

Compliance Cheat Sheet: Temporary Layoffs

written by vickyp | April 14, 2020



Workforce reductions aren't just heartbreaking but expensive. The silver lining is that structuring layoffs as temporary can be much easier on both your emotions and your budget. Temporary layoffs enable you to maintain ties with key employees and avoid or at least delay notice and other termination payments. Here's what HR directors must do to ensure that temporary layoff arrangements are legally sound.

The Difference between Termination & Temporary Layoff

Temporary layoffs don't terminate the employment relationship like 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 decide to make the layoff permanent). Result: You get a breather to resolve your financial difficulties. And if you do land that big contract or secure that key loan before the deadline expires, you can recall the employees without making termination payments. Meanwhile, employees can take advantage of EI, CERB and other emergency COVID-19 unemployment benefits.

The 6 Questions to Ask

There are 6 questions to ask before going the temporary layoff route.

1. Is Temporary Layoff Legal?

Every jurisdiction but PEI allows for temporary layoffs, i.e., provides a window before which a layoff becomes permanent effectively allowing employers to recall the employee without having to pay notice until the window closes. But temporary layoffs may be problematic under *other* laws, including constructive dismissal. Courts in several jurisdictions, including ON, AB, BC and MB have ruled that a temporarily laid off employee was constructively dismissed. Note: New Ontario Regulations ban employees from bringing ESA constructive dismissal claims for temporary layoffs and hours reductions of 50% or more due to COVID-19.

Example: Even though the AB ESA allows temporary layoffs, the court ruled that a travel agent temporarily laid off after the 9/11 terrorist attacks still had her constructive dismissal rights under common law, i.e., non-statutory law existing before the ESA was enacted, and ordered the employer to pay her termination notice [*Turner v. Uniglobe Custom Travel Ltd.*, 2005 ABQB 513 (CanLII)].

Practical Strategy: The COVID-19 situation is unusual because employees can agree to

temporary layoffs without necessarily forfeiting their right to collect EI, CERB and other benefits. And, by definition, changes that employees agree to can't be the basis for constructive dismissal.

2. What Time Counts as Temporary Layoff Time?

In calculating how long a temporary layoff can last, you need to understand what counts as temporary layoff time in your jurisdiction. General Rule: Days that employees don't work and don't get paid count as layoff time (FED, AB, NB, NL, NS, PEI, QC, SK and the 3 Territories); Exceptions: Layoff time includes days in which employees work for you but earn 50% or less than their regular wage due to a wage or hours' reduction or combination of the two (BC and ON).

3. How Long Can Temporary Layoff Last?

The next thing you must determine is how long the temporary layoff can last before it becomes permanent. Many jurisdictions temporarily changed their rules in response to the COVID-19 pandemic and, in some cases, future public health crises forcing employees to miss time from work.

How Long Temporary Layoffs Can Last, by Jurisdiction (No Temp. Layoffs in PEI)

Jurisdiction	Normal Rules	Temporary Rules for COVID-19 Layoffs
FED	Up to 3 months or 12 months if layoff is mandatory under collective agreement	–
AB	Up to 60 days in 120-day period	Up to 120 days for layoffs due to COVID-19, retroactive to March 17, 2020
BC	Up to 13 weeks in 20-consecutive weeks period	Up to 16 weeks in 20-consecutive weeks period
MB	Up to 8 weeks in 16-week period "or greater number of weeks in a longer period of time"	No time limits for layoffs due to COVID-19, retroactive to March 1, 2020
NB	Up to 6 days (layoffs due to unforeseen interruption or lack of work can last indefinitely)	–
NL	Up to 13 weeks in 20-consecutive weeks period	Up to 26 weeks in 33 consecutive weeks period, retroactive to March 18(1)
NS	Up to 6 days	–
ON	Up to 13 weeks in 20-consecutive weeks period	Indefinite—employees on layoff beyond deadline deemed to be on emergency infectious disease leave
QC	Up to 6 months (12 months for employees with recall rights under a collective agreement)	–

SK	Up to 6 days	Up to 12 weeks in 16-weeks period if due to a public health emergency(1)
NT/NU	Up to 45 days in a 60-consecutive-day period	–
YK	Up to 13 weeks in 20-consecutive weeks period	–

Note:

1. Extended deadlines in SK and NL apply to layoffs due not only to COVID-19 but any other emergency infectious illness

4. Is It Possible to Extend the Temporary Layoff Period?

Some jurisdictions allow for extension of 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 and ON allow the layoff to continue past the maximum if the employer agrees to continue paying employees or making pension or group insurance payments on their behalf; that rule also applies in MB for temporary layoffs not due to COVID-19. 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.

