New Regulation Prevents Deemed Termination and Constructive Dismissal Claims Related to COVID-19 Under the Employment Standards Act, 2000

By: Landon Young and Amanda Boyce

The Ontario government introduced a new regulation on May 29, 2020 under the **Employment Standards Act, 2000** (the "ESA" or the "Act") that changes how the layoff and constructive dismissal provisions of the ESA will apply to employees who have been laid off or had their hours or wages reduced as a result of the COVID-19 pandemic.

Many employers have had to layoff employees or reduce their employees' hours or wages as a result of the economic impact of COVID-19. There has been some uncertainty as to what termination entitlements employees may have as a result under the ESA.

Ontario Regulation 228/20 (the "Regulation") addresses some of this uncertainty and should prevent a flood of employees seeking payouts of termination and severance pay as a result of layoffs or pay reductions. Employers should note that the Regulation does not prevent employees from seeking damages under the common law. Further, most of the provisions of the Regulation do not apply to employees who are represented by trade unions. The collective agreements of such employees address how layoffs apply.

The Regulation applies to "designated infectious diseases" which include all diseases caused by a novel coronavirus, such as Severe Acute Respiratory Syndrome and Middle East Respiratory Syndrome. However, the Regulation is only currently relevant to COVID-19 during the defined "COVID-19 period".

The Regulation applies for the "COVID-19 period", which starts retroactively on March 1, 2020, and will run until six weeks after the emergency order declared by the province on March 17, 2020 is terminated or disallowed.

Legal Background

We previously wrote about Infectious Disease Emergency Leave here. This new leave of absence was added to the ESA's Emergency Leave provisions on March 19, 2020. This gave employees the right to take Emergency Leave as a result of the COVID-19 pandemic. However, it did not require employees to take such leave and employees laid off as a result of the pandemic were not automatically considered to be on such leave.

Some employers have been under the misapprehension that all employees on layoff as a result of the COVID-19 pandemic were on emergency leave, so that the ESA provisions relating to layoffs did not apply.

The ESA deems employees to be terminated if they are on temporary layoff for 13 weeks in any period of 20 consecutive weeks. Where certain conditions are met, for instance where the employer continues an employee's benefits or provides supplementary unemployment benefits, a layoff may last a maximum of 35 weeks in any period of 52 consecutive weeks.

We will soon be reaching 13 weeks from when the emergency order introduced by the Ontario government on March 17 ordered many industries and employers to close. Employers have been left to wonder what will happen when employee reach 13 weeks of layoff.

Where an employer "constructively dismisses" an employee and the employee resigns within a reasonable period, the employee is also deemed to be terminated and entitled to pay in lieu of notice of termination and, if applicable, severance pay.

The ESA does not define when exactly a constructive dismissal is deemed to have occurred. Court decisions that consider when an employee has been constructively dismissed are very fact specific and do not provide concrete guidance as to when exactly an employee has been constructively dismissed as a result of a reduction of hours or pay. Many employers have been left guessing as to whether they could be considered to have constructively dismissed their employees under the ESA.

While many employees are working with employers to find solutions and keep their jobs in the long run, others may choose to take legal action and claim to have been constructively dismissed.

There had been no indication from the province prior to the introduction of the Regulation on May 29, 2020 as to whether any exceptions would be made to help employers facing this additional legal uncertainty.

Employees Deemed to be on Leave

Employees whose hours of work have been temporarily reduced or eliminated for a reason related to COVID-19 are now deemed to be on infectious disease emergency leave during the COVID-19 period even if they did not apply for such leave.

As a result, the job protections of the ESA's Emergency Leave provisions will now apply to employees who have been on layoff as a result of COVID-19 in addition to the protections previously announced by the government. This means employees will be entitled to job

reinstatement at the conclusion of the leave if the job still exists or to a comparable one if it does not. Employees are not entitled to reinstatement if the job is ended for reasons unrelated to the leave.

However, the Regulation has taken away the right of employees to benefits continuation that ordinarily applies during leaves under the ESA if the employer stopped making benefit contributions during the COVID-19 period prior to May 29, 2020.

This also means that employees who are not working because of COVID-19 are considered to be on leave, not on a layoff. Other sections of the Regulation also explicitly state that such employees are not on layoff.

When Employees are Deemed Not to be on Infectious Disease Emergency Leave

Employees will not be deemed to be on infectious disease emergency leave where the any of the following happened on or after March 1, 2020:

- the employer dismisses the employee or otherwise refuses or is unable to continue employing the employee;
- the employer lays the employee off because of a permanent discontinuance of all of the employer's business at an establishment; or
- the employer gives the employee notice of termination, and the employee gives 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.

