

## **Coronavirus disease (COVID-19) Frequently Asked Questions for Employers As of 8:00AM on March 30, 2020**

At present, there is much uncertainty with the Coronavirus disease, its impacts on your workplace and your legal rights and obligations to your workers. To that end, we have put together the following Frequently Asked Question (FAQ) guide to provide you with general information so you can respond and develop a strategy as matters unfold.

This FAQ is a guide only: it provides general information as it pertains to COVID-19 **for most Ontario workplaces: federally regulated and unionized workplaces excluded**. Should you require advice and assistance about your specific situation, do not hesitate to contact us.

Above all, please consult your regulatory bodies (if applicable) as well as Public Health authorities, and municipal, provincial and federal government to obtain up-to-date alerts and information about COVID-19 and your workplace's obligations to staff and the public.

Changes to this memo are included in **red** text.

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## Workplace Health & Safety

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### **Q. How do I ensure workplace safety during this crisis?**

Effective midnight on March 25, 2020, the Ontario government has ordered that all non-essential workplaces (the physical offices) close for a period of at least 14-days to support social distancing measures to prevent the spread of the virus.

Essential workplaces can continue to operate in their physical locations. A list of essential workplaces can be found here: <https://bit.ly/39hOlic>

Workplaces included under the order include for-profit, non-profit or other entities (i.e. persons or organizations) that provide goods and services.

The order does not prevent work and services by non-essential workplaces provided online, by telephone or by mail/delivery. Teleworking and online commerce are also permitted.

### **Q: Can a worker refuse to work because of COVID-19?**

Yes, however the standard is quite high. Under the *Occupational Health and Safety Act* (“OHSA”) workers generally have the right to refuse work if they have a genuine belief that the physical condition of the workplace is likely to endanger himself or herself, or another worker.

In addition, some workers are unable to refuse work under OHSA. These exempted workers include police officers, firefighters, ambulance service workers, workers employed in the operation of correctional institutions, as well as health care workers and persons employed in workplaces like hospitals, nursing homes, mental health centres, rehabilitation facilities, and residential group homes.

Of note, during the 2003 SARS outbreak, many workers refused work simply due to the fact that they would be exposed to individuals returning from countries where the illness was prevalent. In the cases where such work refusals were reviewed by an appeals officer, the workers were generally unsuccessful. Appeals officers consistently found that the risk of contracting SARS did not meet the level of danger required to justify a work refusal.

### **Q: If a worker refuses to work due to COVID-19, what should I do?**

The OHSA sets out a specific procedure that must be followed for a work refusal. Information about this procedure can be found here: <https://bit.ly/3bqRlZG>

If a worker refuses to work due to COVID-19 and you require guidance and assistance, please contact us.

***Q: Can we require a worker to disclose any symptoms of COVID-19?***

Yes. Though you cannot request the disclosure of health diagnosis information (i.e. information about the nature of a worker's illness), you can obtain information about prognosis information and limitations the worker may have. Work limitations would include symptomatic effects of COVID-19.

***Q: Can we prohibit a sick worker from coming to work?***

Yes. Under the OHSA, employers are required to take every precaution reasonable in the circumstances for the protection of a worker. Where a worker is sick and/or exhibiting COVID-19 symptoms, you may consider applying the same policy that you would for other absences due to illness or injury.

*The Employment Standards Amendment Act (Infectious Disease Emergencies), 2020, which was enacted by the Ontario government on March 19, 2020 provides job-protected leave to workers in isolation or quarantine due to COVID-19. Further, workers who are quarantined as a result of COVID-19 can apply for Employment Insurance's Canada Emergency Response Benefit, further discussed below.*

***Q: Can we require employees to wear masks, gloves or other protective gear?***

Yes, but only if it is reasonable and/or necessary to ensure the worker's health and safety. Under the OHSA, Employers are required to take every precaution reasonable in the circumstances for the protection of a worker. If there is a realistic chance that an employee may contract COVID-19 in the workplace (whether through interacting with co-workers or customers), then mandating protective wear may be necessary.

Also, an Employer can equally prohibit a worker from wearing certain protective gear if there is no reasonable threat to the worker that he or she will be exposed to COVID-19.

Remember that whether or not a worker is required to wear protective gear is an extension of your workplace dress code policy, which policy should be managed and applied in fair, equitable and functional manner.

## Worker Travel

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### **Q: Can we restrict a worker's personal travel?**

No. You can't force workers to restrict their personal travel. However, in light of the Government of Canada's non-essential travel restrictions, personal travel is already restricted.

