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Temporary Layoff Employer Toolkit

Grow | Protect | Operate | Finance

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Overview

The COVID-19 pandemic served as a stark reminder about the practical need for employers to be able to quickly implement changes to the workforce in order to reduce costs, and try to save jobs. Temporary layoffs – moving employees to inactive status while keeping them employed – effectively do just that. Although they are subject to certain requirements which will be set out below, temporary layoffs are an important and generally permissible tool for employers to use.

During a temporary layoff, the employment relationship is treated as ongoing, with the understanding that the employee will be recalled to work if possible. As a result, employees enjoy a certain level of protection while on a temporary layoff, as they often continue to receive benefits, can apply for Employment Insurance (EI) and can even search for another job while laid off. If things work out for the employer, the employees eventually return to work; if things do not work out for the employer, then the employees are terminated, and receive their corresponding entitlements.

It is important that temporary layoffs be conducted in compliance with applicable laws, as otherwise they will be treated as a termination of employment, and trigger employer liability under applicable employment standards or labour standards legislation (employment standards), contract, or common law (or, in Québec, civil law). In addition, if an employer is implementing layoffs in relation to government imposed requirements (for example, COVID-19), there may be different requirements that apply. Employers should ensure they understand the maximum amount of time a layoff can be in place before becoming a deemed termination, as well as the requirements for notifying employees of layoffs and recalling employees back to work.

This Toolkit will review the topics above, set out best practices for handling temporary layoffs, provide strategies to mitigate risks associated with temporary layoffs, and then summarize jurisdiction specific requirements. Note that this information is current as at the time of publication.

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Key Considerations

All temporary layoffs must comply with employment standards. The legislative requirements for temporary layoffs are set out by jurisdiction below, along with other jurisdiction-specific considerations. Generally speaking, employment standards will prescribe the maximum length of temporary layoff permitted (which varies widely between provinces), notice requirements prior to imposing a layoff (if any), pay/benefits continuation requirements (if any) and the rules regarding recalling employees.

It is important to keep in mind that the employment standards requirements are just legislative requirements. Employee rights are also informed by the common law, and by any written employment contract setting out terms and conditions of employment.[1]

Common law

The common law does not permit temporary layoffs, as they involve a unilateral fundamental change to work conditions (i.e. stopping both work and compensation, the two key elements of the employment contract). Employers should be aware of the risk that employees who have been temporarily laid off may assert constructive dismissal, and seek a termination package under employment standards, contract, or common law, as applicable.

Civil law

In Quebec, where private law is civil and not common law, it is unclear whether temporary layoffs are permitted. In a 2016 decision, the Court of Appeal concluded that temporary layoffs for economic reasons are an implicit part of the employer's generally recognized power to make decisions necessary to safeguard the company's interests, to which an employee submitted him or herself by accepting a position.[2]

However, other decisions have concluded that unless an employment contract specifically contemplates that the employee may be subject to a temporary layoff or that it's recognized practice within the industry, said layoff does constitute a substantial change in the employee's conditions of employment and consequently may trigger a constructive dismissal claim.[3]

Including an employment contract provision on layoffs

As a proactive measure to get around this issue, employers should include a temporary layoff provision in all employment contracts. This provision should be worded to give the employer discretion to implement temporary layoffs for legitimate business reasons, and can specify that any such layoff will not constitute constructive dismissal. This simple contractual provision greatly minimizes the risk of a constructive dismissal claim being successfully made by employees placed on temporary layoff.

Reducing risks

Where employment contracts do not expressly permit temporary layoffs, there are other ways to reduce risk. First, it is generally best to keep temporary layoffs as short as possible. Second, whenever possible, group insurance benefits should be continued during the layoff period. When employees believe that the employer is trying to save their jobs, the risk of constructive dismissal

1 Employers are not permitted to contract out of employment standards; in other words, all terms of the employment contract must meet or exceed the minimum requirements set out in employment standards.

2 *Groupe Lelys inc. v. Lang*, 2016 QCCA 68.

3 *Stepanian c. Réseaux sans fils Calamp Inc.*, 2018 QCCS 611

complaints is often reduced. This is also why clear communication with employees is important when it comes to the temporary nature of the layoff and, where appropriate, the high-level reason for same.

Employers should also be aware that where an employee claims they have been constructively dismissed, the employer may be able to insist that the employee return to work, and work out any applicable reasonable notice period that the employee believes has been triggered. In other words, if an employee does not agree to a temporary layoff, and instead seeks a termination package due to constructive dismissal, the employer can often ask the employee to return to work in order to work out the notice period, rather than having the notice paid out.

As a practical consideration, even if complaints of constructive dismissal are followed through with legal action, it will generally take a minimum of three months to be heard by a decision-maker (and typically much longer, depending on the process the employee uses). Therefore, even if a claim is made for constructive dismissal, it is often worth taking the risk and enacting a temporary layoff as: (i) if the company remains solvent, it can pay out any constructive dismissal damages at the appropriate time; or (ii) if the company does not remain solvent, by the time that a judgment is received by the employee, the company will not be able to honour the judgment.

