

Breakfast Seminar Series

RESTRUCTURING YOUR ORGANIZATION: THE DEVIL IS IN THE DETAILS

Paul Lalonde
Steven Williams

March 3, 2009

Session Overview

- Restructuring Options for Non-unionized Employees
 - (1) Changing the terms and conditions of employment
 - (2) Temporary lay-offs
 - (3) Mass and individual terminations – voluntary
 - (4) Mass and individual terminations – involuntary
- Restructuring Options for Unionized Employees
 - (1) Renegotiating terms and conditions
 - (2) Mass and individual terminations – voluntary
 - (3) Mass and individual terminations – involuntary

RESTRUCTURING OPTIONS FOR NON-UNIONIZED EMPLOYEES

Restructuring Options for Non-Unionized Employees

- (1) Changing the terms and conditions of employment
 - Constructive dismissal
- (2) Temporary lay-offs
- (3) Mass and individual terminations – voluntary
 - Phased-in retirement plans
 - Voluntary departure (or exit) packages
- (4) Mass and individual terminations – involuntary
 - Individual terminations
 - Mass terminations
 - Severance pay
 - Requirements during notice period

Option (1): Changing the Terms and Conditions of Employment – Non-Unionized

Checklist for Changing Terms and Conditions

Review Employer's Authority to Make Changes:

- Letter of offer
- Employment contract
- Human resources policy
 - Past practice
 - Precedent

Important to Note

Although an employer has previously relied upon past practice or precedent to change an employee's terms and conditions of employment, this may not always be sufficient authority.

Option (1): Changing the Terms and Conditions of Employment – Non-Unionized

Checklist for Changing Terms and Conditions

Possible Changes:

- | | |
|---|--|
| <input type="checkbox"/> Compensation and/or benefits (salary, bonuses, RRSP contributions, stocks, etc.) | <input type="checkbox"/> Duties and/or responsibilities |
| <input type="checkbox"/> Claw-back of perks (paid parking, company car, etc.) | <input type="checkbox"/> Relocation of work |
| <input type="checkbox"/> Cut back in hours of work | <input type="checkbox"/> Reduction of overtime work |
| | <input type="checkbox"/> Removal of shifts |
| | <input type="checkbox"/> Reporting structure |
| | <input type="checkbox"/> Shut-downs every 2 nd Friday |

Important to Note

Changing terms and conditions of employment may lead to a constructive dismissal claim where the employer does not have the authority to make the change.

Constructive Dismissal

- Elements of constructive dismissal:
 - Unilateral employer decision
 - Fundamental or substantial change to the employment contract
 - Results in the termination of the contract
 - Entitles employee to consider himself / herself constructively dismissed
- Test is objective – “reasonable person”
- The determination is fact-specific

Constructive Dismissal

Checklist for Avoiding Claims for Constructive Dismissal

Unilateral Changes to:

- Hours of work or shifts
- Compensation and/or bonuses
- Benefits and disability plans
- Location of work
- Duties and/or responsibilities
- Reporting structure

How to Avoid Claims:

- Give notice of the change
- Length of notice is the same length as notice of termination
- Require acceptance within a set timeframe
- Clearly indicate that refusal to accept the change will result in termination

Important to Note

- Notice of the change can be significant for older, long-service employees, particularly where prospects for re-employment are bleak.
 - Avoid human rights complaints by making changes based on business needs.

Option (2): Temporary Lay-off of Non-Unionized Employees

- Temporary lay-offs – s. 56(2) of *ESA*
 - 13 in 20, or
 - Longer period (35 in 52) where certain conditions are met:
 - i.e. Benefits are continued
- Does not mean that employer can temporarily lay-off non-unionized employees – common law constructive dismissal
- However, no finding of constructive dismissal where
 - Express or implied right to lay-off
 - Common practice in employer sector
 - Past practice
- Right to recall election – s. 67

Option (3): Mass and Individual Termination of Non-Unionized Employees – Voluntary

- Phased-in retirement plans
- Voluntary departure (or exit) packages:
 - Common terms of VDPs / VEPs:
 - Notice and severance
 - Benefit continuation and conversion rights
 - Outplacement services
 - Financial counseling
 - Retraining
 - Letter of reference
 - Releases

Option (4): Mass and Individual Termination of Non-Unionized Employees – Involuntary

- **Individual terminations** – 3 sources of notice
 - 1. *Employment Standards Act, 2000* notice – ss. 54 and 57
 - To a maximum of 8 weeks
 - A minimum entitlement only
 - Lump sum pay instead of notice – s. 61(1) of *ESA*
 - 2. Employment contract notice provisions
 - Review employment contract(s) to see if notice period fixed
 - 3. Common law reasonable notice
 - If notice period not addressed in employment contract, employee is entitled to common law reasonable notice
 - Substantially more notice than entitled to under *ESA*
 - Based on character of employment, length of service, age and availability of similar employment

