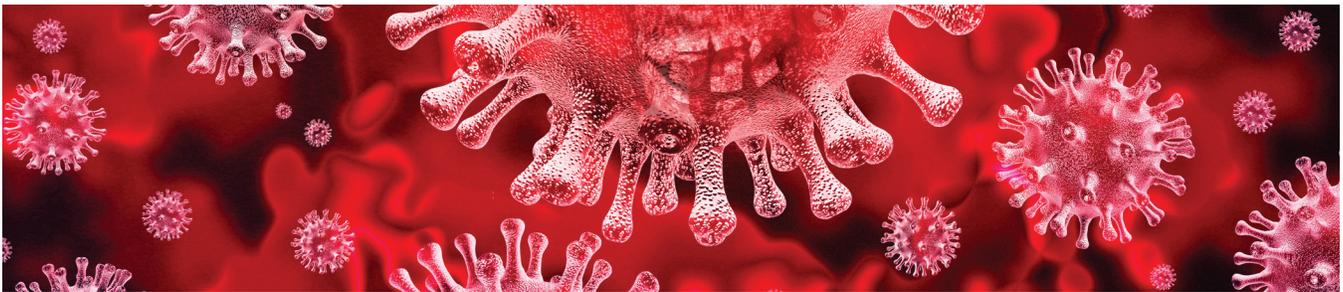


# COVID-19 and Ontario Workplaces:

## Protecting Employees and Knowing Your Rights as an Employer.

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*This information bulletin is intended to provide general information only, and should not be considered legal advice. The issues this bulletin is addressing are complex and often fact-specific. In addition, our situation is ever changing and new measures are being taken by the government that could change the applicable law and practices. Before taking any steps, it is advisable to secure legal advice particular to your own unique workplace and situation.*



COVID-19, along with the precautions being implemented by government and private companies alike, is having a significant impact on businesses and workplaces across the province. The Federal Government and Ontario Provincial Government are developing plans and introducing legislation to assist businesses and families. While these programs are developing, this bulletin contains information up to date as of March 18, 2020.

## Reporting to Work

One of the most common questions asked by employers is whether or not they can close their office and lay off their employees without pay.

Generally speaking, employers cannot lay off an employee without a contractual right to do so. While the Employment Standards Act, 2000, for example, permits employers to lay an employee off for thirteen weeks without benefits or up to thirty-five weeks with benefits, an employee still may make an argument that he or she has been constructively dismissed at common law. You will want to look to your written employment agreements to see whether there is a provision providing for the right to lay an employee off. If you do not have such an agreement, consider whether you have laid your employees off in the past. If

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neither of these factors exist, you will be at risk of an employee claiming constructive termination if you lay them off.

Should that occur, you may have to pay an amount in lieu of notice at common law that are substantially similar to the obligations that would arise if you had terminated that employee without just cause and you do not have a valid employment contract limiting your employees to the ESA minimums. This is the law as it currently stands. Courts will inevitably recognize the trying times we are living in and may be loathe to find that an employee who is laid off to protect their health and safety has been constructively dismissed – but this is the current law. It is important for employers to be proactive and have properly constructed and valid employment contracts which set out an employee’s rights and entitlements in good times, in order to protect both employees and employers in difficult times such as those we find ourselves in today.

Remind your employees who are being laid off of work that they should apply for employment insurance. Don’t promise them they will be entitled to EI – that will depend on a number of factors outside of your control, including whether they have worked enough insurable hours in the qualifying period. Ensure that you file an accurate Record of Employment immediately for each employee who is laid off or otherwise away from work for more than five days. More information about employment insurance regular benefits can be found here: <https://www.canada.ca/en/services/benefits/ei/ei-regular-benefit.html>

## **Employment Insurance Considerations**

For employers wanting to provide extra assistance to their employees during temporary stoppage of work, illness or quarantine, it may be worth considering providing top-ups to their employees while they are receiving Employment Insurance benefits. These arrangements are called Supplementary Unemployment Benefit Programs (SUB). In order to provide these top-ups without Employment Insurance clawing back payments, an employer must register their plan with Service Canada. For further information, please click on the following link: <https://www.canada.ca/en/employment-social-development/programs/ei/ei-list/ei-employers-supplemental-unemployment-benefit.html>

