

Coming into Force of the Reopening Ontario (A Flexible Response to COVID-19) Act, 2020: What This Means for Employers

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In Ontario, a declaration of emergency made under the *Emergency Management and Civil Protection Act* (“EMCPA”), as well as any emergency orders adopted under the EMCPA, are periodically reviewed and renewed, as required. Most recently, the provincial declaration of emergency was extended to July 24, 2020 while existing emergency orders were extended to July 29, 2020. However, recognizing that there will likely be a continued need to manage the public health risks and effects of COVID-19 well beyond the declared emergency, on July 21, 2020, the Ontario government passed Bill 195, now known as the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020* (the “Act”).

End of Declared Emergency

The Act provides that the COVID-19 declared emergency is terminated once it comes into force unless the emergency has been terminated beforehand. The Act came into force on July 24, 2020, which in fact coincided with the termination of the state of emergency.

Continuation and Amendment of Emergency Orders

The Act also provides that emergency orders made under section 7.0.2 or 7.1 of the EMCPA that are in force on the date the Act came into force will cease to be orders under the EMCPA but will be continued as valid and effective orders under the new legislation. The orders are continued for an initial period of 30 days, but the Act allows for the extension by the Lieutenant Governor in Council for further periods of no more than 30 days at a time.

Bill 195, as it was passed, does not allow for the creation of new emergency orders under the Act. However, the continued orders may be amended by the Lieutenant Governor in Council, but only if the amendment requires persons to act in compliance with the advice, recommendations or instruction of a public health official and the amendment relates to one of the following subject matters:

- Closing or regulating any place, whether public or private, including any business, office, school, hospital or other establishment or institution;

- Providing for rules or practices related to workplaces or the management of workplaces, or authorizing the person responsible for a workplace to identify staffing priorities or to develop, modify or implement redeployment plans or rules or practices that relate to the workplace or the management of the workplace, including credentialing processes in a health care facility; or
- Prohibiting or regulating gatherings and organized public events.

Bill 195, as it was passed, also provides that some orders cannot be amended, including, for example: Order 210/20 (Management of Long-Term Care Homes in Outbreak), Order 240/20 (Management of Retirement Homes in Outbreak) and Order 241/20 (Special Rules Re Temporary Pandemic Pay).

The Act limits the authority to extend or amend emergency orders continued under it to a period of one (1) year, subject to further extension by the legislature. It provides for oversight of that authority through regular, mandated reporting wherein any extension of an emergency order under the Act would have to be justified. Additionally, it addresses enforcement and compliance through the same type of provisions on offences and penalties as those already set out under the EMCPA.

It is important to note that despite the provincial declaration of emergency coming to an end, it will nonetheless remain possible for an individual head of the council of a municipality to declare that an emergency exists in any part of their municipality (or to continue such a declaration) and to therefore exercise the powers granted to municipalities in such circumstances by the EMCPA. It also continues to remain possible for Ontario's Chief Medical Officer of Health or for local medical officers of health to exercise the powers granted to them by the *Health Protection and Promotion Act*.

What This Means for Employers

Practically, the termination of the declared state of emergency and the continuation of existing emergency orders under the Act will potentially have significant consequences for employers and employees alike. In particular, it will be important for employers to be mindful of the following:

- **Risk of Deemed Termination Claims**

As detailed in our earlier [Focus Alert](#), in late May, the Ontario government filed Regulation 228/20 under the *Employment Standards Act, 2000* ("ESA") which provided that employees who did not perform their duties because their hours of work had been temporarily reduced or eliminated due to COVID-19 during what was referred to as the "COVID-19 period" were deemed to be on Infectious

Disease Emergency Leave (or “IDEL”). The COVID-19 period was specifically defined under the Regulation as beginning on March 1, 2020 and ending six (6) weeks after the declared state of emergency comes to an end.

Because the declared state of emergency ended on July 24, 2020, the proverbial clock will start ticking towards the end of the COVID-19 period. Once that period ends, the regular ESA rules regarding temporary lay-offs will apply once again and employers who cannot return employees to work within the time frame permitted for such temporary lay-offs may face claims of deemed termination.

- **Risk of Constructive Dismissal Claims**

Pursuant to Regulation 228/20, the Ontario government also provided employers with limited statutory protection against claims of constructive dismissal where an employee’s hours were temporarily reduced or eliminated, or where an employee’s wages were temporarily reduced, due to COVID-19 during the COVID-19 period. Once the COVID-19 period ends, employers who remain unable to return employees to their regular hours or wages will therefore also need to be mindful of the risk of claims of constructive dismissal.

- **Availability of Emergency Leave: Declared Emergencies and Infectious Disease Emergencies**

Under the ESA, Emergency Leave – which is an unpaid, job-protected leave of absence available to eligible employees – can currently be accessed in two ways:

1. In cases of declared emergency (also referred to as Declared Emergency Leave or “DEL”); i.e., when an emergency is declared under the EMCPA and the individual meets other legislated conditions; or
2. In cases of infectious disease emergencies (also referred to as Infectious Disease Emergency Leave or “IDEL”); i.e., for reasons related to COVID-19 specifically, including but not limited to that the individual is under medical investigation, supervision or treatment; the individual is under quarantine or isolation; or the individual is providing care or support to an a listed family member (e.g., school or daycare closures).

With the termination of the declared state of emergency in Ontario, employees will generally no longer be able to qualify for DEL. However, IDEL will continue to remain available to those who qualify for reasons related to COVID-1 specifically and employers will need to be mindful of each individual employee’s circumstances when determining whether or not they will continue to remain

eligible for IDEL from this date forward.

- **Continuation of Emergency Orders**

As all existing emergency orders will continue under the Act, employers must continue to monitor for any such temporary orders that might apply to their workplace. For example, there are currently a number of orders that deal with labour redeployment or workplace and management rules in certain sectors, as well as with the closure of certain places and spaces or the regulation of how businesses and establishments can safely operate.

Furthermore, although the Act does not permit the Lieutenant Governor to create new temporary orders, it does allow some of them to be amended. Employers must therefore be mindful that any applicable temporary orders are potentially subject to change.

In Our View

The Ontario government is taking steps beyond simply dealing with the immediate public health crisis, including ensuring that the appropriate legislative framework is in place to allow for the long-term management of the COVID-19 outbreak within the province.

The coming into force of the Act may have significant consequences for employers who are not yet ready to resume operations in full or even in part for reasons related to COVID-19. Amongst other things, employers will have to turn their minds to properly managing any risk related to deemed terminations and constructive dismissals.

For more information on your rights and obligations as an employer dealing with COVID-19 and other related issues, please contact [Porter Heffernan](#) at [613-940-2764](tel:613-940-2764), [Vicky Satta](#) at [613-940-2753](tel:613-940-2753), [André Champagne](#) at [613-940-2735](tel:613-940-2735), [Lynn Harnden](#) at [613-940-2731](tel:613-940-2731), [Raquel Chisholm](#) at [613-940-2755](tel:613-940-2755) or [J.D. Sharp](#) at [613-940-2739](tel:613-940-2739).