Option (4): Mass and Individual Termination of Non-Unionized Employees – Involuntary

- **Mass terminations** – s. 58(1) of *ESA*
 - If 50 or more employees terminated in any 4-week period
- Mass termination requirements
 - If terminating 50 – 199 employees – 8 weeks' notice
 - If terminating 200 – 499 employees – 12 weeks' notice
 - If terminating 500 or more employees – 16 weeks' notice
- Employer must complete form for Employment Standards Director and post information in workplace
- Lump sum pay instead of notice – s. 61(1) of *ESA*

Option (4): Mass and Individual Termination of Non-Unionized Employees – Involuntary

Checklist for Avoiding Mass Termination Provisions

When Mass Termination Provisions Apply:

- 50 or more employees terminated in any 4 week period
- But not if these 50 or more employees represent 10% or less of the employees at the establishment and none of the terminations caused by permanent discontinuance of business

How to Avoid the Application of Mass Termination Provisions:

- Terminate fewer than 50 employees
- If 50 or more employees, “stagger” the terminations, ex. every 4 weeks + 1 day
- Demonstrate that employees are part of different “establishments”

Important to Note

“Staggering” terminations refers to the date employees actually walk out the door. Notice can still be given on the same day to more than 50 employees.

Option (4): Mass and Individual Termination of Non-Unionized Employees – Involuntary

- Severance pay entitlement – s. 64(1) of *ESA*
 - An employee is entitled to severance pay if employed for 5 years or more, and
 - The employee is one of 50 or more employees terminated within a 6-month period, or
 - The employer has a payroll of \$2.5 million or more
- Severance pay – s. 65 of *ESA*
 - 1 weeks' wages per year of employment, prorated for partial year of employment
 - To a maximum of 26 weeks' severance pay

Option (4): Mass and Individual Termination of Non-Unionized Employees – Involuntary

- Requirements during notice period – s. 60(1) of *ESA*
 - No reduction in employee's wage rate
 - No alteration of terms or conditions of employment
 - Continue to make benefit plan contributions that would otherwise be required

Option (4): Mass and Individual Termination of Non-Unionized Employees – Involuntary

- Federal sector employers under *Canada Labour Code* should be aware of s. 240
 - Unjust dismissal complaints where:
 - The employee has completed 12 months' service, and
 - The employee is not subject to a collective agreement
 - Adjudicators have broad powers, including reinstatement
 - Defences include: just cause, progressive discipline, and position elimination

RESTRUCTURING OPTIONS FOR UNIONIZED EMPLOYEES

Restructuring Options for Unionized Employees

- (1) Renegotiating terms and conditions
- (2) Mass and individual terminations – voluntary
- (3) Mass and individual terminations – involuntary

Option (1): Renegotiating Terms and Conditions – Unionized Employees

- Review your collective agreement
- Is there a reopener clause? Agreement may be amended by mutual consent
 - Revision by mutual consent, at any time, any provision except term – s. 58(5) *OLRA*
- Where no reopener clause
 - Early termination of collective agreement – s. 58(3) *OLRA*
 - Consent of OLRB on joint application of the parties

Option (1): Renegotiating Terms and Conditions – Unionized Employees

- Practical Considerations on Reopening
 - Scope, narrowly define what you're bargaining (i.e. reduction in wages and benefits, mechanisms if no agreement)
 - Know your bargaining agent, anticipate their behaviour
 - Union may have demands as well
 - Be prepared to open organization's books

Option (2): Mass and Individual Termination of Unionized Employees – Voluntary

- Voluntary departure (exit) packages
- Same features as in non-unionized workplace
- To introduce VDPs / VEPs:
 - Discuss with union
 - A majority of arbitrators and labour boards have found that employers cannot unilaterally introduce VDPs / VEPs

Option (3): Mass and Individual Termination of Unionized Employees – Involuntary

- Determine your organization's status with the union:
 - Union(s) certified?
 - Currently in collective bargaining?
 - Notice to collective bargain?
- If “yes”, terms and conditions are “statutorily frozen”
- Tests – “business as usual” and/or “reasonable expectations of employees”

- Consult your collective agreement

Option (3): Mass and Individual Termination of Unionized Employees – Involuntary

Checklist for Common Collective Agreement Clauses to Review

Authority to Terminate?

- Managements rights
- Technological change
- Contracting-out
- Deemed termination

Clauses affecting Termination:

- Union consultation rights
- Union notification rights
- Notice of lay-off to employees
- Bumping rights
- Lay-off procedure
- Recall rights

Important to Note

If considering termination, ensure that a union's consultation rights are met.
Failure to do so may result in monetary damages being awarded.

Questions?