Generally, claims for statutory and common law pay in lieu of notice of termination (or in Quebec pay in lieu of the reasonable notice of termination set forth in the *Civil Code of Quebec*), as well as statutory severance, do not constitute a liability for directors and officers; therefore, any judgment arising from a temporary layoff constructive dismissal claim will fall in line with all other creditors' claims as prescribed by applicable legislation.

Implementing temporary layoffs

Written notice of temporary layoff

All temporary layoffs should be implemented in writing with a clear effective date of temporary layoff given.

The return to work date does not generally need to be provided at the time that the temporary layoff commences, but it must be given in writing at some point prior to the return to work date (which, in turn, must be prior to the end of the maximum layoff period available under employment standards). In fact, it is generally best to not specify a return to work date in writing when the temporary layoff is first announced, as that will remove the flexibility that an employer otherwise has to determine or move the return to work date, within the confines of employment standards.

In the unionized context, the layoff provisions of the collective agreement will govern how to implement temporary layoffs, including any notice requirements.

A written notice of layoff should include the date the layoff will commence, the intention to recall the employee as soon as reasonably possible pursuant to employment standards, the employee's entitlements while on layoff (including if any wages or benefits will be paid), and the employee's obligation to return to work upon recall. The notice should communicate that the employment relationship will be ongoing during the layoff, and that the employer hopes to be able to bring employees back as soon as possible. Finally, the

notice should advise employees of their right to apply for EI benefits and to accept new and non-competitive employment during the layoff period.

Record of employment

Employers are generally required to issue a Record of Employment (ROE) if the layoff is expected to last more than seven days, as that will constitute an interruption of earnings. The ROE should be coded carefully to ensure it reflects that the layoff is intended to be temporary and the reason for the layoff.

Years of service

Employees do not experience a break in service while on a temporary layoff. All time on layoff is included in the employee's years of service, including for the purposes of calculating any statutory entitlements governed by length of service. Vacation time continues to accrue during the layoff period, but not vacation pay (as vacation pay is calculated as a percentage of wages received from the employer, and wages are usually not received during a temporary layoff period). If an employer is permitting an employee to do some work during the temporary layoff however, vacation pay will be owed on those wages earned by the employee.

Paying of accrued vacation

In some cases, it is possible to pay off any accrued vacation (i.e. vacation accrued to the date of layoff) in order to keep possible director and officer liabilities to a minimum. However, that can only be done if the employee agrees (and, ideally, requests it). Employers should always defer to employment standards requirements specific to the jurisdiction in which they are implementing layoffs.

Recalling employees

Written notice for recalling employees

If an employer chooses to recall an employee from layoff, they must provide the employee with written notice that they are being recalled, along with the date they are expected to return to work. The recall notice should confirm that the employee is being recalled to the same or substantially similar job conditions as before the layoff, provide sufficient notice (the required notice may be prescribed by employment standards) and explain that a failure to return to work on the specified date will constitute job abandonment.

In circumstances where an employer is recalling employees back to work for a period which is significantly less than full-time, it is possible that such employees who earn a low income will still be eligible for EI through what is called 'Working While on Claim'.[4] In those cases, employers should advise employees in the recall notice that if they are in receipt of a government benefit, they will need to report to the government any income they earn upon return from temporary layoff, so that they do not receive government benefits in excess of their entitlements.

Employers should also refer to the employment standards specific to each jurisdiction in order to ensure that a partial recall is valid, as some provinces have threshold wage requirements before a recall will be considered effective to end the temporary layoff.

4 "Working While on Claim" allows individuals receiving EI to retain a portion of their EI benefits and all earnings they receive while on EI benefits. Specifically, employees can retain 50 cents of their EI benefits for every dollar earned, up to 90% of the weekly earnings used to calculate the employee's EI entitlement. Any amounts earned by employees in excess of this cap are deducted dollar-for-dollar from the employee's EI benefits. Employees do not need to apply for Working While on Claim as receiving EI benefits is a precondition of being eligible for "Working While on Claim", but do need to declare any earnings on their reports to Service Canada. Employees are not eligible to receive EI benefits if they work a full week, regardless of their income.

Return to work

Employees who have been recalled to work from a temporary layoff are required to return within a reasonable time (in some provinces, within a specified time), failing which the employee may be deemed to have abandoned their job, and will lose their right to statutory termination pay.[5] Where the employee is required to return to work within a "reasonable" time, the question of what is reasonable will depend on the specific facts, including whether the employee received written notice of recall (always recommended), whether the return to work offer was genuine and how much notice the employee was given of their recall.

It is good practice to take reasonable steps to ensure that the recall notice has actually been received by the employee. For example, the employer can attempt other forms of communication, and may eventually send a final notice which indicates that any failure to respond to same by a certain date will be construed as a resignation or abandonment of employment.

