissal [Corey v. Dell Chemists (1975) Ltd.].

**Example:** Promoting an airport superintendent who worked on weekdays to shift manager was constructive dismissal because, in part, the change meant he could be required to work weekends and night shifts [Parks v. Vancouver International Airport Authority].

4. Demotions

When companies restructure, employees often get shifted to different positions. In many cases, the new position is a step down or demotion. As such, it might trigger constructive dismissal. But, as a general rule, lateral changes in which the employee stays at the same level, with the same amount of authority and performs similar work are acceptable.

**Example:** As part of a corporate reorganization, the VP of Leasing and Franchising was made simply VP of Leasing. In finding that the company didn’t commit constructive dismissal, the court noted that the VP was still a VP earning a VP’s salary and that he excelled at leasing but not franchising. Thus, the new position was a lateral change and not a demotion [Black v. Second Cup Ltd.].

Even if it does constitute a demotion, a reassignment isn’t automatically grounds for constructive dismissal. Again, it depends on all of the circumstances involved. But the greater the step down in pay, prestige, position and responsibility, the greater the likelihood of liability for constructive dismissal.

**Example:** As a result of corporate restructuring, a company assigned its CFO’s duties to a new hire and asked the CFO to perform duties previously done by his subordinates. The CFO suffered a loss of authority and influence within the company and was constructively dismissed, the court ruled [Galbraith v Acres international].

**Example:** An executive director who lost her title and had to report to one of her former co-directors was found to have been constructively dismissed [Hainsworth v. World Peace Forum Society].

5. Increasing Duties

Another way restructuring can result in constructive dismissal is if additional duties or responsibilities are dumped on employees. It’s unfair to expect remaining employees to make up for the production of their laid off colleagues at the same pay and with the same resources. Sugarcoating the increase in workload as a promotion won’t work if the step up is only in title and not accompanied by additional compensation.

**Example:** During a reorganization, an airport manager was informed that he was being promoted to shift manager in charge of 30 additional employees. Although he had a chance to earn more in the new position,
his compensation was now also more contingent on performance bonuses. The court ruled that he had been constructively dismissed [Parks v. Vancouver International Airport Authority].

Similarly, the risk of liability increases if the nature of the employee’s work changes and becomes more burdensome or stressful as a result of restructuring. In addition, while you might see it as a reward, assigning an employee more responsibility might be constructive dismissal if it’s more responsibility than the employee signed up for.

Example: An employee performing primarily secretarial, clerical and accounting work was switched to mostly dispatching duties which required a Tuesday to Saturday, 11 am to 7 pm schedule. The change was considered a promotion by the employer. The court said that there was “little question dispatching is more stressful and responsible work” than the clerical, secretarial and accounting work she had been doing and the change thus resulted in a constructive dismissal [Knezevic v. Rodger W. Armstrong & Associates].

Finally, keep in mind that even if the employee’s core responsibilities don’t change, you could be liable for constructive dismissal by reducing the staff or resources available to the employee to carry out those functions.

Example: A corporate restructuring and downsizing first split a manager’s division into two separate units and then further decreased his staff, thus increasing the manager’s workload and removing vital support staff. The manager was constructively dismissed, according to the court [Dick v. Canadian Pacific Limited].

By contrast, you’re unlikely to be found liable for constructive dismissal if you maintain an employee’s core duties and distribute the workload of laid off employees fairly among several employees.

Example: As a result of layoffs, duties were reassigned and an employee complained she had to take over the work of laid off employees. But a court ruled there was no constructive dismissal because her core duties remained the same, her workload was not expected to increase and she didn’t work excessive hours [Huynh v. Carbo Group Inc.].

How to Avoid Liability

At heart, constructive dismissal is a violation of the employment contract. To the extent that employees knew and agreed in that contract that changes would or could happen when they took the job, they’ll have a harder time winning a constructive dismissal lawsuit. So one of the things you can do to protect yourself is let an employee know up front that certain aspects of the employment relationship aren’t guaranteed and are subject to change. After all, in determining if changes were constructive dismissal, courts look at the employment arrangement to see if they contemplated and permitted such changes.

Example: Changing the responsibilities and number of employees supervised by a low level manager wasn’t constructive dismissal because it was an “implied, if not express” term of the contract that such changes would be made [Mate v. Laidlaw Environmental Services Ltd.].

Example: A 9% cut in compensation wasn’t constructive dismissal because, among other things, the employer had reserved the right to make such cuts in the employment contract [McSeveny v. Phone Directories Company, Inc.].

Conclusion

Rarely can companies that layoff large numbers of employees keep on operating exactly like they did before. But while it may be inevitable, the restructuring that accompanies layoffs must be carried out with great sensitivity, care and attention to legal detail. Employees who remain on the payroll have feelings that affect their productivity. Just as importantly, those employees also have legal rights, not to mention an army of employment lawyers who’d just love to represent them in a constructive dismissal suit against your company. So, if at all possible, make employees part of the restructuring process and seek their input in key decisions. Above all, remember that treating employees like pieces on a chessboard that you can move around any way you like isn’t just bad but risky business.

SHOW YOUR LAWYER

The cases cited in this article (in order of appearance):
- Peiris v. 1176902 Ontario Limited o/a Il Fornello, 2004 CanLII 22582 (ON L.R.B.), Sept. 1, 2004
- Parks v. Vancouver International Airport Authority, 2005 BCSC 1883 (CanLII), July 14, 2005

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CONSTRUCTIVE DISMISSAL
Don’t Let Salary and Benefits Cuts Lead to Wrongful Dismissal Liability

Like many other employers, you may be under pressure to pare back or rework current compensation and benefits arrangements. Maybe you just can’t afford to match employee defined contribution pension plan contributions anymore or pay out those big discretionary bonuses that you have in the past. Or maybe you’re planning to convert compensation arrangements from straight salary to contingent pay. You’re well aware that such changes may trigger protests from employees and their unions. But what you might not realize is that changing compensation and benefits can expose you to liability for, of all things, wrongful dismissal. The danger you need to watch out for stems from constructive dismissal. This article will explain the risk of changing compensation and benefits packages and how to avoid liability for constructive dismissal.

WHAT THE LAW SAYS
Constructive dismissal results when you don’t directly terminate employees but change their jobs so unfavourably that you drive them out the door. But it’s just as serious and carries the same liability risks as a termination. Moreover, since the employee is the one who takes the initiative in ending the relationship, you lose control over events and might not even be aware that you’ve crossed the line until a judge or arbitrator smacks you with damages.

Constructive dismissal is the result of unilateral, substantial and unfavourable changes to the key terms of employment, including work hours, duties, title and status and, of course, compensation and benefits. Restructuring generally has an impact on all of these things. This article focuses on the changes in compensation and benefits that trigger liability for constructive dismissal.

Of course, you’re not automatically liable just because you change how much employees earn. Exactly how much income must you deprive the employee of to cross the line? Unfortunately, the law doesn’t furnish a specific answer. Courts and arbitrators (“courts” for simplicity) must consider the facts of each case. Here are some of the leading cases from across Canada in which courts had to decide whether changes in compensation and benefits made the employer liable for constructive dismissal.

INSIDER SAYS: Be aware that otherwise minor changes in compensation and benefits could constitute constructive dismissal when combined with unilateral changes in other terms of employment such as job responsibilities or titles. For simplicity’s sake, we’ve limited the focus to compensation and benefits-related changes.

Patterns of Constructive Dismissal: Lessons from Cases
The array of compensation and benefit changes that can result in constructive dismissal claims is endless. In many cases, constructive dismissal is the result of not one big change but the cumulative effect of a lot of smaller ones. But based on the cases, the Insider found four patterns.

1. Cutting Salary or Wages
The most obvious form of a compensation-related constructive dismissal offence is a direct cut in wages and salary. The deeper the cut, the greater the risk of liability. But again, there’s no bright line of how deep you can cut before crossing the line. In the words of one case, courts can’t rely “exclusively on a mathematical calculation of the loss of income” [McSeveny v. Phone Directories Company, Inc.]. Even so, the cases clearly show that courts do consider the percentage reduction in employee’s income when deciding whether constructive dismissal resulted. While no court was willing to set a specific figure, we were able to discern some ballpark figures:

10% or less isn’t enough: We found courts were generally unwilling to find constructive dismissal when compensation changes resulted in a less than 10% change in an employee’s income. However, 10% or less could be enough when coupled with unfavourable changes in the other terms of employment. Thus, for example, an Ontario court ruled that a pharmacy that reduced an employee’s salary from $40 to $36 per hour, a 10% cut, and also changed her position was liable for constructive dismissal [Ontario Chemists Rx Inc. v. Ibrahim].

20% or more is enough: By contrast, changes that result in at least a 20% reduction in income generally did result in a finding of constructive dismissal. For example, a BC court ruled that reducing an employee’s monthly salary from $3,600 to $2,400—a 30% cut—breached a fundamental term of the employment relationship and was constructive dismissal [Farquhar v. Butler Brothers Supplies Ltd.].

2. Cutting Bonuses and Commissions
Unilaterally cutting employees’ bonuses and commissions can be just as bad as, if not worse than, cutting their salary, depending on the amount of the cut and how much of the employee’s income comes from bonuses and commissions.

Example: As part of a change in the employee’s job responsibilities and title, an employer removed a bonus of five percent of company

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Chapter 2: Restructuring
revenues. The court said the employee had been constructively dismissed because the revenue bonus was a critical part of his compensation package. Eliminating the bonus would likely cut his compensation 25%—a substantial change [MacLean v. CrossOff, Inc.].

That’s not to say that you can never reduce bonuses and commissions. If the reduction doesn’t have a significant dollar impact, it won’t by itself amount to constructive dismissal.

Example: As a result of corporate restructuring, a company cut an employee’s bonus from 15% to 10% of salary—a net income loss of $4,500. The court ruled that the cut was too insignificant to amount to constructive dismissal [Poole v. Tomenson Saunders Whitehead Ltd.].

Insider Says: Failing to pay bonuses or commissions on time could also be seen as an indirect cut resulting in constructive dismissal. For example, the failure of a car dealer to pay a substantial portion of the employee’s $2,000 monthly bonus on time was constructive dismissal. The bonus constituted nearly half of the employee’s monthly compensation, the court explained [ilikay v. Acadia Motors Ltd.].

3. Restructuring the Compensation Package

Although it’s more subtle than a wage or bonus cut, unilaterally changing the structure of an employee’s compensation package can achieve the same effect. If the restructured package is substantially less favourable than what the employee agreed to at the start of employment, it could be constructive dismissal. One way to restructure your way into constructive dismissal is to convert guaranteed salary to contingent payments such as commissions and bonuses.

Example: An employee had a guaranteed base salary with commissions and benefits and managed 21 branches of a real estate company that produced more than $16 million in gross income. The company demoted him to manager of a poorly performing branch. At the new position, the employee received commissions rather than a guaranteed base salary. Adding insult to injury, his commissions were based on the sales of the poorly performing branch. True, the commission was 3% higher than what other branch managers got. The company also threw in a “reorientation allowance.” But the Supreme Court of Canada ruled that the company had constructively dismissed the employee because the new package didn’t compare to the previous one due to its failure to include a guaranteed base salary [Farber v. Royal Trust Co.].

Of course, shifting from guaranteed to contingent isn’t the only way to adversely re-engineer a compensation package. The reverse change can also rise to the level of constructive dismissal. In other words, there are no pre-determined formulas. Courts will look at the overall impact of the changes, including the amount and nature of the cuts made.

