Compliance Briefing: Temporary Layoffs & Constructive Dismissal Liability Risks

This is an article from 2020, reflective upon the COVID-19 pandemic, but the principles and strategies mentioned are still applicable for HR directors facing any economic uncertainty or crisis in the workplace due to external factors.

The Temporary Layoff Constructive Dismissal Conundrum

"Temporary layoff" gives employers a respite to get through tough financial times jobs 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 provided under the jurisdiction's employment standards law expires and the layoff is considered permanent termination. (Use the "Around the Provinces" sheet on the HRI website to look up the temporary termination time limits of your province.)

In addition to its limited shelf life, temporary layoffs expose employers to liability risks. That's because courts have held that employees on temporary layoff can sue their employer for money damages. The theory: The failure to provide the employee work is a fundamental change in the terms of employment and constructive dismissal of the employee, even if the employer complies with the jurisdiction's employment standards temporary layoff requirements.

Example: Ontario court rules that manufacturing company constructively dismissed 15-year employee by placing him on temporary layoff, even though the layoff didn't exceed the ESA 13 weeks in any consecutive 20-week maximum and the company made all the required benefits payments on the employee's behalf. Compliance with ESA rules didn't change the fact that the company committed constructive dismissal by unilaterally imposing the layoff without any contractual right to do so, reasoned the court [*Bevilacqua v Gracious Living Corporation*, 2016 ONSC 4127 (CanLII)].

Note: Suing for constructive dismissal may also be an option for employees who are still working but at reduced hours and wages.

How Employers Can Limit Their Liability Risks

One thing that may help at least some of those 2 in 5 employers sleep better at night is knowing that some courts have rejected the *Bevilacqua* reasoning and found that there can be no constructive dismissal when the temporary layoff complies with ESA

requirements. Still other courts have ruled that even if the contract doesn't expressly allow it, employers may have an implied right to impose temporary layoffs in some circumstances, for example, where the employer:

- Has a history of temporary layoffs, e.g., due to shortages of work;
- Is in an industry where temporary layoffs are common;
- Has a policy warning employees of the possibility of temporary layoffs in the event of a business downturn or shortage of work; and
- Continues to provide the employee benefits during the layoff.

And while it's probably too late for most of those 2 in 5 employers, the best way to avoid constructive dismissal lawsuits is by including express contract language authorizing you to impose temporary layoffs in accordance with your province's employment standards laws.

The New Ontario Regulations

Least worried of all should be Ontario employers. Explanation: On May 29, Ontario became the first province to adopt regulations shielding employers from constructive dismissal liability risks for COVID-19 layoffs or hours reductions. 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 will apply until 6 weeks after the government ends the current public health emergency:

1. No Constructive Dismissal 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 file ESA constructive dismissal suits (although suits under so called common law are still possible) 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, 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.