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Changes to Layoffs and Constructive Dismissals During COVID -19

Late Friday afternoon, the government of Ontario enacted Regulation 228/20 (the "**Regulation**"). The Regulation applies only to non-unionized employees and, among other things, modifies the layoff and constructive dismissal sections of the *Employment Standards Act, 2000* ("**ESA**"). It will have far-reaching effects for employers and employees during the coronavirus pandemic.

What has changed?

As we reported earlier, on March 19, 2020, the government amended the ESA to create an "infectious disease emergency leave". This leave applies to employees who are required to stop working because of various reasons related to COVID-19, including quarantine or family care responsibilities. The Regulation extends the infectious disease emergency leave to employees whose hours of work are temporarily reduced or eliminated for reasons related to COVID-19.

Further, where an employee's hours or wages are temporarily reduced or eliminated because of COVID-19, their employment is not terminated or severed, and they are not constructively dismissed under the ESA.

All of these changes are temporary. They apply only during the "COVID-19 period", which the Regulation defines as being "the period beginning on March 1, 2020 and ending on the date that is six weeks after" the end of Ontario's state of emergency.

What does this mean for employers?

Employees whose hours or wages are temporarily reduced or eliminated because of COVID-19 during the "COVID-19 period" are deemed to be on a statutory leave of absence. In other words, they are not laid off or constructively dismissed under the ESA. As a result, those employees cannot claim entitlement to termination or severance pay under the ESA.

However, these employees will be entitled to benefit continuance during the leave of absence. Moreover, they are entitled to job protection, meaning they must be reinstated to their former position when they return to work, or a comparable alternative position if their former position is eliminated.

The Regulation also relieves employers from related complaints by employees before the Ministry of Labour. Complaints alleging termination or severance of employment because of a temporary reduction in hours or wages caused by COVID-19 are deemed not to have been filed.

What hasn't changed?

Employers should note that the Regulation does not apply where a business discontinuance is permanent rather than temporary. The changes also do not affect an employee's entitlements if their employment ended before May 29, whether because of constructive dismissal, or with notice or payment in lieu thereof. In each of these instances, employees may still be entitled to termination and severance pay under the ESA.

The Regulation also does not affect the common law. As we discussed previously, where an employee is placed on a layoff, regardless of the ESA, the common law may entitle them to reasonable notice of termination. The Regulation does not expressly abrogate this common law right. And in fact, the ESA provides explicitly that, "no civil remedy of an employee against his or her employer is affected by this Act". This most likely means that the Regulation does not affect an employee's claim for constructive dismissal under the common law.

Going Forward

The Regulation passed with virtually no notice or guidance to the legal profession. As a result, its full impact is still unclear. We will monitor the Regulation in the coming weeks and report on any significant developments.

This publication is intended only to provide general information. It should not be relied on as legal advice. Employers facing specific circumstances should consult their legal counsel for specific advice. For specific legal advice, please contact Leslie Dizgun, Allyson Fischer, Justin Anisman, William McLennan, or Alyssa Jagt.