

# A COVID-19 Lay Off May Not Be Termination



Canada lost a staggering million plus jobs in the month of March. The International Labour Organization has said based on current statistical information, 1.25 billion workers or 38% of the Global Workforce may face workplace displacement as a result of the COVID-19 pandemic. Pundits warn that almost 50% of Canadians may be laid off as a result of the Corona virus shutdowns with potentially up to 30% permanently losing their jobs or businesses in certain sectors. In the midst of this economic carnage, there is a lot of confusion about what rights employees have during the unprecedented period of time.

## What we know

The federal government and its provincial counterparts have enacted tough new laws to protect employees from losing their jobs while simultaneously providing support to businesses across the country through a variety of economic stimulus packages aimed at helping both groups successfully manage the crisis with as little disruption as possible through an enhanced employment insurance program [CERB] and a 75% wage subsidy sending a clear message it is not “business as usual”.[1] Additionally many provincial governments are proposing changes to the definition of Statutory Leaves to avoid an onslaught of law suits.

## Layoffs for most employees during COVID-19 is not an automatic termination

Under normal circumstances, a layoff without an employee’s consent is considered a ‘termination’ under our common law system. Additionally, Provincial Employment Standards Acts allow for layoffs with certain conditions which if not met; the employee is also considered terminated. A termination then allows an employee the right to a severance package based on many factors such as income, age, length of service, nature of the job, market conditions, etc. Typically, 24 months of severance is the most an employee can expect to receive for long term service.

## **Nothing normal about COVID-19 and frustration of contracts**

However, there is nothing normal about the COVID-19 circumstances. The legal doctrine of 'Frustration' and 'Impossibility' which means that when the nature of the contract has been changed because of an unforeseen event outside the control of the parties, the normal rules of law are not likely to apply and as such the normal rules of severance may not apply. Therefore, employees need to consider all the factors before they initiate a lawsuit as a result of a layoff.

During the COVID-19 pandemic, courts are likely to look at the following factors to determine if an employee who has been laid off has been in fact been terminated entitling them to severance.

The list of non-exclusive factors includes:

- we are in a declared State of Emergency which is likely to last for months not weeks;
- a governmental shut down of non-essential work places disabling many employers from carrying on their businesses;
- unfeasibility of some work places to be able to work remotely thereby necessitating layoffs;
- governmental declaration that employees cannot be terminated for COVID-19 related reasons, making layoffs, work reductions, and salary reductions (which are typically seen as constructive dismissals) currently the only options for businesses;
- statutory exemptions from severance in cases of government ordered closures, pandemics, or permanent discontinuance of business;
- adherence to statutory rules by the employer acting in good faith;
- the actual nature and reality of the employer's business, the nature of the employee's position and any contracts in place; and
- did the employer recall the employee right after the end of COVID-19 emergency period.

## **It is not better to sue right after you are laid off during COVID-19**

During COVID-19 an employee is not better off suing immediately after being laid off in an effort to get their job back or for that matter to receive severance. The courts are largely closed and employees will not know what their actual damages are.

This means laid off employees trying to sue for damages for termination during this time may not succeed or only have limited success if their employer recalls them. Given Canadian and Global statistics, most employees will be better off waiting out a layoff during the next few months. Saving a job has to take priority under these unprecedented conditions.

## **Warning to employers**

Employers cannot use the concept of indefinite layoff to categorically terminate their employees without severance. They also cannot wait much past the COVID-19 emergency period to recall their employees. Otherwise, employers will likely lose what leverage they might have under this exceptional period and the general common law rule that a layoff without an employee's consent is termination will be applied. The courts will look at the industry, employer, employee and any

contracts in place to determine what is appropriate in the circumstances.

In this emergency period, however layoffs are not necessarily guaranteed terminations entitling employees to a severance package and as such employees are likely better off waiting to see if they are recalled by the end of the State of Emergency period.

#### **Footnote**

1 <https://www.canada.ca/en/departement-finance/news/2020/03/canadas-covid-19-economic-response-plan-support-for-canadians-and-businesses.html>

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