

Guidelines for Employers RE: COVID-19

March 16, 2020

By now, your email inbox has been inundated with messages regarding COVID-19. Based on inquiries we have received, we share the following thoughts. This is an evolving situation, and so these considerations are current as of writing this email. **Since finalizing this summary, Prime Minister Trudeau has advised this afternoon that all Canadians remain home, if possible. As a result, all thoughts below must be considered in light of this most recent request.** For specific advice about your particular circumstances, we encourage you to reach out to us.

****Please note: These guidelines are with respect to Ontario non-union, provincially regulated workplaces. This email discusses general information and should not be considered legal advice.***

- **Set the Tone.** These are unusual circumstances for your employees. We encourage all employers to have open, honest, and respectful communications with their employees, as many employees are concerned and look to their employers for guidance. Encouraging an open dialogue focused on safety for your employees and their families promotes a relationship of trust, which will benefit the workplace long after this crisis ends. All of us have to look beyond our immediate needs to also consider the general community. For instance, asking employees to line up for medical notes may not be the best use of our medical services, which could quite literally be saving lives. We have to instead focus on the public health goal of slowing down and reducing the spread of the virus. Communication with your employees during this time could emphasize the employer's commitment to being a good corporate citizen.
- **Stress the Basics.** While it is trite, public health officials continue to stress the need for good hygiene. If employers remain open, employers should provide supplies and opportunity to encourage regular handwashing (e.g. more frequent breaks), disinfect workspaces (e.g. provide wipes for equipment if used by many workers), and provide healthcare products like Kleenexes and hand sanitizer (if you are lucky enough to find some!). Guidelines on reducing personal contact (e.g. no handshaking) and social distancing (2 meters) should be circulated, stressed, and enforced. Ramp up routine cleaning of the premises, including workstations and surfaces, with a recommended disinfectant, is encouraged. React to concerns or emergencies – e.g. timely sanitation of a potentially contaminated workstation would boost employee confidence.
- **Reconsider the way you operate.** Over the next few weeks, many employers may decide to close down voluntarily, will need to reduce the workforce for business reasons,

or will have to close due to an infected employee/visitor or government order. Review the essence of your business for emergency planning to see what technology can offer and what you can do without. Encourage telephone conferences and Skype meetings instead of face-to-face. Cancel travel requirements. Allow flexibility to work from home or in other remote locations. Permit commuting during non-peak hours. Consider job sharing – more below. Be creative.

- **Monitor Illness.** Actively encourage sick employees to call in and stay home. Comfort employees who feel their job will be in jeopardy. There are a number of job-protected leaves for workers in Ontario under the [Employment Standards Act](#) that may apply. Attached is a summary of existing leaves.

The Ontario government announced today, March 16, 2020, that it is preparing legislation that will provide job-protected leave for employees

- 1) under medical investigation, supervision, or treatment for COVID-19;
- 2) acting in accordance with public health information/direction or an order under the [Health Protection and Promotion Act](#);
- 3) in isolation or quarantine;
- 4) who an employer directs not to work;
- 5) who need to provide care to a person for a reason related to COVID-19 such as a school or day-care closure. The right to ask for medical notes has been removed. There is no requirement for employers to pay for this leave.

The Ontario government is not scheduled to sit again until at least March 23, 2020, so there is uncertainty about how and when this will be passed, but the leave will be retroactive to January 23, 2020, and will remain in effect until further notice. The *Human Rights Code* also prohibits employers from terminating employees for any “disability”. While it is uncertain if COVID-19 would qualify as a disability, there would certainly be much sympathy for any infected employee who lost their job. For employees who come to work sick because they are not self-aware, circulate communications about the signs and symptoms as an important reminder. [<https://www.canada.ca/en/public-health/services/diseases/coronavirus-disease-covid-19.html>] or [<https://www.ontario.ca/page/2019-novel-coronavirus>] For employees who can't afford to stay home, providing paid sick days may give the employee financial security to stay home and reduce the spread. At this point, there is no statutory requirement for an employer to pay an employee who is not at work because they are sick or are quarantined. Employers must review existing employment contracts, sick leave policies, past practices, and disability policies to see if employees are eligible. Perhaps also consider the “long game”: meaning that it may, in fact, be cheaper to pay someone sick leave than to have them bring COVID-19 to the workplace, which could result in Public Health closing down your entire workplace. We understand that this is an expensive

undertaking and may not be available in all workplaces when business is slowing and sales may be softening. Still, it may be in the employer's best interests to either extend the number of paid sick days allowed, allow a special allotment of sick days for this particular crisis, or at least work with employees who are in need in this crisis.

