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PUBLICATION

What Employers Need to Know in the Era of Covid-19

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Amidst the fear and uncertainty caused by the current, rapidly changing COVID-19 pandemic, employers have been left asking, “What can I do with my employees?”, and “What can I do to help them out?” This article explores some of the questions that employers are asking in these uncertain times.

Can I reduce my employee's hours/days of work?

Like many things, the answer is “it depends”. Subject to contractual provisions permitting a reduction in hours, and depending on the magnitude of the reduction, the loss in hours, and accordingly in earnings, could amount a fundamental change to the employment relationship that would trigger a “constructive dismissal”. Ordinarily, this can give rise to a claim for lost income, however in the present circumstances, it remains to be seen whether a court would see such a step as being anything other than reasonable. In any event, to the extent that the reduction is undertaken to reduce immediate financial strains, any potential liability would likely be pushed off well into the future.

In any event, frank discussions and other communications with employees, if undertaken in advance of imposing any such changes, might well make those changes more palatable when they must take place. If the employer is eligible, a cooperatively minded workforce might be prepared to agree to a Work-Sharing Program as a means of dealing with the situation.

What is Work-Sharing?

Employers may wish to give consideration to the federal government’s Work-Sharing Program. This is designed to help employers and employees avoid layoffs when there is a temporary reduction in the normal level of business activity due to reasons beyond the employer’s control.

The program, which has been in place for a number of years through the Employment Insurance program, allows participating employees to receive a measure of relief in the form of EI benefits while working a temporarily reduced work week. Participating employees must agree

to a reduced work schedule that reduces the hours of work of all participants by the same percentage, and to share the available work.

Participating employers must reduce hours of work between 10% and 60% and institute a recovery plan to return the Work-Sharing unit to it normal hours by the end of the agreement.

In response to the downturn in business caused by COVID-19, the government has implemented temporary special measures to enhance the program during this critical time.

These temporary special measures will:

- Double the maximum duration of a Work-Sharing agreement from 38 weeks to 76 weeks. This applies generally to businesses affected by the downturn in business caused by COVID-19 and which meet the other program criteria;
- Waive the mandatory waiting period that existed between one such agreement and the next, so that employers with a recently expired agreement may immediately apply for a new agreement, without waiting between applications, and
- Ease the requirements for the recovery plan mentioned above.

Detailed information on the program, including the means of applying, may be found at https://www.canada.ca/content/dam/canada/employment-social-development/migration/documents/assets/portfolio/docs/en/work_sharing/Work_sharing_applicant_guide.pdf

Can I Temporarily Lay-Off my Employees?

A temporary layoff is a limited period during which an employer ceases to provide work, and in most cases pay, to employees. A temporary layoff is not necessarily a termination of employment, but depending on applicable legislation, it may become one where the layoff extends beyond a set period. For example, under the Ontario *Employment Standards Act, 2000* (*ESA*), a temporary lay-off can be up to 13 weeks, and may extend up to 35 weeks where certain criteria which benefit the affected employee are met.

If the lay-off extends beyond the prescribed period, then the termination obligations contained in the *ESA* will apply.

Despite provisions of this type, and as discussed earlier in this article, any temporary layoff may constitute a constructive dismissal unless such a layoff is expressly permitted in a written agreement. It is to be noted that most, if not all collective agreements for unionized workplaces contain such a provision.

Employees on layoff are entitled to EI benefits, subject to the usual qualifications. EI sickness benefits may also be available for employees who must stay away from work due to coronavirus. For more information see: https://www.canada.ca/en/employment-social-development/corporate/notices/coronavirus.html

Can I "Top-Up" my employee's EI entitlements?

Many employers can qualify to participate in a Supplementary Unemployment Benefit Plan ("SUB Plan") and top up employees' EI benefits during a period of unemployment due to a temporary layoff, illness or quarantine. Such a plan has some benefits for employers, including the ability to extend a temporary layoff under the Ontario *ESA,* as described above.

SUB Plans registered with Service Canada and the Canada Revenue Agency do not result in a clawback from the EI benefits ordinarily received by the employee, and the employer neither deducts EI premiums from the SUB payments, nor makes the usual employer contribution to EI on behalf of the employee.

To qualify for registration, the SUB Plan must meet a number of detailed criteria as set out at https://www.canada.ca/en/employment-social-development/programs/ei/ei-list/reports/supplemental-unemployment-benefit/requirements.html#s2, and more general information on the program may be found at

https://www.canada.ca/en/revenue-agency/services/tax/businesses/topics/payroll/payroll-deductions-contributions/special-payments/supplementary-unemployment-benefit-plan-subp.html.

We recognize that the changes resulting from COVID-19 are happening in real-time; what might be the best approach today may not be the best approach tomorrow. As a result, the contents of this article may become outdated over even a short period of time. We therefore recommend that employers seek up to date legal advice on these issues, and the decisions they might need to make as a result of the COVID-19 pandemic.

The information contained in this article is intended to provide information and comment, in a general fashion, about recent cases and related practice points of interest. The information and views expressed are not intended to provide legal advice. For specific legal advice, please contact us.