CAVEAT ON LAYOFF PAYMENTS & CERB ELIGIBILITY

Payments during the layoff period may jeopardize employees' entitlement to the new CERB. **Explanation:** Employees who attest that they've stopped working for at least 14 consecutive days in a 4-week period are eligible to receive the CERB for the first 4-week benefit period but must expect to have no employment income to receive the CERB for later benefit periods.

Extension by Agreement: FED and AB allow for extension of a temporary layoff if the collective agreement allows the employee to retain recall rights during the layoff. In MB, the normal rule is that 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; but COVID-19 layoffs can last indefinitely until the pandemic ends. 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 is actually recalled by the agreed upon date.

5. Must You Notify Laid Off Employees?

Jurisdictions differ on whether employers must provide notification to temporarily laid off employees.

Notification Required: Jurisdictions that do require notification include:

- AB: Unless a collective agreement provides otherwise, notice must be given at least 1 week before start of the layoff or 2 weeks if the employee has been employed for 2 or more years or, “as soon as practicable in the circumstances” if the employer can’t meet the above deadlines due to “unforeseeable circumstances”; notice must list layoff start date, indicate that it’s a temporary layoff notice and include copies of relevant sections of the ESC;
- NT, NU: Employers must notify affected employees and specify the expected recall date;
- PEI, SK: Notice required for both termination and layoff without distinction between temporary and permanent layoff, but in SK, a temporary layoff due to COVID-19 or other public health emergency doesn’t require notice;
- NB: Notification required 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: Notification required if the layoff exceeds one week (it’s allowed for up to 13 weeks) unless the terms of layoff are addressed under the collective agreement.

No Notification Required: FED, BC, MB, NS, ON, QC and YK don’t require notification as long as the layoff ends by the period specified in the statute. FED and QC laws require written notification if the layoff lasts longer than stated temporary layoff deadline and becomes permanent.

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

As long as 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 quit and thus not entitled to notice payments. But if you don’t recall employees before the maximum threshold, the layoff becomes permanent and must pay employees termination payments, including banked time, vacation pay and other benefits. To calculate these payments, you must determine the effective date of termination:

Termination Effective at Start of Layoff: In BC, MB (except where provided otherwise under a collective agreement), NL, NS, ON and YK, termination of temporarily laid off employees is considered effective at the start of or the first day of the 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, or 120 days for COVID-19 layoff. In NT and NU, it’s 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 because both provinces treat all layoffs and terminations the same, an employee is likely deemed terminated at the start of the layoff; this is definitely the case for temporary layoffs due to public health emergencies in SK.

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, permanent termination of the employment must be explicit.

**Around The Provinces: Temporary Layoffs
(Not Counting Temporary Extensions for COVID-19 Layoffs)**

FEDERAL

How Long Layoff Can Last	*3 months or less *12 months or less if mandatory under collective agreement
Potential Extensions of Layoff Duration	*Longer than 3 months if employer notifies employee of layoff in writing and sets specific recall date no longer than 6 months and employee actually recalled *Longer than 3 months if employer makes agreed payments or pension contributions *Longer than 3 months if less than 12 months + employee keeps collective agreement recall rights
Deemed Termination Date If Layoff Becomes Permanent	
Notification Required	If layoff exceeds 3 months, employer must notify employee in writing that he'll be recalled on a set date or within a set period of time that's no more than 6 months after layoff date

ALBERTA

How Long Layoff Can Last	*Normally, 60 days within 120-day period *120 days for COVID-19 layoffs
Potential Extensions of Layoff Duration	<u>Longer than 60 days if:</u> *Sides agree to payments from employer during layoff or *Employer makes payments to pension or insurance plan or *Provided in collective agreement granting recall rights Presumably also applies to COVID-19 layoffs of more than 120 days
Deemed Termination Date If Layoff Becomes Permanent	*60th day after layoff; If employee doesn't return within 7 days after request, employment ends and employee doesn't get termination pay—unless collective agreement contains recall rights *Presumably applies to 120th day of COVID-19 layoffs
Notification Required	*Unless collective agreement says otherwise, layoff notice required: (a) at least 1 week before date layoff begins, if employee employed for <2 years; (b) at least 2 weeks before date layoff begins, if employed 2 years or more; or (c) as soon as practicable if unforeseeable circumstances prevent notice by above times Presumably applies to COVID-19 layoffs

BRITISH COLUMBIA

How Long Layoff Can Last	*Up to 13 weeks in 20 consecutive week period *"Week of layoff" means any week employee earns less than 50% of regular wages (averaged over 8-week period)
---------------------------------	--

