

COVID-19: Government of Ontario Ends State of Emergency, Terminating Deemed Emergency Leaves

September 3, 2020

Background

As discussed in our previous **newsletter**, the Ontario Government passed the *O. Reg 228/20 - Emergency Leave: Declared Emergencies and Infectious Disease Emergencies* on March 19, 2020. This Regulation altered how layoffs and constructive dismissals were treated under the *Employment Standards Act, 2000* ("ESA") by, amongst other things, deeming an employee to be on an Emergency Leave when the employee was placed on a layoff or had their hours of work and/or wages temporarily reduced or eliminated by the employer due to COVID-19.

Bill 195 – Reopening Ontario (A Flexible Response to COVID-19) Act, 2020

With the Ontario Government's passing of *Bill 195 – Reopening Ontario (A Flexible Response to COVID-19) Act, 2020* on July 21, 2020, which came into force on July 24, 2020, the protections afforded to employers under *O. Reg 228/20* will be coming to an end effective September 4, 2020. This is simply because Bill 195 terminates the "COVID-19 declared emergency" and revokes *Ontario Regulation 50/20 (Declaration of Emergency)*.

Impact on your Business

For employers who have employees still on layoff/deemed emergency, they will again have to be mindful of the time limits for a maximum layoff period as well as the risks of a constructive dismissal claim when reducing an employee's hours and/or wages.

With respect to layoffs in particular, the Ministry of Labour has previously provided the following guidance to those employers who continue to be in need of laying off their employees:

If at the end of the deemed leave your employees continue to meet the definition of temporary lay-off in the ESA, your 13-week in 20-week layoff period will continue to run. Any weeks the employees were on the deemed leave would not count for the purposes of determining whether the employee has been laid off. You must recall the employee(s) before the temporary lay-off reaches 13 weeks in a 20-week period, or the affected employees will be deemed terminated under s. 56(5), and you will be required to pay termination pay (and severance pay if applicable) based on the employee's individual length of employment.

For those employers who continued an employee's benefits or otherwise meet the requirements for an extended layoff period, which were discussed in our newsletter **here**, then the longer layoff period of 35 weeks in a 52 consecutive week period may apply.

In addition to layoffs in general, certain employee entitlements have been tied to the declaration of the emergency leave including entitlement to the Declared Emergency Leave and (non-deemed) Infectious Emergency Leaves. For those employees who were on such a leave and remain unable to work, Employers should consider the individual circumstances of each employee so as to remain compliant with the ESA and the *Human Rights Code*.

Continued

Conclusions

The impact of the termination of the declared emergency leave may have a significant impact on those employers who continue to operate at less than full capacity due to COVID-19. Employers will want to review their current operations to ensure compliance with the ESA as the usual ESA rules will be re-engaged effective September 4, 2020. That being said, there may be strategies available that can be implemented to remain compliant with the ESA and minimize liabilities.

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.