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**DENTONS**

**WEBINAR SERIES**  
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FOR CANADIAN EMPLOYERS

# **Navigating workforce challenges amid economic uncertainty: A special Border Talks edition**

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Grow | Protect | Operate | Finance



# Moderator:



**Andy Pushalik**

Partner and Co-lead, National Employment & Labour Group, Toronto

+1 416 862 3468

[andy.pushalik@dentons.com](mailto:andy.pushalik@dentons.com)

# Speakers:



**Cristina Wendel**

Partner, Edmonton

+1 780 423 7353

[cristina.wendel@dentons.com](mailto:cristina.wendel@dentons.com)



**Jeff Bastien**

Counsel, Vancouver

+1 604 443 7104

[jeff.bastien@dentons.com](mailto:jeff.bastien@dentons.com)



**Nicolas Séguin**

Associate, Montreal

+1 514 878 5876

[nicolas.seguin@dentons.com](mailto:nicolas.seguin@dentons.com)





# Temporary layoffs: Pros and cons

Cristina Wendel

# Layoffs

## What is a layoff?

- Typically refers to a temporary suspension of employment linked to a shortage of work.
- Allows the employer to maintain the employment relationship during the layoff period.
- Sections 62-64 of the Alberta *Employment Standards Code*.
  - Technical requirements.
- For unionized employees, layoff provisions are usually set out in the collective agreement.
- For non-union employees, common law generally does not contemplate a layoff.
- At common law, layoffs will be considered a constructive dismissal unless:
  - Contemplated in an employment agreement;
  - Implied by custom or industry practice; or
  - Otherwise agreed to or condoned by the employee.

# Layoffs

## How long?

- Length varies from one province/territory to another.
- “Regular” layoff period in Alberta is 90 days within 120-day period.
- In Alberta, the layoff period can be extended by agreement with the employee if the employer continues to pay the employee’s wages or an amount instead of wages or makes payment for the benefit of the employee in accordance with a pension, employee insurance or similar plan.
- Layoff periods may also be different where there is a collective agreement.

# Layoffs

## Notice requirements

- Notice requirements also vary from one province/territory to another.
- In Alberta, advance notice is not required. However, certain statutory requirements must be included in the notice:
  - The written layoff notice must:
    - state that it is a temporary layoff notice;
    - state the date that the layoff is to commence; and
    - include a copy of sections 62-64 of the Code.
- Layoffs may also trigger group/mass termination requirements in some provinces/territories.

# Layoffs

## Deemed termination

- At the end of the layoff period, if the employee is not recalled, the employee is deemed to have been terminated.
  - This triggers the employer's obligation to provide termination pay under the statute.
- Employers need to keep an eye on the layoff period so that they are not caught off guard with an unintended deemed termination.
  - Consider recalling the employee or obtaining an extension as allowed by the applicable legislation.



# Layoffs

## *Northern Air Charter (PR) Inc v Dunbar, 2023 ABKB 171*

- Pilot entered into multiple employment agreements, none of which contemplated temporary layoffs.
- Employee Handbook did contemplate circumstances which could result in a temporary layoff, with the possibility of recall or permanent position elimination.
- Pilot was told in a phone call that he was being laid off.
- Communication to staff stated that he was no longer employed with the employer.
- Pilot took the position his employment had been terminated.
- Employer responded that he had been laid off, not terminated.
- Approximately 2 ½ months after his “layoff”, the employer sent the pilot a recall letter.
- Pilot declined to accept and commenced a wrongful dismissal claim.



# Layoffs

## *Northern Air Charter (PR) Inc v Dunbar, 2023 ABKB 171*

- Appeal from the Provincial Court trial judge's 2019 decision finding the employer liable for wrongful dismissal.
- The Court of King's Bench dismissed the appeal, finding:
  - The pilot's employment was governed by the *Canada Labour Code* (CLC).
  - The CLC did not grant the employer the right to lay off the pilot, nor did it preclude the pilot from pursuing a civil remedy for his dismissal.
  - The employer did not have a contractual right to lay off the pilot.
  - The employer terminated the pilot's employment.
  - The phone call was not a constructive dismissal to which the pilot acquiesced.
  - The pilot was not obligated to accept the recall offer to mitigate his damages.

