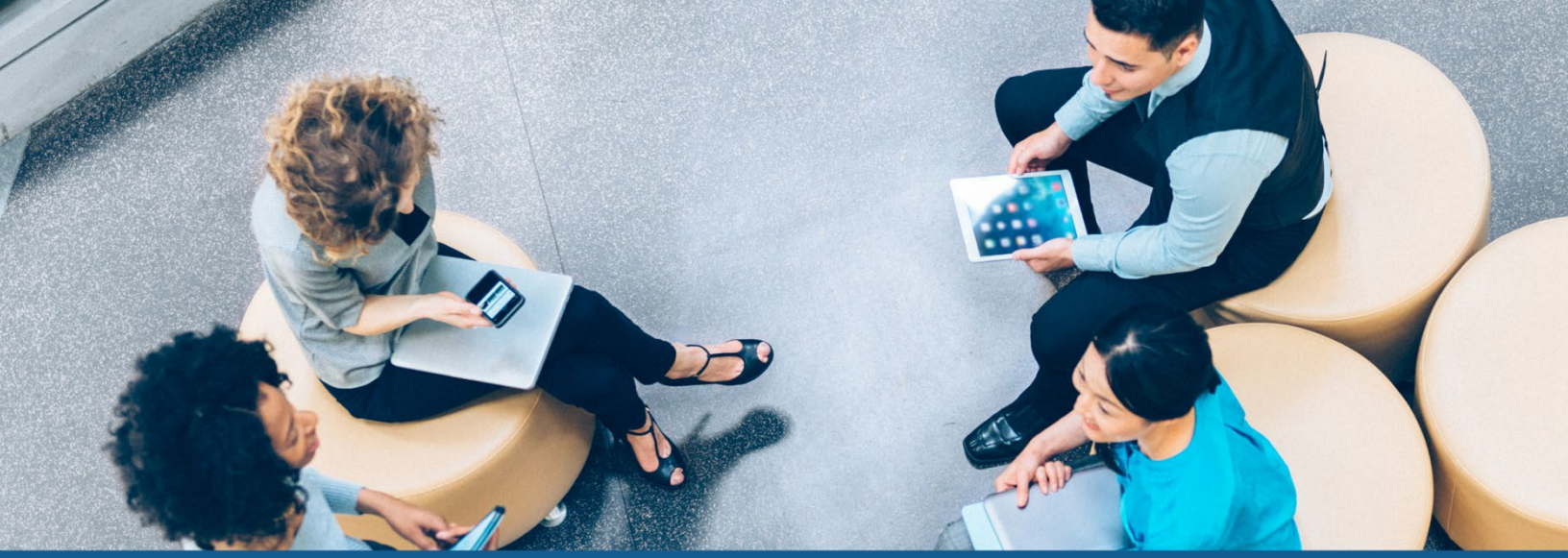

What's New in HR Law

Temporary Layoffs: Considerations for Ontario Employers during the COVID-19 Crisis

March 27, 2020

COVID-19 Update

The downturn in business across Canada amongst the COVID-19 pandemic has resulted in employers having to make difficult decisions to ensure business viability. Many employers are considering a temporary reduction in staff. While not without risk, a temporary layoff can be a valuable – and sometimes necessary – tool in managing a business through turbulent times.

The *Employment Standards Act, 2000*

In Ontario, the *Employment Standards Act, 2000* (the "*ESA*") permits employers to cut back or stop an employee's work without ending their employment. The same is true in most other jurisdictions across Canada.

For the purposes of the *ESA*, a week of layoff is any week in which an employee earns less than half of what they would ordinarily earn at their regular rate in a regular week. Where a worker

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does *not* have a regular work week, a layoff occurs where a worker earns less than one half of the average amount he or she earned per week in the 12 consecutive weeks prior to the layoff period.

While a laid-off employee does not typically receive compensation from their employer, they may qualify for and receive Employment Insurance ("EI") benefits from the government. Employees who are laid off for COVID-19 related reasons may also be able to avail themselves of the new Canada Emergency Response Benefit ("CERB"). Many employees will also continue to participate in their employer's group benefit plans while on temporary layoff.

