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CaleyWray Clients

Re: Covid-19

On March 11, 2020 the World Health Organization declared novel coronavirus outbreak a pandemic. The federal government has assessed the risks posed by the virus as low for the general population of Canada at this time. However, as circumstances worsen, there is potential for an impact on the operation of businesses.

CaleyWray has received numerous inquiries from clients regarding the rights and obligations of employees in these uncertain times. In particular, there have been two recurring issues: what rights or recourse do employees have in situations where an employer decides to or is forced to close all or a portion of its operations and what rights and obligations do employees have to keep working where they are concerned for their own health and safety.

This is obviously a very fluid situation but we offer the following general advice.

**What if my Employer sends me home/suspends operations?**

*Minimum Standards Legislation and the Collective Agreement*

Recourse in the event of temporary layoffs due to Covid-19 will be fact-specific as the rights provided under Collective Agreements and the relevant legislation may vary. While provincial and federal minimum standards legislation will provide some guidance as to employees’ rights, in many cases a Collective Agreement will provide a greater right or benefit.

Temporary layoffs in Ontario can last 13 weeks in a consecutive 20-week period as per the *Employment Standards Act* (ESA). Temporary layoffs can be extended if:

* The employee is still receiving substantial payments from the employer;
* The employer is still making benefits payments on behalf of the employee
* The employee receives or is entitled to receive supplementary unemployment benefits; or
* if the employee is recalled to work with the approved time frame.

A Collective Agreement may provide for greater rights than those under the ESA. In the event that an Employer is not adhering to temporary layoff provisions in the Collective Agreement, the solution would be to grieve the violations.

In the federal context, temporary layoffs can last up to three months or twelve months if the Collective Agreement requires it. A layoff can exceed the three month period if an employee is notified in writing of a recall date which does not exceed 6 months after the date of the layoff. Employers are not required to notify their employees of a layoff that lasts three months or less. However, a Collective Agreement may require notice.

In both the federal and provincial context, if an Employer fails to give the required notice, if any, as outlined in the Collective Agreement for either temporary or permanent layoffs, the Union should grieve and claim damages for the employee’s loss. In addition, if the layoff occurs in violation of the seniority provisions in a Collective Agreement, an employee may have a claim for damages resulting from being denied work opportunities.

In the event that an Employer proceeds with layoffs without consulting a Union in spite of either implied or explicit requirements in the Collective Agreement that the Union be consulted, a grievance should also be filed.

However, Employers may not in the event that the Collective Agreement contains “An Act of God clause” or “force majeure clause” which operate to discharge the obligations of a party where an unexpected event beyond the foresight and control of the parties makes performance of the agreement impossible. What constitutes an "emergency" or "circumstances beyond the employer's control and foresight" will vary and likely be determined on a case-by-case basis. At this stage, it is difficult to say whether temporary business closures without notice due to the threat of the virus will be justifiable.

*Employment Insurance (EI)*

On March 11, 2020 Prime Minister Justin Trudeau announced that there would be modifications to EI assistance for individuals who must self-isolate due to Covid-19. The federal government will waive the one-week waiting period for EI benefits for individuals who cannot work due to the outbreak. Usually, individuals would have to wait one week before benefit payments start which would mean that those under two week quarantine would only receive benefits for one of those weeks. This change allows employees to receive benefits for the whole 14 day quarantine period. In order to qualify, it is likely that employees will have to show that they were ordered by law or a medical professional to remain in quarantine. However, individuals told to self-isolate by their employers may also qualify for EI without a note from a medical professional indicating that they should remain off work.

The requirement that individuals must have worked 600 insurable hours during the year leading up to their claim date is still currently in place.

**What if my Employer does not suspend operations but I am concerned about risk to my health?**

Workers in Ontario have the right to refuse unsafe work if they believe that it may pose a danger to them or coworkers. Some workers have a limited right to refuse work, such as health care workers and those who work in hospitals and other care institutions.

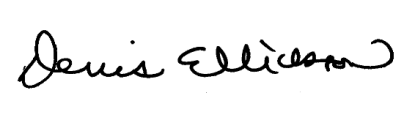
Similarly, in the federal context, employees have the right to refuse dangerous work. Danger is defined as: "any hazard, condition or activity that could reasonably be expected to be an imminent or serious threat to the life or health of a person exposed to it before the hazard or condition can be corrected or the activity altered."

As the government is currently characterizing the risk to the general population as low, continuing with “business as usual” in most workplaces is unlikely to be considered “dangerous ” or “unsafe” work at this time. However, cases must be assessed on an individual basis. A workplace may not pose a risk of danger if the employee is young and healthy. This may be different for an older worker with a pre-existing condition or a compromised immunity system.

Similarly, Employers have a positive obligation to take all reasonable steps to ensure the safety of employees. In certain workplaces where there is a higher risk of infection, greater precautions are expected. This includes monitoring who has access to the facility, regular disinfection, proper protective equipment and constant communication and education.

At this point – and until there are further directives from the government or health boards – we recommend exercising caution and assessing each case with the above guidelines in mind.

As always, please do not hesitate to contact myself or any of the lawyers in the firm for further advice.

Yours truly,  
**CaleyWray**  
  
Denis W. Ellickson

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