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SPECIAL CARTERS COVID-19 WEBINAR: LEGAL ISSUES FOR CHARITIES AND NFPS

April 9, 2020

EMPLOYER ISSUES AND CONSIDERATIONS IN RESPONSE TO COVID-19

By Barry W. Kwasniewski, B.B.A., LL.B.

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Barry W. Kwasniewski, B.B.A., LL.B. – Mr. Kwasniewski joined Carters' Ottawa office in 2008, becoming a partner in 2014, to practice in the areas of employment law, charity related litigation, and risk management. After practicing for many years as a litigation lawyer in Ottawa, Barry's focus is now on providing advice to charities and not-for-profits with respect to their employment and legal risk management issues. Barry has developed an expertise in insurance law, and provides legal advice pertaining to insurance coverage matters to charities and not-for-profits.

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OVERVIEW

- Workforce adjustment measures
 - Temporary lay-offs
 - Federal Work-Sharing Program
- Federal Relief Programs
 - Canada Emergency Response Benefit
 - Employment Insurance (“EI”) Benefits
 - Supplemental Unemployment Benefit Program
 - Canada Emergency Wage Subsidy (“CEWS”)
- Infectious Disease Leave under the Ontario *Employment Standards Act, 2000*
- Workplace Health and Safety Legislation and Related Considerations

A. WORKFORCE ADJUSTMENT MEASURES

1. Temporary Lay-offs

- Due to the closure of non-essential businesses, charities and NFPs may be faced with the prospect of having to temporarily lay-off some or all of its employees
- The Ontario *Employment Standards Act, 2000* (“ESA”) provides for temporary lay-off of employees for up to 13 weeks in any 20 week period, or up to 35 weeks in any 52 week period if certain obligations, such as benefit continuance are met by the employer
 - See sections 56(1) to 56(5) of the ESA for reference:
<https://www.ontario.ca/laws/statute/00e41#BK119>

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- While the ESA temporary lay-off is not considered a termination of employment, Ontario courts have in some decisions ruled that even a temporary lay-off may constitute wrongful dismissal at common law, unless the employee has agreed in advance to the lay-off
- To mitigate legal risks of temporary lay-offs
 - Limit the period of lay-off to as short a time as possible, while complying with all emergency measures imposed by governments, as well as the temporary lay-off time limits in the ESA
 - Continue benefits coverage for the period of the lay-off, and make it known to employees that they will be recalled as soon as possible

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- Consider asking employees for their written consent to a temporary lay-off to avoid allegations of wrongful dismissal to mitigate the risk of future litigation
- Consider other temporary measures, such as reduction in hours or pay
- Consider a temporary change in duties of employees
- Set up a remote workplan, if possible, for individual employees
- Be open and communicate with employees

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2. Federal Work-Sharing Program

- Temporary special measures to support both employers and employees, and are available to employers facing business downturns that may directly or indirectly be due to COVID-19
- Work-Sharing agreements involve employers, employees and Service Canada as the parties
- Program can be accessed by employers submitting their application, 10 calendar days prior to the requested start date, to ESDC.ON.WS-TP.ON.EDSC@servicecanada.gc.ca for Ontario
 - [Applications for a Work-Sharing Agreement form \(EMP5100\)](#)
 - [Attachment A: Work-Sharing Unit form \(EMP5101\)](#)

- Minimum duration for these agreements is 6 weeks and new changes extend the maximum duration from 38 weeks to 76 weeks
- Other recent COVID-19 related changes include:
 - The mandatory waiting period being waived for those who have already used the program previously
 - Previous requirements for a recovery plan have been eliminated
 - Employers' eligibility expanded to include NFPs experiencing a shortage of work due to a reduction of business activity and/or a reduction in revenue levels due to COVID-19

- Employees’ eligibility requirements:
 - Eligible to receive EI Benefits;
 - Agree to reduce normal working hours by the same percentage and share the available work;
 - Must be “core staff” – year-round, permanent, full-time or part-time employees needed to carry out the day-to-day functions of the business; and
 - Now also includes employees considered essential to the recovery and viability of the business
- For more information, refer to:
 - <https://www.canada.ca/en/employment-social-development/corporate/notices/coronavirus.html#work-share>

