



# COVID-19 Pandemic: Frequently Asked Questions



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We recently published some practical recommendations for employers who are dealing with employees returning from travel in the midst of the COVID-19 pandemic. In this document, we will be taking a broader look at the implications of COVID-19 for employers and employees by providing answers to some of the questions we have received from our clients over the past few weeks.

It is important to note that the purpose of this post is to provide both employers and employees with general information regarding their legal rights and obligations.

Every situation is unique, and we strongly encourage all readers to obtain advice with respect to your individual circumstances.

As we are all aware, things are moving very quickly in relation to this pandemic, and the below information may change as the situation evolves. We will continue to monitor the situation and provide you with timely updates on our blog.



## CAN AN EMPLOYER PREVENT AN EMPLOYEE FROM ATTENDING AT WORK DUE TO CONCERNS RELATING TO COVID-19? DOES THE EMPLOYER HAVE TO PAY THE EMPLOYEE DURING THIS TIME?

It depends on whether or not an employer has a legitimate reason to be concerned.

As noted in our blog post on Friday, an employer is not entitled to arbitrarily prevent an employee from attending at work. Interfering with an employee's ability to work and requiring that they remain at home without a valid reason can constitute a constructive dismissal.

In addition, treating an individual differently because of ethnicity, race or place of origin is prohibited by the Ontario *Human Rights Code* (the "**Code**"). An employer cannot single out an employee, who otherwise has no additional risk factors, due to any of the protected grounds under the Code and require that they remain at home.

The Ontario Human Rights Commission recently released a [policy statement on COVID-19](#) which confirms the OHRC's position that the Code ground of disability is engaged in relation to COVID-19. As a result, negative treatment of employees who have, **or are perceived to have**, COVID-19, is discriminatory and prohibited under the Code.

Where an employee has not been advised by a medical or health professional to remain at home, they are entitled to attend at work. If an employer insists on the employee remaining at home, the employer will have to pay the employee for this time. Forcing an employee to take an unpaid leave when there is no indication that the leave is necessary could expose the employer to a claim for constructive dismissal and/or discrimination.

However, in circumstances where there is a legitimate safety risk in allowing the employee to return to work, including where a) the employee is displaying symptoms or is feeling unwell, b) the employee is returning from travel outside of Canada, or c) the employee has been in contact with someone who has traveled outside of Canada or who may have COVID-19, then the employer may be able to require that the employee remain home on an unpaid leave. The employer should explore all options, including allowing the employee to work remotely, as a best practice.



## **CAN AN EMPLOYER SEND AN EMPLOYEE HOME WITHOUT PAY IF THEY ARE DISPLAYING SYMPTOMS OF COVID-19 (I.E. COUGH, FEVER, DIFFICULTY BREATHING)?**

Yes, as long as the symptoms warrant concern. An employee sneezing or coughing once or twice in the office will not justify an employer sending the employee home. An employer should at all times keep their obligations pursuant to the Code in mind, and only act when an employee's symptoms present a legitimate safety risk to other workers, visitors or clients.

Where an employer believes that an employee is displaying symptoms of COVID-19, they can ask them to remain at home on an unpaid leave. However, as noted above, if the employee is cleared to work by a medical professional, the employer must allow them to return to work or make other arrangements, such as allowing the employee to work remotely or keeping them off work on a paid leave.

## **IF AN EMPLOYEE IS NOT DISPLAYING SYMPTOMS BUT IS SELF-ISOLATING DUE TO RECENT TRAVEL, OR BECAUSE THEY MAY HAVE COME INTO CONTACT WITH SOMEONE WITH SYMPTOMS, ARE THEY ENTITLED TO STAY HOME? IS AN EMPLOYER REQUIRED TO PAY THEM DURING THIS TIME?**

The Government of Canada is now recommending that anyone who is returning from travel anywhere outside of Canada self-isolate for 14 days. If an employer is aware that an employee has recently returned from travel, or if an employee alerts an employer to a potential risk of infection, the employer should allow the employee to remain at home on an unpaid leave.

This will assist an employer to maintain a safe working environment for other workers, while also providing accommodation to the employee who may potentially be impacted. We do not recommend that employers insist on medical notes from employees at this time. As noted by the CHRC in its policy statement: "Employers should be flexible and not overburden the health care system with requests for medical notes. Unnecessarily visiting medical offices increases further risk of exposure for everyone."