If employees are recalled to work at any time prior to the end of the temporary layoff period and they come back to work, then their employment continues on as if the temporary layoff never happened. There is no break in service for the purpose of calculating vacation entitlements, subsequent termination entitlements or any other entitlements based on years of service.

In certain circumstances, an employee's refusal to return to work from a temporary layoff may raise additional considerations. For example, if the employee refuses to return to work because of ongoing family-care obligations that arose during the period of layoff, the employer will need to consider whether the employee's changed circumstances raise human rights obligations.

5 The employee may still be entitled to statutory severance pay, if applicable.

Terminating employees

If the employer does not recall an employee from temporary layoff within the required timeline, the employee's employment will be deemed terminated. The effective date of the termination is determined by applicable employment standards. British Columbia, Manitoba, Newfoundland and Labrador, Nova Scotia, Ontario, Yukon and federally-regulated employees are deemed to have been terminated effective as the first day of the layoff for the purposes of calculating statutory termination entitlements, even in a case of deemed termination well after the employee first went on temporary layoff.

If a large group of employees are not being recalled, mass termination entitlements may be triggered, resulting in longer statutory notice periods and various filing obligations. Each province has its own threshold for what qualifies as a mass termination, with different entitlements owing as a result.

If, over the course of the temporary layoff period, an employee's position was eliminated, employers should consider offering reasonable alternative employment. If an employee refuses to accept a reasonable offer of alternate employment, and instead commences a lawsuit for wrongful dismissal, the employer may present the employee's unreasonable refusal to mitigate their damages as a defense to the claim.

Extending or renewing the layoff

In general, once an employee has hit their maximum temporary layoff date, their employment is deemed terminated. In some provinces, a layoff can be extended with the consent of the employee and permission from the relevant government authority.

Employers may place employees on another temporary layoff if the maximum layoff period applicable has not been reached, or if the "clock" has restarted on the applicable maximum layoff periods (i.e., the applicable period of consecutive weeks has passed).

For example, in Ontario, if the employer has laid off an employee for seven weeks without benefits or payments, and recalled the employee for two weeks, the employer can then lay the employee off for up to another six weeks in the same 20-week period without the employee's employment being deemed terminated. Conversely, if the employer has temporarily laid off an employee in Ontario for 13 weeks without continuing benefits or payments, and then recalled the employee, the employer will need to wait another seven weeks (so that the 20-consecutive-week period has expired), before placing the employee on another temporary layoff.

Because of the need to wait until the "clock" restarts on the maximum layoff period before conducting further layoffs, employers should be looking ahead at their long-term needs before maxing out their layoff times. Employers must also defer to the jurisdiction-specific requirements when considering whether they can extend or implement additional layoffs.

Temporary layoff requirements by jurisdiction

As noted above, the majority of Canadian jurisdictions have specified periods during which employees may be temporarily laid off without triggering a deemed termination under employment standards. Before the applicable temporary layoff period has expired, the employer must recall the employee, failing which the employee's employment is deemed to have been terminated and all applicable termination entitlements become owing to the employee.

Most jurisdictions amended or enacted provisions specific to layoffs resulting from COVID-19 during the pandemic, although most of these specific provisions no longer apply. Those temporary measures are not included in the information below. Employers conducting temporary layoffs should seek specific advice relevant to their jurisdiction and circumstances, as the legislative requirements are unique, and the reason for the layoff may impact the manner in which it should proceed.

Note that the termination provisions outlined below (i.e. when calculating notice of termination upon a deemed termination arising from a temporary layoff), do not take into account mass terminations or collective redundancies of large groups of employees. That topic will be addressed in a later Dentons Canada Toolkit.

In addition, unionized employees in all of the below jurisdictions who are subject to collective agreements, will be generally be governed by the temporary layoff notice period set out in a collective agreement. If the collective agreement does not address temporary layoffs, then the legislated temporary layoff rules set out below will apply in the relevant jurisdiction.

British Columbia

Although BC's *Employment Standards Act* contemplates temporary layoffs, those provisions do not give an employer a general right to temporarily lay off any employee. For an employer to be entitled to temporarily layoff an employee, the temporary layoff must be:

- Expressly permitted by the contract of employment (or collective agreement); or
- Consistent with a well-known industry-wide practice[6]; or
- Consented to by the employee.

A "temporary layoff" means:

- In the case of an employee who has a right of recall pursuant to a Collective Bargaining Agreement, a layoff that exceeds the specified period within which the employee is entitled to be recalled to employment; and
- In any other case, a layoff of up to 13 weeks in any period of 20 consecutive weeks.

An employee will be considered to be on a "week of layoff" where they earn less than 50% of their regular weekly wage. The regular weekly wage is calculated

6 For example, Section 37.7 of the British Columbia *Employment Standards Regulation* provides that employees working in the logging industry are not deemed to be temporarily laid off when the cessation of work is due to normal seasonal reduction in activity.

by summing the employee's total wages over the previous eight weeks, and dividing the total by eight.

Temporary layoffs should be undertaken in writing, and must be intended to be temporary (i.e. there must be an intention to return the employee to work).

