Moving Forward: Coronavirus and the New Normal

By: Jeremy D. Schwartz, Ryan J. Conlin and Erika M. Montisano

Most of Ontario's public health units are now well into Stage 3 of the Framework for Reopening our Province, which has helped more people safely get back to work and enjoy some everyday recreational activities. As the province gradually reopens, we wanted to provide an update on some of the latest pandemic developments and how they will affect your business.

In Stage 3, nearly all businesses and public spaces are permitted to reopen. Further, larger public and private gatherings will increase in size to permit up to 100 people to gather outdoors and 50 people to gather indoors in most locations. Gatherings are, however, still subject to physical distancing requirements. Shopping malls, beauty salons, restaurants, fitness facilities, libraries, campgrounds and other businesses are now open with social distancing and other health and safety measures in place. Note that a number of high-risk places and activities, including amusement parks and water parks, buffet-style food services and saunas will remain closed. The majority of the Greater Toronto Area, as well as Hamilton, Lambton, Niagara and Windsor, will move into Stage 3 at a later unidentified date.

As the province transitions open, now is the perfect time to assess where we are, what's worked for employers and what hasn't, to help us chart a course forward.

Getting your Workplace Ready

We've received a lot of questions with respect to how employers can best prepare their workplace for a reopening during the pandemic. As a general reminder, all businesses must comply with Ontario's **Occupational Health and Safety Act** ("OHSA"), which requires employers to take *reasonable* precautions for the protection of their workers. In addition to complying with an employer's duties under the OHSA, the employer must modify their physical workplace to comply with certain provincial public health requirements. Each employer should assess all aspects of their operations in order to determine a proper reopening plan that best suits the individual needs of their workplace. Many different factors will affect a business' plan to reopen including the impact of specific governmental or public health requirements, size and location of the workplace, number of employees, employees' ability to continue remote working arrangements, scheduling restrictions and employer's ability to increase cleaning frequency. Employers should continuously monitor their workplaces for any modifications that need to be made. Finally, employers should also consider establishing a procedure for dealing with confirmed COVID-19 cases in the workplace in order to reduce the risk of further transmission of the virus.

Relief from Constructive Dismissal

As we explained in a recent update, the Ontario government had just introduced a new regulation (Ontario Regulation 228/20, the "Regulation") under the **Employment Standards Act, 2000** (the "ESA" or the "Act"), which deemed employees whose hours of work have been temporarily reduced or eliminated for reasons related to COVID-19 to be on infectious disease emergency leave during the COVID-19 period,

even if they did not apply for such leave. The Regulation was put in place to prevent a flood of employees seeking payouts of termination and severance pay as a result of layoffs or pay reductions.

The Regulation is set to be in place until six weeks after the emergency order declared by the province on March 17, 2020 is terminated or disallowed. At the time of writing, the province's emergency declaration is to terminate on July 29, 2020, meaning that the Regulation will expire on or around September 9, 2020, unless the Government extends the declaration. Although we are yet to see any litigation arise out of the new regulation, we do believe that employers must be ready for the clock to start ticking again on temporary layoffs, constructive dismissals and deemed terminations.

Note that, as we mentioned in our prior update, the Regulation only applies to the ESA and does not affect the rights of employees to bring dismissal claims in the courts if they are entitled to reasonable notice under the common law. So, employers without (valid and enforceable) contractual provisions which limit employees' entitlements on termination of employment to the minimums prescribed by the ESA, would be well advised to discuss layoffs and substantial changes with legal counsel before acting.

Statutory PROTECTED Leave

Employers have welcomed that the Regulation effectively avoided innumerable deemed terminations and constructive dismissals. However, an oft-overlooked consequence of the Regulation deeming layoffs to be statutory leaves of absence, is that when an ESA protected leave of absence ends employees have reinstatement rights: either to their prior position if available, or to another comparable position if not.

Employers that fail to reinstate employees may face reprisal allegations and demands for reinstatement with backpay retroactive to what would have been the end of the leave. The onus of proof is reversed in such cases; whereby, employers must prove that no part of the failure to reinstate related to the leave – a heavy burden indeed. In pre-COVID reprisal applications, for example, employers often attempted to defend by asserting that positions were no longer available. Those employers were typically unsuccessful, as the employees could often show that their core duties were still required but had been reassigned. In that sense, their 'position' remained, the duties were merely redistributed.

As such, employers should avoid looking at this deemed statutory leave as an invitation to clean house or to permanently reorganize and right-size. It may also be prudent to avoid initiating terminations during the leaves unless operations are being permanently discontinued (or you have a reliable crystal ball).

End of Subsidies

The Federal Government has announced the extension of certain programs, such as the Canada Emergency Wage Subsidy ("CEWS"), and the potential relaxation of the prequalification criteria. However, it is fair to say that even for those companies 'lucky' enough to have qualified, the financial and economic impacts were still severe, and effects are likely long-lasting. Moreover, as those programs' end-dates approach, companies must look to the future.

Programs like work-sharing and supplemental unemployment benefit plans were seldom used during the declared emergency, as CEWS and other programs enabled employers to better soften the financial impact

on employees. However, with those programs nearing their respective ends, employers should reconsider their introduction. It takes time to prepare and file applications and to await approval for work-sharing and other programs. So, employers should start investigating now.

Occupational Health and Safety Considerations During Reopening

As workplaces reopen and employees are slowly recalled back to work, employers should be prepared to handle a potentially unprecedented number of work refusals.