Example: A store manager earns $92,000, including $33,000 in base salary plus a personal bonus and a bonus tied to the store’s profitability. The employer decides to merge salaries with personal bonuses. To make up for the lost bonus opportunity, the store adjusts the manager’s base salary to $64,000. The manager claims that this is really a pay cut and resigns. The BC court rules that the manager was constructively dismissed because the store bonus was a fundamental term of the employment contract and eliminating it resulted in a significant salary reduction [Wood v. Owen De Bathe Ltd.].

4. Cutting and Restructuring Benefits

Significant changes in benefits can also result in constructive dismissal, especially when combined with cuts in direct compensation. As with direct compensation, the most obvious form of an adverse change is a direct cut in benefits. This could include eliminating or reducing contributions to pension, health and other employer-sponsored benefits plans.

Of course, the size of the cut is a key factor in determining if benefit reductions amount to constructive dismissal. Although there’s no predetermined cutoff point, courts do look at the value of the benefits cut and the percentage by which it decreases the employee’s earnings in determining if constructive dismissal occurred.

Example: In addition to cutting her salary and removing a wellness bonus, a BC employer stopped paying Medical Services Plan premiums on an employee’s behalf. The total impact of those changes was an approximately 20% reduction in compensation. The court found this to be “material” and found the employer liable for constructive dismissal [Streight v. Dean].

Example: A SK employer failed to make $1,218 in pension contributions for an employee. This represented 3% of her salary. The court dismissed the employee’s constructive dismissal claim, ruling that this wasn’t significant enough to amount to a fundamental breach of the employment contract [Hlewka v. Moosomin Education].

Example: As a result of hard economic times, an Alberta employer suspended matching contributions to an RRSP plan and cut vacation benefits from six to four weeks. Two employees claimed constructive dismissal. The cuts represented between six and eight percent of the employees’ total compensation, not enough to make the employer liable for constructive dismissal, according to the court [Otto v. Hamilton & Olsen Surveys Ltd.].

Insider Says: Although the Insider didn’t find any cases addressing this issue, in theory, the restructuring of benefits packages in a way that’s unfavourable to the employee can also result in constructive dismissal. In other words, the same principles that apply to restructuring direct compensation would apply to the restructuring of benefits packages.
2 Ways to Avoid Liability

In addition to understanding what is and is not constructive dismissal, you can take the following two steps to minimize the risk of liability.

**Reserve the right to make changes.** At heart, constructive dismissal is a violation of the employment contract. The sin the employer commits is unilaterally changing the agreement with the employee. The operative word is “unilaterally.” To the extent that employees knew and agreed that such changes would or could happen when they took the job, they’ll have a harder time winning a constructive dismissal lawsuit. So one of the things you can do to protect yourself is let an employee know up front that certain aspects of the compensation package aren’t guaranteed and are subject to change.

**Example:** A 9% cut in compensation wasn’t constructive dismissal because, among other things, the employer had reserved the right to make such cuts in the employment contract [McSeveny v. Phone Directories Company, Inc.].

**Give advance notice of changes.** Notifying employees in advance of the change can also help minimize the risk of liability. The more notice employees get, the less they can claim they were waylaid by the change. “A fundamental change that is accompanied by reasonable notice is not constructive dismissal,” according to one court [Fellowes-Strike v. Co-operators Group Ltd.].

**Insider Says:** Giving notice of a pay change doesn’t automatically enable you to avoid liability especially if the employee expressly objects to the change. For example, an employer notified an employee of a cut in severance from two years’ to 30 weeks, the minimum required by law. An Ontario court ruled that the employer couldn’t unilaterally change such a pivotal contract term even with advance notice, noting that the employee had continuously objected to the change and thus the employer was bound by the terms of the original agreement. The employer appealed but the Supreme Court of Canada refused to hear the case [Wronko v. Western Inventory Service Ltd., [2008] S.C.C.A. 294, Oct. 9, 2008].

**CONCLUSION**

Nobody is suggesting that it’s illegal to cut compensation and benefits, especially in tough economic times. However, the risks of such actions extend beyond the obvious potential for employee backlash. They could also make you susceptible to constructive dismissal claims. If you understand the risk, you can take steps to manage it. Better yet, you can make constructive dismissal a moot point by getting employees to agree to the changes. But if unilateral action is your only realistic recourse, make sure you account for constructive dismissal risks when making decisions.

**SHOW YOUR LAWYER**

The cases cited in this article (in order of appearance):

- Ontario Chemists Rx Inc. v. Ibrahim, 2007 CanLII 48597, Nov. 7, 2006
Corporations under pressure to cut payroll usually respond with layoffs. But there may be more imaginative alternatives. One is to pay employees smaller salaries and promise additional compensation if the company does well. Generally used in good times to recruit and retain top talent, variable pay schemes can also be effective during recession because they enable companies to hang onto key personnel who might otherwise be targeted for layoffs or straight pay cuts. But implementing variable pay schemes is tricky. This article will help you avoid five common mistakes in administering variable pay arrangements.

Defining Our Scope
There’s an almost infinite variety of variable pay plans. This article is limited to a particular scheme, one in which compensation is tied to a company’s financial performance or value. More precisely, we’ll focus on schemes where employees get a one-time pay increase over fixed salary when the company meets certain financial targets. There are four common mechanisms:

- **Bonuses** that are tied to product or company revenues. Example: ABC Company promises to pay Penny Packer, a product manager, an additional 5% of her salary six months after a new product launch if at least 10,000 customers buy the product.

- **Profit sharing plans** in which employees can earn a share of the company’s net profits in addition to salary. Unlike bonuses, which are based on salary, additional payments are based on company profits. Example: Each year, Penny gets 2% of the profits attributed to the product she developed.

- **Stock options** that let employees of publicly-traded companies buy shares of company stock at a fixed price called the “exercise price.” If shares increase in price, the employee benefits. Example: ABC grants Penny the right to buy 1,000 shares of company stock at $50 per share, the market value of the stock on the date the option is granted. ABC’s stock price rises to $100. Penny exercises her option and pays $50,000 for stock worth $100,000. She then sells the shares on the open market and earns a $50,000 profit.

- **Discount stock purchase plans** that let employees buy company stock at a discount. Typically, a portion of the employee’s fixed compensation is used to buy company shares at less than fair market value. Example: Penny lets ABC withhold 5% from each pay cheque. Twice a year, ABC uses the money to buy stock for Penny at a 10% discount.

What the Law Requires
Variable pay arrangements are subject to the same laws as payment of fixed salary, including:

- Human rights laws. Variable pay plans can’t be based on discriminatory grounds such as the employee’s race, age, gender, disability, etc.;
- Employment standards. Assuming the employee is covered by the ESA, variable pay must be properly factored into calculations of her overtime and wages in lieu of notice; and
- Income tax, EI and CPP laws. Variable pay may be subject to income tax, CPP and EI withholding and reporting by the employer.

Unfortunately, applying the laws to variable pay arrangements is often difficult, particularly when calculating income tax withholdings, CPP deductions and EI premiums. “The almost infinite variety of variable pay arrangements makes it all but impossible to establish blanket rules,” explains Ontario payroll consultant Alan McEwen. But some guidance exists. Although it doesn’t provide all the answers and hasn’t been updated for 2009, the best place for payroll managers to look for guidance is in CRA T4001 (Employer’s Guide) and CRA T4130 (Taxable Benefit Guide).

Avoid 5 Traps
Based on CRA guidance, court cases and the advice of payroll experts, the Insider has unearthed five common traps that employers fall into when processing payroll under variable pay plans.

### AT A GLANCE

#### 5 VARIABLE PAY TRAPS TO AVOID

1. Changing method of variable pay without employees’ consent
2. Subtracting CPP exemption from bonus payments
3. Taxing profit-sharing distributions and allocations incorrectly
4. Not informing employees about tax consequences of buying stock at a discount
5. Repricing ‘underwater’ stock options

### Trap #1: Changing Variable Pay without Employees’ Consent

**Pitfall:** Whether set out in an employment contract, collective agreement or company policy, employers must honour the terms of variable pay arrangements unless the employee agrees otherwise.
Unilateral changes can lead to liability including for “constructive dismissal”—a form of wrongful dismissal where an employer doesn’t actually tell an employee that he’s fired but changes his job terms so substantially and unfavourably that it forces him to leave. Because it goes to the very heart of the employment relationship, changing the terms of compensation is the kind of practice that can lead to constructive dismissal claims—even if the change affects only the variable pay part of the compensation arrangement.

**Example:** Each year, an Alberta galvanizing company paid a portion of company profits to employees, in addition to regular wages. One year, without warning, the company decided to issue company shares instead of cash bonuses. The company claimed it could make unilateral changes because the profit-sharing plan was a company policy rather than a term of an employment contract. But the court disagreed and ordered the employer to pay profits in cash to each employee. Switching from cash bonuses to stock shares substantially changed the essential terms of employment and amounted to constructive dismissal, the court ruled [Carabine v. Daam Galvanizing].

**Solution:** Changing the terms of variable pay arrangements isn’t illegal, even if the changes are unfavorable to employees. What you can’t do is make those changes unilaterally. Thus, in finding the company liable for constructive dismissal, the court in Carabine said the employer should have communicated the changes to employees and gotten their input in restructuring the plan.

However, you don’t have to offer new employees who haven’t yet signed an employment agreement the same exact terms that apply to current employees who are under contract. New employees start with a clean slate and you’re free to negotiate any variable pay arrangement you want. Of course, payroll ultimately has to process all the agreements. And the more variable pay arrangements you make, the more burden it places on payroll.

**Trap # 2: Incorrectly Applying CPP Exemption to Bonuses**

**Pitfall:** To calculate the CPP premium amount to deduct from a pay cheque, you normally subtract a portion of the basic CPP exemption ($3,500 per year in 2009) for each pay period and multiply the remainder by the CPP rate (4.95%). But what if the employee receives not just his normal pay cheque but a separate bonus cheque during the pay period? Some employers subtract the basic CPP exemption from both cheques, McEwen says. This is wrong and results in a CPP premium underpayment that employees must account for at the end of the year. The employer will also receive a Pensionable and Insurable Earnings Review (PIER) report for the deficiency.

**Example:** D. Ducts Ltd. pays a group of employees $5,000 per month in fixed compensation. The payroll department deducts CPP contributions using the basic exemption for that pay period from each pay cheque. In March, June, September and December, the company hits revenue targets and, consequently, pays each employee a quarterly bonus equal to 3% of salary. The payroll department mistakenly deducts CPP contributions from each bonus cheque using the same basic exemption it applied to the employee’s regular earnings, resulting in a $14 underpayment per bonus cheque, per employee, as shown in the following chart.

### CPP Contribution Underpayment: $14 per bonus check per employee

<table>
<thead>
<tr>
<th>What ABC Did</th>
<th>What ABC Should Have Done</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pay</td>
<td></td>
</tr>
<tr>
<td>Monthly Base</td>
<td>$ 5,000</td>
</tr>
<tr>
<td>Quarterly Bonus</td>
<td>$ 1,800</td>
</tr>
<tr>
<td>Less Basic Exemption</td>
<td>-$ 292</td>
</tr>
<tr>
<td>($3,500 ÷ 12)</td>
<td></td>
</tr>
<tr>
<td>Contribution Base</td>
<td>$ 4,708</td>
</tr>
<tr>
<td>Quarterly Bonus</td>
<td>$ 1,508</td>
</tr>
<tr>
<td>CPP Contribution</td>
<td></td>
</tr>
<tr>
<td>(Contribution Base x 4.95%)</td>
<td>$ 233</td>
</tr>
<tr>
<td></td>
<td>$ 75</td>
</tr>
<tr>
<td></td>
<td>$ 233</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>CPP Contribution Underpayment</td>
<td></td>
</tr>
</tbody>
</table>

**Solution:** Although the CRA guides don’t spell it out, under Section 21 of the Canada Pension Plan, you shouldn’t apply the CPP exemption against a bonus because it’s not a regular pay cheque. **Exception:** Employers in Québec must apply the QPP exemption to each pay period, even if the only thing paid is a bonus. In other words, under federal rules, the CPP exemption doesn’t get applied if the only payment the employee receives in the payment period is a bonus; but it does apply if Québec is the province of employment.

