Goodmans LLP Update

Amendments to *Employment Standards Act, 2000* Provide Temporary Relief to Employers From Termination and Severance Obligations due to COVID-19-Related Wage or Hours Reduction

The Government of Ontario recently published Ontario Regulation 228/20 – Infectious Disease Emergency Leave (the "**Regulation**"), which amends the *Employment Standards Act, 2000* (the "**ESA**") as it relates to Infectious Disease Emergency Leave, replacing the previous Infectious Disease Emergency Leave Regulation (O. Reg. 66/20).

The Regulation temporarily relieves employers of non-unionized employees from the consequences arising under the ESA from certain fundamental workplace changes related to COVID-19 and other infectious diseases. In particular, the Regulation provides relief to employers from the deemed termination of employment provisions, which would otherwise apply as early as 13 weeks after a temporary layoff and deem a reduction or elimination of hours of work and/or wages not to amount to a constructive dismissal.

The changes to the ESA apply only to non-unionized employees. Obligations to unionized employees will continue to be governed by their collective agreements and the ESA without the Regulation.

The COVID-19 Period

The changes to the ESA govern the period from March 1, 2020 to six weeks after the state of the emergency declared by the Government of Ontario has ended (the "**COVID-19 Period**").

If employers cannot resume full pre-COVID-19 operations, pay pre-pandemic wages and/or recall their employees from temporary layoff by the end of the COVID-19 Period, the usual ESA rules will apply.

Infectious Disease Emergency Leave

Under the Regulation, employees who do not perform the duties of their position following a temporary reduction or elimination in their hours or wages by the employer for reasons related to COVID-19 (or another designated infectious disease) during the COVID-19 Period, are deemed to be on an Infectious Disease Emergency Leave under section 50.1 of the ESA.

This Infectious Disease Emergency Leave would be in respect of all times during the COVID-19 Period where an employee's hours/wages are reduced/eliminated, both retroactive to March 1, 2020 and prospective to the end of the COVID-19 Period. Significantly, this leave applies even if the employer initially characterized the employees as being on temporary layoff. However, employees who were permanently laid off on or after March 1, 2020, or who were terminated or provided with notice of termination on or after March 1, 2020, will not be deemed to be on an Infectious Disease Emergency Leave; those terminations will give rise to the "normal" termination and severance obligations under the ESA for employers.

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Infectious Disease Emergency Leave is a statutory job-protected leave, with affected employees having the same rights and entitlements as other employees who are on other job-protected leaves under the ESA (such as pregnancy or parental leave). During the Infectious Disease Emergency Leave, employees are entitled to continued participation in the employer's health & welfare benefit plans, except that an employer need not continue the employee's benefit plan contributions if the benefit plan contributions ended before May 29, 2020. At the end of an Infectious Disease Emergency Leave, employees are generally entitled to be reinstated to the position they most recently held if it still exists, or to a comparable position if it does not.

As further outlined below, employees deemed to be on Infectious Disease Emergency Leave are (i) exempt from the application of the temporary layoffs provisions in the ESA, and (ii) precluded from bringing a claim for a constructive dismissal in respect of the temporary reduction or elimination of the hours of work or wages.

Employees Deemed not to be Laid Off

Employees who have had their hours of work or wages reduced or eliminated by their employer for reasons related to COVID-19 (or another designated infectious disease) during the COVID-19 Period are deemed not to be temporarily laid off for the purposes of the ESA. They are deemed instead to be on Infectious Disease Emergency Leave. Any period of layoff that arose on or after March 1, 2020 that otherwise meets the requirements of the Regulation (including that it was related to COVID-19) will be eliminated for the COVID-19 Period and will not count for any statutory temporary layoff calculations in the future.

This is a stark departure from the ESA's usual termination and severance rules related to layoffs. Ordinarily, where an employee is on layoff for more than 13 weeks in any 20-week period, or more than 35 weeks in any 52-week period (if certain benefits or other compensation is maintained), the ESA deems the layoff to be a termination of employment, with the attendant termination and severance pay obligations; these may be significant, especially if the group termination provisions of the ESA are triggered.

As a result of the Regulation, employers no longer need to be concerned regarding a deemed termination under the ESA as a result of exceeding the applicable layoff timelines. Given that many COVID-19-related layoffs occurred in early March 2020, a deemed termination after a layoff of 13 weeks (which generally applies unless benefits are continued) was fast approaching for many employees. Since these employees are now deemed to be on Infectious Disease Emergency Leave for the COVID-19 Period (and not on a temporary layoff) the deemed automatic termination rule no longer applies.

There are two key exceptions where the ESA's usual layoff rules and obligations on employers apply:

- if an employee is or was laid off as part of a complete closure of a business at an employer's establishment, he or she will be treated as having been terminated under the ESA's usual rules; or
- if the employee's employment had already been deemed terminated or severed under the ESA as a result of a layoff before May 29, 2020.

Any period of layoff that arose on or after March 1, 2020, that otherwise meets the requirements of the Regulation in that it was connected to COVID-19, will be eliminated and will not count for any statutory temporary layoff calculations in the future.

Constructive Dismissal

Employees whose hours of work are temporarily reduced or eliminated or whose wages are reduced by their employer for reasons related to COVID-19 (or another designated infectious disease) during the COVID-19 Period are deemed under the Regulation not to be constructively dismissed.

However, if an employee resigned before May 29, 2020 in response to a constructive dismissal, the Regulation does not preclude the employee from bringing a constructive dismissal claim.

It is uncertain what effect the Regulation, and in particular, the deeming that there is no constructive dismissal, will have on common law or breach of contract claims in civil proceedings seeking damages beyond remedies available under the ESA.

Complaints Deemed Not To Have Been Filed

A complaint filed with the Ministry of Labour alleging the termination or severance of an employee's employment on account of a temporary reduction or elimination of an employee's hours of work or wages for reasons related to COVID-19 during the COVID-19 Period is deemed not to have been filed if the temporary reduction occurred on or after March 1, 2020.

Rules Regarding Reduction in Hours or Wages

An employee with a regular work week will be considered to have had (i) their hours reduced, if the employee works fewer hours in the work week than they worked in the last regular work week before March 1, 2020, and (ii) their wages reduced, if the employee earns less regular wages in the work week than they earned in the last regular work before March 1, 2020.

An employee who does not have a regular work week will be considered to have had (i) their hours reduced, if the employee works fewer hours in the work week than the average number of hours they worked per work week in the 12 consecutive work weeks preceding March 1, 2020,and (ii) their wages reduced, if the employee earns less regular wages in the work week than the average number of hours they worked per work week in the 12 consecutive weeks preceding March 1, 2020.

Working Notice of Termination

If an employee has been terminated and is currently on working notice of termination, and provided that both parties agree, the notice of termination may be withdrawn and the employee can be deemed to be on an Infectious Disease Emergency Leave instead of having his or her employment terminated.

For further information on these regulations, please contact any member of our Employment and Labour Group.