A notice of recall must also be provided to the employee in writing. Once recalled, employees are required to return within a "reasonable" amount of time; the BC *Employment Standards Act* does not specify a timeline. The employee's circumstances should be considered to determine whether the proposed timeline is "reasonable". For example, if the employee has found other employment from which they want to resign, or if they have relocated, a longer period may be required for the employee to return to work. If the employee refuses to return to work, this will generally be treated as a resignation.

A temporary layoff period can be extended by way of a joint application by the majority of the affected employees and the employer to the Director of Employment Standards. The Director has discretion to approve the extension, but only if it is satisfied that a majority of the employees who will be affected are aware that an extension means a prolonged period of layoff, and that the prolonged period is not inconsistent with the purpose of the *Employment Standards Act*.

If the above conditions are not met, then the layoff is deemed a termination as of the first date of the temporary layoff, and employees are entitled to minimum notice of their termination under the *Employment Standards Act*, as follows:

Length of Service	Notice
Less than 3 months	No notice
3 months – 1 year less a day	1 week
1 – 3 years less a day	2 weeks
3 – 4 years less a day	3 weeks
4 – 5 years less a day	4 weeks
5 – 6 years less a day	5 weeks
6 – 7 years less a day	6 weeks
7 – 8 years less a day	7 weeks
More than 8 years	8 weeks

Ontario

There are no specific requirements for the form of temporary layoff notice under the *Employment Standards Act, 2000* (Ontario) (the ESA).

A temporary layoff is deemed to be a termination if the period of layoff is longer than 13 weeks in a period of 20 consecutive weeks. If a temporary layoff is longer than 13 weeks in any period of 20 consecutive weeks, then in order that it not be considered a deemed termination, the layoff must be less than 35 weeks in any period of 52 consecutive weeks, and meet at least one of these conditions:

- The employee continues to receive substantial payments from the employer;
- The employer continues to make payments for the benefit of the employee under a group or employee insurance plan;
- The employee receives supplementary unemployment benefits;
- The employee is employed elsewhere during the lay-off and would be entitled to receive supplementary unemployment benefits if that were not so;
- The employer recalls the employee within the time approved by the Director of Employment Standards;
- In the case of a non-union employee, the employer recalls the employee within the time set out in an agreement between the employer and the employee; or
- In the unionized context, a lay-off results in a deemed termination if the period of lay-off is longer than the time set out in the collective agreement.

Continuing group benefits

Practically speaking, for most Ontario employers, it makes the most sense to continue group benefits insurance coverage during the period of temporary layoff, as that will give the employer flexibility to continue the layoff for up to 35 weeks. Note that if an employer does not continue benefits at the start of the layoff and then wants to extend the layoff after 13 weeks, it will not be possible. Benefits must be continued from the start of the layoff in order to take advantage of the longer layoff period.

An employee who has a regular work week is considered laid off for a week if, in that week, the employee earns less than half the amount they would earn at their regular rate in a regular work week, and the week is not an excluded week. An excluded week is a week during which, for one or more days, the employee is: (a) not able to work; (b) not available for work; (c) subject to a disciplinary suspension or; (d) not provided with work because of a strike or lock-out occurring at their place of employment.

Further, in order to properly continue benefits in accordance with the above, payments must be made pursuant to a legitimate insured benefits plan, meaning that the provisions of the plan were in existence prior to the layoff and they are such that continued coverage during the layoff is permitted.

Shared cost of benefits payments between the employer and employee

Employers should note the circumstances where the cost of benefit payments is shared between the employer and employee. Where the employee is requested to provide their share of the contribution and refuses, and the employer is thus prevented from continuing its payments under the plan, the lay-off will nevertheless still be considered to be a temporary layoff past the 13-week point. However, the employer should do everything reasonably possible to ensure continued coverage for the employee, such as taking advantage of any grace periods and contacting the employee to ensure the employee's failure to pay was not due to an oversight.

Actions for employees who do not return to work within a reasonable time

Employees who do not return to work within a reasonable time after having been requested by the employer are not entitled to notice of termination. The ESA does not specify what that reasonable time period is; however if an employee fails to respond to a recall notice, it is good practice to take reasonable steps to ensure that the notice has actually been received. For example, the employer can attempt other forms of communication, and may eventually send a final notice which indicates that any failure to respond to same by a certain date will be construed as a resignation or abandonment of employment.

If the employment relationship is severed because a period of layoff exceeds the temporary lay-off requirements, then the effective date of the employee's termination will be the first day of the layoff for the purposes of calculating statutory termination entitlements under the ESA.

In Ontario, an employee represented by a trade union with a contractual recall right in the collective agreement, who has been on a layoff for the maximum of less than 35 weeks, can elect between: (i) having their employment deemed terminated and collecting their termination entitlements; or (ii) foregoing their termination entitlements and continuing to be on layoff, while retaining their right to be recalled to work.

