

# Compliance Alert: Ontario Eliminates Time Cap, Constructive Dismissal Liability for COVID-19 Temporary Layoffs



*2 in 5 employers have reduced the hours of or temporarily laid off at least one employee since the start of the COVID-19 crisis*  
–Statistics Canada

Ontario adopted new rules to ensure that employees placed on temporary layoff or whose hours have been reduced due to COVID-19 can't sue their employers for constructive dismissal.

## The Temporary Layoff-Constructive Dismissal Conundrum

"Temporary layoff" gives employers a respite to get through tough financial times by putting jobs on hold for a defined period of time. Termination notice and other payments required under employment standards law come due only when the window for recall expires.

The fly in the ointment is that courts have held that temporarily laid off employees can, in fact, sue for constructive dismissal, even if the employer complies with the jurisdiction's employment standards temporary layoff requirements. This also applies to employees who are still working but at reduced hours and wages. The resulting risk of constructive dismissal liability has weighed heavily on the minds of employers resorting to temporary layoffs as a result of COVID-19-related financial pressures.

## The Limited Shelf Life for Temporary Layoffs

The other thing that limits the value of temporary layoff to employers is its limited shelf life. If employers don't recall employees within the time period specified in the jurisdiction's employment standards laws, the layoff becomes permanent termination and the employer must shell out notice and other termination and severance payments required by employment standards law.

# The New Ontario Regulations

On May 29, Ontario became the first province to implement regulations addressing these issues. Technically, new ESA regulation O. Reg 228/20 ("Reg") revises the previous Infectious Disease Leave regulation giving employees unpaid leave to deal with COVID-19 issues, e.g., being in self-isolation, caring for family members, etc. The Reg makes 2 big changes that apply during the "COVID-19 period," i.e., from March 1, 2020 until 6 weeks after the government ends the current public health emergency:

## 1. No Constructive Dismissal Liability for Reduced Hours

Under the Reg, employees whose hours or wages were temporarily reduced are deemed not to have been discharged under the ESA. Result: They can't sue for constructive dismissal under the ESA (although suits under so called common law are still a possibility) and the MOL will automatically dismiss any such claims.

## 2. Elimination of Temporary Layoff Maximum Duration

Employees who've been laid off, either completely or as a result of having their hours reduced by more than 50% in one week due are deemed to be not on layoff but leave of absence, specifically infectious disease emergency leave. Result: Effective May 29, 2020 and for as long as the "COVID-19 period" lasts, the normal ESA 13-week cap on temporary layoffs doesn't apply to temporary layoffs due to COVID-19 (although time limitations may still apply under a collective agreement).

**Caveat**: These 2 changes aren't retroactive and don't apply to temporarily laid off employees who were already terminated or constructively dismissed before May 29, 2020.

## Revisions to Benefits Requirements

The Reg also modifies the benefits rights of employees on infectious disease emergency leave:

- Employers don't have to allow employees who stopped participating in a benefit plan as of May 29, 2020 to continue to participate in the benefit plan during the leave; and
- Employers that weren't making contributions benefit plan contributions as of May 29 don't have to contribute to plans during the leave.