COVID-19 UPDATE: September 8, 2020

Introduction:

This brief bulletin is aimed at keeping employees and employers informed of COVID-19 related changes and concerns in the world of employment. To find more answers to common employment questions, you can:

- Visit the Levitt LLP website COVID-19 page.
- Read Howard Levitt's columns in the National Post.
- Listen to Howard Levitt and the other lawyers from Levitt LLP on Newstalk 1010.
- For a summary of key employment issues, such as whether your employer has a right to place you on a temporary lay-off and your right to a safe workplace, contact us to request the COVID-19 Bulletins previously circulated by Levitt LLP.

Important: Everyone's circumstances are different. The information provided in this bulletin and at the above resources is for general information purposes only and is not intended to be legal advice.

If you are interested in obtaining legal advice for your specific problem, you can contact us to book a **free consultation on COVID-19 related issues**. To set up a consultation, call us now at 416-594-3900 or complete this form.

IN THIS BULLETIN:

1. **Q & A with Levitt LLP lawyer Tahir Khorasanee**

Tahir Khorasanee is an associate at Levitt LLP and regularly appears on Newstalk 1010 with Howard Levitt. He is a member of the Ontario Bar Association Council. He was previously the vice chair and regional representative of the Young Lawyers Division, a newsletter editor of the Alternate Dispute Resolution section and a newsletter editor of the Constitutional, Civil Liberties and Human Rights section of the Ontario Bar Association.

Tahir has several court victories under his belt and is an anomaly in the legal profession for having received a Master of Laws degree. Tahir also has experience working in the financial services industry; he understands numbers and always has one eye on his client's bottom line.

His diverse background, strong litigation style and exceptional negotiation skills make him ideal for both employers and employees. Tahir's practice focuses on complex labour, employment and human rights disputes at all levels of court, the Human Rights Tribunal of Ontario and the Canadian Human Rights Commission.

Q & A

Q: People have a lot of questions about what they can and cannot do as the province transitions out of the state of emergency and into the 'new normal'. What is one of the biggest mistakes you see people making?

A: Making employment law decisions without first seeking legal advice. We provide everyone with affordable consults where clients get targeted advice in one hour. A consult with a lawyer at Levitt LLP is probably the single best access to justice instrument in the country right now. Far too many employers are terminating employees inappropriately, exposing themselves to bad faith, human rights or reprisal claims. Similarly, far too many employees are not getting any

employment law advice and accepting the information given to them by their employers as the cardinal truth. Sometimes, good advice early on can save or make tens of thousands of dollars.

Q: What is the biggest point of confusion you see among people coming to you for advice?

A: The biggest confusion in Canada right now is the false belief that an employer is allowed to lay off its work force, to reduce pay or to substantially change an employee's duties. There is a proper procedure to do this. Most employers are not following the law when making human resource decisions. In the process, they are exposing themselves to large wrongful dismissal claims that frankly, given the dire economic outlook, can mean the difference between doom and gloom. I suspect many employers will go bankrupt because they made an inappropriate employment decision and as a result, will have to pay far too much money to resolve wrongful dismissal claims. This can often be avoided.

Q: What is one tip you would give to employees in the current climate? What is one tip that you would give to employers?

A: Book a consult with one of our lawyers. For a few hundred dollars, it is the best investment you will make all year. It can either save you a lot money or make you a lot of money.

Q: Courts and tribunals are currently closed. Have you found any creative solutions for advocating for your clients remotely*?*

A: Absolutely. Thankfully, Chief Justice Morawetz issued a notice to the profession effective May 19, 2020. In it, he directed lawyers to "engage in every effort to resolve matters". For civil proceedings, this includes attendance at mediation "whether prescribed or not". The Consolidated Notice also provides that:

> (i) Counsel and parties are expected to comply with existing orders and rules of procedure to bring cases closer to resolution. The Court provides non-exhaustive examples. It states that "where it is possible through virtual means to comply with procedural timelines, produce documents, engage in discoveries, attend pre-trials, case conferences and hearings, and respond to undertakings, those steps should be pursued."
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> (ii) The Court further states that "Where COVID-19 has prevented lawyers and parties from fulfilling their obligations, they should be prepared to explain to the Court why COVID-19 has rendered compliance not feasible."

