

## Help for Employers

- New Regulation:** On Friday, May 29, 2020, Ontario Regulation 228/20 (a Regulation to the *Employment Standards Act* (“ESA”)) was published. The Regulation seeks to address the pressing issues around the temporary reduction of hours of work and wages, as well as the associated risk of constructive dismissals owing to layoffs - which many employers were compelled to consider and implement as a result of the COVID-19 Pandemic.
- How long will the Regulation apply for?** The Regulation will apply for the period from March 1, 2020 and will end on a date six weeks after the day that the Declaration of the State of Emergency is terminated or disallowed (“**the COVID-19 Period**”).
- How does the Regulation apply to my business?** Where an employee had been placed on a “temporary layoff” under the *ESA* (due to a loss or significant reduction in hours) and for reasons related to COVID-19, the Regulation stipulates that the employees will no longer be considered to be on a temporary layoff. Instead, their absence from the workplace will be essentially converted into an ‘*infectious disease emergency leave*’.
- What changes are contemplated by the Regulation?** Employees who were temporarily laid off as a result of COVID-19 will no longer trigger the deemed termination provisions under the *ESA*, where their layoffs continue beyond the statutory periods under which temporary layoffs may generally occur.
- What about temporary layoffs that were contemplated to extend to 35 weeks in a 52-week period, and where employers continued making qualifying payments including health benefits, pension contributions, or SUB Plan top-ups?** These temporary layoffs appear to have also been deemed as ‘*infectious disease emergency leave*’, even if they continue beyond 35 weeks and will therefore not trigger the deemed termination provisions under the *ESA*. Where benefits were still being paid / contributed to as at May 29, 2020 it appears that these should continue, given that they have not been exempted. Only in cases where qualifying payments and benefits were not being paid as at May 29, 2020, will the employer be exempt from continuing such payments / contributions during the COVID-19 Period, and while the employee is on ‘*infectious disease emergency leave*’.
- Does the Regulation have an impact on any notice of termination?** Where written notice of termination has been given to an employee, the employees will not be deemed to be on ‘*infectious disease emergency leave*’ unless the employer and employee agree to withdraw the notice of termination.
- What about claims for constructive dismissal?** The Regulation provides that the temporary reduction or elimination of hours of work or wages, which is related to COVID-19 and which occurs during the COVID-19 Period, shall not be considered to be a layoff and therefore will not constitute constructive dismissal for purposes of the *ESA*. This applies even where the layoff was resorted to in the absence of language or an agreement permitting the layoff.
- Does this mean employees can no longer claim constructive dismissal during the COVID-19 Period?** No, the only limitation on constructive dismissal is in relation to temporary layoffs under the *ESA* – which are now deemed to be ‘*infectious disease emergency leave*’. Therefore, claims of constructive dismissal on other bases will still be possible. Individuals may still attempt to assert constructive dismissal at common law.
- My employee has already filed a complaint with the Ministry of Labour regarding their reduction / elimination of hours and/or wages. What is the status of these complaints?** Complaints filed will be deemed not to have been filed if the reason for their filing relates to COVID-19 and the issues contemplated by the Regulation. Essentially, those complaints will not be processed by the Ministry of Labour.
- What about unionized work environments and those where collective agreements otherwise provided for layoffs?** The Regulation does not apply to employees represented by trade unions.

*As always, our further updates will follow as and when new information is confirmed. Should you have any specific questions or concerns, please continue to reach out to us directly at – [nic@leclairandassociates.ca](mailto:nic@leclairandassociates.ca) or [ron@leclairandassociates.ca](mailto:ron@leclairandassociates.ca)*