BEARDWINTER LLP

Employment Law Group

Temporary Lay-Off Update: Amendments to the Employment Standards Act, 2000

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As a result of the ongoing COVID-19 public health emergency, many employers were forced by economic circumstances to utilize the temporary lay-off provisions contained in the *Employment Standards Act, 2000* (the "**ESA**"). As we are now approaching 3 months from the start of the COVID-19 crisis, an important date was looming for both employers and their employees who founds themselves on temporary lay-off.

While there was always an argument that a lay-off of any length could be considered a constructive dismissal under common law principals if the employee did not sign a written agreement permitting a temporary lay-off, a full discussion of that issue is beyond the scope of this article. In any event, given the current circumstances, many employers had no choice but to take that risk and rely on the temporary lay-off provisions of the ESA.

Section 56(1)(c) of the ESA essentially deems an employer to have terminated the employment of an employee if the employer lays the employee off for a period which is longer than a temporary lay-off. This is critical, as a lay-off longer than permitted by the ESA automatically triggers pay in lieu of notice and, if applicable, severance payments under the ESA.

A temporary lay-off is first defined as a lay-off of <u>not more than 13 weeks</u> in any period of 20 consecutive weeks. However, the ESA provides for the possibility of a longer temporary lay-off of <u>up to 35 weeks</u> in any period of 52 consecutive weeks if one of the following applies:

i. the employee continues to receive substantial payments from the employer;

ii. the employer continues to make payments for the benefit of the employee under a legitimate retirement or pension plan or a legitimate group or employee insurance plan;

iii. the employee receives supplementary unemployment benefits;

iv. the employee is employed elsewhere during the lay-off and would be entitled to receive supplementary unemployment benefits if that were not so;

v. the employer recalls the employee within the time approved by the Director; or

vi. in the case of an employee who is not represented by a trade union, the employer recalls the employee within the time set out in an agreement between the employer and the employee.

While many employees in Ontario may be covered by one of the above criteria, most commonly the continuation of benefits for employees on temporary lay-off, the 13 week recall deadline was quickly approaching for many others.

The 13 week deadline was creating significant concern and uncertainty for both employers and employees. As we all know, some businesses are just starting the recovery process and others still remain closed and may be weeks, or even months, away from being able to recall employees from temporary lay-off.

For many of those employers, the prospect of a "deemed termination", and the pay in lieu of notice and severance costs that go along with that, could have resulted in bankruptcy. However, the Provincial government has now stepped in and passed *Regulation 228/20: Infectious Disease Emergency Leave* in order to amend certain provisions of the ESA. The amendments pursuant to the new regulation are retroactive to March 1, 2020 and remain in place until 6 weeks following the end of the declared state of emergency in Ontario (which was recently extended to June 30, 2020 and may be extended again).

The new regulation effectively suspends the temporary lay-off provisions of the ESA for many non-unionized employees and deems employees who were placed on temporary lay-off on or after March 1, 2020 to be on an infectious disease emergency leave rather than a lay-off.

As a result of this announcement, temporary lay-offs (which are now considered infectious disease emergency leaves) can now continue for longer than 13 weeks even if no benefits (or other payments described above) are provided by the employer or otherwise received by the employee, although this does not permit employers who were already making benefit contributions prior to May 29, 2020 to cease doing so.

The new regulation also provides that a reduction or elimination of an employee's hours of work or wages during the COVID-19 period does not constitute a constructive dismissal for the purposes of the ESA. However, as mentioned above, a court may still consider such reductions to amount to constructive dismissal under common law principles and only time will tell how courts handle such cases in light of the pandemic.

While this announcement may not be ideal for some employees, they will still be able to collect CERB payments while on an infectious disease emergency leave and the amendments will hopefully help preserve jobs for them to return to in the near future.

For more information, please contact:
David Bleiwas at 416-306-1813 or dbleiwas@beardwinter.com.

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