

Employment law issues in uncertain times

Triaging workplace restructuring options in light of COVID-19

March 25, 2020

This advisory note has been developed to assist our Québec clients with some of the continuing employment legal issues they may face in light of the COVID-19 virus. This is not intended as a substitute for legal advice, but a supplement to it. Each employer will need to make its own decisions, having regard to such things as: (i) the constantly changing advisories from government and public health agencies in Canada; (ii) the nature of the employer's business; and (iii) the employer's financial health. If you have any questions, please reach out to one of the members of the Dentons Canada Employment and Labour Law group in Montréal.

Potential options for Québec employers, in no particular order:

Short leave of absence (sick leave / quarantine leave):

Employees who are ill may be entitled to up to 15 weeks of Employment Insurance (EI) sickness benefits. A medical certificate is usually required. However, on March 13, 2020, the Government of Canada announced that employees who take such leave or are under quarantine will be entitled to Employment Insurance (EI) sickness benefits for a 14-day period, effective immediately, and without the usual seven-day waiting period, and without the need for a medical note. If the employee becomes ill while under quarantine or continues to be ill (in either case requiring a longer leave period), the EI benefit will only be continued once a medical certificate has been provided.

Short-term disability plans:

For employers that have short-term disability (STD) plans, the Canadian Life and Health Insurance Association (CLHIA) has indicated that employees who have been put in quarantine by a doctor or a government authority, may be able to receive short-term disability benefits under those plans. For plans that are insurer-funded rather than employer funded, this may be of assistance for ill employees at no additional cost to employers. Employers are advised to review their STD plans and call their insurance providers for additional information.

Workplace restructuring:

Employers may consider undertaking temporary layoffs, work-sharing, pay cuts, reduced working hours and/or staggered work hours.

All of these options would likely constitute a fundamental change to the terms of employment of employees, and could, therefore, constitute constructive dismissal. However, employers should be able to defend themselves against such claims, if any, by demonstrating that the measures were implemented solely for organizational and economic reasons. In fact, the Québec Court of Appeal has already decided that the management's rights implicitly allow an employer to make all the decisions that are necessary to protect the legitimate interests of the business, including conducting temporary layoffs for economic reasons when required. In addition, it may be reasonable to assume that due to court closures and the fact that employees may be thankful to not have job cuts, constructive dismissal claims will not be as big an issue as might have been the case under other circumstances.

Pay cuts, reduced working hours and/or staggered work hours are an operational consideration for each employer, with no legal repercussions other than the possibility of constructive dismissal claims. Temporary layoffs and work-sharing need to be undertaken properly, if at all, and are addressed in more detail below.

Temporary layoffs:

In Québec, the obligation to provide the employees with a notice of termination, or with an indemnity in lieu thereof, only applies to dismissal and layoff for six months or more. As such, an employer can layoff its employees for a period of fewer than six months without any obligation in this regard. In the case of a layoff of indefinite length, or one with a planned duration of six months, but that ultimately exceeds this period, the indemnity must be paid by no later than six months after the layoff date.

The benefit of temporary layoffs is that even though there is a risk of constructive dismissal claims, they preserve jobs and permit employees to collect EI coverage for the duration of the layoff.

It should be noted that even if a temporary layoff constitutes a constructive dismissal, if the employer is able to show that the employee would have returned to work in a few short weeks when the public health emergency ended, had the employee not left and claimed constructive dismissal, then the employer will have an argument that the employee should have stayed with the employer in order to mitigate. In such a case, the employee may only be entitled to notice during the period of the public health emergency temporary layoff.

Finally, while it is not an obligation, we strongly recommend that temporary layoffs be undertaken in writing and clearly state the reasons for the layoff. It is also generally safest for the employer (and best for the employee) if the employee is given benefits continuance. Dentons Canada's Employment and Labour lawyers can assist with providing temporary layoff letters and additional advice.

