



COVID-19 UPDATE: June 26, 2020

Introduction:

This brief weekly bulletin is aimed at keeping employees and employers informed of COVID-19 related changes and concerns in the world of employment. To find more answers to common employment questions, you can:

- Visit the [Levitt LLP website COVID-19 page](#).
- Read [Howard Levitt's columns in the National Post](#).
- Listen to Howard Levitt and the other lawyers from Levitt LLP on [Newstalk 1010](#).
- For a summary of key employment issues, such as whether your employer has a right to place you on a temporary lay-off and your right to a safe workplace, [contact us to](#) request the COVID-19 Bulletins previously circulated by Levitt LLP.

Important: Every one's circumstances are different. The information provided in this bulletin and at the above resources is for general information purposes only and is not intended to be legal advice.

If you are interested in obtaining legal advice for your specific problem, you can contact us to book a **free consultation on COVID-19 related issues**. To set up a consultation, call us now at 416-594-3900 or complete [this form](#).

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1. Q & A with Levitt LLP Lawyer Howard Levitt



Howard Levitt is a Senior Partner at Levitt LLP. He is a well-known and widely quoted authority on employment law in Toronto, the GTA and across Canada. Howard writes a weekly employment law column in the [National Post](#), hosts a weekly talk show on employment law on [Newstalk 1010 CFRB](#), and is the author of one of Canada's leading dismissal text books, *The Law of Dismissal in Canada*.

Howard has appeared as counsel in employment law and labour law cases at all levels of court in Ontario and across Canada, including the Supreme Court of Canada. In fact, Howard has appeared as lead counsel at the Supreme Court of Canada on employment law cases more than any other lawyer in Canadian history.

Howard is the labour lawyer and employment lawyer for many of Canada's largest corporations and acts as chief spokesperson for numerous collective bargaining negotiations in a variety of industries. Howard frequently represents other lawyers and provides his opinions on complex employment matters when requested.

Over the past 36 years, Howard has lectured at seminars across Canada, appearing at over 400 employment law conferences. He welcomes the opportunity to work with you to help you find the optimal legal solution to your workplace issues.

Q & A with Howard Levitt

Q: People have a lot of questions about what they can and can't do during this COVID-19 pandemic. What is one of the biggest mistakes you see people making?

They are applying for CERB when they have no entitlement to it, which could result in a claim against them to return the monies and incur penalties for fraud. The government gave out the money so easily that many did not pay attention to the eligibility requirement.

Another major mistake is that of employees who refuse to return to work because of anxiety. Employers have to accommodate safety but do not have to accommodate anxiety. They risk dismissal and losing their CERB and EI entitlements.

Q: What is the biggest point of confusion you see among people coming to you for advice?

In addition to the points above, employees focus on CERB entitlement and neglect their much greater entitlements to wrongful and constructive dismissal damages for layoffs and reductions in hours and wages.

Q: What is one tip you would give to employees in the current climate? / What is one tip you would give to employers in the current climate?

Employee Tip: do not accept layoffs or reductions in wages without, if you wish to accept it, making it time limited

Employer Tip: be transparent with employees. Most are accepting layoffs and reductions that would be constructive dismissals if they believe the employer really has no choice.

Q: Courts and tribunals are currently closed. Are you still able to continue advocating for your clients?

Nothing has changed. We can still file Claims and move actions along through Zoom mediations and discoveries, just like before.

Q: What are you doing to ride out this crisis?

I am going to work every day as before and spending more time educating Canadians on their rights through 9 regular radio shows, two weekly National Post columns, and many additional *ad hoc* radio and television appearances.

2. Extension of Canada Emergency Response Benefit (CERB) and the Canada Emergency Wage Subsidy (CEWS)

On June 16, 2020, the Prime Minister announced that the government is extending the Canada Emergency Response Benefit (CERB) by 8 weeks, to ensure Canadians have the help they need as they transition back to work. This extension will make the benefit available to eligible workers for up to a total of 24 weeks or until August 30, 2020.

As a reminder CERB is available to workers who:

- live in Canada and are at least 15 years old
- have stopped working because of reasons related to COVID-19, or are eligible for EI regular or sickness benefits, or have exhausted their EI regular or fishing benefits between December 29, 2019 and October 3, 2020

- had employment and/or self-employment income of at least \$5,000 in 2019, or in the 12 months prior to the date of their application
- have not earned more than \$1,000 in employment and/or self-employment income per benefit period while collecting the CERB
- have *not* quit their job voluntarily

The Canada Emergency Wage Subsidy (CEWS) is also being extended to August 29, 2020, to protect jobs, allow businesses to keep employees on the payroll, and re-hire workers who were previously laid off.

3. What does Ontario's Phase 2 of Reopening Mean for Employees/Employers?

The Ontario Government's plan to reopen the province is organized into three phases:

1. Phase 1 involves the closure of non-essential businesses and public/recreation areas, as well as restrictions on essential workers such as long-term care home workers.
2. Phase 2, which we are currently in, involves the gradual easing of restrictions over three stages, each of which is to last between two and four weeks.
3. Phase 3 will see the government partner with businesses to pursue economic recovery, with an emphasis on job creation.

