

Best Practices for Employers Navigating a Recession

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Overview

- There is currently a fair amount of speculation about whether a recession is here or is coming
- Whether we are already in a recession or heading into one by fall, it's clear that many businesses—especially those impacted by ongoing tariffs—are facing difficult decisions
- No matter what state your business is currently in, as an employer, it is wise to adopt best practices to ensure a strong future
- The purpose of today's webinar is to review employer best practices for handling a recession
- This seminar acts as a complement to the webinars that we hold throughout the year
- This webinar should not be relied on in lieu of legal advice, and you should always consult with your employment lawyer to understand your legal options and obligations



Agenda

- 1) Reducing labour costs
- 2) Strategically handling slowdowns
- 3) Strategically handling terminations



1) Reducing Labour Costs

- There are a variety of options available to employers to reduce their overhead in response to or in advance of a recession
- There are three common approaches:
 - 1) Reduce overtime obligations
 - 2) Pause bonus programs
 - 3) Reduce compensation

1) Reducing Labour Costs: Overtime Pay Obligations

- For overtime obligations, most employees are entitled to overtime pay at a rate of 1.5 for all hours worked in excess of 44 hours per week
- These entitlements to overtime pay apply to both salaried and hourly workers
- As an employer, you can limit overtime pay with an averaging agreement
- The agreement allows employers to calculate overtime pay based on an average of the employee's hours of work over a specific period of two or more weeks, up to a maximum of four weeks
- For employers with fluctuating demands, overtime averaging agreements can result in an employee earning no overtime pay
- For example, if Sam's overtime is averaged over two weeks, and Sam worked 50 hours in week 1 and 30 hours in week 2, then Sam would have no overtime pay entitlements
- Without the averaging agreement, Sam would have been entitled to 6 hours of overtime pay

1) Reducing Labour Costs: Bonus Program Obligations

- For bonus obligations, while they can be a valuable tool to incentivize your team, the economic realities may be that your company cannot afford to continue to provide what it has in the past
- To that end, it is important that you ensure your employee compensation memos and HR Handbook confirms that bonuses are discretionary and only applies to active employees
- Confirming that bonuses are discretionary is also important to reduce your labour costs further to your vacation pay obligations
- If the bonuses are discretionary, then the payments are not included in calculating the 4% or 6% vacation pay entitlement

1) Reducing Labour Costs: Reducing Compensation

- For compensation obligations, generally you have to accept what has already been promised to be paid to employees as their salary and commissions
- Sometimes though employees will accept a slight salary reductions
- Further, sometimes employees will accept a pivot, whereby their salary decreases, but their commission entitlements are improved
- It is important that any changes to an employee's compensation, especially changes that decrease compensation by 10%+, should come with the employee's consent
- Otherwise, the employee can claim that they have been constructively dismissed (i.e. effectively fired)

2) Strategically Handling Slowdowns

- During a recession, your business or part of your business (i.e. a department), may need to scale back or temporarily close
- As an employer, you potentially have the following five options to reduce your labour costs:
 1. schedule vacations;
 2. reduce hours of work;
 3. reduce compensation;
 4. temporarily lay off employees; and
 5. dismiss employees.
- There is no requirement to only pick one option or stay with one option
- For example, you may schedule some employees on vacation, reduce hours for other employees, and then later decide to dismiss some employees

2) Strategically Handling Slowdowns

- Regarding option 1 (scheduling vacations), employers can unilaterally schedule weeklong vacations
- By scheduling vacations, you are addressing a liability (or a future liability) and are ensuring a proper complement when your labour needs pick up again
- The right to unilaterally schedule vacations must be confirmed in the employment agreement or the employee handbook
- Further, it is important to note that the unilateral scheduling must occur on a week-long basis (i.e. not a couple of days at a time)

2) Strategically Handling Slowdowns

- For option 2 - 4 (reducing hours, reducing pay, and temporarily laying off), employers should be mindful that the employee may respond by claiming they have been constructively dismissed
- An employee can claim that they have been constructively dismissed if a fundamental term of their employment was unilaterally changed without proper authority or consent
- For example, if you temporarily layoff an employee and the lay off was not consented to by the employee, then the employee may claim that they were constructively dismissed
- A constructively dismissed employee is entitled to their termination entitlements – being statutory entitlements under the *Employment Standards Act* and common law entitlements as determined by a Judge (unless there is an enforceable employment agreement providing otherwise)

2) Strategically Handling Slowdowns

- If you are looking at option 2 (reducing hours), you may want to take part in the Work-Sharing Program
- Work-Sharing is a long-standing government program designed to help employers and employees avoid layoffs by allowing a reduced work week, while the employees are eligible for EI
- Work-Sharing requires a three-party agreement between the employer, the employees, and Service Canada
- To qualify for Work-Sharing, an employer would need to have:
 - 1) seen a recent and temporary 10% decline in business;
 - 2) its core employees consent to a 10% - 60% reduction in hours/pay; and
 - 3) a comeback plan.

