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Labour & Employment

Key considerations for employers managing fallout from COVID-19

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(April 1, 2020, 12:07 PM EDT) -- COVID-19 is causing the largest disruption to the Canadian economy, potentially in a century. The number of claims for employment insurance the week of March 16 approached one million, dwarfing the 2008 financial crisis in both speed and volume.

Provincial emergency directives ordering schools, restaurants and other businesses to close substantial portions of their operations and politicians and medical health officers advising people to practise social distancing by staying home are having rapid effects on markets.

Business owners across Ontario are looking for ways to temporarily cut costs to protect the long-term viability of their businesses as customer demand has weakened and supply chains have dramatically slowed.

This two-part guide provides a high-level overview of the immediate legal issues employers will face over the coming weeks and months:

1. What do employers need to do to keep employees safe?

2. What are an employer's options if it needs to temporarily lay off employees?

3. Can an employer establish a workshare program with employees?

4. What government support is available to employees?

Federal government responses to the pandemic are rapidly evolving with new programs being announced on a rolling basis, making it especially important that business owners review the status of the government response and available options with counsel before taking action.

1. Obligations and best practices for keeping employees safe

Employers in Ontario have a legal obligation to take every precaution, reasonably available in the circumstances, to protect their employees, their customers and the broader public. When dealing with COVID-19, and pursuant to the advice and direction of the chief medical officer of Ontario, this involves employees self-quarantining if they have exhibited symptoms, have been in close contact with someone exhibiting symptoms, someone diagnosed with COVID-19 or someone recently arrived from international travel, particularly countries hard hit by the virus.

Canadians have also been instructed to self-quarantine for 14 days following arrival from international travel, and employees returning from business or personal travel will be under this same obligation.

Employee privacy rights permit an employer to collect information from employees that is reasonable in the circumstances. To ensure the health and safety of all employees, in the context of COVID-19 an employer can reasonably require an employee to disclose the above information, and direct employees to take the appropriate steps to protect the health and safety of employees, including taking emergency sick leave.

The Ontario government amended s. 50.1 of the *Employment Standards Act* (ESA) on March 19, changing the scope of the emergency leave provisions. The amendments permit an employee to take unpaid leave in situations where they are under medical investigation for COVID-19; are acting in accordance with an order under the *Health Protection and Promotion Act*; are self-isolating in accordance with public health information and direction; or at the direction of their employer. It also permits employees to take unpaid leave to care for a

family member in such situations.

If an employee is refusing to work or perform particular tasks because they believe the work constitutes a danger to their health and safety, an employer cannot force the employee to continue working. Where an employee exercises this right, the *Occupational Health and Safety Act* prohibits employers from disciplining or terminating the employee.

In the context of the COVID-19 pandemic, best practice supports employers taking a transparent and collaborative approach with employees, identifying risks with and to employees and putting in place operating procedures and practices to keep employees and customers safe.

2. An employer's ability to temporarily lay off employees

If you are directed to, or independently make the difficult choice to drastically reduce business operations, or close entirely, requiring you to temporarily lay off employees, here is what you need to consider.

The terms of your employment contract with your employee, if there is one, will govern. If the contract includes provisions permitting the employer to temporarily lay off the employee, the terms and specific language of that provision will be determinative. You should speak with a lawyer to discuss how such a provision applies in the current circumstances.

The Ontario Court of Appeal has held that a unilateral layoff by an employer is, absent a provision in the employment contract, a substantial change in employment, and that it therefore constitutes a constructive dismissal (*Elsegood v. Cambridge Spring Service (2001) Ltd.* 2011 ONCA 831 at para. 14).

While the *Employment Standards Act* includes provisions for temporarily laying off employees, these provisions function as limits on the right of employers to contract with employees to be able to temporarily lay them off. An employer has no right to impose a layoff either by statute or common law, unless that right is specifically agreed upon in the employment agreement. The fact that a layoff may be conducted in accordance with the ESA, does not generally mean a court will not find constructive dismissal (*Martellacci v. CFC/INX Ltd*. [1997] O.J. No. 6383 at para. 30). This lack of a right at law, absent a contractual right, to layoff an employee, applies even where the employer does not mean to repudiate the contract.

As a practical matter, the provisions of the ESA mean that a temporary layoff in accordance with the temporary layoff provisions under the legislation will not trigger statutory termination of the employee, and will not immediately require the employer to pay applicable statutory severance pay.

The ESA defines a temporary layoff under subsection 56(2) as:

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, where the employee continues to receive various specified benefit payments from the employer.

An employee's right to claim constructive dismissal in response to a temporary layoff due to COVID-19 is a common law right. This means it must be exercised by initiating a proceeding in superior court. Any employee choosing to pursue this right also has an ongoing obligation to mitigate the damages they suffer from being laid off, which will include accepting recall to their existing position. Employees also have an obligation to notify their employer that they are treating a notice of temporary layoff as a constructive dismissal. From an employee's perspective pursuing a constructive dismissal claim is likely to be expensive and risky, given the unprecedented economic circumstances.

Best practices support taking a co-operative approach with employees, to weather the economic downturn caused by COVID-19. While employers can obtain the agreement of employees, to a temporary layoff, such agreement is not required. Communicating to employees your intention to recall them as soon as possible, committing to giving them notice of a return date when available and informing them of the employment support available will all help avoid these difficult decisions turning into litigation disputes.

If your business is remaining open, various work schedule arrangements can be reached with employees to temporarily lay them off, including rotating the maximum 13 layoff weeks under the ESA within the 20 consecutive weeks permitted (or the longer period as permitted) and maintaining various supplementary benefits.

This is part one of a two-part series.

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