

Considerations for Revising Employment Contracts As An Alternative to Terminations

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Due to necessity arising out of an economic downturn, employers may consider changing the terms of the employment contract, such as rolling back employee salary or benefits or revising termination provisions. These actions may be a cost-effective way to escape some of the economic pressures many organizations are facing, without having to reduce the strength of the employer's workforce.



Rollbacks of Employee Salaries and other Compensation

Rollbacks to salary or other benefits of any kind (for example, RRSP contributions) must be considered carefully, as there is some legal risk to an employer that certain rollbacks will constitute constructive dismissal of the employee. Constructive dismissal occurs when an employer makes a unilateral and fundamental change to a key term or condition of the employee's contract without giving the employee adequate and reasonable notice of such a change, such that the employment contract is repudiated. The employee may then be able to treat the contract as being wrongfully terminated and sue the employer for damages.



Not all changes will constitute constructive dismissal. If the change goes to the "root" of the employment relationship, then there is a risk that the employer will be seen as having constructively dismissed the employee. While a significant decrease in salary imposed unilaterally without cause or substantial advance notice risks a constructive dismissal claim, there are certain strategies and legal advice that can be employed to minimize the practical risk at play when rollbacks are undertaken. Consider the following:

- Any change to the employment relationship must be done in consideration of the overall framework of the employee's current status and employment contract (written or otherwise).
- Sometimes, doing a smaller wage rollback but combining it with certain reductions of other benefits can accomplish savings with less constructive dismissal risk than a single large wage rollback.
- The risk of a constructive dismissal claim may increase when more senior employees or employees with managerial-type duties and responsibilities undergo changes to their employment contracts.
- In order to minimize the risk of liability for constructive dismissal, reasonable notice should be given to the employee of any fundamental and unilateral change to the employment contract. What is reasonable will vary, but generally longer periods of notice will lower the risk of liability for constructive dismissal.

Termination Provisions

Employers may also wish to put in place or revise the termination provisions contained in the employment contracts with their employees. Enforceable and clear termination provisions can allow an employer to more accurately forecast any separation cost that may be associated with the termination of an employee. If your organization is considering downsizing now or in the future, this increased certainty can prove invaluable.

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Additionally, limiting the employer's obligations upon termination is important because a dismissed employee is more likely to take longer to mitigate his or her loss in tough economic times, which may result in an employer being obligated to provide longer notice periods (or pay in lieu of) at common law. Keep in mind, however, that implementing such termination provisions is easiest to do with new employees. Should you decide to make changes to the employment contract's termination provisions for existing employees, sufficient notice must be given to employees of such change.

Use Caution When Imposing Unilateral Contract Changes

In 2008, the Ontario Court of Appeal issued an interesting decision that purports to verify what options are available when an employment contract is being unilaterally changed by the employer (*Wronko v. Western Inventory Service Ltd.*, 2008 ONCA 327). If the employee plainly accepts the proposed contract change (preferably with detailed confirmation in writing) and acquiesces to the new contract terms, that is preferable. If the employee refuses to accept the change, however, *Wronko* suggests that the employer must provide proper notice of termination according to the current contract and then offer re-employment on the new terms if it wants to insist on the new contract. If the employer simply continues to employ the employee with unilateral notice that the new contract will take effect immediately or in the future, that will likely not be effective at law, the new contract will likely not be binding, and the employer will be exposed to a wrongful dismissal claim. Therefore, should an employee reject the new term(s), the employer must carefully consider and evaluate its next steps in relation to that employee's employment contract. ▲

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