

Feature

Making Changes to an Employment Policy

Avoid the risk of constructive dismissal

It is common for employers to decide that a policy or employee benefit has to be changed. However, when employers make changes in the workplace, it is important to remember the concept of constructive dismissal to avoid unintended legal risk and expense.

The Concept of Constructive Dismissal Explained

In law, if an employer unilaterally makes a change to an employee's terms and conditions of employment that is "fundamental", the employee has to option to accept the new terms and conditions and keep working, or refuse to accept the new terms and sue for constructive dismissal.

Minor changes that an employer may make to an employment policy will likely not amount to constructive dismissal. The test for constructive dismissal is an objective one which focuses on the conduct of the employer and not the subjective perceptions of any one particular employee. The basic test is whether a "reasonable person" in the same situation – faced with the same changes – would have felt that the essential terms of the employment contract had been substantially altered by the actions of the employer. The Court will review the terms of the contract agreed to by the parties (including any policies referred to therein) and determine whether the employer's change is contrary to the contract in a significant respect.

When faced with a potential constructive dismissal, employees may continue to work or they may resign. They are permitted a reasonable amount of time in which to decide whether to treat the employment contract as at an end. If the employee is presented with a change and begins to work under the new conditions without complaint, however, the employee may later be found to have accepted the change and will not be entitled to sue for constructive dismissal.

If a Court finds that there has been a constructive dismissal, damages will be assessed in a manner similar to that applied when an employee has been wrongfully dismissed. The employee is entitled to "reasonable notice" of the changes and can sue for damages for the reasonable notice period that was not given. Reasonable notice is particular to each employee, and in the absence of a contractual notice provision, depends on the employee's age, length of service, position and the availability of similar employment in the market.

What Types of Changes Can Cause a Constructive Dismissal?

There are many types of changes that employers have made in a workplace that raise the potential for constructive dismissal claims. The following changes require close careful attention:

- A reduction in an employee's remuneration;
- Significant changes to an employee's job duties, particularly if they result in a demotion;
- Significant changes to an employee's bonus or commission plan;
- Changes to an employee's bonus policy;
- Geographic relocations;
- Significant changes in working conditions.



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Mitigating the Risk of Con-structive Dismissal Claims

There are a few basic steps that employers can undertake to mitigate risk of constructive dismissal claims.

- 1. Awareness:** Employers always need to be thinking about the possibility of constructive dismissal when changes in the workplace are discussed. The first step in mitigating constructive dismissal claims is being aware of the concept and the risk.
- 2. Review of Contracts and Policies:** A constructive dismissal is a unilateral fundamental change in the employment relationship. Accordingly, employers should review their standard form employment contracts and policy manuals to ensure that they contain appropriate language that will allow the employer to make changes in the future. Flexible language is particularly helpful and important when describing employee benefit, retirement, bonus and commission plans.
- 3. Develop a Plan:** Employers should always have a detailed plan in place prior to implementing a significant change in the workplace, particularly when the change will result in the loss of a significant employee benefit or a reduction in employee compensation. Employers should consider how this change will be communicated to employees and whether notice of the change is required or advisable. Consultation with legal counsel prior to implementation of a change is always advisable.

Changes are common in every workplace. Our job as managers, human resources professionals and lawyers collectively is to ensure that changes can be made without imposing unnecessary risk on the organization. If you remain mindful of the potential risks involved with constructive dismissal claims, you are more likely to be able to assist your organization in managing change.

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