

SEPTEMBER 4, 2020

Reinstatement Date for Normal Layoff and Constructive Dismissal Provisions of the Employment Standards Act

On June 2, 2020, I sent an E-Blast stating the Ontario Government had introduced [Regulation 228](#) of the *Ontario Employment Standards Act, 2000* ("ESA"), to provide relief to employers who reduced or eliminated employees' hours and/or wages due to COVID-19.

Reg. 228 provided an employer could reduce an employee's hours/wages due to COVID-19 without triggering a lay off or a constructive dismissal. Specifically;

1. **Layoff.** A reduction in hours would not crystallize into a termination (as a layoff would in the normal course after 13 (or 35) weeks) and the employer would **not** be responsible for paying termination or severance pay.
2. **Constructive dismissal.** An employee could not claim the reduction in hours/wages was a constructive dismissal under the ESA. They could not resign and claim ESA termination or severance pay.

Pursuant to [Bill 195](#), the Reg. 228 relief provisions will end on **September 4, 2020** and the standard ESA rules for layoffs and constructive dismissal will become effective again.

Layoffs – If as of September 4, 2020 (or thereafter), employees are laid off, then the layoff clock begins ticking toward a termination of employment.

In other words, starting on September 4, 2020, employers can temporarily lay off employees for a period of 13 weeks in a 20 week period. This can be extended to 35 weeks in a 52 week period if benefits are continued (or supplementary payments are paid to the employee on lay off).

After the 13th (or 35th) week (post September 4, 2020), the layoff becomes a termination and the employee is entitled to:

- a. notice of termination under the ESA
- b. Severance pay under the ESA (If the employee has at least 5 years of service and the employer has a payroll of 2.5 million or more per year)
- c. Common law notice if the employee does not have a termination provision in their contract that limits entitlement to ESA only.

Constructive Dismissal – Employees have the right to claim constructive dismissal (and demand termination pay) under the ESA, if an employer unilaterally reduces an employee’s hours of work. The right to make such a claim was suspended by Reg. 228. The employee’s right to make a constructive dismissal has been revived by Bill 195, effective **September 4, 2020**.

A constructive dismissal claim will be determined by an Employment Standards Officer based on the specific factors of the employment relationship between the employee and the employer. It is not known how these claims will be treated during the COVID 19 pandemic. Each case will be decided on its own facts.

The point of this E-Blast is that, as of September 4, 2020, employees have the right to bring constructive dismissal claims under the ESA.

TO DO

If you will have employees on mandatory layoff or reduced hours as of September 4, 2020, you should review your circumstances to determine if and when you should recall people to work/reinstate normal hours.

You still have some time, as the clock does not begin ticking until September 4, 2020. But this is definitely something to put on your “To Do List” in the next few weeks.

Please contact me if you have any questions or concerns about employment issues.

Kind Regards

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