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L a w y e r s

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**Working Notice - The Win-Win Solution to Rightsizing
your Organization**

In this difficult economic and business climate, which most economists unfortunately expect to last well into this new year of 2009 (and perhaps longer), organizations are often left with the dilemma of continuing to keep staff at unnecessarily high levels or enduring the perceived extraordinary expense of termination packages to reduce payroll going forward. This always creates a difficult decision, often stalling decisions being made in an effective and timely manner, which ultimately can make such terminations more costly in the long run.

However, a little used and little known effective tool to assist in rightsizing your organization, is the creative use of working notice as part of termination packages to your employees. In doing so, your organization can significantly lessen the cost of terminations – and in cases where your organization's payroll is below \$2,500,000, the cost of the terminations can be reduced to practically no cost at all.

How can this be done? What is often forgotten is that in employment law, a week's notice is equal to a week's pay in lieu of notice – taken on a more serious scale: 12 months' notice equals 12 months' pay in lieu of notice (subject only to statutory severance pay, if applicable).

For example, assuming yours is an organization with 100 employees. Due to the recession, you forecast a need to reduce your workforce by 20 to 25 employees. For ease of reference in this example, let's assume all of the employees have five years of service with your organization and all earn \$80,000 per year – as such statutory severance pay would apply to these employees (5 weeks pay each). At common law, to terminate these 25 employees without notice, your organization will be looking at termination costs in the magnitude of between \$500,000 to \$750,000 (at common law, based on 3 to 4.5 months per employee), and even the statutory minimum applicable is almost \$400,000 (notice plus statutory pay – 5 weeks each, total 10 weeks).

However, if instead, each of the employees was offered 3 months' working notice (plus a minimum severance pay at the end of the 3 months' notice of 5 weeks per applicable employment legislation), the cost of these terminations is significantly reduced to under \$200,000.

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Moreover, if you find that during the notice period that perhaps you overestimated the need to cut back, some of those employees on notice could be offered continued employment during the notice period, thus reducing your termination costs even further and avoiding the cost and time involved in finding new employees to hire. Also, if some of the employees to be terminated have less than 5 years service, the cost is reduced even further – as statutory severance pay would not apply to those employees.

The above analysis assumes that no written employment contract overrides the common law of reasonable notice, and your organization is regulated under Ontario law. Similar results arise under Federally regulated or out province organizations as well, as employment legislation is very similar in all Canadian jurisdictions.

Of course, in using this approach, it is important that any employees whom you may have concerns for potential disruption or subversion during the notice period not be included – or be ready to terminate with no further notice, upon such occurrence. By and large however, most employees will be cooperative, especially when they understand they are part of a group who are being treated in a like manner. Further, there are significant advantages to the employee as well:

1. It is almost always easier to find a job while still employed; and
2. From a psychological point of view, the employee's life is not as disrupted during the notice period, instead of being at home concerned about getting a new job.

In order to make the working notice versus termination payment even more attractive to employees, the following additional incentives might also be provided as part of the working notice:

1. During the notice period, employees are provided the opportunity to attend interviews at other organizations during working hours – upon reasonable terms;
2. Career counseling services and/or letters of reference are provided to assist in looking for new positions; and
3. Should the employee find a job during the working notice period, a small cash payment can be added for finding a new position early – and thus leaving the payroll early.

In these circumstances, a win-win solution is provided to all. Your organization continues to receive services from these employees



during the transition notice period and at the same time the cost of terminating these employees is reduced, while they each pursue new directions in their careers.

Of course each organization's employee profile is different and accordingly, the amount of notice and severance that may be applicable to any particular employee will vary. But in all cases, this approach will provide huge savings, except in the rare cases where all services from these employees is wholly redundant going forward – a rare situation indeed.

Where legal advice is of significant importance however, is in crafting the offers to such employees to ensure as little risk of litigious response as possible, within an efficient termination framework, and having legal advice thereafter, if there is any “push-back” that might be forthcoming from employees (or counsel) after termination notice is received. Nevertheless, in taking this approach, the expenses of termination are significantly reduced (even factoring in legal advice involved), and your organization can act quickly and plan for future downsizing through the creative use of working notice.

Should you wish to explore this approach, please contact Warren Rapoport at Gardiner Roberts LLP (416-865-6776 or wrapoport@gardiner-roberts.com) with respect to any terminations that your organization may be contemplating at the present time, regardless of whether they are to be implemented immediately or over the next few months.