

Stop the Clock: Ontario Again Extends the Deemed COVID-19 Emergency Leave and Introduces Flexibility for Layoffs in Unionized Workplaces

December 18, 2020

By Daniel Wong, and Max Skrow

Ontario has once again extended the relief for employers from the temporary layoff provisions under the Ontario *Employment Standards Act, 2000* (ESA) in the hopes of protecting businesses from the costs associated with terminating employees and ensuring that employees retain their position while on leave due to COVID-19.

On May 29, 2020, Ontario enacted Ontario Regulation 228/20 (the "Regulation"), which provided that certain changes to an employee's hours of work and/or wages do not constitute a constructive dismissal or a layoff if they are done for reasons related to COVID-19.^[1] This Regulation also introduced the concept of "infectious disease emergency leave". Normally, Ontario's ESA provides that a temporary layoff may not exceed 13 weeks in any period of 20 consecutive weeks, or 35 weeks in any period of 52 consecutive weeks, where certain criteria are met. Once the layoff exceeds these durations, the layoff becomes a termination under the ESA, giving rise to an employer's obligation to provide the employee with his or her statutory termination entitlements. However, under the Regulation, employees whose hours and/or wages are eliminated or reduced, or who are temporarily laid off for reasons related to COVID-19 are deemed to be on an infectious disease emergency leave and are not considered laid off for the purposes of the ESA.

Originally set to expire six weeks after the lifting of Ontario's State of Emergency, in September the Regulation was extended until January 2, 2021,^[2] and it has now been extended again. Effective December 17, 2020, the Regulation will now expire on July 3, 2021. The regular rules and time limits under the ESA regarding temporary layoffs will resume on July 3, 2021, subject to further extensions.

Additionally, the Ontario government is introducing a special industry regulation that allows employers and unions to negotiate flexible arrangements in circumstances in which unionized workplaces are subject to layoffs. Ordinarily, when employees in unionized workplaces are laid off for a period of 35 weeks or more, the employee can elect between surrendering their right to be recalled and accepting termination (and the payments associated with it) or the employee can elect to retain the right to be recalled, in which case the employer and union can negotiate an arrangement whereby the employee's severance entitlements are held in trust. Ontario's new regulation permits employers and unions to negotiate alternative arrangements while preserving the employee's right to be recalled – for example the employer and union could agree that only half of the employee's termination entitlements will be held in trust. This provides employers with additional funds needed to keep their business operations and ensure that the employee's right to be recalled is paired with a job to which they can be recalled.

WeirFoulds' employment law group is monitoring these developments and will be providing updates as the COVID-19 situation progresses. For more information on how to respond to COVID-19 in your workplace or organization, please contact Daniel or Max.

[1] <https://www.weirfoulds.com/the-clock-is-ticking-the-expiration-of-the-deemed-infectious-disease-emergency-leave-and-next-steps-for-ontario-employers>

[2] <https://www.weirfoulds.com/a-cautious-reopening-ontario-extends-the-deemed-covid-19-emergency-leave-to-january-2021>

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

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