For those in the forestry, steel and aluminum sector, it may be an option to introduce work-sharing into the work place. This would allow employees to work shorter hours in order to avoid lay-offs while receiving Employment Insurance benefits. For more information, please click on the following link: <https://www.canada.ca/en/employment-social-development/services/work-sharing/temporary-measures-forestry-sector.html>

## **Human Rights Considerations**

While there are employment law considerations arising from a decision to lay employees off work, it is not discriminatory or a human rights violation for an employer to lay off employees if there is no work for them to do because of the impact of COVID-19.

Human rights legislation requires employers to accommodate disabled employees to the point of undue hardship. There is little doubt that COVID-19 would be considered a disability. You should also be mindful

that human rights legislation protects against both actual disabilities and perceived disabilities (this means that human rights protection likely extends in the event an employee is self-isolating or being tested and exhibiting symptoms).

The duty to accommodate has two components – a procedural component and a substantive component. The procedural component requires employers to think of all of the ways an employee could be accommodated and the substantive component requires an employer to provide accommodation if it would not result in undue hardship.

In relation to COVID-19, employers should consider:

- Whether remote work is a possibility on a temporary basis;
- Whether the physical structure of the workplace can be altered on a temporary basis to minimize the risk of exposure;
- Employees who are expressing anxiety and fear should be permitted to remain home unpaid (mental health issues, like anxiety, PTSD and depression are also disabilities recognized by human rights legislation) – remember, fear of COVID-19 may, in some circumstances, rise to the level of a disability requiring accommodation;
- Whether shift schedules can be altered to reduce risk of exposure.
- Permitting employees to use vacation time to be away from the workplace during this critical period (typically employers determine when employees can use their vacation time);

It is important to talk to your employees about potential solutions/ideas they may see as well moving forward. You may be surprised. The duty to accommodate also requires a joint process wherein options are discussed and reviewed when implementing an accommodation.

## **What if an Employee is Exhibiting Symptoms but Still Attending Work?**

Decisions to prevent an employee from attending work must be based on objective factors, and not stereotypes or discriminatory factors. For example, it would likely be a human rights violation to ask an employee of Asian ethnicity with a cough to go home, but allow other employees with a cough to remain working.

The Ontario Human Rights Commissions' Policy on COVID-19 states:

COVID-19 is not isolated to people of any particular ethnic origin, place of origin or race. Some restrictions, such as a restriction based on where an individual has recently travelled, may be reasonable and not discriminatory.

If you are assessing risk, where an employee has recently traveled may be a legitimate factor – their race or ethnic origin is not. To review the Ontario Human Rights Commission's Policy Statement of the COVID-19 Pandemic, click here: [http://ohrc.on.ca/en/news\\_centre/ohrc-policy-statement-covid-19-pandemic](http://ohrc.on.ca/en/news_centre/ohrc-policy-statement-covid-19-pandemic)

If there is a possible risk of COVID-19 infection, it may be reasonable to ask that employee to self-isolate from home. Make all efforts to permit that employee to perform remote work that is productive and for which he, she or they can be paid. If that is not possible, it may be reasonable to ask that employee to remain home, unpaid, in the event of a legitimate risk to other workers. Health and safety legislation requires employers to provide a safe workplace.

It is important however to ensure that the steps you are taking are consistent with up-to-date advice from medical and public health officials. Following real and up-to-date medical information will increase the chance of successfully arguing undue hardship based on health and safety in the event that you face a human rights application or complaint in the future.

