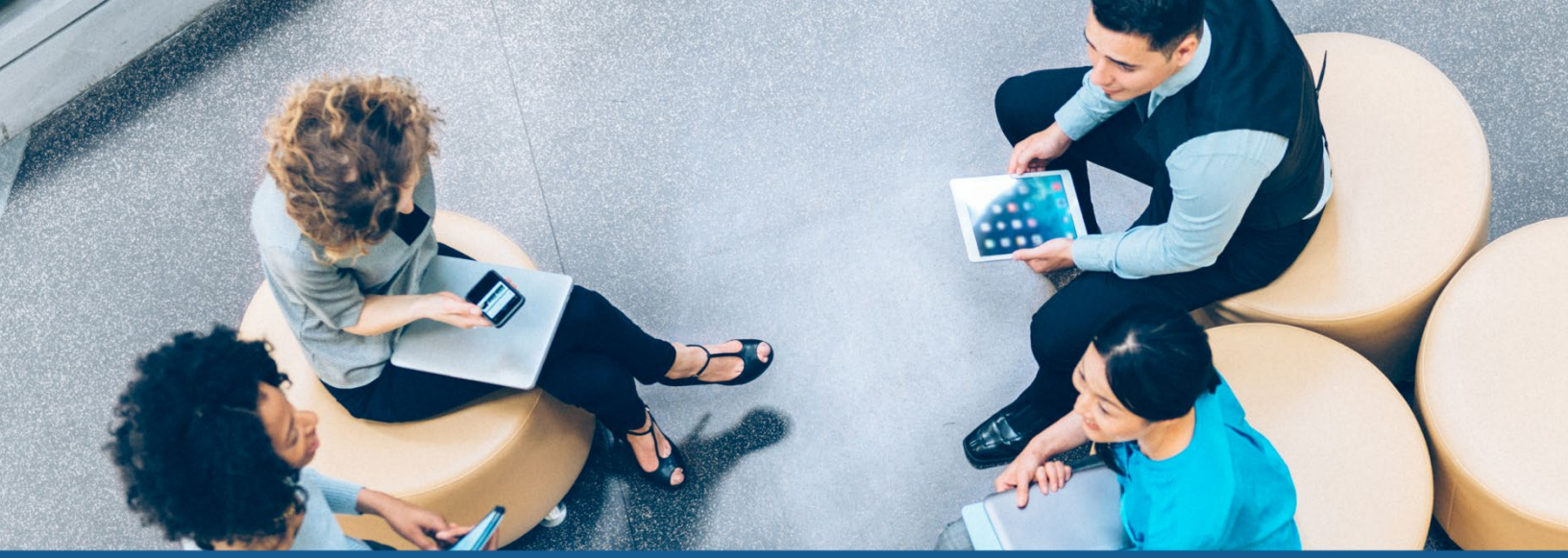

What's New in HR Law

New Ontario Regulation: Relief from Termination Obligations during COVID-19 Period

June 1, 2020

Bottom Line

On May 29, 2020, the Government of Ontario issued *O. Reg. 228/20: Infectious Disease Emergency Leave* (the "Regulation"). The Regulation is designed to provide employers with temporary relief from various obligations under the *Employment Standards Act, 2000* (the "*ESA*").

Employers are now permitted to temporarily reduce or eliminate an employee's hours or wages throughout the COVID-19 period without triggering the temporary lay-off provisions under the *ESA*. Instead, employees who are subject to reduced hours or wages will be deemed to be on a job-protected infectious disease emergency leave. The Regulation also deems wage or hour reductions not to be constructive dismissals.

Employers should note that the Regulation does ***not*** alter any entitlements that unionized employees may have under a collective agreement. While the Regulation does not apply in

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respect of unionized employees, it does apply to workers employed by temporary help agencies, with necessary modification.

Period of Relief

The temporary relief afforded by the Regulation is limited to the "COVID-19 period", which is deemed to run retroactively from March 1, 2020, until 6 weeks after the provincial emergency order ceases. As of the date of this update, the COVID-19 period will span from March 1, 2020 until at least July 21, 2020 (subject to any further extension of the current state of emergency).

Reduction in Hours or Wages to Result in Deemed Leave, not Lay-Off

On March 19, 2020, the *ESA* was amended to provide for an unpaid, job-protected emergency leave for reasons relating to infectious disease emergencies. For more detailed information about this earlier *ESA* amendment see our previous update here.

