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BEACON LAW CENTRE



Legal Update
for Business Owners

COVID-19 Edition

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Contracts, Covid-19, and You



Article by: Karl Maier

Business disruption is in the air, literally. What does that mean for contracts, especially leases? Like many things, the answer is “it depends”...

Force Majeure

Many contracts, including commercial leases, have a clause for *force majeure*. Whether it is called that or not, its effect is to excuse failure to perform caused by an event that is reasonably beyond the party’s control.

For this kind of clause to apply, the event must actually prevent performance, not just make it more expensive or onerous. Our courts are reluctant to excuse non-performance of contracts.

If it applies, depending on its wording, the clause may allow a person to:

- extend the time to perform,
- prioritize one delivery over another,
- suspend your obligation until the event ends, or
- cancel the contract without liability.

Therefore, the specific wording matters. Each clause must be looked at carefully.

Frustration of Contract

The legal concept of “frustration of contract” applies to all contracts. A person might also be able to rely on this concept, in the face of a sudden crisis, to avoid a contract such as a lease.

Frustration is also based on an unexpected event that is not the fault of either party to a contract. Again, our courts look critically at each situation, and set a high bar to finding that a contract was frustrated. The event must either make the contract impossible to perform (for example, the building to be used was destroyed), or radically change the parties’ purpose in making the contract (for example, the event that the contract was all about was cancelled).

Warning: frustration of a contract does not just result in performance being delayed or suspended. It cancels the contract entirely. If a tenant is only looking for temporary rent relief, and not to terminate the lease, this is not a good option.

Practical Alternatives

Even where the options above are not relevant or desired, other contract clauses will apply and should be reviewed: e.g., liability and damages, dispute resolution, and termination.

It may well be more practical to negotiate temporary adjustments that acknowledge the reality but preserve the business relationship. In that case, document all changes carefully.

Sound, timely legal advice is so important at times like this. Review documents carefully and do the cost-benefit risk analysis before acting.

Covid-19 Employment Law Update

Article by: Kelvin Scheuer

The Covid-19 pandemic has severely impacted employers and employees alike. This article explores the rights and obligations of both employers and employees in these circumstances.

Termination during self isolation or illness

The BC Government has introduced new Covid-19 leave provisions, for employees who:

- are unable to come to work because they are in quarantine or self-isolation in accordance with public health guidelines,
- are directed by their employer not to work due to concern about exposure to others,
- are outside of BC and unable to return to work due to travel restrictions,
- are required to take time off to care for a child or dependent adult for reasons related to Covid-19, including a school, daycare, or similar facility closure .

Employers may not terminate the employment of workers who are unable to come to work for these reasons, and will be required to give the employee the same job, or an equivalent, once they return to work.

The new Covid-19 leave provisions are retroactive to January 27, 2020, are in addition to the 3 days of unpaid sick leave already allowed in BC, and are unpaid except as per any paid sick leave provisions in the worker's employment agreement.

Other relevant forms of leave

An employee is entitled to 5 days of unpaid family responsibility leave, if they are required to care for a child or immediate family member. As well, an employee is entitled to 27 weeks of unpaid leave to care for a terminally ill family member, and up to 36 weeks of unpaid critical illness or injury leave (up to 16 weeks if the family member is older than 19 years). Employment can not be terminated while an employee is on leave.



Requiring employees to stay home

Employers have a right to require employees to stay home if they are sick, and employees have a duty to report if they are unwell.

Temporary layoffs

A temporary layoff occurs when an employee is given less or no work, with a plan that they will return to their regular work schedule at some point in the future. A reduction in hours worked is considered a layoff as soon as the employee earns 50 per cent or less of their weekly wages, at their regular rate.

An employee in British Columbia can be laid off only if:

1. the employee agrees to the layoff,
2. the layoff is normal and expected for the industry, or
3. the layoff is permitted by an employment contract that was in place prior to the lay off.

It is up to the employer to prove that the temporary layoff falls into one of the allowable categories. If they can not, the layoff will likely be considered a termination of employment.

If the temporary layoff is permitted, the maximum length of the layoff permitted by the Employment Standards Act is 24 weeks expiring on August 30, 2020.

Employment impossible to perform

It may be impossible for an employee to perform the work required of them due to unforeseen circumstances.

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Section 65(1)(d) of the Employment Standards Act states that sections of the Act (63 and 64) that set the minimum notice of termination required do not apply “to an employee employed under an employment contract that is impossible to perform due to an unforeseeable event or circumstance”.

This section, however, only applies to the minimum amount of notice required pursuant to the Employment Standards Act. There is a separate common law requirement to compensate an employee on termination which is separate from that required under the Act. It would be difficult, but may be possible, for an employer to claim that an employment agreement has been frustrated in common law as well, thereby possibly avoiding the common law compensation provisions.

Government Assistance

The Government of Canada has introduced several programs to assist employers and employees. As these programs are frequently updated, the government’s website, or your local chamber of commerce or business association, is the best source for more information.

If you require guidance with employment issues, we are here to help.

liability protection only for businesses that are listed as essential services. The order provides that you will not be liable for damages from someone being infected with or exposed to the virus as a result of you operating or providing an essential service, if you were operating or providing that essential service in accordance with public health guidance, or reasonably believed that you were.

Limitation Periods

The BC government has suspended the limitation period for starting a lawsuit. The suspension lasts until the provincial state of emergency is ended. The suspension does not apply to the time limit to file a claim of builder’s lien or to start a lawsuit to enforce a builder’s lien.



Other Covid-19 Legal Updates

Article by: Del Elgersma

Essential vs. Non-Essential Businesses

Some businesses have been ordered to close, such as pubs and hair salons. Any business that has not been ordered to close, but can adapt their services and workplace to comply with the orders and guidelines of the Provincial Health Officer, may remain open. While this means that some “non-essential” businesses may remain open, the BC government has issued an order that provides

We are delighted to have been voted top law office in Victoria for the third year in a row in the Times Colonist Readers’ Choice Awards.

Thank you to our wonderful clients, we appreciate your support and could not have accomplished this without you!



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