**Trap # 3: Treating All Profit-Sharing Distributions the Same for Tax Purposes**

**Pitfall:** Many variable pay arrangements involve distribution of a share of company profits. Taxation of distributions varies, depending on the type of plan, says McEwen. CRA distinguishes among four types of plans:

- Cash or current distribution profit-sharing plans, in which the employer distributes cash or shares of stock as additional compensation to employees;
- Employee profit-sharing plans, where profits accumulate in a trust fund along with interest;
- Deferred profit-sharing plans, which also accumulate in a trust fund and are distributed after the year in which they are earned; and
- Registered profit-sharing pension plans, which also accumulate in a trust fund and are distributed after retirement.

Since there are so many types of profit-sharing plans, it’s easy to confuse them and report income tax withholdings at the wrong time, or not at all.

**Example:** Profitshare Ltd. provides semi-annual cash distributions to all employees based on a percentage of company profits. It puts an additional percentage of profits into a fund for executive managers in which these employees may also make contributions. Profitshare’s payroll department properly withholds income tax from the cash distributions...
as it pays them. But instead of treating the executive manager’s fund as an employee profit sharing plan, it misclassifies it as a deferred profit sharing plan. Result: Allocations are never reported on a T4PS slip.

Solution: Be careful when characterizing profit-sharing plans for tax purposes. If you’re in doubt, review Section 5.15 of CRA’s Digest of Benefit Entitlement Principles and Sections 144 and 147 of the Income Tax Act. Follow the chart below to determine when to withhold income tax on distributions or report allocations.

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**Type of Plan** | **Subject to Income Tax**
--- | ---
Cash or Current Distribution Profit Sharing Plan | When paid
Employee Profit Sharing Plan | Once each year (plus tax on interest)
Deferred Profit Sharing Plan | Only when received by employee
Registered Profit Sharing Pension Plan | Only when received by employee

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**Trap # 4: Subjecting Stock Purchases to Double Tax**

Pitfall: Another common mistake occurs when employers offer shares at a discount (that is, below fair market value) through an employee stock purchase plan (ESPP). Tax on these payments is separated into two amounts:

- The difference between the purchase price and the fair market value of the stock. This is the employee benefit and is subject to income tax.
- The difference between the fair market value and the selling price. This amount is taxed only as a capital gain or loss.

But employees may not know how the tax rules work; and they get no notification from their employers. This ignorance may come home to roost when employees sell their shares and pay a capital gains tax. If they don’t use the right numbers to calculate their capital gain, they could be subject to double tax, which diminishes the value of their variable pay benefit.

Example: Decadent Corp. offers shares to John at 10% below the closing price on the day of purchase. On June 1, Decadent’s stock closes at $100. John buys 100 shares through Decadent’s ESPP at $90 each. Decadent must include $1,000 ($10 per share x 100 shares) in John’s taxable income and withhold income tax on this amount immediately. If John later sells the stock for $150 per share, he should pay a capital gains tax only on $50 per share. Not realizing this, John pays a capital gains tax on $60 per share based on the $150 selling price less the $90 purchase price.

Solution: If employees are getting ESPP distributions, provide a clear explanation of the amount that’s taxable as an employment benefit. Tell them the fair market value of the stock purchased via your ESPP as of the date of purchase and explain that they should only pay a capital gains tax on the difference between that value and the price they ultimately sell their shares for. This will keep employees from being double-taxed on the capital gain.

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**Insider Says:** Note that in a Canadian Controlled Private Corporation (CCPC), a special type of private corporation that’s not controlled by a public or foreign corporation, the employee benefit usually isn’t taxed until the employee sells his shares.

**Trap # 5: Repricing Stock Options**

Pitfall: Remember how not too long ago, it was axiomatic that stock values always increased and that stock options would likely end up in the money eventually? Thus, granting options enabled companies to pay big bonuses financed not by corporate coffers but growth in share value. Of course, everything went sour when stock values started to decline. Suddenly, employees found themselves holding options that were “underwater.”

Example: Three years ago, Joe received the option to purchase 1,000 shares of company stock at the current market price of $50 per share. A year later, the stock was worth $80 per share. If Joe had exercised his options then, he would have made a cool $30,000. But he didn’t. And now that stock is trading for a measly $20 per share. So Joe’s option is worthless and will remain so until the company’s shares recover and become worth more than $50. Of course, there’s no guarantee that will ever happen, especially in this economic climate.

That’s why there are a lot of angry executives out there. Many are asking their employers to lower the options’ exercise price to make them valuable again. But most experts agree that this is a bad idea:

- Repricing stock options alienates existing shareholders, who are expected to weather out the storm and wait for the value of their shares to increase again;
- In most cases, repricing stock options requires board and shareholder approval, and you have to disclose the modification to regulatory authorities; and
- Employees may lose the stock option deduction and pay full-tax on the options when they’re exercised.

Solution: Don’t reprice your stock options. If you have to do something, consider repurchasing them or granting restricted share units (RSUs), which are exchangeable for shares after they have vested. We’ll talk about RSUs more in a future issue.

**Conclusion**

With so many types of variable pay, taking the appropriate deductions and withholdings can be confusing. Hopefully, this article will help you avoid some of the more common mistakes employers that make when calculating withholdings and deductions or modifying variable pay programs.

**INSIDER SOURCE**

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**SHOW YOUR LAWYER**

Rising medical and drug costs and increasing life expectancy have made it increasingly expensive for companies to provide group health benefits to their retirees. But once benefits have been promised, they’re hard to take away, especially when the employee on the other end of the promise has retired since the promise was made. Companies that have tried to cut back or restructure their retiree health benefits packages have encountered fierce resistance, including class action lawsuits. Perhaps the only good thing to emerge from these lawsuits is that courts have begun to draw lines clarifying how far employers can go in reworking post-retirement benefits.

If you’re contemplating changes to your retiree benefits packages, it behooves you to learn from the experiences of the companies that have gone before you. That’s what this series will help you do. With the help of some of Canada’s leading benefits lawyers, the Insider has analyzed and drawn practical lessons from the leading cases. In Part I, we’ll explain the chief obstacle you must overcome to rework retiree benefits: the “vesting” theory.

**Defining Our Scope**

Although this article focuses on health insurance, the principles it discusses generally apply to other kinds of retiree benefits, including pensions and life insurance.

**WHAT THE LAW SAYS**

The mere promise by an employer to pay a benefit isn’t a guarantee. The employer might later have a change of heart and try to reduce or completely take back the promised benefit. Can an employer do this without the employees’ consent?

The answer may depend on whether the employee’s right to the benefit has “vested.” A vested right is absolute and can’t be taken away. In the context of benefits, “vesting” turns promised benefits into a guaranteed right to receive them, either immediately or in the future. Thus, the whole question of whether employers can cut retiree benefits boils down to the question of whether retirees have a “vested” right in those benefits. Courts tend to be more protective of the benefits of retirees because compared to active employees, retirees generally:

- Lack bargaining power vis-à-vis the employer;
- Have fixed incomes, limited financial resources and little to no earning power;
- Are more dependent on employer health benefits provided by their employer because of their age and susceptibility to medical problems; and
- Are seen as having already provided their side of their contract to employers by rendering past services of employment.

**Courts Rule that Retiree Benefits Can Vest**

A turning point in the vesting controversy occurred in 1993 when the Supreme Court of Canada ruled that it’s possible for retirees to have a vested right to promised post-retirement benefits. After closing its plant, an Ontario company tried to discontinue group insurance benefits to active employees and retirees promised under a collective agreement. The company argued that it didn’t have to keep paying the benefits because the collective agreement had expired two years earlier. The retirees claimed that their benefits vested when they retired. The Court agreed that rights to benefits granted under a collective agreement could vest even after the agreement had expired. But it stopped short of finding that the retirees in that case actually did have a vested interest [Dayco (Canada) Ltd. v. CAW Canada].

But other courts have taken the extra step of ruling that retirees had a vested right in promised benefits. One of the key cases took place in Manitoba in 2005. For 15 years, an employer adjusted employees’ pension benefits using an indexing formula based on the plan’s investment performance. The plan began to experience spectacular returns and the resulting adjustments shot through the roof. So the employer decided to amend the plan to allow for basing adjustments on the Consumer Price Index instead.

Retirees claimed that they had a vested right to have their benefits adjusted under the previous indexing formula. The court agreed. Upon retiring, the retirees obtained “a vested right to their pension entitlement” based on the adjustment formula in effect at the time of retirement. So the employer could not change the adjustment formula for retirees’ pensions from being tied to the investment performance to instead be tied to the CPI [Dinney v. Great West Life Assurance Co.].

**4 Ways Retiree Benefits Can Vest**

There are at least four theories retirees can use to claim that their post-retirement benefits have vested.

1. **Vesting Under Employment Contract**
   
   The promise to pay benefits is often part of a legally binding employment contract. Of course, contracts are subject to negotiation and renegotiation. But retirees may argue that once they retire, the terms of their contract are frozen in place. Consequently, the theory goes, upon retiring, employees gain a vested right to the post-retirement benefits promised in the agreement in effect when they retired.
Example: BC public employees claimed their employers promised to pay 100% of their premiums on extended health benefits after retirement. The employer later changed the policy and refused to pay 100% of premiums for retirees. A group of retirees sued, claiming that they gained a vested right in the promised benefits when they retired. The BC court ruled that the retirees could bring their lawsuit as a class action [Bennett v. British Columbia].

The argument that retirees have a vested right under an employment agreement can be based either on an express or implied term of a contract, notes Toronto benefits lawyer Barbara Austin. Implied contracts come into play when the terms of the official plan documents or agreements are ambiguous and unclear, Austin explains. In these situations, courts may rely on external materials outside the four corners of the written documents, such as verbal statements, statements made in plan disclosure statements and member communications and even employers’ conduct to interpret the meaning of the plan.

Example: In the Dinney case discussed above, the plan amendment gave the company some discretion on indexation but also required adjustments be based on the plan’s “investment performance.” The court said that the employer’s “subsequent conduct” in using indexing tied to investment performance was a “tool” for interpreting the amendment.

2. Vesting Under Collective Agreement

Post-retirement benefits are often granted as part of a collective agreement. And employers can’t refuse to pay promised benefits without the union’s consent. But, again, provisions in collective agreements get reopened in each round of subsequent negotiations. Employees who retire might argue that their rights to benefits promised in the agreement in effect at the time of retirement vested upon retirement even if the agreement expired or got changed in subsequent negotiations.

That’s what happened in Dayco. Current employees, the Court explained, are still working and part of the bargaining unit. So they’re “subject to the vicissitudes of the collective bargaining process” and could lose some post-retirement benefits bargained for in prior collective agreements when a new bargain is struck. Retirees, by contrast, are out of the collective bargaining game. When they retire, their “accrued employment rights crystallize into some form of vested retirement right,” according to the Court. So they may have a vested right to receive the post-retirement benefits promised to them under the collective agreement in effect when they retired even if that agreement is no longer in effect.

Insider Says: Disputes under collective agreements are also generally subject to arbitration rather than litigation in a civil court. So, current employees will probably need to arbitrate their rights to these benefits. But because retirees are usually considered no longer represented by unions under the current collective agreement, class action litigation in a civil court is often an appropriate method for them to assert rights to post-retirement benefits.

