

New employment regulations offer relief to employers

June 3, 2020

On May 29, 2020, the Ontario Government released a new regulation to the Ontario *Employment Standards Act, 2000* (**the ESA**): Infectious Disease Emergency Leave ([Reg. 228/20](#)) (**the New ESA Regulations**). The New ESA Regulations offer welcomed relief for employers who have placed non-unionized employees on temporary lay-off, or reduced hours or wages, as a result of COVID-19.

The New ESA Regulations retroactively apply to the **COVID-19 Period**, which is defined as the period beginning March 1, 2020 and ending six weeks after the day that Ontario's declared emergency leave is terminated or disallowed. A high-level summary of the New ESA Regulations and its impacts are set out below.

Note that the New ESA Regulations apply to non-union employees. Unionized employees will be subject to the usual ESA provisions. Also note that the below only pertains to the ESA. It remains to be seen if courts and arbitrators would take a similar approach at common law.

1. Temporary layoffs that occur during COVID-19 Period will be deemed an ESA leave

Impact: Employees laid off after March 1, 2020 due to COVID-19 will be on leave and not layoff, and so not subject to deemed termination (and the resulting termination/severance pay entitlements) during the COVID-19 period.

Generally:

- An employer can only place an employee on temporary layoff for up to 13 weeks in any 20 week period; or if certain conditions have been met to extend the layoff period, up to 35 weeks in a 52 week period.
- If any employee exceeds the above maximum layoff periods, the employee is deemed to be terminated under the ESA and so entitled to termination pay and any applicable severance pay.

Under the New ESA Regulations and subject to limited exceptions (below):

- Employees who were (or are) placed on temporary layoff due to COVID-19 and during the COVID-19 Period (for example, due to an essential services declaration, lack of work, workplace safety concerns etc.) are now considered to be on Infectious Disease Leave and not temporary layoff.
- This leave is considered to have commenced the later of March 1, 2020 or the date the employee was actually placed on layoff.
- Because these employees are deemed to be on leave and not layoff, weeks off work do not count towards the above maximum layoff periods. Hence, these employees cannot be deemed to have been terminated under the ESA during the COVID-19 Period.

The limited exceptions referenced above include where:

- Any time after March 1, 2020, the employer takes steps to terminate the employee's employment (for example, by actual termination, notice of termination, or closure of the business).

- However, the New ESA Regulations provides that an employer and employee can mutually agree to withdraw a written notice of termination given after March 1, 2020.
- Before May 29, 2020, an employee's employment had already deemed to have been terminated under the ESA as a result of an earlier layoff, or, the employee was constructively dismissed and resigned within a reasonable time.

2. Reduction in hours or wages is not a temporary layoff or constructive dismissal

Impact: Employees subject to a reduction in hours or wages after March 1, 2020 due to COVID-19 (a) will be on leave and not layoff, and (b) cannot allege the reduction results in constructive dismissal. Therefore, these employees are not subject to deemed or actual termination (and the resulting termination/severance pay entitlements) during the COVID-19 Period.

Generally:

- A temporary layoff not only occurs when an employee is off work entirely, but also in any week that the employee earns less than half of what they would ordinarily earn. These weeks therefore count towards the above maximum layoff periods and could result in a deemed termination under the ESA.
- A constructive dismissal can occur under the ESA when an employer makes a significant change to a key term of employment (like a reduction in wages or hours). The result is that the employment relationship is terminated, and the employee is entitled to termination pay/any severance pay under the ESA.

Under the New ESA Regulations and subject to limited exceptions (below):

- Employees who experience a loss of hours or wages due to COVID-19 and during the COVID-19 Period are now considered to be on Infectious Disease Leave and not temporary layoff. This leave is considered to have commenced the later of March 1, 2020 or the date the employee was actually placed on layoff.
 - Because these employees are on leave and not layoff, weeks of reduced hours/wages do not count towards the above maximum layoff periods. Hence, these employees cannot be deemed to have been terminated under the ESA during the COVID-19 Period.
- A temporary reduction in hours of work or wages due to COVID-19 will not result in constructive dismissal under the ESA.

The limited exceptions referenced above includes where the employee was constructively dismissed before May 29, 2020 and had resigned within a reasonable time.

3. Employees on emergency leave are entitled to most ESA leave entitlements

Impact: The Infectious Disease Leave is job-protected, meaning employees are entitled to be returned to the same or comparable role at the end of the leave period (and are entitled to ESA termination pay/any severance pay if this is not possible). Employees may also be entitled to benefits during the leave period.

Generally, ESA leaves:

- Are unpaid (although nothing precludes an employer from providing payments during the leave period).
- Are job-protected (and so employers are expected to reinstate employees, to the same or comparable role, when the leave ends).
- Entitle an employee to continue to participate in group benefit plans while on leave.

Under the New ESA Regulations:

- The Infectious Disease Leave is unpaid (but employer can voluntarily elect to provide paid leave).
- The Infectious Disease Leave is job-protected (so, if the employer cannot reinstate the employee at the end of the COVID-19 Period, the employment relationship can be treated as terminated and the employee is entitled to ESA termination pay/any severance pay).

- Employers' requirement to provide benefits during the Infectious Disease Leave period is modified:
 - If an employee stopped participating in a benefit plan on or before May 29, 2020, the employee does not have a right to continue participating in the benefit plan during the COVID-19 Period.
 - If an employer had stopped its contributions to a benefit plan on or before May 29, 2020, the employer is not required to make contributions to that benefit plan during the COVID-19 Period.
 - Otherwise, benefits must be continued as usual.

As a result of the above and other key changes that the New ESA Regulations have introduced, employers will likely wish to reconsider their existing approach to COVID-19-related layoffs. In addition, employers will need to carefully advise impacted employees of these changes – including the fact that employees laid off after March 1, 2020 are now deemed to be on Infectious Disease Leave.

Employers should also be prepared to demonstrate that employees are on leave for reasons related to COVID-19 (as otherwise, the New ESA Regulations would not apply). Specifically, employers will need to continue to retain records to rebut any employee allegations that their leave (or reduction in hours or wages) is not due to COVID-19.

Finally, employers need to start strategizing the above employee reinstatement obligations that come with job-protected ESA leaves, and prepare for employees' eventual return to work (or alternative, termination of the employment relationship and resulting obligations).

Our Employment & Labour team is closely following the New ESA Regulations and the resulting opportunity and risk to employers. We encourage you to reach out to a member of our team to discuss how these important changes may impact your workplace.

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