How to Work When Nothing Is Working: Canadian Employment Law And COVID-19

As with the rest of the world, Canadian employers are confronting unprecedented challenges in the face of the global COVID-19 pandemic. Employers are now tasked with navigating a mix of existing laws (designed for what used to be the status quo), and new, quickly enacted emergency measures, with the possibility of yet more changes in the weeks ahead.

This bulletin is current as of 12:00 p.m. EDT on March 23, 2020. Since the situation is rapidly evolving, it is important for employers to continue to check government websites and other information sources to ensure they make decisions with information that is as up to date as possible.

This bulletin will therefore consider employment law developments in Canada *excluding* the province of Québec.

The following are some of the most common questions we have received from employers in the week since the province of Ontario declared an emergency on March 17, 2020.

Can I cut hours of work or implement "work-sharing"?

Many employers are now faced with the sudden business need to cut available hours for employees. If an employer finds itself in this unfortunate situation, work-sharing is a potential solution to consider.

"Work-sharing" refers to an agreement between an employer, its participating employees and their union(s), if any, to share what remaining work the employer still needs done among the current workforce. The goal is to avoid layoffs.

Work-sharing programs are approved by Employment and Social Development Canada (ESDC), the federal department responsible for administering Employment Insurance (EI). Under an approved work-sharing program, the employer pays eligible employees their salary or wages for a reduced workload and, in turn, the employees receive a weekly EI supplement. One advantage of this program is that the cumulative amount an employee can receive in (reduced) wages and EI supplements will exceed the amount that he or she would receive if not working at all and receiving solely EI support.

What requirements apply to employers?

In order to be eligible for work-sharing, the employer must be a public company, a private business or a not-for-profit organization that has been active in Canada on a year-round basis for at least two years. **Note there are additional criteria for not-for-profit organizations.** Public sector and Crown corporation employers do not qualify.

The employer must apply to ESDC. Normally, the employer must apply at least 30 days before the work-sharing program is to become effective. In the application, the employer must do the following:

- Show that it has suffered a reduction in business of at least 10%.
- Show that the current work shortage is temporary and beyond its control (not cyclical). The reduction in business cannot be due to a labour dispute (including with a supplier). It appears that while COVID-19 is rather obviously beyond any employer's control, applications may nevertheless be scrutinized to determine whether there is indeed a correlation between the COVID-19 pandemic and the particular employer's work shortage. Employers in some sectors may be better able to show this than in others.
- Submit and put in place a recovery plan designed to return the affected employees to normal working conditions.

Work-sharing agreements must include a reduction in work activity of affected employees' regular work schedule of between a minimum of 10% (one-half day) and a maximum of 60% (three days). Additionally, employers must maintain employee benefits for the duration of the agreement.

What requirements apply to the employee?

Eligible employees must be "core employees" (i.e., year-round permanent full-time or part-time employees who are required to carry out the everyday functions of normal business activity). They must also be eligible to receive EI benefits. Finally, an employee must agree to a reduction of his or her normal working hours. Employees who do not agree and are laid off without any work may still be eligible for EI benefits, although the quantum of these could be less than if they had participated in the arrangement.

What has changed in light of the COVID-19 pandemic?

The maximum duration of a work-sharing program has been extended to 76 weeks, from 38 weeks.

Employers will still otherwise need to meet the other requirements. That means that new entrants to the Canadian market (less than two years) will not qualify, at least under the program that exists today. As this situation is fluid, the government may relax more of the requirements in the future.

My employees are unable to work because of self-isolation or other COVID-19-related measures. What rights do they have?

Some Canadian jurisdictions have passed emergency legislation to protect jobs when an employee is absent from work because the employee is showing COVID-19 symptoms or has tested positive for it; is caring for an immediate relative with

it; or is undergoing government-directed self-isolation (such as the 14-day self-isolation for those who have been exposed to someone with COVID-19 or are returning from international travel).