B. FEDERAL RELIEF PROGRAMS

1. Canada Emergency Response Benefit (“CERB”)

- Temporary income support program for employees who stopped working due to COVID-19
- These reasons may include, for example: layoff, being quarantined or sick with COVID-19, need to take care of others who are quarantined or sick, and/or needing to take care of children or other dependents whose care facility is closed due to COVID-19
- Must not have voluntarily quit job
- Do not need to be eligible for Employment Insurance (“EI”) to apply
- Provides \$500 a week for up to 16 weeks – amount of \$2000 paid in blocks of 4 weeks

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- Other eligibility requirements include:
 - Residing in Canada;
 - Being at least 15 years of age;
 - Must have had an income of at least \$5000 in 2019 or in 12 months prior to application date; and
 - Are or expect to be without employment for at least 14 consecutive days in the initial four-week period with no employment income being expected for subsequent benefit periods
- If became eligible for EI regular or sickness benefits on March 15, 2020 or later, claim will automatically be processed through the CERB

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- The CERB is being jointly delivered by Service Canada and the Canada Revenue Agency (“CRA”)
- Available from March 15, 2020 to October 3, 2020
- Applications opened April 6, 2020 with specific days being set up to apply for the CERB based on the month of birth of the applicant
- Must apply by December 2, 2020
- To begin application process, visit <https://www.canada.ca/en/services/benefits/ei/cerb-application.html>

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2. EI Benefits

- Always been in place and available to employees losing their jobs through no fault of their own, which would include shortage of work or temporary/mass layoffs
- Unless an employer provides for paid leave entitlements, this is particularly helpful for employees that meet the EI insurable hours requirement and other eligibility criteria
- Available to COVID-19 related absences from prior to March 15, 2020, and individuals will become EI eligible again once the CERB has been exhausted
- **EI Sickness benefits:**
 - Up to 15 weeks of income replacement for individuals that qualify for EI Benefits and are unable to work due to being ill or in quarantine
 - The one-week waiting period that applied to EI sickness benefits was waived, along with the waiver of the requirement for a medical certificate

3. Supplemental Unemployment Benefit Program

- Plan to enable an employer to top up employees' EI benefits during a period of unemployment due to a temporary or indefinite layoff for, among other things, illness, quarantine, or temporary stoppage of work
- The Plan must be registered with Service Canada, otherwise any top-up amounts (up to 95% of wages) paid by the employer would be considered insurable earnings and be deducted from the employee's EI benefits
- For more information, visit <https://www.canada.ca/en/employment-social-development/programs/ei/ei-list/ei-employers-supplemental-unemployment-benefit.html>

4. Canada Emergency Wage Subsidy (“CEWS”)

- The goals of the CEWS include preventing further job losses and encouraging employers to rehire employees laid off due to COVID-19
- This is a 75% wage subsidy to eligible employers, including charities and NFPs, that see a drop of at least 15% of their revenue in March 2020 and 30% for the following months
- For charities and NFPs, revenue will include most forms of revenue, excluding revenues from non-arm’s length persons, and they may choose to include or exclude any government funding received when calculating loss of revenue as long as a consistent approach is maintained
- Revenue may also be calculated either on an accrual or cash basis, but not a combination of both

- **Claiming and Reference Periods for Eligibility:**
 - Revenues of March, April and May 2020 can be compared to that of the same month of 2019, or to an average of the employers’ revenue earned in January and February 2020

	Claiming period	Required reduction in revenue	Reference period for eligibility
Period 1	March 15 to April 11	15%	March 2020 over: <ul style="list-style-type: none"> • March 2019 or • Average of January and February 2020
Period 2	April 12 to May 9	30%	April 2020 over: <ul style="list-style-type: none"> • April 2019 or • Average of January and February 2020
Period 3	May 10 to June 6	30%	May 2020 over: <ul style="list-style-type: none"> • May 2019 or • Average of January and February 2020

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- There would be no overall limit on the subsidy amount that an eligible employer may claim
- The subsidy amount for a given employee on eligible remuneration paid between March 15 and June 6, 2020 would be the greater of:
 - 75% of the amount of remuneration paid, up to a maximum benefit of \$847 per week; and
 - the amount of remuneration paid, up to a maximum benefit of \$847 per week or 75% of the employee's pre-crisis weekly remuneration, whichever is less
- Employers may be eligible for a subsidy of 100% of the first 75% of pre-crisis wages or salaries of existing employees, and will also be eligible for a subsidy of up to 75% of salaries and wages paid to new employees
- Employer must pay wages and then apply for subsidy. Employees do not wait to get paid

