

Cross-Border Legal Considerations in the COVID-19 Era

November 19, 2020

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Telecommuting Employees

- **What are some risks of employee telecommuting?**
 - Protecting confidential information
 - Ensuring employee productivity
 - Wage-and-hour issues
 - Telecommuting as a privilege, not a right
- **When might an employer *be required* to permit telecommuting?**
 - Government order
 - Reasonable accommodation of a disability
- **How does an employer limit risk?**
 - Written telecommuting agreements/policies
 - Written job descriptions



U.S. Employee Release Agreement Requirements

- **Is the employee 40 years or older?**
 - 21-day review period
 - 7-day revocation period *for release of age discrimination claims*
 - Written notice to consult with legal advisor
- **Does the layoff involve two or more employees?**
 - Age notices to affected individuals
 - 45-day review period

Temporary Layoffs/furloughs and Separations in Canada – Common Pitfalls for U.S. Employers

- **Temporary layoffs/furloughs constitute a breach of contract for many**
 - Does the employment offer/agreement permit them?
 - Does the workplace have a proven history of doing them?
 - If not, then *even if the employer complies with statutory rules* about notification, duration and terms of layoff/furlough, employee can still potentially:
 - *claim breach of contract*
 - *assert constructive dismissal and claim a termination package*
 - *claim damages for the lost wages*
 - Success of these claims depends on *many* factors – pandemic adds complexity and uncertainty

Temporary Layoffs/furloughs and Separations in Canada – Common Pitfalls for U.S. Employers

- **Separations require a multi-level risk analysis**
 1. What are the baseline mandatory statutory rules for *that employee* (based on their duration of service, industry/business, and – usually - province of work)
 2. Does the employment offer/agreement include a termination clause?
It is *enforceable*?
 3. “**Reasonable notice**” - the primary driver of *all* separation and change planning:
 - Duration of package period?
 - What exactly is in their “compensation basket”?
 - Does anything in the employment offer/agreement and plan documents purport to limit/reduce/remove what is in that basket?
Is it enforceable?
- Success of wrongful dismissal claims depends on *many* factors – again, pandemic adds complexity and uncertainty

Questions?



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Force Majeure Clauses

Elements and Interpretation

- *US Perspective*
 - A *force majeure* (French for “superior force”) clause is a contract provision that relieves the parties from performing their contractual obligations when certain circumstances beyond their control arise.
- *Canadian Perspective*
 - Concept stems from the French civil code and is NOT a principle that has developed through common law – if the contract does not include a *force majeure* provision, then you cannot claim or rely upon *force majeure* (unless in Quebec)

Force Majeure – US Aspects

- Allows parties to allocate risk and decide what will or will not excuse performance.
- Equivalent to an affirmative defense.
- What types of events constitute force majeure depend on the specific language included in the clause itself.
 - Event must fit within one of the categories in the contract.
- Must be beyond the party's control and not due to its fault or negligence.
- Contract may have additional requirements and limitations, such as notice and material adverse change clauses.



Force Majeure – Canadian Aspects

- No “standard template” clause – may vary quite substantially from contract to contract
- Typically include:
 - Relief from damages or penalties due to delay or non-performance – must be beyond affected party’s control
 - Lists types of events ie: acts of God, severe weather and natural disasters
 - In context of Covid-19 – clause would need to include pandemics, epidemics, global health emergencies, infectious or communicable diseases, global outbreaks etc



Elements of a *Force Majeure* Clause - US

- List of events, e.g., “the parties’ performance under this agreement is subject to acts of God, war, terrorism, strikes, natural disasters,”
 - May include “epidemic” – defined? (World Health Organization, U.S. Centers for Disease Control and Prevention)
- “Catch-all” phrase, e.g., “or any other emergency beyond the parties’ control making it inadvisable, illegal or impossible to perform their obligations under this agreement”
 - How broadly these catch-all phrases are interpreted depends on the jurisdiction governing the contract.
 - New York: FMCs narrowly construed using the rule of *ejusdem generis* and catch-all phrases are interpreted to only include events similar to those specifically mentioned in the FMP, meaning of the same character or class.

Elements of a *Force Majeure* Clause - Canada

- Canadian courts impose a very high standard – clauses not meant to be easily relied upon
- FM event must be both beyond the affected party's control and **unforeseen**
 - Window on Covid as unforeseeable event likely closing
- Mitigation is required
- Performance must be truly impossible (not just difficult or expensive)
- FM event must be the **direct cause** of the affected party's delay or inability to perform

Recommendations

- Carefully review contracts
- Ensure *Force Majeure* clause covers the event preventing performance
- Consider desired result or remedy
 - Temporary suspension?
 - Relief from penalties?
 - Termination?
- What if FM provision is not helpful?



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US Common Law Doctrines: Impossibility, Impracticability, and Frustration

- May apply to excuse performance even if the contract has no *force majeure* clause.
- Impossibility (destruction of sm of the contract or performance objectively impossible) largely replaced by impracticability (event occurs that parties assumed would not happen and continued performance is not commercially practicable)
- Frustration of purpose/commercial frustration is similar to impracticability – often both can be invoked.
- Either party may have a claim for relief, including restitution, if frustration or impracticability apply.

Canadian Common Law Doctrines

- Check other provisions in contract:
 - Excusable Delay
 - Unavoidable Delay
 - Relief Event
 - Notice
 - Suspension, Cancellation or Termination
- Doctrine of Frustration
 - Unforeseen situation not addressed in contract
 - Renders performance “radically different from that which was undertaken”
 - Results in termination of contract

Covid Impacts on M&A Transactions

- Access to government subsidy/economic support programs
 - Diligence on amounts received, validity of claims and repayment obligations
- Reps, warranties and covenants in purchase agreement
 - List all applicable/available programs accessed
 - Cover actions taken to prevent the spread of Covid-19
 - No knowledge of diagnosis or presumption of infection in workforce
 - Preventative actions taken in case of any infection



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Thank you

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