The infectious disease emergency leave applies retroactively from January 25, 2020, and can be taken by employees in the following circumstances:

- The employee is under medical investigation, supervision or treatment for COVID-19
- The employee is acting in accordance with an order under the *Health Protection and Promotion Act*
- The employee is in isolation or quarantine in accordance with public health information or direction
- The employer directs the employee not to work due to a concern that COVID-19 could be spread in the workplace
- The employee needs to provide care to a person for a reason related to COVID-19 such as a school or day-care closure
- The employee is prevented from returning to Ontario because of travel restrictions
- ***Any other reason as may be prescribed***

The Regulation prescribes a new reason for which an employee will be eligible for emergency leave: "The employee's hours of work are temporarily reduced or eliminated by the employer for reasons related to the designated infectious disease."

Under the Regulation, non-union employees whose hours or wages are temporarily reduced or eliminated during the COVID-19 Period will be "deemed" to be on infectious disease emergency leave. During this prescribed period, temporary reductions in hours and wages will not be subject to the *ESA* lay-off provisions provided that the lay-offs were implemented for reasons relating to COVID-19. Furthermore, because the leave is deemed, employees are not required to advise their employer that they are taking a leave.

Not only does this amendment apply to hours and wage reductions implemented after the publication of the Regulation, because of its retroactive application, is also has the effect of

converting lay-offs that were previously communicated to non-union employees on or after March 1, 2020 to unpaid, job-protected infectious disease emergency leaves.

Terminations prior to May 29, 2020

The relief afforded by the Regulation does not apply in situations where an employee's employment has been terminated or severed. In other words, the Regulation does not have the effect of converting dismissals to deemed leaves (including dismissals that were triggered by temporary layoffs that exceeded the prescribed maximum threshold prior to May 29, 2020). However, the Regulation does provide that an employer and employee may agree to withdraw a notice of termination that was previously issued to instead allow the employee to be placed on infectious disease emergency leave.

Benefits during the Deemed Leave

Generally, during a period of infectious disease emergency leave, an employer must continue to make its contributions toward any prescribed benefit plans in which the employee participates for the duration of the leave period. The Regulation makes clear that this requirement will continue to apply with respect to employees who are deemed to be on leave, with the exception that employers who did not continue benefits as of May 29, 2020 will not be required to start now.

Practically, employers who opted not to continue benefits when initially implementing lay-offs will not be required to maintain benefits now that the layoffs are deemed to be converted to infectious disease emergency leaves. In contrast, it appears that those employers who did opt to continue benefits when lay-offs were initially implemented will be required to maintain them.

Reduction in Hours or Wages not Constructive Dismissal

The Regulation permits employers to do the following during the COVID-19 period without triggering a constructive dismissal:

- temporarily reduce or eliminate an employee's hours of work for reasons related to COVID-19
- temporarily reduce an employee's wages for reasons related to COVID-19

The only exception to the above is where an employee was constructively dismissed and resigned in response before May 29, 2020 (i.e. before the Regulation was published).

The Regulation stipulates how to determine whether an employee's wages or hours have been reduced. Depending on the employees' hours of work and whether they were on leave or vacation (or absent for other prescribed reasons), different calculations will apply.

Complaints Deemed not to be Filed

To manage the flow of complaints received by the Ministry of Labour, the Regulation creates a deeming provision specifically for constructive dismissal complaints. Any complaints filed by

employees as a result of a reduction or elimination of wages or elimination of hours of work due to COVID-19, will be deemed not to have been filed.

Future Updates

The Regulation provides some welcome relief for employers who already have, or may yet need to, implement hours or wage reductions in response to the ongoing COVID-19 pandemic. While the Regulation affords a temporary reprieve from some termination and severance obligations, employers should carefully consider how these changes impact their particular workplace, and the additional obligations the Regulation may impose.

Filion Wakely Thorup Angeletti LLP continues to closely monitor the developments surrounding the COVID-19 pandemic and will provide additional updates as new information becomes available.

Need more information?

For more information regarding reopening and workplace management during the COVID-19 pandemic, contact Laura Freitag at 416-408-5505, Mark Van Ginkel at 416-408-5560, or your regular lawyer at the firm.

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