Workers who return from travel should self-quarantine for a period of 14-days if they are required to return to your physical workplace.

You can (and should) restrict business related travel.

### **Q: Can we require a worker to disclose if they are travelling to an "affected" area?**

Yes and this should extend to include all international travel - not just regions designated as "affected areas" by the [World Health Organization](#).

The Government of Canada's guidelines on travel can be found on this [website](#). Workers who return from travel are required to self-quarantine for a period of 14-days.

### **Q: What can we do if a worker returns from travel?**

Workers who return from travel are required to self-quarantine for a period of 14-days and these workers can apply for Employment Insurance's Canada Emergency Response Benefit, further discussed below.

Under the *Employment Standards Amendment Act (Infectious Disease Emergencies)*, 2020 legislation, workers who are in isolation or quarantined due to COVID-19 are protected from job-loss.

## Alternate Work Arrangements

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### **Q: A worker is asking for time-off to take care of family (i.e. children, parents, spouse). What should I do?**

The newly passed *Employment Standards Amendment Act (Infectious Disease Emergencies)*, ("Infectious Disease Act") 2020 extends job-protected leave for workers who are required to take time-off to care for loved-ones. The legislation provides job protection for workers unable to work for the following reasons:

- they are under medical investigation, supervision or treatment for COVID-19;

- they are acting in accordance with an order under the *Health Protection and Promotion Act*;
- they are in isolation or quarantined in accordance with public health information or direction;
- they are directed by their Employer not to work due to a concern that COVID-19 could be spread in the workplace;
- the worker needs to provide care to a person for a reason related to COVID-19, for a school or daycare closure, for example; and
- they are prevented from returning to Ontario due to travel restrictions.

Under the *Infectious Disease Act*, emergency leave is allowed for people to care for extended family members including siblings, step-siblings and 'in-laws'; grandparents; aunts, uncles, nieces and nephews. It also has a "like a family" member provision which may apply.

The measures outlined in this legislation are back dated to January 25, 2020 when the first presumptive case was identified in Ontario. And the measures will remain in place until COVID-19 is defeated.

Remember also that under the *Human Rights Code*, 'family status' is a protected ground. The *Code* defines "family status" as "being in a parent and child relationship" which includes parents caring for children (also by adoption, fostering and step parenting), people caring for aging parents or relatives with disabilities, and families headed by lesbian, gay, bisexual or transgendered persons.

As an employer, you cannot discriminate against a worker on the basis of family status. Also, if a worker requests accommodation on the basis of family status, as an employer you have a duty to accommodate the worker, up to the point of undue hardship.

If you have questions regarding accommodating a worker, please contact us.

**Q: What leaves are available for workers to take time off work for illness specifically?**

The *Employment Standards Act, 2000* (the "ESA"), has a number of leaves which workers can use if they require time away from work to care for themselves or a loved-one. These leaves for eligible workers under the ESA **continue to apply at this time and include:**

- **Sick leave:** 3-days off per calendar year in the event of personal illness, injury or a medical emergency.
- **Family responsibility leave:** 3-days off per calendar year in the event of:
  - (i) an illness, injury or medical emergency involving certain classes of family members; or
  - (ii) another "urgent matter" that involves one of those family members.
- **Family medical leave:** up to 28-weeks in a 52-week period where the worker is providing support to certain classes of family members suffering from a serious medical condition, who are at significant risk of death within 26-weeks.

- **Family caregiver leave:** up to 8-weeks to care for or support certain classes of family members suffering from a serious illness.
- **Critical illness leave:** up to 37-weeks to provide care or support to a critically ill minor child or 17-weeks to provide care or support to a critically ill adult family member.

Note that most leaves of absence under the ESA are unpaid leaves.

As the Provincial government has declared a state of emergency, the *Employment Standards Act's Declared Emergencies and Infection Disease Emergencies* leave now applies. This leave provides a worker with a leave of absence without pay if the worker will not be performing the duties of his or her position as a result of a declared emergency or infectious disease. There is no time-limit for this leave: the duration of the leave can extend for as long as the worker is not performing his or her duties because of an emergency.

The newly enacted *Employment Standards Amendment Act (Infectious Disease Emergencies), 2020 (the "Infectious Disease Act")* protects the jobs of persons affected by COVID-19 who need time away from work (please see the question above).

**Q: A worker wants to work from home. Am I required to permit this?**

In light of the closure of non-essential workplaces, a work from home arrangement might be inevitable: if your workplace is considered to be non-essential by default your physical workplace should be closed. However, as per the Ontario government's order, non-essential office closures do not preclude work and services in emergency situations (for certain health professionals), online, by telephone, or by mail/delivery.

