

'Made In Canada': Workforce Considerations In Times Of Tariffs



For businesses, the past several weeks have been amongst the most unpredictable in recent memory. The tariffs imposed by the United States have created new challenges and opportunities for companies across the globe. We take a look at the key legal considerations for employers in Canada as they weigh-up changes in their workforce to respond to an uncertain economic and business environment.

On a sometimes-daily basis, businesses in Canada are responding to ever-changing realities to respond to threats of tariffs on goods exported to the United States, the actual imposition of such tariffs, the extension and non-extension of deadlines for tariffs to come into force, and Canada's retaliatory tariffs on goods imported from the United States. It remains unclear how long such tariffs will remain in place, whether there will be any further escalation, how they will affect globally integrated supply chains, and what their economic impact will be in the coming months and years.

Such an uncertain environment makes it difficult to make investment and business decisions, including decisions regarding labour and employment matters. The possibility of an economic downturn as a result of the disruption in cross-border trade has all employers taking a closer look at their budgets and anticipating their future human resources needs, which is no easy task. This article highlights some of the key legal considerations for employers as they consider changes in their workforce to respond to this unpredictable environment.

Flexibility In Terms of Employment

For unionised employers, the collective agreement may include provisions regarding restructuring of the workforce to meet changing operational requirements. Employers can be proactive by engaging in negotiations with unions to build provisions into the collective agreement, through a letter of understanding, for example, to increase flexibility, regain competitiveness or forestall closure.

In a non-unionised work environment, a claim for constructive dismissal could arise if an employer makes unilateral changes to an employee's pay, hours of work, location, duties, reporting structure or other essential terms of the employment agreement. To minimise this risk, and where an employment agreement includes such terms, or a job description, employers should provide the employee with sufficient notice of any proposed changes.

The length of notice required depends on the circumstances, but ultimately must be commensurate with the length of notice that would be owed upon termination of employment. Employers may also offer employees new agreements that better respond to changing business and operational requirements, however, such offers must be made with caution, to avoid claims of constructive dismissal, and with offers of fresh consideration, in order to be valid.

Layoffs and dismissals

An unfortunate reality of economic downturns is that employers sometimes need to reduce their workforce either temporarily or indefinitely. In most situations, minimum standards legislation will allow temporary layoffs up to a certain number of weeks, however, a layoff could be considered constructive dismissal at common law, unless the employment agreement allows it.

Most collective agreements contain provisions regarding layoffs and seniority, allowing unionised employers to downsize their workforce during slowdowns and scale up should the business climate improve. Non-unionised employers considering laying off employees should review their employment agreements to see if it allows for temporary lay-offs, and seek legal advice, particularly if they are considering mass layoffs, which are usually subject to additional statutory requirements depending on the applicable jurisdiction.

When dismissing employees, an employer's potential liability depends on the terms of the collective agreement or the employment agreement, but may not be limited to it. For non-unionised employers, where there is no written employment agreement that rebuts the presumption of reasonable notice at common law, the employer is usually liable for a reasonable notice period that allows the employee sufficient time to find alternative employment. The length of such a notice period could be as low as a few weeks or could go up to 24 months, or even higher in exceptional circumstances. Some court decisions, for example, have previously awarded damages for up to 30 months' reasonable notice for an employee.

Recent decisions, particularly in Ontario, have made it increasingly difficult to enforce contractual provisions limiting entitlements upon termination to statutory minimums. Employers should therefore be aware of their liabilities at common law, and regularly review their employment contracts to ensure that the language is up to date in accordance with the latest case law.

Flexibility in new hiring

Economic changes may also create new opportunities for employers, particularly due to an increasing demand for "Made in Canada" goods and services. Employers seeking to hire new workers in a climate of economic uncertainty may wish to take advantage of contractual provisions that provide them with flexibility during employment, and clarity on entitlements if it ends. However, employers should exercise caution while entering into fixed term contracts or independent contractor agreements, as they may not provide the benefits that employers commonly expect.

Fixed term contracts can convert into agreements for an indefinite duration if an employee continues working past the end date, or if such contracts are repeatedly renewed. Where a fixed-term contract is terminated prior to its end date, an employee may be entitled to damages equal to the loss of remuneration for the balance of the fixed term, without a duty to mitigate, resulting in unanticipated liability for employers.

Similarly, a worker can be considered to be an 'employee' at law even if work is

performed under a written independent contractor agreement. In making such a determination, courts will consider a number of factors, including economic dependence, exclusivity, and the question of whether the individual was carrying on business for themselves or contributing to the business of the organisation from whom they were receiving compensation.

A safer alternative is to enter into a written agreement that is appropriate for the circumstances providing flexible terms of employment, either with a short, fixed term, or for an indefinite duration, but in all cases with enforceable termination provisions.

Takeaway for employers

These are difficult and unpredictable times for employers in Canada. Those employers considering workforce changes in response to the impact of tariffs and the resulting economic uncertainty should bear the following in mind:

- **Engage in proactive negotiations:** For unionised workplaces, employers should engage in proactive negotiations with unions to invoke or include provisions in the collective agreements that allow for workforce restructuring to meet changing operational requirements.
- **Review and update employment agreements:** Employers should regularly review their employment contracts to ensure they are up to date with the latest case law and include provisions that allow for flexibility during economic uncertainties.
- **Seek legal advice for workforce adjustments:** Employers contemplating layoffs or dismissals should seek legal advice. This includes understanding the implications of temporary layoffs, constructive dismissal claims, and ensuring compliance with statutory requirements for mass layoffs.

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.

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