

COVID-19 BULLETIN – April 1, 2020

Understanding Your Workplace and Employment Rights and Responsibilities

Over the past several weeks, the news and guidelines surrounding the current COVID-19 pandemic have been constantly evolving. Canada's federal and provincial governments have been rapidly announcing emergency legislative measures to help Canadian individuals and businesses see out the crisis. As the effects of the pandemic and the details of these new supports continue to unfold, we have received a deluge of questions about workplace health and safety, layoffs and terminations, and what supports are available to both workers and employers.

The purpose of this bulletin is to help you understand your employment rights and responsibilities, including the new government assistance measures, as they relate to the impact of COVID-19 on the workplace. The bulletin is current to the morning of April 1, 2020. Updates will be circulated as they arise.

If you require further guidance or advice on any of the matters addressed in this bulletin, please do not hesitate to [contact us](#).

The Workplace

Maintaining a safe workplace

Canadian businesses that have been deemed non-essential have been ordered to close by the Ontario and other provincial governments. Those businesses that remain open must ensure that they are taking the necessary steps to protect workers from the dangers of COVID-19.

Occupational health and safety legislation (such as the *Occupational Health and Safety Act* in Ontario) requires employers to provide a safe working environment. What precautions are necessary will vary depending on the workplace, but employers must be able to show that they have exercised due diligence in protecting employees from possible hazards. Employers should:

1. Continually assess and respond to the potential hazards in their workplace;
2. Look for alternative solutions such as allowing employees to work remotely; and
3. Remain up to date with the advice and requirements from local government and public health agencies.

Though employers have a responsibility to provide a safe workplace, employee rights must be respected.

For instance, if an employer wishes to monitor the health of their workforce, they should do so in a way that is minimally intrusive, safe, informed by the proper medical authorities, and is conducted by qualified individuals. Employees should be informed in advance of what is planned, why it is planned, and how it will work. Employers should not publish or retain the results of any collected medical information.

Right to refuse work

An employee has a right to refuse to work or to refuse to perform duties that he or she reasonable believes to be dangerous. An employee who has refused unsafe work cannot be forced to complete the task, nor can they be penalized for their refusal.

Exactly what qualifies as a reasonable exercise of the right to refuse work will vary depending on that provinces' respective health and safety legislation. If an employer has refused to take basic precautions such as cleaning high-traffic surfaces, providing the necessary protective equipment, and not requiring employees that have contracted or been exposed to the virus to stay home, an employee will almost certainly be justified in refusing to continue working.

Normally, the right to refuse work is not a common occurrence and must pass a high standard to be reasonable. However, the COVID-19 pandemic has likely created an exceptional situation.

In the end, whether a workplace or specific task is “dangerous” will depend on many factors, which will likely include local infection levels, whether the employee is in a vulnerable demographic, the nature and layout of the workplace, what steps the employer has taken to protect workers, and more.

The process that must be followed once an employee has refused to work will also vary by province. Generally, the process is:

1. The worker informs their employer of the reason for refusing the work. The employer must investigate, and if necessary, resolve the problem.
2. If the worker believes the workplace remains dangerous, they may again refuse the work. At this point, either the employee or the employer must inform a government inspector who will conduct an investigation and prepare a report.

Given that Safety Officers are likely extraordinarily backlogged right now, you will have a long initial period before you potentially could be forced to work.

Employees should know that if they have unreasonably refused to work in circumstances that are deemed safe by an inspector from the province, it is possible that their employer may have reason to fire them for an unauthorized leave of absence. Remember that your employer is allowed to require you to work as long as they have taken the necessary steps to provide a safe working environment.

However, employers should exercise extreme caution in taking any steps to discipline or fire an employee in relation to any COVID-19 related issues. Employees who are concerned about the dangers of COVID-19 and/or who may have contracted it or are otherwise affected by it may be protected by one or more of the following:

1. Recent amendments to employment standards legislation that protect employees who are unable to work for reasons related to COVID-19;
2. Human rights legislation, which protects those who have or are perceived to have a disability (which can include sickness); and
1. Occupational health and safety legislation that includes provisions that forbid reprisals against employees that have refused unsafe work. See for example s.50(1) of the OHSA.

Employees with COVID-19 or who have been exposed to it

An employee that is known to have COVID-19 must not be allowed to return to the workplace until they have fully recovered. Any employee that came into contact with the infected employee should stay self-isolated at home for 14 days until it is clear that they are not carriers.

What obligations an employer has towards an employee who is required to stay home because of COVID-19 will depend on factors such as the terms of the employment agreement, any statutory entitlements for sick leave, and whether the employee is able to work from home.

Unpaid job-protected leave for employees unable to work for reasons related to COVID-19

During this time, many workers may be unable to show up for work for various reasons related to COVID-19: they may be in isolation or quarantine, they may be staying home to care for children, they may be blocked by travel bans from returning to their place of work, they may have been ordered to stay home by their employer, or there may be some other reason.

