

ONTARIO AMENDS EMPLOYMENT STANDARDS LEGISLATION IN RESPONSE TO COVID-19

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As part of its continuing effort to support Ontario employers and workers impacted by the COVID-19 pandemic, the Ontario government has passed a series of amendments to the *Employment Standards Act, 2000* (the “ESA”).

Importantly, these amendments do not apply to employees of federally-regulated entities, such as banks, airlines and telecommunications companies, even if those employees are working in Ontario.

Job-protected unpaid leave

The new legislation, titled the *Employment Standards Amendment Act (Infectious Disease Emergencies), 2020*, provides unpaid job-protected leave to employees who are in quarantine or who are required to self-isolate due to COVID-19.

The new leave is also available to employees who must be away from work to care for children due to school or daycare closures, as well as those who must care for other relatives as a result of the pandemic.

This new leave replaces the “declared emergencies” leave that was previous available under the ESA.

Specifically, job-protected leave – called “infectious disease emergency leave” – is now available and is retroactive to January 25, 2020 for the following reasons:

- The employee is under medical investigation, supervision or treatment for COVID-19;
- The employee is acting in accordance with an order under the *Health Protection and Promotion Act*;
- The employee is in isolation or quarantine in accordance with public health information or direction;
- The employer directs the employee not to work due to a concern that COVID-19 could be spread in the workplace;
- The employee needs to provide care to a person for a reason related to COVID-19, such as a school or day-care closure; or
- The employee is prevented from returning to Ontario because of travel restrictions.

Infectious disease emergency leave will be available to individuals who are caring for the following individuals that are affected by COVID-19:

- The employee's spouse;
- A parent, step-parent or foster parent of the employee or the employee's spouse;
- A child, step-child or foster child of the employee or the employee's spouse;
- A child who is under legal guardianship of the employee or the employee's spouse.
- A brother, step-brother, sister or step-sister of the employee;
- A grandparent, step-grandparent, grandchild or step-grandchild of the employee or the employee's spouse;
- A brother-in-law, step-brother-in-law, sister-in-law or step-sister-in-law of the employee;
- A son-in-law or daughter-in-law of the employee or the employee's spouse;
- An uncle or aunt of the employee or the employee's spouse;
- A nephew or niece of the employee or the employee's spouse;
- The spouse of the employee's grandchild, uncle, aunt, nephew or niece;
- A person who considers the employee to be like a family member, provided the prescribed conditions, if any, are met; or
- Any individual prescribed as a family member for the purposes of this section.
- Any "prescribed conditions" are not yet known.

Doctor's note not required

The amendments also codify the Ontario government's earlier announcement that employees will not be required to provide employers with a doctor's note to support their request for a medical leave (now called infectious disease emergency leave) in connection with COVID-19.

Employers will, however, be permitted to ask for evidence "reasonable in the circumstances", and that evidence must be provided "at a time that is reasonable in the circumstances".

The Ontario government has indicated that notes confirming a daycare closure or flight cancellation are examples of what might be "reasonable in the circumstances".

Nevertheless, employers are advised to exercise caution when requesting supporting evidence and to comply with all applicable privacy laws in this regard. Employers should limit, where possible, the collection of employees' personal information (and that of their family members) to what is reasonably necessary to substantiate an employee's request for leave.

Reporting obligations

The Ontario government has also indicated that employers are required to report in writing all occupational illnesses, including COVID-19, to the Ministry of Labour, Training and Skills Development within four days of learning of the illness. Employers are also required to notify their joint health and safety committee or health and safety representative and the trade union, if applicable.

The contents of the notice are prescribed by law, and include, among other things, the name and address of the worker affected, the period when the worker was affected, and the steps that have been taken to prevent further illness in the workplace.

Occupational illnesses are specifically defined under *Ontario's Occupational Health and Safety Act* to include "conditions that result from exposure in a workplace to a physical, chemical or biological agent, to the extent that the normal physiological mechanisms are affected and the health of the worker is impaired [...]". In that this definition contemplates exposure within the workplace, it is not clear that cases of COVID-19 that have no apparent nexus to the workplace will trigger the reporting obligation.

Given the sensitivity of the personal information involved and the potential for upset in the workplace as a result of such a report, employers are advised to seek legal advice prior to reporting a case of COVID-19 as an occupational illness.

Further measures

The *Employment Standards Amendment Act (Infectious Disease Emergencies), 2020* adds to the many steps taken or proposed by the federal government to respond to the drastic impact of COVID-19 on businesses and their employees. For example, the federal government has:

- Extended eligibility and streamlined the application process for the Employment Insurance Work Sharing Program, which provides employment insurance ("EI") benefits to workers who agree to reduce their normal working hours as a result of developments beyond the control of their employers;
- Proposed to provide eligible small employers with a temporary wage subsidy equal to 10% of remuneration paid in a three-month period, to a maximum subsidy of \$1,375 per employee and \$25,000 per employer; and
- Proposed various changes to the availability of employment insurance, including waiving the one-week waiting period for individuals in imposed quarantine that claim EI sickness benefits, as well as introducing EI emergency care benefits for various workers who may otherwise not be entitled to EI coverage.

Considerations for employers

Ontario employers should treat the new infectious disease emergency leave in a similar manner to other

statutory leave requests.

The retroactive nature of the new leave means that employees off work for one of the reasons covered by the leave will have a right to return to their occupations following the end of their leave. Employers that have had to implement temporary layoffs for economic reasons should also be cognizant of employees on layoff that may claim an entitlement to infectious disease emergency leave.

Employers should also remember that, as with other protected leaves of absence, employees are entitled to continue participating in certain benefit plans unless they elect in writing not to continue their participation. Employers should continue to make all necessary contributions to pension, life insurance, accidental death, and extended health and dental plans, unless and until an employee advises in writing that they do not intend to pay their own contributions to such plans (if any).

Upon their return to work, employees who availed themselves of the infectious disease emergency leave are entitled to be reinstated to the position they most recently held, if it still exists. If their position no longer exists, they must be returned to a comparable position. Further, the employee must be paid the greater of what they most recently earned pre-leave and what they would be earning had they worked throughout the leave.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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