



April 3, 2020

Coronavirus/COVID-19 Business Continuity Spectrum

Employment Law



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The following is an overview of the various options currently and generally available to Ontario employers for addressing employment-related business disruptions arising from the coronavirus/COVID-19. Note that options and applicable laws/ requirements may differ in other Canadian jurisdictions.

The options are presented along a spectrum that starts with employees working from home and ends with permanent layoffs. With the financial, political, legal and social landscape constantly changing during the pandemic, this document is, by necessity, a “work in progress” – it may not present all options and it may not fully describe each option.

Please note this document was updated on April 3, 2020 so it does not include any developments or changes following that date.

Note also that the full spectrum may not be available to unionized employers, depending on the terms and conditions of the applicable collective agreement.

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1

Work from Home

- Employees are permitted (or required) to stay away from the workplace.
- However, there is enough work to perform from home to continue earning full wages (with or without the Temporary Wage Subsidy or the Canada Emergency Wage Subsidy – see resources below).
- Employees are paid as usual.

Resources:

<https://www.canada.ca/en/revenue-agency/campaigns/covid-19-update/frequently-asked-questions-wage-subsidy-small-businesses.html>

<https://www.canada.ca/en/department-finance/news/2020/04/the-canada-emergency-wage-subsidy.html>

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Reduced Work Volumes – Work from Home Not Available

(a) Hours of Work and Wage Reductions

- There is work available for employees to perform (and employees available to perform it), but not enough work for all employees to remain as busy as usual.
- Employer-imposed hours of work and/or wage reductions may constitute constructive dismissal, permitting affected employees to claim termination entitlements.
- Reductions of 10% or less *generally do not* constitute constructive dismissal – reductions of greater than 10% *generally do* constitute constructive dismissal. The pandemic context *may* prompt judges to determine that reductions of greater than 10% do not constitute constructive dismissal (but it will likely take months for constructive dismissal cases to make it before judges).
- Some employees may prefer to accept imposed or negotiated hours of work and/or wage reductions as opposed to claiming constructive dismissal, demanding termination entitlements, and then finding themselves unemployed.
- Effective employer-employee communication is key:
 - providing a detailed explanation of the necessity for the reductions, outlining the less-desirable alternatives (e.g., laying off some employees while others keep working);
 - ensuring the reductions are not only equitable, fair, and/or logically justifiable, but perceived by employees to be so (e.g., implementing reductions across

the organization, providing valid explanations for exceptions, fostering a “we’re all in this together” mentality);

- maintaining ongoing communication about anticipated work volumes; etc.

(b) Employment Insurance Work Sharing Program

- There is work available for employees to perform (and employees available to perform it), but not enough work for all employees to remain as busy as usual.
- Work sharing may be used as an alternative to temporary or permanent layoffs. Essentially, employees work temporarily reduced work weeks, at reduced wages – but with EI benefits made available to help “fill the gap” in their wages.
- The normal requirements to qualify for work sharing include:
 - the employer must have been in business in Canada year-round for at least 2 years;
 - the employer must be a private business, a publicly-held company, or a not-for-profit organization;
 - there must be a shortage of work that is temporary, beyond the employer’s control, and not a cyclical/recurring slowdown;
 - the recent decrease in business activity must be approximately 10% or more;
 - the employer must submit and implement a recovery plan designed to return the work-sharing employees to normal working hours, with a reasonable expectation that the plan will succeed;
 - the employer must continue all existing employee benefits for the duration of the work sharing arrangement;
 - the participating employees must be “core” employees (e.g., year round permanent full-time or part-time employees who are required to carry out the everyday functions of normal business activity);
 - the participating employees must be eligible to receive EI benefits;
 - the participating employees must agree to a reduction of their normal working hours in order to share the available work; and
 - applications should be submitted 30 calendar days prior to the requested start date.
- The federal government has implemented coronavirus-driven adjustments/enhancements to the normal work sharing program rules to make it more readily available

between March 15, 2020 and March 14, 2021:

- the employer is only required to have been in business for 1 year;
- the duration of a work sharing program may be extended by an extra 38 weeks, for a total of 76 weeks;
- if the employer has recently implemented a work sharing plan, the mandatory waiting period before applying for a new work sharing program has been waived;
- the requirement to provide sales/production figures at the same time has been removed; and
- applications should be submitted 10 calendar days prior to the requested start date

Resources:

<https://www.canada.ca/en/employment-social-development/services/work-sharing.html>

<https://www.canada.ca/en/employment-social-development/corporate/notices/coronavirus.html#work-share>

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Reduced Work Volumes – Temporary Layoffs

