

THE COVID-19 OUTBREAK: YOUR RIGHTS AT WORK

INTRODUCTION

This is a general information sheet prepared to answer some of the most commonly heard questions and issues currently facing workers and clinic clients amidst the ongoing COVID-19 outbreak. The below advice is subject to change as this situation develops, and as new laws and/or measures may be introduced.

Please note that this sheet is legal information only and does not constitute legal advice.

(A) LAYOFFS AND TEMPORARY QUARANTINES

Many workplaces are requiring employees to stay home and not come into work due to the outbreak. Other workplaces deemed non-essential services, such as daycares, bars and restaurants have been forced to close as a result of recent government directions.

Your rights in these situations will depend on the circumstances of the work stoppage.

You have a right to be paid if:

- You are required to come into work;
- You are working remotely for your employer;
- Your employer elects to have you remain at home without an actual health and safety risk in the workplace; and/or
- Your contract of employment offers you paid sick days, or you have vacation days which your employer agrees to allow you to use towards such a work stoppage.

You do not have an automatic right to pay from your employer if:

- You are taking a Declared Emergency Leave (DEL) (*see below*) and/or an Infectious Disease Emergency Leave (IDEL) under the *Employment Standards Act, 2000*;
- You are choosing to self-isolate and not perform any work for personal, medical, family, or other reasons;
- You need to be home to care for or recover from the COVID-19 virus, unless your contract of employment provides you with paid sick leave (*see below*);
- The government has forced the employer to shut down operations as a non-essential business; and/or
- You have to self-quarantine due to return from travel and your employer is unable to offer you any work from home options.

Can my employer require me to self-quarantine?

- Only Public Health officials can require you to self-quarantine or self-isolate. Your employer can require you to not come into work and can suggest self-quarantine in accordance with current Public Health & Safety protocols, as long as there is a legitimate health related reason. These reasons can include:
 - If you have shown symptoms of the virus;
 - If you have been in close contact with someone who has shown symptoms or been exposed to the virus;
 - If you recently returned from any international travel; and/or
 - If Public Health officials have required you to self-isolate due to symptoms or exposure to the COVID-19 virus.

Can my employer place me on a temporary layoff without pay as a result of COVID-19?

- An employer can only place you on a temporary layoff if you have agreed to such a layoff in a written contract of employment. If there is such an agreement, in most cases employers can only place you on a temporary leave of absence for 13 weeks in a 20-week consecutive period, or up to 35 weeks in a 52-week period if they continue your benefits, pay or other aspects of your compensation.
- If you do not have a contract or a provision in your contract, your employer cannot place you on a temporary layoff without your consent. Doing so may mean that you have been terminated and are owed termination pay and/or severance pay. In the current climate, this will be judged on a case-by-case basis and so it is recommended to seek legal advice in such a scenario.
- Employers may ask you for your consent to a temporary layoff in the absence of wording in your contract. You can give them such consent, which would negate the abovementioned termination effect of placing you on a temporary layoff. Make sure to put any agreement of this nature into writing to avoid giving them an ongoing temporary layoff right. Seek advice if you are unsure about your rights in this situation.

Can my employer reduce my hours for COVID-19 related reasons?

- In normal times they cannot but given current conditions many employers may have to reduce hours or pay due to ongoing closures and reductions in business. You should seek advice if you find yourself in this scenario. It should be clear that the reduction in hours is temporary and will have a defined period.
- Employers ideally should ask you for your consent in writing the same manner as they should for temporary layoffs. You should regularly follow up with your employer. Make it

clear to them in writing if you are available for work and are being impacted by the reduction in hours or pay.

- If after the COVID-19 related emergency is over and you are not put back onto your original terms of employment, then you may have a claim for constructive dismissal. Seek advice in all scenarios.

Will my job be protected if I need to be off work for COVID-19 related reasons?