3. Vesting Under Terms of the Plan

Retirement plan documents can also create a vested right, e.g., if the plan grants post-retirement health benefits and doesn’t permit future changes. Even if amendments are permissible, employees can claim that their rights to receive benefits as provided under the plan documents vest when they retire. Consequently, employers can’t amend the plan to take away those rights without retirees’ consent.

This is essentially the “crystallizing of rights” upon retirement theory that the Supreme Court of Canada set out in the Dayco case. Of course, the theory doesn’t always work. The question of whether rights crystallize depends on what the plan actually says.

4. Vesting by Legislation

Another way retirees can claim that their rights have vested is to point to a piece of legislation that guarantees them the promised benefit, e.g., by banning employers from adopting plan changes that take away promised benefits of employees once they’ve retired. Generally, this occurs in the public employment sector where public employee benefits are addressed in statutes.

Example: In response to rising health costs, a BC municipality decided to cut the 100% subsidies it paid on the health insurance premiums of retired nurses to 50%. The nurses claimed they had a vested right to a 100% subsidy. But the argument didn’t work. Nothing in the law that established the nurses’ pension plan said that the nurses’ right to post-retirement benefits were vested and not subject to change, the court said. On the contrary, the law gave the pension board discretion over benefits. Moreover, the court noted that legislature’s intention in enacting the law was clear that post-retirement group benefits were provided subject to available funding [B.C. Nurses’ Union et al v. Municipal Pension Board of Trustees et al].

**HOW TO TELL IF RETIREE BENEFITS HAVE VESTED**

How do you know if retirees have a vested right to benefits?

**Check Granting Language**

The starting point is to review the plan, employment contract or other document that granted the employee the benefit. Scour the language in those sources, advises Vancouver labour and employment lawyer Earl Phillips, for any indication whether these post-retirement benefits are guaranteed or can be changed. Questions to ask:

- Is the obligation to pay benefits phrased as an essential purpose of the plan? If so, you’ll have a problem trying to take away the benefit.
- Do the documents say that the promise is irrevocable or do they allow for change?
Does the employer have discretion over benefit amounts or payments as in the BC Nurses case discussed above?

Does the document say anything else that specifically indicates or implies a vested right for retirees, or a right of employers to make changes? A statement like “these benefits are guaranteed” is a slam dunk. But there may be more subtle suggestions one way or the other.

Check for Indirect or Implied Indications that the Benefit Is Guaranteed

When your plan documents, employment contracts or collective agreements are at all unclear about the benefits, courts will look to other evidence outside the four corners of those documents for help interpreting them. Courts have looked at the following when interpreting pension and retirement benefits:

**Member Communications**: Look for assurances in plan brochures, information packets, summaries, letters, employee handbooks, company policies and any other communications with employees that address retirement benefits, advises Austin.

**Example**: Retired civil service employees claimed Ontario couldn’t unilaterally reduce certain post-retirement benefits citing booklets given before they retired as evidence of promises about the benefits to be provided. The court agreed that the guide could have promised the benefits and allowed a class action proceeding to be certified *(Kranjcec v. Ontario)*.

**Past Conduct**. Another “aid to interpretation” is how a company has historically handled post-retirement benefits. Thus, providing a benefit to retirees in the past could be seen as an interpretation of a plan provision as requiring the payment of the benefit and make it hard to take away from employees who’ve retired while the practice was still in effect.

**Example**: The court in Dinney ruled that an employer’s historical indexing of benefits was a “tool” for interpreting the language of a vague clause that required adjustment of benefits but didn’t specify a method. The fact that the employer used indexing tied to investment performance to implement the plan provision was an indication that it interpreted the plan as requiring indexing, said the court.

**Circumstances of Grant**. The circumstances under which the benefits were granted can also help a court determine whether the rights were guaranteed in the future. For example, evidence that the benefits were granted as an immediate exigency would weigh against the argument that the benefits were meant to be permanent. Conversely, evidence that the benefits were provided as part of a long term purpose, e.g., to ensure loyal employees a comfortable retirement, would support the vesting argument.

One of the circumstances to consider is the history of the relationship between the union and the employer. Look at the negotiations, advises Phillips. For example, if times are good, a company might offer benefits on its own initiative; at other times, benefits are won through hard bargaining. These circumstances offer important clues to whether the benefits were meant to be permanent.

**Conclusion**

Post-retirement benefits, health benefits in particular, are an expensive perk for employers to provide their employees. So naturally, when companies look for ways to trim their budgets, this is one cost that is tempting to cut. But employees and retirees have legal rights that can get in the way of your cost savings. Before you attempt any changes, you need to understand the legal hurdles in front of you. This article hopefully will get you started down that road. Once you’ve reviewed how to handle changes that will affect active employees and retired employees.

**INSIDER SOURCES**

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Cases cited in the order they appear

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If you’re looking to cut costs, it might be tempting to pare back on health, drug and other post-retirement benefits. Good luck. First, there’s the moral issue of making good on the company’s past promises especially to retired employees who are most dependent on post-retirement benefits. And, then there’s the little question of whether you even have the right to make cuts. In Part 1 of this series, we explained how retirees’ rights to receive post-retirement benefits can vest and thereby eliminate your option to make cuts unilaterally. Let’s now expand the discussion to include current employees. What are the practical options available to employers who want to cut post-retirement benefits without violating the rights of either group?

**WHAT THE LAW SAYS**

When cutting post-retirement benefits, you must account for the rights of both retired and current employees, cautions Vancouver lawyer Earl Phillips.

**Retirees’ Rights.** To recap, courts have generally found that upon retiring, employees gain a vested right in the post-retirement benefits they’ve been promised by their employer, says Phillips. Vesting means the benefits are guaranteed and can’t be taken away without the employee’s consent.

**Current Employees’ Rights.** When you seek to unilaterally cut post-retirement benefits promised to current employees the question becomes whether the change is permissible under the terms of the contract, collective agreement or plan documents establishing the employees’ terms of employment. Keep in mind that the documents establishing the post-retirement benefits rights of current employees might differ from those establishing the rights of retirees. Thus, for example, the Supreme Court of Canada ruled that an employer still had to honour the terms of an expired collective agreement in dealing with retirees even though the agreement no longer applied to current employees [Dayco (Canada) Ltd. v. CAW Canada].

The good news is that it’s generally easier to cut or rework benefits of current employees because the fact that they’re still under contract makes their terms of employment subject to ongoing negotiation. That’s not the case with retirees who are out of the collective bargaining game. Contracts, plan documents, etc. might also give employers the right to make unilateral cuts or other changes in benefits from time to time.

The bad news is that when employers unilaterally cut a current employee’s benefits, they encounter the risk of “constructive dismissal.” If the cuts are significant enough, employees may claim that the employer breached the fundamental terms of the employment relationship, leave the company and sue the employer for wrongful dismissal.

**3 Questions to Ask**

There are three basic questions you should ask to account for the rights of retired and current employees affected by proposed cuts to post-retirement benefits:

1. Have the rights of retirees to receive the benefit originally promised vested?
2. Does the employer have the right to force the cuts on current employees?
3. If the answer to Question 2 is yes, do the cuts nevertheless go deep enough to give the employee a claim for constructive dismissal?

**LEGAL WAYS TO CUT POST-RETIREMENT BENEFITS**

To answer these questions, you must look at the provisions of applicable contracts, collective agreements, plan documents, plan communications, etc. Focus on language indicating whether the benefit originally promised was inviolable or subject to change. Part 1 of this series explained how to make that determination. Let’s now discuss what to do after you’ve made it.

**Insider Says:** Unless you’re schooled in employee benefits laws, you shouldn’t try evaluating retirees’ and current employees’ rights to benefits without talking to an experienced lawyer.

**First Scenario: Changes Are Permissible**

The best case scenario is that some language in the relevant legal documents will enable you to conclude with certainty that retirees’ rights haven’t vested and that you have the right to make unilateral cuts to the benefits of both retirees and current employees.

**Caveat:** Don’t be too hasty in reaching this conclusion, especially when evaluating the rights of retirees. “There’s a presumption that benefits promised to retirees can’t be changed,” warns Ontario lawyer Barbara Austin. To rebut the presumption, the right to make changes to the benefits must be very clear and express. “If the plan documents are vague or ambiguous, courts tend to interpret them against the drafter which is usually the employer,” Austin explains.

If unilateral changes are permissible, be sure to strictly comply with...
any restrictions governing the exercise of those rights. For example, carefully follow the required procedures for notifying those affected by the amendments to ensure that the amendment is found valid. If the post-retirement benefits you’re cutting are pensions, ensure that your amendment procedures comply with the requirements of your province’s pension laws, including notification of members and beneficiaries, filings with appropriate government authorities, etc. (See, Insider, Vol. 3, No. 4 for a discussion of pension laws governing DB to DC conversions and other significant pension plan amendments.)

Finally, make sure that the cuts don’t give current employees a claim for constructive dismissal. One way to minimize liability is to provide ample notification. How much notice is enough? There’s no black-and-white answer. Generally, the closer the employee is to retirement, the more notice you’d be expected to provide. For example, a 62 year old employee qualifying for retirement at 65 may argue that two years’ notice really wasn’t notice at all because she effectively lost the benefit the day you gave notice. Even five years notice may still not be adequate for employees close to vesting, cautions Austin. Employers should therefore consider grandfathering employees eligible or close to being eligible for retirement in cases where effective notice of changes to benefits can’t be given.

The other way to guard against constructive dismissal is to get employees to consent to the changes. For the consent to be valid, you must give the employees “consideration,” i.e., something of value, in return. Negotiating the change will also help you win employees’ acceptance and head off potential lawsuits—which is always a great idea even if you think your decisions are legally sound and that you’d ultimately prevail in the suit.

The final way to avoid the constructive dismissal trap is to keep cuts as modest as possible. How deep must a cut be to cross the line? Although there’s no concrete formula, in actual cases involving wages courts have generally ruled that cuts of 9% or less don’t constitute constructive dismissal—assuming the cuts aren’t accompanied by other unfavourable changes in the terms of employment. But trying to establish a dividing line for cuts in post-retirement benefits is much trickier, notes Phillips, especially since those benefits are harder to quantify and tend to vary from employee to employee. What can be said is that changing the details of benefits is likely to be less problematic than eliminating them altogether and that while some costs can be shifted to employees via higher premiums, co-payments, etc., those increases should be kept as low as possible.

**Second Scenario: Unilateral Changes Not Permissible**

Suppose you determine that you can’t unilaterally cut post-retirement benefits because retirees’ rights have vested and/or unilateral changes are banned by current agreements with active employees? All is not lost. You may still be able to achieve the cuts via negotiation. Here are some possible strategies.

**Option 1: Get Union Help**

If your workforce is unionized, you might find the unions to be an effective business ally in your efforts to get retiree benefits under control. “Unions have been willing to work with struggling employers even to the point of agreeing to take on some of the financial responsibility of providing the benefits to retirees,” says Phillips. Unions can also help shift some of the financial burdens to employees, e.g., by increasing co-payments or requiring employees to share premium costs. In addition, while unions can’t bind retirees, they often have the credibility and leverage to persuade them to support reductions in benefits, he adds.

Of course, unions won’t make concessions out of altruism. They’ll do it to keep the company viable and out of bankruptcy so they can protect their members’ benefits. You can also expect unions to drive a hard bargain. “Unions may accept reductions of benefits but probably oppose their total elimination,” Phillips explains.

**Option 2: Negotiate Changes with Current Employees**

Because current employees are still active, you can negotiate and renegotiate benefits in the course of normal collective bargaining. If the situation is too urgent to wait for existing agreements to expire and the next round of scheduled negotiations to begin, you can also initiate special negotiations, notes Phillips. However, your bargaining power might not be as great during these special negotiations than it would be if agreements were about to expire, he cautions.

