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## **AMO & OMHRA Webinar: Municipal Labour Relations during COVID19 April 22, 2020 Question and Answer Summary**

On April 22, 2020, the Association of Municipalities of Ontario (AMO) and the Ontario Municipal Human Resources Association (OMHRA) along with Hicks Morley, held a webinar digging into many of the human resource challenges and issues that managing through COVID-19 has presented.

The panel consisted of experts in the area of human resources practice and policy including: *Jane Albright (moderator)*, Commissioner of Human Resources and Citizen Service, Region of Waterloo & President, OMHRA, *Monika Turner*, Director of Policy, AMO, *Mark H. Mason*, Partner, Hicks Morley, *Stephanie N. Jeronimo*, Partner, Hicks Morley and guest panelist, *Omo Akintan*, Chief People Officer, People & Equity Division, City of Toronto.

Outlined below are many of the questions that arose during the Webinar.

Some questions that were answered live have been reproduced below for completeness. Some questions were duplicated and have been condensed below. Some questions have been slightly rephrased to reduce confusion. Some questions have not been answered and direct follow up will occur due to the unique and very focused area of concern.

### **1. While municipalities are not eligible for the Wage Subsidy, what about libraries?**

The CEWS was introduced through the Income Tax Act (ITA) and the definition of public institutions is defined with reference to specific sections of the ITA which provide for particular tax exemptions. As a result, the answer could vary depending on the particular corporate structure of your library. In-house municipal legal counsel will likely be able to clarify the library's status under the ITA. Alternatively, we recommend that you consult your corporate/tax counsel as to where your library fits into the eligibility criteria.

### **2. For workforce reductions, inside and outside workers, should the Declared Emergency Leave (DEL)/Infectious Disease Emergency Leave (IDEL) be used before temporary layoffs?**

Both DEL and IDEL provide employees with a job-protected leave under the ESA. When considering workforce reductions, employers should consider if the entitlement criteria for DEL or IDEL are satisfied for particular groups of employees. These ESA provisions are untested and a broad range of interpretations and approaches have been adopted depending on the amount of risk employers are willing to assume and the reason for the reduction. The individual circumstances of each case will need to be examined to provide a more fulsome response.

**3. Do we know why it has been deemed that child care is not essential to be provided to municipal water and wastewater staff (while it is deemed essential for non-municipal water and wastewater staff)?**

They are, in fact eligible. The list is broader please see paragraph 19 of Schedule A in the attached. Also consider paragraph 15 which includes "An individual who performs work that is essential to the delivery of core services in a municipality or First Nation community, as determined by the municipality or First Nation."

**4. Our county has created 2 licensed child care centres for essential workers. What right do the workers have to decline the child care and take the DEL?**

Generally speaking, an employee in an essential role will not be entitled to refuse the provided child care and not attend work unless they can substantiate why the child care is not suitable based on their individual circumstances and the circumstances of their child(ren). This would unlikely be satisfied by a general concern about the safety of the environment. These issues can become extremely complicated and may involve human rights issue under the Human Rights Code.

Practically speaking, however, an employee cannot be forced to work and so the question becomes what action the employer is prepared to take, with a variety of options available. The appropriate action will depend on a variety of factors that must be assessed on a case by case basis. These issues generally require legal advice as they can be extremely complex and depending on the unique factors and circumstances of each case.

**5. Is there leave entitlement under the DEL or IDEL for employees who have medical documentation requiring them to isolate at home away from the workplace during the pandemic because they are immuno-compromised?**

Yes, this would likely be captured in the IDEL leave and they would be approved for unpaid statutory leave of absence.

**6. Do we know how the Canadian Emergency Response Benefit (CERB) will interact with the new funding just announced to support post-secondary students? Some students may be eligible for both, but obviously better off to apply for CERB to receive more money if eligible.**

A student who was not working and will not be able to start the summer job they had lined up will not be eligible for the CERB. The Canada Emergency Student Benefit (CESB) is designed for post-secondary students and recent graduates who are ineligible for the CERB. Students should be directed to Service Canada to determine their eligibility for government benefits. A student who gets a summer job funded through a government jobs funding program will also not be eligible for the CERB.