To determine how to proceed, we suggest you use the following decision-making framework based whether your workplace is essential or non-essential, which can be determined by reviewing the list found here: <https://bit.ly/39hOlic>

**Essential Workplaces:**

1. If your workplace is essential, is the work performed by the worker capable of being performed (either partially or wholly) remotely?
  - a. If the workers' duties cannot be performed remotely, then the worker will be required to attend the workplace to work.
  - b. If the workers' duties can be performed remotely, you may wish to consider a flexible work arrangement, as this will go a long way in generating goodwill with the worker and supporting social distancing measures. That said, for essential work, you are not required to provide work from home.

**Non-Essential Workplaces:**

1. Are the worker's duties required to provide emergency care or goods and services online, by telephone, or by mail/delivery?

- a. If 'no', your physical workplace should be closed, and the worker should be permitted to work from home if possible.
- b. If 'yes', determine whether the worker is capable of performing all or some of the work remotely?
  - i. If the workers' duties cannot be performed remotely (e.g. a cook at a restaurant), then declining the work from home request is reasonable.
  - ii. If the workers' duties can be performed remotely, you should consider a flexible work arrangement to support social distancing measures.

Remember also that teleworking is permitted for all businesses even those businesses that are deemed to be non-essential. So, if you can find a way to operate remotely, you may be able to maintain some or all of your business operations.

If you require assistance with the development of a work from home policies, please contact us.

## Office Mandated Closures, Temporary or Permanent Layoffs

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### ***Q: We are required to close our office temporarily. What are our risks?***

Your risk is a constructive dismissal complaint (discussed in greater detail below). And the risk of a constructive dismissal complaint largely depends on whether the worker is an independent contractor or an employee, and the terms of your written contract with the worker.

If the worker is an independent contractor, you can terminate the contract in accordance with the terms of your contract. Also, unless the written contract provides a specific guarantee of hours, you are not required to provide an independent contractor with a set number of hours of work: if there is no work for the independent contractor to perform, you do not have an obligation to maintain the contractor's pre-Covid-19 work hours.

If the worker is an employee (whether full or part-time), remember that the *Employment Standards Act* gives an Employer the right to temporarily lay-off a worker for a period of up to 35-weeks (further discussed below). The risk of a constructive dismissal complaint will depend on whether the written employment contract with the worker references this right. If the written contract includes a temporary lay-off provision, there is little risk of a constructive dismissal allegation because you laid-off the worker.

However, if you do not have a written employment contract with the worker, or you don't have a temporary lay-off provision in a written contract, then there is a risk of a constructive dismissal allegation. However, as discussed below, this risk may be minimal given the current, unprecedented environment we find ourselves in.

**Q: What is Constructive Dismissal? Am I likely to face a constructive dismissal complaint or lawsuit if I lay-off some or all of my workers without pay?**

Constructive dismissal is a kind of wrongful dismissal of a worker. It occurs when an Employer makes a unilateral, fundamental and substantial change to a worker's job. A temporary layoff without pay would typically lead to an allegation of constructive dismissal, unless the worker's written contract of employment enables you to temporarily layoff the worker in accordance with the *Employment Standards Act*. Constructive dismissal applies in employment (i.e. employee and employer) situations and would not typically apply to an independent contractor.

Whether a worker, who has been laid-off because of COVID-19, can claim constructive dismissal is being hotly debated in employment law circles. Those who argue that a worker can claim constructive dismissal rely on legal precedents (i.e. previous legal decisions) where the constructive dismissal doctrine has been developed and refined.

I continue to hold the opinion that these precedents would not apply to the unprecedented circumstances we find ourselves in now. Because constructive dismissal is a common law (i.e. case law) remedy, and as with all cases in the common law remedies, the Courts are required to take a contextual analysis, balancing the interests of the litigants and the public at large. I believe that a strict application of the constructive dismissal doctrine by Canadian Courts during COVID-19 would create far more chaos in the legal system than not following previous precedents.

In light of the foregoing, I offer the following guidance:

- If your office closure results from the Ontario governments non-essential workplace closure (and work can't be performed remotely), a directive from a regulatory body or similar agency, and as a result, the worker is laid-off without pay, your risk of a successful constructive dismissal allegation in these circumstances is very low.
- If the office closure is discretionary and based on your personal preference, you may be obligated to compensate workers for their time away from work or offer remote work opportunities. Failure to do so could lead to a claim of constructive dismissal.