Many provinces have amended their provincial employment standards legislation to protect these workers' employment. In Ontario, the *Employment Standards Act, 2000* has been amended to guarantee non-paid, job-protected leave for those unable to work for the above reasons. Although an employer may request from the employee some reasonable evidence of why the leave is required, the employer cannot require the employee to produce a medical certificate.

Several other provinces have enacted similar legislative amendments with similar protections, including British Columbia, Alberta, and Saskatchewan.

In addition, human rights legislation prohibits employers from discriminating against employees who have or are perceived to have a disability (which would include having COVID-19).

Temporary layoffs and termination of employment contracts

Temporary layoffs

Employment standards legislation appear to permit a temporary layoff. For instance, the Ontario *Employment Standards Act* allows for temporary layoffs of up to 13 weeks (without any pay or benefits) or 35 weeks (with benefits continued). However, numerous court decisions make it clear that outside of specific circumstances, a temporary layoff is considered to be constructive (wrongful) dismissal.

An employer may only temporarily lay-off an employee in the following circumstances:

1. If the employment contract expressly permits it,
2. The right is implied (for instance, as an industry practice or based on past practice), or
3. The employee has agreed to the layoff.

However, employers and employees should weigh their decisions carefully. If an employer chooses to temporarily lay off an employee outside of the three scenarios listed above, they expose themselves to a potential lawsuit for constructive dismissal.

An employee who has been informed that they are about to be laid off will want to consider whether it is in their best interests to accept the layoff, or to treat it as a wrongful termination and pursue a claim for damages.

An employee may prefer to accept the layoff, knowing that they will (hopefully) have a job to return to once circumstances improve.

If an employee chooses, under the circumstances, to accept the temporary lay off, they should inform their employer clearly and in writing that they have only done so only by virtue of the current exceptional circumstances. Otherwise, there is a risk that the right to temporary layoffs may become an implied term of the employment relationship.

Both employers and employees should know that employees are entitled to take a “reasonable” amount of time to decide whether or not they will accept the layoff. However, what exactly amounts to a “reasonable” amount of time is not defined but will vary depending on the circumstances. In any event, employees should try to make their decision relatively quickly after being laid off, since if they decide to accept (or appear to have accepted) the layoff, they will be unable to refuse it at a later time.

Even if an employee has treated the layoff as a wrongful termination, in the event that the employer offers them their job back they should accept it (unless they have already found comparable employment). Failing to accept the offer of re-employment will likely be seen by a court as a failure to mitigate damages and could significantly diminish their entitlement to wrongful dismissal damages.

A temporary layoff that exceeds the limits created by employment standards legislation automatically becomes a dismissal. For instance, if in Ontario a “temporary” layoff lasts longer than 13 weeks (without continuing benefits), or 35 weeks (with continuing benefits), or new employees have been hired to replace the laid off employees, then a dismissal has occurred and the employee is entitled to severance.

Frustration

If a business has been ordered to close by the government, then the employer will most likely be able to lay off employees without liability (assuming that there is no way to continue functioning while closed for business). A government-ordered shutdown will in most cases be considered frustration of the employment contract, freeing the parties from their obligations under it.

However, it is not clear whether businesses that have not been ordered to close by the government due to COVID-19 would be able to claim frustration of their employment contracts.

Frustration arises by an operation of law in extraordinary circumstances, when the performance of a contract would be something radically different than what was agreed to by the parties. The test for frustration is extremely high and rarely met and each case requires a unique analysis. Employers should not assume that their employment contracts have been frustrated but should seek legal advice.

Benefits and Government Programs for Employers

The government of Canada has created several programs to assist small businesses through this uncertain period. These include the following. More information and updates can be found at this website:

<https://www.canada.ca/en/department-finance/economic-response-plan.html>

Temporary wage subsidy program

The government of Canada recently replaced the initial temporary wage subsidy program, which would have subsidized up to 10% of an employee's wages, with a program that will subsidize up to 75% of wages for qualifying businesses, for up to 3 months, retroactive to March 15, 2020. The government announced on March 31 that the wage subsidy will be available to employers of any size, including charities and not-for-profits, who can show their revenues have decreased by at least 30% due to COVID-19. The wage subsidy is capped at \$847/week per employee.

Further details of eligibility will be released shortly, and should be available at this website:

https://www.canada.ca/en/department-finance/economic-response-plan/covid19-businesses.html#wage_subsidies

Supplemental unemployment benefit (SUB) plan

It is possible for employers to create and register a supplemental unemployment benefit (SUB) plan to top-up employees' weekly earnings when they are unemployed due to a temporary stoppage of work, training, illness, injury or quarantine. Payments from SUB plans that are registered with Service Canada are not considered 'earnings' and are not deducted from an employee's EI benefits.

An overview of the Supplemental Unemployment Benefit Program is available here and an overview of SUB plan requirements is available here.