Ontario has introduced these protections for provincially regulated employees through the *Employment Standards Amendment Act (Infectious Disease Emergencies), 2020*, which received royal assent on March 19, 2020, retroactive to January 25, 2020. The retroactive effect means that employees who took such a leave in late January or February are protected against dismissal because of certain COVID-19-related absences. A doctor's note is not required, but the employer may request other reasonable evidence of the need to take the leave, such as evidence that the employee returned from international travel.

Other jurisdictions that have introduced similar leave protections:

- Alberta: Up to 14 unpaid days of job-protected leave if the employee is required to self-isolate or care for a child or dependent adult who is required to self-isolate.
- Saskatchewan: An unpaid leave for so long as a "public health emergency" remains in place if the employee is required to self-isolate or care for a child who has been affected by the emergency.

Must I pay employees for a job-protected COVID-19-related leave?

No. Unless a collective agreement or employment agreement says otherwise, none of the measures introduced to date require employers to pay employees for a job-protected COVID-19-related leave. However, if employees work remotely, then they are not on "leave" and will need to be paid. Employees may also be able to draw on accrued paid sick days and vacation time, but the employer will generally need to agree to any use of vacation time. Employers may wish to review their existing vacation policies, since a number of employees may be looking to use their paid vacation to mitigate what otherwise would be an extended unpaid absence.

Even in jurisdictions that have not enacted special COVID-19-related job-protection measures, existing statutory job-protected leaves could cover certain COVID-19-related absences.

What about human rights protections?

An employee infected with COVID-19 or its symptoms could be considered to have a "disability" within the meaning of applicable human rights legislation. Employers are precluded from discriminating in employment on the basis of a disability and usually have a duty to accommodate disabilities to the point of undue hardship. While no employee exhibiting symptoms or having recently been exposed to someone with the virus should come into the workplace, human rights protections mean that the employer cannot dismiss the employee on the basis of his or her condition. In addition, since it is not yet clear whether there may be longer-term effects from COVID-19, an employee who has recovered may require workplace modifications and other concessions in the future, which the employer will need to accommodate up to the point of undue hardship.

In addition, applicable human rights legislation typically precludes an employer from discriminating in employment on the basis of an employee's "family status." Thus, when employees are required to stay home as a result of school or daycare

closures, the employer will have a similar duty to accommodate the employee's family obligations, again up to the point of undue hardship.

What should I do if an employee has or is suspected of having COVID-19? How can I keep my workplace safe?

All employers must ensure a safe and healthy workplace. For those workplaces that have not been ordered closed by public health authorities, this may mean a number of different things. First, given the contagious nature of COVID-19 and its seriousness, employers should be justified in not allowing into the workplace anyone who displays symptoms of COVID-19, has tested positive for COVID-19 or has had recent close contact with someone with COVID-19. Such individuals should be required to isolate for at least 14 days or, in the case of someone with the virus, until he or she is free of COVID-19.

Second, depending on the workplace, an employer may be reasonably justified in implementing broader screening measures such as temperature checks. If you have begun or are contemplating implementing a screening program, a number of considerations under human rights legislation may be relevant and you should discuss the potential issues with your regular Davies contact.

What does COVID-19 mean for my ability to terminate employment?

To date, no Canadian jurisdiction has enacted laws that reduce or eliminate any of employers' obligations on termination of employment. With limited exceptions and subject to any additional requirements in a collective agreement or employment agreement, employers will still need to provide notice or termination or pay in lieu of notice and, if applicable, benefit plan continuation and severance, as required by employment standards legislation.

When an employment contract becomes impossible to perform because of an event that was not contemplated by the parties when they entered into the agreement, the employer may be entitled to treat the contract as frustrated and at an end, so that no notice of termination or pay in lieu of notice would be required. It may therefore be asked whether employment contracts can be considered frustrated as a result of the COVID-19 pandemic. We are still in the early days of the COVID-19 pandemic, and so this issue has yet to be litigated in the current factual environment. However, for certain employers and certain industries, the concept of frustration may become important as the pandemic continues. In most situations, however, it is likely to be very risky for an employer to attempt to rely on frustration of employment contracts.

