

HR LAW UPDATE

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Spectrum HR Law LLP is Growing!

We welcome our newest lawyers.



Mark Holthe
Business Immigration

Allyson Marta
Pensions, Employment Benefits and Executive Compensation

Jamie Taylor
Employment & Labour

SPECTRUM HAPPENINGS

Spectrum HR Law LLP and HBI Business Immigration Law have merged under the Spectrum HR Law LLP banner. Spectrum HR Law is pleased to announce that we now have an office in Lethbridge, Alberta.

Chris Brown was re-elected as President of the Association of Canadian Pension Management.

Chris Brown was recognized by Best Lawyers in Canada as Calgary Employee Benefits Law Lawyer of the Year for 2012.

Kristin Smith was recognized by Best Lawyers in Canada in its 2012 edition in the area of Employee Benefits Law.

Scott Sweatman was recognized in the area of Employee Benefits Law by Best Lawyers in Canada for 2012.

Michael Wolpert was recognized by Best Lawyers in Canada in the area of Employee Benefits Law for 2012.

Will Cascadden will be speaking at Mount Royal University's 8th Annual Human Resources Breakfast on November 15, 2011 in Calgary.

Will Cascadden will be speaking at Lancaster House's Pre-Conference Workshop, Developing Effective Negotiation Skills, on November 21, 2011 in Vancouver.

Spectrum HR Law LLP's Vancouver office has moved to its new location at Suite 300, 570 Granville Street.

Executive Compensation: Retiring Allowances for “Long Service”

“Retiring allowances” are not novel in taxation and employment law. Defined in the *Income Tax Act (Canada)*¹ and explained in CRA publications², “retiring allowances” are routinely treated as a tax effective approach to severance obligations on termination of employment or “loss of office”. Yet, with the ability to also grant a retiring allowance in recognition of “long service”, they are becoming more prevalent when transitioning an executive out of an organization either at the time of termination or retirement.

As part of an executive exit strategy, retiring allowances can offer an employer greater flexibility than many other more conventional arrangements. Although the most common application of a retiring allowance is the payment of an additional sum to an employee upon the termination of their employment relationship (e.g., severance), it is also possible for an employer to pay a retiring allowance solely in recognition of long service on departure. This can be done either as an established contractual obligation or simply as an *ad hoc* payment at the time of an executive’s departure.

The treatment of a retiring allowance as a contractual obligation between an employer and an executive is not widely utilized. However, if employed, retiring allowance obligations may be evidenced through specific contractual terms or an internal policy that clearly establish when a payment will apply: retirement, specific circumstances of termination, termination due to change of control, etc.

¹ See Section 248(1).

² Canada Revenue Agency, Interpretation Bulletin 337R4: Retiring Allowances, February 1, 2006 (“IT-337R4”).

In recognition of long service, the case law is far from conclusive in establishing guidelines for what actually constitutes “long service”. Although the CRA position is that long service is “usually considered”³ to reference the employment term with a particular employer or affiliate, it is suggested that an employer could take into consideration the cumulative industry employment of an executive in determining an appropriate payment. As the quantum of the retiring allowance must be reasonable, it is necessary to define, within the parameters of the contract or internal policy, what service conditions an executive must satisfy in order to be entitled to payment. In the simplest terms, the contract or policy must specify when payment of the retiring allowance becomes a right accrued to the executive through, for example, the completion of a specified period of service.

While the promise of a retiring allowance as a contractual or policy obligation creates certainty for the parties, both in amount and payment method, there is no requirement that it must be a formal arrangement. From the perspective of the employer, a retiring allowance may also be a gratuitous payment offered to a departing long service executive as a means of, for example, increasing retirement income outside of a registered or supplemental pension arrangement.

The benefit of utilizing a retiring allowance as an additional form of compensation is that it can be highly beneficial from a tax perspective. For instance, retiring allowances are one of the few payments, in the employment context, that are permitted to be paid over several years.

³ *Ibid.* at para. 3.

Consequently, only those amounts paid in a calendar year will be taxed as income to the executive in the year it is received thereby minimizing the tax implications that would otherwise attach to a lump sum payment of the overall amount.⁴ This also allows the employer to spread out the cost of the payment obligation. However, it is a question of fact considered by the CRA whether incremental payments are truly a retiring allowance. As such, if challenged, the executive must be able to establish that all other ties indicative of an employment relationship have been extinguished.