**7. Does pension income impact ability to receive CERB? For example, a seasonal staff member that receives a pension but works in the summer to supplement their income.**

The government has indicated that pension income does not affect eligibility for the CERB. However, employees should generally be directed to Service Canada to determine their eligibility for government benefits so that the employer is not providing such advice.

**8. If we call people back who are currently on temp layoff prior to the 13 week timeframe, and then a 2nd wave hits whereby we are obligated to stop services once again, what are the impacts to the 13 week temp layoff? Start over? Continue timing?**

The ESA defines a temporary layoff as 13 weeks within a consecutive 20 week period. Therefore, if the second layoff occurs within the same 20 week period it would be cumulative. However, the period of temporary layoff can be extended to 35 weeks in a 52 weeks period if the employer has met one of the listed criteria, including continuing benefit entitlements or obtaining written agreement from the employee.

**9. Is a "general leave of absence" separate and apart from layoffs and ESA leaves an actual thing?"**

Employees can request a leave of absence and the approval would be dependent on the Employer's policies and practices. Some staff may elect for a leave of absence for personal reasons. This request could be distinct from a DEL/IDEL under the ESA or a lay off. There is nothing precluding an employee from requesting a leave of absence during a pandemic. However, eligibility for CERB is based on lack of work, not the name of the leave. Therefore, if there is work for the employee to do, they are arguably not entitled to receive the CERB.

**10. Can an employee apply for CERB if they go on DEL/IDEL?**

Yes, provided they meet the other eligibility criteria. CERB is available to employees who stop working for reasons related to COVID-19. Accordingly, employees on DEL, IDEL or layoff can all apply.

**11. Looking for suggestions on what to consider regarding extra screening measures such as taking the temperature of employees working on-site?**

The Ministry of Health and local public health authorities have provided guidance to employers on screening. How employers choose to put that guidance in to practice is based on the needs and direction of the employer. There is a continuum of responses out of an abundance of caution to strict adherence to public health guidelines. It is up to individual municipalities to review the guidelines and determine the right approach in concert with their local public health authority and health and safety professionals.

Temperature screening is just one tool in general toolbox of options available and has its limitations as there are various reasons why a fever might exist, and it might be temporary, and therefore it should be used in conjunction with other tools to be more reliable.

**12. If we put an employee on DEL (vs temporary layoff), what is the expectation of the employer once the Declared Emergency is lifted. Are we expected to bring the employee back immediately - can the DEL continue beyond the Declared Emergency?**

The entitlement to DEL under the ESA ends when the emergency is terminated by the Province. If the municipality is not ready to bring employees back at that time, they may need to place employees on a layoff for the intervening period. The period of DEL would be eligible for OMERS buy back (subject to the terms of OMERS) but the subsequent period of layoff would not be.

**13. Under the new Order for redeployment, can a by-law employee be denied DEL/IDEL? (It speaks to denial/cancellation of leaves) where it is for care of children?**

Arguably, the Order would allow for this, however there are human rights implications that should be considered. If there is daycare available for essential workers in your area, the employee should be directed to that service but as referenced herein, individual circumstances may require further consideration of this issue and possible exceptions may be applicable.

**14. Is there any way to continue to make OMERS contributions and pay for health premiums for employees on DEL?**

Generally speaking, municipalities must ensure that benefits are continued during DEL and IDEL, though exceptions for certain kinds of benefits might apply, and employees would need to continue their share of benefit costs (if applicable).

An employee on a DEL or an IDEL can purchase the period of the leave. If the employee chooses to do so by the required deadline, the employee will pay the employee's portion of the contributions and the municipality will pay its portion. In other words, employees will have the option to buy back their OMERS service once the leave is completed. Employers should bring this option to the attention of employees and be careful to direct employees to OMERS for information about eligibility to purchase OMERS service for the period of the leave and the timing for doing so. The

municipality will be responsible for reporting the leave to OMERS on the appropriate form and giving the member the opportunity to elect to purchase the leave in the same manner as for other statutory leaves, like pregnancy and parental leaves

**15. Regarding a unionized Public Works department, during this time, can we mandate employees(s) to take a weeks vacation?**

Generally speaking, an employer has the right to schedule vacation time (management right) in the absence of a collective agreement provision to the contrary (and/or any past practice arguments) for employees represented by a union. There is risk of litigation depending on the particular circumstances and language of each collective agreement and each case must be assessed carefully before proceeding. Discussions with union leaders can help to reduce such risk and negotiated terms and conditions may be required. Furthermore, depending on the municipal service area in question, changes in vacation scheduling may be supported through provisions in Regulations passed pursuant to the Emergency Management and Civil Protection Act.