**Option 3: Negotiate Changes with Retirees**

Negotiating with retirees is trickier because they no longer participate in collective bargaining and their former union can’t make binding agreements on their behalf. Still, you can reach out to retirees and ask them to appoint a representative. When and if negotiations produce a settlement, you’ll probably need a court to approve it and ensure that all retirees accept it, notes Austin. You’ll also have to provide the retirees something of value as “consideration” in return for their acceptance of cuts to ensure that the agreement is legally valid.

Of course, if you proceed with planned benefits cuts without consulting them, retirees might organize themselves and bring a class action lawsuit against you. Retirees are also likely to organize if the company files for bankruptcy. In these situations, Austin notes, you’ll have to follow established procedures to negotiate a post-retirement benefits settlement.

**Example:** 900 current and retired employees filed a class action lawsuit against an employer after it cut dental benefits, set a $50,000 lifetime cap on health benefits and reduced lifetime maximum for out-of-
country emergency coverage from $1 million to $50,000. The case was eventually settled. The terms: Employees retiring before Jan. 1, 2009, agreed to pay an annual deductible and share cost of hospital coverage. Current employees accepted a $200,000 out-of-country maximum and substitution of generic prescriptions unless a doctor prescribed otherwise. In return, the company agreed to make no other benefits changes in the future [Smith v. Labatt Brewing Company].

**A PROACTIVE STRATEGY TO BENEFITS CUTS**

It's probably too late now to go back and change your post-retirement benefits commitments, especially to retirees. But looking forward, there are proactive steps you can take now to ensure that you don't find yourself painted into the corner in the future. 1. Clearly Reserve Right to Make Changes

First and foremost, Austin says you should make sure that your plan documents, employment agreements, etc. clearly and conspicuously state that your obligation to pay post-retirement benefits isn’t unconditional but subject to funding constraints and other changes considered necessary at the employer’s sole discretion. And make sure you emphasize your discretion to effect changes to benefits in all plan communications, including information pamphlets, booklets and brochures.

Caveat: The language reserving your right to cut and change benefits must be clear and unequivocal or a court won’t enforce it. Thus, for example, an Ontario court ruled that a clause purporting to limit pension benefits to active employees wasn’t clear and unequivocal notice to employees because it was buried in the fine print of a 162-page document [Taggart v. Canadian Life Assurance Company].

2. Be Clear About the Benefit You Promise to Furnish

One problem that employers encounter when it comes to post-retirement benefits is lack of clarity about the benefit they’re providing, warns Phillips. For example, when providing post-retirement health and/or disability benefits, specify whether you’re furnishing the actual benefits or just agreeing to pay premiums to an insurer to provide them under a plan. Why does it matter? If you’re just paying for coverage rather than furnishing benefits, you’re not responsible for determining what the plan covers. So employees and retirees who are denied coverage under the plan will have to sue the insurer instead of you, Phillips explains.

**Insider Says:** If you incorporate the benefit into the collective agreement, when disputes arise with employees, they’ll be considered issues involving the interpretation of the collective agreement that get decided in arbitration rather than in a more costly civil lawsuit.

**Conclusion**

The economy will eventually recover like it always does. But not all companies will survive the current turbulence. For many companies, the key to survival will be finding a way to get out of the past benefits promises that they can no longer afford to keep. Post-retirement benefits are among the most expensive to provide; but they may also be the hardest to cut. The legal rights of retirees—and to a lesser extent, current employees—to hold companies to their benefits promises are only starting to be clearly understood. This series should, however, provide employers and administrators a roadmap of the legal boundaries and practical options with regard to cutting post-retirement benefits.

**INSIDER SOURCES**

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Suppose a company sells off a division or closes down part of its operations. What happens to the pension plans of the employees who get laid off? If the company wants to continue operations, winding up—that is, terminating—the entire plan might be too drastic a solution. One alternative is to wind up only a portion of the plan corresponding to the employees who’ve been laid off. But partial wind-up doesn’t always result in a clean break, especially when the wound-up plan is a DB in surplus. Terminated plan members may claim a share of the surplus. And they might have a case.

The question of members’ rights in the actuarial surplus of a partially wound-up DB plan has been the subject of considerable litigation across Canada. Some thought that a 2004 Canadian Supreme Court case called Monsanto had resolved the issue once and for all. But now a brand new federal case has re-opened the question. Here’s what you need to know about the case and the rights of plan members to a surplus in a partial wind-up.

Defining Our Terms
The terms “termination” and “wind-up” sound like synonyms of each other. But, as we’ll see, there’s a significant distinction between whether the process is a “wind-up” or a “termination.” So, from now on, we’ll use the generic term “cessation” or “cease operations” to refer to the general act of ending a plan, in whole or in part. We’ll only use “termination” and “wind-up” in the way they’re used in the pension laws.

WHAT THE LAW SAYS
When a plan ceases operations, members are entitled to payment of certain pension benefits, which could include a share of the surplus in a DB plan. To protect members, most pension laws include a provision guaranteeing that in a partial cessation, members affected get all the same rights and privileges they would if the entire plan was ceasing operations. So if members would be entitled to a portion of the surplus upon total cessation, they’d also be entitled to a share of the surplus upon partial cessation. But applying this seemingly simple principle to real-life situations is complicated due, in large part, to differences in how the protection is written into the pension laws. The provinces follow two basic approaches:

The Wind-Up Provinces: In five provinces—MB, NB, NS, ON and SK—members’ rights on partial “wind-up” must be the same as they would be on full “wind-up.” Wind-up is generally defined as termination of the plan and distribution of plan assets. The implication is that plan termination and asset distribution coincide and are part and parcel of the same process. Thus, members’ entitlement at partial wind-up is determined at the time the part of the plan being wound up actually ceases operations.

The Termination Provinces: Four jurisdictions—AB, BC, Fed and NL—guarantee members the same rights on partial “termination” as they would enjoy if the entire plan was being terminated. Termination is generally defined as cessation of contributions or crediting benefits to members. Wind-up is the distribution of plan assets that occurs after termination. In other words, termination and wind-up are treated as separate processes.

This termination vs. wind-up distinction might seem like just a technicality. But, as we’ll see, it has crucial practical implications. In the “termination” jurisdictions, termination takes place before wind-up. And when termination occurs, it’s premature to determine if the plan is even in surplus. It’s only during the wind-up process that surpluses are evaluated and distributed. So members’ rights upon termination can’t include rights to a surplus. This is true regardless of whether the termination is full or partial.

Further, AB and BC specifically spell out what the other “termination” jurisdictions—Fed and NL—just imply: that members don’t get a share of surplus assets upon partial termination unless the plan says otherwise.

How the Law Applies
Because so many companies that have DB plans undergo corporate restructuring involving partial wind-up, the battle over ownership of surplus assets has become a major issue in pension law. To resolve the issue, you need to first look at what your own plan documents say about members’ rights to a surplus in the event of partial cessation. Do the documents express a clear intent to grant members a share of an actuarial surplus upon partial cessation? If so, follow the terms of the plan and distribute the surplus to members.

But what if the intent of the plan isn’t clear from the documents? At this point, you need to look at the terms of the pension law.

Insider Says: Remember also that the pension documents must meet the requirement of the law that members get at least the same deal on partial termination or wind-up as they would on full termination or wind-up.
**The Monsanto Case**

In looking at the provisions of the pension law, you need to focus on the distinction between wind-up and termination described above. This analysis is based on the seminal case, the 2004 Supreme Court ruling in Monsanto Canada Inc. v. Superintendent of Financial Services.

As part of a corporate restructuring, Monsanto terminated 146 employees and partially wound-up their DB plan. At the time, the plan was running a $19.1 million surplus. The terminated employees claimed that their share of the surplus was $3.1 million. But Monsanto’s proposed partial wind-up allocation made no distribution of the surplus to the terminated employees. The Ontario Superintendent of Financial Services wouldn’t approve the wind-up plan unless it did. The dispute eventually reached the Supreme Court.

The Court ruled that the terminated employees were entitled to a share of the surplus under Section 70(6) of the Ontario Pension Benefits Act, which guarantees members of partially wound-up plans “rights and benefits that are not less than the rights and benefits they would have on full wind-up of the pension plan on the effective date of partial wind-up.” If the plan were undergoing full wind-up, members would be entitled to a share of the surplus according to the pension plan terms. So they should get the same deal upon partial wind-up, according to the Court. Consequently, Monsanto had to distribute the $3.1 million to the terminated employees as part of the partial wind-up.

**The Cousins Case**

At the time, many believed that Monsanto stood for the proposition that any time a DB plan in surplus undergoes partial wind-up, it must distribute a share of the surplus to members. But a new federal case called Cousins v. Canada (Attorney General) that came down at the end of June challenges this interpretation.

The case began when Marine Atlantic, which is federally regulated, laid off employees and partially terminated their DB plan, which was running a surplus. The partial termination proposal provided for no distribution of the surplus to the terminated employees. The federal Office of Superintendent of Financial Institutions approved the proposal. Soon thereafter, the Monsanto decision came out. So the members claimed that like the employees in Monsanto, they were entitled to a share of the surplus assets at the time the part of the plan being terminated ceased operations.

After almost four years of litigation, the federal court of appeal ruled that Monsanto didn’t apply and the surplus didn’t have to be distributed to the members. Like the Monsanto employees, members of the Marine Atlantic plan were guaranteed certain rights and benefits in the event of a partial cessation of their plan. But the court noted a key difference between Ontario and federal pension law. In Ontario, termination and wind-up are basically a single process; under the federal PBSA, they’re separate processes.

Distribution of surplus or any other assets isn’t made at the time of termination, the court explained. It’s only at wind-up that the amount of the surplus can be determined, when assets net of liabilities are calculated. And, because the federal law requires equal treatment of members on partial and full termination, the members weren’t entitled to surplus on partial termination because that right wouldn’t exist at full termination since wind-up wouldn’t have yet occurred, the court reasoned.

Moreover, unlike in Monsanto in which all parties agreed that members were entitled to surplus on full wind-up under the plan, the parties in Cousins had differing interpretations of the plan document’s intentions with regard to distribution of the surplus. The Cousins court found that the Marine Atlantic plan provided that “once all liabilities of the Plan have been legally discharged,” any surplus would be returned to the company with the consent of the Superintendent. In other words, the plan didn’t require members to get a piece of the surplus.

Insider Says: Marine Atlantic appealed Cousins but the Supreme Court of Canada refused to hear the appeal. Therefore, Cousins will remain binding law for federally regulated pension plans and precedent that might influence courts and tribunals in other jurisdictions.

**What it Means to You**

If your company has DB plans that it wants to cease operating, in whole or in part, you need to be aware of the Monsanto and Cousins cases and how they might affect your DB cessation strategy, especially if the plans you’re targeting are in actuarial surplus. Whether you’ll have to distribute surplus assets to members of plans under a partial cessation of plan operations will be determined by two factors: the plan documents and the province whose pension laws your plan is subject to.

If the plan documents aren’t clear, the right of members to a piece of the surplus will have to be decided according to pension law. That, in turn, will be decided by whether the issue is resolved in accordance with Monsanto or Cousins. If Monsanto is the controlling case, members will have a strong claim to a share of the surplus; but if Cousins controls, they won’t. In determining whether to apply Monsanto or Cousins, courts will focus on what the applicable pension law says, specifically whether termination and wind-up are treated as one or separate processes. Here’s how this is likely to shake out geographically.

