EMOND HARNDEN
LABOUR & EMPLOYMENT LAW
DROIT DU TRAVAIL ET DE L'EMPLOI

Bill 1 establishes unpaid, job-protected SARS leave

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On April 30, 2003, the Ontario Legislature unanimously passed Bill 1, the *SARS Assistance and Recovery Strategy Act, 2003* (Bill 1, the Act). Bill 1 received Royal Assent on May 5, 2003. Part I of the Act concerns the workplace implications of severe acute respiratory syndrome (SARS) and establishes a "SARS leave" which is in addition to the entitlement to the emergency leave provided under recent amendments to the *Employment Standards Act, 2000* (*ESA*) (see "Emergency leave and agreements under the *ESA 2000*: new variables in the workplace mix" on our Publications page).

Unlike the entitlement to *ESA* emergency leave, however, SARS leave is not restricted to employees of businesses employing 50 or more employees. Further, due to the definition of "employee" in Bill 1, and the extension of the entitlement to police officers, dependent contractors and other prescribed individuals, a broader range of individuals in the work force are eligible for SARS leave, as opposed to emergency leave under the *ESA* (see next paragraph).

APPLICABLE PERIOD, ENTITLEMENT TO SARS LEAVE

SARS leave is available to employees during the "applicable period", which is defined as the period commencing on March 26, 2003 and ending on a day specified by proclamation of the Lieutenant Governor. "Employee" is defined as including both an "employee" as defined under the *ESA* and a "dependent contractor" as defined under the *Labour Relations Act, 1995*. As noted above, entitlement to SARS leave is extended to police officers and other individuals specified by regulation. The regulations may also modify the nature of the entitlement of police officers and the other specified individuals.

An employee is entitled to SARS leave if he or she falls into one or more of the following categories:

1. The employee is unable to work because he or she is under individual medical investigation, supervision or treatment related to SARS.

2. The employee is unable to work because he or she has been ordered by a medical officer of health or a court to go into quarantine pursuant to the *Health Protection and Promotion Act*.

3. The employee is unable to work because he or she is in some form of quarantine or isolation in

accordance with SARS related information or directions issued by the Commissioner of Public Security, a public health official, a physician or a nurse or by Telehealth Ontario, the Government of Ontario, the Government of Canada, a municipal council or a board of health. These employees must comply with the conditions set out below.

4. The employee is unable to work because of a direction given by his or her employer in response to a concern of the employer that the employee may expose other individuals in the workplace to SARS.

5. The employee is unable to work because he or she is needed to provide care or assistance to the employee's spouse or other close relative because of a SARS related matter concerning the spouse or relative.

CONDITIONS ON ENTITLEMENT FOR EMPLOYEES IN SELF-IMPOSED QUARANTINE

Where the employee takes the leave under paragraph 3, the employee must contact a public health official or physician within two days to receive directions as to whether he or she should continue to be absent from work for SARS related reasons and arrange to receive a written confirmation of those directions. The employee can continue on leave beyond two days only if he or she complies with this obligation, and is directed to stay on leave by the public health official or physician.

NOTIFYING EMPLOYER, EVIDENCE OF ENTITLEMENT TO LEAVE

Employees must advise the employer that they will be taking SARS leave before doing so or, if this cannot be done, as soon as possible after going on leave. Employers may require employees to provide reasonable evidence that they are entitled to the leave, but employees need not provide the evidence until they return from leave.

REINSTATEMENT

On the conclusion of an employee's leave, the employee must be reinstated to the employee's most recent position or to a comparable position, if the employee's position no longer exists. Upon reinstatement, the employee is to be paid the higher of the employee's most recent rate of pay, and the rate the employee would have earned had the employee not gone on leave.

The employer's obligation to reinstate the employee does not prohibit the employer from terminating the employee, provided the termination is solely for reasons unrelated to the SARS leave. As well, the employer may terminate the employee where the employer's business has been adversely affected due to SARS, such that the employer must reduce its workforce and eliminate the employee's position.

SARS LEAVE NOT COUNTED TOWARDS LAY-OFF

The Act provides that any week in which an employee misses one or more days due to SARS leave is an "excluded week" under the *ESA*. This means that the week is not counted as a week of lay-off for the purpose of determining whether termination or severance rights are triggered.

REPRISALS

Employers are prohibited from retaliating against an employee who takes SARS leave or who:

- asks the employer to comply with the Act's provisions,
- makes inquiries about his or her rights under the Act,
- files a complaint with the Ministry of Labour under the Act,
- exercises a right under the Act,
- gives information to an employment standards officer, or
- participates in a proceeding under the Act.

ENFORCEMENT

If an employment standards officer finds that an employer has contravened any of the Act's provisions, the officer may order that the employee be compensated for any loss incurred as a result of the contravention, that the employee be reinstated, or both.

LEAVE TAKEN BEFORE BILL IS LAW

Where an employee has taken an emergency leave under the *ESA* after March 26, 2003 and before May 5, 2003, the employee will be deemed to have taken SARS leave under the Act, provided that the employee would have met the criteria for entitlement to SARS leave set out in the Act. Where such an employee has been terminated either for taking the leave or for taking any of the actions described above under "Reprisals", the employer bears the burden of proving it did not violate the anti-reprisal provisions of the Act. However, any violation related to SARS leave that occurs before May 5, 2003 is not an offence.