It is necessary to evaluate each scenario to determine whether or not constructive dismissal has occurred or will occur. Therefore, if you believe that you may be exposed to a constructive dismissal complaint, please contact us.

**Q: I would like my worker to receive compensation during all or part of the temporary lay-off? What options are there?**

Under the *Employment Standards Act*, a temporary lay-off can be without pay. However, if you would like your worker to receive some compensation during the lay-off, consider the following options:

- You could give the worker the option of using all or some of their paid vacation time during the temporary lay-off period.
- If you have business interruption insurance and the policy covers your current situation and provides payment for operational losses, you may consider using these funds to subsidize employee earnings (please consult the terms of the policy).
- If you are continuing to pay the worker, you may consider the Federal government's Temporary Wage Subsidy for Employers. This 3-month measure will allow eligible Employers to reduce the amount of payroll deductions required to be remitted to the Canada Revenue Agency. More information about the program can be found here: <https://bit.ly/2vO5vf8>

In addition to the above, there are other programs available to compensate workers during a lay-off (please see the applicable questions below).

**Q. How long can a temporary layoff last?**

Under the ESA, a temporary layoff is defined as:

- a lay-off of not more than 13-weeks in any period of 20 consecutive weeks; or
- a lay-off of more than 13-weeks in any period of 20 consecutive weeks, if the lay-off is less than 35-weeks in any period of 52 consecutive weeks and
  - the employee continues to receive substantial payments from the employer,
  - the employer continues to make payments for the benefit of the employee under a legitimate retirement or pension plan or a legitimate group or employee insurance plan,
  - the employee receives supplementary unemployment benefits,
  - the employee is employed elsewhere during the lay-off and would be entitled to receive supplementary unemployment benefits if that were not so,
  - the employer recalls the employee within the time approved by the Director, or
  - in the case of an employee who is not represented by a trade union, the employer recalls the employee within the time set out in an agreement between the employer and the employee.

**Q: Can we terminate a worker because they contracted COVID-19?**

No. *The Employment Standards Amendment Act (Infectious Disease Emergencies), 2020* provides job-protected leave for employees experiencing isolation, in quarantine or who have child-care responsibilities as a result of school and daycare closures. In addition, most leaves under the *Employment Standards Act* are job protected.

Doing so could also violate the *Human Rights Code*, which obligates employers to accommodate workers with disabilities to the point of undue hardship. Lastly, terminating the employment of a worker simply because he or she has COVID-19 would

likely result is in wrongful dismissal lawsuit against your company, which could require you to pay substantial monetary damages.

If a worker has violated a workplace policy as it pertains to COVID-19 (such as not obeying a 14-day quarantine period or failing to show up to work, whether on-premise or remotely), you can use disciplinary measures up to and including job termination based on the severity of the offence.

If you have questions about terminating an employee based on COVID-19, please contact us.

## Financial Supports Available During COVID-19

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### ***Q: What financial supports are available for workers who can't work because of COVID-19?***

The federal Finance Minister announced a number of changes to the Employment Insurance ("EI") regime to ensure workers who are temporarily laid-off or who have lost earnings because of COVID-19 have access to financial supports. These programs include:

**EI Sickness Benefits:** up to 15-weeks of income replacement, subject to EI rules, for eligible claimants who are unable to work because of illness, injury or quarantine. The one-week waiting period will be waived for new claimants and a medical certificate is not required.

**Traditional EI Benefits:** regular benefits for individuals who lose their jobs through no fault of their own (for example, due to shortage of work, seasonal or mass lay-offs).

**Canada Emergency Response Benefit ("CERB"):** a taxable benefit of \$2,000 a month for up to 4 months to:

- workers who must stop working due to COVID19 and do not have access to paid leave or other income support.
- workers who are sick, quarantined, or taking care of someone who is sick with COVID-19.
- working parents who must stay home without pay to care for children that are sick or need additional care because of school and daycare closures.
- workers who still have a job but are not being paid because there is currently not sufficient work and their employer has asked them not to come to work.
- wage earners and self-employed individuals, including contract workers, who would not otherwise be eligible for Employment Insurance.

The CERB replaces the previously announced Emergency Care Benefit and the Emergency Support Benefit.

## **EI Work Sharing Program**

New temporary measures allow eligible Employers to retain skilled employees during COVID-19 by:

- Extending the Work-Sharing agreements by an additional 38 weeks to 76 weeks;
- Waiving the mandatory waiting period between agreements; and
- Easing the recovery plan requirements.