- The *Employment Standards Act, 2000* (the “ESA”) provides you with a number of job-protected unpaid leaves of absence, for which you can normally apply for Employment Insurance. The DEL and the IDEL leaves in particular are applicable for these situations.
- The Declared Emergency Leave (DEL) is available to anyone who, due to a declared state of emergency, is unable to work as a result of:
 - A government order
 - A public health order; or
 - A need to provide care or assistance to certain family members, including a spouse, parent, step-parent, parents-in-law, child, step-child, fosterchild, grandchild, daughter or son-in-law, sibling, or a dependent relative.
- The Infectious Disease Emergency Leave (IDEL) is available to an employee who:
 - Is under individual medical investigation, supervision or treatment related to COVID-19;
 - Is following a COVID-19 related order under the *Health Promotion and Protection Act*;
 - The employee is in quarantine, isolation (voluntary or involuntary), or is subject to a control measure, isolation or control measure from public health officials, health practitioners, Telehealth Ontario, the Government of Ontario of Canada, a municipal council, or a board of health. This includes individuals who are required to self-isolate after returning from travel abroad per public health directions;
 - The employee is directed to self-isolated by their employer due to a concern that the employee might expose other individuals in the workplace;
 - The employee is providing care to a family member relating to an infectious disease, including those caring for children whose school or daycare was closed because of an infectious disease; and/or
 - The employee is abroad and unable to travel back to Ontario due to travel restrictions.
- While your employer may ask you for some reasonable evidence of your need for a DEL or an IDEL, they cannot ask you for a medical note to substantiate your need. They may be able to ask you medical notes when you need to return to work.

- Reasonable evidence could include travel documentation, a copy of the public health notice or order, or a note from your child’s daycare provider indicating that the centre was closed because of an emergency or a designated infectious disease.
- You do need to give your employer notice in writing or orally, ideally in advance, of your need to take a leave. With that said, if you are unable to give them advance notice, then you will not lose the right to take the leave either.
- These rights to an IDEL or a DEL are retroactive to January 25, 2020, meaning that if you needed to take a leave for a qualifying reason under the new ESA provisions after January 25, 2020, then your job should be protected. If you were fired after January 25, 2020 for needing to take one of these leaves, then you may have the right to ask to be reinstated back to your job or a comparable job.
- There is no specified limit to the number of days an employee can be on an IDEL or a DEL. They have the right to be away from work only for as long as the event that triggered the entitlement to the leave lasts. For IDEL, when the disease for which the employee was on leave stops being a designated infectious disease, the employee’s right to the leave also ends.
- Other applicable leaves under the ESA include eight (8) weeks of family caregiver leave, and, in cases of severe illness or risk of death, 26 weeks of family medical leave, and 17 or 37 weeks of critical illness leave for a sick child or adult.

What if I need to be off work to care for my spouse, child, or parent?

- Your job should be protected if you need to take time off to care for these family members, pursuant to the new provisions of the ESA that provide for a DEL or an IDEL.
- Employers must also accommodate your family-status related needs under the *Human Rights Code* (the “Code”), defined as those needs arising out of a parent-child relationship, up to the point of undue hardship. Tell your employer right away if you have such a need, and they should work with you to allow you to do your job in a way that has as limited of an impact as possible on your caregiving obligations.

(B) OCCUPATIONAL HEALTH AND SAFETY QUESTIONS

Can my employer fire me for refusing to come into work due to COVID-19?

- You have the right to refuse unsafe work without reprisal under the *Occupational Health and Safety Act* (OHSA). This includes refusing to work in an environment where you will be actually exposed to the COVID-19 virus, and/or may cause you to expose those more vulnerable to severe versions of the virus.

- If there is a legitimate risk, and your employer fires you for refusing to work in that environment, this may be reprisal for which you can make a complaint to the Ontario Labour Relations Board. It is likely that as the infection spreads, the definition of “legitimate risk” will grow, so seek legal advice if you are confused about your rights.
- Your employer cannot fire you for self-isolating or quarantining due to exposure to COVID-19 or pursuant to a public health or declared emergency order.

Can my employer require me to come into work even though I am trying to social distance?

- This will depend on whether your workplace has been designated an “essential service” by the Ontario Government. Employers do have the right to demand you to come to work if the work environment is safe and you are healthy, and especially if your workplace has been deemed an essential service. There are some essential services such as pharmacies and grocery stores that will require employees to come in despite the current government recommendations to avoid leaving home and practice social distance.
- In those situations, your employer can require you to come into work. However, you also have the right to ask your employer to take safety precautions as part of your right to have a safe and healthy workplace under the *OHSA*. This may include asking for gloves, handwashing stations, cleaning solutions to wipe down surfaces, and/or asking for a workplace setup that permits social distancing from coworkers or members of the public.
- Ideally, employers should not be requiring you to take public transport or otherwise require you to expose yourself to unnecessary risk of COVID-19 exposure. If this is a concern, then talk to your employer about accommodations and steps that can be taken in order to get you to work safely. Ensure to maintain appropriate social distancing if you do need to take public transport to travel to work.