Can I lay off some or all of my employees?

Colloquially, "layoffs" usually mean sending an employee home temporarily without pay because of work shortages, with the expectation that the employer will recall the employee in the near future when work once again becomes available.

With unionized workforces, the collective agreement will often address layoff conditions and procedures. With non-unionized workforces, employers will need to consider the following: (i) employment standards legislation; and (ii) affected employees' contracts of employment.

Layoffs under employment standards legislation

Employment standards legislation in each province sets out rules governing layoffs. In particular, depending on the jurisdiction, the legislation specifies the amount of notice an employer must give to an employee for a layoff (and there are typically exceptions if a work shortage is sudden or unforeseen) and the conditions that a layoff must meet so that it does not trigger statutory termination entitlements.

In some jurisdictions, such as British Columbia and Ontario, a week is considered a period of "layoff" if the employee makes less than 50% of his or her regular weekly wages. Therefore, in reducing hours for employees, employers should be mindful that reductions that are significant enough could still trigger statutory layoff rules. This means that if the layoff lasts long enough, employees may consider themselves to be terminated even though they were working on a reduced schedule the entire time.

Layoffs under contracts of employment

If an employment agreement expressly allows the employer to implement layoffs — or, even if it does not but there has been a consistent past practice of layoffs to which the employee can be considered to have acquiesced — employers may have a contractual right to lay off employees in response to the COVID-19 pandemic.

If the employment agreement is silent on this issue, the employer's decision to lay off the employee or significantly reduce his or her hours could amount to a "constructive dismissal," which would allow the employee to resign and claim wrongful dismissal damages on the basis that he or she was terminated without reasonable notice. Since the employee must actually terminate employment in this case, it is unclear how widespread or practical this risk will become in the current economy. In addition, courts have not yet considered constructive dismissal claims in the context of COVID-19 and the resulting widespread layoffs in many sectors. Accordingly, it is not clear whether a laid-off employee would succeed in a constructive dismissal claim given the global severity of the pandemic.

What should I do if my employee is stranded abroad because of business travel?

The employer should use reasonable efforts to enable the employee to return home. That said, the employer may not be able to arrange transportation to or from a locked-down jurisdiction that has suspended all incoming traffic. However, employers can continue to monitor announcements from the Canadian government and any embassies or consulates in the affected jurisdiction and help communicate vital information to affected employees. In this regard, the employee should also sign up for notifications from diplomatic authorities. Time may be of the essence, and there may be only a narrow window for the employee to get home when transportation does become available.

Generally, an employer would not be required to pay an employee who is abroad and unable to work because of COVID-19-related travel lockdowns (unless, of course, the employee can and does work remotely). In some circumstances, the employer may wish to consider advances or loans to the employee to cover the extended period abroad.

What financial and other help have Canadian governments offered employers?

To date, there have been no broad governmental commitments in Canada to subsidize employers' payrolls, comparable to measures recently announced in the United Kingdom and Denmark.

However, limited relief was announced on March 18, 2020, when the federal government committed to a targeted payroll subsidy for non-profit organizations, registered charities and Canadian-controlled private corporations (CCPC) if the CCPC's taxable capital employed in Canada for the preceding taxation year, calculated on an associated group basis, is less than $15 million.

The targeted subsidy is equal to 10% of the remuneration the qualifying employer pays between March 18, 2020, and June 20, 2020, up to $1,375 per employee, to a maximum of $25,000 total per employer. The employer is entitled to deduct the subsidy amount from its federal, provincial or territorial income tax remittance to the Canada Revenue Agency. The government has published a more detailed FAQ for employers.

* * *

If there is any certainty, it is that nothing is certain anymore. We will continue to monitor all legal ramifications of the COVID-19 pandemic and bring you up-to-date information about how it will affect your business.

By Mark Firman of Davies Ward Phillips & Vineberg