COVID-19: Key considerations for U.S. companies in Canada

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As COVID-19 restrictions begin to ease across Canada, allowing employees to return to work and economies to re-open in phases, U.S. companies should consider the impact on their Canadian subsidiaries. Below are some of the key considerations for organizations to prepare for changes over the coming months.

We will be updating this page with additional business topics in the coming weeks.

Employment

- **Introduction of health and safety protocols:** U.S. employers with offices or locations in Canada may wish to introduce new health & safety protocols that address return-to-work testing methods such as thermal testing, mandatory employee surveys, and the use of masks in the workplace. Canadian human rights and privacy law does not address each of these intrusions upon employee life in the same manner as U.S. law. U.S. employers should work carefully with Canadian counsel to ensure that any methods introduced in Canadian workplaces are compliant with *PIPEDA* and the applicable provincial Canadian employment and human rights legislation.
- **Essential services list rollbacks:** As many states open up their economies, U.S. employers should be aware that many Canadian jurisdictions are taking a much more cautious approach to the re-opening of retail and office locations. Many Canadian provinces are establishing multi-phase plans that involve the roll back of “essential services” lists to allow for different types of businesses to open up to consumers on schedules that will differ significantly from their U.S. counterparts.
- **Coordination with unions:** As “essential services” lists rollback, and the Canadian economy opens up, U.S. employers should be proactive in coordinating “return to work” plans and protocols with any Canadian unions that may represent their workers. Additionally, employees may feel increasingly vulnerable at this time, increasing the threat of unionization, and U.S. employers should be considerate of this threat in their non-unionized Canadian locations.
- **Dealing with confirmed COVID-19 cases or employees displaying symptoms:** There is substantially different guidance being distributed by U.S. and Canadian Public Health authorities in regards to the testing and treatment of

symptomatic individuals. U.S. employers should be sure to look to the Public Health Agency of Canada (PHAC) for updated guidance on “best practices” and protocols as it applies to Canadian employees. For example, PHAC and the CDC have provided markedly different guidance in respect of the use of masks, as PHAC has warned of the dangers of relying on masks to the point of employee overconfidence.

- **Recall rejections and work refusals:** U.S. employers should be prepared for Canadian employees (who are not employed “at will”) to reject recalls from layoffs, and refuse work because of health and safety concerns related to COVID-19. Employers will have to respond to these rejections and refusals in accordance with provincial employment and occupational health and safety laws.
- **Travel and border restrictions:** While both the CDC and PHAC offer travel advisory levels in a similar fashion, these institutions do not always offer the same guidance in respect of travel to specific locations. As the borders open up and work-related travel re-commences, employers should be sure to examine PHAC’s travel advisory levels before asking employees to travel for work-related purposes. There may also be work permit and immigration issues related to travel to certain destinations.
- **EI repayment issues:** Canadian employees who have been “furloughed” or laid off by their U.S. employers may experience Employment Insurance or Canada Emergency Response Benefit repayment obligations once they are recalled to work, if their employer decides to use the Canada Emergency Wage Subsidy program. Employers should be prepared to communicate these issues to their employees to avoid taxation issues later in the year.
- **Updated employment agreements:** U.S. employers should re-examine their Canadian employment agreement templates to ensure they contemplate layoff provisions and *force majeure* clauses, to mitigate any effects of a second wave of COVID-19, in adherence with applicable provincial employment legislation.

Tax

- **Reduced valuations:** The current economic environment may be the ideal time for companies to take advantage of depressed valuations that reduce or eliminate potential tax costs of corporate restructurings (*e.g.*, spin-outs and asset extractions), property transfers (*e.g.*, intangibles), and stock option repricing.
- **Intra-group debt financing:** Canada's thin capitalization rules restrict the amount of interest-deductible debt that a Canadian subsidiary of a multinational group can incur on debts owed to related non-residents, based on a 1.5:1 debt/equity limit. Canadian subsidiaries need to review COVID-19’s impact on their equity (retained earnings) and increase equity (or reduce intra-group debt) accordingly to stay onside these limits.
- **Loss utilization:** Unlike the U.S., Canada’s tax system contains no consolidation or group filing rule: each Canadian entity within a related group computes its own taxes and files its own tax return separately. As a result, planning is needed to match income and losses amongst Canadian members of a multinational group to optimize one entity’s excess deductions and losses.
- **Debt forgiveness:** The settlement of debt at less than its principal amount creates adverse consequences for a Canadian-resident debtor, reducing favourable tax attributes and/or creating taxable income. Careful planning is required to minimize the adverse impact of these rules.

- **Transfer pricing:** The prices at which a Canadian member of a multinational group buys and sells goods and services from non-Canadian group members greatly influence profit and loss in each country. The changed business environment requires Canadian subsidiaries to re-examine and document their applicable transfer pricing methodologies to prevent the Canada Revenue Agency from challenging intra-group transfer prices and re-assessing taxes, penalties and interest.

For more information on any of the topics outlined above, please get in touch with one of the contacts listed below. BLG has also created a COVID-19 Resource Centre to assist businesses on a variety of topics, including contractual risks, public disclosure requirements, and criminal law.

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