# Layoffs

## *Pham v. Qualified Metal Fabricators Ltd., 2023 ONCA 255*

- Welder commenced wrongful dismissal action after he received a notice of layoff, with several extensions.
- At the time of the layoff, the welder had worked for the employer for almost 20 years.
- The employer explained that the layoff was temporary, in response to financial losses from the COVID-19 pandemic.
- The welder was one of 11 welders who were laid off.
- The welder claimed the employer neither sought nor received his consent to the layoff.
- The employer claimed the welder had signed a document agreeing to the layoff.
- Employer applied for summary dismissal on the basis that the welder had agreed to or condoned the layoff.
- The motion judge granted summary judgment dismissing the claim. The welder appealed.

# Layoffs

## *Pham v. Qualified Metal Fabricators Ltd., 2023 ONCA 255*

- The Court of Appeal allowed the appeal and remitted the matter back for trial.
- The motions judge had failed to address the appropriateness of proceeding by way of summary judgment.
- The welder's terms of employment did not expressly permit the employer to lay him off.
  - The employer argued it had an implied right to lay off the welder due to its past practice of laying off employees.
  - The motions judge failed to consider whether there was an implied term allowing the layoff. This was a reversible error of law.
- The fact other employees were laid off did not constitute an implied term that the employer was permitted to lay off the welder.



# Layoffs

## *Pham v. Qualified Metal Fabricators Ltd., 2023 ONCA 255*

- The Court of Appeal considered the condonation argument.
  - An employee may condone the employer's conduct, thereby preventing a constructive dismissal claim. Condonation requires a determination that, viewed objectively, the employer would believe that the employee freely consented to the change. The burden is on the employer to prove condonation.
- The Court of Appeal held that condonation was not established on the record before the motion judge.
  - The signature on the layoff letter, assuming it was the welder's, was nothing more than an acknowledgement of receipt.
  - The fact the welder sought legal advice was not evidence of knowledge of the ramifications of the layoff or consent to the layoff.
  - The evidence did not support the conclusion that the welder's failure to object to the layoff constituted condonation.

# Layoffs

## *Pham v. Qualified Metal Fabricators Ltd., 2023 ONCA 255*

- The motions judge made three legal errors when considering the effect of the welder's silence:
  - He failed to consider that an employee is permitted reasonable time to assess contractual changes before taking a position. The motions judge erred in equating silence during these reasonable periods with condonation.
  - Condonation in the face of a layoff is expressed by positive action. There was no such evidence here.
  - The motions judge incorrectly distinguished an earlier case and here, held that the welder was not medically incapacitated from condoning the changes. However, the Court of Appeal held that the welder was unable to condone changes to his employment because he was not actively working during the period.
- Further, employees are not required to ask when they might be recalled before commencing an action for constructive dismissal.



# Downsizing in a down economy

Jeff Bastien



# Downsizing

(not the Matt Damon movie)

- Weak economy and business slowdown requiring downsizing vs. costs and liabilities of terminations.
- Goal: **identify** sources of costs and liabilities and attempt to **minimize**.
- Termination clauses vs. presumptive right to reasonable notice at common law:
  - Is there an enforceable termination clause? If not, employees are entitled to reasonable notice.
- What do employers need to provide?
  - Statutory notice / common law notice;
  - Statutory severance (if applicable);
  - Benefits continuation (depending on jurisdiction and whether working notice is given).

# Statutory termination notice

## Individual terminations

### BRITISH COLUMBIA

Length of Employment	Notice
3 months – 1 year	1 week
1 – 3 years	2 weeks
3 – 4 years	3 weeks
4 – 5 years	4 weeks
5 – 6 years	5 weeks
6 – 7 years	6 weeks
7 – 8 years	7 weeks
8+ years	8 weeks

### ALBERTA

Length of Employment	Notice
90 days – 2 years	1 week
2 – 4 years	2 weeks
4 – 6 years	4 weeks
6 – 8 years	5 weeks
8 – 10 years	6 weeks
10+ years	8 weeks

