

ONTARIO PROVIDES EMPLOYERS WITH TEMPORARY RELIEF FROM COVID-RELATED TERMINATION RISKS

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On May 29, 2020, the Ontario government introduced a new regulation (*Infectious Disease Emergency Leave O. Reg. 228/20*) (the “**Regulation**”) that provides employers with temporary relief from certain termination provisions in the *Employment Standards Act, 2000* (“**ESA**”).

The new measures, summarized below, provide enhanced protection from COVID-related termination risks for employers whose operations have been impacted by the recent pandemic. The Regulation limits the risk of a temporary layoff turning into a permanent dismissal or being deemed a constructive dismissal under the ESA for the duration of the “COVID-19” period. However, the new measures do not apply to unionized employees. [1]

Definition of “COVID-19 Period”

The COVID-19 Period is defined as the period beginning on March 1, 2020 and ending on the date that is six weeks after the day that the [emergency](#) is terminated. Importantly, having six-weeks after the declared emergency ends will provide employers with an opportunity to assess long-term needs coming out of the pandemic.

Constructive Dismissal

The Regulation provides that, for the purposes of the ESA, the following does not constitute constructive dismissal if it occurred during the COVID-19 Period:

- a. A temporary reduction or elimination of an employee’s hours of work by the employer for reasons related to the designated infectious disease.
- b. A temporary reduction in an employee’s wages by the employer for reasons related to the designated infectious disease.

However, the above does not apply if the employer constructively dismissed the employee and the employee resigned from his/her employment in response before May 29, 2020.

Suspension of Temporary Layoff Period

The Regulation modifies the effect of the ESA's temporary layoff provisions by providing that an employee whose hours have been partially or entirely reduced (i.e. placed on temporary layoff) is exempt from the ESA's termination and severance provisions. Specifically, section 6 of the Regulation states:

“An employee whose hours of work are temporarily reduced or eliminated by the employer, or whose wages are temporarily reduced by the employer, for reasons related to the designated infectious disease during the COVID-19 period is exempt from the application of [the termination and severance sections] of the Act for the purposes of determining whether the employee has been laid off, and the employee shall not be considered to be laid off under those sections, other than [where there is a permanent discontinuance of all the employer's business at an establishment].

The Regulation's effect is that the time limits on temporary layoffs – the times at which temporary layoffs become terminations – are suspended for the COVID-19 Period, with all employees laid off because of COVID-19 deemed to be on a leave of absence, instead. This means that time spent on layoff during the COVID-19 Period will not count towards the period of time that an employee can be on temporary layoff. So, if an employee was laid off for 12 weeks during the COVID-19 period, they are deemed to be on leave instead. If the employer has to keep that employee on layoff at the end of the COVID-19 Period, the “clock” resets to zero. Otherwise, a layoff lasting longer than the periods below would be deemed to be a “termination” which triggers the employer's obligations to provide termination pay (and severance pay if applicable):

- a. A layoff of not more than 13 weeks in any period of 20 consecutive weeks; or
- b. A layoff of more than 13 weeks in any period of 20 consecutive weeks, if the layoff is less than 35 weeks in any period of 52 consecutive weeks and if certain conditions are met.

Complaint Deemed not to have been Filed

The Regulation provides that a complaint made by an employee to the Ministry of Labour regarding the temporary reduction or elimination of the hours or work and/or wages, will be deemed not to have been filed.

This applies only if the reduction or elimination of hours of work and/or wages occurred during the COVID-19 Period for reasons related COVID-19.

Amendment to Infectious Disease Emergency Leave

As previously reported [here](#), in response to the COVID-19 crisis, the Ontario government introduced a new job-protected unpaid leave called the infectious disease emergency leave.

The Regulation prescribes^[2] a new reason for entitlement to the infectious disease emergency leave by providing that an employee is deemed to be on the leave if their hours of work have been temporarily reduced

or eliminated by their employer due to COVID-19 during the COVID-19 Period (the “**Prescribed Reasons**”). This new provision is deemed to have started on March 1, 2020 and applies during the COVID-19 Period.

Benefits

Under the ESA, an employee has the right to continue to participate in each type of benefits plan during a leave of absence unless they choose not to do so in writing. If an employee on an infectious disease emergency leave for the prescribed reasons stopped participating in any benefit plan before May 29, 2020, they are exempt from this right for the duration of the COVID-19 Period. Similarly, employers who stopped making employer contributions for any benefit plan before May 29, 2020 are exempt from the obligation to make contributions for the duration of the COVID-19 Period.

Key Takeways

The new measures introduced by the Regulation may provide relief for Ontario employers that have been forced to reduce employee hours or wages in response to the COVID-19 pandemic’s impact on their operations.

Employers whose layoffs were approaching the 13-week ESA threshold will now be able to continue with the status quo without worrying about triggering a number of terminations, including a possible mass termination.

However, while the Regulation provides that the temporary reduction of hours of work and wages are not constructive dismissal for the ESA purposes, it remains to be seen how the common law will ultimately react to the employer’s unilateral reduction in hours of work and wages. It remains possible that an Ontario court will find that a reduction in hours or wages, even if in response to the COVID-19 pandemic and permitted by the ESA, amounts to a constructive dismissal. What is positive for employers is that an employee will have to bring a claim in Court, rather than at the Ministry, if they want to make a constructive dismissal claim.

Employers should also remain aware of the risk that layoffs might trigger a mass termination if employees are not brought back after the COVID-19 Period expires. The ESA still provides that any termination caused by a layoff exceeding the permitted time limit is deemed to occur on the first date of the layoff. Employers should be aware of mass termination risks if they are unable to resume operations after the declared emergency ends.

Finally, employers should be aware that all employees whose hours of work have been temporarily reduced or eliminated are now deemed to have been placed on the infectious disease emergency leave. The infectious disease emergency leave is a job-protected leave under the ESA, and as such, the employees under this leave are generally entitled to the same right, including reinstatement to the same position if it still exists, or a comparable position, if it no longer exists, as employees who take pregnancy or parental leave, although benefits continuation is not required during the COVID-19 Period.

If you have any questions relating to the above, please do not hesitate to contact a member of the [Employment & Labour Relations Group](#).

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[1] Note that the Regulation does not apply to employees of federally-regulated entities, such as banks, airlines and telecommunication companies, even if those employees are working in Ontario.[ps2id id='1' target='']

[2] See ESA section 50 (1.1)(b)(vii)[ps2id id='2' target='']

a cautionary note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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