



Lancaster, Brooks & Welch LLP

BARRISTERS AND SOLICITORS

Temporary Layoffs: the Benefits & Risks

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When there is too little work for the staff on hand, temporary layoff can be a good alternative to termination. Especially if the economic causes for layoff are temporary or of uncertain duration, the employer may not want to lose good people and also may wish to save money in the short run and avoid (or delay) severance obligations.

The temporary layoff, which is basically an unpaid leave of absence imposed by the employer, can have a defined length with a known recall date, or can be indefinite. Either way, the employee who qualifies may apply for EI benefits. The Record of Employment form is typically issued indicating a layoff for shortage of work.

The Employment Standards Act defines temporary layoff in two ways: layoff of up to 13 weeks (total) in any period of 20 consecutive weeks, or layoff of up to 35 weeks (total) in any consecutive period of 52 weeks. For the 35 week period to apply, the employer must continue to provide payments or benefits, such as pension contributions or health care coverage. In either case, there is no termination (and related severance obligations) under the ESA unless the layoff exceeds the temporary period. In that case, there is a deemed termination retroactive to the original layoff date.

In a unionized environment, the collective agreement typically provides for layoff and recall rights in a period longer than the ESA requires. In that case, the employee has the right to give up recall rights and cease to be an employee in favour of ESA minimum payments if the period exceeds the 13/20 or 35/52 rule.

Despite the Employment Standards Act, courts do not generally recognize temporary layoff. This is on the theory that it is a fundamental term of employment that a person is entitled to work and be paid. However, if there is clear language in an employment agreement or policy, past practice of layoff with the employer (or in the industry) or if the employee accepts the layoff, then a court will concede that the layoff does not end the employment relationship. If, looking ahead, an employer wants to preserve the option of temporary layoff, there should be policy put into place and communicated to the employees accordingly.

If an employee fails to return from layoff within a reasonable time after recall, there will be a deemed resignation, and therefore no claim for payments either under the ESA or in court.

Used properly, temporary layoff can be an effective technique for an employer to manage its workforce in times of uncertain need. The key is to know the rules.

*The foregoing information is provided to you for information purposes only.
We caution you to obtain legal advice specific to your situation in all circumstances*

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