



Employer Best Practices for Sailing Through a Recession

January 2023 Employer Alert

There is currently a fair amount of speculation about whether a recession is coming in 2023. Based on certain industries and sectors in Canada, it certainly appears there may already be a rolling recession. No matter what state your business is currently in, as an employer, it is wise to adopt best practices to ensure a strong 2023.

Enticing and Keeping Top Employees

With ongoing workforce shortages, employers are constantly looking for ways to entice and keep top employees. Often, this means improving compensation packages, through higher salaries, generous bonuses, substantial commission programs, RRSP matching programs, additional vacation days, flex scheduling, hybrid work locations, etc. While these perks are important carrots, it is crucial you offer them strategically. By engaging in strategic compensation, you can avoid unintentionally expanding your employer obligations and can limit some of your substantial employer obligations.

One method of strategic compensation is to use new compensation to current employees, as an opportunity to have them sign off on a new enforceable employment agreement. This agreement can define and limit numerous employer obligations (e.g. vacation obligations) and can establish new employee obligations (e.g. non-solicitation obligations). One of the most critical provisions in a written employment agreement, is the

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termination provision. With an enforceable termination provision, an employee can be limited to their statutory entitlements or a greater amount. Without such a provision, when dismissed, an employee will be entitled to both their statutory termination entitlements and their common law termination entitlements. As an example, an employee with 20 years of service in Ontario may be entitled to 24 months' compensation as common law termination entitlements, but could be limited by an enforceable employment agreement to only 8 weeks.

Being Ready to Pivot Between Remote and In Person Workplaces

As a result of the pandemic, many businesses adopted the practice of allowing some or all of their employees to work remotely. Many businesses found that remote work can allow them to substantially reduce their overhead costs and to attract better talent. However, many businesses also found that certain employees perform better in person and certain positions are best performed in person.

As part of being recession-ready, businesses should be ready to pivot between remote and in-person work, as and when appropriate. To that end, the business' remote work policies should be addressed in the HR handbook and by way of individual remote work agreements. These documents should confirm various company rights, including that the employee's work location may be changed with 2 weeks' notice (or another specified amount). These documents should also define/limit the company's obligations, including whether the company must pay for the employee's home office expenses.

Reducing Labour Costs by Limiting Overtime Pay Entitlements

As an employer, you are able to limit your overtime pay exposure by: i) properly tracking hours of work; ii) confirming employees are only entitled overtime statutory minimums (e.g. overtime at 44 hours, instead of when they work more than their usual 40

hours); and iii) putting into place overtime average agreements.

In regards to the third strategy, in Ontario, overtime-averaging agreements allow 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 example, an employer with a bi-weekly payroll may find it easier to calculate overtime pay based on whether the employee worked more than 88 hours during the two-week payroll period. 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. To average an employee's overtime, the company must enter in to an enforceable and executed written averaging agreement with that employee.

Reducing Labour Costs by Limiting Vacation Pay Entitlements

Employees have vacation entitlements, as defined by the applicable employment legislation or bettered by an employment agreement. For example, in British Columbia, most employees are entitled to a minimum of 2 weeks' vacation days per year and 4% of their wages as vacation pay. Of course, a company may offer something more generous – such as 3 – 5 weeks vacation, with indefinite carry-forward.

As an employer, you can reduce your labour costs by providing that vacation entitlements are use-it-or-lose-it for any entitlements in excess of statutory entitlements. This should be confirmed by way of the employment agreement and/or HR handbook. For example, an employee may be statutorily entitled to only 3 weeks vacation per annum, but promised 5 weeks per annum. In 2022, that employee took 4 weeks vacation. By way of the HR handbook, the company can provide that the employee will not be paid out anything regarding the 5th week, as it as a

use-it-or-lose policy it for any vacation entitlements in excess of statutory entitlements.

In addition, as an employer, you can reduce your labour costs by avoiding unintentionally increasing your employees' vacation entitlements, as a result of the bonuses they were awarded. In particular, if a bonus is awarded to an employee and the bonus falls within the definition of statute's wages, then the bonus will increase the employee's vacation pay entitlements. To avoid unintentionally increasing vacation pay entitlements, a written bonus policy should confirm that the entitlement to the bonus is entirely discretionary. Where a bonus is discretionary, as opposed to automatically earned based on performance, then (for most provinces) the bonus does not fall within the definition of wages and will not increase the employee's vacation pay and holiday pay entitlements. As such, if your company will be paying out bonuses, you should consider whether these bonuses will increase other entitlements and whether you wish to avoid this outcome through a proper written bonus policy.

Being Ready to Scale Back or Temporarily Close

During a recession your business or part of your business (i.e. a department), may need to scale back or temporarily close. There are multiple options available to employers, each with their own implications, when you need to scale back or temporarily close. These options include: i) placing the impacted employees on week-long vacations; and ii) temporarily laying off the impacted employees. Both scheduling week-long vacations and temporarily laying off employees are permitted by the Ontario *Employment Standards Act*. However, you must confirm the company's right to do so by way of past practice, in the employment agreement, and/or in the HR handbook. If this is not currently addressed in your HR handbook, it should be updated to confirm the company's right to unilaterally schedule vacations and to place employees on temporary lay off. Failure to confirm the company's rights can preclude the company from unilaterally scheduling vacations and can result in an employee properly claiming they have been constructively dismissed (i.e. effectively fired) when

temporarily laid off.

It should also be noted that, even if the company has confirmed the right to temporarily layoff, the lay off must not last more than 13 weeks in total in any period of 20 consecutive weeks. There are though, a few exceptions that allow for the temporary layoff to be extended to not more than 34 weeks. For example, employees can be laid off for 34 weeks if you continue to pay for the employee's benefits. During a layoff, the employees may ask and be provided with their earned and unpaid vacation pay during their absence.

In review of the above, to weather a recession, employers must ensure that their HR practices and documents are up-to-date and strategic. For further information, including how best to update your current HR practices and documents, please [contact our firm](#).

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