SHERRARD KUZZ LLP
Employment & Labour Lawyers

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FACT-SHEET:
Managing Layoffs and Terminations During the COVID-19 Pandemic

Current as of March 18, 2020 at 5:00 p.m.

These are uncertain times for many franchisees. As COVID-19 continues to spread globally, the Federal and Provincial Governments take bold and unprecedented action to mitigate the impact.

Many franchisees are in a position where they must reduce employee hours or implement layoffs or terminations due to a lack of work. The question becomes: *What are a franchisee's legal obligations and liabilities in such a situation?*

In answering this question, this briefing note focusses on Ontario and British Columbia.

Temporary Layoff Under Employment Standards Legislation

The **Ontario *Employment Standards Act, 2000*** **("Ontario ESA")** entitles an employer to lay off an employee for a prescribed period of time, after which the layoff is deemed to be a termination of employment and the employee is entitled to termination and severance pay (if that applies).

A temporary layoff is deemed a termination of employment if the layoff lasts longer than 13 weeks in any period of 20 consecutive weeks. However, a temporary layoff may last for up to 35 weeks in any period of 52 consecutive weeks if:

- the employer continues the employee's coverage under a group or employee insurance plan or retirement or pension plan
- the employer provides substantial payments or supplementary unemployment benefits to the employee during the layoff period (or would have if the employee was not employed elsewhere)
- the employer recalls the employee within the time approved by the Director of Employment Standards
- the employer and a non-unionized employee have agreed to the period of layoff in writing
- in a unionized workplace, the employer recalls a laid off unionized employee with a right of recall under a collective agreement within the 35 week period.

It is important to recognize a reduction in employee hours may also be considered a layoff for purposes of the Ontario ESA, even though the employee continues to work. An employee is considered to be laid off for a week if the employee earns less than 50% of the amount the employee would earn at their regular rate of pay in a regular work week.

For the purpose of establishing an employee's entitlement to **severance** pay, an employee is considered to be laid off for a week if the employee earns less than 25% of the amount the employee would earn at their regular rate of pay in a regular work week. An employee is entitled to severance pay if laid off for more than 35 weeks in a 52 week period.

If an employee works an irregular schedule, the Ontario ESA establishes a formula to determine when an employee is considered to have been laid off. This means that, over time, a work reduction may eventually be considered a termination under the Ontario ESA, triggering entitlement to termination and severance pay (in certain circumstances).

Under the **British Columbia *Employment Standards Act* ("BC ESA")**, a temporary layoff is deemed a termination of employment if the layoff lasts longer than 13 weeks in any period of 20 consecutive weeks or, if the employee has a right of recall, the layoff exceeds the specified period within which the employee is entitled to be recalled. An employee is considered to be laid off for a week when the employee earns less than 50% of the employee's weekly wage at the employee's regular wage rate averaged out over the previous eight weeks.

However, under the BC ESA an employer can only lay off an employee on a temporary basis if the employment agreement expressly permits, there is a well-known industry-wide practice of temporary layoffs, or the employee consents. Without one of these three factors, a temporary layoff may trigger an entitlement to termination pay under the BC ESA.

Notice of Layoff

There is no specific requirement an employee be provided with written notice of layoff in either the BC ESA or Ontario ESA. However, as a best practice, an employer should provide written notice of layoff to any impacted employee. The notice should state when the layoff will start, who the employee should be in contact with during the layoff, and if there is an expected date of recall, include the date (or an anticipated date). Unless the employee's contract allows for a temporary layoff, an employer may also want to include a signature line for the employee to sign indicating the employee consents to the layoff, particularly in light of the requirements under the BC ESA.

Constructive Dismissal Considerations

Despite the express provisions of the Ontario ESA, courts have held that, **unless an employment contract or other agreement includes an express or implied right to lay off an employee an employer has no right to do so.** If there is no express or implied right, a layoff may amount to a fundamental breach of the employment contract (whether or not that contract is in writing). In such cases, the employee is deemed to be constructively dismissed and entitled to notice of termination, or pay in *lieu* of notice, and possibly severance pay. Because notice (in this context) is based on what a court would award from a common law perspective, the amounts involved are generally considerably higher than those required by employment standards legislation.

If a franchisee unilaterally and significantly reduces an employee's hours of work this may be viewed as a constructive dismissal. In this case, the employee may be entitled to notice of termination, or pay *in lieu*, even if the reduction does not meet the threshold of a "layoff" under the employment standards legislation.

It is important to note that a constructive dismissal arises only if there has been a **unilateral** change by the employer to terms and conditions of employment. As such, if an employee **agrees** to the change in the terms of employment (either the temporary layoff or the reduction in hours) no constructive dismissal arises. Similarly, if the change to terms and conditions of employment are not imposed by the **employer** but are the result of a Government directive to close operations, it is arguable an employee will not be able to successfully assert the layoff constitutes a constructive dismissal. In that case, the termination occurred because it was impossible for the employment to continue, and the contract of employment may be considered "frustrated". Statutory notice and severance pay is therefore not required.

Even if an employee does not agree to the layoff, and claims it amounts to a constructive dismissal, the employee will still have an obligation to mitigate any damages they claim to have suffered. This means, if a laid off employee is recalled to work and declines, the employee may later be found to have failed to mitigate their losses, dramatically reducing the value of their claim against their employer.

