

# Ontario makes important changes to ESA rules related to temporary layoffs and constructive dismissals

**Date :** June 2, 2020

On May 29, 2020, the Ontario government filed [Regulation 228/20](#) – Infectious Disease Emergency Leave (“Regulation”) under the *Employment Standards Act, 2000* (“ESA”). This new Regulation provides employers impacted by the COVID-19 pandemic with temporary relief from the ESA’s rules on temporary layoff, termination, severance and constructive dismissal by deeming an employee to be on unpaid, job-protected Infectious Disease Emergency Leave (“IDEL”) in certain situations.

The relevant changes apply only to non-unionized employees, including assignment employees who are employed by temporary help agencies.

## Employees Deemed to be on Infectious Disease Emergency Leave (IDEL)

Rather than being on a temporary layoff, an employee who does not perform their duties because their hours of work have been temporarily reduced or eliminated due to COVID-19 during the “COVID-19 Period” is deemed to be on IDEL. The “COVID-19 Period” is defined under the Regulation as the period beginning on March 1, 2020 and ending six weeks after the state of emergency in Ontario comes to an end. IDEL is an unpaid, job protected leave which came into effect under the ESA on March 19, 2020 and discussed in a [previous Focus Alert](#).

Under the usual ESA rules, an employee on a statutory leave of absence is entitled to continue to participate in benefit plans for the duration of the leave. The Regulation provides an exception to the usual rules in that if, as of May 29, 2020, an employee ceased participation in the employer’s benefit plan, or the employer ceased contributions to a benefit plan, the employer is exempt from the general requirement that it continue benefits during an ESA leave.

Employees will not be considered on IDEL if, at anytime on or after March 1, 2020, the employer:

- terminates/severs the employee’s employment;
- closes its entire business at an establishment; or
- has given or gives notice of termination to an employee and the employee resigns in response as specifically provided under the ESA.

Similarly, employees will not be considered on IDEL if, before May 29, 2020, the employee had already been:

- deemed terminated or severed under the ESA because of their layoff; or
- constructively dismissed and had resigned within a reasonable period.

Where an employee has been given written notice of termination, if the employer and the employee agree, the notice of termination can be withdrawn and the employee can be deemed to be on IDEL.

### **Reduction in Hours/Wages Not a Layoff**

For an employee whose hours of work have been temporarily reduced or eliminated, or whose wages have been temporarily reduced, for reasons related to COVID-19 during the COVID-19 Period, the usual ESA termination and severance provisions related to layoffs will not apply. In other words, these employees will not be considered to be laid off for the purposes of the ESA during the COVID-19 Period. The usual ESA rules remain in place if:

- the employee is or was laid off as a result of a complete closure of the employer's business at an establishment; or
- before May 29, 2020, the employee had already been deemed terminated or severed under the ESA because of their layoff.

### **Reduction in Hours/Wages Not a Constructive Dismissal**

The Regulation also deems certain circumstances not to constitute a constructive dismissal under the ESA if they occur during the COVID-19 Period, and are for reasons related to COVID-19:

- A temporary reduction or elimination of an employee's hours of work.
- A temporary reduction in an employee's wages.

However, employees may still claim that such a reduction/elimination constitutes a termination if the employee resigned within a reasonable period before May 29, 2020.

### **ESA Complaints**

Subject to several exceptions, complaints filed with the Ministry of Labour claiming that a temporary reduction or elimination of an employee's hours of work, or a temporary reduction in an employee's wages, constitutes a termination or severance of employment are deemed not to have been filed if the reduction or elimination occurred during the COVID-19 Period for reasons related

to COVID-19. One such exception is where an employee's employment was deemed terminated before May 29, 2020 because they were laid off for a period longer than a temporary layoff under the ESA; in such a circumstance, the employee would still be able to file an ESA complaint if they were not paid their termination and severance (if applicable) entitlements. Another exception is where an employee was constructively dismissed and had resigned within a reasonable period before May 29, 2020.

## **Additional Information**

The Regulation also addresses how to determine if an employee's hours of work or wages have been reduced. For example, where an employee has a regular work week, the employee's hours of work will be considered reduced if the employee works fewer hours in the work week than they worked in the last regular work week before March 1, 2020. Where the employee does not have a regular work week, the average number of hours worked in the 12-week period before March 1, 2020 is to be used for comparison purposes.

## **In Our View**

The new Regulation will provide much-needed relief for Ontario employers (with non-unionized employees) who have had to temporarily close their businesses or otherwise reduce or eliminate their employees' hours of work or reduce their employees' wages due to the ongoing COVID-19 pandemic. Of great importance for employers is the fact that non-unionized employees who had been laid off for COVID-19-related reasons will not be deemed to be terminated during the COVID-19 Period. This will provide much-needed temporary relief for those non-unionized employees who would otherwise be covered by the 13-week temporary layoff threshold. Unless further relief is granted by the government in the future, this means that the pre-existing ESA rules, including the deemed termination provisions for exceeding the temporary layoff period, will apply once the COVID-19 Period expires. Note that, for any layoffs that preceded March 1, 2020 and were COVID-19-related, the COVID-19 Period effectively stops the clock on the layoff period.

Lastly, the relevant amendments will not apply to unionized employees. Employers seeking relief will need to review their collective agreements, including any layoff and recall provisions, and seek legal advice.

For further information or advice on the new Regulation or about your rights and obligations as an employer when dealing with COVID-19, please contact [Kecia Podetz](#) at [613-940-2752](tel:613-940-2752), [J.D. Sharp](#) at [613-940-2739](tel:613-940-2739), [Sheri Farahani](#) at [613-940-2745](tel:613-940-2745), [Jennifer Birrell](#) at [613-940-2740](tel:613-940-2740), [Colleen Dunlop](#) at [613-940-2734](tel:613-940-2734), [André Champagne](#) at [613-940-2735](tel:613-940-2735) or [Lynn Harnden](#) at [613-940-2731](tel:613-940-2731).