### ONTARIO

Length of Employment	Notice
3 months – 1 year	1 week
1 – 3 years	2 weeks
3 – 4 years	3 weeks
4 – 5 years	4 weeks
5 – 6 years	5 weeks
6 – 7 years	6 weeks
7 – 8 years	7 weeks
8+ years	8 weeks

### QUEBEC

Length of Employment	Notice
3 months – 1 year	1 week
1 – 5 years	2 weeks
5 – 10 years	4 weeks
10+ years	8 weeks

# Statutory severance

## Not all provinces

### ONTARIO

#### Two preconditions:

Worked for 5+ years AND

The employer:

- Has global payroll of 2.5M; or
- Has severed the employment of 50+ employees in a 6-month period because all or part of the business is permanently closed

#### Severance Pay:

Approx. 1 week of regular wages per year of service up to 26 weeks

### FEDERALLY-REGULATED

#### Precondition:

Completed 12 months' continuous employment

#### Severance Pay:

The greater of:

- 2 days' wages for each completed year of employment; or
- 5 days' wages



# Reasonable notice at common law

## Common Law notice:

- Inclusive of statutory amounts;
- No formula;
- *Bardal* Factors: age, length of service, availability of similar employment (considering nature of position, skills, qualifications, etc.);
- A weakened or depressed economy resulting in a lack of alternative available employment opportunities is a proper factor for the court to consider when assessing the reasonable notice period, but should not be given undue emphasis.
- Unofficial rough upper limit of 24 months.

## Avoid common law notice with a termination clause:

An enforceable termination clause can rebut the presumption of the right to reasonable notice at common law, and limit liabilities on termination. Note: cannot contract out of reasonable notice obligations under the *Civil Code of Québec* – can still include a termination clause, but court could intervene if the length of notice is unreasonable.

# Group/mass terminations

- In all jurisdictions (except PEI) and for federally-regulated employers, there are group or mass termination obligations when an employer terminates a group of employees within a short period of time.
- However, the thresholds and timelines differ, so necessary to consult each jurisdiction's employment standards legislation.
- Length of service is irrelevant.

Province	Threshold	Timeframe	Notice
British Columbia	50+ terminations at a single location	2 months	8 weeks (50-100 employees) 12 weeks (101-300 employees) 16 weeks (301+ employees)
Alberta	50+ terminations at a single location	4 weeks	4 weeks
Ontario	50+ terminations at an establishment	4 weeks	8 weeks (50-199 employees) 12 weeks (200-499 employees) 16 weeks (500+ employees)
Quebec	10+ terminations at the same establishment	2 months	8 weeks (10-99 employees) 12 weeks (100-299 employees) 16 weeks (300+ employees)

# Group/mass terminations

Do employees get group termination notice plus individual statutory notice of termination?

- The answer depends on the jurisdiction, and there are nuances depending on whether working notice or pay in lieu of notice is provided, so it is necessary to check in each province.
- BC employees are entitled to group termination notice in addition to individual notice of termination; Ontario and Quebec employees get the greater of the two; Alberta employees only get their individual notice of termination.

Most group/mass termination provisions also require written notice be provided to the Ministry of Labour.

## Keep in mind:

- Constructive dismissals count towards the threshold.
- Just cause terminations do not count – but be cautious!
- Layoffs that become permanent and therefore are deemed terminations count towards the threshold.
- Rolling timeframe – cannot select specific 4-week or 2-month periods to apply.
- Strategically stagger terminations and build in a buffer for unplanned terminations.
- Consider whether single locations or separate establishments apply to the threshold calculation.
- Provide notice in writing.

# Strategies to minimize liabilities

- Consider if a period of **working notice** is practical.
- Some employees may be willing to consider **voluntary retirement** packages.
- Potential **human rights** issues: when selecting who is impacted by terminations, ensure protected characteristics such as age, disability, gender, etc. are not factors. Have a defensible and clear basis for who is selected.
- Potential **OHS** issues: did any of the selected employees recently raise health and safety concerns?
- **Unionized workplaces**: statutory requirements to provide notice to the union and possibly discuss an adjustment plan.
- Incentivize **mitigation** for employees with lengthy common law entitlements.
- **Plan ahead**: if/when hiring, ensure agreements include enforceable termination clauses, layoff clauses.