**16. How many employees did you redeploy in Toronto?**

Five hundred to date (as of April 22, 2020)

**17. Did I hear correctly, top up on DEL or EI?**

DEL is an unpaid statutory protected leave under the Employment Standards Act. The Canadian Emergency Response Benefit (CERB) is the “new” version of payment for employees who do not have work available as a result of the COVID-19 pandemic. There are specific requirements for CERB eligibility that must be met. At this time, the CERB is not eligible for “top up” through a registered SUB plan. Individuals laid off as a result of the COVID-19 or going on DEL on or after March 15, 2020 are automatically being streamed to the CERB rather than Employment Insurance.

**18. Did Toronto management take the top-up to Council for approval?**

This did not happen. However, staff engaged and worked with the Mayor

**19. How is Toronto dealing with FT NUG employees?**

Toronto is taking the same approach.

**20. Given that there is no time limit currently for the declared emergency leave, is there any time limit of the SUB plans?**

Currently, there is no mechanism in effect to permit top up of the CERB. However, in general terms, an employer can specify payment of a weekly SUB top-up benefit for whatever number of weeks it wishes. A maximum number of weeks payable under the SUB Plan should be specified in the SUB Plan text. The SUB plan must be in effect for at least one year. If the plan is contained in a collective agreement, it will be valid

until the expiry date of the agreement. It is recommended that employers seek legal advice before setting up a SUB plan as the issues can be complex and each case depends on its own circumstance.

**21. Do you have any concern with allowing employees to decline redeployment? What if you find many declining but you need the resources?**

Currently, Toronto has more people available than opportunities so it was not a major concern. However, this is a concern that each municipality would have to weigh in their decision making process.

**22. Is there a child-care subsidy for the employees who have child care costs because schools are closed but they are still working?**

No, but there is emergency child care funded by the province for those who qualify.

**23. I'd be interested in hearing more about how seniority is being calculated for employees who are redeployed as well as PT LTC employees who are now being given FT hours.**

The calculation of seniority is generally determined by the specific provisions of the collective agreement. As such, the answer to this question is likely unique to each employer depending on their particular circumstances and collective agreement provisions. Each employer will have to make this determination based on their circumstances and, in all likelihood, through discussions with their union partners. .

In Toronto, Permanent Full Time employees' seniority is date base – redeployed employees will maintain/continue to accrue seniority. Temporary Full Time and all PT Unionized employees including PT LTC employees accrue seniority based on hours worked, so these employees will be credited for seniority for the hours (up to and including FT hours) that they work.

**24. I thought that employees on DEL had to go on CERB and not EI, so until things change, there is no ability to have a top-up. Is this correct?**

Correct. At this time employers cannot top up the CERB without impacting employee entitlement. Employers can still seek to register SUB plans in case this changes in the future.

**25. For the City of Toronto, did you survey your part-time staff for redeployment as well?**

Yes.

**26. How is the process of redeployment working at City of Toronto with 42% of employees requiring accommodation? Obviously you are weary of**

**human rights issues, yet the need to react quickly and be nimble is important. Any tips for others?**

(Answered online during presentation) Toronto lined up 2 items, (one for family status and one for medical accommodation) and forms created to gather the necessary information so that we can work through these requests quickly. The work started April 22, 2020. It's a heavy lift and we may have tips to share later on.

**27. What is a DEL? What does that stand for?**

Declared Emergency Leave – statutory unpaid leave under the Employment Standards Act 2000.

**28. So, if I understand properly, a person could use their vacation leave to top up the CERB up to a max value of \$1000 per month?**

We are not able to answer this question at this time. The government has not addressed this question in its published guidance and we have not seen the Regulations implementing the \$1,000 rule at this point. Until the specific text related to the rule is released, there is no definitive answer.

**29. Does the municipal order relating redeployment of staff apply to Police/Fire/Paramedics ?**

No the municipal deployment Order 157/20 does not apply to police, fire or paramedics.

