

As the public health crisis in relation to COVID-19 continues to unfold, Alberta companies are facing even more difficult decisions regarding social distancing, remote work arrangements, layoffs and even terminations. In our second information update, we will provide further information regarding some of the more pressing issues that our clients have encountered over the past few days. This information is intended for non-unionized workers, so if you require information related to your unionized employees, please feel free to reach out and we will direct you to alternate sources of information.

Please note that this is a rapidly changing and evolving situation, and that this information is based on our best knowledge at the current time. Due to the unique circumstances of every business, not all information is applicable to all employers, so please feel free to contact us with any questions.

Q1: There has been a lot of confusion about Premier Kenney's announcement that Alberta employees are now entitled to 14 days of paid sick leave. Has this situation been clarified?

Yes – on March 17, the Employment Standards Regulation was amended to state that an employee is entitled to unpaid leave for 14 consecutive days if the employee is under quarantine.

Q2: What is the difference between sick leave and layoffs for the purposes of allowing our employees to access EI benefits?

If an employee who does not have access to paid sick leave (or similar workplace accommodation) is sick, quarantined or forced to stay home to care for someone ill, they can access up to 15 weeks of EI sickness benefits, and the usual one week waiting period has been waived. No medical note is required to access these benefits. In addition, those employees who are quarantined or sick as a result of COVID-19, but who do not qualify for EI sickness benefits, may be eligible for receipt of the newly created Emergency Care Benefit, which provides a payment of up to \$900 bi-weekly for 15 weeks. The details of this program have not yet been released.

In contrast, a layoff under the *Employment Standards Code* is a temporary suspension of employment for up to 60 days, during which time the employee may apply for regular EI benefits under the usual processes. At this time, this presumably includes the one-week waiting period before the benefits will commence. If the employee has not been brought back to work within 60 days, on the 61st day their employment is deemed to be terminated and the employer must provide pay in lieu of termination notice to the employee. The 60-day layoff period can be

Tara L. Hamelin
Barrister & Solicitor

T 780.421.2416

E THamelin@bmlp.ca

W <http://www.bmlp.ca/profile/hamelin-tara-l>

Kerry Lynn Okita
Barrister & Solicitor

T 403.750.2244

E KOkita@bmlp.ca

W <http://www.bmlp.ca/profile/okita-kerry-lynn>

extended in certain circumstances, and it is possible that the layoff itself could trigger an allegation of constructive dismissal (both of which will be discussed below).

Q3: What do I have to include in my layoff notices?

Pursuant to the *Employment Standards Code*, a written notice of a layoff must be provided to each affected employee. This written notice must include the following:

- That the layoff is temporary and the date that the layoff takes effect (the “Effective Date”);
- That the Employee will be paid all amounts owing up to and including the Effective Date;
- That the Employee will be given seven days’ written notice of their return to work; and
- The notice must include the provisions of the *Alberta Employment Standards Code*, sections 62-64.

The employer is required to give two weeks’ notice of the layoff to all employees who have been employed two years or more, and one week’s notice for those employed for less than two years. However, if the notice cannot be provided, the employer must acknowledge that notice is being provided as soon as possible due to the “unforeseeable circumstances” of COVID-19 and the resulting health and government directives, which is permissible under the *Employment Standards Code*.

Q4: If the COVID-19 situation does not resolve, can I extend my employees’ layoffs beyond 60 days?

Maybe – the *Employment Standards Code* allows a layoff to be extended if, during the period of the layoff and with the consent of the employee, the employer pays the employee wages or an amount instead of wages, or makes payments for the benefit of the laid-off employee in accordance with a pension or employee insurance plan or similar plan. Once those payments cease, however, the employee is deemed to have been terminated and they are entitled to receive termination pay under the *Employment Standards Code*.

Given the economic uncertainty created by the COVID-19 crisis, the Alberta government may be forced to implement new rules to extend or waive the 60-day period for layoffs. Although there is no guarantee that this will happen, it could be a necessary step to curtail the financial crisis that many businesses are now facing, and we may hear more about this in the coming weeks.

Tara L. Hamelin
Barrister & Solicitor

T 780.421.2416

E THamelin@bmlp.ca

W <http://www.bmlp.ca/profile/hamelin-tara-l>

Kerry Lynn Okita
Barrister & Solicitor

T 403.750.2244

E KOkita@bmlp.ca

W <http://www.bmlp.ca/profile/okita-kerry-lynn>

Q5: If our business does not cut its operating costs during this time, we will most likely be forced to close our doors. Can we ask our employees to voluntarily reduce their work hours from full time to part time?

Generally speaking, imposing any such changes on an employee without their consent would most likely trigger an allegation of constructive dismissal, entitling the employee to sue for wrongful dismissal and entitlement to termination pay as required under the *Employment Standards Code* including common law notice (for further information, see our Employer Information Update #1). However, an employer and employee can mutually agree to changes in the employee's conditions of employment, as long as those changes do not breach the minimum statutory requirements under the *Employment Standards Code*. If agreed upon, all such changes and the employee's consent should be clearly documented in writing.

