

Ontario orders mandatory closure of non-essential workplaces

Date : March 24, 2020

To further contain the spread of COVID-19, the Ontario Government has ordered the mandatory closure of all non-essential workplaces to be effective as of March 24, 2020 at 11:59 p.m. This order will be in effect for 14 days with the possibility of being extended as the situation evolves.

For the purposes of this order, businesses include any for-profit, non-profit or other entity providing the goods and services described therein. This does not preclude the provision of work and services by entities not on the list either online, by telephone or by mail/delivery. Furthermore, teleworking and online commerce are permitted at all times for all businesses.

A full list of the “essential workplaces” that are permitted to stay open is available [here](#). The list is fairly comprehensive and includes specified businesses in the following areas:

- Supply chains
- Retail and Wholesaling
- Food Services and Accommodations
- Institutional, Residential, Commercial and Industrial Maintenance
- Telecommunications and IT Infrastructure/Service Providers
- Transportation
- Manufacturing and Production
- Agriculture and food production
- Construction
- Financial activities
- Resources
- Environmental Services
- Utilities and Community Services
- Communications Industries
- Research
- Health Care and Seniors Care and Social Services
- Justice Sector
- Other Businesses
- Business Regulators and Inspectors

Temporary Layoffs

The mandatory shutdown in Ontario of non-essential workplaces will force numerous employers to make the difficult decision of temporarily laying off their employees, especially where teleworking is not an appropriate alternative. Below, we have summarized some of the key legal considerations when dealing with temporary layoffs under the Ontario *Employment Standards Act, 2000* (“*ESA*”).

Employers may invoke a temporary layoff in accordance with the provisions of the *ESA*, which does not amount to a termination or severance of employment pursuant to the *ESA*. Under the *ESA*, a temporary layoff is the following:

1. A layoff of not more than 13 weeks in any period of 20 consecutive weeks;
2. A layoff of more than 13 weeks in any period of 20 consecutive weeks, if the layoff is less than 35 weeks in any period of 52 consecutive weeks and:
 - 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;
 - the employee is employed elsewhere during the layoff and would be entitled to receive supplementary unemployment benefits if that were not so;
 - the employer recalls the employee within the time approved by the Director of Employment Standards;
 - in the case of an employee who is not represented by a union, the employer recalls the employee within the time set out in an agreement between the employer and the employee;or
3. In the case of an employee represented by a union, a layoff longer than a layoff described in clause (b) above where the employer recalls the employee within the time set out in an agreement between the employer and the union (i.e., recall rights in a collective agreement).

The *ESA* specifies that an employer who temporarily lays an employee off without specifying a recall date shall not be considered to terminate the employment of the employee, unless the period of the layoff exceeds that of a temporary layoff. Therefore, if a layoff exceeds the above-noted period for a temporary layoff, an employee will be deemed to have been terminated for *ESA* purposes and will therefore be entitled to *ESA* termination pay and severance pay, if applicable.

Employers are not required under the *ESA* to provide employees with an advanced notice of a temporary layoff but unionized employers may be subject to notice requirements under their collective agreement, which may prove impossible to implement in light of the mandatory order, which will take effect at 11:59 p.m. on March 24. Unionized employers should also carefully review their collective agreements for any layoff and recall procedures. Furthermore, if the layoff of a unionized employee extends beyond 34 weeks (i.e. lasts for 35 weeks or more) and the employer

and the union have an agreement which provides a recall period that is 35 weeks or more, then the employee may elect to take *ESA* termination pay and severance pay (if applicable), or retain their recall rights, but not both.

It is also important to note the current state of employment law in Ontario which is that, notwithstanding the permissive provisions in the *ESA*, absent a term in an employment agreement (express or implied) permitting temporary layoffs (or in some cases an established practice relating to temporary layoffs), a layoff, even if intended to be temporary, may result in the risk of constructive dismissal claims. In other words, even if a temporary layoff under the *ESA* is carried out properly such that employment is not deemed terminated under the *ESA*, absent an agreement to the contrary and/or a well established practice, a unilateral layoff by an employer may result in the triggering of a termination of employment by virtue of the common law in Ontario.

That being said, there is currently much debate amongst employment lawyers as to whether in the time of crisis, such as the unprecedented COVID-19 pandemic, there may be an implied term in the employment agreement that an employer can place an employee on a temporary layoff. There has also been discussion about whether an employment contract can become “frustrated” as a result of the COVID-19 crisis and the mass closures that have followed. Frustration is a legal doctrine which essentially involves an unforeseen change to the circumstances underlying the contract, through no fault of the parties, that renders the contract incapable of performance.

Additionally, a constructive dismissal arises if there has been a unilateral change by the employer that substantially alters an essential term of the contract. Therefore, if a change to the terms and conditions of employment are not imposed by the employer, but are rather imposed as a result of a mandatory closure ordered by the Ontario Government, it is questionable in these extraordinary circumstances whether an employee would be able to successfully argue that the temporary layoff constitutes a constructive dismissal. An employee claiming constructive dismissal also has an obligation to mitigate any damages they allege to have suffered, which means that if a laid off employee is recalled to work and declines, a court may later find that the employee failed to mitigate their damages (in whole or in part), therefore reducing the value of their claim.

In Our View

Employers should consult the comprehensive list of “essential workplaces” to determine if their workplace is captured under the Ontario Government’s order. The Government also announced that it will be setting up a 1-800 number and website for inquiries.

Considering the mandatory shutdown of non-essential workplaces in Ontario and the ongoing work shortages due to the pandemic, non-union employers may wish to consider benefit continuation or providing supplementary unemployment benefits to qualify for the longer temporary layoff period

under the *ESA*. Employers should also remember that under the *ESA*, an employee is entitled to a job-protected leave of absence without pay if the employee will not be performing the duties of their position because of an emergency declared under the *Emergency Management and Civil Protection Act* (“*EMCPA*”) and as a result of an order that applies to them made under the *EMCPA*. For more information see our previous Focus alert, [Ontario expands ESA job-protected leaves for COVID-19](#).

Emond Harnden LLP will continue monitoring the development of COVID-19 carefully and closely and will provide additional information as it becomes available through our Focus Alerts and our [website](#). The Ontario government in its March 23rd News Release noted that businesses that can continue operations with employees working remotely, or through other contingency measures, are being given 36 hours to prepare and adapt. We will soon publish a Focus article to provide a guide for remote work considerations. We will also be publishing a Focus article in the coming days to provide some key information about employment insurance benefits.

For further information or advice on your rights and obligations as an employer when dealing with COVID-19 and similar issues, please contact [André Champagne](#) at [613-940-2735](#), [Lynn Harnden](#) at [613-940-2731](#), [Sheri Farahani](#) at [613-940-2745](#), [Porter Heffernan](#) at [613-940-2764](#) and [Kecia Podetz](#) at [613-940-2752](#).