A retiring allowance is also one of the few vehicles that permit rolling all or a portion of the sum directly into a registered retirement savings plan ("RRSP") held in the name of the executive or a spouse, or a registered pension plan subject to certain criteria. Although a direct RRSP contribution may be limited if the executive was employed in 1995 or earlier, or simply by available contribution space, provided that the funds do not flow through the hands of the executive, what remains is an additional tax-beneficial compensation tool. Of further benefit to the executive is that the amounts that would otherwise be required to be withheld from the retiring allowance, due to its status as income, are reduced by the RRSP or registered pension plan contribution. As such, the taxes owing in relation to the remaining income are minimized.

Historically, retiring allowances have generally been paid to employees in conjunction with the termination of employment or "loss of office". However, the definition of "retiring allowance" contemplates payments in the mutually exclusive

circumstances of both a "loss of office" and "long service" recognition thereby broadening the applicability of such a payment. While it is not advocated that payment of a retiring allowance become a matter of course, it is suggested that if an organization is considering transitioning an executive out of office, either by way of termination or retirement, offering the option of a retiring allowance may provide a flexible form of compensation not previously employed in this context.

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⁴ *Income Tax Act*, R.S.C. 1985 c.1 (5th Supp.), s. 56(1)(a)(ii)

Temporary Layoff in Alberta: What Employers Should Know

In Alberta, specific provisions of the *Employment Standards Code* (the “Code”) allow employers to temporarily lay off employees for up to 60 days. Employers are likely to do so during uncertain financial times, when demand for work is dwindling, and the outlook for the future is unpredictable. Pursuant to the *Code*, an employer can suspend the employment relationship with its employees for up to sixty days, at which point termination pay is provided if the employees are not called back to work.

The Alberta Court of Appeal’s Interpretation

In *Vrana v Procor*¹ (“*Vrana*”) the Alberta Court of Appeal found that pursuant to the provisions in the *Code*, employers must provide some form of notice to employees prior to a temporary layoff. The court held that notice should be provided in order to uphold the “spirit” of the *Code*, namely open communication between the employer and employee, which includes an understanding of each other’s rights. In *Vrana* the court found that an employer had not provided sufficient notice to the employee prior to the layoff, and allowed the employee to bring an action for constructive dismissal against the employer. It follows that if sufficient notice is provided to employees prior to a temporary layoff, then the employee’s common law right to sue its employer for wrongful or constructive dismissal is suspended for the duration of the sixty-day period provided for under the temporary layoff provisions in the *Code*.

¹ 2004 ABCA 126

Ontario and British Columbia Differ in their Interpretation

This issue has been interpreted very differently by the courts in Ontario and British Columbia. In *Style v Carlingview Airport Inn*² (“*Style*”), the Ontario Divisional Court considered a similar provision in Ontario’s employment standards legislation. The court found that a temporary layoff did not suspend or limit the employee’s common law right to bring a claim for wrongful or constructive dismissal. The court emphasized that an employee’s common law rights were not limited or restricted simply because an employer applied provisions of the employment standards legislation. According to the Ontario court, meeting employment standards minimums does not, in and of itself, provide employers with a full defence against an employee’s common law rights. Similarly, in *Collins v Jim Pattison Industries Ltd.*³ (“*Collins*”), the British Columbia Supreme Court interpreted its comparable provision of British Columbia’s employment standards legislation. In *Collins* the court found that the legislation did not create a statutory right allowing all employers to temporarily lay off its employees. Instead it found that the legislation merely served to qualify employee agreements that already included layoff provisions.

The Alberta Court of Queen’s Bench accepted the reasoning of the British Columbia and Ontario courts when it rendered its decision in *Turner v Uniglobe*

² 1996 O.J. No. 705

³ 1995 CanLII 919 (BCSC)

*Custom Travel Ltd.*⁴ (“Turner”). In this case the court found that an employee’s common law right to bring an action against its employer for wrongful dismissal was not suspended simply because the employer had applied sections 62 to 64 of the *Code*. While *Turner* has not been appealed (and *Vrana* remains the current state of law on this matter in Alberta), it is interesting to consider the various interpretations across Canada on this issue, and it is likely that this issue will be reexamined at some point in Alberta.

What do employers need to know?

Employers should provide employees with notice prior to advising them that they are being temporarily laid off. While the Alberta Court of Appeal in *Vrana* does not expressly insist that the warning be in writing (nor does it describe how much notice is “sufficient”), it does state that employees must be properly advised of the employer’s intentions, and that notice should include both the fact of the temporary layoff and the relevant sections of the *Code* (sections 62 to 64) explaining the effect of the layoff.

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Employers should provide employees with notice prior to advising them that they are being temporarily laid off.

