COVID-19 Labour & Employment Alert #3

I hope you and your loved ones are well as we continue to navigate this pandemic.

The Ontario government is taking steps to reopen the economy under its *Framework for Reopening our Province*. Many non-union employers have laid off some or all of their workforce in accordance with the *Employment Standards Act, 2000* while recognizing the common law risks that generally go with doing so. Others have cut hours or pay to some or all of their staff. Many employers are considering layoffs or extending layoffs as the pandemic continues to ravage the economy notwithstanding the loosening of operational restrictions. Some employers are considering recalls to avoid a deemed termination under the ESA.

The government passed *Reg. 228/20 – Infectious Disease Emergency Leave* and provided some (albeit at times confusing) relief to employers who have temporarily laid off employees or reduced hours or wages as a result of COVID-19. The impact of this regulation, if any, on common law issues (such as whether a layoff in the context of COVID-19) is unclear.

This Alert will review *Reg. 228/20*. Keep safe and keep in touch.

Welcome News for Non-Union Employers

On Friday, May 29, 2020, the Ontario Government published *Reg. 228/20 – Infectious Disease Emergency Leave* and, in so doing, provided considerable relief to employers from the termination provisions in the *Employment Standards Act, 2000* ("ESA") in certain circumstances.

In fact, the Ontario government took a different approach from that taken by other provinces who simply extended the periods of temporary layoff under their employment standards legislation. The Ontario approach has created some confusion and unanswered questions some of which will be touched on below.

Although *Reg. 228/20* does not apply to unionized employees, the Ontario Federation of Labour ("OFL") has come out strongly against the regulation (*Ford government's new infectious disease emergency leave rules are an attack on Ontario's most vulnerable workers, says OFL*).

Regulation 228/20 - What's all the fuss about?

The Regulation is retroactive and applies during the *COVID-19 Period* which is defined as the period beginning on March 1, 2020 and ending on the date that is six weeks after the day that the emergency declared by Order in Council 518/2020 on March 17, 2020 is terminated or disallowed.

Although only 10 substantive sections, *Reg. 228/20* tries to accomplish a lot. Among the important elements are:

- An employee whose hours of work are *temporarily* reduced or eliminated or whose wages are *temporarily* reduced by the employer, *for reasons related to COVID-19* during the *COVID-19 Period* is not laid off but is deemed to be on an *unpaid infectious disease emergency leave* ("IDEL").

- A *temporary* reduction or elimination of an employee's hours of work by the employer for reasons related to COVID-19 will not be considered to be a constructive dismissal for purposes of the ESA; or

- A *temporary* reduction in an employee's wages by the employer for reasons related to COVID-19 will not be considered to be a constructive dismissal for purposes of the ESA.

The Regulation provides assistance in determining when and under what circumstances hours or wages are reduced. In terms of reduced hours:

1. If the employee has a regular work week, the employee's hours of work are considered to be reduced if the employee works fewer hours in the work week than they worked in the last regular work week before March 1, 2020.

2. If the employee does not have a regular work week, the employee's hours of work are considered to be reduced if the employee works fewer hours in the work week than the average number of hours they worked per work week in the period of 12 consecutive work weeks that preceded March 1, 2020.

3. If the employee was not employed by the employer during the entire work week that immediately preceded March 1, 2020, the employee's hours of work are considered to be reduced if the employee works fewer hours in the work week than they worked in the work week in which they worked the greatest number of hours.

An employee's wages are considered to be reduced as follows:

1. If the employee has a regular work week, the employee's wages are considered to be reduced if the employee earns less regular wages in the work week than they did in the last regular work week before March 1, 2020.

2. If the employee does not have a regular work week, the employee's wages are considered to be reduced if the employee earns less regular wages than the average amount of regular wages they earned per work week in the period of 12 consecutive work weeks that preceded March 1, 2020.

3. If the employee was not employed by the employer during the entire work week that immediately preceded March 1, 2020, the employee's wages are considered to be reduced if the employee earns less regular wages than they did in the work week in which they earned the most regular wages.

The effect of these provisions, where they apply, is to suspend any weeks of temporary layoff after March 1, 2020 when determining whether the employee is deemed terminated under the ESA. The layoff is converted into an IDEL. For a brief discussion of temporary layoffs, see *this early post*). In addition, temporary hours or wage reductions for reasons related to COVID-19 will not be considered a termination for purposes of the ESA.

It should be noted that the ESA provides that, in certain circumstances, an employee may be deemed to be on a lay-off for purposes of the ESA even though they are still doing some work. As a general comment, if the employee earns less that 50 percent of their average wages per week, they would be considered on layoff.

Importantly, *Reg. 228/20* does not apply and the employee will not be deemed to be on an IDEL where, on or after March 1, 2020:

- the employer dismisses the employee or otherwise refuses or is unable to continue employing him or her;

- 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 under the ESA, in response, 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.

Also, *Reg. 228/20* does not apply and the employee will not be deemed to be on an IDLE where, on or 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; or

- the employer lays the employee off for a period longer than the period of a temporary lay-off under the ESA (i.e. the employee is deemed terminated).

An employee who has been given written notice of termination under the ESA will not be considered to be on IDEL unless the employer and employee agree to withdraw the notice of termination.

