Temporary Lay-Offs – What are the risks?

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In uncertain times, many employers look for creative ways to manage payroll, retain talent and minimize risk. These are not easy challenges to face.

Some industries, such as the construction industry go through periodic "cycles" where business slows down. Other businesses face slow periods between orders, deliveries or contracts. The question that these employers often ask is: how do I reduce costs during the slow periods?

One way for employers to reduce employment costs is to make use of the temporary layoff provisions of the *Employment Standards Act, 2000* (the "*Act*"). Section 56(2) of the *Act* permits an employer to lay an employee off for a period of "not more than 13 weeks in any period of 20 consecutive weeks" or "more than 13 weeks in any period of 20 consecutive weeks if the lay-off is less than 35 weeks in any period of 52 consecutive weeks". However, if the layoff falls under the second part (less than 35 weeks in any period of 52 consecutive weeks), there are several additional requirements that apply.

Lay-offs are an effective tool which employers can use to reduce employee costs over relatively short periods of time. This may allow employers to survive a period where there is a shortage of work, or a period between contracts, client orders or where the employer needs to retool its manufacturing operations.

A lay-off under the *Act* is available to any employer with operations in Ontario (provided the employee is normally employed in Ontario) that falls within the jurisdiction of the *Act* (as opposed to federally regulated employers who are governed by the *Canada Labour Code*). An additional consideration is whether or not the employer is a party to a collective agreement with a union. If an employer's workforce is unionized, the terns of the collective agreement will regulate the availability of layoffs.

Lay-offs do come with risk. Before instituting layoffs, an employer must review the terms of the employee's employment to see if a lay-off is permissible. If the terms of employment do not

expressly grant the employer the right to institute layoffs, there is a significant risk that the employee may allege that the layoff amounts to a termination of his or her employment and may seek damages for wrongful dismissal or constructive dismissal.[1]

A second risk is that the lay-off is not conducted in accordance with the terms of the *Act*. If the layoff is not in compliance with the *Act*, it will very likely be found to be a termination of employment or constructive dismissal resulting in damages owing to the employee.

If you are considering making use of statutory layoffs, it is highly advisable to include a term in your offers of employment or employment agreements that expressly permits the use of lay-offs, and seek advice before doing so.

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[1] There are cases such as *Trites v. Renin Corp*. 2013 ONSC 2715 which suggest that an employer can unilaterally and arbitrarily impose a temporary layoff upon an employee in the absence of an express or implied term in the contract of employment to support the employer's action. Nevertheless, the best and safest practice is to include a layoff provision as a standard term of an employer's offer of employment or employment agreement.