



A Guide for Employers on

Recalling Staff

Bringing non-unionized employees back
from temporary layoff

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PENINSULA



A Guide for Employers: Recalling Staff

Bringing non-unionized employees back from temporary layoff

As the COVID-19 pandemic improves, many employers are planning to recall employees that have been laid off during this global health threat.

When recalling staff, employers must understand their legal rights and responsibilities, as well as the legal rights and responsibilities of employees. Understanding the law regarding staff recalls may reduce the risk of employees taking legal action against their employer, and helps facilitate a smooth transition of staff back into the workplace.

What do employers need to know about recalling non-unionized employees?

Recalling staff is the process of bringing employees back to work after a period of temporary layoff. Temporary layoffs in Canada are governed by employment standards legislation and employment agreements.

Recalling staff before the end of the statutory layoff period

Employment standards legislation imposes a maximum length of a temporary layoff, which in some jurisdictions may be extended if the employer provides certain payments or benefits to the employee while laid off.

If an employee on layoff is not recalled within the applicable statutory temporary layoff period, the employee's employment is deemed to be terminated,

and the employer will owe the employee termination pay and other statutory entitlements on termination (if applicable), and may owe additional damages under the employment agreement, such as damages in lieu of reasonable notice at common law.

How long can an employee be on temporary layoff before being recalled?

When recalling staff in Canada, employers must understand what the applicable employment standards legislation says on the subject, as well as how long they are legally able to temporarily layoff an employee before it is deemed to be a termination of employment:

Ontario

In Ontario, the maximum duration of a temporary layoff is 13 weeks in a 20 consecutive week period. In some scenarios, it can be extended to no more than 35 weeks in a 52 consecutive week period if the employer continues to provide some form of compensation as set out in the *Employment Standards Act, 2000*, such as substantial payments or continuation of benefits, to your employees.

British Columbia

In British Columbia, the maximum duration of a temporary layoff is 13 weeks in a 20 consecutive week period. Due to the COVID-19 pandemic, this has been extended to 16 weeks in a 20 consecutive week period.

Alberta

In Alberta, the maximum duration of a temporary layoff is normally 60 days in a 120 consecutive day period. This timespan has temporarily been extended to 120 days where the layoff is due to the COVID-19 pandemic. On the 121st day, the employment is deemed to terminate and the employer must pay termination pay, unless the employer and employee have agreed that the employer will make certain payments, such as benefits contributions, in lieu of a firm limit on the length of temporary layoff.

What does recalling staff involve?

Recall notice language

Recall notices should be in writing and sent to the employee via a method that allows the employer to confirm that the employee personally received the recall notice. In a recall notice, the employer should use the same recall language in any employment agreements or policies (if applicable).

The recall notice should specify that the temporary layoff will end on a certain date, and that the employee is expected to return to work by that date. The selected date should ideally give employees a few days to prepare for returning to work – for example, some employees may need to make childcare arrangements. The layoff notice should inform employees that, if for some reason the employee is unable to return to work by the specified date, the employee should contact the employer to discuss an alternative return to work date.

Some jurisdictions may have specific requirements for return to work notices – for example, in Alberta, the notice must state that the employee must return to work within 7 days of receiving the notice. Review applicable

employment standards legislation for jurisdiction-specific requirements.

Return to pre-layoff position

An employer should state in the recall notice that the employee will be returning to the same position and responsibilities they held prior to being laid off.

Return to work schedules

Employers can recall employees at different times or stagger recall dates of employees for greater convenience, or to assist with a phased re-opening in accordance with government guidance on COVID-19. Employers might consider recalling employees in the reverse order of layoff so that those who were laid off first can be recalled first, if feasible. In many cases, however, employers will recall employees based on immediate business needs.

Hours and payment terms upon return to work

A recall notice should also specify the pay details pertaining to the employee being recalled if the employee will return to fewer hours of work or lower hourly pay. Employers should review their employment agreements to determine whether they have a right to reduce hours of work or rates of pay. If no such contractual right exists, there is a risk that employees receiving such recall notice will refuse to return to work and later claim to have been constructively dismissed and entitled to damages.

What are employers asking about recalling staff?

1. With the COVID-19 situation, what if I cannot guarantee the duration of the recall?

It is very difficult for an employer to foresee how COVID-19 will develop after recalling an employee. For instance, a second wave could occur, further impeding the daily operations of a company.

If an employer expects that recalled employees might soon be laid off again, the employer might elect to explain this uncertainty in the recall letter, although this is not required.

2. How long can an employee be on temporary layoff before being recalled?

In Canada, the maximum permissible length of a temporary layoff varies by jurisdiction. See above for details on the maximum permissible length of temporary layoff in Ontario, British Columbia, and Alberta.

3. What happens if the employer chooses not to recall an employee that has been laid off?

Once the statutory maximum length of a temporary layoff is exceeded, the employee's employment is deemed to be terminated, and the employer will owe termination pay (as well as benefits continuance and severance in Ontario) and possibly additional damages, such as damages in lieu of reasonable notice at common law.

Learn More

If you have questions about best practices for recalling staff in the workplace, our HR experts can answer your questions. Learn more about your employer obligations today, by calling:

1 (833) 247-3652

We've got you covered.

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