

## FREQUENTLY ASKED QUESTIONS REGARDING OFFERS OF EMPLOYMENT FROM AVAYA

Updated January 25, 2010

**Note:** *The following is intended to provide general advice only and may not be applicable to your particular situation. This site will be updated as more information becomes available.*

- Legal Representation
- Acceptance/Rejection of Avaya's Offer
- Terms and Conditions of the Offers
- Nortel Pension Issues –**Updated January 25, 2010**
- NCCE Claims and Potential Claims in CCAA Process

### LEGAL REPRESENTATION

**Q. Is Nelligan O'Brien Payne providing legal advice to continuing Nortel employees at no cost to the employees?**

As Representative Counsel for Continuing Employees, we have been appointed to provide advice and representation to Continuing Employees, concerning employment-related claims and potential claims, at Nortel's expense. We will continue to disseminate appropriate information and advice to the group through our website and FAQ and by e-mail.

**Q. Can representative counsel assist me in negotiating the terms of the offer of employment I have received from Avaya?**

No. This is beyond the scope of our mandate as representative counsel. Individuals are free to retain us directly for this assistance if they wish. The Court has advised us that we are not able, at Nortel expense, to advise on matters between a purchaser of Nortel assets and the employees it proposes to hire. That is a matter for individuals to handle and pay for personally.

**Q. Can representative counsel assist me in understanding the legal significance of Avaya's offer of employment in the context of the CCAA proceedings?**

Yes. We can review Avaya's offers with a view to informing continuing employees of the nature and extent of claims and potential claims that they can make in the Nortel CCAA proceedings if they accept or reject the offer. This is within the scope of our mandate and the related fees will be paid by Nortel. To date, we have been doing this through inquiries to our web address [NCCE@nelligan.ca](mailto:NCCE@nelligan.ca) and these FAQ.

**Q. If I accept an offer of employment with Avaya, will I still be considered to be a Continuing Nortel Employee and be represented by Nelligan O'Brien Payne in the CCAA claims process?**

Yes. Employees who accept an offer from Avaya will be considered Continuing Employees for purposes of legal representation in the CCAA proceedings.

**Q. Will Nelligan O'Brien Payne be representing continuing and transferring Nortel employees with respect to their pension and TRA issues?**

We will continue to represent continuing and transferring employees with respect to these issues.

**Q. May I retain an employment lawyer at your firm for personal advice beyond the scope of the representation order?**

Yes you may. To do so, please contact Leigh Norton at 613-231-8216.

## **ACCEPTANCE/REJECTION OF AVAYA'S OFFER**

**Q. How much time do I have to review Avaya's offer of employment?**

Two weeks from the date you received the offer.

**Q. What are the consequences if I decline Avaya's offer of employment?**

At a minimum, Nortel would normally be required to provide you with the notice and severance pay to which you were entitled under the Ontario *Employment Standards Act, 2000*.

However, Nortel is not honouring its statutory obligations with respect to termination and severance pay while it is under CCAA protection. You would have to claim your statutory entitlements through the CCAA claims process once it is established.

The Avaya offers contain terms and conditions that have the potential to dramatically limit your entitlement in certain situations, such as the termination of your employment. Given the extent of the proposed limitations and depending on your individual circumstances, it may be possible to argue that your Avaya offer is not comparable to the terms and conditions you enjoy at Nortel, in which case you may have a claim against Nortel for common law reasonable notice should you refuse Avaya's offer.

However, there is also an argument that, by declining the offer, you may have failed to take reasonable steps to mitigate any damages arising out of the termination of your employment with Nortel.

You may wish to obtain individual advice with respect to your own situation.

**Q. What are the consequences if I accept Avaya's offer of employment?**

By accepting the offer as presented, you are agreeing to its terms and would be bound by them.

**Q. Can I try to negotiate better terms?**

In theory, all of the terms in an offer of employment are negotiable. In practice, Avaya may not be prepared to negotiate with individual employees for improved terms.

**Q. Will Avaya recognize all of my service with Nortel?**

Avaya has agreed to recognize Nortel service dates for vacation and severance entitlement and pension plan only.

## **TERMS AND CONDITIONS OF EMPLOYMENT OFFERED BY AVAYA**

**Q. It appears that Avaya is proposing to dramatically change the terms and conditions of my employment. Can the company do that?**

Under its agreement with Nortel, Avaya agreed to provide employees with offers that were on terms and conditions substantially comparable to those terms and conditions of employment of similarly situated employees of Avaya. It did not commit to offer comparable terms to those employees had at Nortel. If you accept the offer of employment, you will be bound by its terms.

