

# Employers' Legal Obligations During Major Disasters

## Introduction

We write this column within a week of the devastating floods in southern Alberta. A few years ago, this column addressed the H1N1 influenza outbreak. Before that was SARS. Alberta has experienced serious tornados and fires. While not 'natural' disasters, we remember the potent threat of Y2K as we entered the current millennium with the fear that computer systems would fail and dreadful acts of terrorism that suddenly and grievously disrupted communities and economies far from the strikes of September 2001. A few years later, the electrical grid was unexpectedly knocked out in the northeastern US and central Canada. We often hear of possible scenarios of paralyzing cyber-attacks on key infrastructure sites upon which we have become almost entirely dependent.



What is remarkable about the late June 2013 floods in Calgary and neighbouring communities is that the sudden and unforeseeable damage affected not only a large number of peoples' homes, but it disabled many places of business, all utilities and public access to them. In times like these when faced with imminent danger and threats of disaster, employers may not immediately consider their legal obligations to their employees. Employers should have a plan for disaster response or business interruption. This article highlights some elements to keep in mind.

## Employment Relationship

Many employers in Calgary and elsewhere in southern Alberta advised their workers to not report to work during and in the aftermath of the flood. Are employers obligated to pay those employees who normally would have worked during that time?

Fundamentally, the employment relationship is contractual. The consideration for salary is service. If the employee does not provide service, the employer is not obligated to pay the employee subject to statutory and contractual obligations. However, compassionate flexibility and good sense should prevail. Often there may be more value in supporting employees through these troubled times by creating a positive and accommodating work environment than strictly adhering to the letter of the law. This may mean paying wage despite no legal requirement to do so.

Employers can likely cancel shifts for casual employees who are normally free to accept or refuse work during these times with little risk subject, of course, to minimum pay requirements for employees who may have already begun their shift before being sent home. The situation is more complicated for other employees. Employers should consider options for having these employees report to a different location or working from home.

## Safety First

The employment contract, all workplace policies, and other legislation such as the *Employment Standards Code* and the *Occupational Health and Safety Act* continue to apply. Employees can refuse to work when their workplace is unsafe and there is an imminent danger to health or safety. Employers would be well-advised to not require their employees to report for work under such conditions in any event unless, of course, the employees provide services that are essential during such times of crisis (e.g., fire, police, emergency medical services, etc.).

There are no other statutory provisions in Alberta that address employer obligations during a state of emergency. Some provinces, such as Ontario, have legislated personal emergency leave to allow employees to take up to 10

unpaid days off from work which employees could likely utilize during natural disasters. This kind of leave is not expressly provided for in Alberta's legislation. For employees dealing with the hardships resulting from natural disaster, sick leave or other stress-related leave may be an option depending on workplace policies and the particular terms of benefit plans provided by employers.

Complications may arise where the workplace is otherwise safe but the employer might wish to reduce or shut down operations for a period of time. If an employer prevents an employee from returning to work for any reason other than safety concerns, there is a risk that a constructive dismissal claim could develop.

## **Prolonged Closures**

Employers have options in cases where their operations may be shut down for an extended period of time. In consultation with the employee, employers may encourage their workers to take advantage of unused vacation time while the business is not in operation.

Employers may also consider temporary lay offs for up to 60 days. In either case, the employer should be mindful of the minimum requirements of Alberta's *Employment Standards Code* and any relevant provisions in the employment contract or workplace policies that may apply.

## **Termination of Employment**

Termination may be the final option if the shutdown will be lengthy or permanent. In some cases, the business will not survive the disaster and employment can be summarily terminated under some common law or equitable principle of *force majeure* or frustration of contract. These are serious, fact-driven scenarios governed by the terms of every employment contract and the law. Generally, judges are generous to employees and will seek a basis for employers to provide some period of notice or pay in lieu.

The *Employment Standards Code* also states that employees are not entitled to notice of termination or pay in lieu of notice if the contract of employment has become impossible for the employer to perform by reason of unforeseeable or unpreventable causes beyond the control of the employer. A natural disaster that completely destroys the employer's business may be a situation in which this provision of the *Code* could be invoked.

In the event that large numbers of employees are dismissed in a short period of time (in Alberta, 50 or more within 4 weeks), special provisions in the various provincial *Codes* require employers to notify the cabinet minister in charge of employment protections.

## **Conclusion**

The days and weeks following a disaster are challenging times for everyone, first with the physical damage and then with the emotional and economic damage. Employees' rights are limited and must be balanced against the losses and adjustments that employers must confront arising out of the same disaster.