In these uncertain economic times, a collaborative approach to a reduction in hours may be the best way to manage the situation and the risks. By explaining the reasons behind the reduction in hours (ie. a desire to keep the business afloat without terminating employment where possible) employers may get more buy-in from employees and a willingness to agree to the reduction in hours. The situation may be more acceptable to employees given the implementation of the EI Work Sharing Program, which provides EI benefits to workers who agree to reduce their normal working hours as a result of developments beyond the control of their employers, by extending the eligibility of such agreements to 76 weeks, easing eligibility requirements, and streamlining the application process.

Q6: What are the risks of laying off employees?

Even though temporary layoffs are permitted by the *Employment Standards Code*, the common law does not recognize an absolute right to lay off employees. In the absence of a policy which informs an employee that an employer can temporarily suspend their employment, the common law looks upon a layoff as a constructive dismissal, which triggers an employee's right to termination pay as required under the *Employment Standards Code* including common law notice (for further information, see our Employer Information Update #1). Therefore, in order to take advantage of the layoff provisions of the Code, an employer must have a contractual provision or layoff policy in place.

Having said that, the situation that employers are currently facing is unique, and it remains to be seen whether future courts will see things differently as a result of the COVID-19 crisis. It is

Tara L. Hamelin
Barrister & Solicitor

T 780.421.2416

E THamelin@bmlp.ca

W <http://www.bmlp.ca/profile/hamelin-tara-l>

Kerry Lynn Okita
Barrister & Solicitor

T 403.750.2244

E KOkita@bmlp.ca

W <http://www.bmlp.ca/profile/okita-kerry-lynn>

possible that the courts will find that a reasonable person, in these unique circumstances of COVID-19, would not view a layoff as an indication that the employer no longer intended to be bound by the employment contract. However, as it stands now – this is the state of the law – as such, employers should maintain careful records to back up the exigent circumstances that led to the layoffs during this time. They should also explore whether alternative options may be available, such as a voluntary reduction in hours (see discussion above) and potential top ups of the employee’s wages through new EI benefit programs.

Q7: Can we simply terminate employees at this time?

While you can terminate employees at this time, this may be a very expensive undertaking for your business. Generally, an employer can terminate an employee at any time for any reason, as long as reasonable notice of termination is provided and there is no breach of the *Alberta Human Rights Act* in relation to the termination. In the current circumstances, this means that you must exercise particular caution with respect to any employees who are on sick leave, or who are required to care for children or sick family members.

However, unless the employee has a valid employment agreement which contains an enforceable clause limiting their entitlement to reasonable notice, reasonable notice entitlements are calculated according to the common law. The reasonable notice entitlements are influenced by many factors, and can be as high as one month’s notice per year of service, or more. In addition, an employee is entitled to receive all amounts that they would have received if their employer had given them working notice instead of pay in lieu. This includes the value of all benefits, commissions, bonuses, etc. that they would ordinarily have received. The fact that COVID-19 has negatively impacted your business, and that you may not be able to provide each employee with pay in lieu of reasonable notice, does not make any difference (at this time at least) to an employer’s obligation to provide notice of termination. For further information, see our Employer Information Update #1.

Q8: How can we manage our employees who are working from home as a result of COVID-19, to ensure that they are continuing to work?

The best way to ensure that your employees are aware of your expectations while they work from home during this crisis is to establish and communicate clear guidelines and policies regarding remote work. These policies should address such things as confidentiality of information, hours of work, availability, ownership of electronic equipment, reporting requirements, etc. We can

Tara L. Hamelin
Barrister & Solicitor

T 780.421.2416

E THamelin@bmlp.ca

W <http://www.bmlp.ca/profile/hamelin-tara-l>

Kerry Lynn Okita
Barrister & Solicitor

T 403.750.2244

E KOkita@bmlp.ca

W <http://www.bmlp.ca/profile/okita-kerry-lynn>



COVID-19 EMPLOYER INFORMATION UPDATE #2

Current and accurate as of March 20, 2020

assist you in creating and implementing remote work policies in your workplace, so please feel free to reach out to us with any questions.

As the above questions and answers have clarified, this may be an opportune time to consider your business' employment contract and policy needs going forward, so that your business can weather future economic interruptions with greater certainty. Please feel free to reach out to us to discuss how we can assist you in this regard.

Recognizing that things are changing rapidly and each business and workforce is unique, please do not hesitate to reach out with questions, concerns, or if we can be of assistance in any way. Also, please note that this information is current as of March 20, 2020 and will be subject to change following this date.

From us and the Bishop & McKenzie team, please stay safe and healthy!

Tara Hamelin and Kerry Lynn Okita

Tara L. Hamelin
Barrister & Solicitor

T 780.421.2416

E THamelin@bmlp.ca

W <http://www.bmlp.ca/profile/hamelin-tara-l>

Kerry Lynn Okita
Barrister & Solicitor

T 403.750.2244

E KOkita@bmlp.ca

W <http://www.bmlp.ca/profile/okita-kerry-lynn>