Phase 2 will involve the reopening of workplaces throughout the three stages, and as of Wednesday, June 24, 2020, we are in Stage 2. The government's plan suggests that Stage 1 will see the "modified" reopening (meaning delivery or curbside pickup) of "select workplaces", Stage 2 will see the reopening of "some service industries and additional office and retail workplaces", and Stage 3 will involve the "opening of all workplaces responsibly".

The provincial government has confirmed that its top concern is worker health and safety. Employers will be required to have a plan that promotes and adheres to strict hygiene and sanitation standards, and employees must practice physical distancing to the extent possible. The provincial government will be releasing guidelines, documents and learning tools to provide guidance to employers as they restart their business, and to complement the guidelines that have been provided to essential workplaces. The provincial government has also added more resources for worker protection, including increasing the number of workplace inspectors and specialists, and doubling the capacity of Ontario's Health and Safety Call Centre.

Employers are responsible for the health and safety of their workers, and all other workers at their workplace. They are responsible for completing and posting the COVID-19 Safety Plan and to train and educate everyone at the workplace of the contents of that plan. Employers are also responsible for having a system in place to identify the hazards of COVID-19, control the risk, and monitor the effectiveness of the controls.

Employees are responsible for taking reasonable care to protect their own health and safety and the health and safety of other people at workplace. In the context of COVID-19, this means workers are responsible for their own personal self-care, which includes frequent hand washing and staying home

when sick. Workers are also responsible for reporting unsafe conditions to their employer, and following the procedures put in place by the employer to control the risks associated with COVID-19.

4. Working from Home is not a Permanent Option

Although many employees are dreading their return to work, the current “work from home” arrangements were only intended to be temporary. Although some tech based companies, like Shopify, have decided to change their practices by mandating that the majority of employees will continue working from home on a permanent basis—it is neither reasonable nor possible to expect most to do the same.

Our office has received phone calls from employees expressing their desire to remain at home in the face of recalls. They claim that, since their employer has accommodated the need to work from home, they do not understand why the accommodation cannot continue.

Despite such desires, employees are required to return to the office because it is a requirement of their employment. It is that simple. Just because employees have been accommodated in an emergency situation, does not mean employers have to provide that option indefinitely. It is only if there are genuine provable safety concerns at that workplace for that employee or the employee must remain home to look after family members because, for example, schools/daycare is closed, that a workplace refusal is justified. Another aspect of this is that if the employer decided to make the change to a working from home permanent, an employee could refuse, arguing that it is a constructive dismissal, just as employees, who have always been working from home, can claim constructive dismissal if they are ordered to now begin working from the office.

The option to work from home, introduced as a stop-gap function, cannot, at an employee’s preference, be rendered permanent, even if they could establish their work can be performed as or more productively from home. Indeed, if an employee refuses to return to work, in most cases, they can be properly terminated for cause.

5. Frequently Asked Questions About Returning to Work (FAQ)

Q: A company temporarily laid off employees but was unable to recall them due to financial hardship. What’s the least risky way to handle this situation?

A: As every employee who is not recalled would inherently be suspicious, I would do the callbacks in an order that would make sense to them. If a company could announce at the time of layoff the basis for recall, it should follow that sequence to minimize upsetting employees and reduce the possibility of being sued for constructive dismissal. If employees think companies are being reasonable, and they are not suddenly at risk that they will never be recalled, they are less likely to sue.

Q: Is there risk in recalling non-union employees and imposing medical fitness tests?

A: The risk is that it will be seen as discriminating on the ground that is a violation of the human rights legislation in most provinces.

Q: Can an employee refuse to work if they live with a family member with a compromised immune system?

A: Each case is determined individually. Some compromised immune systems have greater risks to the coronavirus than others. If, say, an employee works in a private office with a door, and other measures for the workplace that I have recommended in a previous [column](#) are prescribed, there is relatively little practical risk, whatever that employee or their family members' circumstances are.

When it gets closer to the margin respecting a safe workplace, employees have a greater right to refuse work depending on the degree of risk to themselves or a live-in family member.

Q: What needs to happen for organizations who want people to work from home permanently going forward?

A: Since that, too, could be a constructive dismissal, it's best to provide as much advance notice as possible. You should also focus on the type of employees that you hire in order to ensure you have employees that can work independently, prefer autonomy and are self-motivated since those characteristics will be of considerable importance. To the extent employees can be paid on piecework or commission basis, that's obviously desirable since those employees work more successfully from their homes, or there is less risk to the employer.

Q: Do you recommend employers making masks a requirement in the office?

A: It depends to what extent you can easily create social distancing and have strict policies preventing employees from interacting closely. At the very least, all employees should be permitted to wear masks if they wish to do so, and they should be supplied by the employer.

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Remember, this bulletin provides only general information and is not a substitute for legal advice. If you have a legal problem, you should seek out legal advice before making any decisions. The fact that you have received this bulletin from Levitt LLP or have communicated with members of Levitt LLP does not create a lawyer-client relationship.

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