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Regulations Amending the Canada Labour Standards Regulations (COVID-19): SOR/2020-138

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Her Excellency the Governor General in Council, on the recommendation of the Minister of Labour, pursuant to paragraphs 227(d), 233(a) and 236(a) of the *Canada Labour Code* ^a, makes the annexed *Regulations Amending the Canada Labour Standards Regulations (COVID-19)*.

Regulations Amending the Canada Labour Standards Regulations (COVID-19)

Amendments

1 (1) Section 30 of the *Canada Labour Standards Regulations* ¹ is amended by adding the following after subsection (1):

(1.1) The period of three months or less set out in paragraph (1)(c) is extended

(a) by six months after the day on which it would otherwise end, if it began before March 31, 2020 and ends on or after the day on which this paragraph comes into force; and

(b) to December 30, 2020, if it begins during the period beginning on March 31, 2020 and ending on September 30, 2020.

(1.2) The fixed date or fixed period set out in subparagraph (1)(d)(i) is extended

(a) by six months, or to December 30, 2020 if that day is before the end of those six months, if the lay-off occurred before March 31, 2020 and the fixed date or fixed period for the

employee to be recalled to work falls or ends, as the case may be, on or after the day on which this paragraph comes into force; and

(b) to December 30, 2020, if the lay-off occurs during the period beginning on March 31, 2020 and ending on September 30, 2020 and the fixed date or fixed period for the employee to be recalled to work falls or ends, as the case may be, before December 30, 2020.

(2) Subsections 30(1.1) and (1.2) of the Regulations are repealed.

Coming into Force

2 (1) Subject to subsection (2), these Regulations come into force on the day on which they are registered.

(2) Subsection 1(2) comes into force on December 31, 2020.

REGULATORY IMPACT ANALYSIS STATEMENT

(This statement is not part of the Regulations.)

Issues

Due to the COVID-19 pandemic, and the subsequent economic crisis, many employers in the federally regulated private sector have temporarily laid off their employees. While employers may have every intention of bringing employees back to work once the economy starts to pick up again, they may not know exactly when, and it may not be within the next few months.

Section 30 of the *Canada Labour Standards Regulations* (the Regulations) currently provides that a temporary lay-off will not be deemed a termination of employment for the purposes of the *Canada Labour Code* (the Code) in certain circumstances, including where the term of a lay-off is for less than three months (paragraph 30(1)(c)) and where the term of the lay-off is for six months or less and the employer notifies the employee in writing of the date or period within which they will be recalled to work (paragraph 30(1)(d)). However, once this time period expires, or if the employer has not recalled the employee by the specified date, the employee's employment will be deemed terminated.

As per the Regulations, some employees who were laid off in March or April 2020 as a result of the COVID-19 pandemic may see their employment deemed terminated as early as June or July 2020 for lay-offs that are three months or less, or within the next few months for lay-offs that are longer than three months, but not longer than six months, where the employer provides an expected recall date.

When a lay-off becomes a termination of employment, employees who meet eligibility requirements under the Code are entitled to severance pay, termination pay (if notice of termination of employment was not provided) and any accumulated vacation pay. This financial

requirement for employers could put additional pressures on the viability of businesses. This is particularly problematic when many employers see these lay-offs as a temporary measure and they intend to recall these employees once the economic situation improves.

For employees who have been temporarily laid off, although termination could entitle them to severance pay and or termination pay, the prospect of having their employment terminated could also further aggravate their precarious situation by cutting their ties to employment.

Some of the mandatory analytical requirements related to this proposal may have been adjusted as it is related to the Government of Canada's response to COVID-19.

Objective

The objective of this proposal is to avoid the termination of employment resulting from the COVID-19 pandemic, by giving employers more time to recall employees whose employment would otherwise have been terminated due to the duration of the lay-off.

Description and rationale

The amendments temporarily extend certain time periods set out in the Regulations to give employers more time to recall employees who have been laid off. Specifically,

- the period of three months or less set out in paragraph 30(1)(c) is extended
 - by six months for employees laid off prior to March 31, 2020, and
 - to December 30, 2020, for employees laid off between the period of March 31, 2020, and September 30, 2020;
- the fixed date or fixed period in the written notice given under subparagraph 30(1)(d)(i) is extended
 - by six months or until December 30, 2020, whichever occurs first, for employees laid off prior to March 31, 2020, and
 - to December 30, 2020, for employees laid off between the period of March 31, 2020, and September 30, 2020, and where the fixed date or fixed period specified in the written notice occurs before December 30, 2020. If the fixed date or fixed period specified in the written notice occurs on or after December 30, employers will have until that date to recall their employees.