Potential Extensions of Layoff Duration	Sides can ask Employment Standards Director for longer period
Deemed Termination Date If Layoff Becomes Permanent	Termination effective as of first day of layoff
Notification Required	Notification not required if layoff ends by maximum period and doesn't become permanent
MANITOBA	
How Long Layoff Can Last	*Normally, 8 weeks in a 16-week period. *Temporary COVID-19 layoffs can last indefinitely until emergency ends
Potential Extensions of Layoff Duration	<u>Longer layoff period allowed if:</u> * Employment Standards Director approves; or *In business "employees are subjected to regular and recurring lay-offs" and employee was told about this upon hiring; or *Employer continues wage payments or pays employee's pension benefits during layoff *Collective agreement provides for longer period
Deemed Termination Date If Layoff Becomes Permanent	Termination effective as of first day of layoff
Notification Required	Notification not required if layoff ends by maximum period and doesn't become permanent
NEW BRUNSWICK	
How Long Layoff Can Last	*Up to 6 days *No limit on layoff due to interruption of work because of lack of work due to unforeseen reason
Potential Extensions of Layoff Duration	
Deemed Termination Date If Layoff Becomes Permanent	
Notification Required	*Notice required for termination or layoff, unless layoff is only up to 6 days or due to lack of work unforeseen by employer *Notice not required if collective agreement applies
NEWFOUNDLAND & LABRADOR	
How Long Layoff Can Last	More than 13 weeks in 20 consecutive week period
Potential Extensions of Layoff Duration	
Deemed Termination Date If Layoff Becomes Permanent	Termination effective as of beginning of temporary layoff
Notification Required	Written notification required for any termination unless terminated for no more than one week or under collective agreement

**NORTHWEST TERRITORIES/
NUNAVUT**

How Long Layoff Can Last	No longer than 45 days in a 60 consecutive day period
Potential Extensions of Layoff Duration	Employment/Labour Standards Officer can grant an extension for special circumstances as long as employee will be recalled
Deemed Termination Date If Layoff Becomes Permanent	Termination date is last day of layoff
Notification Required	*Written notice specifying date of expected recall required *Layoff is permanent termination if notice not given *Notice not required if employee doesn't return within 7 days after being recalled to work in writing

NOVA SCOTIA

How Long Layoff Can Last	Up to 6 days without notification
Potential Extensions of Layoff Duration	
Deemed Termination Date If Layoff Becomes Permanent	Termination date is date of layoff
Notification Required	Notification required unless layoff is for no more than 6 days

ONTARIO

How Long Layoff Can Last	*Up to 13 weeks in 20 consecutive week period *Includes time employee gets less than 50% of regular wages
Potential Extensions of Layoff Duration	<u>Layoff can last up to 35 weeks in 52 consecutive week period if:</u> *Employer continues making substantial payments to employee *Employer makes payments under pension, retirement or insurance plan *Employee gets supplementary unemployment benefits *Employee recalled in time set by director or agreement with employee <u>Temp layoff can go longer than 35 weeks if employee recalled as required in collective agreement</u>
Deemed Termination Date If Layoff Becomes Permanent	Deemed termination date is first day of layoff
Notification Required	No notice for temporary layoff; if employment contract grants seniority rights allowing laid off employee to displace another, notice of the layoff posted conspicuously is sufficient termination notice to the displaced employee

PRINCE EDWARD ISLAND

How Long Layoff Can Last	No mention of temporary layoff specifically but references layoff and discharge together
Potential Extensions of Layoff Duration	
Deemed Termination Date If Layoff Becomes Permanent	Start of layoff
Notification Required	Notice required for any layoff or termination
QUÉBEC	
How Long Layoff Can Last	Up to 6 months
Potential Extensions of Layoff Duration	Up to 12 months if employee entitled to recall under collective agreement
Deemed Termination Date If Layoff Becomes Permanent	
Notification Required	No notification required unless layoff lasts longer than maximum 6 months and becomes permanent
SASKATCHEWAN	
How Long Layoff Can Last	*Up to 14 consecutive days *Up to 12 weeks in 16-week period if temporary layoff due to public health emergency
Potential Extensions of Layoff Duration	
Deemed Termination Date If Layoff Becomes Permanent	Start of layoff
Notification Required	Notice due for termination or any layoff except temporary layoff due to public health emergency
YUKON TERRITORY	
How Long Layoff Can Last	Up to 13 weeks in 20 consecutive week period
Potential Extensions of Layoff Duration	Employer can apply to Employment Standards Director to extend layoff past 13 weeks as long as employer recalls employee by date set by Director
Deemed Termination Date If Layoff Becomes Permanent	Start of layoff
Notification Required	Notification not required as long as layoff ends by required 13-week maximum or longer deadline approved by Director