### ***Q: I have heard about the Supplemental Unemployment Benefit Program. What is this program and how does it work?***

A supplementary unemployment benefit plan (SUBP) is a plan established by an Employer or group of Employers to top up a worker's employment insurance (EI) benefits during a period of unemployment due to a temporary or indefinite layoff.

These top-ups payments are registered with Service Canada, are not considered as earnings, and are not deducted from the workers' EI benefits. Workers are required to apply for and be in receipt of EI benefits to receive SUBP top-up payments. The combined weekly payments from the Employer's top-up and the EI weekly benefit cannot exceed 95% of the workers' normal weekly earnings.

SUBP plans must be registered with Service Canada through the SUBP program before their effective date. Further, SUBP are wholly financed by the Employer.

For more information about the SUBP, please visit this website: <https://bit.ly/2xDTKZ9>

### ***Q. What financial support from government is available for businesses during this COVID-19 pandemic?***

**Temporary Wage Subsidy:** provides eligible Employers with a temporary wage subsidy for a period of 3-months. The wage subsidy has been increased to 75% of a workers' wages (up from 10%) for small and medium businesses affected by COVID-19. Under the previously announced rules, the 10 per cent subsidy had a cap of \$1,375 per employee and \$25,000 per employer. However, with the increased subsidy level of 75%, these maximums may be increased.

Details about this program and how it works will be released on Monday March 30, 2020.

**Canada Emergency Business Account:** this program will be implemented by financial institutions in cooperation with Export Development Canada ("EDC"). It will provide interest-free loans of up to \$40,000 to small businesses and not-for-profits, to help cover their operating costs during a period where their revenues have been temporarily reduced, due to the economic impacts of COVID-19.

Program applicants will need to demonstrate they paid between \$50,000 to \$1 million in total payroll in 2019. Repaying the balance of the loan on or before Dec. 31, 2022 will result in loan forgiveness of 25% (i.e. up to \$10,000).

Details about this program and how it works will be released on Monday March 30, 2020.

**Business Credit Availability Program:** This program provides improved access to credit for businesses who are credit-worthy, have viable business models and whose activities fall within the mandates of either the Business Development Bank of Canada (“BDC”) or EDC. It is accessed through a business’ own banking institution. Information about the BCAP can be found here: <https://bit.ly/2JqPYVW>

**Deferred CRA payment deadlines:** The CRA will allow all businesses to defer the payment of any income tax amounts that are owing on or after March 18, 2020 until September 2020. This relief applies to tax balances due, as well as income tax instalments. No arrears interest or penalties will accumulate on these amounts during this period. Further, the remittance deadline for GST/HST will be extended to June 30, 2020.

***Q: Other than government programs, are there other ways that I can obtain financial relief during this time?***

Various banks announced relief for businesses during the COVID-19 pandemic. Please check with your financial institutions for further details.

BDC will provide working capital loans up to \$2 million with flexible repayment terms for qualifying businesses and will postpone payments for up to 6 months at no charge for existing BDC clients who have loans totalling a maximum of \$1 million.

It is also a good idea to speak with your insurer to find out if your business insurance policy provides any relief during a crisis such as this. Ask them about business interruption or business continuity coverage and other ways that your business may have opportunity for an insurance claim.

## Taking Care of and Communicating with Your Workers

***Q- Can I request a sick note from a worker who has requested or is taking time-away from work because he/she is sick?***

No. Under the newly passed *Employment Standards Amendment Act (Infectious Disease Emergencies), 2020*, Employers are not permitted to require medical notes. That said, they can request other evidence to prove need for a leave, such as notes from a daycare centre.

**Q: What best practices do you recommend for communicating with workers?**

Employers should openly **and regularly** communicate with workers to limit the fear and uncertainty that will undoubtedly result as this situation progresses.

Your communications with workers could include the following:

- A statement that preventing an outbreak within the workplace is your top priority and that you are taking steps to monitor and respond to developments as they occur.
- **If you are an essential workplace and your employees continue to work, consider providing information about the safeguards you are implementing and the steps you are taking to ensure worker safety and that of the public.**
- Lists of reliable resources for information and education, which may serve to alleviate panic and anxiety. Examples include [Canada Public Health](#)
- A reminder to eligible workers of their statutory or contractual rights to time away from work under your workplace policies or the ESA.
- If applicable, a reminder of resources available to workers under your private health insurance programs, such as an employee assistance plan (EAP). If you do not offer EAP Services, your regulatory body (if applicable) might offer such a program for licensees.