On March 19, 2020, the Ontario government enacted the *Employment Standards Amendment Act (Infectious Disease Emergencies), 2020*. This bill amends the *Employment Standards Act, 2000* to provide unpaid, job-protected leave to employees who are in isolation or quarantine due to COVID-19, or those who need to be away from work to care for children because of school or daycare closures or to care for other relatives. This amendment states that:

“An employee is entitled to take a leave under clause (1.1) (a) for as long as he or she is not performing the duties of his or her position because of an emergency declared under section 7.0.1 of the Emergency Management and Civil Protection Act and a reason referred to in subclauses (1.1) (a) (i) to (iv), but, subject to subsection (6), the entitlement ends on the day the emergency is terminated or disallowed.”

The act also makes it clear that an employee will not be required to provide a medical note if they need to take this leave. However, the employer may require the employee to provide other evidence that is reasonable in the circumstances, at a time that is reasonable in the circumstances. This could include such requests as a note from the daycare or for evidence that the airline cancelled a flight, but not a medical note.

Please note that this amendment is retroactive to January 25, 2020.

To be clear, this amendment does not require an employer to pay an employee who is unable to work due to COVID-19. However, it does provide job protection to employees who must take such a leave, meaning that employers will be expected to return the employee to work at the end of the leave.

**On March 19, 2020, the Ontario government enacted the *Employment Standards Amendment Act (Infectious Disease Emergencies), 2020*.**



**IF AN EMPLOYEE IS NOT DISPLAYING SYMPTOMS, BUT NEEDS TO STAY HOME TO CARE FOR CHILDREN, ELDERLY PARENTS OR OTHER RELATIVES, CAN AN EMPLOYER REQUIRE THAT THEY ATTEND AT WORK?**

Employers should never deny an employee's request to work from home arbitrarily, as they may have a duty to accommodate the employee. Under the Code, employees are entitled to accommodation on the basis of family status up to the point of undue hardship.

This may include allowing an employee with care-giving responsibilities the ability to stay home on an unpaid leave from the workplace. Employers can of course explore alternative options, including allowing employees to work remotely or to vary their hours to share caregiving responsibilities with other family members.

Employees who must remain at home to care for children or other relatives due to COVID-19 now have access to a job protected leave of absence pursuant to the Ontario government's amendments to the *Employment Standards Act, 2000*, as described above. This leave is identified as "Emergency leave: declared emergencies and infectious disease emergencies".

**DOES AN EMPLOYER HAVE TO PAY AN EMPLOYEE WHO IS UNABLE TO WORK DUE TO A POSITIVE DIAGNOSIS OF COVID-19?**

No. Employees who are in quarantine or who have been advised by a medical or health official to self-isolate are entitled to take an unpaid leave of absence from the workplace. They can use paid sick time or vacation time to cover this period (if available), and employers should also encourage employees to apply for Employment Insurance ("EI") sick leave benefits. Many employers are offering paid sick days to employees to cover this time, but this is not legally required.

The Ontario government's amendments to the *Employment Standards Act, 2000* confirm that employees are entitled to unpaid leave if they are unable to work due to COVID-19.



## WHY WOULD AN EMPLOYER OFFER PAID SICK LEAVE TO EMPLOYEES IF THEY ARE NOT LEGALLY REQUIRED TO DO SO?

Some employers have made public statements confirming their intention to provide paid sick leave to employees who are unable to work due to COVID-19. In this climate of uncertainty and fear, a commitment like this can create significant positive publicity for a company and endear them to their customers.

However, there is another legitimate reason why employers may offer paid sick leave to employees. The practical reality is that many employees are concerned about the financial impact that an unpaid leave would have on them and their families. As a result, employees may be dissuaded from reporting any COVID-19 symptoms or alerting their employer if they may otherwise be potentially at risk. Offering paid sick leave removes this barrier and makes it more likely that employees will report any concerns in a timely manner to their employer.

Not all employers are in a financial position to offer paid sick days to employees impacted by COVID-19. However, employers should consider all options available to assist employees, including allowing them to use vacation time or to work remotely.





## WHAT FINANCIAL SUPPORT IS AVAILABLE TO EMPLOYEES WHO ARE UNABLE TO WORK DUE TO COVID-19?

Aside from using paid sick days or vacation time, employees who are unable to work due to COVID-19 may be eligible for EI sick leave benefits or short-term disability benefits, if available through their employment benefits plan. Notably, the government has waived the one week waiting period for eligibility for EI sick leave benefits.

