



LABOUR, LAYOFFS AND THE LAW

What every business owner needs to know during the pandemic

BY RONALD M. SNYDER

The COVID-19 pandemic has impacted businesses across the industry spectrum in a manner not previously seen in a generation. Its collateral effect upon employees is nothing short of devastating. In response, both the Canadian federal and provincial governments have issued an array of support measures and guidelines that are continually being revised to address ever-evolving considerations. Based on client inquiries I have received in recent weeks; the following are some of the more recurrent employee-related questions being raised by employers.

WHAT ARE THE REPERCUSSIONS TO LAYING OFF AN EMPLOYEE?

A layoff that is not managed properly can expose an employer to unanticipated financial consequences.

In a unionized environment, the parties' relevant collective agreement will typically address how and in what manner lay-offs are to occur and the monetary and non-monetary ramifications that will arise.

In a non-unionized environment, a unilateral layoff by an employer can, absent an agreement with the employee to the contrary, constitute a constructive dismissal, which essentially is a deemed termination of the employee. A constructive dismissal occurs where there has been a substantial or fundamental change to the employee's employment. An employer has no right to impose a unilateral layoff either by statute or common law, unless that right is specifically agreed upon in the employee's contract of employment. The fact that a layoff may be conducted in accordance with a provincial employment standards act will typically be regarded as irrelevant to the question of whether a constructive dismissal has occurred.

Should a lay-off thus become an unintended constructive dismissal, the employer will then be required to pay the affected employee compensation equivalent to, at minimum, the appropriate working notice and severance pay to which that employee would be entitled under the *Employment Standards Act (ESA)*. In the case where the dismissed employee has an employment contract or is otherwise entitled to common law damages, the compensation to be paid out could be even more substantial.

It is to be noted that the subject matter of lay-offs is typically addressed in a province's employment standards legislation, some of which set out the conditions when lay-offs will be viewed as permanent dismissals, to which financial consequences will also attract.

For example, the *ESAs* in Ontario and British Columbia provide that an employer is deemed to have terminated an employee if the employee is laid-off for a period longer than a "temporary lay-off", which is a defined phrase under these *Acts*. In Ontario, it means:

- A lay-off of not more than 13 weeks in a period of 20 consecutive weeks; or
- a lay-off of more than 13 weeks in a period of 20 consecutive weeks where the layoff is less than 35 weeks in 52 consecutive week period, and, other certain listed conditions in the Act must exist.

An Ontario employee who has been laid off without having been provided a recall date will be deemed to have been dismissed if the laid-off period exceeds the period of the "temporary lay-off." Notwithstanding above, on May 29, the Ontario government has provided some relief to employers who have laid off staff due to COVID-19 by introducing a new regulation enacted pursuant to the *Employment Standards Act (Infectious Disease Emergency Leave)*, altering how layoffs are handled under the *ESA* during the pandemic.

Generally, an employee who has been laid off for reasons related to COVID-19 beginning March 1, 2020 and onwards, and whose leave continues for six weeks after the

day that Ontario's current State of Emergency has been declared terminated, is deemed to be on "Infectious Disease Emergency Leave." In other words, a reduction or elimination of an employee's hours will not trigger a temporary layoff.

Consequently, an employee's claim filed under the *ESA* of having been terminated or otherwise constructively dismissed as a result of a layoff during this period is now significantly curtailed. One such exception is where a deemed termination under the *ESA* has occurred prior to May 29, 2020 as a result of a temporary layoff. Essentially, an employee lapsed is considered to be on an unpaid leave of absence and has a right to return to the job when the leave ends, should the job still exist. During this period of leave, all of the normal rules associated with statutory leaves under the *ESA* continue to apply.

It is of importance to note that this new regulation does not preclude a laid off employee from pursuing a civil action constructive dismissal claim against the employer.

To the extent that many employers are currently experiencing severe cash flow shortages, the financial consequences of mismanaging a lay-off could be particularly onerous. Employers should consult with a labour and employment law professional to ensure that all of the necessary steps and precautions are being taken to manage layoffs in a manner that minimizes their financial exposure.

WHAT TYPE OF UNEMPLOYMENT SUBSIDIES ARE AVAILABLE FOR MY EMPLOYEES?



The Government of Canada has introduced the *Canada Emergency Response Benefit (CERB)* to address those individuals who find themselves unemployed as a direct result of COVID-19. This program provides a taxable benefit of up to \$500 per week for up to 16 weeks.

