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Feature

Termination and Disability Benefits: Protect Yourself

Reduce the risk of liability

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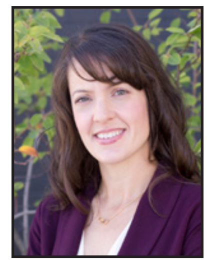

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Many, if not most, employers provide disability benefits as part of the overall benefits package employees receive. Depending on the plan, insurance premiums may be paid by the employee, employer or both and sometimes the employer is self-insured for the STD portion.

The Issue

Under both the *Employment Standards Act*, 2000, ("ESA") and the common law, when an employee is terminated, he or she is entitled to all benefits to which they were entitled as an employee during the notice period, including disability benefits. But not all employers extend disability benefits during the notice period, which can create a risk of liability. Since the employer is legally required to continue disability benefits, if it fails to maintain coverage through the insurer and the employee suffers a disability during the reasonable notice period, the employee can turn to the employer for the benefits. As a result, the employer essentially becomes the self-insurer for both the employee's STD and LTD coverage. In many cases if you are self-insured for STD benefits, then there is an argument that the employee cannot "double-dip" and would get either the STD benefits or the termination pay, but not both.

The trickier issue is with LTD coverage which you may be required to extend to the employee in addition to termination pay.

This issue was addressed by the Ontario Superior Court of Justice in the case of *Brito v. Canac Kitchens*. In that case, the 55-year-old employee, Luis Romero Olguin, was terminated after 24 years of service due to restructuring. Canac Kitchens provided only Mr. Olguin's ESA entitlements, which were eight weeks' notice and 24 weeks' severance pay. Mr. Olguin's benefits, including STD and LTD insurance, were discontinued at the end of his eight-week notice period. He became re-employed after one month, but at a lower salary and with no benefits. Fifteen months later, Mr. Olguin was diagnosed with cancer and was unable to continue working. He sued Canac Kitchens for wrongful dismissal and benefits.

The trial judge found in Mr. Olguin's favour and determined that the appropriate notice period was 22 months. The court's goal was to place Mr. Olguin into the position he would have been had Canac Kitchens provided him with working notice, so it required the employer to pay STD benefits for 17 weeks starting when he became disabled and LTD benefits to age 65. The total value of the damage award was approximately $260,000.

This is obviously concerning. Unfortunately, while most insurers will cover employees during the ESA notice period, they will not provide coverage during the common law notice period. This puts the employer in an awkward position because you are legally obligated to continue the benefits to the end of the entire notice period, but, practically, cannot do so.

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Ways to reduce the risk

There are several ways for you to protect yourself as an employer from liability for disability benefits:

1. Continue disability benefits at least during the ESA notice period to ensure compliance with the minimum standards under the ESA.
2. Use an employment agreement with new staff that specifies that the employee is only entitled to disability benefits during the ESA notice period.
3. Ensure that you obtain a signed release when terminating an employee, which references the fact that the employee relinquishes all rights to a claim for disability benefits.
4. Consider working notice of termination for as long as possible for employees who you perceive to be at risk of making a claim for disability benefits. Since they are still actively at work, they should still be eligible for coverage under most policies.
5. During any period of negotiations on the severance package, you may also want to provide a sum of money on a without prejudice basis that the employee can use to obtain alternate coverage.

Lastly, you may also want to place pressure on your insurer to extend coverage during the entire notice period. We have seen this done in the past, although the premium is considerably more expensive in our experience. If enough employers do so, the burden will be shifted to the insurer, in the same way that it has during the ESA notice period.

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