

# Part I: Temporary Layoffs & Constructive Dismissal under the Amended Employment Standards Act

By Ashley Winberg



The Employment Standards Act permits employers to temporarily layoff employees for a limited period of time, typically without terminating the employment relationship and instead putting the employment relationship on hold. Under the Employment Standards Act, employers can temporarily layoff employees for up to 13 weeks in any consecutive 20-week period or for up to 35 weeks in any consecutive 52-week period (if certain conditions are met). The employer can then recall any employee who has been temporarily laid off back to work at any time before the end of the statutory temporary layoff period. If the employee is recalled within this time period, then the employment relationship continues, and termination entitlements are not owed. Alternatively, if the employee is not recalled within this time period, the employment relationship is deemed to have been terminated, and the employee would be entitled to reasonable notice of termination under the Employment Standards Act and/or the common law, whichever is applicable.

It is important to note that although the Employment Standards Act permits employers to temporarily layoff employees as detailed above, at common law, if the employer does not have a contractual right to temporarily layoff the employee or if the employee does not consent to the temporary layoff, the employee can consider themselves as being constructively dismissed as of the date that they are temporarily laid off and in such an instance, the employee may be entitled to reasonable notice of termination under the Employment Standards Act and/or the common law, whichever is applicable.

On May 29, 2020, the government enacted Ontario Regulation 228/20: Infectious Disease Emergency Leave (the “**Regulation**”) under the Employment Standards Act. The Regulation provides that non-union employees who are temporarily laid off during the “COVID-19 Period”, which is defined in 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, are deemed to be on infectious disease emergency leave under the Employment Standards Act during the COVID-19 Period.

The Regulation also provides that non-union employees who are temporarily laid off as a result of COVID-19 during the COVID-19 Period are not deemed to be constructively dismissed. As stated in the first portion of this article, even though the Employment Standards Act permits employers to temporarily layoff employees, at common law, if the employer does not have a contractual right to temporarily layoff the employee or if the employee does not consent to the temporary layoff, the employee can consider themselves as being constructively dismissed. Thus, it is unclear what impact the Regulation will have on the common law doctrine of constructive dismissal.

It is important to keep in mind, that the common law and the Employment Standards Act are two separate legal regimes. Thus, although the Regulation amends portions of the Employment Standards Act that pertain to temporary layoffs and constructive dismissal, it is unclear whether these amendments will impact the common law’s consideration of these issues. For example, if an employee is temporarily laid off as a result of COVID-19 during the COVID-19 Period and their employer does not have a contractual right to temporarily lay them off and they do not consent to the temporary layoff, at common law, the employee could consider themselves as being constructively dismissed and sue their employer for constructive dismissal. However, with the introduction of the Regulation, the employee would be deemed to have been put on infectious disease emergency leave during the COVID-19 Period under the Employment Standards Act and their employer’s right to put them on such leave would not be deemed to be constructive dismissal under the Employment Standards Act.

Because the common law and the Employment Standards Act are two separate legal regimes, employers cannot assume that the Regulation justifies temporary layoffs if the employer does not have the contractual right to do so and the employee does not consent to the same. Thus, prior to taking any action, it is advised that all employers consult with their legal professionals to assess their risk exposure and their best course of action.

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This article was originally published in June 2020.