The Ontario government has announced that it is currently working on legislation that is aimed at “helping workers affected by the COVID-19 outbreak”. The legislation is still in development and it is not clear whether it will include paid leave provisions or who will qualify for such benefits.

The *Employment Standards Amendment Act (Infectious Disease Emergencies)*, 2020 does not provide for any kind of paid leave to employees impacted by COVID-19. Prime Minister Justin Trudeau has announced a number of measures to assist employees including:

1) The Emergency Care Benefit, which will provide employees with up to \$900 bi-weekly, for up to 15 weeks. This flat-payment Benefit will be administered through the Canada Revenue Agency (CRA) and provide income support to:

- Workers, including the self-employed, who are quarantined or sick with COVID-19 but do not qualify for EI sickness benefits.
- Workers, including the self-employed, who are taking care of a family member who is sick with COVID-19, such as an elderly parent, but do not qualify for EI sickness benefits.
- Parents with children who require care or supervision due to school or daycare closures, and are unable to earn employment income, irrespective of whether they qualify for EI or not.

Application for the Benefit will be available in April 2020.





2) For Canadians who lose their jobs or face reduced hours as a result of COVID's impact, the Government is introducing an Emergency Support Benefit delivered through the CRA to provide up to \$5.0 billion in support to workers who are not eligible for EI and who are facing unemployment.

3) Implementing the EI Work Sharing Program, which provides EI benefits to workers who agree to reduce their normal working hours as a result of developments beyond the control of their employers, by extending the eligibility of such agreements to 76 weeks, easing eligibility requirements, and streamlining the application process.

4) The government is also proposing a one-time special payment in early May 2020 for low and modest income families through the Goods and Services Tax credit, which will be close to \$400 for single individuals and \$600 for couples.

5) The government has also proposed an increase in the maximum annual Child Care Benefit payments by \$300 per child.

Other measures are also being implemented, such as moratoriums placed on repayment of Canada Student Loans, which you can read about [here](#).

## CAN AN EMPLOYER INSTITUTE A TRAVEL POLICY WHICH PREVENTS EMPLOYEES FROM TRAVELING OUTSIDE OF CANADA?

As noted above, the Government of Canada is currently recommending that Canadians avoid **all non-essential travel outside of Canada** to reduce the spread of COVID-19, and are recommending that anyone who does travel self-isolates for 14 days upon their return. An employer can develop a policy which strongly recommends that employees avoid traveling at this time, and which imposes a positive duty on employees to report any travel to the employer. The policy can also make it clear to employees that, if they choose to travel, they will be required to remain at home for 14 days after they return and, if remote work is not available, that this will be an unpaid leave.



On March 16, Canada announced it was closing its borders and denying entry to anyone who is not a Canadian citizen or permanent resident, except for immediate family members of Canadian citizens, airplane crew members, diplomats, and US citizens.

On March 18, the United States and Canada entered into a joint agreement to suspend non-essential travel between the two countries. Trade will not be affected.

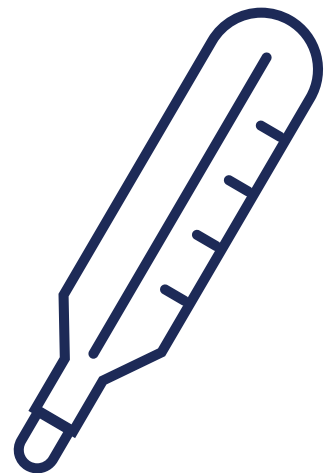
Starting March 18, most international flights to Canada will be directed through four airports. The Canadian government continued to urge Canadians to return home while they still can.

## WHAT IS AN EMPLOYER REQUIRED TO DO TO ENSURE THE HEALTH AND SAFETY OF ITS WORKERS?

Employers must take all reasonable precautions to ensure the safety of its workers. Employers should ensure that employees are educated in terms of how to protect themselves, including washing their hands with soap and water thoroughly and often, coughing and sneezing into their sleeve or a tissue, keeping surfaces clean and disinfected and staying at home when they are sick.

Employers should maintain the cleanliness of the workplace to the extent possible. It may also be appropriate to explore alternative work arrangements, including allowing employees to work remotely or encouraging customer or client meetings to be held by phone or video rather than in person. In some environments, it may be appropriate for employees to be provided with protective equipment such as gloves or face masks.