- **Sending employees home.** Under the [Occupational Health and Safety Act](#), employers have to ensure the workplace is safe for its employees. Communicable diseases are covered under this Act and if there is evidence of a contagious illness, employers can send employees home. Letting employees know this before they show signs of illness may help to set expectations. Pay or no pay? See below.
- **Travel Plans.** When we started this article, there were specific travel restrictions for only certain countries. With international borders closing, there is now a blanket travel advisory not to travel outside Canada. The Public Health Agency is advising anyone returning from outside Canada to self-isolate for 14 days. For the listed countries, travelers have to self-isolate and are required to contact local public health authorities to be monitored. Based on this recommendation, employers can advise those who have recently traveled or are away now what they can expect when they return home. If the employee can work from home for 14 days, that is an easy solution. If working from home is impossible, the issue of pay or no pay is covered below.
- **Pay or no pay.** If an employee is not at work because they are sick, there is no current statute that requires an employer to pay the employee while they are away from work. If the employer has paid sick leave or short term disability benefits, these policies should be applied. Employment insurance sick leave benefits may be available. The federal government recently made the process easier to cover employees who are sick or quarantined. Quarantine includes an order by a public health official or if the quarantine was recommended by an official for the health and safety of the public at large and the employee was asked by their employer to place themselves under quarantine. As a result, if you are asking an employee to stay home, for instance, because they have traveled outside Canada, are showing signs of illness, or are self-isolating due to contact with an infected person, these employees would be eligible for sick leave employment insurance benefits of up to 15 weeks. The normal one week waiting period has been waived. There will be a delay for employees to receive this income, but it will be available.
- **Constructive Dismissal.** Even if eligible for employment insurance benefits, sending an employee home without pay can result in a claim for constructive dismissal. As a result, employers have to be careful. We are in uncharted waters with no definitive answers as these issues will not be decided until many months after this crisis has passed. Acting as reasonably as possible will only help employers if or when they later appear before any adjudicator.

- **Right to Refuse Work.** Under the [Occupational Health and Safety Act](#), if employees feel that their workplace is unsafe because of a communicable disease, they can refuse to work. If this is the case, an employer will have to find an alternative safe place for the employee to work while their complaint is investigated (by the employer and worker representative/joint health and safety committee). The Ministry of Labour may have to attend if the issue is unresolved.
- **Getting Ill at Work.** If it is proven that an employee got infected with COVID-19 at work, if an insured workplace, employees would be entitled to WSIB benefits. Some have wondered if the stress that is occurring in workplaces over the possibility of infection could lead to chronic mental stress benefits under WSIB. This is a fairly new provision and our view is that proving the predominant cause of the mental stress arose out of or was in the course of the employee's employment may be extremely difficult. This benefit was not available for past pandemics, so it is unclear if and how it will be used in these circumstances.
- **Child Care Responsibilities.** After March break for the public school system, many parents will be scrambling for child care as schools are currently closed until April 6, 2020. The [Human Rights Code](#) requires employers to accommodate employees with respect to family status, including childcare responsibilities. While case law has stressed that accommodation is normally a two-way street, due to the last minute and province-wide nature of the school closures, employees may have few options other than to stay home. There is no current law that would require this leave to be paid by the employer. The Ontario government's new leave will also give job protection for these employees.
- **Layoffs / Closing down.** With recent government announcements, it is clear that many businesses will close for several weeks or experience slowdowns, which will result in a lack of work for its workers. Any type of layoff for shortage of work (not quarantines or sickness) would be governed by our existing employment laws. Unless there is an industry practice, written policy, contract term, or the employee consents, laying an employee off for shortage of work can be deemed a constructive dismissal. If it was only for 2 weeks, from a very practical perspective, it would be aggressive for an employee to sue over 2 weeks of pay. But if this turns into a longer period, the risk increases. We encourage employers to review federal government programs that may make sense for their workplaces, including a supplemental unemployment benefit plans (SUB) <https://www.canada.ca/en/employment-social-development/programs/ei/ei-list/reports/supplemental-unemployment-benefit.html> (allows employees to collect employment insurance and receive their top-up payment from their employer for either illness, injury, quarantine or a shortage of work) or Work Share <https://www.canada.ca/en/employment-social-development/services/work-sharing.html> (allows employees to collect employment insurance and wages for job share due to reduced workloads) These plans do require prior approval from the federal government