- There is not enough work available for employees to perform, but the employer doesn't want (or can't afford) to terminate employment.
- (a) Employment Agreement (or Established Past Practice) Provides for Temporary Layoffs**
- If the employee's contract of employment expressly permits temporary layoffs (or if the employer has an established past practice of temporary layoffs), then imposing a temporary layoff should not constitute constructive dismissal.
 - Notice of layoff must be given in writing, but advance notice of temporary layoff is not required. However, if advance notice is given and the layoff later becomes permanent, the employer can claim "credit" against the employee's termination entitlements for the notice given.
 - If the employee has group benefits coverage but it is not continued during the layoff, or if the employee doesn't have such coverage, the layoff can only last up to 13 weeks in any period of 20 consecutive weeks before it becomes termination of employment (effective the first day of the layoff).
 - If the employee has group benefits coverage and it is continued during the layoff, the layoff can last up to 35 weeks in any period of 52 consecutive weeks before it becomes a termination of employment (effective the first day of the layoff). (There are other ways to extend a temporary layoff, but continuation of group benefits is the most common one.)
 - Employees may be asked to contribute their employee share of benefits premiums during the temporary layoff.
 - Employees who are laid off work for a temporary period can apply for payment of EI benefits – the standard 1-week waiting period applies.
 - A Record of Employment should be issued for the employee, indicating Code A (Shortage of Work / Layoff).

- Even if the temporary layoff becomes permanent (by lasting too long before the employee is recalled to work), some employees may prefer to remain on layoff, as opposed to claiming constructive dismissal, demanding termination entitlements, and then finding themselves unemployed.
- Note that, if the employment of 50 or more employees is terminated in any 4-week period, including temporary layoffs that become deemed permanent, Ontario's more onerous "mass employment termination" provisions will apply.

(b) Employment Agreement (or Established Past Practice) Does Not Provide for Temporary Layoffs

- If the employee's contract of employment does not expressly permit temporary layoffs (and there is no established past practice of temporary layoffs), then imposing a temporary layoff constitutes constructive dismissal – *unless* a judge concludes that temporary layoffs were reasonable in the circumstances (but it will likely take months for constructive dismissal cases to make it before judges).
- However, some employees may prefer to accept temporary layoff as opposed to claiming constructive dismissal, demanding termination entitlements, and then finding themselves unemployed.

Resources:

<https://www.ontario.ca/document/your-guide-employment-standards-act/termination-employment#section-3>

4

Employee Work Refusals

- An employee is refusing available work, asserting that it is unsafe – for example:
 - “I can’t maintain required social distancing in our workplace”
 - “delivering product to customers exposes me to the risk of COVID-19”
 - “my co-worker’s spouse is a healthcare provider – my co-worker might be bringing the virus into our workplace”
 - “my co-worker tested positive for COVID-19 – the virus might be in our workplace”
- Under the Ontario *Occupational Health and Safety Act*, most employees in Ontario can exercise the right to refuse unsafe work.
 - The right to refuse does not apply to police officers, firefighters, corrections workers, acute care and long-term care home workers, and some other workers, if the hazard is a normal condition of work, or if the refusal would directly endanger the life, health or safety of another person.
- If an employee refuses work and alleges that the work is unsafe, you must follow the 2-step OHS work refusal process. If you’re not familiar with the process, refer to the resources below (and/or seek legal advice) – at a high level, this means:
 - Step 1 – Discuss the employee’s concerns/fears and try to satisfy the employee that the refused work is safe (e.g., demonstrate that you’re taking appropriate/applicable precautions to protect your employees, in accordance with public health recommendations – suggested resources below).
 - Step 2 – If the employee remains unsatisfied, contact the Ministry of Labour to have an inspector investigate the refusal.
- If an employee tests positive for COVID-19, take care to maintain an appropriate balance between (i) protecting the privacy of the affected employee’s personal health information, and (ii) informing co-workers of the potential that they were exposed and sanitizing the workplace in accordance with applicable public health recommendations (suggested resources below).

Resources:

<https://www.ontario.ca/document/guide-occupational-health-and-safety-act/part-v-right-refuse-or-stop-work-where-health-and-safety-danger>

<https://www.labour.gov.on.ca/english/hs/pubs/refusalprint.php>

<https://www.canada.ca/en/public-health/services/diseases/2019-novel-coronavirus-infection/health-professionals/public-health-measures-mitigate-covid-19.html>

<http://www.bccdc.ca/health-professionals/clinical-resources/covid-19-care/infection-control>

<http://www.foodsafe.ca/dilution-calculator.html>

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Stay at Home – Employee is Not Ill

