Ontario government addresses temporary layoffs during the COVID-19 period

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As Ontario's "non-essential" businesses slowly re-open and expand their services with physical distancing safety measures in place, employers are still not in a position to return to "business as usual." The unfortunate reality is many employers continue to have employees on temporary layoff, or working with reductions of hours or pay, in order to maintain their operations during the COVID-19 pandemic.

As June approached, many employers faced mass terminations for employees on temporary layoff that were nearing the end of the prescribed period under the *Employment Standards Act, 2000* (ESA). To protect employers and employees alike, the Government of Ontario introduced Ontario Regulation 228/20 – Infectious Disease Emergency Leave (the Regulation) on May 29, 2020. The Regulation replaces the previous Infectious Disease Emergency Leave Regulation (O. Reg. 66/20) and amends the ESA as it relates to infectious disease emergency leave, temporary layoffs and deemed terminations. The Regulation does not apply to unionized employees.

The COVID-19 period

The Regulation establishes a "COVID-19 period" from March 1, 2020 to six weeks after the current emergency declaration in Ontario is terminated or disallowed. Since Ontario's emergency declaration has now been extended to June 30, 2020, the COVID-19 period will last at least until the second week of August.

Retroactive infectious disease emergency leave

One of the significant changes imposed by the Regulation is it retroactively deems non-unionized employees, whose hours of work or wages were reduced or eliminated during the COVID-19 period, to be on infectious disease emergency leave. As BLG noted in a previous article, infectious disease emergency leave entitles an employee to a leave of absence *without pay* where the employee is unable to work for COVID-19 related reasons.

Protections applicable to job-protected statutory leaves, including the right to reinstatement, will apply to an employee who is deemed to be on an infectious disease

emergency leave during the COVID-19 period. However, the following exceptions will apply:

1. An employee is not required to advise the employer of his or her intention to take the leave;
2. If the employee stopped participating in certain benefit plans as of May 29, 2020, the employee does not have to make a further election to not participate during the COVID-19 period; and
3. If the employer stopped making contributions to certain benefit plans as of May 29, 2020, the employer does not have to reinstate those contributions during the COVID-19 period.

Moreover, any payments or benefits the employee received from the employer between March 1, 2020 and May 29, 2020 will have no impact on the employee being deemed to be on infectious disease emergency leave.

Temporary layoffs not deemed a termination or constructive dismissal

Importantly, the Regulation establishes that a temporary reduction or elimination of hours or a reduction of wages during the COVID-19 period does not constitute a termination, severance or constructive dismissal under the ESA.

In addition, the Regulation permits a temporary layoff to exceed the prescribed length of 13 weeks or 35 weeks during the COVID-19 period without being deemed a termination. Layoffs that exceeded the “temporary layoff” periods prior to May 29, 2020, however, will still constitute terminations and severances under the ESA.

Employees that were already given written notice of termination during the COVID-19 period will not be considered to be on infectious disease emergency leave unless the employer and employee agree to withdraw the notice of termination.

Ministry of Labour complaints

The Regulation also establishes that a complaint filed with the Ministry of Labour for termination or severance — based on the temporary reduction or elimination of an employee’s hours of work or a temporary reduction in an employee’s wages during the COVID-19 period for reasons related to the designated infectious disease — will be deemed not to have been filed.

Takeaways

As many employers are still unable to recall employees who are on temporary layoff, the Regulation prevents the wave of deemed terminations which would have certainly occurred later this month. More importantly, the Regulation will enable employers to implement temporary reductions or eliminations of hours of work or temporary reductions of wages during the COVID-19 period without triggering a termination, severance or constructive dismissal under the ESA.

BLG will continue to monitor this unfolding situation and its implications in the employment context.

BLG has created a COVID-19 Resource Centre to assist businesses on a variety of topics, including labour and employment, contractual risks, public disclosure requirements, schools and criminal law.

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