Entitlements upon a deemed termination:

If the temporary layoff extends beyond the time periods set out in the ESA, then the employee will be entitled to statutory termination notice (or pay in lieu) as follows:

Length of Service	Notice
3 months to 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 or more years	8 weeks

In addition, Ontario employees with five or more years of service will also be entitled to a statutory severance payment (one week of total wages per year of service, calculated pro rata) in the event that: (i) the employer's annual payroll is CA$2.5 million or more; or (ii) 50 or

more employees are terminated within a given four-week period.

Quebec

The *Act respecting Labour Standards* does not specifically allow temporary layoffs, or state that a layoff is deemed not to be a termination if it is under a certain duration. However, it recognizes this concept at section 82, and follows by imposing to employers that lay off an employee - for a period that is planned or actually lasts six months or more - to give them the same statutory notice (or indemnity in lieu thereof) that would be applicable in the case of a termination. The case law has generally interpreted this requirement as meaning that an employer can layoff an employee provided they are in accordance with the provision of the *Act respecting Labour Standards*, but a few decisions concluded that the right to layoff shall exist otherwise (i.e. pursuant to a provision of the employment agreement, or because it is a standard practice in the industry). In any event, the *Act respecting Labour Standards* provides that, when laying off an employee for a period of six months or more, the employer shall provide the employee with a written notice of layoff, and pay them an indemnity in lieu of the notice. The duration of this notice depends of the length of service of the employee:

Length of Service	Notice
3 months to 1 year	1 week
1 – 5 years	2 weeks
5 – 10 years	4 weeks
10 or more years	8 weeks

In addition, if the layoff takes place in a context of "collective dismissal" (i.e. a situation where 10 or more employees of the same establishment are terminated or laid off for a period of six months or more over the course of two consecutive months), then the employer shall also send a notice of "collective dismissal" to the Minister of Employment and Social Solidarity, as well as a copy of such notice to the Commission des normes, de l'équité, de la santé et de la sécurité du travail (CNESST) and the certified association, if any. The notice must also be posted in a visible and easily accessible place in the establishment concerned. The duration of this notice will vary depending on the number of employees affected by the layoff and/or termination.

An employer who does not give sufficient notice to the Minister must pay the affected workers an indemnity in lieu thereof. This indemnity is not cumulative with the indemnity in lieu of the individual notice of layoff/termination, so if an employee is entitled to both, they will only receive the greater of both.

Unless there are reasons to believe that the employer has artificially recalled an employee for the sole purpose of resetting the clock, each period of layoff is calculated separately; the obligation to give notice or pay in lieu of notice depends only on the fact that the layoff lasts at least six months, and not on the fact that the employee has already been laid off in a previous period.

The employer does not have to continue benefits coverage during the layoff (with the exception that it must be done during any period of "collective dismissal notice"), and whether it does will not have any statutory impact on the employer's obligation or allowed length of the layoff. However, when possible, most employers will maintain benefits, because it helps keep the employees happy, and could potentially help to defend against constructive dismissal claims.

If employees are recalled to work at any time prior to the end of the temporary layoff period, they are required to attend at work within a "reasonable time," failing which they are deemed to have resigned and the employer is not required to provide them with notice of termination or severance (under statute, contract or the *Civil Code of Quebec*). If employees are not recalled to work prior to the end of the temporary layoff period, they are deemed to have been terminated, and their effective notice of termination date is the date that they

received notice of the temporary layoff. Under this scenario, the notice of termination under the *Act respecting Labour Standards* is calculated as of the date of the temporary layoff, but the termination entitlements are provided from the end of the temporary layoff period.

If the employer decides during the temporary layoff period that it does not want the employees to return, it can advise them of same. However, the employee will have the same rights and recourses as they would in the case of any other termination without cause, which includes the right to file a complaint to request reinstatement in their employment (provided the employee has more than two years of service), and the right to receive statutory, legal and contractual indemnity in lieu of notice, as applicable.

Alberta

In Alberta, temporary layoff notices must be in writing, and 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, 63 and 64 of the *Employment Standards Code* (Alberta).

There are no required notice periods associated with providing a temporary layoff notice to an employee.

The maximum duration of a temporary layoff will depend on the reason for layoff. For reasons unrelated to COVID-19, employers can temporarily layoff employees for up to 90 days in a 120 day period with no obligation to provide benefits or continuing payments. If an employer is temporarily laying off an employee for reasons deriving from COVID-19, the employee can be laid off for up to 180 consecutive days.

Depending on the reasons for layoff, an employee who is laid off for either one or more periods exceeding 90 days in a 120 day period, or on the 181st consecutive day, is deemed terminated unless during the layoff, the employer by agreement with the employee: (a) pays the employee wages or an amount instead of wages; or (b) makes payments for the benefit of the laid-off employee in accordance with a pension or employee insurance plan. If benefits and/or wages are continued, then employment will be terminated when the payments cease.

A recall notice must also be in writing, served on the employee, and state that the employee must return to work within seven days of the date the recall notice is served on the employee. If the employee does not return within seven days then the employee is not entitled to termination pay or notice.

