

LAY-OFF OF EMPLOYEES DURING COVID-19 – GUIDANCE

As many employers start to cope with the effects of COVID-19 and various measures imposed by our governments, many of our clients ask about laying off their employees – how it works, what needs to be done and how to proceed with the process.

In order to understand the process and its implications, employers must understand that their relations with employees are governed by various legal and contractual provisions, including a) Employment Standards Act (Sec. 56(2)) (ESA); b. Employment Agreement; c) Common Law provisions.

Here I will try to provide a basic explanation of the rights and responsibilities of employers and how to apply them to the current situation (*this should not be considered as a legal advice*).

1. What is a lay-off?

It is important to note that temporary lay-off does not terminate the employment relations between the employer and its employee(s).

Accordingly, there is no requirement for the termination notice, severance pay or anything else arising from the termination of employment (please see the section relating to consequences for further information).

Essentially, lay-off is a temporary termination of the employee's work without actually terminating the employment.

2. Can I lay-off employees?

Yes. From the perspective of the ESA, an employer has the right to temporarily lay off employees for a period not exceeding those provided in the Act.

You must consult with the employment agreement to make sure this right was not limited by the employment agreement with each particular employee.

3. For how long can I lay-off employees without it being considered as a termination of employment?

The ESA provides for two distinct periods:

- a. Not more than 13 weeks in a 20 consecutive weeks period – without any conditions or limitations.
- b. More than 13 weeks but less than 35 weeks in a 52 consecutive weeks period – if any of the conditions listed in sec. 56(2)(b) are met.

4. Do I have to provide a lay-off notice, like in the case of termination?



No. There is no requirement for a lay-off notice in the ESA.

That being said, and having in mind the current circumstances, a written notice, explaining the process and the expectations would definitely be welcome and will soften the hit for the employees. But keep it short.

5. What are the possible consequences of laying an employee off?

There are no consequences for the lay-off under the ESA. That being said, we must pay attention to the following substantial issues:

- a. A lay-off is considered a material change in the employee's terms of employment, which might justify employee's claim for a constructive dismissal (which means the employee might resign, but will be entitled for the regular termination rights – termination notice and severance pay, if applicable).
- b. You must ensure that your employment agreement provides for the right to lay-off an employee without it being considered as a constructive dismissal (if you don't have this provision now, make sure to add it in the future).

6. Do I have to pay-out employee's accrued vacation?

No. The lay-off is temporary and is not considered as the termination of employment.

But, if your employees ask for the payout of their vacation pay and you agree – this will definitely assist them to pass this period of lay-off.

7. How do I call an employee back to work from the lay-off?

Just like you laid them off – by providing a short notice of when to return to work.

8. Do I have to issue a ROE for lay-off?

Yes. The ROE should state the reason for ROE as “shortage of work – code A00”.

Please issue the ROE as soon as possible in order to enable your employees to apply for the EI and other government assistance programs.

I hope this Guide answers most of your questions relating to lay-off of your employees. Please feel free to reach out to get additional information or retain our services to assist you in this difficult period.

Yours truly,

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