⁴ 2005 ABQB 513

BC Pilot Project to allow more Family Members of Temporary Foreign Workers to hold Open Work Permits

On August 12, 2011, the Federal and British Columbia Governments announced a pilot program intended to attract more working families to British Columbia. As of August 15, 2011, spouses, common law partners, and working-age (18-22 years of age) dependent children of most temporary foreign workers in British Columbia qualify for an open work permit.

Prior to this pilot program, only spouses and common law partners of “high” skilled temporary foreign workers in British Columbia were eligible to apply for an open work permit. These included temporary foreign workers in a managerial, professional or skilled trade occupation (NOC 0, A, and B). Previously, dependent children in British Columbia were not eligible for an open work permit and had to apply on their own merits.

The situation is quite different elsewhere in Canada. Only spouses and common law partners of high skilled, temporary foreign workers are eligible for an open work permit. Spouses and common law partners of low and semi-skilled (NOC C and D) foreign workers do not qualify. Alberta and Ontario are the only other provinces with work permit programs for working-age, dependent children.

The move is intended to attract temporary foreign workers and their families to British Columbia. The Minister of Jobs, Tourism and Innovation, Pat Bell, was quoted as saying: “More than a million jobs will open up in B.C. by 2020, and we will need foreign workers to help meet the skills shortages our businesses are already beginning to face. Giving more spouses and working-aged children of temporary foreign workers the chance to take jobs will support local businesses, while contributing to local, regional and provincial economic growth.”

This province-specific pilot project was negotiated pursuant to the Canada-British Columbia Immigration Agreement, which was signed in April 2010. Under Canada’s Constitution, responsibility for immigration is shared between the federal and provincial/territorial governments. Citizenship and Immigration Canada (CIC) has specific agreements with the provinces and territories respecting immigration matters. These agreements are negotiated separately, with each province or territory to allow them to address unique needs and specific priorities. For example, the provincial nominee programs are part of specific agreements between the federal and provincial governments, which allow the provinces to nominate immigrants to meet specific labour-market needs.

Certain categories of temporary foreign workers are excluded from this pilot, and include participants in the live-in caregiver and International Experience Canada programs (such as the Working Holiday Program), as well as seasonal agricultural workers.

Up to 1,800 open work permits will be granted under the pilot project, which is scheduled to end on February 15, 2013. Given that over 40,000 temporary foreign workers currently live in the province, we expect this quota to be filled very quickly.

Interested families are therefore encouraged to act quickly! If you employ temporary foreign workers, we recommend that you advise them of this opportunity and encourage them to apply as soon as possible.

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Severe Penalties Levied for Canadian Immigration Violations

Two recent incidents involving US citizens and Canada Border Services Agency (“CBSA”) serve as a reminder that non-compliance with immigration laws can lead to significant monetary penalties, serve as a bar to entering Canada, and result in employers being blacklisted by Canadian immigration authorities.

Earlier this month, CBSA reported that an American owner of a US-based event planning company was fined \$8000 for lying to Canadian Border Officers about the purpose of his trip to Canada and for counseling his employees to do the same. When he entered Canada in July 2011, Steven Mark Gordinier stated that he was attending the Crankworx bike festival and meeting some friends in Whistler, BC. When one of his employees arrived at the border a short time later, he told a similar story. The employee was referred to secondary inspection where his phone was searched and an email was discovered from Mr. Gordinier. The email described the work that the employee would be performing, but instructed him to say that he was entering Canada as a tourist. Based on this information, CBSA turned up at the hotel in Whistler where Mr. Gordinier and thirteen of his US staff were staying. All thirteen admitted to working, and Mr. Gordinier was subsequently arrested and charged with the offences of misrepresentation and counseling misrepresentation pursuant to the *Immigration and Refugee Protection Act*.

Similarly, the [New York Post](#) recently reported that more than thirty American employees of the popular US retailer, American Apparel, were refused entry to Canada in early October on the grounds that they were intending to work at the company’s Canadian warehouse sale without the necessary work authorization. According to the company’s CEO, Dov Charney, the employees simply said the wrong thing to Border Officers when they indicated that they would be “helping out” at the sale. Mr. Charney stated that the real purpose of the trip was for the US employees to observe and be trained on the company’s sales processes and systems so that they could participate in similar sales events in the US and Europe. The border incidents prompted CBSA to conduct a site visit to the warehouse sale in order to ensure that no unauthorized individuals were working on the sales floor.

Companies can avoid similar fates by developing and implementing policies regarding business travel. Such policies should reflect a zero tolerance position on misrepresentation, should ensure that legitimate business travelers are equipped with the proper paperwork, and should identify and support those who require work authorization.

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