What if I have COVID-19 symptoms or know I have been exposed, but I don’t want to tell my employer because I don’t want to be sent home?

- As much as employers have a duty to keep the workplace safe, employees too have duties to report unsafe work conditions to their employers. If you know you have been exposed to the COVID-19 virus or are feeling unwell, it is your job to inform your employer under the *OHSA* to prevent the workplace becoming more unsafe for your coworkers and colleagues.
- Work with your employer as far as possible to find solutions if you are concerned about a loss of pay, including the use of sick days or vacation days.

What if my employer is forcing us to come into work even though there has been active COVID-19 exposure in the workplace?

- You have a right to a safe and healthy workplace. You can make a complaint in such a scenario to your employer, and/or your joint health and safety committee or representative. If the situation continues despite talking to your workplace, you can file a complaint with the Ministry of Labour. You can also contact the Ministry of Labour's Health and Safety Centre at 1-877-202-0008.

(C) HUMAN RIGHTS CONSIDERATIONS

- The Ontario Human Rights Commission has published two comprehensive policies on human rights issues in the workplace. For more detailed human rights information, visit their website at http://www.ohrc.on.ca/en/news_centre/ohrc-policy-statement-covid-19-pandemic and at <http://www.ohrc.on.ca/en/policy-statement-human-rights-based-approach-managing-covid-19-pandemic-0>.
- Additionally, the Commission has also listed a detailed "Human Rights Q&A" on its website, found here: http://www.ohrc.on.ca/en/news_centre/covid-19-and-ontario%E2%80%99s-human-rights-code-%E2%80%93-questions-and-answers-0

Does COVID-19 count as a disability under the *Code*?

- Yes. Per the Ontario Human Rights Commission, COVID-19 counts as a "disability" under the Code which employers cannot discriminate against you for, and must accommodate up to the undue hardship. Remember to make sure to disclose any needs arising from this disability in order to begin the accommodation process.

Can my employer send me home if they think I have COVID-19 because of my ethnic background?

- Employers cannot require you to go home based on their perceptions that you are more "likely" to catch the virus due to your race, creed, ethnic origin, or any other *Code* based ground.
- Employers can send you home if they think you have COVID-19 symptoms. They cannot however require you to be home if your doctor clears you to return to work. They must then either return you to work or come up with other alternatives.

Can my employer fire me for having COVID-19 or needing time off work to recover?

- As a general rule, employers in Ontario can fire anyone at any time provided that they give employees their entitlements to termination pay and/or severance pay if applicable. They must also give some employees additional pay that court-based employment law decision may say they owe them.

- With that said, if someone is fired directly due to a diagnosis, symptoms, or the perception of COVID-2019, that will likely be a serious violation of the *Code* on the basis of disability. Even if the employer's decision is 1% based on you having or being perceived to have COVID-19, that could provide you with grounds to make a human rights complaint to the Human Rights Tribunal of Ontario. Contact your local community legal clinic and/or the Human Rights Legal Support Centre (www.hrlsc.on.ca) if this happens.
- An employer should also not discipline you or enforce a workplace policy on attendance if you are unable to come into work because medical or health officials have quarantined you or have advised you to self-isolate and stay home due to COVID-19.
- Employers also have the duty to accommodate a medical leave of absence up to the point of undue hardship. This includes a medical leave for COVID-19. Your employer may violate your rights under the *Code* if they fire you for having symptoms of the COVID-19 virus, or for communicating a need to specifically be away due to the COVID-19 virus' symptoms.
- Similarly, if you have to care for a parent, child or spouse ill with the virus, your employer has the obligation to accommodate that to the point of undue hardship on the basis of family status and/or marital status, as well as under *ESA* related leaves. They should not fire you because of your need to take these leaves, or else you may have a reprisal and/or family-status related human rights claim against them.

I have OCD and the idea of getting COVID-19 from going into work each day is exacerbating my symptoms. What can I do?

- If you have a mental health disability, such as Anxiety or Obsessive-Compulsive Disorder (OCD) that is exacerbated by potential exposure to COVID-19, then talk to your employer about accommodation surrounding that. Mental health disabilities must also be accommodated to the point of undue hardship in this scenario.

