

You're fired... but not quite yet

Risks, advantages to giving staff working notice

BY LIZ BERNIER

GENERALLY, getting fired means you also get sent home — free to wallow without being expected to report back to work the next day. But that wasn't the case for many of the 17,600 Target workers losing their jobs in the retailer's closure of its Canadian operations.

Workers were given working notice, meaning they'll have to continue to work — some for up to 16 weeks — before the stores' final closure dates. Regardless of when their last day is, all employees will receive a full 16 weeks of pay — while managers will receive additional payouts totalling up to \$6.5 million.

Giving working notice may be a bit unexpected but it's a decision that's completely above-board legally, said Lisa Stam, partner at Koldorf Stam in Toronto.

"Unless you have a contract provision that states otherwise, what an employee is entitled to is notice, and then the employer can either elect to provide notice or pay in lieu of notice."

Working notice is seen more often now than 20 or 25 years ago because it is a method where employers can get value in return for pay, said Ron Minken, managing director at Minken Employment Lawyers in Unionville, Ont.

"However, because of the risks associated with it, many companies would definitely not do it. We see it done with employees that are very long-term employees, employees that are really trusted and also industries where there is little potential for harm or sabotage by the employees."

The potential risks depend on a number of factors, said Cissy Pau, principal consultant at Clear HR Consulting in Vancouver.

"It really depends on the employee and it depends on the culture of

the company," she said. "I've seen it work both ways.

"It really depends on the company being able to evaluate that employee's reaction to the termination, and whether they're able to still perform their job and do a good job and not jeopardize the business."

'Bang for your buck'

The reason employers like working notice is because instead of paying out a lump sum of payment in lieu, they receive work for pay, said Michael Fitzgibbon, founding partner of Watershed in Oakville, Ont.

"One of the perceived advantages from the employer's perspective is you get some bang for your buck — you get some services for the payment that you're providing. Employers perceive that to be an advantage. The other advantage that employers see is one that I think may be a little but more real, around cash flow issues. So you can pay out the (payment) over time," he said.

Employers most often are motivated by the prospect of cost savings, said Stam.

"But they really need to think twice about whether or not, practically speaking, they're going to get performance out of this person... if the person's only performing at 50 per cent, you're still paying out 100 per cent of the salary for the remaining amount of time."

Another perceived advantage is it makes it easier for employees to find another job, said Stam.

"It's a tough job market out there and so, increasingly, employees may be quite open to a working notice period because it's perceived to be easier to find a job while employee rather than unemployed."

Sabotage and other risks

Negative impacts on performance, productivity and morale are likely

byproducts of working notice, said Stam.

"Nobody's going to be overly motivated if they were just terminated, so there's always the risk that your employee is just not going to be performing, and it just may be a waste of your resources," she said.

"There's also the risk of them sabotaging all of the electronic assets or going on the server and deleting things."

There could be some risk of property damage, defamation or harassment when employees become highly disgruntled, said Minken. Employees could also take confidential information or pass proprietary information to competitors.

There are particular risks when it comes to client-facing roles, such as with Target, he said.

"Target provides product and service assistance to customers so if you have unmotivated staff, if you have unfriendly staff, staff with poor morale or a lack of motivation, then you're not going to exceed on sales, certainly," he said.

"Are they going to be very pleasant to your clients anymore? Are they going to be complaining to your clients or customers? It depends on the role. If it's a receptionist and they're the face of the company, you might want to think twice about working notice for that person," said Stam.

You've basically told the employee she's not wanted, so there's a good chance of a negative reaction, said Fitzgibbon.

"Are they going to poison whatever sort of working environment you have by becoming a source of discontent in the workplace?" he said.

"Oftentimes, when you're going through a restructuring, you're trying to straighten out your workforce. And is having this person around going to bring everybody down to

the point where you're defeating the purpose?"

Whether or not working notice is a ticking time bomb depends on the employee's personality, said Minken.

"And you don't know what they're going to do until it happens."

Something else to consider? When only working notice is provided, employers cannot insist on a release for other claims, he said.

"A release is nice to have because it could bar an employee from litigation or a human rights application or a ministry of labour complaint... the release could provide a bar from the employee suing and the employer could rely on the release to dismiss any proceeding by the employee."

When can it work?

There are limited circumstances where working notice can work, said Fitzgibbon.

"In particular, where it's a mutual sort of decision, where the employee and the employer realize that it's in their mutual best interest that the relationship should end, and the employee says, 'In order for me to either save face, or to allow me an opportunity to look for work while I can say I still am employed, I'd like a bit of working notice and I'm prepared to help you out,'" he said.

It might also work for trusted, long-term employees who want to end their tenure with dignity, or for front-line employees whose opportunities for sabotage are relatively limited, said Stam.

However, employees who decide to try working notice should have a backup plan in place, said Fitzgibbon.

"Oftentimes, during a working notice period, it becomes apparent that it's unworkable," he said. "The reality is that working notice doesn't generally work."