Under the *ESA*, a temporary layoff is: (a) a layoff of not more than 13 weeks in any period of 20 consecutive weeks; or (b) a layoff of more than 13 weeks in any period of 20 consecutive weeks but less than 35 weeks in any period of 52 weeks where:

- the employee continues to receive substantial payments from the employer;
- the employer continues to make payments for benefits or a legitimate retirement or pension plan;
- the employee receives supplementary unemployment benefits;
- the employee would be entitled to supplementary unemployment benefits but is not receiving them because they are employed elsewhere; or
- the employer recalls the employee within a timeframe approved by the Director of Employment Standards or as set out in an agreement or collective agreement.

Under the *ESA*, an employee that is on a temporary layoff is **not** entitled to termination pay. A temporary layoff and a termination should not be conflated.

The Common Law and Constructive Dismissal

The *ESA* sets out the *minimum* entitlements an employee must receive. However, the common law (or "judge-made law") considers what an employee is entitled to beyond the *ESA* by way of the employment relationship or contract. Herein lays the potential issue with layoffs.

Because a layoff effectively removes an employee from the workplace without pay for a period of time, depending on the length of the layoff, a layoff could be argued to be what is known as a constructive dismissal.

A constructive dismissal can occur where: (a) the employer has unilaterally altered or breached a fundamental term of the contract of employment such that a reasonable person would consider themselves to be dismissed; or (b) through a series of actions, the employer demonstrates that it no longer intends to be bound by the contract of employment.

In some cases, courts have found that unless an employment agreement expressly allows for a layoff in accordance with the *ESA*, a layoff is, in fact, a constructive dismissal and the employment relationship has been terminated. If the relationship has been terminated, the employee would be entitled to notice in accordance with their employment contract. Where their employment contract does not address entitlement upon termination, or where the

contractual termination provision is unenforceable, the employee would be entitled to common law reasonable notice.

Notably, an employee's entitlement to common law reasonable notice is subject to mitigation. Mitigation may also apply to any notice an employee may be entitled to by way of their employment contract, depending on the specific language of the contract itself. Meeting the duty to mitigate will ordinarily include accepting an offer of recall.

Frustration of the Employment Contract

Both the *ESA* and the common law recognize that an employment contract may become frustrated at law. Frustration occurs when an employment contract becomes impossible to perform through no fault of either party. If frustration occurs, both the employee and the employer are relieved of any obligations under the employment contract.

As frustration is different from termination of a contract, an employee who has had their employment contract frustrated will have no common law or contractual entitlements to pay in lieu of notice of termination. Moreover, the employee will only have statutory entitlements to termination pay or severance pay in very limited circumstances.

In the context of a global pandemic, and in light of the Ontario government's recent announcement that all non-essential businesses must close, employment contracts may become frustrated at law. This case has yet to be tested in the context of the COVID-19 pandemic, of course, but the argument exists to be made in the event it becomes necessary to do so.

Layoffs Related to COVID-19

The COVID-19 crisis is an unprecedented situation and, for some businesses, layoffs will be necessary to ensure continued business viability. All levels of government are working together in an attempt to lessen the financial burden on employees.

In the current climate, should an employee assert that their employment has been constructively dismissed due to a temporary layoff, judges are likely to consider the reasonableness of the employer's decision in the context of the current situation – including that we are in the midst of a global pandemic.

Bottom Line

Employers should carefully consider what steps need to be taken to ensure business viability so that workers have jobs to return to when the pandemic has subsided. This is an important consideration for businesses individually, as well as for our economy as a whole. Different approaches will work for different workplaces; there is no one-size-fits-all solution. There are risks and benefits with any course of action, and employers must carefully weigh these in order make decisions that works best for their business.

Need more information?

Should you require any assistance with your ongoing pandemic or business continuity planning, please contact Jessica Fay at 416-408-5566 or your regular lawyer at the firm.

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