What does being on an IDEL mean under the ESA?

The employer must be mindful of the fact that, now, employees who had been temporarily laid off as a result of COVID-19 during the COVID-19 Period are on a *job protected leave* of absence and are entitled to all the usual rights and protections that go along with being on such a leave including being reinstated to "the position the employee most recently held with the employer, if it still exists, or to a comparable position, if it does not" and no-reprisal.

An employee on a leave under the ESA also has the right to continue to participate in certain benefit plans including:

- Pension plans;

- Life insurance plans;

- Accidental death plans;

- Extended health plans;

- Dental plans;

- Any other plans that are prescribed by regulation.

Reg 228/20 however, moderates this in some cases by providing that where an employee has been laid off as of May 29, 2020 and benefits *were not continued*, that:

- the employee does not have a right to continue participating in the benefit plan during the COVID-19 Period.

- the employer is not required to make contributions to the benefit plan during the COVID-19 Period.

However, if the employer continued benefits for the laid-off employee, perhaps to take advantage of the longer temporary layoff period under the ESA before there is a deemed termination, then that employer may be required to continue maintain those benefits and contributions. This appears to be one of the issues not dealt with under the regulation.

How does this impact the common law?

As discussed in *COVID-19 – New Normal at Least for Awhile* many employers believe that because the *Employment Standards Act, 2000* gives them a right to temporarily lay off employees, this provides an unqualified right to lay people off for all purposes, including the common law.

Notwithstanding the temporary layoff provisions in the *Employment Standards Act, 2000*, at common law, an employer generally does not have a right to temporarily lay off an employee and doing so could be considered a constructive dismissal or termination at common law. The exception is where the employer and employee have agreed in a contract to a term that clearly and unambiguously allows temporary layoffs conducted in the manner prescribed under the ESA without triggering a constructive dismissal or termination.

Where *Reg. 228/20* applies and the employee is deemed to be on an IDEL leave of absence under the ESA, it might be argued that the regulation is not limited to the ESA, and that the employee has not been constructively dismissed or terminated for common law purposes. The employer might argue that an employee on a statutory leave is specifically not terminated (at least under the ESA) and continues to enjoy all of the benefits of being on such a leave.

This argument is not free from doubt and employers should not simply assume that *Reg. 228/20* shields them from common law liability.

Claims Deemed Not Filed

Reg. 228/20 provides that a complaint filed with the Ministry of Labour by an employee arguing that a temporary reduction or elimination of an employee's hours of work by the employer or a temporary reduction in an employee's wages by the employer constitutes the termination or severance of the employee's employment shall be deemed not to have been filed if the temporary reduction or elimination of hours or the temporary reduction in wages occurred during the COVID-19 period for reasons related to the designated infectious disease.

There are a number of exceptions to this and employers should review *Reg. 228/20* carefully.

What Employers Can Do

With the economy gradually reopening, many employees who had been laid off will be recalled. Other employers will be considering extending the period of temporary layoff, or other options.

Reg. 228/20 provides employers with flexibility about recalling employees to work at this time. Where *Reg. 228/20* applies, the ESA layoff clock is no longer ticking and this provides the employer with some options. There's no question, some employees will remain off work as employers now find themselves in a position where they can defer recalls under the ESA at least.

It is important to remember that *Reg. 228/20* only provides relief for the length of the declared state of emergency and for six (6) weeks thereafter. Accordingly, it is critical for employers in their planning that they be mindful of the fact that the breathing room provided to maintain the employment relationship without triggering a termination under the ESA is not indefinite.

Employers might consider some of the following:

- *Reg. 228/20* only applies where the action (layoff, wage or hours reduction) is related to COVID19. It is important for the employer to be in a position to prove, if called upon, to show that the action falls within the four-corners of *Reg. 228/20*. Employers should clearly document the layoffs and that they are the result of COVID-19.

- Confirm or reiterate to the impacted employees that any changes to hours and/or wages is temporary. *Reg. 228/20* applies to applicable changes that are temporary in nature.

- Contact employees who have been temporarily laid off and inform them that, as a result of *Reg. 228/20* they are no longer laid off, but are on an infectious disease emergency leave under the ESA.

  Inform employees of their rights under the ESA leave provisions. This should be done with the benefit of legal advice since, in the COVID-19 world, employers are, of necessity, continuously assessing their employment needs in this ever changing landscape.

Conclusion

Ontario has taken a unique approach to this challenging issue and that approach has created some confusion.

Many employers who implemented temporary layoffs under the ESA are approaching the deemed termination date (*i.e.* 13 weeks in 20 weeks where benefits were not continued or 35 weeks in 52 weeks where benefits were continued) and, as such, *Reg. 228/20* provides some welcome relief. Other employers have implemented wage and/or hours reductions. The regulation will provide them with some flexibility *at least under the ESA*.

There remain a number of open and unanswered questions and it is hoped that the government will provide some clarification in the days and weeks ahead. If not, these complex issues will have to be resolved in the fulness of time through litigation.

As relates to *Reg. 288/20*, employers are well advised to proceed cautiously, without making assumptions and with the benefit of legal advice regarding the options, risks and approach that is tailored to the circumstances.

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