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Ontario Government Passes New Regulation on COVID-19 Layoffs

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According to Statistics Canada, two in five employers in Canada have reduced hours or laid off one or more employees since the beginning of the COVID-19 crisis. One of the risks associated with those difficult decisions is a constructive dismissal claim that would trigger statutory notice and severance requirements under provincial employment standard legislation and under the common law. Ontario's government has now taken a major step to prevent claims under its *Employment Standards Act, 2000* (ESA) resulting from COVID-19.

On May 29, 2020, Ontario enacted Ontario Regulation 228/20 under the ESA. The regulation retroactively reclassifies any temporary layoff that takes place during the COVID-19 period, (defined in the regulation as March 1, 2020, until six weeks after the government ends the current state of emergency) as an infectious disease emergency leave.

As a result of the legislation:

1. All employees whose hours or wages have been temporarily reduced are deemed not to have been discharged (or constructively dismissed) under the ESA.

2. All employees who have been laid off (either completely, or by having their hours reduced by more than 50 percent in one week) due to COVID-19 are deemed not to have been laid off; instead, they are deemed to be on a leave of absence.

    a. This means that employers will not need to worry about the time limits for a temporary layoff under the ESA.

3. Any claims filed with the Ministry of Labour alleging constructive dismissal due to a temporary reduction in hours or wages during the COVID-19 period are automatically dismissed.

Actual terminations that take place during the COVID-19 period are not subject to the deemed leave of absence provisions under this regulation. In cases where the employee is still employed but is

working while on notice of termination at a future date, the employer and employee can agree to withdraw the notice, and reclassify the termination as a leave of absence.

The regulation also includes special rules for benefits for those on infectious disease emergency leave, including an amendment to the usual rules concerning benefit continuation during leaves of absence. The regulation stipulates that if an employee stopped participating in a benefit plan as of May 29, 2020, then the employer is not obligated to permit that employee to participate in the benefit plan during the leave. It also specifies that if an employer was not making benefit plan contributions as of May 29, 2020, the employer is not obligated to make contributions during the leave. This effectively maintains the status quo for benefits. Employees who ceased to participate in benefits plans and employers who ceased making contributions to benefit plans are exempt from the usual benefit plan continuation rules during leaves, but otherwise, the standard rules apply and an employee has the right to continue to participate in a benefit plan during a leave of absence.

The regulation does not apply to employees who are represented by a trade union, meaning unionized employers must still comply with relevant collective bargaining agreement provisions.

What does this mean for employers?

Given the large number of employees whose hours and/or wages have been reduced during the pandemic, it was reasonable to expect a sharp increase in complaints to the Ministry of Labour. This regulation will protect employers against those complaints.

Even though the regulation prevents complaints to the Ministry of Labour, it does not bar an employee from bringing a civil action for constructive dismissal at common law. Employers can only hope that if they face such a claim, judges will interpret Ontario Regulation 228/20 as demonstrating the government’s view that temporary layoffs and reductions in hours or pay caused by COVID-19 should not be treated as constructive dismissal.

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