- Work is available for an employee, but the employee decides to stay at home, even though the employee isn't ill.
- Be cautious about imposing disciplinary action or terminating employment – the employee may qualify for job-protected, unpaid declared emergency leave under the Ontario *Employment Standards Act, 2000* (ESA). This applies if the employee is:
 - under medical investigation, supervision, or treatment;
 - acting in accordance with an order under the *Health Protection and Promotion Act* that relates to COVID-19;
 - in quarantine or isolation or subject to a control measure implemented as a result of COVID-19;
 - directed by the employee's employer to stay at home in response to a concern of the employer that the employee may expose other individuals in the work- place to COVID-19;
 - providing care or support to a family member (broadly defined) because of a matter that relates to COVID-19 (including but not limited to school or day care closures); or
 - affected by travel restrictions related to COVID-19 and, under the circumstances, cannot reasonably be expected to travel back to Ontario.
- An employee may be required to provide evidence reasonable in the circumstances (with the exception of a medical certificate), at a time that is reasonable in the circumstances, that the employee is entitled to an unpaid leave.
- If the employee doesn't qualify for declared emergency leave, consider whether the employee may qualify for other ESA job-protected unpaid leaves (e.g., family medical leave, family caregiver leave, critical illness leave, family responsibility leave, bereavement leave, etc.).
- If the employee doesn't qualify for job-protected unpaid leave, but still refuses to report

to work, before imposing discipline or terminating employment, consider using the following strategies to support the employee:

- permitting the employee to use paid vacation time; or
- granting the employee an extended unpaid leave of absence (Record of Employment Code N).

Resources:

<https://www.ola.org/en/legislative-business/bills/parliament-42/session-1/bill-186>

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Stay at Home – Employee is Ill or in Isolation/Quarantine

- The employee is ill (whether with actual COVID-19, or suspected COVID-19, or with some other actually or potentially contagious illness) or is in required isolation (e.g., the employee recently returned from international travel) or quarantine.
- The employee is too ill to work at home, or there isn't enough work for the employee to perform at home.
- Failing to keep paying the employee full wages should not constitute constructive dismissal.
- As noted in section 5, be cautious about imposing disciplinary action or terminating employment.
- Strategies to support the employee (and minimize the risk of allegations of constructive dismissal) include:
 - permitting the employee to access any employer-provided (insured or self-funded) paid sick leave benefits;
 - permitting the employee to use paid vacation time;
 - supporting the employee to apply for EI sick leave benefits (see section 7);
 - informing the employee about the Canada Emergency Response Benefit (see section 8);
 - permitting the employee to use job-protected unpaid sick leave entitlements (see section 5);
 - placing the employee on unpaid leave (as part of the employer's duty to accommodate a disability on the part of the employee – noting that the Ontario Human Rights Commission has deemed COVID-19 to constitute a disability under the Ontario *Human Rights Code*).

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EI Sick Leave Benefits

- After employer-provided (insured or self-funded) sick leave benefits (if any) end, employees can apply for up to 15 weeks of EI sick leave benefits.
- The employee must have lost at least 40% of their usual weekly pay as a result of illness.
- The employee must have worked a minimum of 600 insurable hours in the 12 months before the claim (or since their last EI claim).
- Effective March 15, 2020, the normal 1-week waiting period is waived for employees in isolation or quarantined due to COVID-19. After submitting an application for EI benefits, the employee must call Service Canada at 1-833-381-2725 to request a waiver of the waiting period.
- The normal requirement to provide a medical certificate is waived.
- If EI sick leave benefits are paid for precautionary isolation/quarantine and the employee later tests positive for COVID-19, a signed medical certificate confirming the diagnosis may be required for ongoing payment of EI sick leave benefits.
- The current EI payment is 55 per cent of regular earnings up to a maximum of \$573 per week.
- Service Canada says it will process COVID-19-related EI applications on a priority basis, but it might still take approximately a month for EI benefits to be paid to the employee.

Resources:

<https://www.canada.ca/en/services/benefits/ei/ei-sickness.html>

<https://www.canada.ca/en/employment-social-development/corporate/notices/coronavirus.html>

8

Canada Emergency Response Benefit (CERB)

- The CERB replaces the previously-announced Canada Revenue Agency Emergency Care Benefit and the Emergency Support Benefit
- \$2,000 per month for up to 4 months is available for workers who lose their income as a result of the COVID-19 pandemic
- The CERB covers Canadians who have lost their job, are sick, quarantined, or taking care of someone who is sick with COVID-19
- The CERB also covers working parents who must stay home without pay to care for children who are sick or at home because of school and daycare closures
- It applies to wage earners, as well as contract workers and self-employed individuals who would not otherwise be eligible for EI benefits
- Workers who are still employed by are not receiving income because of disruptions to their work situation due to COVID-19 also qualify
- The CERB will be available from March 15, 2020 to October 3, 2020

Resources:

<https://www.canada.ca/en/services/benefits/ei/cerb-application.html>

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Permanent Layoffs

- Work volumes decline too significantly and for too long to permit work sharing, temporary layoffs, EI sick leave benefits, or other measures to be or remain viable.
- The normal requirements (e.g., providing ESA notice of termination/termination pay in lieu of notice, ESA severance pay, ESA benefits continuation, common law reasonable notice or damages in lieu, etc.) continue to apply even if permanent layoffs are made necessary as a result of the coronavirus.



Questions? We're here to help.

For questions about this publication, or to speak with someone about your specific situation, please contact:



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