Benefits and Government Programs for Employees

Employee access to the CERB

Note: the Canadian government has replaced the Emergency Care Benefit and Emergency Support Benefit with the simpler and more accessible Canada Emergency Response Benefit (CERB).

The CERB would cover Canadians who have lost their job, are sick, quarantined, or taking care of someone who is sick with COVID-19, as well as working parents who must stay home without pay to care for children who are sick or at home because of school and daycare closures. The CERB would apply to wage earners, as well as contract workers and self-employed individuals who would not otherwise be eligible for Employment Insurance (EI).

The online portal for the CERB will not be available until early April. Canadians who are eligible for EI benefits can continue applying. However, once the CERB portal is open, workers who are otherwise eligible for EI may apply instead for the CERB.

Canadians who are already receiving EI and EI sickness benefits will continue receiving those benefits and should not apply for the new CERB. If their EI benefits end before October 3, 2020, they may apply for the CERB once their EI benefits cease, if they are still unable to return to work due to COVID-19.

Canadians who have already applied for EI and whose application has not yet been processed do not need to reapply. Canadians who are eligible for EI regular and sickness benefits will still be able to access their normal EI benefits, if still unemployed, after the 16-week period covered by the CERB.

This taxable benefit would provide \$2,000 a month for up to four months for workers who lose their income as a result of the COVID-19 pandemic. CERB payments will be issued every four weeks and will be available from March 15, 2020 to Oct. 3, 2020.

The CERB is not available to workers who have left their job voluntarily.

The online portal to apply for CERB will be available in early April, and people can expect payments within 10 days. Information about CERB should become available at this webpage:

https://www.canada.ca/en/department-finance/economic-response-plan/covid19-individuals.html#new_canada_emergency_response_benefit .

This website has a “Benefits Finder” tool for individuals to find what other benefits they may qualify for:

<https://srv138.services.gc.ca/daf/q?id=a0d1df50-7985-4715-b8c5-47b530239748&GoCTemplateCulture=en-CA>.

Applying for EI

Qualifying for EI

You may qualify for **EI regular benefits** if:

- You have worked the required number of insurable employment hours in the last 52 weeks or since the start of your last EI claim. Normally, this number is between 420-700 hours. However, the number depends on the area you are in. To find out the specific number, you can visit this site: https://srv129.services.gc.ca/eiregions/eng/postalcode_search.aspx
- You were employed in insurable employment;
- You are ready and capable of working each day;
- You lost your job through no fault of your own; and
- You have been without work or pay for at least seven consecutive days in the last 52 weeks.

To see the guidelines for EI eligibility, you can visit this website:

<https://www.canada.ca/en/services/benefits/ei/ei-regular-benefit/eligibility.html> .

However, the only way to know for sure if you are eligible is to apply.

EI Sickness benefits

Individuals may also be eligible for the **EI sickness benefits**. These benefits provide eligible workers with up to 15 weeks of financial assistance.

You may be eligible if:

- You are unable to work for medical reasons and have a medical certificate;
- You have not worked for a period of one week;
- Your regular weekly earnings have decreased by more than 40% for at least one week; and
- You accumulated 600 insured hours of work in the 52 weeks before the start of your claim or since the start of your last claim, whichever is shorter.

The need for a medical certificate and the one-week waiting period have been waived for individuals who are quarantined because of COVID-19.

The Government is also waiving the one-week waiting period for those individuals in imposed quarantine that claim EI sickness benefits. This temporary measure will be in effect as of March 15, 2020.

Details about EI sickness benefits are available here: <https://www.canada.ca/en/services/benefits/ei/ei-sickness.html>

Record of Employment (ROE)

You do not need your ROE to apply for EI benefits. In fact, you should apply for EI as soon as possible, whether or not you have it. If you wait more than 4 weeks to apply for EI, you may lose the benefits.

However, you will need to provide your ROE as a supporting document for your application. If your employer has issued you a paper ROE, you must provide a copy to Service Canada. If your employer has submitted your ROE electronically to Service Canada, you do not have to provide it to Service Canada. To see if an ROE has been issued electronically for you, you can visit (or create) your My Service Canada Account here: <https://www.canada.ca/en/employment-social-development/services/my-account.html>.

If your Employer refuses to issue the ROE, you should contact Service Canada. You can use this form to have Service Canada request the ROE from the Employer:

<https://catalogue.servicecanada.gc.ca/content/EForms/en/Detail.html?Form=INS3166> .

Applying for Employment Insurance (EI)

You can apply for EI regular benefits as well as the EI sickness benefit by visiting:

<https://www.canada.ca/en/services/benefits/ei.html> , and applying online.

Given the necessary precautions that they are taking against COVID-19, Service Canada strongly recommends that individuals apply for EI online, and not in person at their local Service Canada offices.

As an alternative, you may also access their services by calling 1 800 O-Canada.

For a **free consultation** on coronavirus related issues, call us now at 416-594-3900 or complete [this form](#).

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