**Strong Monsanto Provinces:** Because it’s a direct interpretation of Ontario laws. Monsanto will apply in that province (unless the Ontario PBA is amended.) Monsanto is also likely to apply in Nova Scotia and New Brunswick because their partial wind-up provisions mirror Ontario’s.
**Medium Monsanto Provinces**: A less compelling case can be made for applying Monsanto in Manitoba and Saskatchewan. Although we labeled it a “wind-up province” in the section above, SK law refers only to termination and doesn’t use the term “wind-up” when discussing members’ rights on the cessation of part of a pension plan. In fact, the SK law never uses the term wind-up at all in addressing cessation of pension plans. The only term used is termination. But the implication is that termination and wind-up are part of the same process and that members would have a claim to surplus assets when termination occurs. MB’s definition of “termination” as cessation of contributions mirrors federal law and would suggest that Cousins governs. However, the provision in MB law addressing members’ rights on partial termination or wind-up lump the two processes together. The implication is that the two things are part of the same process and that Monsanto would apply.

**Strong Cousins Influence**. Cousins applies to federally regulated pension plans because it interprets federal law. (Remember that the three territories also follow federal pension law.) AB, BC and NL mirror federal law in treating termination and wind-up as separate processes. And, as noted above, AB and BC spell out that members don’t get a share of the surplus upon partial termination unless the plan documents specifically provide that right.

**The Unsettled Provinces**. Québec pension law doesn’t expressly follow either of the two models. The interested parties are left to decide how surpluses and other plan assets are distributed upon cessation of the plan. PEI doesn’t have pension law provisions that specifically address this issue.

**Conclusion**

The question of members’ entitlement to actuarial surpluses of DB plans upon partial wind-up isn’t just a lawyer’s side show. It’s a major business issue. Monsanto has served as a brake on the elimination of DBs. In addition, a number of provinces are exploring pension reforms that would preserve the DB. By freeing employers of the obligation to distribute surplus assets, Cousins makes at least federally regulated DBs more vulnerable to elimination and cuts against the political grain. And now that the Supreme Court has decided not to hear the case, the impetus to maintain members’ rights to surpluses will have to come ultimately from the legislatures of the jurisdictions affected by Cousins.

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Cases in the order they were cited

CHAPTER 3:
Collateral Damage of Layoffs, Terminations & Restructuring
THE BUSINESS CASE FOR HR
Showing Your CEO How HR Budget Cuts Cost More than They Save

In this economy, all parts of an organization are being called on to justify their existence in terms of the economic value they bring to the table. HR is no exception. How do you as HR manager prove that your staff and programs directly contribute to the company’s bottom line? It’s not easy. Warm and fuzzy rhetoric about the fundamental importance of human assets to organizational success isn’t enough. Hard times demand hard dollars-and-cents arguments. Here are a few you can use.

Proving the ROI of HR Programs
The compulsion to justify the return on investment (ROI) of HR programs is nothing new. On the contrary, the traditional perception of HR as a cost center has long made the HR program a tempting target for budget cuts for companies under financial stress. “Companies are always trying to cut unproductive staff,” notes BC employment lawyer Robert Smithson. “And the perception of HR as nonproductive staff is one HR people are forever battling,” he adds. Of course, the current global economic situation is intensifying the scrutiny on HR programs.

What kind of arguments can HR directors use to justify HR activities in terms of ROI? There are two basic approaches:

1. Demonstrating the cost savings attributable to HR programs; and
2. Showing how HR programs actually make money.

Let’s take a look at how to use each approach.

1. HOW HR PROGRAMS SAVE COMPANIES MONEY

A priority for most companies right now is to save money. But CEOs and CFOs understand that budget cuts need to be made judiciously and can’t be penny wise and pound foolish. Thus, programs that have a demonstrated capacity to enable the company to achieve long-term cost savings are among those most likely to survive.

And this is precisely what HR does. One key value of HR programs is that they enable companies to avoid potentially devastating costs. Smithson explains. Some of the costs HR activities save companies are direct costs—for example the cost of hiring outside consultants to perform HR tasks such as recruiting, likely at a higher rate and without inside knowledge of the company’s workforce, he adds.

But direct costs are just the tip of the iceberg. Most of the savings HR produces result from enabling companies to avoid indirect costs and liabilities down the road. For example, every dollar spent on HR salary enables a company to avoid having to spend far more in litigation costs and wrongful dismissal liabilities in the months or even years ahead.

Similarly, money spent on programs to retain and educate staff is an investment that yields major dividends later by enabling the company to retain key talent and avoid the considerable costs of recruiting and retraining new staff.

These indirect cost savings more than offset any short-term savings achieved by cutting or outsourcing HR staff, programs and functions. But those savings may be harder for CEOs to see on the financial statements and attribute directly to HR investments. So it’s essential for HR directors to educate their CEOs about the impact of HR cuts on indirect costs.

Cost Savings of HR during Downsizing and Restructuring

The equation: HR investment = long-term cost avoidance applies in any and all business climates. But it takes on a special significance in down times. Explanation: When companies engage in downsizing and restructuring, they think they’re saving money. But the price tag for these activities is often greater than companies anticipate. The good news is that the hidden costs associated with downsizing and restructuring are precisely those that HR is best suited to help the company avoid. But it’s imperative for HR directors to understand these costs and demonstrate how the HR function enables the company to minimize or even avoid those costs altogether. Here are four key indirect costs to point to in making your case:

Indirect Cost # 1: Legal Liabilities Resulting from Downsizing. Downsizing and restructuring aren’t just business challenges but major liability risks. Affected employees are desperate and apt to fight back with grievances and lawsuits. Regulators are also paying close attention. Thus, Smithson says that since the economy started going south, he’s observed a notable increase in the volume of work for lawyers relating to individual and group terminations.

It’s precisely at these times that companies most need experienced HR staff and programs to navigate the legal minefields of downsizing. “Companies that choose to make cuts in HR may be shooting themselves in the foot in the sense that they will derive short term payroll savings by eliminating HR positions but are likely to end up squandering those savings in terms of the greater cost of dealing inappropriately with terminating other employees,” warns Smithson. HR is especially integral to keeping the company in compliance with:
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Chapter 3: Collateral Damage of Layoffs, Terminations & Restructuring

Cost # 4: Loss of Competitiveness in the Labour Market. Cutting recruitment and retention resources is one of those penny-wise, pound-foolish decisions that companies may come to rue later when the economy turns around. Although things seem bleak now, the economy will recover and hiring will resume in the future. It always does. And the fundamental importance of attracting and retaining talent will remain a key factor of business success.

In fact, the costs of neglecting recruitment and retention might come home to roost much sooner than some employers think. That’s because there are organizations that are actually growing during this economic downturn, advises Cohen. For example, government investment in infrastructure will create new jobs at the time other businesses are failing, he explains. These new ventures will need talent and could be stealing yours if you don’t keep some HR resources devoted to retention.

Hiring and training a new employee costs more than retaining existing employees. “One of the most common missteps by management is the philosophy that it’s an employer’s market and people won’t leave. That’s not true because the competition might see this as an opportunity to make an offer to your best employees, at less than it would have taken before, and hire them out from under you because of your inaction in their development,” explains Cohen. For that reason, you can’t neglect or abandon your recruitment and retention efforts even in a downturn.

By the same token, it’s during downtimes that companies should not only look to keep existing talent but also step up their recruitment efforts. “Recessionary economies create an opportunity to get good people—it’s during volatile times that opportunities to sign up key employees can arise,” sometimes at a fraction of the normal costs, explains Smithson. Cutting recruitment budgets is thus an opportunity lost.

2. HOW HR PROGRAMS MAKE COMPANIES MONEY

The second set of arguments you can use to justify the ROI of HR programs is to demonstrate how HR not only saves your company money but helps it make money. HR activities, in other words, contribute to both the top and bottom line. Of course, it’s one thing to assert a theory and another to prove it. There are two study-based arguments you can use to show how HR programs help companies grow revenue and company value.

HR Activities Improve Performance. One of the best studies linking HR activities to a company’s financial performance comes from Cornell University. Researchers measured how HR functions affected financial performance at 323 small companies (between 8 and 600 employees). The study found that companies investing in the following three HR practices experienced improved financial performance:

- Selective hiring, searching for employees who fit the company culture rather than just people who fit the job description;
Promoting employee involvement and self-management rather than tight control and monitoring of employee activity; and

Creating a family-like environment through social events and offering challenging jobs that foster employee growth.

The results were eye-popping. Companies that invested resources in all three of these HR practices had:

- 22% higher sales growth;
- 23% faster profit growth; and
- 67% lower employee turnover.

Even simply focusing on one of the three practices showed improved financial performance. For example, hiring employees based on how well they “fit” into the company culture raised revenue growth 7.5%, and profit growth 6.1% and reduced employee turnover 17.1%. Encouraging employees to manage themselves rather than be micro-managed yielded 11.5% higher revenue growth, 3.9% faster profit growth and 15.1% lower turnover. Companies that created a family-like atmosphere had 13.3% faster profit growth and reduced turnover by 19.1%.

Higher Shareholder Value. Watson Wyatt, a consulting firm, surveyed companies in the US and Canada and found that companies with the best HR management practices such as pay, development, communications and staffing services also had the best returns for their shareholders. The survey looked at the effectiveness of these HR programs and scored them. It then compared the scores to the company’s financial performance and found that companies with the highest HR scores returned the most value—an average of 64% return over five years—to their shareholders. While those with the lowest scores had a 21% return.

**Conclusion**

Maintaining your HR programs gets your company a double benefit in terms of ROI. That’s because HR programs and staff help your company avoid potentially devastating costs that can lower your bottom line—in the form of lost productivity, litigation costs and liabilities for mishandled terminations. At the same time, HR efforts increase the top line on your financial statements by improving financial performance and shareholder returns. So use this article to help build the case that will persuade your CEO that the HR department isn’t just a cost center but a sound business investment that yields measurable results.

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THE BUSINESS CASE FOR SAFETY

Debunking the Myth that Recessions Reduce Workplace Incidents

It’s official—the world’s economy is in a recession. As a result, budgets for all aspects of a company’s operations—including health and safety—are getting slashed. So it won’t be a surprise if CEOs and upper management say the company will have less money this year to ensure that the company protects its workers and complies with its OHS duties. But it might be a surprise if the CEO rationalizes this budget cut by claiming that it won’t compromise workplace safety because safety incidents actually decline in a recession.

Where in the world would a CEO get such a crazy idea? There’s actually some statistical evidence to support this position. Of course, those statistics are completely misleading. Still, CEOs are likely to grasp at this straw to justify budget cuts in the safety program. HR managers should be concerned about budget cuts to the safety program because it helps protect the company’s workforce and HR’s investment in recruiting, training and retaining talent. So here’s some ammunition to help you speak up in favour of maintaining the company’s safety budget.

We’ll explain the recession = safety myth and how to use a 2003 study by researchers from Tilburg University, The Netherlands, to debunk it.

The Argument that Recessions Reduce Incidents

The argument that fewer workplace incidents occur when the economy is in a recession isn’t a complete fabrication. It’s based on statistics, such as unemployment and workplace injury rates. The numbers do seem to provide evidence of a rough correlation between incident rates and macro-economic conditions. There are two apparent manifestations of this correlation:

Strong economy = higher incident rates. Statistics from industrialized nations around the world document that reported incidents actually increase in times of economic prosperity. For example, countries such as Denmark, France, Italy, Portugal and Spain all experienced higher incident rates when their national economies were strong.

Weak economy = lower incident rates. The correlation also works in reverse. That is, when the economy is in a downswing, workplace incident rates decline. For example, the increase in unemployment rates in the early 1990s in Canada, Finland and Sweden was accompanied by a major drop in workplace incident rates. And the European countries mentioned above that had higher incident rates in economic upturns saw their incident rates decline during economic downturns.

The statistical evidence is hard to refute: Incident rates do seem to increase when the economy prospers and decrease when it struggles. The question is why?

