

A Way to Cut the Hurt & Costs of Workforce Reductions

written by Rory Lodge | July 24, 2014



Workforce reductions aren't just heartbreaking but expensive. But you may be able to reduce your workforce in a way that is easier on your emotions and finances: Structure layoffs as temporary. Such arrangements can enable you to maintain ties with key employees you hope to recall and if not avoid at least delay having to provide notice and other termination payments. Here's what HR and payroll managers need to understand to ensure that temporary layoff arrangements are legally sound.

WHAT THE LAW SAYS

Employees terminated without cause may be entitled to termination payments like wages in lieu of notice and severance. Layoffs may also trigger wrongful dismissal lawsuits and expose the company to risk of damages including *Wallace* and other forms of punitive damages if you act like a jerk during the termination process.

Technically, temporary layoffs don't terminate the employment relationship the way permanent layoffs do. That's a big deal because it avoids triggering termination notice requirements. Notice doesn't kick in unless and until the layoff continues past the deadline stated in the law (or sooner if you do decide to make the layoff permanent after all). Thus, temporary layoff gives employers a breather and a window to resolve their financial difficulties. If the company lands that big contract or secures that key loan before the deadline expires, you can recall the laid off employees without having to shell out termination payments.

6 QUESTIONS TO ASK ABOUT TEMPORARY LAYOFFS

There are 6 questions to ask to ensure that your temporary layoff decisions are valid:

1. Is Temporary Layoff Legal?

The good news is that employment standards laws in all 14 jurisdictions allow for temporary layoffs, i.e., provide a window after layoff before which the layoff

becomes permanent effectively allowing the employer to recall the employee without having to pay notice until the window closes.

The bad news is that temporary layoffs may be problematic under *other* laws. The key law to watch out for is the so called “common law,” i.e., law that comes not from a piece of legislation or regulation but from rulings by judges in court cases. For example, under common law employees may claim constructive dismissal when employers make unilateral changes to key terms of their employment. Does that include a temporary layoff? Courts in AB, BC, MB and ON have all answered this question YES.

Example: An Alberta travel agent temporarily laid off after the 9/11 terrorist attacks claimed that she was wrongfully dismissed. Even though the AB ESA allows temporary layoffs, the court ruled that the agent still had her constructive dismissal rights under common law and that the temporary layoff was constructive dismissal entitling her to notice [*Turner v. Uniglobe Custom Travel Ltd.*, 2005 ABQB 513 (CanLII), July 7, 2005].

Employers in places where courts haven’t yet specifically addressed the issue must ensure that temporary layoffs permitted under the employment standards laws don’t give rise to constructive dismissal. The simplest way to guard against constructive dismissal claims is to get the employee’s consent to the temporary layoff. After all, agreed-to changes can’t be the basis for constructive dismissal.

2. What Time Counts as Temporary Layoff Time?

You have a window between the layoff date and the date the layoff becomes a permanent termination. Each jurisdiction counts temporary layoff time differently so you need to understand the rules that apply to your workplace to make accurate calculations. In general, days that employees don’t work count as layoff time. But layoff time might also include days that employee work for the employer and earn substantially less. Thus, for example, in BC and ON, employees may be considered laid off if they’re earning 50% or less than their regular wage from the employer as a result of either a wage or hours’ reduction or combination of the two.

3. How Long Can Temporary Layoff Last?

You also need to determine how long the temporary layoff can last before it becomes permanent and notice is required. Jurisdictions set the duration in 2 ways:

- **Rolling Period:** In some places, the threshold is based on number of days or weeks in a rolling period. For example, in BC, NL, ON and YK, temporary layoffs can last up to 13 weeks in any 20-consecutive week period. NT and NU allow for temporary layoffs of no longer than 45 days in a 60-day period. In MB, temporary layoffs can last 8 weeks in a 16-week period “or greater number of weeks in a longer period of time.” In these jurisdictions, you must assess weekly whether it’s still temporary or has become permanent before the window closes.
- **Number of Days:** Some laws count the length of the layoff itself regardless of the window in which it occurs. Thus, in NS and SK, layoffs can last up to 6 days before termination notice obligations arise. In AB, a temporary layoff can last up to 60 days. QC allows temporary layoffs of up to 6 months. Under federal law, temporary layoffs can last up to 3 months or up to 12-months if the layoff is mandatory under the collective agreement.

4. Can the Temporary Layoff Period Be Extended?

Some jurisdictions allow the temporary layoff period to be extended.