2) Strategically Handling Slowdowns

- Under option 4 (temporary layoffs), you may place your employees on an unpaid layoff for up to 13 weeks in a 20 consecutive week period
- There are exceptions though that allow for the temporary layoff to be extended to not more than 34 weeks in a 52 consecutive week period
- For example, employees can be laid off for 34 weeks if you continue to pay for their benefits
- However, if the company has not confirmed the employee's consent to be temporarily laid off, then the employee can then claim they have been constructively dismissed

3) Strategically Handling Terminations

- During a recession, your business or part of your business (i.e. a department), may need to permanently eliminate some positions or some departments
- It is also possible that you may decide that you will cease operations in the coming months
- When an employee is dismissed, generally the employee will be entitled to their minimum statutory termination entitlements and reasonable notice at common law (judge-based law)
- In Ontario, the *Employment Standards Act* entitlements are termination notice or pay in lieu of notice (capped at 8 weeks), severance pay (applying only after 5 years of service and only where the employer's worldwide payroll is over \$2.5m per annum, capped at 26 weeks), benefits continuance during the termination pay period, and vacation pay on the termination pay

3) Strategically Handling Terminations

- Common law termination entitlements are normally more substantial than statutory termination entitlements and are based on a consideration of various factors (e.g. position, compensation, length of employment, age of the employee, the job market, and whether they were poached)
- For example, an employee with 20 years of service may be entitled to only 8 weeks' statutory termination pay, but entitled to 22 – 24 months' termination compensation at common law
- Unlike statutory entitlements, common law entitlements are subject to mitigation

3) Strategically Handling Terminations

- There are three exceptions to these normal termination entitlements:
 - 1) where the company is dismissing the employee for cause and for wilful misconduct
 - 2) where there is frustration
 - 3) where the company has properly limited the employee's termination entitlements by way of an enforceable employment agreement

3) Strategically Handling Terminations

- When preparing to terminate an employment relationship, the employer must properly understand the termination liability that they are triggering and the implications
- For example, it should be confirmed:
 - whether the employee is limited to their minimum statutory entitlements by way of a written employment agreement;
 - whether there is just cause and wilful misconduct;
 - whether the employment relationship is coming to an end due to frustration;
 - what the employee's statutory and common law entitlements are or would be (if it was determined they were entitled to same); and
 - whether there are other categories of damages that may be owing to the employee (e.g. unpaid vacation pay, unpaid overtime pay, compensation for a violation of the *Human Rights Code*, etc.).
- In addition, the impact of the decision on the company should be reviewed

3) Strategically Handling Terminations

- Once you have confirmed the facts, then decide which path makes the most sense:
 - 1) as an alternative to a dismissal, offer of a mutual separation package, conditional on a release;
 - 2) as an alternative to a with cause dismissal, offer of a mutual separation package, conditional on a release;
 - 3) a termination without any entitlements;
 - 4) a termination with only statutory entitlements; OR
 - 5) a termination with an offer beyond minimum statutory entitlements, conditional on a release.
- The best approach will vary based on the facts and the personalities

3) Strategically Handling Terminations

- Once you have confirmed the facts, then decide which path makes the most sense:
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3) Strategically Handling Terminations

- Generally, to avoid costly termination pay outs, the best practices are:
 1. Ensure that you have limited and defined the employee's termination entitlements by way of an employment agreement.
 2. Consider using working notice for your benefit.
 3. Consider offering or negotiating a mutual separation prior to dismissing the employee.
 4. Consider offering another opportunity to the employee post-dismissal, which can reduce their entitlements.

3) Strategically Handling Terminations

- Example One: Company ABC has decided to close in 1 year from now. It wants the most cost-effective way to deal with termination obligations. The company's payroll is under \$2.5m per annum.
- Solution:
 - If the company gives each employee notice of termination now, then this 1 year's working notice should satisfy most employees' entitlements.
 - For more senior employees though, there may need to be an additional package. However, the company could wait until closer to the end of operations to see who in fact remains. Those who quit to pursue other opportunities would have no further entitlements. In addition, during that year, the company could seek to help employees find new opportunities.
 - It should be noted that if the company's payroll exceeds \$2.5m per annum then employees with more than 5 years of service will be entitled to an additional payment of approximately 1 week per year, capped at 26 weeks. This payment cannot be satisfied by working notice.

3) Strategically Handling Terminations

- Example Two: Company XYZ has experienced a permanent slow down and wants to decrease a department by 20%. It is open to several different employees being picked.
- Solution:
 - First, prepare an excel spreadsheet, detailing each employee's relevant information, their statutory termination entitlements, and their potential common law termination entitlements.
 - Second, consider whether it would make sense to offer to everyone the ability to raise their hand to be packaged out, and then decide who to go ahead with dismissing. A mutual separation package has multiple advantages.
 - Finally, determine how best to handle the dismissals of those uninterested in a mutual separation package (e.g. working notice).

Managing your HR Issues

Wilson Vukelich LLP can help ensure that your employment and labour law matters are handled effectively and efficiently, and in a manner that is reflective of new legal developments and obligations. If you have any questions or require further information, please contact:

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