



Labour and Employment Law eBulletin

Special Edition – March 27, 2020

A Brief Summary of Employment-related Matters due to COVID-19

Businesses may be experiencing a rapid decline in production and revenue as a result of the economic impact from the COVID-19 pandemic, which requires swift decisions regarding its workforce. As employers, it's important for businesses to be aware of the various options that are available.

As a result of the COVID-19 pandemic, the Ontario Government passed Bill 186, *Employment Standards Amendment Act (Infectious Disease Emergencies), 2020*, which introduced two emergency unpaid leaves for workers in Ontario, including for those that are self-employed (see table below).

In addition, the Federal Government has introduced various programs to assist employees and employers during these challenging economic times. In addition to EI sickness benefits, which may apply to employees impacted by COVID-19, the Government has also rolled out a new Canadian Emergency Response Benefit (CERB), available for workers (including contractors and those that are self-employed) who are also not otherwise eligible for EI benefits. This new benefit replaces the previously announced Emergency Care Benefit and Emergency Support Benefit. The CERB is expected to be available in early April 2020 (see table below).

Employers with employment contracts that provide for the ability to layoff employees may choose to do so. Employers with unionized staff must turn to the applicable collective agreement and the layoff provisions contained therein. For non-unionized employees, employers should be mindful that if a layoff is not contemplated in the employment contract, a layoff is not permitted, unless the employee agrees to it. Otherwise, the layoff may be construed as a constructive dismissal. Layoffs must also abide by the applicable provisions in the *Employment Standards Act*. Once laid off, employees may be able to access EI benefits and/or the new CERB.

Employers may also want to provide employees with access to their vacation or sick credits/pay prior to layoff. Vacation or sick pay at 100% (subject to statutory deductions) may prove to be advantageous to employees at this critical time as compared to the lower paying EI benefits. When vacation/sick pay is exhausted, the employee can then be placed on a consensual layoff. From the point of strategic planning, this may reduce the burden on employers in having to schedule many vacations for their workforce upon their return and during the balance of the year.

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If an employer otherwise chooses to terminate employees, the applicable termination and severance pay pursuant to the employment contract and/or the *ESA* applies.

While the Ontario government has introduced the new emergency leaves, it is the employee's right to access the leave and an employer cannot force the employee to take it. For businesses that have been declared as non-essential, the new emergency leaves are key. For those that are continuing operations, the situation is a bit more challenging. Employees are undoubtedly aware of the current and forecasted economic challenges faced by all. Employers are encouraged to approach their employees openly to discuss layoffs or the option to go on the new unpaid emergency leave to either access EI benefits (unemployment and/or sickness benefits) or the CERB. Employees may also agree to a reduction in hours or to a work-share agreement with a co-worker for a period of time. There is also the formal Work-Sharing Program through the Federal government which also provides EI benefits.

Many businesses have recently been forced to adapt to a remote workplace in a rapid timeframe. Employers need to be mindful of their continuing obligations under the *Occupational Health and Safety Act* and their privacy obligations. Employers may consider new remote working agreements in order to ensure certain protocols are in place and to monitor how much employees are working from home, if necessary. In addition, due to the ordered closure of schools and daycares and the recommendation for all individuals to stay at home, employees who are parents must also be accommodated in light of their changed caregiving roles pursuant to the Ontario *Human Rights Code*. For parents who cannot perform the duties of their position as a result of this change, the new emergency leave under the *ESA* and the CERB are available.

Perhaps the most important obligation of an employer right now is to keep the workplace and all workers safe amidst the spread of COVID-19. Due to the existence of new health and safety concerns, employers now have the ability to seek more information from its employees regarding symptoms and diagnoses of COVID-19 in order to keep others safe in the workplace. Employees should be made aware of this obligation to report this information to its employer.

We will continue to monitor ongoing changes and developments with respect to this matter and provide updates as necessary.

For more information on this or any other employment-related matters, please contact your regular Shibley Righton LLP lawyer or Jessica Koper at jessica.koper@shibleyrighton.com or at 519-967-3789.

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ONTARIO'S NEW EMERGENCY LEAVE: a new unpaid leave of absence has been introduced under the *Employment Standards Act*, which is available to employees who are not performing the duties of his/her position due to any of the following reasons:

A. DECLARED EMERGENCY LEAVE A state of emergency has been declared in Ontario [s. 7.0.1 of the <i>Emergency Management and Civil Protection Act (EMCPA)</i>], AND:	B. INFECTIOUS DISEASE EMERGENCY LEAVE Any reason related to COVID-19:
(1) An order applies to an employee under s. 7.0.2 of the <i>EMCPA</i> – i.e., requiring the person to do provide a specific service as it relates to Ontario's state of emergency, evacuate an area etc.	(1) Employee is under medical investigation, supervision or treatment related to COVID-19
(2) An order that applies to an employee under the <i>Health Protection and Promotion Act (HPPA)</i> – i.e., requiring the person to be placed under the care and treatment of a physician.	(2) Employee is acting in accordance with an order made under s. 22 or s. 35 of the <i>HPPA</i> (order of a medical officer of health that may require a person to take or refrain from taking any action as specified due to a communicable disease OR an order from a Judge of the Ontario Court of Justice re. a person for failing to comply with an order of a medical officer of health due to a communicable disease, i.e., to isolate themselves or submit to treatment by a physician etc.)
(3) The employee has to provide care or assistance to anyone listed in section 8 (see below).	(3) Employee is in quarantine, self-isolation or subject to a control measure – any of which was implemented by a public health official, qualified health practitioner, Telehealth Ontario, the Government of Canada, a municipal council or board of health through print, electronic, broadcast or other means
(4) For any other reason as may be prescribed.	(4) Employee is under direction given by employer relating to a concern that the employee may expose other individuals in the workplace to COVID-19
	(5) Employee is providing care or support to an individual referred to in section 8 (see below) due to a matter relating to COVID-19 that concerns the individual, including, but not limited to school or daycare closures
	(6) Employee is directly affected by travel restrictions relating to COVID-19 and cannot reasonably be expected to travel back to Ontario
	(7) Any other reason as may be prescribed

