NEW INFECTIOUS DISEASE EMERGENCY LEAVE PROVIDES RELIEF TO ONTARIO EMPLOYERS

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A. INTRODUCTION

The Ontario government filed Regulation 228/20, *Infectious Disease Emergency Leave* (the "Regulation")[1] under the *Employment Standards Act, 2000* (the "ESA") on May 29, 2020,[2] providing an unpaid job-protected Infectious Disease Emergency Leave to non-unionized employees whose employers have temporarily reduced or eliminated their hours of work.[3] The Regulation provides employers, including charities and not-for-profits ("NFPs"), with temporary relief from the ESA's provisions regarding termination, severance and constructive dismissal for non-unionized employees, including "assignment employees."[4] This temporary relief is retroactive to March 1, 2020 and will expire six (6) weeks after the declared emergency ends.

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[1] *Infectious Disease Emergency Leave*, O Reg 228/20, online: Government of Ontario <https://www.ontario.ca/laws/regulation/200228> ["Regulation"]. See also the News Release from the Ministry of Labour, Training and Skills Development, "Ontario Extending Infectious Disease Emergency Leave for Workers during COVID-19" (1 June 2020), *Newsroom*, online: Government of Ontario <https://news.ontario.ca/mol/en/2020/06/ontario-extending-infectious-disease-emergency-leave-for-workers-during-covid-19.html>.

[2] *Employment Standards Act, 2000*, SO 2000, c 41 ["ESA"].

[3] For further details on the enactment of the infectious disease leave, see Barry W. Kwasniewski, "Employer Obligations and Considerations in Response to the COVID-19 Pandemic" (24 March 2020), *Charity & NFP Law Bulletin No. 465*, subsection D2, online: Carters Professional Corporation <http://www.carters.ca/pub/bulletin/charity/2020/chylb465.pdf>.

[4] Regulation, *supra* note 1, s 10. Under the ESA, *supra* note 2, an "'assignment employee' means an employee employed by a temporary help agency for the purpose of being assigned to perform work on a temporary basis for clients of the agency."

This *Bulletin* provides a general overview of the Regulation that will be of relevance to charities and NFPs. Given the complexity of the Regulation, independent legal advice should be sought to determine how the Regulation would apply to any specific fact scenario.

B. EMERGENCY LEAVE ENTITLEMENT

The Regulation replaces Ontario Regulation 66/20,[5] and reiterates the designation of COVID-19 as an infectious disease for purposes of the emergency leave prescribed in section 50.1 of the ESA. Similarly, the Regulation provides that the entitlement to emergency leave under clause 50.1(1.1)(b) of the ESA for a COVID-19 related reason is deemed to have started on January 25, 2020.[6] These reasons include the employee being quarantined, in self-isolation or directly affected by travel restrictions due to COVID-19, as well as being unable to work because of school or daycare closures, or due to their need to care for "specified individuals."[7]

C. DEEMED INFECTIOUS DISEASE EMERGENCY LEAVE

Under the Regulation, non-unionized employees will be deemed to be on Infectious Disease Emergency Leave if their "hours of work are temporarily reduced or eliminated by the employer for reasons related to" COVID-19,[8] and the employee does not perform his or her duties due to these reasons.[9] In essence, employees on temporary lay-offs due to COVID-19 related reasons are deemed to be on Infectious Disease Emergency Leave. The entitlement period for this is retroactive to March 1, 2020 and ends six (6) weeks after the declared emergency in Ontario is terminated or disallowed (the "COVID-19 period").[10] On June 2, 2020, the declaration of emergency in Ontario was extended until June 30, 2020, which means that the Infectious Disease Emergency Leave will be available until at least August 12, 2020.[11]

In addition, the deeming provisions also provide the following relief:[12]

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[5] *Infectious Disease Emergency Leave*, O Reg 66/20 [revoked], online: Government of Ontario <https://www.ontario.ca/laws/regulation/r20066>.
[6] Regulation, *supra* note 1, ss 1(2) and 3(1).
[7] See ESA, *supra* note 2, ss 50.1(1.1)(b)(i) to (vi) for COVID-19 related reasons; and ss 50.1(8) for the list of "specified individuals".
[8] Regulation, *supra* note 1, s 4(1), para 1.
[9] *Ibid*, s 4(2).
[10] *Ibid*, s 1(1). See also, *ibid*, ss 3(2) and 4(1), (2).
[11] Office of the Premier, "Ontario Extends Declaration of Emergency until June 30" (2 June 2020), *Newsroom*, online: Government of Ontario <https://news.ontario.ca/opo/en/2020/06/ontario-extends-declaration-of-emergency-until-june-30.html?utm_source=ondemand&utm_medium=email&utm_campaign=p>.
[12] See Regulation, *supra* note 1, s 4.

- There is no need to inform or advise the employer of the employee's intention to take this leave; and

- If, as of May 29, 2020, an employee on Infectious Disease Emergency Leave stopped participating in any benefits plans described in subsection 51(2) of the ESA,[13] the employee will continue to be exempt from participation in these benefit plans during the COVID-19 period. The same applies for employers who stopped making contributions towards these benefit plans as of May 29, 2020 for an employee on Infectious Disease Emergency Leave, with such employers now exempt from making contributions towards those benefit plans during the COVID-19 period. Generally under the ESA, employers would otherwise require continued participation of employees in these benefit plans and be required to contribute towards them, unless the employee had previously elected in writing to not participate (in the former scenario), or provided written notice to the employer that the employee does not intend to make its contributions towards those plans (in the latter scenario).[14]

However, any payments or benefits received by the employee from the employer between March 1, 2020 and May 29, 2020 are not affected.