# Employment insurance

Nicolas Séguin

# Regular benefits

## Unemployment benefits

### What are regular benefits?

Financial support provided to unemployed workers who have lost their jobs through no fault of their own and are actively seeking work.

### Eligibility requirements:

- a) Have been employed in insurable employment.
- b) Have lost their job through no fault of their own.
- c) Have been without work and without pay for at least seven consecutive days in the last 52 weeks.
- d) Have accumulated the required insurable employment hours in the last 52 weeks or since the start of their last EI claim, whichever is shorter.

### Benefit amount

Calculated at 55% of the employee's average insurable weekly earnings. As of January 1, 2025, the maximum yearly insurable earnings are \$65,700, resulting in a maximum weekly benefit of \$695.

### Duration of benefits:

Benefits can be received for 14 to 45 weeks, depending on the unemployment rate in the claimant's region and their accumulated insurable hours.

# Deduction of earned income during benefit periods

## Overview

Claimants receiving Employment Insurance (EI) benefits may have the opportunity to work while still receiving partial benefits, encouraging them to stay connected to the workforce.

## How it works

- Claimants can earn income while on EI; however, their benefits will be reduced based on their earnings.
- For every dollar earned, EI benefits are reduced by **50 cents**, up to **90%** of the earnings used to calculate the benefit rate.

## Earnings thresholds

- If claimants work more than the threshold (approximately four and a half days of work), their EI benefits may be reduced to zero.
- Total weeks of payable benefits are not affected, even if claimants work a full week.

## Example

If a claimant's weekly EI benefit is **\$275** and they earn **\$300** while working part-time, their EI benefits will be reduced by **\$150** (50% of \$300), resulting in a total EI payment of **\$125**.



# Employment insurance top-ups by employers

## Supplemental Unemployment Benefit (SUB) plan

### What is the SUB program?

A program designed to support employees during periods of unemployment caused by temporary work stoppages, illness, injury, or other specific life events by allowing employers to supplement Employment Insurance (EI) benefits.

### How it works

- Employers can provide additional financial support to employees receiving EI benefits, bringing their total income closer to their regular earnings.
- The SUB payment can be up to 95% of the employee's weekly insurable earnings.

### Benefits

- Provides employees with a financial safety net during periods of reduced income.
- Encourages employee retention and morale during challenging times.
- SUB payments are **tax-deductible** for employers and do not affect the employee's EI benefits.



# Work-Sharing program

## What is the Work-Sharing program?

A federal program that helps employers and employees avoid layoffs during temporary downturns in business by reducing work hours and providing Employment Insurance (EI) benefits to eligible workers.

## How it works

- Employees **share available work** instead of being laid off.
- Employers must apply and get approval for a **Work-Sharing agreement** (6 to 26 weeks, with possible extensions).
- Employees receive **EI benefits** to compensate for reduced hours.

## Benefits

- Helps businesses retain skilled workers.
- Provides income support to employees.
- Reduces the financial burden of layoffs.

# Record of employment (ROE)

## What is a Record of Employment (ROE)?

A form issued by employers to employees when there is an interruption of earnings due to job loss, layoff, or other reasons. It outlines the employee's work history and is essential for applying for EI benefits.

## When is an ROE Required?

- When an employee experiences an interruption of earnings lasting **seven consecutive days** or more.
- Situations include job termination, layoffs, or significant reductions in salary due to various circumstances (illness, injury, etc.)

## Key Information Included in an ROE:

- Employee's insurable earnings and hours.
- Reason for the interruption of earnings (specific codes must be used).
- Dates of employment and any other relevant work history details.

# Thank you



**Andy Pushalik**  
Partner, Toronto  
+1 416 862 3468  
andy.pushalik@dentons.com



**Cristina Wendel**  
Partner, Edmonton  
+1 780 423 7353  
cristina.wendel@dentons.com



**Jeff Bastien**  
Counsel, Vancouver  
+1 604 443 7104  
jeff.bastien@dentons.com



**Nicolas Séguin**  
Associate, Montreal  
+1 514 878 5876  
nicolas.seguin@dentons.com