

COVID-19 & Employment Issues

Brought to you by



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Agenda

1. Overview
2. Laying off Employees
3. Reducing Hours/Pay
4. Quarantine or Self-Isolating Employees
5. Refusals to Work
6. Government Shutdown of Businesses

The situation remains fluid

Read your employment contracts and policies

Be careful when reviewing the *Employment Standards Act* (Ontario)

Laying Off Employees

Temporary Layoffs Permitted by Agreement

Temporary Layoffs Not Contemplated in Agreement

No Written Agreement

Temporary Layoffs Permitted by Agreement

- Temporary layoff must be expressly permitted by a written employment agreement between the employer and the employee in question
 - In order for a temporary layoff to be lawful in the Province of Ontario, the employee must have explicitly agreed to it as part of a written employment contract with the employer.

Temporary Layoff - Mechanics

- Section 56(2) *Employment Standards Act* (Ontario) - Period for temporary layoff:
 - Maximum of 13 weeks in any period of 20 consecutive weeks, or
 - Maximum of 35 weeks in any period of 52 consecutive weeks if, for example:
 - the employee continues to receive substantial payments from the employer;
 - the employer continues to make payments for the benefit of the employee under a legitimate retirement or pension plan or a legitimate group or employee insurance plan;
 - the employee receives supplementary unemployment benefits.

Temporary Layoff - Mechanics

- Employee may qualify for Employment Insurance (EI) benefits during layoff
 - *For most people, the basic rate for calculating EI benefits is 55% of your average insurable weekly earnings, up to a maximum amount. As of January 1, 2020, the maximum yearly insurable earnings amount is \$54,200.
- We recommend continuing to make employee benefit payments
- It remains to be seen if the provincial government will amend this legislation to extend the length of the temporary layoff period in light of the COVID-19 pandemic.

*Source: www.canada.ca

Temporary Layoff - Mechanics

- Supplementary Unemployment Benefits (SUB) plan
- Notice of Layoff
 - In order to layoff an employee, an employer must provide them with:
 - a) written notice of the layoff and include the effective date of the layoff; and
 - b) issue a Record of Employment or "ROE".

Temporary Layoff - Mechanics

- Record of Employment "ROE"
 - An employer must issue the ROE every time there is an interruption in an employee's earnings e.g. layoff
- Filing Instructions
 - File ROE electronically 5 calendar days after the end of the pay period to issue the ROE
 - File paper ROE 5 days after an interruption in earnings.
- When completing, use Code A (Shortage of Work or Layoff) in Block 16 of the ROE form.

If Temporary Layoffs Not Contemplated or No Employment Agreement

- Difference between layoff and termination
- Constructive dismissal: pay in lieu of notice, and severance pay
- Practical solutions in unprecedented times
 - Likelihood that recalled employees will sue for constructive dismissal?
 - Likelihood that courts will take a practical approach and permit temporary layoffs due to COVID-19 slowdown?
- One alternative, which might not be practical, is to amend the verbal or written employment agreements to permit layoffs

If Temporary Layoffs Not Contemplated or No Employment Agreement

Without employment contract expressly permitting a layoff, employee can take the position that they have been constructively dismissed.

Alternatives to Layoff

- Government programs to deal with COVID-19 crisis
 - application for the temporary wage subsidy for small businesses introduced by the Government of Canada
 - arrangements under the Federal Workshare program
 - deferral of income tax filing and payment deadlines
 - Business Development Bank of Canada (BDC) support program

Reducing Hours/Pay

Unilaterally Reducing Hours/Pay

- Review employment agreements
- Substantial change to material term = constructive dismissal
- Courts determine constructive dismissal on a case-by-case basis
 - Reducing hours of administrative employee by 10% likely permissible
 - Reducing pay of associate veterinarian by 10% could be constructive dismissal
- Alternative: 10% wage subsidy by Federal Government

Consensually Reducing Hours/Pay

- Consensual Amendments to Employment Agreements are Permissible
 - Requires written amendment to employment agreement
 - Employee must voluntarily consent and have opportunity to obtain legal advice
 - Consideration: employee must be given something in exchange for amendment, e.g., a small payment
 - Temporary reductions of hours/pay from start date to end of COVID-19 situation
 - Not practical for all employees, but could be used for unique situation

Reducing Hours/Pay

- If employees are offered reduced hours/pay and refuse:
 - Impose unilateral change and sort it out later
 - If employee continues to work, argue acquiescence
 - If employee returned to full hours/pay, argue damages mitigated except period of reduced hours/pay
 - Increase incentive or get more creative
- Impose rotating layoffs
- Terminate employees
- Ask for volunteers to take leaves of absence

Quarantine or Self-Isolation

Quarantine or Self-Isolation

- Layoffs versus Leave of Absence
- ESA provides for a number of leaves for caregivers and illness
- In response to COVID-19, ESA amended to include new protected leaves for sickness, quarantine, self-isolation and caregivers
- Without pay by default, but review employee handbook and policies for any obligation to provide pay
- Review benefit plans for short-term disability entitlement

Quarantine or Self-Isolation

- Generally, employers have a duty to accommodate employee illness or disability to the point of undue hardship
- *Occupational Health and Safety Act:*
 - duty to provide a safe work environment
 - for the safety of other employees and clients, employers may be required to ask certain employees to stay home
- New protected leave: employer “directs the employee not to work due to a concern that COVID-19 could be spread in the workplace”

Quarantine or Self-Isolation

- Ontario Human Rights Commission:
 - If asking employee to stay home then employers concerns must be reasonable and consistent with the most recent advice from medical and Public Health officials
 - negative treatment of employees who have, or are perceived to have, COVID-19, for reasons unrelated to public health and safety, is discriminatory and prohibited under the *Code*

Refusals to Work

Refusals to Work

- Under Ontario *Health and Safety Act* (OHSA), most employees may refuse unsafe work
- If genuine safety concern, employer must address, otherwise may require employee to work
- Likely a suspension or slower response time of escalation procedures to OHSA officers

Refusals to Work

- If employee continues to refuse even though employer, in good faith, determines safe work environment:
 - Place on leave without pay with employee consent
 - Termination
- If employee refuses to work and takes leave of absence, the employee must demonstrate the reason for the leave has been resolved before returning to work
- If there is no work for the employee, leave can be converted to layoff and vice versa

Government Shutdown of Businesses

Government Shutdown of Businesses

- Shutdown of non-essential businesses began 11:59pm on Tuesday, March 24
- Veterinarians and businesses that provide veterinary services are considered essential and not subject to shutdown
- May continue business normally, subject to social distancing wherever possible

Questions?

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