I make sure the other side knows that any unreasonable delay will have serious cost consequences and that I will demand that they explain themselves to a judge. I also use ZOOM very regularly to conduct hearings, discoveries and mediations. There is also a skill to advocating remotely and I feel very confident that I have it down to a science.

Of course, some of my clients would like to wait, and I have a toolbox full of tricks for just that.

Q: What are you doing to ride out the crisis?

A: Spending a lot of time with family and working as hard as a I can. There really has never been a better time to be an employment lawyer. The complexities are fascinating. And I get to help people and in turn, help the economy.

2. **Changes to Ontario's emergency leaves of absence – what can employers and employees expect?**

The government of Ontario announced on September 4, 2020 that the moratorium on regular layoff timelines in the *Employment Standards Act, 2000* ("ESA") will once again be extended, this time until **January 2, 2021**. This change had numerous implications that both employers and employees should be aware of.

During the declared state of emergency, employers were permitted to lay off employees or temporarily reduce wages and hours without triggering the layoff timelines that could lead to constructive dismissal under the ESA.

(This did not affect the ability of an employee who had been laid off to claim constructive dismissal at common law.)

On **January 3, 2020**, the regular ESA timelines regarding when a temporary layoff (or a reduction in wages or hours) becomes a constructive dismissal will apply. The consequences of this change are described further at Section 2 of this bulletin. To avoid a potential claim for constructive dismissal under the ESA, employers should consider the following options:

- Reinstating employees to their pre-leave position or a comparable position;
- Terminating employees and providing them with an appropriate severance package; or
- Attempting to place employees on a temporary layoff (see below for a detailed discussion of temporary layoff conditions and timelines).

Employers should also be aware that the current suspension of limitations periods in Ontario will expire on September 11, 2020.

3. **What options are available for laid-off employees who have not been recalled?**

While many employees have already begun their return to work, others have been left waiting and wondering: what can I do if I am not called back?

What if temporary layoffs are permitted by the employment contract?

If an employment contract permits for layoffs and an employee continues to be laid off after January 2, 2021, the following layoff timelines in the Employment Standards Act will be triggered:

- Unpaid temporary layoffs lasting 13 weeks or more (during any 20-week period) will be deemed a termination of employment.
- Paid temporary layoffs or layoffs where benefits continue to be paid lasting 35 weeks or more (during any 52-week period) will be deemed a termination of employment.

Employers should be aware of these timelines and plan accordingly. Once a layoff has been deemed a termination, employees will become entitled to notice of termination and possibly severance pay. If these are not provided, the employee will have a potential claim for wrongful dismissal.

What if the employment contract does not provide for layoffs?

Where an employee is laid off and the employment contract is silent on whether layoffs are permitted, they have the option to accept the layoff, or assert "constructive dismissal" and ask for severance pay. Constructive dismissal occurs when an employer makes a fundamental change to the employment relationship that is not accepted by the employee. Consequently, if the employee accepts the change (for example, by expressly agreeing to the layoff), an argument for constructive dismissal may not be available.

If an employee is hesitant to claim constructive dismissal early on for fear of losing their job, one option is for the employee to preserve their claim by making it clear to their employer that they do not accept the change permanently, then waiting to see whether the changes are truly temporary in nature.

What if an employee quits during a layoff or finds new employment?

While employees can leave their job at any time during a layoff, they should be aware of the notice requirements in their contract. Employers may have a claim for "wrongful resignation" if an employee quits without notice. While these claims are not frequently pursued, employees should always give notice to their employers when they resign.

Employees should also be aware of the effects that resignation may have on their entitlement to benefits. Since employees are eligible for benefits such as employment insurance and CERB when they lose income through no fault of their own, resignation may disentitle them to such benefits.

4. The latest CERB and EI changes

On August 20th, the Government of Canada announced extended income-support measures to assist Canadians as provincial states of emergency draw to a close.

Specifically, the new measures expand Employment Insurance (EI) eligibility to cover more than 400,000 people who would not previously have been eligible, extend the Canadian Emergency Response Benefit (CERB) for an additional four weeks, and create new recovery, sick leave, and caregiving benefits.

The changes to the EI program reduce the number of hours required to qualify. Claimants can now qualify with 120 insurable hours compared with the previous criteria of 420-700. EI insurance premium rates have also been frozen for the next two years, meaning that employees and businesses will not face immediate increases to costs and payroll deductions due to the additional expenses incurred as a result of the expanded program.