If the employee's employment is terminated, then they are entitled, at minimum, to:

Length of Service	Notice
Less than 2 years but more than 90 days	1 week
2 – 4 years	2 weeks
4 – 6 years	4 weeks
6 – 8 years	5 weeks
8 – 10 years	6 weeks
More than 10 years	8 weeks

Please note that, as discussed, employees also have common law rights, and may be able to assert a constructive dismissal claim instead of accepting temporary layoff, unless their employment agreement contains a provision agreeing to temporary layoffs. Further, on termination, employees can also claim a longer notice period through common law if there are no provisions in their employment agreement restricting their common law entitlements.

Federally regulated employers

A temporary layoff is not deemed to be a termination of employment where:

- The layoff is the result of a strike or lockout;
- The layoff is for 12 months or less, and is mandatory pursuant to a minimum work guarantee in a collective agreement;
- The layoff is for three months or less;[7]
- The layoff is more than three months but not more than 12 months,[8] and the employee maintains recall rights under a collective agreement throughout the layoff period;
- The layoff is more than three months and the employer notifies the employee, in writing, that they will be recalled to work on a fixed date, or within a fixed period, that is not more than six months[9] from the date the layoff commenced (and then recalls the employee in accordance with that period); or
- The layoff is more than three months (with no maximum period) and during the period of layoff:
    - The employee received an agreed-upon amount from their employer,
    - Their employer makes contributions to a registered pension plan or a group or employee insurance plan; or
    - The employee receives supplementary unemployment benefits.[10]

Federally-regulated employers should note that just dismissal protections do not apply if an employee has been laid off due to lack of work or the discontinuance of a function.[11] The layoff notice should therefore specify the reasons for the layoff and demonstrate an economic justification for the layoff and a reasonable explanation for the choice of the employees impacted by the layoff. Employers should be cautious not to include other reasons for the layoff (such as performance) in the notice.

Saskatchewan

Layoff is defined in *The Saskatchewan Employment Act* as "the temporary interruption by an employer of the services of an employee for a period exceeding six consecutive work days."

Employers cannot layoff an employee who has been employed for a period of more than 13 weeks consecutive weeks without providing notice or pay in lieu of notice as follows:

Length of Service	Notice
More than 13 weeks but less than 1 year	1 week
1 – 3 years	2 weeks
3 – 5 years	4 weeks
5 – 10 years	6 weeks
More than 10 years	8 weeks

A period of employment means any period of employment that is not interrupted by more than 14 days (vacation, employment leaves or leaves granted by an employer are not considered an interruption of employment). After giving notice of layoff, an employer cannot require an employee to take vacation leave or banked overtime as part of the notice period.

7 Note that any period of re-employment under two weeks' is not included in determining the length of layoff.
8 Note that any period of re-employment under two weeks' is not included in determining the length of layoff.
9 Note that any period of re-employment under two weeks' is not included in determining the length of layoff.
10 A temporary layoff can also last longer than three months without being deemed a termination of employment if the employee would have been entitled to supplementary unemployment benefits but was disqualified from receiving such benefits pursuant to the *Employment Insurance Act*.
11 *Canada Labour Code*, s.242(3.1); see also *Rattray-Bennett v Bank of Nova Scotia*, 2020 CanLII 29273 (CA LA).

For non-union employees, the employer is required to pay the sum of the employee's wages over the appropriate notice period in the event of a temporary layoff. If the employee's wage varies on a weekly basis, the employer may use the employee's average wage over the preceding 13 weeks, exclusive of overtime pay, to calculate the appropriate sum.

Manitoba

No notice is required if the lay-off does not exceed eight weeks within a 16-week period (or any longer period specified by the Director upon the application of the employer). A lay-off exceeding eight weeks in a 16-week period is not considered a termination if:

- In the business in which the employee is employed, employees are subjected to regular and recurring lay-offs, and the employee was told about it when they were hired; or
- During the lay-off the employer, by agreement with the employee, continues:
    i. To pay wages to the employee or to make payments to the employee in place of wages; or
    ii. To make payments for the benefit of the employee to a pension plan or group or employee insurance plan or where the employee has a pension plan and a group or employee insurance plan, to both.

If the layoff is deemed a termination, then the employee's employment is deemed to have been terminated without notice on the first day of the lay-off, and the employer must pay the employee a statutory wage in lieu of notice equivalent to a minimum of:

Length of Service	Notice
At least 30 days but less than 1 year	1 week
1 – 3 years	2 weeks
3 – 5 years	4 weeks
5 – 10 years	6 weeks
More than 10 years	8 weeks

Newfoundland and Labrador

Employees may be temporarily laid off for no more than 13 weeks in a period of 20 consecutive weeks, but must be given prior written notice of the layoff in accordance with the statutory notice period (see table below). The 20 consecutive weeks does not include a day for which an employee receives pay, including public holiday pay. If the temporary layoff exceeds the 13 weeks then it is deemed a termination.