OTHER LEGISLATION RELEVANT TO EMPLOYERS' OBLIGATIONS DURING THE SARS CRISIS

ESA

As noted above, where an employee takes *ESA* emergency leave after March 26, 2003 for valid SARS-related reasons (as determined under the provisions of Bill 1) that leave will be deemed to be SARS leave. Therefore, that employee's entitlement to 10 days of unpaid emergency leave per year under the *ESA* will not will not be reduced by the number of days leave subsequently deemed to be SARS leave under Bill 1.

The Ministry of Labour has indicated that where a workplace itself is under quarantine, such as a

hospital, the employer is not obliged to pay employees overtime for time during which they are not working or on call. For staff working under quarantine, the normal rules regarding hours of work and overtime apply.

If SARS results in the employer having to reduce its operations, the employer is entitled to lay-off any or all of its employees. If the lay-off is considered temporary under the *ESA*, no severance or termination entitlements will be triggered (see "Amendments to *Employment Standards Act* introduced by government" on our What's New page).

Occupational Health and Safety Act (OHSA)

Under the *OHSA*, employers have a duty to provide a safe workplace, and they should therefore take reasonable steps to fulfill this duty. Employers must also be cognizant of the employee's right to refuse unsafe work under the *OHSA*. At the first stage of a work refusal, it is not necessary that the employee's belief that the work in question is unsafe be correct or reasonable.

Therefore, even if the actual risk of contracting SARS is quite low, where an employee has a genuine belief that he or she is at risk, at this initial stage the work refusal should be taken seriously and dealt with in accordance with the procedures specified in the *OHSA*. It is only after a Ministry of Labour inspector has determined that the workplace is safe that the worker must objectively justify his or her continuing work refusal. Up to this point, the worker refusing to work is entitled to be paid in the normal fashion.

The right to refuse work is more circumscribed for certain occupational groups where the danger in question is a normal part of the job and where a work refusal would endanger the life, health or safety of another person. These workers include police officers, firefighters and healthcare workers, among others.

Workplace Safety and Insurance Act, 1997 (WSIA)

The Workplace Safety and Insurance Board has announced that workers who are infected with SARS in the course of their employment may be entitled to benefits and services under the *WSIA*, but notes that, as with all claims under the *WSIA*, each claim is decided on an individual basis. The Board indicates that the *WSIA* does not provide benefits to workers who are symptom-free, even if the workers are quarantined or sent home on a precautionary basis.

Human Rights Code

Employers should take care that any precautions taken are not discriminatory in nature. Barring an employee from the workplace because of his or her race or place of origin is obviously unlawful, but what happens where an employee returns to Canada from a trip to a SARS "hotspot"? Of course, it is important to remember that for a short time, the City of Toronto was one such hotspot, so we would

urge caution before imposing any burdens on an employee returning from a trip to Hong Kong, for example who is asymptomatic.

With respect to discrimination based on disability, employers should be careful not to subject an employee with SARS or who is perceived to be at risk of contracting SARS to differential treatment beyond that which is required to ensure a safe workplace. In this regard, it may be that where SARS leave under Bill 1 is taken because the employee "is unable to work because of a direction given by his or her employer in response to a concern of the employer that the employee may expose other individuals in the workplace to SARS" per paragraph 4 above, the requirement that the employee go on unpaid leave itself could be seen as discriminatory, unless the employer is able to justify its direction on objective health-related grounds.

Employers owe employees disabled or perceived to be disabled from SARS a duty of accommodation, the extent of which will vary with the nature and circumstances of the employee's disability. In many cases, subject to the observations made above regarding a direction by the employer to stay off work, complying with the terms of Bill 1by providing unpaid leave may be sufficient to discharge the duty. However, it is possible that in other circumstances, more would be required to discharge the duty, such as allowing the employee to work from home, or extending the unpaid leave beyond the "applicable period" under Bill 1.

Employment Insurance Act and Regulations (EI)

Some employees placed on unpaid leave may be eligible for sick benefits under *EI*, which provides up to 15 weeks of such benefits where the claimant cannot work because of illness, injury or quarantine. Prior to amendments which entered into force on April 30, 2003, claimants without paid sick leave had to wait two weeks before being eligible for sick benefits under *EI*.

The new amendments provide that in SARS-related cases, the waiting period will not apply. As well, where the claimant is under quarantine but not actually ill, there will be no requirement to produce a medical certificate in order to qualify for benefits.

In order to fall under the scope of the amendments, the claimant's quarantine must have been either:

- *imposed* on the claimant by a public health official, or
- *recommended* by a public health official, *and* the claimant was asked by the employer, a medical doctor, a nurse or other person in authority to enter into quarantine voluntarily.

Personal Information Protection and Electronic Documents Act (PIPEDA)

Employers under federal jurisdiction will also have to consider the effect of *PIPEDA* when handling the personal information of an employee in quarantine or ill with SARS. Remember that unless one of the exceptions applies, disclosure of the employee's personal information must be with the knowledge

and consent of the employee. Improper disclosure of this sensitive personal information may result in a privacy complaint being filed with the federal Privacy Commissioner and, where the Commissioner prepares a report on the complaint, a hearing in the Federal Court of Canada. Among the remedies that the Court can order are damages, including damages for humiliation suffered by the complainant.

For those employers not currently covered by federal or provincial privacy legislation, it is recommended that they adopt an approach similar to that dictated by *PIPEDA*, in view of the sensitive nature of this type of personal information.

In Our View

This article has offered a very brief and summary view of the employment-related issues raised by the threat of SARS. Please do not hesitate to contact one of our lawyers should you require advice on your rights and obligations as an employer when dealing with SARS and similar issues.

For further information, please contact Colleen Dunlop at (613) 940-2734.