EMPLOYMENT STANDARDS ACT, 2000 AMENDMENTS – ONTARIO GOVERNMENT TAKES STEPS TO ASSIST EMPLOYERS IN RESPONDING TO COVID-19

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On Friday, May 29, 2020, the Ontario government published a new regulation under the *Employment Standards Act, 2000* ("ESA"). O. Reg. 228/20, Infectious Disease Emergency Leave or the "IDEL Regulation" may provide relief to municipalities who have engaged in layoffs as part of their response to the COVID-19 pandemic. We have briefly outlined the scope of the Regulation and its key provisions below. Note, that these new rules do not apply to unionized employees. The ESA's usual temporary layoff rules continue to apply to unionized employees.

Throughout the below summary we refer to what is called the "COVID-19 Period". This has been defined under the Regulation as running retroactively from March 1, 2020 to the date that is six weeks after the date that the state of emergency in Ontario comes to an end.

Changes to Infectious Disease Emergency Leave

The IDEL Regulation does not alter the current operation of the IDEL provisions in the ESA as it applies to unionized and non-unionized employees. Rather, the key change for employers of non-union employees is the creation of a new category of IDEL. This new IDEL is engaged where an "employee's hours of work are temporarily reduced or eliminated by the employer for reasons related to" COVID-19. Where an employee does not perform their duties because their hours have been temporarily reduced or eliminated because of COVID-19, *the employee is deemed to be on an IDEL during those periods of time throughout the COVID-19 period*.

The usual protections for ESA leaves apply to employees who are on a deemed IDEL. However, the Regulation provides important modifications to the requirement to continue employee participation in benefit plans, which is generally required during ESA leaves. It provides that:

- If an employee has stopped participating in a benefit plan as of May 29, 2020, the employee does not have a right to continue participating in the benefit plan during the COVID-19 Period.
- If an employer has stopped its contributions to a benefit plan as of May 29, 2020, the employer is not required to make contributions to that plan during the COVID-19 Period.

This will be important for municipal employers who temporarily laid off non-unionized employees without continuing employee benefit plans or contributions to such plans. These employers may now be relieved from the obligation to provide continued participation in those benefit plans to their employees who are now deemed to be on an IDEL.

The Regulation also provides two categories of exceptions to the deemed IDEL rules. Specifically, an employee will not be on a deemed IDEL if:

- At any time on or after March 1, 2020, the employer takes steps to terminate the employment relationship. This could occur where the employer (i) actually terminates the employee's employment, (ii) closes its entire business at an establishment, or (iii) has given or gives notice of termination to an employee and the employee resigns in response as permitted by the ESA. (The IDEL Regulation provides that an employer and employee may agree to rescind a notice of termination, in which case the employee could access the deemed IDEL if other requirements are met).

- Before May 29, 2020, the employee had already been (i) deemed terminated or severed under the ESA as a result of an earlier layoff, or (ii) constructively dismissed and had resigned within a reasonable time.

Deeming Certain Employees Not to be on Layoff

The second key component of the Regulation relates to non-union employees whose hours of work have been reduced or eliminated or whose wages have been reduced for reasons related to COVID-19 during the COVID-19 Period.

The Regulation provides that the ESA's usual termination and severance rules as they relate to layoffs will not apply to these employees. In other words, these employees are effectively deemed not to be on a layoff for the purpose of those sections during the COVID-19 period. Employees will remain subject to the ESA's usual layoff rules (and be exempted under these provisions) if: (1) the employee was laid off as part of a complete closure of a business at an employer's establishment or (2) if before May 29, 2020 the employee's employment had already been deemed terminated or severed under the ESA as a result of an earlier layoff.

Deeming Certain Actions Not to be a Constructive Dismissal

The Regulation also provides that certain actions of an employer made in response to COVID-19 will not be considered a constructive dismissal if they occur during the COVID-19 Period and are for reasons related to COVID-19. This includes a temporary reduction or elimination of an employee's hours of work or a temporary reduction in an employee's wages. This rule will not apply where before May 29, 2020 the employee had already been constructively dismissed and had resigned within a reasonable time.

Takeaways for Municipalities

The IDEL Regulation will provide welcome relief to a wide range of municipalities employing non-unionized employees who have had to either shut down portions of their operations, curtail hours of work or reduce wages in response to the pandemic. In most situations, these employees will now be deemed to be on an IDEL and not on a layoff. This should be the case regardless of how municipalities characterized the cessation of work at the outset of the pandemic (whether as a temporary layoff, leave of absence, or otherwise).

Despite this general rule, several words of caution are in order.

Although the Regulation amends the ESA rules related to layoffs and constructive dismissal it is unclear what impact it will have on the common law's consideration of these issues. Municipalities should therefore not automatically assume that the Regulation would justify a temporary layoff or wage reduction in the absence of express contractual provisions. Legal advice should be sought where municipalities are considering such actions.