Employment Insurance top-ups:

Employers that have registered a Supplemental Unemployment Benefit (SUB) plan with Service Canada may top up EI coverage while an employee is on sick leave. If a SUB plan has not been registered with Service Canada, EI top-ups are currently only permitted for employees on Pregnancy Leave, Family Medical Leave and Critical Illness Leave. Unfortunately, for employers that provide a top-up to EI coverage for a non-approved leave, or where there is no SUB plan in place, the government will claw back payments from the employee.

It is hoped that as part of its response to the COVID-19 outbreak, the federal government may amend its legislation to provide for EI top-ups for other leaves, although no such amendment has yet been made public.

For employers that wish to apply for the registration of a SUB plan now, the registration date of a SUB plan is the date it is submitted to Service Canada, as long as the application is complete. It ordinarily takes some time for the government to process applications.

Work-Sharing:

As per the federal government, "Work-Sharing (WS) is an adjustment program designed to help employers and employees avoid layoffs when there is a temporary reduction in the normal level of business activity that is beyond the control of the employer. The measure provides income support to employees eligible for Employment Insurance benefits who work a temporarily reduced work week while their employer recovers. Work-Sharing is a three-party agreement involving employers, employees and Service Canada. Employees on a Work-Sharing agreement must agree to a reduced schedule of work and to share the available work over a specified period of time."

Due to the COVID-19 situation, the federal government has announced that the maximum duration of approved WS agreements can be extended from 38 weeks to 76 weeks.

For companies that do not have an approved WS agreement in place, applications must be submitted to Service Canada a minimum of 30 days prior to the proposed start date. Application information can be found [here](#). It is currently unknown how long it may take for the processing of applications. It is hoped that as part of its response to the COVID-19 outbreak, the federal government may amend its legislation to provide for easier access to WS, although no such amendment has yet been made public.

Termination of employment:

It is recognized that for some employers, the only option may be a termination of employment. While that will presumably be the last option for employers, the benefit is that eligible employees will be entitled to apply for EI coverage. Employees can receive EI from 14 weeks up to a maximum of 45 weeks, depending on the unemployment rate in their region at the time of filing the claim, and the number of insurable hours that the employee has accumulated in the last 52 weeks or since their last claim, whichever is shorter. The basic rate for calculating EI benefits is 55 percent of average insurable weekly earnings, up to a maximum amount of \$573 per week.

Employers considering termination of employment for their employees should try to keep in mind, to the extent possible, whether employees have worked sufficient insurance hours prior to the termination so as to be able to qualify for EI coverage.

Working on Claim:

Service Canada has an EI Working on Claim program, provided the person on benefits does not work a full week. Working While on Claim requires the employee to declare their earnings online. However, it permits the employee to keep 50 cents of every dollar earned, up to 90 percent of their usual weekly pay. If they go over 90 percent, then EI benefits are deducted dollar for dollar.

The following is a Working on Claim calculation example from the federal government:

John was laid off when the grocery store where he worked shut down. His weekly earnings at the grocery store were \$500, so his weekly EI benefit rate is \$275 (55 percent of \$500). He has found a part-time job at a restaurant, where he works three days a week and earns \$300 per week. As a result, his \$275 in EI benefits are reduced by \$150 or 50 cents for every dollar he earns at the restaurant ($\$300 \div 2 = \150). This brings his total EI benefit to \$125 ($\$275 - \$150 = \125). In the end, John takes home \$125 per week in EI benefits plus his part-time wages of \$300, for a total of \$425.

Key contacts



Christian Létourneau

Partner, Montréal
+ 1 514 878 8860

christian.letourneau@dentons.com



Arianne Bouchard

Senior Associate, Montréal
+ 1 514 878 5892

arianne.bouchard@dentons.com

As the world's largest law firm, Dentons works in most of the countries seriously impacted by COVID-19. We bring to bear our own experience of dealing with the impact of COVID-19 in each of our markets, coupled with local knowledge and legal solutions, to help you fully assess and address its ramifications across countries. For instance, if you need oversight of the latest local government announcements or a comparison guide to the regulations that apply to your employees across markets, we are here to help you. Please see our [COVID-19 Client Resources Hub](#).