The qualifying criteria to secure this benefit are as follows:

- Must be a resident of Canada and at least 15 years old;
- Unemployment must be a direct result of COVID-19, and the individual did not voluntarily quit their job or is eligible for unemployment insurance or sickness benefits;
- Had a minimum income of \$5,000 in 2019 or in the 12 months prior to the date of their application; and
- Will not have employment or self-employment income for at least 14 consecutive days in the initial 4-week period, and for subsequent benefit periods, the individual expects to have no employment or self-employment income;

On April 15, this criterion was expanded to permit applications where an individual earns up to \$1000 per month while collecting

the benefit. Further, the *CERB* is available to individuals who have exhausted their Employment Insurance (EI) regular benefits and are unable to secure work due to COVID-19.

It is to be noted that EI benefits and *CERB* cannot be paid for the same period of unemployment.

Some provinces have elected to provide assistance in addition to the *CERB*. British Columbia, for example, has provided an Emergency Benefit for Workers that will provide a one-time \$1,000 payment to individuals who lost employment income because of COVID-19. Eligibility for this payment exists even if EI or *CERB* has or is being received. Individuals are thus encouraged to investigate whether such similar additional support is available in their province.

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WHAT TYPE OF WAGE SUBSIDY IS AVAILABLE FOR MY COMPANY?



The Government of Canada has also made available the **Canada Emergency Wage Subsidy (CEWS)**, which pays temporary wage subsidies of up to 75 percent of an eligible employee's remuneration (for salaries that do not exceed \$58,700 and to a maximum benefit of \$847 per week per employee.) This program was originally instituted for 12 weeks from March 15 through June 6. The government, however, recently announced it will extend CEWS to August 29, 2020. Entitlement to this subsidy is predicated on an employer being able to demonstrate a drop in gross revenues of at least 15 percent in March

and 30 percent in the following months in comparison to its 2019 revenues. For newer companies, the comparative months will be January and February 2020. This subsidy is available to employers of all sizes and across all sectors of the economy.

Additionally, eligible employers can receive a 100 percent refund for certain withholding contributions to the **Canada Pension Plan, EI, the Quebec Pension Plan and the Quebec Parental Insurance Plan.**

There is also a **Temporary Wage Subsidy (TWS)** program; a three-month, 10 percent wage subsidy available to employers to reduce the amount of payroll deductions required to be remitted to the Canada Revenue Agency (CRA). The subsidy is equal to 10 percent of the remunerations paid from March 18, 2020 to June 19, 2020 (up to \$1,375 per employee to a maximum of \$25,000 per employer).

Eligible employers include individuals, partnerships, non-profits and registered charities, as well as Canadian-controlled private corporations (including cooperatives) that have an existing business number and

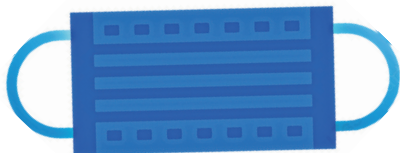
payroll program account with the CRA as of March 18.

Although an employer can apply for both the CEWS and TWS, any benefit received pursuant to the CEWS will likely be reduced by an amount equivalent to a TWS received for the same period.

Finally, a word of caution to employers applying for the CEWS: to ensure that the subsidy is not inappropriately obtained and that employees are paid the amounts, the government is considering the introduction of new offences that will apply to individuals, employers or business administrators who provide false or misleading information to obtain access to this benefit or who misuse any funds obtained under the program. The penalties may include fines or imprisonment.

Thus, vigilance should be exercised in the filing of a claim and in the administration of the wage subsidy received. Where an employer determines, subsequent to its receipt of CEWS, that it is not legitimately entitled to the CEWS or any portion thereof, appropriate due diligence should be exercised that includes notifying the appropriate authorities.

UNDER WHAT SCENARIO CAN MY EMPLOYEE CLAIM SICK BENEFITS DUE TO ILLNESS?



Where an individual is incapable of working due to quarantine, injury or illness, EI sick benefits can provide up to 15 weeks of income replacement.

The benefit is limited to 55 percent of one's

earnings, to a maximum of \$573 per week. An individual claiming the benefit due to quarantine will not have to provide a medical certificate and the standard one-week waiting period will be waived.

WHAT TYPE OF LEAVE PROTECTIONS ARE ACCORDED TO EMPLOYEES WHO ARE ABSENT DUE TO COVID-19?

Virtually all provincial governments and the Government of Canada have passed or shortly will pass legislation to protect employees who are absent from work due to COVID-19.

For example, on March 19, the Government of Ontario passed the *Employment Standards Amendment Act* (Infectious Disease Emergencies), 2020 that prohibits employers from threatening, firing or penalizing an employee because the employee took or plans to take emergency 'infectious disease leave.' At this time, COVID-19 is the only disease for which infectious disease emergency leave may be taken.

