3 Traps to Avoid When Asking Employees to Take Pay Cuts



This is an article from 2020, reflective upon the COVID-19 pandemic, but the principles and strategies mentioned are still applicable for HR directors facing any economic uncertainty or crisis in the workplace due to external factors.

Asking employees to take a temporary pay cut to help you stave off layoffs can be a win-win for organizations experiencing short-term crises like during the current COVID-19 pandemic. The organization gets the financial relief it needs and employees get to keep their jobs. But beware of 3 legal traps that can get your organization into trouble.

1. Constructive Dismissal: Ask, Don't Tell

Pitfall: One big risk is liability for constructive dismissal, which can arise when you impose pay cuts unilaterally. Explanation: Constructive dismissal occurs when you don't actually fire employees but unfavourably revise their employment terms or conditions to the extent that you repudiate the contract and force the employee to leave. And in terms of potential damages, being found liable for constructive dismissal can be just as expensive as being found liable for actual dismissal. Courts and arbitrators have consistently ruled that pay cuts may constitute a form of constructive dismissal, even if they're just temporary.

Solution: But constructive dismissal applies only when the changes get made unilaterally. As a result, you can take constructive dismissal off the table by getting their written agreement to the pay cut. But continue reading. . .

2. Lack of Consideration: Provide *Quid Pro Quo*

Pitfall: Putting an agreement in writing doesn't automatically make it enforceable, especially if the deal is one-sided. As many an employer has learned, employee give-backs are valid only when the employee receives "consideration," i.e., something of value in return for making them. For example, a BC court recently refused to enforce an amendment changing a one-year employment contract to a month-to-month because the company didn't give the employee anything in exchange for the concession [*Quach v. Mitrux Services Ltd.*, 2020 BCCA 25 (CanLII), Jan. 23, 2020].

Solution: Make sure the employee gets something of real value in exchange for taking

the pay cut, e.g., extra vacation or other benefits enhancements. And specifically describe the new consideration in the pay cut agreement.

3. The Pre-Existing Duty Rule: Just Keeping the Job May Not Be Enough

Pitfall: Under the so called “pre-existing duty” rule, agreement to perform a duty the party is already contractually obligated to perform doesn’t count as consideration. Accordingly, just letting employees keep the jobs in exchange for a pay cut may not be adequate to the extent you were already required to provide the employee that employment under the original contract.

Solution: Again, you need to provide the employee some kind of new benefit that wasn’t already promised to him/her under the original employment contract, like an increased or new employment benefit and clearly describe that consideration in the new written agreement.