Notice of layoff is not required where:

- The employee is laid off for a period not exceeding one week;
- The employee rejects an offer of reasonable alternate employment of a similar nature requiring similar skill, effort and ability that would enable the employee to earn during a similar number of working hours and a total wage comparable to that earned by the employee for services rendered under the contract of service;
- The layoff results from destruction of, or major breakdown to, plant machinery or equipment, or climatic or economic conditions that are beyond the foreseeable control of the employer;
- The contract of service between the employer and the employee has existed for less than 30 days;
- The employee is employed in the construction industry;

Upon termination and temporary layoff, an employee is owed the following notice:

Length of Service	Notice
3 months – 2 years continuously employed[12]	1 week
2 – 5 years	2 weeks
5 - 10 years	3 weeks
10 – 15 years	4 weeks
15 or more years	6 weeks

If a different temporary layoff notice period is set out in a collective agreement or written employment agreement, then that notice period applies as long as the required notice is the same for the employer and employee (i.e. resignation notice).

New Brunswick

Employees can be temporarily laid off without notice for a period not exceeding six days, or where there is a lack of work for any reason unforeseen by the employer at the time that notice of termination would otherwise have been given, for as long as the lack of work continues due to that reason. The temporary layoff may last for the period that the lack of work continues due to the original reason for the layoff.

If the above conditions are not met, then the layoff is deemed a termination and the following minimum notice is owing to the employee:

Length of Service	Notice
6 months – 5 years	2 weeks
5 years or more	4 weeks

An employee may be terminated without notice if: (a) they refuse reasonable alternative employment; (b) they are retiring under a bona fide retirement plan; or (c) the layoff results form the normal seasonal reduction closure or suspension of an operation.

If an employee is provided written notice of termination or layoff but then continues to work one month or more beyond the end of the notice period, then the notice is extinguished and fresh notice must be given to effect the layoff or termination. Also note that the individual notice of termination does not apply if the employee is party to a collective agreement.

Nova Scotia

Section 72(1) of the *Labour Standards Code* (Code) requires employers to provide all employees who have been employed for more than three months with written notice prior to a layoff (or pay in lieu).

Notice obligations do not apply to:

- A layoff not exceeding six days;
- A layoff for any reason beyond the control of the employer, including complete or partial destruction of plant, destruction or breakdown of machinery or equipment; unavailability of supplies and materials; cancellation, suspension or inability to obtain orders for the products of the employer; or fire, explosion, accident, labour disputes, weather conditions and actions of any governmental authority, if the employer has exercised due diligence to foresee and avoid the cause of the lay-off;
- A person who has been offered reasonable other employment by their employer;
- A person in the construction industry;

The Code does not require employers to pay employees any other money or continue benefits during a temporary lay off.

12 "Continuously employed" includes the employment of seasonal workers who are engaged under a contract of service of two or more consecutive seasons of at least five months for each season.

If an employee is laid off then employment is deemed terminated as of the first date of the layoff, and the following notice is owing to the employee:

Length of Service	Notice
Less than 2 years	1 week
2 – 5 years	2 weeks
5 – 10 years	4 weeks
10 years or more	8 weeks

PEI

An employer must provide an employee with notice of a layoff equivalent to the notice the employee would receive in the event of termination. Notice obligations do not apply to:

- A layoff not exceeding six consecutive days;
- A layoff for any reason beyond the control of the employer, including the complete or partial destruction of a plant; the destruction or breakdown of machinery or equipment; the inability to obtain supplies and materials; or the cancellation or suspension of, or inability to obtain, orders for the products of the employer, if the employer has exercised due diligence to foresee and avoid the cause of termination or layoff.
- A person who is terminated or laid off because of labour disputes, weather conditions or actions of any governmental authority that affect directly the operations of the employer.

If the layoff does not meet the above requirements, then it is a termination and the following statutory notice is owing to the employee:

Length of Service	Notice
6 months to 5 years	2 weeks
5 – 10 years	4 weeks
10 - 15 years	6 weeks
15 or more years	8 weeks

If an employee is provided written notice of termination or layoff but continues to work one month or more beyond the end of the notice period, then the notice is extinguished and fresh notice must be given to effect the layoff or termination. Additionally, no notice is owing where the employer offers reasonable other employment to the employee.

Northwest Territories

An employer must give the employee a written notice of temporary layoff. The notice of temporary layoff must expressly indicate the expected date of return to work, otherwise the employee is deemed to have been immediately terminated.

A temporary layoff cannot exceed 45 days during a period of 60 consecutive days unless an employment standards officer orders an extension. Before an extension will be granted, the employment standards officer must be satisfied that there are special circumstances that justify the extension and that the employee will be recalled to work.

If the employer lays off the employee for longer than 45 days in a period of 60 consecutive days (or longer than the extension granted by the employment standards officer) the employee is deemed to have been terminated on the last day of the temporary layoff.

Nunavut

A "temporary layoff" is an interruption of the employment for a period:

- Not exceeding 45 days in a period of 60 consecutive days; or
- Exceeding 45 days, where the employer recalls the employee to employment within a time frame that is fixed by a Labour Standards Officer.