so employers should review this as soon as possible. We had hoped to have more definitive feedback regarding these federal plans (e.g. loosening approval process), but this was not addressed by the Federal Government today. We also expect that in the future, the waiting period for employment insurance benefits will be waived for all work shortages.

It is time to think outside the box about how work is done in your workplace. Businesses want to continue to operate and employees want to earn a living. Brainstorm now on ways in which these common goals can be met.

We at Minden Gross LLP are also managing this challenge, knowing that our office may also be closed. Please be assured that all three of us, Tracy, Andrew, and Carrington, are organized to work remotely and can access our office phone lines remotely. Please contact us as noted below for assistance.

Wishing you all the best at this challenging time.

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STATUTORY LEAVES OF ABSENCE

Leave of Absence	Maximum Length & Purpose	Employee Eligibility	Documentation
Pregnancy Leave (s. 46 & 47)	17 weeks of unpaid job protected leave for pregnant employees	Due date must be 13 weeks or more after date of hire	Medical certificate stating due date
Parental Leave (s. 48 & 49)	61 weeks (with pregnancy leave) or 63 weeks (without pregnancy leave) of unpaid job protected leave after the birth or adoption of a child	Must be employed for at least 13 weeks	N/A
Family Medical Leave (s. 49.1)	28 weeks of unpaid job protected leave to provide care or support to certain family members at a significant risk of dying within the next 26 weeks	Eligible upon hire	Medical certificate
Organ Donor Leave (s. 49.2)	13 weeks of unpaid job protected leave to undergo surgery for the purposes of organ or tissue donation	Must be employed for at least 13 weeks	Medical certificate
Family Caregiver Leave (s. 49.3)	8 weeks of unpaid job protected leave to provide care or support to certain family members with a serious medical condition	Eligible upon hire	Medical certificate
Critical Illness Leave (s. 49.4)	Unpaid job protected leave to provide care or support to certain family members whose baseline health has significantly changed and whose life is at risk as a result of an illness or injury (17 weeks for a critically ill adult; 37 weeks for a critically ill minor child)	Must be employed for at least 6 months	Medical certificate
Child Death Leave (s. 49.5)	104 weeks of unpaid job protected leave where a child of the employee dies for any reason	Must be employed for at least 6 months	Evidence reasonable in the circumstances
Crime-Related Child Disappearance Leave (s. 49.6)	104 weeks of unpaid job protected leave where an employee's child disappears as a result of a crime	Must be employed for at least 6 months	Evidence reasonable in the circumstances

Domestic or Sexual Violence Leave (s. 49.7)	10 days and 15 weeks (the first 5 days of which are paid) of job protected leave where the employee or their child experiences or is threatened with domestic or sexual violence	Must be employed for at least 13 weeks	Evidence reasonable in the circumstances
Sick Leave (s. 50)	3 days of unpaid job protected leave for a personal illness, injury, or medical emergency	Must be employed for at least 2 weeks	Evidence reasonable in the circumstances
Family Responsibility Leave (s. 50.0.1)	3 days of unpaid job protected leave for an illness, injury, medical emergency, or other urgent matter relating to certain family members	Must be employed for at least 2 weeks	Evidence reasonable in the circumstances
Bereavement Leave (s. 50.0.2)	2 days of unpaid job protected leave for the death of certain family members	Must be employed for at least 2 weeks	Evidence reasonable in the circumstances
Emergency Leave, Declared Emergencies (s. 50.1)	Unpaid job protected leave during certain emergencies declared by the government (i.e. natural disasters, acts of terrorism, health risks, etc.)	Eligible upon hire	Evidence reasonable in the circumstances
Reservist Leave (s. 50.2)	Unpaid job protected leave for the duration of a Canadian Forces operation, including any pre-and-post deployment activities	Must be employed for at least 6 months	Evidence reasonable in the circumstances

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