- **Extension granted by Director:** In NT, NU, ON and YK, the government employment standards officer can grant an exception for special circumstances if the employee is recalled within the period the officer specifies.
- **Notice and recall specified:** Under federal law, the layoff can exceed the 3-month maximum if the employer notifies the employee in writing at or before the layoff that he'll be recalled on a specific date or within a specific period no more than 6 months from the date of the layoff.
- **Payments continued during layoff:** Fed, AB, MB and ON allow the layoff to continue past the maximum if the employer agrees to continue paying employees or make pension or group insurance payments on their behalf. In ON, the extension can't extend the layoff beyond 35 weeks in a 52-week period and any payments made to the employee must be "substantial" to qualify for the extension. Fed and ON also allow the layoff to continue past the maximum if employees get supplemental unemployment benefits or would get them if they're not disqualified under EI because they find alternative work or for another reason.
- **Agreement:** Federal and AB allow a temporary layoff to continue longer than the maximum if the collective agreement allows the employee to retain recall rights during the layoff. In MB, if layoffs are regular and recurring in the business and employees are informed of this upon hiring, employers can extend past the stated temporary layoff maximum. ON allows the employer and employee to agree to a longer temporary layoff and set a recall date in the agreement, provided that the employee actually is recalled by the agreed upon date.

5. Must You Notify Employees of Temporary Layoff?

Employment standards laws differ on whether employers must provide notification to employees who get temporarily laid off.

- **Notification Required:** NT and NU require employers to notify affected employees and specify the expected recall date. NT states that if notification isn't given the layoff is deemed permanent. PEI and SK require notice for both layoffs and terminations and don't distinguish between temporary and permanent layoff. Under federal and QC law, written notification is required if the layoff lasts longer than the stated temporary layoff deadline. Notification is required in NB if the layoff exceeds 6 days or isn't due to a lack of work unforeseen by the employer (except if the layoff is required by collective agreement). NL requires notification if the layoff exceeds 1 week (it's allowed for up to 13 weeks) unless the terms of layoff are addressed under the collective agreement.
- **No Notification Required:** Fed, AB, BC, MB, NS, ON, QC and YK don't require notification as long as the layoff ends by the period specified in the statute. But in at least one province—AB—courts have ruled that notification should be provided to temporarily laid off employees even if the employment standards law doesn't specifically require it to avoid any "misunderstanding" [*Vrana v. Procor*, 2004 ABCA 126 (CanLII), April 15, 2004].

6. What Happens If Layoff Lasts Long than Stated Maximum?

If you recall an employee before the stated maximum for a temporary layoff, you don't need to provide termination notice, severance or other termination payments. Employees who refuse to return to work after being recalled are deemed to have quit and thus aren't entitled to notice payments. But you may owe vacation or other accrued benefits. In such a case, you may need to revise the employee's Record of Employment (ROE) to:

- Account for these subsequent payments;
- Change the reason for interruption of earnings in Block 18 from layoff (Code A) to quitting (Code E); and
- Add a comment to Block 18 to explain what happened. Example: "Employee didn't return to work when recalled for *[insert date due back to work]*." Not amending the initial ROE exposes the employer to significant penalties.

If you don't recall employees by the time the maximum period for a temporary termination passes, they're considered permanently terminated, unless an exception applies. At that point, you must provide employees termination payments, including banked time, vacation pay and other benefits to which they're entitled upon termination. To properly calculate these payments, you must determine the effective date of termination:

- **Termination Effective at Start of Layoff:** In BC, MB (except if a collective agreement provides otherwise), NL, NS, ON and YK, termination of temporarily laid off employees is effective at the start of or the first day of the temporary layoff. Under federal law, an employee is deemed terminated on the date the layoff began;
- **End of Layoff:** In AB, the effective date of a permanent termination is the very next day after the temporary layoff period ends, i.e., 60 days. In NT and NU, it is the last date of the temporary layoff period;
- **Start of Layoff Implied:** PEI and SK don't specify exactly when a temporarily laid off employee is considered permanently terminated. But presumably, since both provinces treat all layoffs and terminations the same, an employee is deemed terminated at the start of the layoff;
- **Doesn't Terminate Employment.** In NB and QC, the law just says that employees are owed notice if the layoff exceeds the threshold. But it doesn't go as far as saying the employment is over. The status of the relationship at that point is based on common law and contract. Technically, then, laid off employees entitled to notice might still be considered in an employment relationship with the employer. Consequently, to terminate the relationship permanently, the employer must do so explicitly.

Conclusion

Layoffs cost money. Making the layoff temporary enables you to defer the costs of notice and other termination payments and maintain ties with employees you might want to recall if your company's fortunes improve. But don't even think about going down that road unless and until you have a solid grasp of the legal requirements involved.