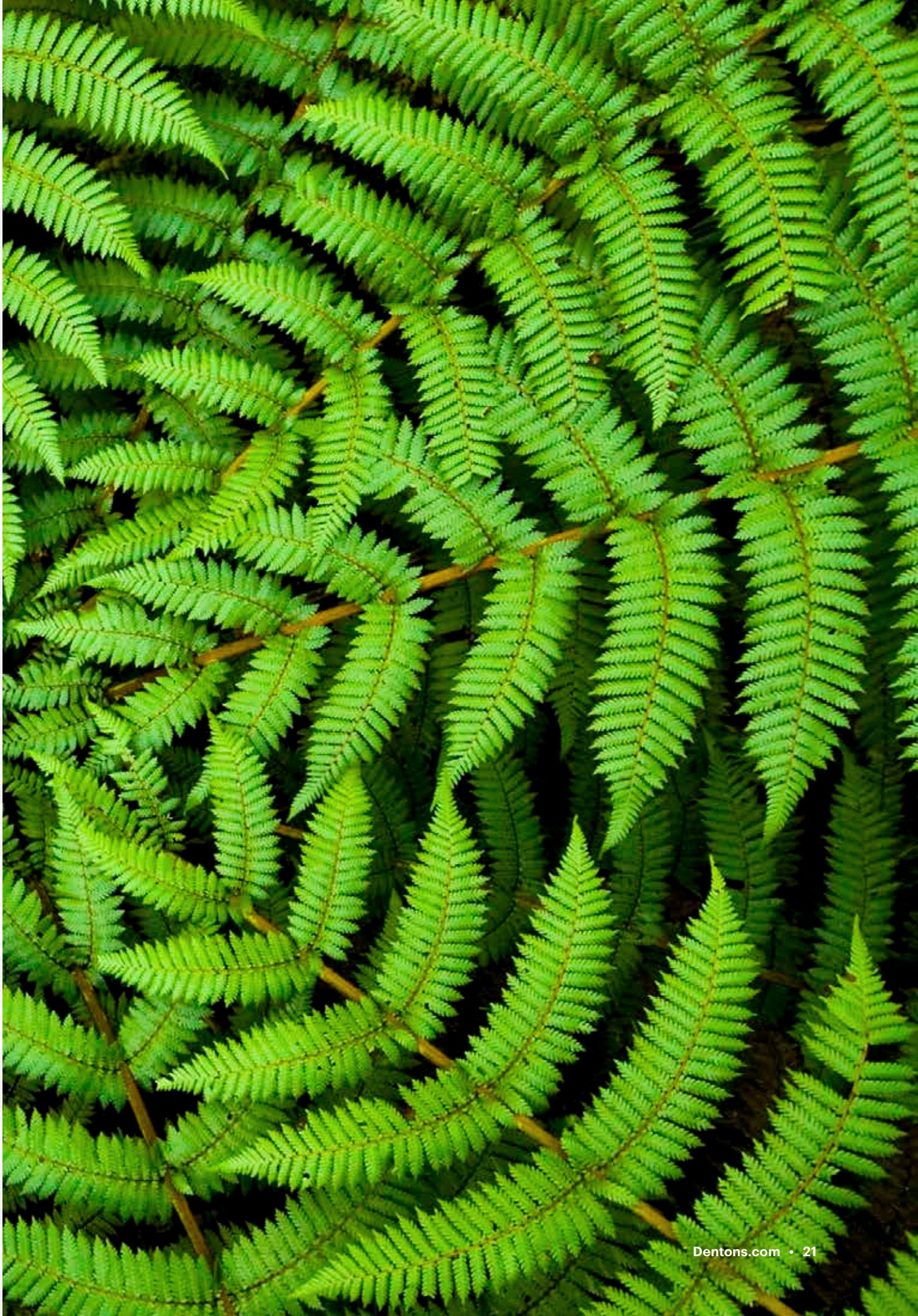
An employer must give the employee a written notice of temporary layoff. The notice of temporary layoff must expressly indicate the expected date of return to work, otherwise the employee is deemed to have been immediately terminated. If a layoff contravenes the above requirements, the employee's employment is deemed to have terminated on the last day of temporary layoff.

Yukon

Notice of termination obligations apply to a layoff, other than a temporary layoff. A "temporary layoff" means an interruption of an employee's employment by an employer for a period:

- Not exceeding 13 weeks of layoff in a period of 20 consecutive weeks.
- Exceeding 13 weeks of layoff, if the employer recalls the employee within a time set by the director.

If a layoff exceeds a temporary layoff, the employee is deemed to have been terminated at the start of the temporary layoff and the employer must pay the employee pay in lieu of termination notice. The employer may seek an order from the board to extend the temporary layoff period.



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The information provided in this Toolkit does not constitute legal or professional advice, or a legal opinion. Please contact legal counsel for further advice and to assist with the preparation of temporary layoff letters and recall letters.

One of the members of the **Dentons Canada Employment and Labour Law group** would be happy to advise.

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