The rise in incident rates during economic upswings seems illogical. After all, companies tend to spend more on health and safety when the economy is strong. One theory is that companies overwork their workers when times are good. Studies have concluded that because of increased demand for a company’s products or services, the company expects more effort from its workers. The increased pressure on workers to perform makes them sloppy and apt to cut safety corners. In addition, companies may need to hire additional workers to meet consumers’ demands. And new workers are more likely to be involved in safety incidents, especially if they’re inexperienced in that particular job or industry.

Logically, the argument could be made that the converse is true—that is, that workers work more slowly and safely when companies aren’t struggling to meet high consumer demand, thus reducing the number of safety incidents. But until 2003, no one had made a careful study of the statistics to determine whether this argument actually explains why incident rates decline when the economy dips.

The Tilburg Study

That’s why the Tilburg study, which is based on data from 16 countries including Canada, is so important. The researchers’ hypothesis was that the apparent decreases in the number of workplace accidents during economic downturns were actually due to changes in the nature of the workforce. They hypothesized that during recessions, companies are more likely to hire temporary or part-time workers who are less likely to be involved in workplace accidents.

The researchers used data from 16 countries, including Canada, to test their hypothesis. They found that the apparent decreases in workplace accidents during economic downturns were not due to changes in the economy, but rather to changes in the nature of the workforce. They found that companies were more likely to hire temporary or part-time workers during recessions, who are less likely to be involved in workplace accidents.

This analysis helps to debunk the myth that recessions reduce workplace incidents. It shows that the apparent decreases in workplace accidents during economic downturns are not due to changes in the economy, but rather to changes in the nature of the workforce. HR managers should be aware of this analysis and use it to argue for maintaining the company’s safety budget.
of safety incidents during economic downturns aren't a result of safer workplaces or work practices but instead reflect workers’ reluctance to report safety incidents to their employers for fear of getting fired. In other words, incidents are still happening in recessions; they’re just not being reported by the workers involved.

To prove this theory, the researchers analyzed the unemployment rates and the number of workplace safety incidents from 1975 to 2000 in 16 countries in the Organisation for Economic Co-Operation and Development (OECD): Belgium, Canada, Denmark, Finland, France, Germany, Greece, Ireland, Italy, The Netherlands, Portugal, Spain, Sweden, Switzerland, the U.K. and the U.S. Although workplace safety incidents are common in all of these countries, there are differences in how each country defines “workplace incident.” For example, some countries count incidents that occur while commuting to work while others don’t consider such incidents as taking place “in the course of work.” There are also regulatory differences in the reporting requirements for workplace incidents. In addition, different countries have different unemployment benefit schemes, with some providing better benefits than others. The researchers took these differences into account when they analyzed the data.

The Study’s Results
Based on the analysis, the researchers concluded that there was a relationship between unemployment rates and the reporting of safety incidents. They found that for some countries, there was clearly an inverse relationship between the number of workplace incidents and unemployment. In other words, the higher the rate of unemployment, the lower the number of incidents that were actually reported. The researchers also concluded that whether workers report a safety incident seems to depend on two factors:

Likelihood of being fired. Workers will consider the likelihood of being fired before they report an incident. The perception is that reporting an incident is a blot on workers’ records, the study explains, making them more vulnerable to termination. When the economy is booming, a company is unlikely to get rid of workers simply because they reported safety incidents (although it may discipline such workers in another way). But when the economy is poor and companies are looking to lay off workers for financial reasons, reporting an incident may make a worker an attractive layoff target. Why? The company may conclude that workers who report incidents are more “accident-prone” than other workers. So if the company has to cut its workforce due to economic conditions, it’s more likely to let go those workers who have reported incidents than those who’ve never had a safety incident. Such concerns aren’t unique to recessions, of course. However, when national unemployment is high and the prospects of finding a new job are poor, workers’ fears of reprisals for reporting incidents sharply increase.

Consequences of being fired. Workers will also consider the consequences of being fired. Of course, getting fired always carries adverse consequences, even in the best of times. But when unemployment rates are high, the consequences of getting laid off are heightened because workers fear they’ll be unable to find a new job quickly. And in countries with poor or low unemployment benefits, the consequences of losing a job are particularly dire. So the relationship between unemployment rates and incident reporting is even stronger in those countries than in countries with high unemployment benefits.

Finally, the researchers concluded that the fluctuations in the number of workplace incidents that correspond to national economic conditions don’t reflect changes in workplace safety conditions or practices. If the fluctuations in the number of workplace incidents were based on safety conditions in the workplace, then both fatal and non-fatal incidents would fluctuate similarly during recessions. But fatal incidents don’t fluctuate like non-fatal incidents. In fact, fatal incident rates aren’t influenced by economic conditions at all. So there must be some reason other than the fact that the workplace is safer to account for the decline of non-fatal incidents reported during recessions.

The explanation is the difference in workers’ reporting behaviour with respect to fatal and non-fatal injuries. Workers generally have a choice about whether or not to report non-fatal incidents. In fact, a company may not know about a non-fatal incident if workers don’t report it, especially if the incident was minor or a “near miss.” In contrast, workers don’t have a choice about reporting a workplace fatality. They know that the company will find out about it even if they don’t report it. Consequently, they don’t gain any advantage by failing to report the incident.

Thus, fluctuations in the overall number of safety incidents reported result entirely from fluctuations in the number of non-fatal incidents reported. And workers’ willingness to report a non-fatal incident is likely to decline in a recession when workers are most worried about layoffs and unemployment.

Conclusion
The argument that workplaces become safer of their own accord during a recession is full of flaws. But the theory has gained some traction and you need to understand how to attack it in case your CEO tries to use it to justify cutting your safety budget. That’s where the Tilburg study comes in handy. Yes, the number of reported incidents does tend to be lower when times are bad and higher when times are good—but not because a bad economy somehow improves safety. If recessions helped safety, the number of fatal injuries would trail off, too. The fact that they don’t suggests that something else is going on. In a tough economy, workers are simply too scared of being fired to report non-
fatal safety incidents. The underreporting of safety incidents not only creates the false impression that your workplace is safe but also makes the workplace even more vulnerable to additional incidents. After all, if workers don’t report incidents, you may not be able to identify hazards and take the appropriate steps to address them.

**Bottom line:** Recessions aren’t good for workplace safety; rather, they actually negatively impact workplace safety by lulling everyone into thinking that the workplace has gotten safer when that’s not the case at all. So don’t let your CEO con you—or the rest of senior management—into believing that the current economy will actually benefit the workplace’s safety record. Speak up for your workers’ safety and help protect the company’s safety budget.

**INSIDER SOURCE**

Canada’s problem with workplace violence has been well documented and there’s no point wasting your time rehashing the statistics. But while recognition of the danger is nothing new, the heightened risk created by the current economic situation most decidedly is. If workplace violence can erupt in times of prosperity, imagine what can happen in a climate of downsizing and mass layoffs—where even employees who are fortunate enough to keep their jobs experience high levels of anxiety and angst.

And then there’s this to consider: All employers, no matter what part of Canada they’re in, are required by law to implement measures to prevent violence in the workplace. It’s not just the safety manager who must be concerned. HR managers must also understand the legal obligation to prevent workplace violence and what’s necessary to comply with the law. That’s no simple task. Workplace violence laws are complex and requirements vary from jurisdiction to jurisdiction. We’ll explain what you need to know to keep your company in compliance. More importantly, we’ll give you a proactive strategy for preventing violence along with a Model Assessment Form (on page 58) to execute it.

Defining Our Terms
Workplace “violence” means more than just physical acts like slapping, punching, shooting and stabbing. It also includes threats of such acts and other forms of intimidation, harassment, bullying and abusive conduct that doesn’t involve actual physical contact.

WHAT THE LAW SAYS
Where in the law does it say that employers must prevent violence in the workplace? The answer, at least in most of Canada, is within Occupational Health & Safety (OHS) laws. The OHS laws impose that duty in two different ways:

The Specific Duty Jurisdictions
The OHS laws of seven jurisdictions—Fed, AB, BC, MB, NS, PEI and SK—specifically say that employers must take certain steps to address workplace violence. Federally regulated companies are the most recent ones to incur such a duty; new workplace violence regulations, Part XX, Section 20.1 et seq. of the Canada OHS Regulations took effect on June 17, 2008. The workplace violence section in SK and NS apply only to employers in certain high-risk sectors, such as schools, healthcare facilities, banks, retail stores and correctional facilities. But the NS regulations specifically state that all workplaces must recognize violence as a workplace hazard in carrying out their duties under the OHS laws [Sec. 3].

In Québec, the workplace violence duty isn’t in the OHS law but the Labour Standards Act. Employers are required to prevent “workplace psychological harassment,” defined as unwanted conduct, verbal comments, actions or gestures that affect a worker’s “physical integrity.” Presumably, QC employers must also prevent acts of physical violence.

Insider Says: In December 2007, a bill that would amend the Ontario OHS Act to expressly require employers to take steps to address workplace violence (Bill 29) passed first reading.

The General Duty Jurisdictions
Six jurisdictions—NB, NL, NT, NU, ON and YT—don’t specifically say in their OHS laws that employers must address workplace violence. But that doesn’t mean that employers in those jurisdictions are off the hook. For those employers, the duty is implied.

Explanation: The OHS laws list the risks employers must protect against, including electrical, chemical, machine, etc. But when the lawmakers adopted the OHS laws, they realized that they might have overlooked—or deliberately decided not to include—certain hazards. So, as a backstop, the OHS statute—or act—of each jurisdiction contains what’s called a “general duty clause” that requires employers to provide a reasonably safe workplace and protect workers from foreseeable hazards that can cause serious injury or death, even if those hazards aren’t mentioned in the laws.

The general duty clause of the OHS laws almost surely requires employers to protect against workplace violence. How do we know? Some jurisdictions have come out and said so. For example, the Ontario Ministry of Labour says on its website, “Under the Occupational Health and Safety Act, all employers must take every precaution reasonable in the circumstances to protect the health and safety of their workers in the workplace. This includes protecting them against the risk of workplace violence.”

Example: A union filed a grievance against an employer in Ontario for failing to meet its duty under the OHS Act to provide a safe work environment when it allowed a foreman to bully a worker. The arbitrator concluded that the foreman had publicly humiliated the worker on a regular and continual basis, noting that “[t]his form of humiliation was akin to placing him in the public stocks.” The arbitrator ruled that the employer violated the general duty clause and fined it $25,000 [Toronto Transit Commission v. Amalgamated Transit Union].
Other “implied duty” jurisdictions have made similar pronouncements. Moreover, the threat of workplace violence is universally acknowledged. Thus, in the words of one lawyer, “it’s unimaginable” that any prosecutor, regulator or court would find that an employer doesn’t have to safeguard employees against violence.

**CONDUCTING A WORKPLACE VIOLENCE ASSESSMENT**

Having a duty is one thing. What must employers do to comply? Some provinces’ OHS laws set out specific steps. Although requirements vary, they follow the same basic approach. One common requirement is to conduct a workplace violence risk assessment. For example, Part 20.5(1) of the new federal workplace violence section of the OHS Regulations requires employers to assess:

- The nature of the work activities;
- The working conditions;
- The design of the work activities and surrounding environment;
- The frequency of situations that present a risk of workplace violence;
- The severity of the adverse consequences to the employee exposed to a risk of workplace violence;
- The observations and recommendations of the workplace violence policy committee or joint health and safety committee (JHSC) and employees; and
- The measures already in place to prevent workplace violence.

