Cassels

Ontario's Expanded Infectious Disease Emergency Leave and Implications for Temporary Layoffs and Constructive Dismissals

Jed Blackburn

June 11, 2020

On May 29, 2020, Ontario enacted a new regulation under the *Employment Standards Act, 2000* (the ESA) which extends the application of the previously announced "Infectious Disease Emergency Leave" during the COVID-19 pandemic (previously discussed here).

Pursuant to this new regulation, non-unionized employees are now deemed to be on an unpaid leave of absence if they do not perform the duties of their positions because their hours of work have been temporarily reduced or eliminated by their employers due to COVID-19 during the period from March 1, 2020, to a date six weeks after the declared end to the emergency under *Emergency Management and Civil Protection Act* (the COVID-19 Period).

An employee's hours are considered to have been reduced where the employee worked fewer hours in a given week than he or she worked in the last regular work week before March 1, 2020, or, if the employee does not have a regular work week, the average weekly hours worked during the 12 weeks preceding March 1, 2020.

The stated intention of this regulation is to ensure that businesses are not forced to terminate employees who have been placed on temporary layoffs under the ESA after the maximum layoff periods have expired, which would trigger potentially unsustainable termination obligations for employers (i.e., pay in lieu of notice and/or severance pay).

This development comes as welcome news to employers faced with the need to lay off employees or reduce their employees' hours/wages due to COVID-19. However, this new regulation has a number of important implications and considerations for employers that should be considered carefully.

Leave Is Automatic

Unlike the existing COVID-19 related reasons that permitted employees to take Infectious Disease Emergency Leave, under this new regulation employees are not merely *entitled* to take an unpaid leave: they are *automatically* deemed to be on Infectious Disease Emergency Leave at any time during the

COVID-19 Period when they do not perform their employment duties due to their hours being temporarily reduced or eliminated.

Exceptions include where an employee has already been terminated or received notice of termination, where there has been a permanent discontinuance of the employer's business, where an employee has been constructively dismissed and resigned in response within a reasonable time prior to May 29, 2020, or where an employee has already reached the maximum temporary layoff period permitted under the ESA prior to May 29, 2020.

Despite the fact that an employee that has been given written notice of termination will not be deemed to be on leave under this new regulation, the employer and employee can mutually agree to withdraw the notice of termination in order to permit the employee to go on this unpaid leave and thereby avoid the termination.

Temporary Layoffs

The new regulation expressly overrides certain of the ESA's layoff provisions, such that many employers who were facing the need to temporarily lay off employees for COVID-19 related reasons will instead be able to place employees on an unpaid leave of absence during the COVID-19 Period.

Indeed, even where an employer has already put an employee on a temporary layoff, the employee's status is automatically converted to a leave of absence retroactively. This applies to any time when the employee does not perform his or her job duties due to a reduction in hours from March 1, 2020, onward throughout the COVID-19 Period. The regulation goes on to expressly state that an employee whose hours (or even wages) are temporarily reduced for reasons related to COVID-19 during the COVID-19 Period shall not be considered to be laid off.

Most significantly, this conversion of temporary layoffs into leaves of absence avoids the automatic terminations that would have occurred for many employees once they hit the maximum temporary layoff period permitted under the ESA (unless this maximum temporary layoff period has already been reached prior to May 29, 2020, in which case the new leave is not applicable). Accordingly, this regulation serves to preserve employment relationships while simultaneously protecting employers from significant statutory termination obligations under the ESA.

Notice Not Required

Since employees cannot decide whether or not to take Infectious Disease Emergency Leave under this new regulation and will instead be automatically deemed to be on leave at any time they do not perform their job duties due to their hours of work being temporarily reduced or eliminated for reasons related to COVID-19,

employee notice to employers of an intention to take this leave is not required. Similarly, employers are not required to provide notice to employees when they are deemed to be on leave under this regulation.

That said, while employers are not strictly required to give notice of the deemed leave, it would be wise to do (and, in particular, to advise employees who were previously given a notice of temporary layoff) so that they can plan accordingly.

Benefits Coverage

Unlike a layoff scenario, if employers reduce or eliminate their employees' hours of work on or after May 29, 2020, such that they are deemed to be on leave under this new regulation, employers will no longer have the option to either continue or discontinue benefits coverage. As it is now a statutory leave situation, the normal leave of absence provisions apply and benefits coverage would have to be continued during the leave unless the employee provides written notice that he or she wishes to opt out.

However, the regulation also provides that where an employee who is now deemed to be on leave stopped participating in a benefit plan as of May 29, 2020, the employee is "exempt" from continued participation in that benefit plan during the COVID-19 Period. Similarly, employers who were not making employer contributions as of May 29, 2020, in respect of benefit plans for employees now deemed to be on leave are exempt from continuing to make employer contributions for the balance of the COVID-19 Period.

Reinstatement

Just like under other statutory leaves of absences, the right to reinstatement applies to an employee deemed to be on leave under this new regulation. Accordingly, such an employee will be entitled to be reinstated at the end of the leave to the position the employee most recently held (if it still exists), or to comparable position (if it does not). This means that employers cannot terminate employees at the end of the COVID-19 Period unless the termination is solely for reasons unrelated to the leave.

Constructive Dismissal

Finally, and perhaps most significantly, the regulation reduces the "constructive dismissal" risk for employers during the COVID-19 Period, which has been a serious concern for employers that have conducted, or are contemplating, layoffs that are not expressly provided for in their employment agreements (a primer on constructive dismissals is located here).

Specifically, the new regulation provides that a temporary reduction or elimination of an employee's hours

(or a temporary reduction of an employee's wages) for reasons related to COVID-19 does *not* constitute constructive dismissal if it occurred during the COVID-19 Period. Just like the temporary layoff exemption, this does not apply where a constructive dismissal has both occurred *and* the employee has resigned in response prior to May 29, 2020.

As a further helpful measure for employers, any complaints filed with the Ministry of Labour by employees alleging that a temporary reduction or elimination of hours or a temporary reduction in wages constitutes a termination or severance of employment under the ESA are deemed not to have been filed where the relevant actions occurred during the COVID-19 Period for reasons related to COVID-19. The same exceptions that apply to the deemed leave generally also apply to Ministry of Labour complaints in this regard.

While some observers have suggested that these new protections only apply to constructive dismissal under the ESA, and not to constructive dismissal claims under the common law, this is not expressly stated in the regulation, and it remains to be seen if courts will draw this distinction or what this would entail in practice.

At a minimum, however, employers who are forced to temporarily reduce hours or wages of their employees due to COVID-19 can do so without the need to lay off or terminate employees for the purposes of the ESA (and thereby avoid triggering statutory termination payments in the short term).

Further, unless employees have already asserted that they have been constructively dismissed and resigned in response within a reasonable time prior to May 29, 2020, they face the risk that any subsequent constructive dismissal claims may be denied and that they will not be entitled to termination or severance pay whatsoever.