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Employment Insurance (EI) Benefits During a Layoff for Economic Reasons

An employee who is temporarily laid off may be eligible to apply for benefits. Benefits are paid at 55% of earnings, to a maximum of $573.00 per week (taxable income).

To qualify, an employee must meet the minimum number of "insurable hours" calculated over the previous 52-week period. The exact number of insurable hours required varies by region. Benefits are paid for a maximum period of time and this too varies by region.

At present, there is a one-week waiting period for benefits. This may be waived by the Government during the current COVID-19 pandemic, but this has not yet occurred.

To facilitate an employee's access to EI benefits, an employer should complete a Record of Employment (ROE) within five days from the interruption in earnings. The "Reason for Issuing" the ROE (Block 16) should be marked as "A" (shortage of work). Under the "Expected Date of Recall" (Block 14) the employer should indicate the anticipated return to work date, or mark "unknown" if no anticipated return to work date has been indicated in the layoff notice. The ROE may be completed online (if an employer wishes to issue it in paper form, the employer must order paper copies from Service Canada).

If an employer wishes to, it may "top up" the EI benefits provided to an employee during a temporary layoff through a Supplemental Unemployment Benefit Plan (SUB Plan). **Special rules apply to a SUB Plan, which must be registered with EI.**

Employment Insurance Sickness Benefits for COVID-19-Related Reasons

An employee will be entitled to EI sickness benefits if ill for any reason (including COVID-19) or quarantined by public health. In addition, the Federal Government has indicated an employee will be entitled to EI sickness benefits if the employee is required to self-isolate by an employer for reasons consistent with the directive of Public Health officials. At present, this would be in circumstances where an employee has returned from international travel and is asked (or required as of March 18, 2020) to self-isolate for a 14-day period.

Sickness benefits are available for a 15-week period. The regular one-week waiting period to apply for these benefits has been waived. The amount of the benefit and the manner of calculation is the same as with regular benefits, as discussed above.

To facilitate an employee's access to EI benefits, an employer should promptly complete a Record of Employment (ROE). The "Reason for Issuing" the ROE (Block 16) should be marked as "D" (illness or injury").

Potential Employer Liability on Termination of Employment

If a franchisee terminates an employee there are two potential sources of liability: **employment standards legislation** and the **common law**.

Employment Standards

Under the Ontario ESA and BC ESA, an employee is entitled to **notice** based on years of service, to a maximum entitlement of eight weeks of notice, or pay in *lieu*. In addition, an employee in Ontario with five or more years of service may be entitled to severance pay approximately equivalent to one week's pay per year of service to a maximum of 26 weeks.[1]

In both provinces, there are additional termination entitlements on a "mass termination" which generally involves a termination of 50 or more employees within a prescribed time period. **If a franchisee is considering a mass termination it is critical to first consult with an experienced employment lawyer because the requirements are different and the liability potential considerable.**

[1] *An employee is only entitled to severance pay where the employer has an annual payroll in Ontario of $2.5 million or more, or the employee is one of 50 or more employees terminated at an employer's establishment in a six-month period.*

Common Law

In addition to employment standards entitlements, a franchisee may be required to pay a terminated employee common law reasonable notice. This is a term of art used by Canadian courts intended to be a rough estimate of how long an employee will take to find comparable, alternate employment. The length of reasonable notice owed to an employee varies depending upon a range of factors including type of work, degree of expertise or training, length of service, employee age, remuneration, availability of alternative employment, and the circumstances surrounding the hiring of the employee (*e.g.,* was the employee 'lured' from secure employment). When assessing the length of reasonable notice the employment standards notice period is included.

Unfortunately, there is no hard and fast formula to determine reasonable notice. The analysis often starts with a frequently referenced estimate of "one month per year of service" to an approximate maximum of 24 months, although there have been exceptional cases in which courts have exceeded this number. In reality, "one month per year of service" is a guidepost and each case requires individualized assessment.

Following termination from employment, an employee typically has an obligation to mitigate their losses during the period of reasonable notice by actively seeking comparable employment. As noted above, if an employee is recalled to employment following a layoff, and refuses, the employer may take the position the employee has failed to mitigate their losses, either in whole or in part, depending on the amounts at issue.

If a franchisee has a properly drafted and enforceable employment agreement with an employee, this will limit the amount of notice, or pay in *lieu*, to which an employee is entitled to as little as the ESA minimum entitlements. As such, it is **important** a franchisee reach out to experienced employment counsel to determine whether any of its employment agreements will limit potential liability should it be necessary to terminate an employee.

Additional Resources

Government resources on layoff, termination and EI entitlement may found here:

British Columbia Guide to the Employment Standards Act and Regulation

Ontario Guide to the Employment Standards Act

Employment Insurance Benefits

These are turbulent times, and the landscape is changing swiftly. For these reasons, we strongly recommend a franchisee reach out to an experienced employment and labour lawyer before implementing any termination or layoff in its workplace.

About Sherrard Kuzz LLP

Sherrard Kuzz LLP is one of Canada's leading employment and labour law firms, exclusively representing employers. We have extensive experience working with and for Canada's franchise industry. For assistance, contact your Sherrard Kuzz LLP directly, or our firm:

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