[Avoid Legal Traps When Changing Wage Payment Methods]

At some point, your company might want to change its method of paying wages. For instance, you might want to wean your employees off of paper paycheques and convert them to direct deposit. Or, you might want to start using prepaid payroll cards. Taking advantage of more convenient payment methods can simplify payroll, cut costs and improve overall productivity. But it can also get you into a whole lot of legal trouble, especially if you impose the changes unilaterally. Here's a look at the problems and how to overcome them.

Accepted Methods of Payment

The employment standards laws of each province specify the methods employers can use to pay wages to employees. The 3 methods accepted in all jurisdictions:

1. Cash;
2. Cheque; and
3. Direct deposit.

Employees without bank accounts must be paid by cash or cheque. Some provinces and territories also allow for payment by draft, order to pay and/or bill of exchange. PEI and the federal jurisdiction don't specify acceptable methods of payment. (To see what your province requires regarding method of payment.

It's up to the employer to decide which payment method to use. However, employers must respect employees' rights and contract limitations in exercising this discretion.

Example: An employee files a grievance against an employer for unilaterally switching from cheque to direct deposit. The employer claims that changing the mode of payment has no real impact on the employee and likens it to "changing the location of the coffee machine." The BC Supreme Court disagrees. Far from being trivial, the Court finds "that the mode of payment is in a matter of sufficient substance and concern to many" employees [*Pottelberg v. British Columbia Telephone Co.,* [1995] B.C.J. No. 1140].

Most courts outside BC also follow *Pottelberg.*

Employer's Right to Change Payment Methods

Payment method disputes typically arise when employers try to change their payment methods. Employees sometimes object to these changes, especially switches from paper paycheques to direct deposit. The key issue in these disputes is whether the employer can implement direct deposit *unilaterally* or requires the consent of the affected employees.

An employee's right to consent to direct deposit (or to other changes in the method of payment) can come from 3 sources:

1. Employment Standards Laws

Although it's an accepted method of payment under employment standards laws, 3 provinces—BC, NL and QC—require employers to get the employee's consent, either individually or through a collective agreement, to use direct deposit. In BC, that consent must be in writing. AB, MB, NB, NS, NT, NU, ON, SK and YK don't specifically say that employers need consent to pay via direct deposit. Of course, the employee's act of designating the account for employer to deposit the funds is an indirect form of consent to direct deposit. In ON, the financial institution must be within "reasonable distance" of the workplace unless the employee agrees otherwise. Thus, even in the non-consent jurisdictions, employers must get employees to buy into the direct deposit system.

2. The Express Terms of the Employment Contract

Even in provinces where employee consent isn't required, employers can't unilaterally adopt direct deposit or any other new payment method if using the current payment method is required under the contract or collective agreement.

Example: As part of its collective agreement with the union, a New Brunswick hospital agreed to pay employees by cheque. The hospital later introduced a direct deposit system. At first, the system was voluntary for existing employees and compulsory for new ones. But a few years later, the hospital tried to make direct deposit compulsory for all employees, including those covered by the collective agreement. So the union filed a grievance.

NB is one of the provinces where employers don't need employee consent to implement direct deposit. But this proved of no help in the hospital's defence. The adjudicator acknowledged that the decision to implement direct deposit "began as a management right." But the hospital had voluntarily chosen to give up this right when it negotiated the collective agreement with the union. Now the employer had to live with the agreement it made and couldn't unilaterally switch to direct deposit [*New Brunswick (Board of Management) v. C.U.P.E.*, 88 D.L.R. (4^{th}) 176 (1992)].

3. The Implied Terms of the Contract

How does a contract term come to be a contract term? The most obvious way is for the term to be written into the contract. The *C.U.P.E.* case is an example where the method of payment was an express term of the contract.

But terms can also get into contracts without actually being written down. The legal doctrine of "implied contract terms" empowers arbitrators and courts to read unwritten terms into the contract. Terms may be implied into a contract:

- Based on custom and business practice—the unwritten term embodies the customary way things are done in this particular business context;
- To carry out the presumed intentions of the parties—the implied term is what the parties really meant when they made their agreement; and/or

- Because it’s required by law—the unwritten term contains rights and duties that are mandatory in a contract of this type.

One of the terms that can be implied into a contract is the method the employer must use to pay the employee.

Example: A BC-based telecommunications company learned this lesson the hard way in the *Pottelberg* case described above. After years of paying by cheque, the employer wanted to start paying non-union management employees by direct deposit. This didn’t sit well with everybody. Some of the managers refused to fill out the direct deposit consent form.

The company put up with the dissent and continued to pay the dissenters by cheque for a while. But after month 4, it drew a line in the sand. Sign the paperwork by Feb. 1, it warned, or we’ll open a bank account on your behalf and start depositing your wages directly into it. The managers stood firm. When Feb. 1 rolled around, the company made good on its threat and started making deposits into accounts it had opened for the managers.

One of the managers, a 13-year veteran of the company, sued for breach of contract. Nothing in the employment contract expressly stated that the company had to pay the manager by cheque. But the manager claimed that the company’s obligation to pay by cheque was an implied term in the contract. The BC Supreme Court agreed. The reasons it cited for finding that the company had an implied contractual obligation to pay by cheque:

- **Custom and Usage:** The company had paid the manager a cheque every two weeks over the course of 13 years;
- **The Parties’ Intentions:** Employee handbooks distributed by the company included the following sentence in at least two places: “You will receive your paycheque from your supervisor every second Thursday”; and
- **The Parties’ Intentions—Part 2:** During his employment interview, the manager had been reassured by a company official that he would be paid by cheque.

Conclusion

Make no mistake: The right to decide how to pay your own employees is and has always been a management prerogative. The purpose of this article is to make you aware that this right isn’t absolute. It may be limited by employment standards or other laws; and it may be traded away by management during contract negotiations. As a practical matter, these legal limitations are most likely to come into play when an employer attempts to force employees it’s been paying by cheque to accept direct deposit. But while that may be a narrow situation, it is certainly far from uncommon. And if you’re still paying your employees by paper cheque, you must understand the legal obstacles you face in converting to more modern payment methods.