

**Work Reduction or Temporary Layoff  
During “COVID-19 Period”  
Not Termination**

May 30, 2020

On May 29, 2020, the Government of Ontario introduced a [regulation](#) under the *Employment Standards Act, 2000* (“ESA”) that provides welcome relief to any employer that temporarily laid off a non-union employee or reduced non-union employee wages and/or hours due to COVID-19. The regulation largely exempts any such layoff or reduction from being deemed a termination of employment, so that there is no obligation to provide ESA notice and severance.

In enacting the regulation, the Government of Ontario has acknowledged that the pandemic’s impact on the provincial economy and labour market is likely to last much longer than the 13-week temporary layoff period under the ESA. If this regulation had not been passed, temporary layoffs and wage and hour reductions introduced by Ontario employers as a means of mitigating the financial impact of COVID-19 would have crystallized into terminations of employment, through no fault of the employers or employees.

The reality is, the layoff provisions of the ESA needed to be temporarily amended to reflect the impact of COVID-19 on Ontario’s workplaces and to provide employers the opportunity to maintain the employment relationship throughout this period of uncertainty, without triggering substantial termination and severance payment obligations.

**This Briefing Note summarizes the new regulation.** For more information, including the impact on your workplace and your return to work plans, contact your Sherrard Kuzz LLP lawyer or any member of the Sherrard Kuzz LLP team at [info@sherrardkuzz.com](mailto:info@sherrardkuzz.com) with the re line COVID-19. We’ll respond promptly.

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**Reduction in hours and/or wages does not constitute a temporary layoff**

In the ordinary course, if an employee is temporarily laid off (the employee earns less than half of what they would ordinarily earn in a week), that layoff can crystallize into a termination under the ESA triggering notice and severance entitlements. The timing for when a layoff becomes a termination depends on a number of factors including whether the employer continued to pay benefit premiums for the employee, but can be as early as 13 weeks from the layoff date.<sup>1</sup>

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<sup>1</sup> In some circumstances, 35 weeks.

Under the new regulation, if an employee is laid off or their hours and/or wages are temporarily reduced for COVID-19-related reasons during the “**COVID-19 Period**” (defined below), the employee is **not** considered laid off for the purpose of the termination and severance pay provisions of the ESA.<sup>2</sup> The “**COVID-19 Period**” is defined as the period from **March 1, 2020** until **six weeks** after the declared emergency in Ontario is terminated or disallowed.

Note: An employee may claim a temporary layoff constitutes a termination of employment if the notice or severance pay entitlement crystallized prior to May 29, 2020.

### **Reduction in hours and wages does not constitute a constructive dismissal**

If an employee is laid off or their hours and/or wages are temporarily reduced for COVID-19-related reasons during the “**COVID-19 Period**”, this will not constitute a constructive dismissal.

Note: An employee may claim such a reduction constitutes a termination of employment if the employee resigned within a reasonable period in response to the reduction, prior to May 29, 2020.

### **Employee absence is now a leave of absence**

Rather than being on a temporary layoff, an employee not working for their employer for COVID-19-related reasons, during the COVID-19 Period, is deemed to be on an unpaid leave under the *Emergency Leave: Declared Emergencies and Infectious Disease Emergencies* provisions of the ESA (enacted in March 2020).

In the ordinary course, an employee on statutory leave is entitled to continued benefit coverage throughout the leave. However, in the case of the current pandemic, many employees have already been laid off without benefits, as is permitted under the ESA. In recognition of this fact, the new regulation provides that if an employee ceased participation in the employer’s benefit plan, or the employer ceased contributions to a benefit plan, prior to May 29, 2020, the employer is exempt from the general requirement that it continue benefits during the ESA leave.

Note: If an employee is permanently terminated, or constructively dismissed or temporarily laid off for a reason unrelated to COVID-19, prior to May 29, 2020, the employee will not be considered to be on leave. Similarly, if an employee has been provided with written notice of termination, the employee is not considered to be on leave unless the employer and employee agree to withdraw the notice.

### **Complaints**

Any complaint filed after May 29, 2020 in which an employee claims a reduction in hours and/or wages constitutes a constructive dismissal or temporary layoff is deemed not to have been filed if the reduction was for COVID-19-related reasons in the COVID-19 Period.

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<sup>2</sup> Except if the employee is laid off due to a permanent discontinuance of an employer’s business at an establishment, in which case the employee will continue to be entitled to severance pay under the ESA.

**For more information on how this regulation may impact your workplace, including your return to work plans, contact your Sherrard Kuzz LLP lawyer or any member of the Sherrard Kuzz LLP team at [info@sherrardkuzz.com](mailto:info@sherrardkuzz.com). We'll respond promptly.**

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