I am immunocompromised and my employer needs me to come into work. What do I do?

- The employer's duty to accommodate applies to you as well. If you are at higher risk of COVID-19 due to a pre-existing medical condition, that counts as you having a disability under the *Code*. Your employer should accommodate your needs arising out of your resultant disability. Talk to your employer and tell them how your medical condition might impact your ability to work, particularly if you have to interact with the public.

Can my employer require me to provide a medical note to substantiate a COVID-19 related absence?

- No. The *ESA*'s leave provisions specifically state that a medical note is not required for a COVID-19 related IDEL or DEL. Some evidence may be required but at this time employers should not be asking for medical notes.

- The Ontario Human Rights Commission has also advised employers to not insist on medical notes in an effort to relieve pressure on doctors and hospitals.

(D) GOVERNMENT SUPPORTS

Should I apply for EI if I have lost my job due to COVID-19?

- The federal Government of Canada recently introduced the “Canada Emergency Response Benefit” or “CERB” to provide income support to those who have lost their jobs, including self-employment, due to COVID-19. If you are eligible, you will receive up to \$2000.00 a month. This is the benefit to apply for, provided you meet the eligibility criteria:
 - You reside in Canada and are at least 15 years old;
 - You have lost your job/source of income due to COVID because of a layoff, a quarantine or illness due to COVID-19, or the need to provide care to a family member who is sick or quarantined or whose care facility closed due to COVID-19;
 - Due to the reasons above, you have no income and expect to have no income for fourteen (14) consecutive days;
 - You have earned at least \$5000.00 in the last 12 months or in 2019; and
 - You have not already started receiving EI benefits for this loss of income.
- You can apply for the CERB even if you are not eligible for EI.
- If you applied for EI after March 15 for this loss of work, your application should automatically be converted to a CERB application, and you very well might have received payments already.
- If you have already received EI due to this loss of work, then you will have to wait till your EI benefits end before you can apply for CERB. You can then apply if you are still out of work at that point.
- You cannot apply for CERB currently if you:
 - Are still working a few hours or earning some income;
 - Do not meet the income threshold above;
 - Did not lose your job due to COVID-19 related reasons;
 - Were already out of work by the time COVID-19 occurred and cannot prove that you stopped working due to COVID-19;
 - Voluntarily quit your employment; and/or
 - Were abroad and residing abroad without an intention to return to Canada

Note that this may change as the federal government adapts the benefit to current situations.

How Do I Apply for CERB?

- You can apply through the Government of Canada's website here: <https://www.canada.ca/en/services/benefits/ei/cerb-application.html>
- You will need your SIN number to apply. You will not need a Record of Employment to apply.
- Make sure to confirm that you are eligible for CERB before applying. Payments are occurring very quickly without much front – end checking, but that does not mean that the government will not review your eligibility later on. This in turn may mean that if you received benefits and were not eligible, then you will have to repay the entire amount to the Canada Revenue Agency (CRA).

What about if my employer has been ordered to close due to the state of emergency declaration?

- If your employer has placed you on a temporary layoff due to a government-ordered shutdown, and you are not sick or quarantined, you would be eligible to apply for the CERB.

I have been placed on an unpaid COVID-19 related leave from work and I have not got my Record of Employment (ROE) yet. What can I do?

- It is your employer's responsibility to deliver your Record of Employment to Service Canada. You should also receive a copy either in paper or electronically via your Service Canada account within five (5) days of the interruption of your earnings.
- Contact your employer first. If your employer does not respond, contact Service Canada to see if they have received your ROE. If they indicate that they have not received it, contact your employer again.
- If your employer for any reason does not answer your calls despite you trying to contact them, contact Service Canada to see if they have received your Record of Employment. If they have not, and your employer is not answering your calls, then Service Canada can help you file a Request for Record of Employment over the phone.

Can my employer force me to use vacation time to cover a quarantine absence?

- If you have vacation time available, then your employer can schedule it for you to be used as paid time off in one-week blocks. You may also choose to use vacation time should it be available.

What if I get COVID-19 from work?

- It depends on the scenario, but Workplace Safety and Insurance Benefits (WSIB) may also be available to you in the event that you develop the symptoms directly during the course of your job. You may wish to file a claim with the Workplace Safety and Insurance Board if you are in an industry that they cover.
- Contact the Workers Health and Safety Legal Clinic if you find yourself in this situation to learn more about your rights in such a situation.