The amendments to the Regulations are only extending the period of time a temporary lay-off is permitted, or, in other words, the length of time an employer may recall a laid off employee before their employment is deemed terminated. At any point, if an employee's employment is terminated by the employer, the employer is required to pay the employee eligible termination pay, severance pay and vacation pay as outlined in the Code.

In addition, the time that an employee is laid off will continue to count towards their continuity of employment and will thus be factored into the calculations for termination pay and severance pay if their employment is eventually terminated. The amendments do not impact an employee's right to eligible termination, severance and vacation pay upon termination.

The amendments do not apply to employees whose employment has already been terminated prior to the coming into force of the amendments, nor do they apply to employees who are covered by a collective agreement that contains recall rights.

This is a temporary measure and these amendments have no impact on lay-offs beginning after September 30, 2020.

Consultation

The amendments to the Regulations address issues raised in correspondence to the Minister of Labour from stakeholders, submissions to the Minister of Justice on the *Time Limits and Other Periods Act (COVID-19)*, informal discussions with stakeholders, as well as ongoing discussions with provincial and territorial counterparts.

Stakeholders were seeking changes to the Regulations to extend the time period that an employee can be temporarily laid off before their employment is deemed terminated. Employee and employer representatives were generally supportive of this effort that will provide financial relief for employers and help promote greater job security for employees by maintaining the employer-employee relationship.

Benefits and costs

The analytical requirements for cost-benefit analysis (CBA) have been adjusted as it relates to the response to COVID-19. The CBA compares the baseline with the regulatory scenario to provide a qualitative assessment of the incremental costs and benefits. The CBA concludes that the amendments impose minimal costs on employers, employees and the government.

Baseline scenario

With the economy having still not recovered, many employers continue to generate little or no revenue at all. In that context, it is highly unlikely that these employers will recall the employees they laid off in March or April 2020. In the absence of these regulatory amendments, for employees who were not provided with an expected recall date, their employment will be deemed terminated as early as June or July 2020.

Under the Code, when a lay-off becomes a termination of employment, employees who meet the eligibility requirements are entitled to severance pay, termination pay and must be paid any accumulated vacation pay. If an employee has completed at least three consecutive months of employment, and if notice of termination of employment was not provided, the employer is required to provide pay in lieu of notice equivalent to two weeks' wages at the regular rate of wages to the employee. In addition, the employer is required to pay severance pay equivalent to two days' pay at the employee's regular rate of wages for each full year of employment, with a minimum of five days' pay. To qualify for severance pay, an employee must have completed at least 12 consecutive months of continuous employment. Finally, upon termination of employment, the employer must pay out any vacation pay owed to the employee for any prior completed year of employment and for the partially completed current year.

In 2019, the average weekly wage in the federally regulated private sector was \$1,204. Assuming an employee has completed one year of employment at the time of his or her termination of employment and that employee earned the average weekly wage, excluding vacation pay that is owed, the employer would owe that employee approximately \$3,613 in severance and termination pay. The cost of severance and termination pay could become a significant financial burden for small employers with 10 employees (\$36,130), 50 employees (\$180,649) and 100 employees (\$361,300). This cost becomes considerably higher for employees that have been with the employer for several years. For those employers who are struggling to earn revenues, have smaller cash reserves and are likely currently accumulating debts, the costs of termination pay, severance pay and vacation pay may affect the short-term viability of their business and create a risk of bankruptcy.

For employees whose employment is terminated, although they are entitled to severance pay, termination pay and potentially vacation pay, seeing their jobs terminated further aggravates their precarious situation. In addition, if their employer filed for bankruptcy or is subject to receivership and is unable to pay termination pay, severance pay or vacation pay, an employee may be eligible to receive a payment under the Wage Earner Protection Program (WEPP). However, the maximum amount that can be paid to a claimant under the WEPP, which is \$6,798.57 in 2020, would not cover the full amount of termination pay and severance pay owed to employees who have been employed with the same employer for any lengthy period (for example an employee with 10 years of consecutive employment earning the average weekly wage would be entitled to \$7,226, not counting vacation pay).

For the government, the risk that a greater number of employers go bankrupt will likely result in additional WEPP payments, which will increase costs for the federal government and, ultimately, taxpayers.

Regulatory scenario

The regulatory amendments extend the time period that an employee can be temporarily laid off before their employment is deemed terminated.

The regulations have minimal negative cost implications for employers. While employers may incur some implementation costs to update workplace policies and procedures, in the short-term, the changes will provide financial relief to employers by temporarily delaying when they are required to pay termination pay, severance pay and vacation pay, should their employees not be recalled to work after a lay-off. In the medium- to long-term, it will allow them to restart at normal staffing levels when the economic situation improves.