Employers in certain industries, such as health care, may have greater obligations.



The Ontario and Federal governments have repeatedly emphasized the importance of social distancing. Employers should consider all reasonable options available to them to ensure that employees can remain safe distances away from each other, and from customers or clients. This may include having employees work rotating shifts to reduce the number of employees in the office at any given time, reducing hours during which the business is open, or spreading out work stations.

## **IF AN EMPLOYEE'S JOB CANNOT BE DONE REMOTELY, IS AN EMPLOYER REQUIRED TO CREATE WORK FOR AN EMPLOYEE THAT WOULD ALLOW THEM TO WORK REMOTELY?**

No. An employer does not have to invent a different job or create work for an employee in order to allow them to work remotely. However, as a best practice, an employer should ensure that they have explored all options to determine whether remote work is possible in the circumstances.



## **CAN AN EMPLOYEE REFUSE TO WORK ON THE BASIS THAT THE WORKPLACE IS UNSAFE DUE TO COVID-19?**

In Ontario, employees are entitled to refuse work if they feel it is unsafe. If that happens, an employer is required to investigate the situation and advise the employee whether the safety risk has been resolved or not. If the employee continues to believe there is a safety concern, the Ministry of Labour can be asked to come in to investigate.

There must be reasonable and legitimate grounds for the employee to believe there is a safety risk in the workplace. A fear of getting sick, if there are no current incidents in the workplace or other risk factors, is likely not sufficient. However, in a situation where another employee has been diagnosed with COVID-19 or where the employee is interacting regularly with the public, there may be a legitimate concern that needs to be addressed by the employer to ensure the health and safety of all workers.

Employers should also be alert to the fact that some employees may have legitimate safety concerns as a result of their personal health or circumstances (for example, any employees who are immunocompromised). In these cases, the employer will likely have a duty to accommodate the employee up to the point of undue hardship.

## **CAN AN EMPLOYER DISMISS OR DISCIPLINE AN EMPLOYEE WHO CANNOT ATTEND AT WORK DUE TO COVID-19?**

An employer cannot discipline or dismiss an employee who is unable to work as a result of COVID-19. This could constitute discrimination pursuant to the Code. In addition, an employer is prohibited from reprising against an employee who must take time off work due to COVID-19.



An employer may be able to dismiss an employee who is unable to work due to COVID-19 if they can demonstrate that accommodating the employee, whether in the workplace or by allowing them to take an unpaid leave of absence, would meet the standard of undue hardship.

The new *Employment Standards Amendment Act (Infectious Disease Emergencies)*, 2020 expressly provides employees who cannot work due to COVID-19 with a right to take a job protected leave of absence.

## CAN AN EMPLOYER LAY OFF ITS EMPLOYEES IF THE BUSINESS NEEDS TO BE SHUT DOWN DUE TO COVID-19 CONCERNS?

Under the *Employment Standards Act, 2000* (the “ESA”), employers can temporarily layoff employees for a period of up to 13 weeks (in some cases this can be extended to 35 weeks). However, although temporary layoffs are contemplated in the ESA, an employer is not permitted to lay off an employee unless the contract of employment between the parties explicitly or implicitly gives the employer the authority to do so.

If an employer is struggling to operate its business due to COVID-19 (e.g. where remote work is not available and a significant portion of the staff are in self-isolation, or where the work environment becomes too high risk for employees), an employer may consider asking its employees to agree to a temporary layoff. An employee’s agreement must be obtained before this option will be available to employers.

It is important to note that if an employee does not agree to a temporary layoff, the employer may have to consider terminating the employee’s employment and providing them with their entitlements on dismissal. In addition, employers should be aware that if the layoff extends beyond the time limits specified by the ESA, the employee will be deemed to have been dismissed as of the first day of the layoff.



Employers who must reduce employee hours may wish to consider taking advantage of the EI Work Sharing Program, which provides EI benefits to workers who agree to reduce their normal working hours as a result of developments beyond the control of their employers, by extending the eligibility of such agreements to 76 weeks, easing eligibility requirements, and streamlining the application process. More information on the Work Sharing Program can be found [here](#).

## CONCLUSION

This document is intended for information purposes and to provide some helpful hints. It does not replace legal advice.

We encourage you to contact the team at Rudner Law so we can discuss if and how we can help.

We should also note that although the information in this document refers primarily to legislation in Ontario, we work with clients across the country.

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