This protection is retroactive to January 25, 2020. Thus, if an employee was fired on or after this date because of an absence due to COVID-19, the employer will be obliged to reinstate the employee to the position the employee most recently held, if it still exists, or to a comparable position if it does not, as of March 19, 2020.

The legislation sets out a list of circumstances in which the job-protected leave will

apply and includes protections for employees who are in quarantine, isolation (voluntary or involuntary) or are providing care or support for family members due to a matter related to COVID-19. The latter may include, for example, employees having to care for a child whose school or day care was closed because of COVID-19 and those who are directly affected by travel restrictions such that they cannot reasonably be expected to travel back to Ontario.

An Ontario employer may ask an employee to provide "evidence reasonable in the circumstances at a time that is reasonable in the circumstances" to justify the employee's absence from work due to a COVID-19 concern, but it cannot request the production of a certificate from a physician or nurse as evidence. However, medical notes can be demanded in the context of issues such as return-to-work situations or for accommodation purposes.

There is no specified limit to the number of days an Ontario employee can be absent from work under this legislation. The em-

ployee may remain absent for as long as the event lasts that triggered the entitlement to the leave. Further, COVID-19 leave absences do not have to be taken consecutively, but rather may be taken in part days, full days or periods of more than one day. If the employee must absent themselves from a shift for a brief period to address a COVID-19 related concern, such as delivering urgently needed COVID-19 medication to a family member, the employer must permit the employee to return to work for the remainder of the employee's shift and to pay the employee for that portion of the shift worked.

Similar legislation passed or to be passed by other provinces to protect employees' jobs due to COVID-19 related absences generally mirror the protections provided by the Government of Ontario. Those employers who operate in more than one province should therefore familiarize themselves with the applicable scope of protections accorded their employees in those respective jurisdictions.



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HOW SHOULD EMPLOYERS PREPARE THEIR STAFF FOR THE RESUMPTION OF BUSINESS?

Provincial occupational health and safety legislation across Canada require that employers take the necessary precautions to protect the safety and health of their employees. With the COVID-19 virus not yet eliminated and the unlikelihood of a vaccine being approved for at least another year, employers must take appropriate steps and implement controls that are reasonably necessary to address the potential hazard of COVID-19 at their workplace.

The failure to do so could result in the levying of provincial penalties in the form of fines, potential criminal prosecutions and even orders to shut down a business until the identified health and safety issues are properly rectified.

The health and safety measures to be taken will vary according to the nature of the operation in question. This will require employers to conduct a hazard assessment for COVID-19 transmission at their facility. Some provincial governments have posted guidelines on-line that are sector-specific in how to prevent the introduction and spread of COVID-19 at the workplace.

It is equally important that employers communicate to the employees being called back to work of the safety measures being implemented. It can be anticipated that some

workers will be reluctant to return to work if they do not feel assured that the employer is implementing all reasonable measures to protect their safety and health. Notably, many provinces give employees the right to refuse work where the employees reasonably view it to be dangerous. In anticipating higher than normal rates of absenteeism and work refusals, employers should develop a communications strategy that provides their employees with the necessary comfort to return to work.

In those circumstances where employees ignore the direction to return, employers should be aware of their legal rights and responsibilities to resolve the matter.

Some of the more common considerations for the protection of employees' safety and health may include the following:

- Daily requirement for employees to complete a confidential 'fit for work' health questionnaire and/or be subject to a temperature reading before being permitted access to the workplace;
- Protocols to address employees at work who become COVID-19 symptomatic;
- New protocols or guidelines for the performance of work at the workplace;
- make changes to workplaces, floor plans, work schedules and breaks to minimize employee interaction;

- Establish and encourage physical distancing, not only as between employees, but also with suppliers, visitors and members of the public;

- Provide personal protective equipment (e.g. masks, gloves);

- Install physical barriers;

- Increase the sanitization of regularly used/high contact areas including computer stations, door handles and shared equipment;

- Ensure access to hand-washing facilities and the prominent placement of hand sanitizer dispensers;

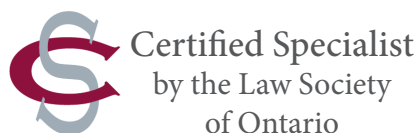
- Implement additional precautions for those who may have compromised immune systems or are 60 years of age or over;

- Provide COVID-19 precautionary measures training to employees;

- Monitor employees for distress and anxiety arising from COVID-19 related changes made in the workplace; and

- Permit, where appropriate, telework (i.e. remote working or working from home) and establish a policy that regulates it.

While this is a uniquely challenging time for both employers and employees, cooperation, accommodation and proper planning will facilitate an employer's resumption of its enterprise. **CRM**



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