

# Flexibility Is Key For Employers Facing Uncertain Economic Conditions



The looming trade war between the United States and Canada has created a great deal of uncertainty for Canadian businesses. As the new normal of uncertainty evolves, businesses must pivot effectively so as to not find themselves at a competitive disadvantage.

Accordingly, the most common reaction to such uncertainty – pausing or canceling planned investments – may not always be the best solution. Where possible, businesses should ensure that they are able to adapt quickly to economic changes and correct course.

Such an approach could work particularly well for managing a business's investment in human resources. A hiring freeze is not necessarily the best solution for a business pursuing growth opportunities in the face of economic uncertainty. Instead, a better solution is to build protections into the business's hiring practices to ensure flexibility to quickly and inexpensively pivot if its workforce needs or economic outlook changes in the future.

Employers face two main legal constraints when it comes to downsizing their workforce: employment standards legislation, and (judge-made) common law. Employment standards legislation sets out a number of employee protections that cannot be contracted out of, including minimum requirements for termination notice or pay *in lieu* of such notice.

While most employers have a good understanding of their obligations under employment standards legislation, many do not fully appreciate their obligations under common law. For example, the concepts of wrongful dismissal and constructive dismissal are not universally understood by employers.

Under common law, employment contracts are presumed to contain an implied term that the employer will provide the employee with "reasonable notice" before terminating their employment without "just cause." Unfortunately, an economic downturn or change in company fortunes does not constitute just cause to terminate an employment relationship. Moreover, any substantial changes to terms of employment (e.g., pay cuts) introduced by employers without the approval of employees are treated under common law as a "constructive" without cause termination of the employment contract. Reasonable notice – which is assessed by judges based on factors such as the character of employment, length of service, the employee's age, and availability of

similar employment – tends to far exceed the amount of termination notice required under employment standards legislation. Damages are measured based on all the wages/salary, bonuses, and benefits the employee would have earned in this period.

This presumption that an employee is entitled to reasonable notice of termination may be rebutted if the contract of employment clearly specifies some other period of notice that meets or exceeds the minimum termination obligations set out under employment standards legislation.

With this in mind, employers wishing to reduce the risk of their hiring decisions have at least three tools at their disposal to do so. When extending a written offer of employment, employers should consider including provisions to implement the following safeguards:

### **A probationary clause**

When clearly implemented into a contract of employment, a probation period provides employers with an initial window (of up to 90 days in Alberta) during which they may terminate the employment relationship without just cause and without providing the employee any notice of termination (or pay *in lieu* of notice). Employers' only obligation to employees during a probation period is to provide them a fair and reasonable opportunity to demonstrate their suitability for the job, which employers are entitled to assess based on many different factors including not only the employees' skills and performance, but also their compatibility and future fit with the company.

### **A temporary layoff clause**

While employment standards legislation permits employers to temporarily lay off employees, the unilateral imposition of a layoff will constitute constructive dismissal under common law if the employment contract does not grant such discretion to the employer. It is therefore important for employers to expressly address layoffs at the time of hire if they wish to have maximum flexibility to effectively react to short-term market fluctuations or disruptions to their operations.

### **A termination clause**

Many employment contracts contain no provisions whatsoever to address termination. Many others contain termination clauses that lack the sufficient clarity to rebut the presumption that the employee is entitled to common law reasonable notice. Yet, this is the most effective way employers can limit the financial costs they will face if forced to quickly downsize their workforce or implement other changes to reduce their labour costs.

While the time of hire is the best opportunity to introduce such safeguards, employers can also amend their existing contracts of employment to allow for more flexibility and cost certainty when responding to market conditions. However, when attempting to implement such changes with an existing workforce, employers face a heavy onus in establishing the necessary elements of a new binding and enforceable agreement. Employers must clearly communicate proposed changes to employees, make them aware that they are being asked to give up or modify their existing legal rights, and offer them valuable consideration to secure their agreement to the changes.

Though the future of Canadian businesses may be uncertain, there are tools to ensure flexibility and adaptability in the face of challenge. Employers should obtain legal advice when adding such terms to their standard offers of employment or making such

changes to their existing employment contracts to help ensure that they meet the exacting standards required to render them enforceable. If you own a business and require guidance with any of the strategies mentioned above, please reach out to our [Labour and Employment team](#) for assistance.

*The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.*

Authors: [Daniel R. Bokenfohr](#), [Vicki Giles](#), [Daniel Weber](#)

McLennan Ross LLP