**Q. The offer provides for a smaller Short-Term Incentive Plan percentage than what I have at Nortel. Is this a change that would result in a claim against Nortel?**

This will depend upon your individual circumstances. If you have been receiving bonuses at Nortel over the past year, you may have a claim for the shortfall, if any, during the reasonable notice period following your termination from Nortel. For Nortel employees who were unlikely to have received a bonus had they stayed at Nortel, there would be no claim.

**Q. The offer says Avaya can modify the terms and conditions of my employment by giving me the minimum notice required for termination under applicable employment standards legislation. What is that notice period and what are the implications to me?**

At common law, an employer cannot unilaterally change fundamental terms of your employment without your consent or without reasonable notice. Avaya is asking you to

agree that the company can make changes, at its sole discretion and with only the minimum notice required under provincial employment standards legislation.

Provincial employment standards legislation provides minimum notice periods for the termination of employment without cause. The notice period is determined with reference to the employee's length of service only. In Ontario, the notice period is capped at eight weeks (for employees with at least eight full years of service).

**Q. Why does Avaya want me to agree that it has the right to make these changes?**

The company is trying to close the door to potential claims of constructive dismissal. If you have agreed in advance that the company can change your duties, reporting relationships, work location, compensation formula, benefits and bonus entitlements, even if those changes have the effect of reducing your total annual compensation, you would not have a legal basis for objecting if Avaya did effect any of those changes.

**Q. If I accept the offer and Avaya does change a fundamental term of my employment, would I have a claim against Nortel for any monetary losses I could demonstrate?**

If the change took place during what would be the reasonable notice period for the termination of your employment with Nortel and before the deadline (not yet established) for filing your proof of claim in the CCAA claims process, you would be able to claim against Nortel for the actual monetary losses you suffered during the reasonable notice period only.

Grandfathered members of the Traditional Part I Pension Plan may have a claim to the extent Avaya's Defined Contribution Pension Plan is less valuable than the growth that would have occurred in Nortel's Defined Benefit Plan during the reasonable notice period.

If Avaya changed a fundamental term of your employment after the end of the reasonable notice period, it would have to provide you with the minimum statutory notice and severance pay and you would have no claim against Nortel.

**Q. What is a temporary lay-off?**

Employment Standards legislation provides a mechanism to enable employers to temporarily "lay off" employees during periods when there is not enough work. It enables the employer to avoid its obligations with respect to paying wages, termination pay and severance pay to the laid off employee, without permanently severing the relationship.

In Ontario, if the employer does not recall the employee, the temporary lay-off will be deemed to have been a termination (a) after 13 weeks if the employer did not maintain the employment relationship in some way (e.g., by keeping benefits in place, for example, or by continuing to make pension contributions on behalf of the employee) or (b) after 35 weeks if the employer did maintain benefit coverage or provide other compensation to the employee during the lay-off period.

The provisions governing temporary lay-off vary from province to province. For specifics, please visit the website of your provincial Ministry of Labour.

**Q. What are my rights if I am temporarily laid off?**

At common law, an employer does not have the right to stop paying an employee's wages. Generally, if the employer no longer needs your services, it is required to provide you with notice and severance pay.

By accepting Avaya's offer, you would be agreeing to the term that permits the company to lay you off in accordance with the applicable employment standards legislation.

An employee who is temporarily laid off is eligible to apply for EI benefits and can accept work elsewhere while waiting to be recalled.

**Q. Would a temporary lay-off give rise to a claim against Nortel?**

If the lay-off occurred during the reasonable notice period following your termination from Nortel, you would have a claim against Nortel for the loss of wages during the weeks you were laid off during the notice period. This loss would be reduced by any income you earned from another employer or as EI benefits.

**Q. What happens if Avaya terminates my employment after the transfer?**

The standard offer states that Avaya can terminate your employment without cause by providing notice or pay of notice and any other payments including severance to which you are entitled under the applicable employment standards legislation. Information about the statutory notice and severance pay requirements across the country are available on provincial government websites. In Ontario, the maximum notice period is eight weeks. Severance pay under the Ontario legislation is available to employees who have at least five years service with an employer with a payroll of \$2.5 million in Ontario, with a cap of 26 weeks (for employees with 26 or more years of service).

If your employment were terminated without cause within the period of reasonable notice following your termination from Nortel, you would have a claim against Nortel for the difference between your common law entitlements and the statutory notice and severance pay you received from Avaya.

