

Using 'Workforce Reduction' Agreements to Buy Out High Earners: The Glenn Commandments



In tight economic times when payroll cuts are necessary, you may be able to save the jobs of employees slated for layoffs by buying out high-earning senior employees instead. The problem is that senior employees who would otherwise gladly give up their jobs exchange for an early retirement or severance package, may balk if the deal would also cost them up their eligibility to receive Employment Insurance (EI) benefits. This is a legitimate concern since employees don't normally qualify for EI benefits when they give up their jobs voluntarily. The good news is that you can get around that obstacle by structuring the buyout arrangement to meet an exception to the *EI Regulations* allowing employees to retain eligibility for employment benefits when they give up employment voluntarily under a "workforce reduction." Here's what you need to know to ensure your own buyout arrangements meet the workforce reduction exception.

What the Law Says

Under Sec. 30 of the *Employment Insurance Act*, employees who voluntarily leave their employment without "just cause" are disqualified from receiving EI benefits. However, (Sec. 51(1) of) the *EI Regulations* provides an exception allowing employees to get EI benefits if they leave their job under a "workforce reduction process that preserves the employment of coworkers whose employment would otherwise have been terminated in the course of the work-force reduction process." To be deemed a "workforce reduction" subject to the exception, the arrangement must meet 4 conditions:

1. Employer Must Initiate Arrangement

The workforce reduction arrangement must be initiated by the employer. Employees can't step forward and volunteer to give up their jobs in exchange for a package.

Example: The EI Umpire denied EI benefits to an employee who resigned under a collective agreement provision allowing employees with advanced seniority to volunteer for layoff to ensure that junior co-workers remain employed, reasoning that the employee had initiated the process and "triggered his own unemployment" [CUB 45745].

2. Arrangement's Objective Must Be Permanent Reduction of Employees

The second condition is that the employer implement the workforce reduction process to “permanently” reduce the “overall number of employees.”

Permanent

A reduction in the workforce isn’t “permanent” if the employer immediately hires somebody to take the place of or promises to recall the employee who surrenders their job by a certain date. By the same token, “permanent” doesn’t mean that the employee can never be replaced or recalled. Permanent means that the reduction must be more than temporary and the possibility of recall isn’t assured, even if it’s hoped for.

Example: A Manitoba company offered senior employees incentives to volunteer for layoff so that junior employees could keep working in the hopes of later recalling the seniors after getting government help or landing a big contract. But it couldn’t guarantee when and if that would ever happen. The Umpire ruled that the layoffs were part of a “permanent” workforce reduction [CUB 56933].

Cut Overall Number of Employees

The workforce reduction must also reduce the “overall number of employees.” According to Service Canada, “at the end of the process, the business [must] have a workforce smaller than the one existing before implementation.” This suggests that what counts is the number of bodies, not how much each employee earns or FTEs. According to this logic, replacing full-time employees with the equivalent number of part-timers wouldn’t count as a force reduction even though it would cut the FTE rate in half.

Employer Must Offer Employee Option to Resign

The employer must offer employees the option of giving up their jobs. In other words, the choice to leave must be made by the employee. If the employee has no real choice in the matter, the exception doesn’t apply. The requirement that the employee make a deliberate decision to leave means that the elimination of positions via attrition doesn’t count as a workforce reduction. Moreover, the decision the employee makes must be stay-or-go. If the employer is the one who decides the employee must go, simply giving the employee options regarding the timing or other terms of the departure isn’t enough to trigger the exception.

Example: A government agency decided to eliminate an employee’s position starting in April. The employee was offered and accepted a buyout package if he agreed to resign 6 months earlier. He accepts. The Umpire ruled that the exception didn’t apply since the decision to terminate the employee came from the agency. Agreeing to move up the effective date of that decision wasn’t a voluntary acceptance of an offer to resign [CUB 24993].

Employer Must Prove that the Workforce Reduction Exception Applies

The fourth condition is that the employer provide the Commission written documentation confirming that the arrangement meets the other 3 requirements I just described. Employers can submit such documentation in a letter, notice, memorandum, or other form.

3 Things to Do

Keep in mind that the work-force reduction exemption only establishes that the employee’s decision to voluntarily leave his employment was for “just cause.” To receive EI benefits, the employee must still meet all of the other standard

eligibility criteria. Pointers:

- In addition to the Commission letter discussed above, considering a letter that employees can pass along to Service Canada as part of the termination package by adapting the Template on the HR Insider site.
- List “K”, Other, as the reason for termination on Block 16 of the Record of Employment.
- Explain in the ROE comments box that the employee left as part of a workforce reduction process.

Takeaway

When companies are struggling and need to cut salaries, EI eligibility rules may directly affect business planning at the highest of levels. In the current economic environment, an understanding of the “workforce reduction” exception of the EI regulations can prove crucial, especially if your company is determined to use voluntary buyouts to avoid the need for involuntary layoffs.