The IDEL Regulation also only addresses *temporary* reductions related to COVID-19. Further, the relief provided by the Regulation will only continue for six weeks after the state of emergency is lifted. If municipalities are not able to resume full pre-pandemic operations or pre-pandemic wages by that time, the usual ESA rules will be re-engaged.

As a final warning, the provisions of this Regulation are complex and municipalities should seek legal counsel before concluding that these provisions will apply to their employees.

Amanda Cohen and Jessica Toldo specialize in labour and employment matters facing municipalities. If you have any questions about this or any other employment matter, do not hesitate to contact Amanda at 416-864-7316 or Jessica at 416-864-7529. They may also be reached by email at: amanda-cohen@hicksmorley.com and jessica-toldo@hicksmorley.com.

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WSIB CONSIDERATIONS DURING THE PANDEMIC AND RETURN TO WORK

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COVID-19 has resulted in an unprecedented situation that has drastically altered day to day life and workplaces. Municipalities have been faced with a variety of concerns and questions throughout this time. As each province in Canada slowly starts to reopen, employers have turned their mind to returning employees to work and considerations that may arise.

During this time, it is important to be mindful of continuing Workplace Safety and Insurance Board ("WSIB") obligations. In this article, we will discuss WSIB obligations during the pandemic, as well as return to work and a private member bill that has been brought forward pertaining to COVID-19.

At this time the WSIB is adjudicating COVID-19 claims on a case-by-case basis. To date 2,302 claims have been allowed, with the largest portion from those who work in residential and nursing care facilities. The costs of allowed claims will be allocated among all employers in the applicable schedule.

WSIB and COVID-19 in the Workplace

Employees who contract COVID-19 while at work may be eligible for WSIB benefits. These cases will be adjudicated on a case-by-case basis. The WSIB will consider the nature of the employee's employment and whether their employment risk of contracting COVID-19 was greater than the risk for the public at large. Employers are expected to make reasonable efforts to meet the regular timelines of initial accident reporting. Workers' initial accident reporting obligations, and appeal timelines to both the WSIB and WSIAT, have been suspended.

WSIB and COVID-19 - Working from Home

WSIB coverage extends to employees as long as they are in the course of employment. The WSIB will typically look at factors of time (did it happen during regular work hours?), place (did it happen in the usual place of work?) and activity (was the activity the employee performing reasonably incidental to their employment?).

The WSIB continues to expect employers to make all reasonable efforts to report any injuries or illnesses within the expected timelines, unless they are prevented from doing so because of the declared emergency. Employers should turn their minds to this continuing obligation as well as potential strategies for minimizing risk of workplace injuries and costs while employees continue to work from home.

When reviewing WSIB obligations, the below questions can be considered:

- Are there any injuries or illnesses that you need to report?
- Have you reported any material changes affecting your obligations under the *Workplace Safety and Insurance Act, 1997*?
- Have you notified the WSIB or the WSIAT of any objections to any WSIB decisions?

- Have you turned your mind to accommodating employees who were injured at work and are now ready to return to the workplace?
- If you had deferred WSIB payments, have you secured the necessary funds to make your payment by August 31, 2020?

Lastly, the WSIB has also published a “Frequently Asked Questions” page to address questions regarding COVID-19 claims, the impact of COVID-19 related closures on injured workers, and changes in WSIB processes during this period.

Private Member WSIB Bill

On May 19, 2020, Bill 191, **Workplace Safety and Insurance Amendment Act (Presumption Respecting COVID-19), 202**0 was tabled by a Private Member and carried on First Reading in the Ontario Legislature.

If passed, Bill 191 would amend the **Workplace Safety and Insurance Act, 1997** to add a presumption that COVID-19 is an occupational disease (unless the contrary is shown) for workers who test positive for COVID-19 and who work for an essential business listed in an order under the **Emergency Management and Civil Protection Act** (EMCPA).

The presumption would apply whether the workers work for the essential business as an employee or otherwise, and regardless of when the business was listed as essential in an EMCPA order. It would apply to a positive test received on or after January 25, 2020.

Transitional provisions would also apply.

Bill 191 is a Private Member’s bill and we note that historically the majority of Private Member’s bills do not pass and become law.

Takeaways for Municipal Employers

Although appeal timelines are suspended for both workers and employers, it is still important to be mindful of the status of WSIB files and make reasonable efforts to meet the regular timelines, if possible. As a reminder, if municipalities engage volunteers they may be liable for WSIB coverage as well.

Mariana Kamenetsky, Jessica Toldo and Amanda Cohen specialize in labour and employment matters facing municipalities. If you have any questions about this or any other employment matter, do not hesitate to contact Mariana at 416-864-7501, Jessica at 416-864-7529 or Amanda at 416-864-7316 or. They may also be reached by email at: mariana-kamenetsky@hicksmorley.com, jessica-toldo@hicksmorley.com and amanda-cohen@hicksmorley.com