

Goodmans^{LLP} Update

So you're not an essential workplace in Ontario: Considerations for managing your obligations to employees during the COVID-19 pandemic

Ontario's emergency Order to close all non-essential workplaces took effect at 11:59 pm on March 24, 2020. All non-essential workplaces were given 36 hours to comply. At present, the emergency Order is to remain in effect until April 7, 2020, with the possibility it could extend as the situation evolves.

Non-essential employers affected by the economic downturn and measures introduced by municipal, provincial and federal governments in response to COVID-19, are increasingly looking at ways to reduce their payroll obligations by implementing one or more of the following measures: (i) wage reductions, (ii) work-sharing agreements, (iii) forced vacation scheduling, (iv) supplementary unemployment benefit (SUB) plans, (v) temporary layoffs, and/or terminations. Employers may also take advantage of the new wage subsidy introduced by the federal government.

Employers should consult with legal counsel before implementing any of the measures discussed in this Update, to assess the appropriateness and risks of the particular measure described herein.

Wage and hour reductions

Employers looking for an alternative to terminations or layoffs, or having reduced demand for an employee's services, may consider requiring employees to temporarily work reduced hours in an effort to lower payroll obligations during the economic slowdown caused by COVID-19. A significant unilateral reduction in hours and wages of this nature may expose the employer to a claim by the employee for constructive dismissal. Employers considering a wage reduction should attempt to mitigate the risk of a constructive dismissal by (i) effectively communicating with employees about the situation the workplace is facing, and (ii) encouraging employees to agree to a wage and/or hours reduction.

Work sharing

Another option that may be available for employers to avoid layoffs and terminations is to enter into a work-sharing agreement with employees and Service Canada. Under the federal work sharing program, eligible employers can enter into an agreement with their employees and Service Canada to reduce the hours of available work. Employees under a work-sharing program will be remunerated for the reduced work they perform and employment insurance (EI) will top up their salary. An employer will be eligible for a work-sharing program if (i) the employer has been in a year-round business in Canada for at least two years, (ii) the employer can demonstrate a recent decrease in business activity of at least 10%, and (iii) the employer can demonstrate that the shortage of work is temporary and beyond the employer's control, and is not a cyclical/recurring slowdown.

The federal government introduced work sharing and other temporary special measures for employers affected by the downturn in business due to COVID-19 and for the forestry, steel and aluminum sector. The measures extend the duration of existing work-sharing agreements by an additional 38 weeks, for a total of 76 weeks, and waive the mandatory waiting period for employers with recently expired agreements to enable them to immediately apply for a new work-sharing agreement and ease recovery plan obligations.

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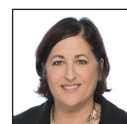
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As of the date of this Update, there is a 30-day processing time required to apply to the work-share program. Accordingly, the work-share program may not be a feasible option for employers looking to take immediate action to reduce their payroll obligations.

Forced vacation scheduling

Another measure employers may look to implement to avoid or delay layoffs or terminations, is the mandatory scheduling of vacation. An employer is generally permitted to schedule employee vacation, provided it is within the timeframe for vacation carryover and the vacation scheduling does not conflict with provisions to the contrary in the employee's employment contract or the employer's vacation policy. Most employers have the flexibility to revise their human resources (HR) policies from time to time and can amend their vacation policy as needed, to mandate using vacation time during the COVID-19 pandemic.

Supplementary unemployment benefit plans

Employers who cannot provide continued employment for employees, but who want to provide additional support for their employees, may consider implementing a SUB plan. Employers can use a SUB plan to supplement their employees' weekly EI earnings when they are unemployed due to, amongst other things, a temporary stoppage of work, illness or quarantine. Compensation paid to employees under SUB plans that are registered with Service Canada, are not considered as earnings and are not deducted from EI benefits. Accordingly, employees receiving EI benefits as a result of a temporary stoppage of work, illness or quarantine, can receive up to 95% of their normal weekly earnings if the SUB plan is registered with Service Canada, depending on the amount of top-up the employer wishes to provide.

The Government of Canada has issued [guidance](#) on the implementation of SUB plans.

Temporary layoffs

Employers may also consider temporary layoffs. In Ontario, subject to the limitations in the *Employment Standards Act* (ESA), an employer may be permitted to temporarily layoff non-unionized employees without triggering a termination. Provided an employer has a contractual right to do so, or the employee(s) in question are subject to a binding HR policy allowing for temporary layoffs or consents to the temporary layoff, this may be a valid option.

There is no requirement in Ontario to provide employees with any notice of layoff or continue an employee's compensation or benefits during a temporary layoff, except to the extent required by an employee's employment agreement or enforceable HR policy.

Employers considering this option need to remain mindful that the temporary layoff is not to exceed 13 weeks in any period of 20 consecutive weeks, with certain exceptions. In particular, if an employer continues to provide some form of continuing compensation, including the continuing payment of employee benefits or legitimate employer sponsored retirement or pension plan or payments under a SUB plan, the temporary layoff may continue for more than 13 weeks in any period of 20 consecutive weeks provided it remains less than 35 total weeks within any 52-week period.

To the extent the layoff exceeds the maximum length prescribed by the ESA, the layoff will be deemed a termination, triggering the employer's termination notice, severance pay, and mass-termination obligations, as applicable.

If an employer temporarily lays off employees in the absence of an employer's right to do so, or in the absence of the consent of the affected employees, there is a risk of claims for constructive dismissal and liability for wrongful dismissal damages. In light of the unprecedented nature of the COVID-19 pandemic and its impact on businesses, courts may be reluctant to consider layoffs a constructive dismissal. However, to mitigate the risk of a constructive dismissal claim, employers should consider following the steps discussed above.

Employers should note that they are not permitted to lay off an employee who has elected to take an unpaid job-protected leave under the ESA, including the new unpaid job-protected infectious disease emergency leave that was recently introduced in response to the COVID-19 pandemic. Employers are required to continue to make benefit plan contributions to the benefit plans of employees who elect to take a job protected leave under the ESA.

Following recent changes to the EI eligibility criteria in response to COVID-19, employees subject to a layoff may be eligible to receive EI for the duration of the layoff. For those employees who are ineligible to receive EI, they may benefit from legislation proposed by the federal

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government on March 25 to establish the Canada Emergency Response Benefit (CERB). CERB is a taxable benefit of \$2,000 a month for up to four months, that will be available to workers who lose their income as a result of the COVID-19 pandemic, and who do not otherwise qualify for EI.

Termination of employment

For employers considering the possibility of permanently terminating employees, it is important they remain mindful of all of their termination obligations. Termination obligations stem from statute, common law and contract, as applicable, and may include notice of termination (or pay-in-lieu), severance and payment of accrued but unused vacation pay.

Additionally, employers who are considering the termination of more than fifty employees should be mindful of their mass termination obligations under the ESA.

Before proceeding with any terminations, employers should seek legal advice.

Wage subsidy

In an effort to prevent terminations and layoffs, the federal government introduced a wage subsidy that will allow eligible small employers, registered charities and non-profit organizations to temporarily reduce the amount of payroll deductions required to be remitted to the Canada Revenue Agency. The subsidy is equal to 10% of remuneration paid by an employer between March 18, 2020 and June 20, 2020, up to \$1,375 per employee and to a maximum of \$25,000 per employer.

Looking forward

For further information regarding the considerations discussed in this Update, contact any member of our [Employment and Labour Group](#).