THIS LEAVE ENDS once Ontario declares that the state of emergency is terminated

THIS LEAVE ENDS once COVID-19 is no longer prescribed as an infectious disease pursuant to the *ESA* and the employee is no longer **not** performing the duties of his/her position for the reason of covid-19

No medical note is required to access these leaves. The employer is entitled to evidence from the employee that is reasonable in the circumstances at a time that is reasonable in the circumstances. These leaves are **retroactive to JANUARY 25, 2020.**

Section 8 Individuals:

- spouse
- parent, step-parent or foster parent (or spouse's)
- child, step-child, foster child (or spouse's)
- child under legal guardianship (or spouse's)
- sibling or step-sibling
- grandparent or step-grandparent, grandchild or step-grandchild (or spouse's)
- brother/sister-in-law or step brother/sister-in-law
- son/daughter-in-law (or spouse's)
- uncle or aunt (or spouse's)
- nephew or niece (or spouse's)
- spouse of employee's grandchild, uncle, aunt, nephew or niece
- **a person who is considered to be a family member as long as prescribed conditions are met**
- any other person as may be prescribed

THE FEDERAL GOVERNMENT'S NEW INCOME SUPPORT AND EMPLOYMENT-RELATED INITIATIVES DUE TO COVID-19

EI SICKNESS BENEFIT	CANADA EMERGENCY RESPONSE BENEFIT (CERB)
<p>-provides up to 15 weeks of income replacement – 55% of the employees' insurable earnings (as recorded in the last 52 weeks) up to a maximum of \$573/week (for salaried employees, the cap is reached at about \$54,000 in annual salary)</p>	<p>-provides a taxable benefit of \$2000 a month for up to 4 months for those who made at least \$5000 in income in 2019 or in the last 12 months</p>
<p>Eligibility:</p> <p>An employee who is SICK or QUARANTINED</p> <p>Notes:</p> <p>In effect as of March 15, 2020</p> <p>The one-week waiting period is waived for those who are QUARANTINED</p> <p>No medical certificate is required for those who are QUARANTINED</p> <p>Those applying can apply later and backdate the application</p> <p>If the employee has symptoms of COVID-19 it appears that they will fall under the QUARANTINE category and no medical note is required</p> <p>Apply online through Federal EI platform</p>	<p>Eligibility:</p> <ol style="list-style-type: none"> 1) A worker who must stop working due to COVID-19 and doesn't have access to paid leave or other income support 2) A worker who is sick, quarantined or taking care of someone who is sick with COVID-19 3) Working parents who must stay home without pay to care for children that are sick or due to school and daycare closures 4) A worker who still has their employment but is not being paid due to insufficient work and employer asked them not to come to work 5) Wage earners and the self-employed, including contract workers, who would otherwise not be eligible for EI <p>Notes:</p> <p>Available in early April 2020 – payments are to be expected within 10 days and will be issued every 4 weeks from March 15 – Oct 3rd, 2020</p> <p>Those who have applied for EI should not apply for the CERB. EI benefits can be accessed after CERB period expires</p> <p>No medical note is required</p> <p>Apply online or by telephone</p>

NOTE FOR EMPLOYERS: if employees are affected by COVID-19 and are no longer working employers need to issue a ROE (but employees can still apply without a ROE and submit that once it is received)

- if the employee is sick or quarantined, used CODE D (illness or injury) as reason for separation
- if the employee is no longer working due to shortage of work (either shut down or decreased operations) use CODE A (shortage of work)
- if there is a situation where the employee refuses to work but is to sick or quarantined, used CODE E (Quit) or CODE N (Leave of Absence) as appropriate.

WORK-SHARING PROGRAM

Provides EI benefits to workers who agree to reduce their normal working hours as a result of developments beyond the control of their employers. Meant to support employers and employees affected by the downturn in business caused by COVID-19. Available to employers impacted directly or indirectly by COVID-19.

Work-Sharing Agreements are extended by an additional 38 weeks (for a total of 76 weeks).

Mandatory waiting period between agreements is waived.

Recovery Plan requirements are eased.

In effect March 15, 2020-March 14, 2021.

One must apply for a work-sharing agreement to be in effect – many documents available online need to be filled out and submitted.

Application must be submitted at least 30 days before temporary special measures are to begin.

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