Employees who are unable to work may be entitled to employment insurance sickness benefits. This provides for a maximum of fifteen weeks of EI benefits. For more information on sickness benefits, click here: <https://www.canada.ca/en/employment-social-development/programs/ei/ei-list/reports/sickness.html>

## **School Closures**

Schools and many childcare options have closed on a temporary basis. This introduces another host of issues for employers. Human rights legislation requires employers to accommodate family status issues. Emergency situations where children require care qualify as family status issues. Employees do not have the right to dictate how they will deal with this situation however and cannot unilaterally decide they will stay home and not attend work. Employees have an obligation to explore other options that will allow their children to be safely cared for, and still allow them to attend work and provide their duties.

After these options have been explored, and should they not be available, employers will have the obligation to provide accommodation. Similar considerations should be considered as those that would take place if the employee was exhibiting symptoms (remote work for instance is one such example).

For more information about accommodating employees on the basis of family status, visit the Ontario human Rights Commission's Policy and Guidelines on Discrimination because of Family Status: <http://www.ohrc.on.ca/en/book/export/html/2483>

## **Steps to Take if Your Business Remains Open**

Obviously take all reasonable steps to prevent the transmission of COVID-19. There is an abundance of information available for legitimate sources – Health Canada, the World Health Organization and other reputable organizations. There is also a lot of incorrect information floating around social media and the world wide web. Follow advisories from reputable sources.

Ensure the workplace is clean and employees have access to cleaning products which will kill or deactivate the virus on areas frequently touched. Try to limit face to face interaction to the extent possible and ensure employees are adhering to social distancing guidelines. Ensure your workplace is informed as to the steps you are taking to prevent the transmission, the steps they should take should they exhibit symptoms and

the policies that will apply should they be required to self-isolate.

## **Final Tip – Strive for Balance**

There are a number of factors at play in situations of this nature. First and foremost should be the health and safety of your employees, clients and customers. Avoid extreme responses to COVID-19 that are not in line with up-to-date medical information from reliable sources. Remember that many of your employees may live paycheque to paycheque and while this will have a detrimental impact on your business financially, this also poses the risk of being disastrous for your individual employees. Consider options to lessen the impact of the precautions on your employees. We're all in this together and balanced and proportionate responses are in order.

Seek legal advice particular to your individual situation. When considering layoffs, ensure you secure employment agreements for your lawyer so they can determine whether there is a contractual right to layoffs or not.

Also, the provincial government is currently in the process of passing employment legislation specifically related to COVID-19. It is important to remain apprised prior to any employment law decisions being enacted. Ross & McBride LLP will be monitoring this situation closely and will be providing advice to our employer clients in a timely manner.

## **Government Updates – March 18, 2020**

The Federal Government announced \$82 billion dollars in aid and programs to ease the burden on workers, businesses and families during these trying times. Many of these programs will have a direct impact on your employees.

The Government had previously announced that it would waive the one week waiting period in which employees are required to wait without income prior to collecting employment insurance. Typically, there is a period of one week where an employee would not have access to employment insurance benefits. This is waived for those who are quarantined. It appears from a review of the website that this would also apply to employees who are self-isolating.

For 2020, employment insurance is calculated on the basis of 55% of an employee's average insurable weekly earnings up to a maximum annual yearly earning of \$54,200. This means the maximum amount of employment insurance that can be collected is \$573.00 per week.

While most employees will likely qualify for employment insurance benefits, some will not. One common reason an employee may not qualify is that they do not have enough qualifying hours (typically 420-700 hours depending on the unemployment rate in a geographic area) in the qualifying period (the previous year).

The Federal Government announced this morning that employees who do not qualify for employment insurance will have access to a program that will provide them with an amount comparable to what they

would have received if they qualified for employment insurance. This is called the emergency care benefit.

Other financial incentives are being provided as well – such as an increase to the child care benefit, loan repayment deferral (for student loans), extending the deadline to file 2019 income tax to June 1, 2020, and likely programs in cooperation with banks with respect to mortgage payments.

Should your work force be laid off, it is important to keep employees up-to-date with programs that may be able to ease the financial burdens they are facing and fears for the future.

While we are working remotely to do our part in preventing the spread of COVID-19, we are actively working to service the needs of all of our clients and to ensure they have the advice they need during these uncertain times. Our contact information is:

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