

How Can Impacted Employers Respond To U.S. Tariffs?



President Donald J. Trump has announced his intention to place significant tariffs on Canada. In response, Prime Minister Justin Trudeau announced that Canada intends to place additional tariffs on certain American goods. While this situation is still developing and remains uncertain, from an employment law perspective, these announcements have both employees and employers concerned. This will have a major impact on the economies of both Canada and the United States. Employers may seek to respond to these economic pressures by reducing their workforce. Employees may be concerned about the potential for temporary lay-offs, terminations, or changes in working conditions and compensation.

In this post we will provide a brief overview of what the imposition of Trump's tariffs and Trudeau's retaliatory response means for both employers and employees.

General Termination Obligations

With Cause Termination

Employers will not, other than in very unusual circumstances, be able to justify a termination due to changing economic conditions as a termination with "cause".

Without Cause Termination

Due to the economic pressures caused by the imposition of these tariffs, many employers may consider reducing their workforce by terminating employees without cause.

When an employer terminates an employee without cause, they are required to provide them with notice of termination ("Notice"). In circumstances where the employment contract contains an enforceable termination provision, the employee will be entitled to Notice in accordance with the contract. At minimum they are entitled to Notice pursuant to the

Employment Standards Act ("ESA")

Under the ESA employees are entitled to one week's pay per year of service up to a maximum of eight weeks. If a termination provision provides for greater entitlements than the ESA, the employee is entitled to Notice in accordance with the contract.

However, an employer cannot contract out of the ESA, meaning that a termination provision that provides an employee with entitlements below the ESA minimums will be unenforceable.

Under the ESA, certain employees will also be entitled to "Severance Pay" which is an additional one week's pay per year of service. For example, employees with five or more years of service and who are employed by an employer with a payroll of \$2.5M or greater will be entitled to Severance Pay.

In circumstances where the termination provision in the employment contract is unenforceable, employees are entitled to common law reasonable notice ("Reasonable Notice"). The period of Reasonable Notice is very case specific. It is calculated by looking at the unique facts of each case, in particular the age of the employee, the character of the employment, the length of service, and the availability of similar employment. Reasonable Notice under the common law is typically greater than the minimums required by the ESA.

See our post "[The Importance of Properly Drafted Termination Clauses](#)" for more information on unenforceable termination provisions.

Mass Termination

There are special rules of Notice that apply in cases of mass termination, which is when an employer is terminating fifty or more employees at its establishment within a four week period.

The amount of Notice employers must give in a mass termination is based on the number of employees who have been terminated at the establishment, rather than the employees' length of service. An employer must give:

- 8 weeks' notice if the employment of 50 to 199 employees is to be terminated;
- 12 weeks' notice if the employment of 200 to 499 employees is to be terminated;
- 16 weeks' notice if the employment of 500 or more employees is to be terminated.

There are certain circumstances where these mass termination rules do not apply. For example, where the number of employees who are being terminated represent 10% or less of the employees who have been employed for at least three months at the establishment, or if none of the terminations are caused by the permanent discontinuance of all or part of the employer's business at the establishment.

Temporary Layoff Provisions

Many employees may be concerned about the possibility of being temporarily laid off while businesses adjust to economic changes. A temporary lay-off is different from termination of employment. While termination ends the employment relationship, a temporary lay-off suspends it, resulting in an employee being off work, without pay, for a set period. This means the employee is still employed but is not currently working.

There are limited circumstances where an employer can legally impose a temporary lay-off. Employers may only do so in the following circumstances:

- the employee consents;
- it is permitted by the employment contract; or
- there is an established custom or practice in the employer's industry.

If none of these conditions are met, the employee may consider the temporary lay-off to be a dismissal and they may be entitled to Notice.

Temporary lay-offs are governed by the ESA, and can last up to thirteen weeks within a twenty week period, or up to thirty-five weeks within a fifty-two week period if certain conditions are met, such as continued benefits or partial pay. If the temporary lay-off lasts longer than this, the employee may be entitled to Notice and possibly Severance Pay.

Even if a temporary layoff is permitted by the ESA, it still may amount to a constructive dismissal unless the employee consents, the layoff is part of an established custom, or there is specific language in the employment contract permitting the layoff. It is recommended that employers

who may wish to manage their workforce size through layoffs to have clear employment agreements expressly permitting layoffs.

The employer is not entitled to change the employee's job when calling them back to work. Employees are entitled to return to the same job under the same conditions as before the lay-off. If there are any significant changes to the employee's pay, duties, or schedule, they may have a claim for constructive dismissal.

Frustration of Contract

Employers may seek to take the position that there has been frustration of contract as a result of the economic changes caused by the tariffs. Frustration of contract occurs when an unforeseen event, beyond the control of either party, makes it impossible to fulfill the terms of the contract. In employment law this typically refers to an external factor such as a change in law, a natural disaster, or a major economic shift renders it impossible for either the employer or the employee to fulfil their obligations under the contract. As a result, the employment relationship comes to an end and the employer is generally not required to provide the employee with Notice or other benefits they may otherwise be entitled to.

While an employer may wish to argue that the imposition of the tariffs lead to frustration of contracts, it will be unlikely that the tariffs will frustrate the contract. For frustration to occur, the event must have been unforeseeable to the parties. Generally, recessions or changing economic conditions are not events that are "unforeseeable". The courts have historically found that major recessions, or even pandemics like COVID-19, were not unforeseeable and did not frustrate the contract.

Conclusion

These tariffs will impact a broad range of employees and employers in unique ways. It is important to talk to a professional to determine your specific rights and obligations. It is crucial for employers to have a properly drafted employment contract in order to ensure that their rights are protected. Through an employment contract, employers can limit their liability flowing from employment changes and can ensure their flexibility in managing their workforce.

Whether you require support with negotiating a termination package, advice for dealing with temporary lay-offs or termination of employment, or are an employee wondering if you have a wrongful dismissal or constructive dismissal claim, Barriston LLP is here to support you in whatever capacity you may need. Call today to book a consult with one of our experienced employment lawyers.

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: [Alison Firth](#), [Emerson Wargel](#)

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