

Temporary Layoffs Compliance Game Plan



Workforce reductions aren't just heartbreaking but expensive. But structuring the employee's exit as a temporary interruption rather than a permanent termination of employment may be much easier on both your emotions and your budget. Such temporary layoffs enable you to maintain ties with key employees while avoiding or at least deferring [termination notice](#) and other payments required by employment standards laws. Here's a 6-step game plan HR directors can use to ensure that their company's temporary layoff arrangements are legally sound.

The Difference between Termination & Temporary Layoff

[Temporary layoffs](#) don't terminate the employment relationship like permanent layoffs do; they simply put it on pause. That's a big deal because it avoids triggering termination notice requirements. The duty to pay notice doesn't kick in unless and until the layoff continues past a specific deadline stated in the law (or sooner if you decide to make the layoff permanent before the deadline expires).

Result: You get a breather and a window 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 having to shell out termination payments. And while employees experience a disruption in earnings, they retain hope of eventually returning to their jobs.

The Legal Risks of Temporary Layoffs & How to Manage Them

However, temporary layoffs also involve legal risk. Leeway to lay off employees without termination notice is subject to specific limitations. Failing to meet these employment standards requirements exposes you to risk of liability for wrongful dismissal. There are 6 things you should do to manage these risks when entering into temporary layoff arrangements with your own employees.

Step 1. Ensure Temporary Layoffs Are Legal

The good news is that employment standards laws in all 14 jurisdictions allow for temporary layoffs, i.e., provide a window before which a layoff becomes permanent effectively allowing employers to recall the employee without having to pay notice

until the window closes. The bad news is that temporary layoffs may be problematic under **other** laws, including contractual obligations under collective agreements and individual employment contracts with non-union employees.

The biggest risk is [potential liability for constructive dismissal](#). Courts have consistently ruled that putting an employee's job on hold may constitute constructive dismissal under what's called "common law," (that is, law arising from court cases rather than legislation) even if the province's employment standards law allows for temporary layoffs. **Example:** An Alberta court ruled that a travel agent temporarily laid off after the 9/11 terrorist attacks had a valid claim for constructive dismissal and awarded her termination notice [[Turner v. Uniglobe Custom Travel Ltd.](#), 2005 ABQB 513 (CanLII)].

Practical Strategy: Constructive dismissal occurs when an employer either exhibits intent to revoke the contract or imposes unfavorable employment changes unilaterally. So, the most effective way to minimize risk of liability is to get the employee's express consent to the temporary layoff arrangement and, if possible, negotiate the terms of the arrangement.

Step 2. Count Temporary Layoff Time Properly

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, MB, 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).

Step 3. Keep Duration of Temporary Layoffs within Employment Standards Deadline

The next thing you must determine is how long the temporary layoff can last before it becomes permanent termination requiring the payment of termination notice. **Caveat:** The maximum duration is generally longer for unionized employees who have recall rights under a collective agreement.

How Long Temporary Layoffs Can Last, by Jurisdiction

Jurisdiction Maximum Duration of Temporary Layoff for Non-Union Employee

FED	Up to 3 months for non-union employee and up to 12 months for union employee with recall rights under a collective agreement.
AB	Up to 90 days in a 120-day period.
BC	Up to 13 weeks in a 20-consecutive week period.
MB	Up to 8 weeks in a 16-week period.
NB	Up to 6 days (layoffs due to unforeseen interruption or lack of work can last indefinitely).
NL	Up to 13 weeks in a 20-consecutive week period.
NS	Up to 6 days.
NT	Up to 45 days in a 60-consecutive-day period.
NU	Up to 45 days in a 60-consecutive-day period.
ON	Up to 13 weeks in a 20-consecutive week period.
PEI	Up to 6 consecutive days.
QC	Up to 6 months for a non-union employee; up to 12 months for a union employee with recall rights under a collective agreement.

Jurisdiction Maximum Duration of Temporary Layoff for Non-Union Employee

SK Up to 6 consecutive workdays.

YK Up to 13 weeks in 20-consecutive weeks period.

Note:

*Temporary layoff duration may be extended in certain situations.

Step 4. Consider Possibility of Extending Temporary Layoff Period

Employment standards laws in 8 jurisdictions (FED, AB, BC, MB, ON, and the 3 territories) provide for extension of the temporary layoff period in some situations:

Extension granted by Government: In BC, ON, NT, NU, and YK, the government employment standards officer can grant an exception allowing the employer to extend the temporary layoff period.

Notice and recall specified: Federally regulated employers can extend the normal 3-month maximum for a non-union employee to 6 months by providing the employee written notice on or before the layoff that lists a specific recall date or period that's no later than the layoff date, provided that they actually recall the employee within that date or period.

Employer makes payments to employee during layoff: In 4 jurisdictions (Fed, AB, MB, and ON), employers can essentially buy more time by agreeing to make payments in lieu of wages and/or contributions to the employee's pension, insurance or other plans, during the layoff period. In ON, the extension may not cause the layoff to exceed 35 weeks in a 52-week period and 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.

Extension by agreement: FED and AB law allow for extension of a temporary layoff if the collective agreement allows the employee to retain recall rights during the layoff. In MB, 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.

Step 5. Provide Temporarily Laid Off Employees Required Notification

Rules differ on whether employers must provide [notification](#) to temporarily laid off employees.

Notification Required: Jurisdictions that require notification include:

- **Alberta:** 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.
- **Northwest Territories, Nunavut:** Employers must notify affected employees and specify the expected recall date.

- **Prince Edward Island, Saskatchewan:** Notice is required for both temporary and permanent layoff.
- **New Brunswick:** Notification is required if the layoff exceeds 6 days, is for a reason other than a lack of work unforeseen by the employer or the layoff is required by collective agreement.
- **Newfoundland:** Notification is required if the layoff exceeds one week 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.

Step 6. Provide Required Termination Notice if Temporary Layoff Exceeds Maximum Duration

As long as you recall an employee before the stated maximum temporary layoff duration, 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 have quit and are thus not entitled to notice payments. But temporary layoffs that exceed the maximum duration become permanent and you 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 FED law, an employee is deemed terminated on the date the layoff began.

End of Layoff: In AB, the effective date of permanent termination is the very next day after the temporary layoff period runs out, i.e., after 90 days. 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.

Doesn't Terminate Employment. In NB and QC, the rules are different. 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.