The law was settled well before the pandemic, that to engage the protections of the OHSA an employee need not expressly say, "I am refusing to work in accordance with the OHSA…" or words to that effect. Rather, any refusal to carry out a task because the work is unsafe, will suffice to engage the OHSA's processes and protections against reprisal.

A fundamental question that arises in any OHSA work refusal, is whether the employee's belief that the work is unsafe is objectively sustainable or is instead based solely on subjective concern. When we are considering a process or piece of equipment, that is typically straightforward enough to sort out. However, distilling concerns raised by the pandemic is a far more complex undertaking.

What are the Courts Saying?

Most work refusals are resolved before the Ministry is called to investigate and most parties accept the Ministry Inspector's findings without appealing to the Ontario Labour Relations Board (the "OLRB"). As such, most experience with work refusals during the pandemic will necessarily be anecdotal. In fact, we have seen no court or OLRB decisions in the OHSA context to address the issue directly during the pandemic.

Oddly enough, we may draw guidance from a recent OLRB decision concerning alleged unlawful strike and lockout at the Grey Owl long-term care facility located in Elmira, Ontario.

Family Options Inc. v Service Employees International Union ["Grey Owl"]

The facts in Grey Owl are fairly straightforward. The parties had paused their collective bargaining during the pandemic. In the meantime, the employer revised schedules to minimize the number of people coming and going from the facility, which of course houses many seniors who are particularly vulnerable and require constant care and supervision. Believing that management was cloaking what was essentially an unlawful lockout behind pandemic precautions, several employees collectively declined shifts. Management responded by taking them off the schedule and utilizing temporary employees to fill the gaps.

The majority of the decision concerned labour relations law and issues. However, both parties referenced the OHSA and pandemic to demonstrate the purity of their actions.

Ultimately, the OLRB held that the employer's actions in altering the schedule and using the agency employees were entirely *bona fide* responses to the pandemic and not in any way tainted by anti-union

motivations. By contrast, the OLRB found that the employees had engaged in an unlawful strike by withdrawing their services in concert.

The union asserted that, essentially, the employees had been penalized for engaging in a protected work refusal and/or for exercising their OHSA rights. Noticeably absent from the decision, is any reference to an objective basis pleaded for the withdrawal of services (for those of us that enjoy the labour-relations nuances, the OLRB found insufficient evidence that the union itself had supported or encouraged the strike).

Responding Practically to a Work Refusal

Drawing from this decision, it would seem that adjudicators will continue to analyze the OHSA nuances through the same set of legal principles that applied pre-pandemic. Thankfully, it would seem that likewise, the tools and skills for responding to work refusals honed pre-pandemic are portable.

Most work refusals related to COVID-19 concerns, of which we are aware, fit into one of three categories: 1) employees fear exposure to the virus from external parties with whom they interact or have contact in their work; 2) employees fear transmission between co-workers because of inadequate processes, insufficient PPE or an inability to socially distance properly when performing certain tasks; and 3) employees fear that they or someone they live with would be especially vulnerable to the harsher effects of the virus, if contracted.

Responding practically, and if possible pro-actively, is surely the best practice to avoid and quickly address valid work refusals in any category. However, each category must be viewed through a different lens.

1. External Concerns

Employees who must interact with the public or in public spaces likely have valid concerns that the government's prescribed PPE and social distancing requirements be maintained. Employees whose work refusals fit into this category, will be hard-pressed to demonstrate objectively that their work is unsafe, if employers have provided procedures consistent with the current government directives, access to adequate sanitizers and PPE.

2. Internal Transmission

Similarly, employees who must work in proximity with one another likely have valid concerns that the government's prescribed PPE and social distancing requirements be maintained. Employees whose work refusals fit into this category, will be hard-pressed to demonstrate objectively that their work is unsafe, if employers have provided procedures consistent with the current government directives, access to adequate sanitizers and PPE. Of course, the procedures and PPE necessary to meet those government directives will have to be enhanced. Employers should ensure shared tools and equipment are either not shared or are sanitized between use. And where tasks must be performed in close proximity, better PPE (such as respirators) may be necessary.

3. Particularly Vulnerable

To be objectively supportable, employees in this category likely base their concerns on those from one of the above categories, but they are uniquely able to demonstrate that they remain unsafe, even with the procedures and PPE that would suffice for other workers. Typically, this issue is raised in tandem with human rights considerations, such as a pre-existing condition or vulnerable close family member. Although, technically, even these employees must demonstrate that their work is objectively unsafe for these reasons, in our experience most employers will offer remote work or unpaid leave to accommodate employees in this situation.

We will continue to monitor these developments closely and to provide strategic assistance to employers as they navigate their way through these unprecedented economic and legal challenges.

In the meantime, please join us on Thursday, July 30, 2020 from 12-1:30pm for a complimentary webinar on our experience with many of these issues and the lessons we've learned from navigating the COVID-19 pandemic to date.

For more information, **please contact:**

Jeremy D. Schwartz at jschwartz@stringerllp.com or 416-862-7011

Ryan J. Conlin at rconlin@stringerllp.com or 416-862-2566

Erika M. Montisano at emontisano@stringerllp.com or 416-849-2552

UPDATE is an electronic publication of Stringer LLP
390 Bay Street, Suite 800, Toronto, Ontario M5H 2Y2
T: 416-862-1616 Toll Free: 1-866-821-7306
E: info@stringerllp.com I: www.stringerllp.com