## **NORTEL PENSION ISSUES**

**Q. If I become an employee of Avaya do I have to wait until my employment with Avaya ends to take my Nortel pension?**

The law is inconsistent from province to province with respect to the treatment of a private pension plan following the sale or partial sale of an employer's business. The answer to this question will, therefore, depend on the province in which you work or, if you work from home, the province in which is located the Nortel office from which you are paid.

Pursuant to Section 80 of the Ontario *Pension Benefits Act*, and comparable provisions in the pension benefits legislation of Saskatchewan, Manitoba, New Brunswick, Nova Scotia and Newfoundland and Labrador, the employment of employees affected by an asset sale is deemed not to be terminated, for pension purposes, by reason of the transaction. If the successor employer has a pension plan and you become a member of the plan, your employment with Nortel will be deemed to continue for pension purposes, and you will not be able to start receiving pension benefits from Nortel without terminating or retiring from employment with Avaya.

There is no equivalent prohibition in the pension benefits legislation of British Columbia, Alberta and Quebec. If you work for Nortel in one of those provinces, your rights under the Nortel pension plan will be governed by the rights of plan members on termination of their pension plan, in accordance with the terms of the plan.

**Q. I live in one province but work in another. How do I know which province's pension legislation applies to my circumstances?**

Your place of employment under all provincial pension benefits legislation is determined, firstly, by the province in which you report for work. If you are not required to report for work for any reason (i.e. you work from home) then you are considered to be employed in the province in which is located the Nortel office from which you receive your remuneration.

**Q. Under what circumstances can I withdraw the commuted value of my pension?**

Your right to withdraw the commuted value of your pension will also depend on the province in which you are working or, if you work from home, the province in which is located the Nortel office from which you are paid.

The Nortel pension plan states that a Part I employee who is terminated and who is not eligible for retirement under the Pension Plan has the right to elect to withdraw the commuted value, rather than waiting to take a deferred pension.

A Part II employee who is terminated can withdraw the commuted value, whether or not the employee is pension eligible.

However, because Avaya will have a pension plan, s. 80 of the *Pension Benefits Act* and comparable provisions in the pension benefits legislation of Saskatchewan, Manitoba, New Brunswick, Nova Scotia and Newfoundland and Labrador would deem your employment with Nortel to not have been terminated, so you would not be eligible to choose the commuted value option until your employment with Avaya had ended.

The pension benefits legislation in British Columbia, Alberta and Quebec does not contain similar restrictions. If you accept employment with a successor of Nortel in one of those provinces, you will be able to transfer the commuted value of your Nortel pension, in accordance with the terms of the plan.

**Q. I am concerned that the Defined Benefit plan might be wound up and the value of the plan and benefits to retirees be much less than it currently is. Would it be financially prudent to opt for early retirement now and take the commuted value of my pension benefits while some funds are still available, rather than accept employment with Avaya?**

We recommend that you consult with a financial advisor to assess your own particular situation.

**Q. Will retiree healthcare benefits and life insurance under the Traditional Part I plan be available to me if I defer my pension or are they available only if I retire directly from Nortel?**

These benefits are available to you only if you retire directly.

## **CCAA CLAIMS PROCESS AND POTENTIAL CLAIMS**

**Q. When will employees be able to file claims?**

The claims process for employee claims has still not been established. Once the process has been approved, employees will be able to submit a proof of claim seeking compensation for any employment-related losses they have suffered. Nelligan O'Brien Payne and Shibley Righton will be working with Nortel and the Monitor to negotiate a separate streamlined claims process for Continuing Employee claims. Once the claims process is established, we will send out an email to all continuing Nortel employees who are on our confidential email communications list advising them of the process and provide updates via our website.

**Q. What kinds of claims can I make in the CCAA proceedings if I either accept or refuse an offer from Ciena?**

We will assist you in identifying and valuing your claims. We expect that they may include:

- loss of bonus income
- loss of future TRA
- pension loss
- retiree benefits
- future loss of patent awards
- possible reduction in salary and benefits with Avaya during the reasonable notice period (to the extent the terms and conditions offered by Avaya are not comparable to your Nortel terms and conditions of employment and that results in a loss, you would have a claim against Nortel for the difference)

- entitlement under the *Employment Standards Act* to termination and severance pay should you turn down an offer of comparable employment with Avaya
- other claims to be identified

**Q. When will you need more information from me?**

If you have a question about your potential CCAA claim you may contact us now at [NCCE@nelligan.ca](mailto:NCCE@nelligan.ca). We are developing a questionnaire that we will ask you to complete to assist in gathering information in an organized fashion.