COVID-19: Government of Ontario's New Regulation Addresses Layoffs and Constructive Dismissals under the Employment Standards Act, 2000

June 1, 2020

Background

Over these past few weeks, there has been a great deal of concern related to the layoff provisions of the *Employment Standards Act, 2000* ("ESA"). As discussed in our previous newsletter, employers have the ability under the ESA to lay off employees for a maximum of 13 weeks in a consecutive 20-week period or, in certain circumstances, 35 weeks in a consecutive 52-week period. At the end of the applicable temporary layoff period, the employee's employment is deemed to have been terminated if they are not recalled to work. This then triggers an obligation on employers to provide ESA termination pay and in some cases severance pay.

We have heard from many of our clients that they are not able to take advantage of the longer 35-week layoff period. As a result, we wrote to the Ministry of Labour and to the Premier's Office in early May 2020 to alert them to the impending 13-week deadline that would impact businesses across the province if action was not taken. On Friday, such action was taken by the Ontario Government when it published ***O. Reg. 228/20*** under the ESA.

O. Reg. 228/20 fundamentally alters how constructive dismissals and temporary layoffs are treated under the ESA. Under *O. Reg. 228/20*, layoffs that have occurred during the COVID-19 pandemic will be deemed to be job protected leaves. In addition, the Regulation declares that reductions in wages and hours during the pandemic are not to be a constructive dismissal in certain circumstances. Please note that the Regulation does not change entitlements for unionized employees.

Emergency Leave Instead of Deemed Terminations

As we wrote about previously, the Ontario Government passed a new "Emergency Leave: Declared Emergencies and Infectious Disease Emergencies" on March 19, 2020, to address employee absences from the workplace due to COVID-19. We had posited at that time that most employees would be able to take advantage of the new Emergency Leave rather than being placed on a layoff. *O. Reg. 228/20* does just this, by deeming an employee to be on the new Emergency Leave when:

"*The employee's hours of work are temporarily reduced or eliminated by the employer for reasons related to the designated infectious disease.*"

There are special rules that apply to an employee who is deemed to be on the new Emergency Leave, including:

- The entitlement to the Emergency Leave is deemed to have started on March 1, 2020, when it is due to the temporary reduction or elimination of an employee's hours of work (i.e. where the employee has been laid off).
- The Emergency Leave will apply during the "COVID-19 Period" which starts March 1, 2020, and will end six weeks after the emergency declared under the *Emergency Management and Civil Protection Act* is terminated or disallowed.
- The employee does not need to advise the employer that they are on the Emergency Leave; they are automatically considered to be on the new Emergency Leave if the above noted conditions are met and there are no further

exemptions that apply.

- If an employee stopped participating in a benefit plan as of May 29, 2020, then the employee is not entitled to continue participating in such benefit plans "during the COVID-19 period with respect to that benefit plan".
- An employer is not required to contribute to any pension plans, life insurance plans, accidental death plans, extended health plans, dental plans or any other prescribed types of benefit plans for an employee who is "deemed to be on leave" if the employer was not "as of May 29, 2020, making the employer's contributions to any benefit plan" (as described in the ESA) that is related to the employee's employment.
- Any payments or benefits that the employee was receiving from the employer during the period starting on March 1, 2020, and ending on May 29, 2020, are not affected.

When Employee Not on Leave

Not all employees will automatically be placed on the Emergency Leave. The Regulation does not convert terminations that were completed after March 1, 2020, into leaves, and temporary layoffs that exceeded the maximum number of weeks permitted by the ESA prior to May 29, 2020, are not impacted by this legislation. More specifically:

- Terminations on or after **March 1, 2020** – Employees who had their employment terminated on or after March 1, 2020, will not be considered to be on the Emergency Leave if:
  - the employer dismissed the employee or refused or was unable to continue employing them;
  - the employer laid the employee off because of a permanent discontinuance of all of the employer's business at an establishment; or
  - the employer gave the employee notice of termination in accordance with the ESA, the employee gave the employer written notice at least two weeks before resigning and the employee's notice of resignation is to take effect during the statutory notice period
- Terminations before **May 29, 2020** - Employees who had their employment terminated before May 29, 2020, will not be considered to be on the Emergency Leave where:
  - the employer constructively dismissed the employee and the employee resigned from his or her employment in response to that within a reasonable period;
  - the employer laid the employee off for a period longer than the period of a temporary lay-off; or
  - the employer lays the employee off for 35 weeks or more in any period of 52 consecutive weeks.

Finally, an employee who has already been given written notice of the termination of their employment shall not be considered to be on the Emergency Leave, unless the employer and employee agree to withdraw the notice of termination.

Reduction in Employee's Hours, Wages is Not a Layoff

The new Regulation clarifies that the temporary reduction or elimination of an employee's hours of work, or a temporary reduction in an employee's wages, for reasons related to COVID-19 during the "COVID-19 Period," shall not be considered a lay off under Sections 56 and 63 of the ESA. This does not apply where:

- the employee's employment was terminated due to layoff before May 29, 2020;
- the employer laid the employee off for 35 weeks or more in any period of 52 consecutive weeks before May 29, 2020; or
- the employee was laid off because of a permanent discontinuance of all of the employer's business at an establishment.

Reduction in Employee's Hours, Wages is Not a Constructive Dismissal

The new Regulation has clarified that the following does not constitute constructive dismissal if it occurred during the "COVID-19 Period":

- a temporary reduction or elimination of an employee's hours of work by the employer for reasons related to COVID-19; or
- a temporary reduction in an employee's wages by the employer for reasons related to COVID-19.

Note that if prior to May 29, 2020, "the employer constructively dismissed the employee and the employee resigned from his or her employment in response to that within a reasonable period," then that will continue to be treated as a constructive dismissal pursuant to the ESA.

Conclusion

This new piece of legislation converts certain layoffs into leaves, and clarifies that certain wage reductions are not constructive dismissals, in order to reduce an employer's liability for ESA termination pay or severance pay due to COVID-19. However, there are other concerns that continue to be present:

- Employees who are placed (or deemed to be placed) on the Emergency Leave will be entitled to protections associated with ESA leaves, such as reinstatement upon the expiry of the leave.
- Employees who are laid off after May 29, 2020, will automatically be placed on the leave and will be entitled to benefit continuation.
- Complaints that have already been filed by an employee with the Ministry of Labour may be permitted to continue in certain circumstances.
- Employers who have already given written notice of termination pursuant to the ESA may wish to reach an agreement with the employee to withdraw the notice.
- Where the contract of employment does not provide for the Employer's right to layoff an employee in accordance with the ESA, the employee may still be able to bring a claim for constructive dismissal in a civil action.

We will continue to monitor these areas and provide you with further updates as they become available. Please note that this bulletin is intended for informational purposes only and does not constitute legal advice or an opinion on any issue. We strongly recommend that you contact your Miller Canfield lawyer with your specific questions in regards to this Regulation so that those questions can be addressed properly with you.

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This information is based on the facts and guidance available at the time of publication, and may be subject to change.