While the Regulations delay when an employee could be eligible for termination pay, severance pay and vacation pay, the Regulations provide greater job security to employees by reducing the risk of lay-offs turning into permanent terminations and improve the chances that they will be recalled when the economic situation improves. Should they not be recalled, the period of lay-off will not impact their continuity of employment and will be factored into the calculations for termination pay and severance pay if they are eventually terminated.

Some employees who have been laid off for more than three months may prefer to collect termination pay, severance pay and vacation pay at the earliest time possible, as currently required under the Code. If they quit their employment during a significantly lengthened lay-off period, they could lose the termination and severance pay entitlements they would otherwise have received.

The cost of implementation of the regulatory changes for the Government of Canada will be low and absorbed through existing operating resources. The resources will be used to update communication and outreach materials, training materials, and inform Labour Program (ESDC) inspectors of the changes.

By providing financial relief to employers and reducing the risk of bankruptcies, the Regulations may benefit the Government by reducing the risk of complaints to the Labour Program (ESDC) regarding unpaid termination pay, severance pay and vacation pay, as well as the number of applicants for the WEPP and any payments made under the program.

The table below provides an overview of the results for the incremental costs and benefits of the regulatory scenario.

Table – Overview of the results for the incremental costs and benefits

| Stakeholder | Cost item and description | Benefit item and description |
|--------------------|---|--|
| Employees | <p>The amendments delay when an employee could be eligible for termination pay, severance pay and vacation pay.</p> <p>Some employees who have been laid off for more than three months may prefer to collect termination pay, severance pay and vacation pay at the earliest time possible, as currently required under the Code. If they quit their employment during a significantly lengthened lay-off period, they could lose the termination and severance pay entitlements they would otherwise have received.</p> | <p>The amendments</p> <ul style="list-style-type: none"> • improve the chances that employees are recalled when the economic situation will improve; • protect employees' continuity of employment and entitlements to termination pay and severance pay; and • ensure that the time period of the lay-off will be factored into the calculations for termination pay and severance pay if their employment is eventually terminated. |

| | | |
|------------|---|--|
| Employers | The amendments may impose minimal costs on employers to implement any necessary changes to their workplace policies and procedures. | <p>The amendments</p> <ul style="list-style-type: none"> • delay when employers are required to pay termination pay, severance pay and vacation pay should their employees not be recalled to work after a lay-off; • reduce the risk of bankruptcies; and • ensure that employers can restart at normal staffing levels. |
| Government | The government will incur some implementation costs to update communication and outreach materials, training materials, and inform Labour Program (ESDC) inspectors of the changes. | <p>The amendments may reduce the risk of bankruptcies, which may reduce the number of applicants for the WEPP.</p> <p>Given that this measure will provide financial relief to employers, the risk of complaints to the Labour Program (ESDC) regarding unpaid termination pay, severance pay and vacation pay will be reduced.</p> |

Small business lens

Analysis under the small business lens determined that the proposal will not negatively impact small businesses in the federally regulated private sector. These businesses, which represented approximately 95% of all employers in the federally regulated private sector but employed approximately 13% of all employees in 2019, will benefit from the regulatory changes as they will temporarily delay when they are required to pay termination pay, severance pay and vacation pay should they not recall employees after a lay-off.

One-for-one rule

The one-for-one rule does not apply as there is no incremental change in administrative burden on business.

Regulatory cooperation and alignment

Responsibility for the regulation of labour matters is constitutionally divided between the federal and provincial governments. The federal government has exclusive authority to legislate labour standards for the federally regulated private sector (e.g. banking, telecommunications, broadcasting and inter-provincial and international transportation), federal Crown corporations, as well as for certain activities on First Nations reserves. This includes about 955 000 employees (or approximately 6% of all Canadian employees) working for 17 700 employers.

Labour standards for other sectors – such as manufacturing, construction, primary industries, and wholesale and retail trade – fall within the exclusive jurisdiction of the provinces and territories.

Discussions took place with provincial and territorial counterparts on how they would respectively address the issue of temporary lay-offs and termination of employment. The changes that are made through these regulations align with similar initiatives taken in Alberta, British Columbia, Manitoba, Ontario and Saskatchewan.

Implementation

These regulatory amendments come into force upon registration.

Once the new Regulations are in force, the Minister of Labour will issue a news release to inform the public about the changes. The Labour Program (ESDC) will also reach out to its stakeholders.

The Labour Program (ESDC) will prepare interpretation and guidance materials to help employees and employers understand their new rights and responsibilities and to facilitate implementation of any necessary changes to employers' workplace policies and procedures. These materials will be available on the Canada.ca website.

Contact

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Footnotes

^a R.S., c. L-2

¹ C.R.C., c. 986; SOR/2019-168, s. 1