Some provinces and territories, including, of course, the six “implied duty” jurisdictions don’t set out specific measures. What should employers in these places do? Lawyers suggest doing a workplace violence assessment patterned after those required by the OHS laws of the other jurisdictions since the obligation to do assessments represents the current legal standard for workplace violence prevention. Accordingly, courts and prosecutors in other jurisdictions are likely to look to those requirements to determine if your company’s response to violence is reasonable.

### LAWSCAPE: THE OBLIGATION TO PREVENT WORKPLACE VIOLENCE

**NOTES:**

- Federally regulated employers specifically required to take measures to prevent violence
- In SK, violence regulations apply to “high risk” workplaces, e.g., schools, healthcare facilities, correctional facilities, etc.
- In NS, violence regulations apply to high risk workplaces but regulations say all employers must treat violence as hazard
Survey Supervisors as Part of Assessment
The purpose of a violence risk assessment is to identify which employees may be at risk of violence, the kinds of violence they may face, the degree of risk and the measures necessary to protect against those risks. Nova Scotia guidelines recommend regular review of the assessment at least every five years. (Ask your company’s lawyer if more frequent reviews are necessary.) You should also review your assessment when incidents occur or circumstances change, causing the risk of violence to increase. Get your JHSC involved in the process, not just because the law requires it (Fed, MB and NS) but to make assessments more effective.

A key aspect of the assessment is to get information from supervisors. After all, they’re on the front line and have uniquely valuable insight into violence risks. A good way to secure supervisor input is to have them complete a survey like the one on page 58 that’s based on a violence hazard assessment form from the Education Safety Association of Ontario. The survey covers the following:

- A description of the department or area the supervisor is in charge of;
- Any history of violence in the department;
- Activities in the department that could expose workers to violence;
- Factors that might increase the risk of violence in the department;
- Measures in place to address violence; and
- Additional measures recommended and resources needed to implement them.

Conclusion
The best reason to undertake a risk assessment and other measures to prevent workplace violence isn’t because the law requires it. The real reason to act is that the danger is real and growing worse by the day. At the end of the day, if anyone at your company is ever unfortunate enough to be involved in violence at the workplace, the liability you’ll incur will be the least of your problems.

SHOW YOUR LAWYER
SUPERVISOR WORKPLACE VIOLENCE SURVEY

Part 1: Work Department/Area
Please describe your department/area and the types of activities/functions performed by workers in the department.

Part 2: History
Have there been incidents when workers in your department have experienced or been threatened with physical violence?
☐ NO  ☐ YES, please describe incidents.

Have there been incidents when workers in your department have experienced verbal abuse i.e. been shouted at or subjected to obscene language, threats or obscene phone calls?
☐ NO  ☐ YES, please describe incidents.

Part 3: Activities Which Might Expose Workers to Risk of Violence
Do workers in your department handle money or other valuables?
☐ NO  ☐ YES

Do workers in your department deliver or collect items of value?
☐ NO  ☐ YES, please describe.

Do workers in your department deal with people who may be under the influence of drugs or alcohol?
☐ NO  ☐ YES

Do workers in your department deal with people who are deeply troubled or distressed?
☐ NO  ☐ YES

Do workers in your department monitor or regulate the activity of others or carry out procedures or make decisions which adversely affect others?
☐ NO  ☐ YES, please describe.

Are workers in your department involved with activities that may elicit a negative or confrontational response?
☐ NO  ☐ YES, please describe.

Are there other aspects of the work in your department that might spark a violent response?
☐ NO  ☐ YES, please describe.

Part 4: Factors That Increase the Risk of Violence
Do any of your workers work alone—that is, out of sight and out of hearing of other workers—during normal working hours?
☐ NO  ☐ YES, please describe.

Do any of your workers work alone after normal working hours?
☐ NO  ☐ YES, please describe.

Please describe any precautions already taken to safeguard workers in your department who work alone.

Please describe other factors which you feel might increase the risk of violence.

Part 5: Reducing the Risk of Violence
Please describe policies or procedures already in place to reduce the risk of violence in your department.

In light of your responses to the questions in this assessment:
Do you believe that all reasonable steps have been taken to prevent or reduce the risk of violence?
☐ NO  ☐ YES

What further steps would you recommend?

What assistance do you need to accomplish any of the above steps?
Specify:

Name:

Date:

Department:

Thank you for your cooperation and input!
With the economy in a downturn, companies may be tempted to try to cut costs by using fewer workers to do the same amount of work. But this strategy is likely to cost companies more money in the long run. Pushing workers to work harder and longer is likely to result in fatigue—both physical and mental. Workers suffering from fatigue are not only less productive and more prone to illness but also more distracted and thus more likely to be involved in a safety incident. For example, two studies show that fatigued workers are more than twice as likely to experience health-related lost productive time. In fact, one study found that 37.9% of U.S. workers experience fatigue, costing companies approximately $136 billion in lost productivity.

Therefore as HR manager, you need to be aware of the dangers of workplace fatigue and warn company management to consider the economic impact of driving workers too hard. But you’ll need solid evidence to support your argument. We’ll tell you about two studies published in the *Journal of Occupational and Environmental Medicine* (JOEM) you can use: One is on the relationship between fatigue and health-related lost productive work time (LPT) in U.S. workers and the other links weekly work schedules of 60 or more hours to health and safety problems. We’ll also explain how you can use these studies to persuade senior management to take the risks of workplace fatigue seriously.

**Fatigue in the Workforce**

Fatigue can be broadly defined as a feeling of weariness, tiredness or lack of energy. Fatigue is a common complaint but, medically speaking, it’s recognized more as a symptom or cause of other conditions than as a condition itself. The best way to understand fatigue is along a continuum. On one end of the spectrum is the fatigue that most of us occasionally experience in the course of our lives when we get physically or mentally overburdened. This kind of fatigue isn’t serious and can usually be resolved simply and quickly, such as by getting extra rest. On the other end is a less common but more serious form of fatigue that’s symptomatic of a more chronic and disabling condition, such as major depressive disorder or chronic fatigue syndrome. This form of fatigue is an acute and/or ongoing state of tiredness that leads to mental or physical exhaustion and prevents people from functioning as usual.

Fatigue clearly impairs work ability. Studies have shown that workers with fatigue are significantly more likely to miss work and experience long-term work absences than workers without fatigue. But there were no studies on the prevalence of fatigue within the workforce (at least in the U.S.) and how fatigue affected productive work time.

**Fatigue Compared with Blood Alcohol Content**

- Being awake for 17 hours impairs performance to the same level as having a 0.05 blood alcohol content.
- Being awake for 20 hours impairs performance to the same level as having a 0.1 blood alcohol content.


**THE FATIGUE STUDY**

The JOEM fatigue study was the first to examine the relationship between fatigue and health-related lost productive work time (LPT) in U.S. workers. The researchers used data from the Caremark American Productivity Audit (the Audit), a random telephone survey of U.S. residents that measures the relation between health and productivity. The Audit used the Caremark Work and Health Interview (WHI) to gather information from workers about their:

- Self-reported employment status;
- Occupational characteristics;
- Health conditions and symptoms;
- Lifestyle factors;
- Health-related quality of life; and
- Demographic characteristics, such as annual salary.

The WHI measures LPT as the sum of self-reported hours per week absent from work for a health-related reason (absenteeism) and the hour-equivalent per week of self-reported health-related reduce performance while at work (presenteeism). The presenteeism analysis focused on five work behaviours:

- Loss of concentration;
- Repeating a job;
- Working more slowly than usual;
- Feeling fatigued at work; and
- Doing nothing at work.

The researchers interviewed a sample of 28,902 adults ages 18 to 65 who’d participated in the Audit and were employed in the week before the interview. To identify which individuals were suffering from fatigue, researchers posed the following question to participants: “Did you have low levels of energy, poor sleep or a feeling of fatigue in the past two weeks?”
The Study’s Results

Based on the information gathered on the participants through the WHI and from the researchers own interviews, they concluded the following:

- The estimated prevalence of fatigue in the U.S. workforce for a two-week period was 37.9%.
- Fatigue was more prevalent in women, workers under age 50, white workers and workers earning more than $30,000 per year in “high control” positions—that is, jobs with a lot of latitude in making decisions.
- Overall, 9.2% of U.S. workers with fatigue reported LPT specifically due to fatigue in the previous two weeks. Such workers lost an average of 4.1 productive work hours per week, most of which was reflected in reduced performance at work rather than absence from work, i.e., presenteeism rather than absenteeism. For these workers, fatigue affected their work performance primarily by impairing their concentration and increasing the time it took them to complete tasks. And distracted workers are naturally more likely to have safety incidents.

Bottom line: The researchers estimated that workers with fatigue cost U.S. employers $136.4 billion per year in health-related LPT—$101 billion more than workers without fatigue.

THE LONG WORK HOURS STUDY

A separate set of JOEM researchers set about to analyze the impact, if any, of long work hours on workers’ health and safety. The researchers relied on a database put together by a truck and engine manufacturer to gauge the impact of long work hours on its workforce. Working overtime at the manufacturer’s worksites was voluntary. But it was common practice for the company to ask workers to work more than 40 hours per week, most of which was reflected in reduced performance at work rather than absence from work, i.e., presenteeism rather than absenteeism. For these workers, fatigue affected their work performance primarily by impairing their concentration and increasing the time it took them to complete tasks. And distracted workers are naturally more likely to have safety incidents.

The database included information on 2,746 workers who completed two surveys that covered a wide range of topics, including:

- Health status;
- Chronic disease;
- Presenteeism and absenteeism;
- Workplace incidents;
- Behaviours that pose a health risk; and
- Use of health services.

The database also included information on workplace incidents that adversely impacted worker health or safety, which was gathered from the manufacturer’s databases on:

- Workers’ comp and short-term disability claims;
- Group health claims and paid prescriptions; and
- Eligibility and absenteeism.

The Study’s Results

Researchers found that for workers who worked fewer than 60 hours per week, the injury rate was negligible. But at the 60-hour mark, the injury rate increased steadily, peaking at the 80 hours per week mark. (Note that the only workers who reported averaging workweeks above 80 hours were salaried workers who performed sedentary jobs. So it’s not surprising that the injury rate for this group was low.) In addition, working 60+ hours per week led to the onset of one or more diseases and to the greater likelihood of at least one acute or other work injury. In contrast, working moderate overtime (defined as 48.01-59.99 hours per week) didn’t have any significant impact on workers’ health or safety.

Conclusion

The JOEM fatigue study shows that fatigued workers cost their employers billions of dollars a year in lost productivity. Of course, fatigue can be caused by many factors—including ones that are unrelated to the workplace, such as family demands, health problems and financial pressures. But as the long hours study shows, fatigue can certainly be caused by working excessive hours. When workers work 60 hours or more per week, they’re more likely not only to get sick or injured and miss work but also to work less productively when they do show up for work. And both forms of productivity loss—absenteeism and presenteeism—directly hit the company’s bottom line.

So although pushing workers to work harder and longer may seem to make financial sense on its face, in reality, an overworked and overtired workforce will ultimately cost the company money. Instead, you should encourage senior management to take steps to address fatigue in the workplace. How? In August 2008, WorkSafe Victoria and WorkCover New South Wales published a guide called “Fatigue – Prevention in the Workplace,” which provides information on how to:

- Identify potential work-related fatigue hazards;
- Determine work-related fatigue risks;
- Control work-related fatigue hazards and risks; and
- Monitor and review work-related fatigue control measures.

The guide, which is available at http://www.worksafe.vic.gov.au/wps/wcm/connect/WorkSafe/Home/Forms+and+Publications/Publications/Fatigue+prevention+in+the+workplace, notes that preventing and reducing fatigue may lead to:

- Better health and safety outcomes;
- Fewer workplace incidents and injuries;
- Reductions in absenteeism and staff turnover; and
- Better performance and productivity.

INSIDER SOURCES