**30. Service Canada has indicated that any one applying for EI will automatically be changed to CERB. If top up is not allowed for CERB, how does this affect EI ?**

Yes, if they apply for EI they will be rerouted to CERB if it is COVID related. As stated above, at this time there is no CERB top up. However, this will have no effect on EI for non-COVID related entitlements such as pregnancy/parental leave as these are separate concepts. Employees who were laid off/stopped working prior to March 15, 2020 are still eligible for EI.

**31. Did City of Toronto send the survey to non union management staff ?**

Yes

**32. I spoke to OMERS and they said if employees are on a temporary layoff, they cannot purchase the leave. But a DEL is purchaseable? How do we decipher the difference to OMERS so that our employees can purchase their leave if they choose to do so?**

It will be up to the employer to correctly report the employee's employment status (ESA leave or layoff) to OMERS. Please see this FAQ document that OMERS has

prepared for employers addressing layoffs and leaves during COVID-19: <https://www.omers.com/Employers/COVID-19-Update>. This page also contains a link to a new e-Learning module that provides information on how to report leaves related to COVID-19.

The Record of Employment will likely use the same code "A" shortage of work whether DEL or layoff related to loss of work due to COVID-19.

**33. Does anyone have a recovery guide they would be willing to share with the group on this webinar.**

Recovery will be part of the next webinar. Stay tuned.

**34. A number of our essential workers are refusing to report to work due to a perceived additional risk of exposure to COVID in the workplace. They are indicated immuno-compromised children, parents at home as the reason they cannot work. How does this perception of risk to the Worker apply to family members within their home?**

Municipalities have to make policy decisions to be consistent in their application of discipline and rules for redeployment. If an employee refuses to attend work it is incumbent on the manager to find out why, to provide rationale for them to attend work, and if they still refuse advise of the consequences depending on the level of risk that any municipality is prepared to assume and depending on the assertiveness that they wish to apply in any particular case. It must also be remembered that various human rights provisions under the Human Rights Code may be engaged and accommodation principles may be engaged.

**35. Are OT and shift premiums available to redeployed employees? Wage rate?**

In general, this is a very difficult question to answer at this point as has been referenced above. It is very contextual and the answer will vary from municipality to municipality depending on the level of risk that is willing to be assumed, the needs of each municipality and the way in which they want to manage their employees and the specific collective agreement(s) in question. At this point there has not been any clarification provided.

In Toronto, redeployed employees are eligible for overtime when working hours above their regularly scheduled work weeks. At the end of March the City had written a COVID19 Overtime policy that applies to staff up to wage grade 11 (Directors) however due to the evolving nature of the situation they are now revisiting the policy.

**36. How do the DEL work with OMERS, or does it??**

Generally, if an employee is on an ESA leave like a DEL, the leave can be purchased under OMERS and if the employee is eligible, the employee and the employer will be

required to pay their contributions. Employers should be careful in communicating any entitlements pursuant to OMERS and should direct employees to satisfy their OMERS questions with OMERS directly.

**37. So if a Municipality directly delivers child care, they could not apply for the 75% wage subsidy?**

Not if the funding for the child care flows from municipal funding as the Service System Manager. Again, see Question #1 for additional response.

**38. Will any of the wage subsidy programs be open for conservation authorities? will we be eligible?**

Generally speaking, the same answer for libraries at Question #1 is applicable.

Conservation authorities would be best to consult corporate/tax counsel to confirm under which section of the ITA they fall and whether they fall into the entities excluded as "public institutions".

**39. While not explicitly stated, is it correct that with the signing of this LoU, City of Toronto and CUPE have agreed to suspend or waive their normal "layoff" process and therein, employee bumping rights?**

To an extent, yes, but really it has been modified by agreement. Toronto has included this language in the FT agreement: If the employee refuses the reassignment or an accommodation is not possible in accordance with paragraph 32, the City may place the employee on an EL, subject to providing no less than forty eight (48) hours notice and there will be no further entitlement to any notice of layoff, redeployment, displacement or bumping.

**40. The municipal executive order only covers re-deploying staff within your municipality correct? not between upper and lower tier**

Yes, that is the case. Transfers of this nature would require specific agreements or other contractual arrangements.