

# Five Downsizing **Pitfalls to Avoid**

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**T**HE NEWS IS ALL AROUND US, AND unfortunately, so is the reality; when economies stagger, downsizing becomes inevitable for some companies. However, economic difficulties are not get-out-of-jail free cards, for employers looking to cull the 'C' list or trim the proverbial deadwood off the organizational tree.

Employers reacting to a recession by reducing their workforces face significant potential liability in the areas of labour and employment law. Moreover, if an unsuspecting employer falls into one of the five traps outlined below, it runs the risk of compounding its economic problems by unbalancing the equilibrium of the balance sheet. Here are five costly traps to avoid:

## **1. Ignoring the Common Law**

Many employers believe their liability flows solely from the individual notice provision of the *Employment Standards Act* (the "Act") when terminating a person's employment. While this may be the case under a properly written employment contract, if there are no express termination provisions governing the relationship, most employees will be able to claim common law damages for

wrongful dismissal. Because such damages usually exceed statutory notice by multiples of four or more, employers should take steps to limit their exposure to this liability.

## **2. Failing to Provide Group Notice**

Under section 64 of the Act, an employer must provide additional notice if 50 or more people at a single location are terminated within a two-month period. The required notice is eight, 12, or 16 weeks, depending on the number of employees being let go. Employers must provide this notice in addition to any notice that is otherwise payable under the Act (s. 63), under a contract of employment, or under a collective agreement.

## **3. Breaching an Express Employment Contract**

Employers who fail to carefully adhere to the letter of their employment contracts often get into trouble when downsizing. For example, despite clear contractual language, an employer might attempt to substitute severance for specified limited notice. By doing so, the employer will have breached the employment contract and could provide the employee a basis on which to claim common

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law damages that greatly exceed the limited notice set out in the employment contract.

#### 4. Disentitling an Employee From Insurance Benefits

Employees are entitled to receive all remuneration that they would have normally received during the notice period. Technically, this includes benefit continuation. To facilitate this, most group policies allow for the employer to continue paying the employee's premiums during this period. Similarly, it is usually possible for the employee to convert the coverage to a private policy such that the coverage can continue after the notice period. Employers face potential liability when they have not ensured that a terminated employee's insurance coverage can be continued, either by failing to pay the appropriate premiums during the notice period or failing to advise the employee of his or her conversion option. When this occurs, and the employee suffers a loss that would have otherwise been insured, the employee or his or her estate can sue the employer for the full insurable amount.

#### 5. Golden parachutes

In order to attract and retain top talent, many companies provide key executives with enhanced contractual separation benefits. Although these clauses may be activated in any number of ways, a common trigger is the loss of responsibility. Employers should be concerned about this issue because they may inadvertently trigger these entitlements when downsizing their workforces. For example, if an employer shuts down two of its three divisions, its director of operations might well be able to spring a golden parachute due to the significant curtailing of duties and responsibilities.

These are the traps; avoid the spikes and the costs they carry. Avoiding these traps, and others, will ensure that a company's cost-saving, downsizing exercise does not have the opposite effect. Careful planning with proper assistance will help employers structure their operations to survive and even thrive during these challenging times. 📌

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