

New Ontario ESA changes – the COVID-19 period has been extended to 2021

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Co-Authors: Christopher McClelland, Maria Kotsopoulos

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Earlier this summer the Ontario government made a number of important changes to employment standards laws in response to COVID-19. These changes, which affected the rules around temporary layoffs as well as temporary reductions in hours or wages, were intended to remain in effect until September 4, 2020. However, late last week the Ontario government announced that the “COVID-19 period” is being extended until January 2, 2021, which means that the changes will remain in effect for several more months.

Background

In June 2020, a Regulation was enacted under the Ontario *Employment Standards Act, 2000* (the “ESA”) that resulted in the creation of Infectious Disease Emergency Leave (“**IDE Leave**”). As a result, non-unionized employees covered by the *ESA* who were placed on temporary layoff or who had their hours or wages reduced during the COVID-19 period for reasons related to COVID-19 were deemed for *ESA* purposes to be on IDE Leave, an unpaid, job-protected statutory leave.

The COVID-19 period did not count towards the time limits ordinarily applicable to temporary layoffs (i.e. 13 weeks in a 20 week period or, if certain conditions were met, up to 35 weeks in a 52 week period). The government framed this as a benefit to employers as an employer no longer faced the statutory termination and severance costs associated with the expiry of the temporary layoff period. The Regulation also specifically provided that a temporary layoff (or reduction of hours or wages) did not constitute a constructive dismissal for purposes of the *ESA*.

Although the changes applied retroactively to March 1, 2020, IDE Leave did not apply to resignations or terminations that took place prior to May 29, 2020 or in respect of employers that stopped making benefit plan contributions prior to May 29, 2020.

Amendment to IDE Leave

As indicated above, on September 3, 2020, the Ontario government announced that the Regulation would be amended to extend the COVID-19 period to January 2, 2021.

In this respect, non-unionized employees whose hours of work have been reduced or eliminated for reasons related to COVID-19 during the COVID-19 period, which is now March 1, 2020 to January 2, 2021, are:

- deemed to be on IDE Leave;
- not considered to be temporarily laid off; and
- not considered to be constructively dismissed under the ESA if their employer temporarily reduces or eliminates their hours of work or wages for reasons related to COVID-19.

The government's press release announcing the amendment to the Regulation and the extension of the COVID-19 period for the purposes of the ESA indicates that after January 2, 2021, employees will no longer be deemed to be on IDE Leave and the ESA's regular rules around temporary layoff and constructive dismissal will resume.

Factors for employers to consider

Employers reviewing these changes will need to keep in mind the distinction between two different types of IDE Leaves:

- **Employer-initiated IDE Leaves:** These changes primarily affect a situation where the employer has initiated the IDE Leave by making the decision to temporarily eliminate or reduce an employee's hours of work or wages. In that case, the employee is "deemed" to be on a job-protected statutory leave of absence. The time period during which an employer can place an employee on an IDE Leave has been extended to January 2, 2021.
- **Employee-initiated IDE Leaves:** Conversely, an employee also has the right to take an IDE Leave for reasons related to COVID19, such as the need to isolate or quarantine or to take care of a designated family member because of a matter related to COVID-19 (including a school or day care closure). Currently, there is no specified limit to how long an employee-initiated IDE Leave can last, provided that COVID-19 remains a designated infectious disease. However, these recent changes are a clear indication that IDE Leaves will remain available to employees until at least January 2, 2021.

As employers plan their reopening strategy through the remainder of 2020 and beyond, they will need to take these new timelines into account. And as these recent changes demonstrate, all timelines and requirements are subject to change based on changes to the COVID-19 situation in Ontario.

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