

B.C. Employers May be Exempt From Providing Termination Notice Due to COVID-19



The B.C. Employment Standards Branch (“ESB”) has recently published guidance on how business closures and staffing reductions related to the COVID-19 pandemic may exempt British Columbia employers from the obligation to provide employees with statutory termination notice or pay in lieu of notice.

The B.C. *Employment Standards Act* (“ESA”) sets out the minimum amount of termination notice that an employer must provide to an employee on termination of employment. There are individual notice requirements, as well as group notice requirements if an employer is terminating 50 or more employees at a single location in a two month period. COVID-19’s impact on the economy means that many British Columbia employers have had to consider these provisions.

There are several circumstances in which an employer will be exempt from providing an employee with statutory individual and group (if applicable) notice of termination.¹ One of the exceptions is if the employee is “employed under an employment contract that is impossible to perform due to an unforeseeable event or circumstance other than receivership, action under section 427 of the *Bank Act* (Canada) or a proceeding under an insolvency Act”.²

Given the unprecedented nature of COVID-19, there are no reported ESB decisions on whether a pandemic could be considered an “unforeseeable event or circumstance” making the employment contract impossible to perform. Prior to COVID-19, the example given by the ESB for this exception was the destruction of a worksite by a fire or flood. The ESB has now updated its website to state that business closures and staffing reductions due to the current COVID-19 pandemic could be seen as resulting from unforeseeable events that make an employee’s work impossible to perform. It explains that if the closure or reduction is directly related to COVID-19, and there is no way for the employee to perform work in a different way (e.g. remotely), then this exception to statutory termination notice may apply.

It is important to note that the ESB has said that the exception *may* apply. In the guidance, it points out that if an employer terminates an employee for reasons that are not directly related to COVID-19, or if the employee’s work could still be done in a different way, then the exception would not apply. The

ESB has said that these situations will be dealt with on a case-by-case basis. In our view, a likely interpretation of this guidance is that a termination that occurs because a business has been ordered shut down by a governmental authority should be able to rely on this exemption, but it is unclear that terminations that result simply from an economic downturn caused by the crisis will qualify.

While this updated guidance may provide some financial relief for some employers, layoffs and terminations must still be conducted with careful consideration to avoid unexpected liability. Employers should continue consider an employee's entitlements upon termination on a case-by-case basis, including whether it is truly impossible for the employment relationship to continue in light of COVID-19. In addition, employers should remember the following important points, which remain unchanged by this recent ESB guidance:

- the ESB takes the position that in order to be able to temporarily layoff an employee, the temporary layoff needs to be: (a) expressly provided for in the employee's written contract; (b) implied by well-known industry practice; or (c) agreed to by the employee; and
- unless the employee's written employment contract states that they are only entitled to the minimum amount of notice set out in the *ESA*, employers may still be contractually obligated to provide an employee with some sort of severance payment on termination.

If you have any questions about whether this exception may apply to your employees, or any other COVID-19 related questions, please contact any member of the Lawson Lundell Labour, Employment and Human Rights Group.

NOTE: Due to the rapidly changing legal landscape with respect to COVID-19 and our government's response to the pandemic, please understand that any blog posts written in the past may not reflect the current applicable obligations, rights and benefits of employers and employees.

Footnotes

1. *ESA*, s. 65
2. *ESA*, s. 65(1)(d).

By Cory Sully , Rob Sider and Deborah Cushing of Lawson Lundell LLP