Further, if both the employer and employee agree to withdraw a written notice of termination that was given by an employer in accordance with sections 57 or 58 of the ESA between March 1, 2020 and May 29, 2020, then it is also deemed an Infectious Disease Emergency Leave.[15]

The Regulation does not prohibit permanent termination or severance of the employment relationship. An employee is *not* considered to be on Infectious Disease Emergency Leave, if:

- On or after March 1, 2020, an employer dismisses the employee, otherwise refuses or is unable to continue to employ them, or the business establishment is permanently discontinued; or

[13] Under ESA, *supra* note 2, s 51(2), these "benefit plans" include "pension plans, life insurance plans, accidental death plans, extended health plans, dental plans and any prescribed type of benefit plan."
[14] See *ibid*, ss 51(1) and (3).
[15] Regulation, *supra* note 1, ss 4(7) and 5(2).

- Before May 29, 2020, an employment relationship has been permanently terminated or severed due to the employer constructively dismissing the employee, and the employee resigns within a reasonable period in response, or the employee is laid off for a period exceeding that allowed for a temporary lay-off under the ESA.

D. TEMPORARY LAY-OFFS

The ESA provides that a temporary lay-off is not deemed to be a termination of employment, so long as the temporary lay-off does not exceed the prescribed time limits (*i.e.* not more than 13 weeks in any period of 20 consecutive weeks, or a period of less than 35 weeks in any period of 52 consecutive weeks if one or more of six conditions are met.)[16] A temporary lay-off in excess of those limits would be considered a termination and severance of the employment relationship, effective the first day of the lay-off.[17] However, the Regulation ascertains that a temporary elimination/reduction in hours or a temporary reduction in wages of an employee by the employer due to COVID-19 related reasons during the COVID-19 period would *not* be considered to be a temporary lay-off, and the general ESA termination and severance provisions would *not* apply, unless:

- There has been a permanent discontinuance of the business establishment; or

- Prior to May 29, 2020, the employee was permanently terminated or there was a severance of the employment relationship, because of having exceeded the ESA-permitted temporary lay-off period.[18]

E. CONSTRUCTIVE DISMISSALS

During the COVID-19 period, a temporary elimination/reduction in hours or a temporary reduction in wages of an employee by its employer due to COVID-19 related reasons will *not* be considered constructive dismissal under the ESA, unless prior to May 29, 2020, the employment relationship had already been permanently terminated or severed due to the employer having constructively dismissed the employee and the employee had resigned within a reasonable period in response.[19]

[16] ESA, *supra* note 2, ss 56(1) and (2),
[17] *Ibid*, s 56(5).
[18] See Regulation, *supra* note 1, s 6.
[19] See *ibid*, s 7.

Any complaints filed by an employee with the Ministry alleging that an employer's temporary elimination/reduction in hours or a temporary reduction in wages should be constituted as the employee's termination or severance would be deemed to have not been filed, so long as what was being alleged was done due to COVID-19 related reasons during the COVID-19 period, unless the complaint relates to the employment relationship being permanently terminated or severed due to:

- The employer dismissing the employee, otherwise refusing or being unable to continue to employ him/her, or the business establishment being permanently discontinued; or

- Before May 29, 2020, the employer constructively dismissed the employee and the employee resigned within a reasonable period in response, or the employee was laid off for a period that exceeded what is allowed for a temporary lay-off under the ESA.[20]

While the Regulation has an impact on the ESA's constructive dismissal provisions, it is not clear whether or not any potential common law constructive dismissal remedies will be affected by the Regulation.

F. WHAT COMPRISES REDUCTION IN HOURS AND WAGES

The Regulation sets out what is considered to be a reduction in hours and wages, as follows:

- For an employee *with* a regular work week, hours and wages are considered reduced if the employee works fewer hours/earns less regular wages in the work week than the last regular work week they were able and available to work before March 1, 2020 (and were not on vacation, subject to a disciplinary suspension, or not provided with work due to a strike or lock-out);

- For an employee *without* a regular work week, hours and wages are considered reduced if the employee works fewer hours/earns less regular wages in the work week than the average number of hours/average amount of wages per work week in the period of 12 consecutive work weeks that preceded March 1, 2020 when the employee was employed, able and available to work (and was not on vacation, subject to a disciplinary suspension, or not provided with work due to a strike or lock-out); and

[20] See *ibid*, s 8.

- For an employee not employed in the entire work week immediately preceding March 1, 2020, that employee's hours of work/wages are considered reduced if the employee works fewer hours in the work week/earns less regular wages than in the work week in which they worked the greatest number of hours/earned the most regular wages. [21]

G. CONCLUSION

Due to the difficulties caused by COVID-19, the Regulation is intended to provide relief to employers, including charities and NFPs, that are forced to temporarily eliminate/reduce the hours and wages of their employees. With regard to employees on temporary lay-offs, by deeming these employees to be on Infectious Disease Emergency Leave, the Regulation provides a longer period than generally would be allowed under the ESA provisions, and also provides protections from allegations of constructive dismissal under the ESA. However, charities and NFPs should be cautious when it comes to the application of the Regulation because of the nuanced detail and complexities involved.

[21] See *ibid*, ss 9(1) and (2).