Further, employees will not be deemed to be on Infectious Disease Emergency Leave where any of the following happened before May 29, 2020:

- the employer constructively dismisses the employee and the employee resigns from his or her employment in response to that within a reasonable period;
- the employer lays the employee off for a period longer than the period of a temporary lay-off;
- the employer lays the employee off for 35 weeks or more in any period of 52 consecutive weeks;

In situations where employers have already given notice of termination, the Regulation allows an employer and employee to agree in writing to withdraw the notice of termination, and the deemed leave provisions will instead apply to that employee.

Decrease or Elimination of Hours and Wages Are Not a Layoff or Constructive Dismissal

The Regulation states that "an employee whose hours of work are temporarily reduced or eliminated by the employer, or whose wages are temporarily reduced by the employer, for reasons related to the designated infectious disease during the COVID-19 period" is deemed not to have been laid off under the relevant sections of the ESA. The Regulation also states that employees in those circumstances are deemed not to have been constructively dismissed.

The Regulation does not place any limit on the amount by which an employee's wages or hours may be reduced. There is also no requirement in the language of the Regulation to suggest that any reduction in wages must be accompanied by a corresponding reduction in hours. Further, the wage or hour reduction need only be "for reasons related to the designated infectious disease". It does not say that COVID-19 must be the dominant or only reason, or the direct cause of the reduction. However, despite the broad language of the Regulation, it seems likely that it will be interpreted to prevent egregious abuse by employers.

If an employee has a regular work week, the Regulation uses the last such week before March 1, 2020 as the standard against which to determine whether their wages or hours have been reduced during the COVID-19 period. If an employee does not have a regular work week, the average number of hours they worked or regular wages they earned per work week in the period of 12 consecutive work weeks that preceded March 1, 2020 is used as the comparator. For employees who were not employed with an employer prior to March 1, 2020, the work week in which they earned the most regular wages or worked the greatest number of hours is used.

If an employee was on vacation, not able to work, not available for work, subject to a disciplinary suspension or was not provided with work because of a strike or lock-out for any part of the last work week before March 1, 2020, the comparator is the last regular work week for which such conditions did not apply. If the employee does not have a regular work week, any week with such conditions is excluded from the 12 week averaging period.

The Regulation does not apply to any constructive dismissal that occurred before May 29, 2020 if the employee resigned in response before that date. Accordingly, an employee who was constructively dismissed before this date and resigned within a reasonable period as a result is still entitled to pay in lieu of notice of termination and, if applicable, severance pay.

Complaints Deemed Not to have been Filed

Some employees may already have filed constructive dismissal complaints with the Ministry of Labour regarding reductions in wages and hours related to COVID-19. The Regulation deems those complaints not to have been filed, except in limited circumstances. The Regulation does not

have any impact on claims that have been filed with the courts or other bodies such as the Human Rights Tribunal of Ontario.

Where Business Permanently Closed

The Regulation also states that the layoff provisions do not apply where the employer lays the employee off because of a permanent discontinuance of all of the employer's business at an establishment. Where an employee is laid off because of such a permanent discontinuance, the ESA will deem employment to have been severed under s. 63(1)(d).

But What About the Common Law?

The Regulation only applies to the ESA and does not affect the rights of employees to bring constructive dismissal claims in the courts if they are entitled to reasonable notice under the common law. Section 8 of the ESA states that "no civil remedy of an employee against his or her employer is affected by this Act".

That being said, it could be argued that for employees covered by the Regulation, it would be incongruous for the courts to find that the very circumstances that constitute the protected leave of absence under the ESA can also constitute a constructive dismissal or termination at common law.

Employees who have contracts that validly limit their entitlements on termination to the provisions of the ESA, which are increasingly common, will be most affected by the Regulation as the only termination entitlements they have are those provided by the ESA.

Looking Ahead

This "pause" on deemed termination claims under the ESA is a welcome development for employers. How long it will last will only be known when the current emergency order in place ends. When that happens employers will need to be ready for the clock to start ticking again on layoffs converting to terminations of employment. Employers will also be faced with obligations to reinstate employees to work or face termination claims.

The government is no doubt hoping that by the time the economy fully re-opens employers will be able to bring most of their employees back to work and avoid a wave of mass terminations that could cripple employers. We can probably expect further amendments and regulations to the ESA

from the government if there is a second wave to the pandemic and the economy hits further bumps in the road.

We will continue to monitor these developments closely and to provide strategic assistance to employers as they navigate their way through these unprecedented economic and legal challenges.

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