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- Applications for the CEWS would be made online through CRA's *My Business Account* portal
- Employers must maintain records demonstrating their loss of revenues and remuneration paid to employees
- CEWS eligible employers will also become entitled to claim a 100% refund for certain employer-paid contributions to Employment Insurance and Canada Pension Plan, *etc*
 - The refund only applies for weeks when employees are on leave with pay and for which the employer is eligible to claim for the CEWS for those employees, *i.e.* the employee does not perform any work for an entire week but is being remunerated
 - Employers continue to collect and remit employer and employee contributions as usual, and apply for a refund at the same time as for the CEWS

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- **Temporary Wage Subsidy:**
 - On March 18, 2020, the Federal Government had proposed to provide eligible small employers, including charities and NFPs, a temporary wage subsidy, which would equal 10% of remuneration paid from March 18, 2020 to June 19, 2020, up to a maximum subsidy of \$1,375 per employee and \$25,000 per employer
 - For employers eligible for both the 10% wage subsidy and the CEWS, any benefit from the 10% subsidy for remuneration paid in a specific period would generally reduce the amount available to be claimed under the CEWS in that same period
 - Further, organizations not qualifying for the CEWS may still qualify for the 10% wage subsidy

C. INFECTIOUS DISEASE LEAVE UNDER THE ESA

- In Ontario, the ESA gives employees the right to take unpaid job-protected [leaves of absence](#), which include sick leave, critical illness leave, personal leave, family caregiver leave, and bereavement leave, among others
- The *Employment Standards Amendment Act (Infectious Disease Emergencies), 2020* was passed on March 19, 2020 providing employees with job-protected leaves for employees who are quarantined, in self-isolation or directly affected by travel restrictions due to COVID-19, unable to work because of school or daycare closures, or due to their need to care for “specified individuals”
 - The [list](#) of “specified individuals” has now been widely expanded – see section 50.1(8) of the ESA

- The ESA had provisions for an [emergency leave](#) limited to **declared emergencies**, but now has been amended to include **infectious disease leaves**
- This Leave may last for the entire period an employee is unable to perform their job duties for reasons prescribed by the ESA or until the day the emergency ends
 - Ontario has been in a state of emergency since March 17, 2020, allowing employees to apply for the declared emergency leave
 - COVID-19 has also been designated as an infectious disease, giving employees entitlement to seek an unpaid leave of absence under the infectious disease provision because of a COVID-19 related reason, deemed to have started on January 25, 2020

D. WORKPLACE HEALTH AND SAFETY

1. *Occupational Health and Safety Act (Ontario)* (“OHSA”)

- Duties of employers:
 - Take all reasonable precautions to protect the health and safety of employees
 - Provide employees with the information and training to protect against hazards
 - Duty to report “occupational illnesses” of employees to the Ministry of Labour, Training and Skills Development and the union, if present, within 4 days
 - Definition of “occupational illness” is broad enough that it would include COVID-19 if contracted by the employee while at work

- Also a duty in Ontario to report occupational illnesses to the Workers' Compensation Board, if covered by it, within 3 days
- Rights of employees:
 - Right to refuse work if have "reason to believe" that the workplace is unsafe to work in (exceptions for workplaces where risk is inherent as part of the job)
 - An employer may not discipline or retaliate
- Violations of the OHSA can lead to an employer being penalized and opens them up to the possibility of being sued

2. Other Relevant Considerations For Employers

- Stay informed with the recommendations and guidance provided by the World Health Organization, Public Health Agency of Canada, Ontario Ministry of Health and Long-term Care, *etc.*
- Implement social distancing measures, including encouraging employees to work remotely, making use of telephones or videoconferencing, and if that is not possible, avoid close contact if physically present at the workplace

- Follow Government of Canada travel directives – all business or personal travel of employees should be discouraged
- Require all employees to disclose any COVID-19 associated symptoms and send them home to self-isolate for 14 days
 - The same applies if an employee discloses that they or a family member has been in contact with someone who was exposed to or tested positive for COVID-19

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