The Four Top Ways for Employers to Avoid Liability to Employees for Disability Benefits

Date: February 17, 2015

Original Newsletter(s) this article was published in: Employment Update: February 2015

One of the most difficult issues faced by employers when terminating employees is how to deal with benefit coverage during the severance period.

Unless there is a written contract of employment that provides otherwise, an employment contract (including a verbal contract) contains an implied term that, absent just cause, employees are entitled to reasonable notice of the termination of their employment.

Most employers provide an employee with a severance package which provides pay in lieu of reasonable notice rather than allowing an employee to work through the reasonable notice period.

In order for a severance package to comply with the common law requirement for reasonable pay in lieu of notice, all compensation and benefits should be continued during the reasonable notice period. Deductions can be made for any earnings the employee has through alternative employment during this period.

Most severance packages are structured in a way that does not comply precisely with this common law requirement because of restrictions in the employer's group benefit plans.

As benefits are generally provided through group insurance policies, it is important for employers to be aware of the terms of the group policies to ensure that coverage can be provided during the reasonable notice period. There is usually no problem continuing benefit coverage during the statutory notice period in Ontario where employment standards legislation deems employees to be actively employed during the statutory notice period. However, once the statutory notice period expires eligibility for benefit coverage is based solely on the terms of the group insurance policy. However, employers usually encounter difficulty in providing long-term disability coverage to their employees during the reasonable notice period as most long-

term disability policies provide that coverage is only available to “active” employees of the company.

This leaves an employer exposed to liability in the event that an employee becomes disabled during the reasonable notice period. As a general rule, the courts have held that an employer is liable for all damages an employee suffers because of an employer’s failure to provide the employee with reasonable working notice. Thus, the employee’s argument is that had they been given reasonable notice, they would have been covered under the firm’s group disability policy at the time their disability occurred. If no coverage was available, the employer is often found liable to the employee for all disability benefits the employee would have recovered from the insurance company had the policy been in effect. The cost to the employer can be extremely high especially in cases of young employees who are permanently disabled. The employer may be liable to pay disability benefits to the employee until they reach age 65 or 70 depending on the terms of the group insurance policy and the length of disability.

This exposure to liability has caused considerable problems for employers in structuring severance packages. Employers always hope that they will be able to settle the terms of severance with their employees and in return receive a full and final release which would absolve them from any further liability to the employer. But if this is not the case, employers remain exposed to liability.

In 2000, the Court issued a decision which disagreed with this approach. In the decision of *Pioro v. Calian Technology Services Ltd.*, an employee sued his employer for wrongful dismissal. He also sued for lost disability benefits when he became disabled during the reasonable notice period. The court granted his claim for damages for wrongful dismissal. However, the court denied his claim for long-term disability benefits during the notice period. The court held that the employee handbook indicated that LTD coverage was not available when you cease to be a full-time employee. Normally language like this is interpreted in favour of the employee based on the argument that had they been given reasonable notice they would still be a full-time employee and thus eligible for coverage. However, the court in this case said that the policy was “consistent with industry standards similar to many in the industry.” Further, the court found that even if the employer had given the employee reasonable notice he would have been sent home because there was no available work and thus he would not have been actively employed during the notice period.

While to some this may seem like a common sense approach to the issue of disability benefits during termination, the case has never been followed in Ontario. Accordingly, employers must still be concerned with this issue and the potential for liability. The following are suggestions on how to minimize liability:

1. Make it clear in all offers of employment and employee handbooks that disability coverage will not be provided to employees beyond the statutory notice period unless the applicable group insurance policy allows for coverage beyond that time.

2. Provide employees with written employment contracts which clearly set out that upon termination of employment, benefits will only be continued during the statutory notice period unless you have the written permission of the insurance company to continue benefits beyond this period.

3. Purchase a group disability policy that has a conversion privilege which allows an employee the opportunity to convert their policy to a private policy upon termination.

4. Offer to pay an employee the premium cost of replacement disability coverage during the notice period.