The CERB has now been extended to cover a total of 28 weeks. From September 27, 2020 onward, CERB recipients and others who remain unemployed will be able to apply for EI or to one of the new recovery benefits.

The new Canada Recovery Benefit ("CRB") provides a taxable benefit of $400/week for up to 26 weeks to those who are self-employed or otherwise ineligible for EI. Like with the CERB, CRB recipients will need to reapply for the benefit for each two week period in which they meet the requirements.

The new Canada Recovery Sickness Benefit ("CRSB") provides a taxable benefit of $500/week for up to 2 weeks to workers who miss at least 60% of their scheduled work in a given week because they have become ill with COVID-19 or must self-isolate after potential exposure. A medical note is not required to receive the CRSB.

The new Canada Recovery Caregiving Benefit ("CRCB") provides a taxable benefit of $500/week per household, for up to 26 weeks, to those who are responsible for caring for a child under 12, a dependent, or a family member with a disability. To be eligible:

- The child, dependent, or family member's school, daycare, or care facility must be closed or operating under an alternate schedule as a result of the pandemic;
- The child, dependent, or family member is unable to attend their school, daycare, or care facility on the advice of a medical professional due to being at high risk for contracting or suffering detrimental from the virus; or
- The child, dependent, or family member's usual caregiver is unavailable as a result of the pandemic; and
- The recipient cannot also receive the CERB, EI, or paid leave from their employer for the same period.

These new benefits and should help ease some of the tension and uncertainty facing Canadians as our reopening efforts continue into the fall.

5. The duty to accommodate "vulnerable populations" in the time of COVID-19

As Canadians return to work or prepare to make their work-from-home circumstances more permanent, many employers now face a new dilemma: how to address accommodation requests made by employees who remain vulnerable to COVID-19. The government of Canada has provided a detailed definition of who qualifies as a vulnerable population, which can be found

here. These individuals will likely be entitled to human rights-based accommodations that minimize or eliminate exposure to the virus.

Employers have an obligation to accommodate employees and adjust rules and practices to enable employees to participate fully and equally in the workplace. Employers are expected to provide accommodations to the point of "undue hardship". However, keep in mind that even if the requested accommodation is found to cause undue hardship, employers must still adapt their policies and practices as much as they are able to in order to address the employee's needs.

It remains to be seen whether this duty extends to the provision of accommodations for employees working from home. Presently, there is no practical answer to whether new economic realities will work to expand the duty to accommodate or narrow it.

The most important consideration for employers faced with an accommodation request by a vulnerable person is individualization; there will rarely be a one-size-fits-all solution that will be attentive to any single employee's needs.

Specific considerations might include:

- The risk of exposure: is the employee in an isolated office, or regularly in contact with the public?
- What infection prevention measures are readily available? This may include measures such as extra PPE, alternating work hours, or moving vulnerable employees to a more isolated location.
- Be aware of the privacy implications of requesting medical information from employees. Generally, requests for information should be limited to what is reasonably related to the nature of the person's vulnerability in order to assess individual needs.
- Always remember that employers must take all requests for accommodation in good faith.

6. Back to school: implications for family status accommodations

As schools and childcare facilities begin to reopen, parents may be faced with the choice of whether to keep their children at home or allow them to return to school full-time. The *Ontario Human Rights Code* provides protections for employees against discrimination based on family status (which includes childcare responsibilities), but these protections are not without limitations.

Parents should be aware that if they opt to stay home with their children by choice and not necessity, workplace accommodations may be denied. While employers will have to provide accommodations for parents whose children genuinely cannot attend school (such as those required by the province to attend on alternating days), parents who keep their kids home by choice are not, as a general rule, afforded the same protections. Employees who choose not to

report to work to attend to childcare responsibilities may also run the risk of being deemed to have resigned, and thus will not be eligible for severance pay.

Once a parent has exhausted their childcare alternatives and a need for accommodation is established, options must be assessed on a case-by-case basis, but may include:

- Working from home;
- Modified schedules, such as granting the ability to take irregular breaks or work irregular hours;
- Modified job duties; and/or
- Tolerance of occasional disruptions related to childcare

Remember that accommodations may need to be adjusted as circumstances change. Communication, compassion, and flexibility are key parts of the accommodation process for all parties.

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