Ultimate SOFTWARE

COVID Q&A

For Canadian Employers

Prepared for Ultimate Software by Rudner Law

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Introduction

The last few months have seen unprecedented developments and change. We have been self-isolating and social distancing to limit the risk of spreading the novel coronavirus (COVID-19). Globally, the economy has been devastated; businesses have closed down or seen their revenues plummet, and individuals have been laid off, dismissed outright, or asked to accept pay cuts.

Many employers are struggling with how to handle this challenging situation. In particular, there are concerns about how to reduce labour costs, how to determine what financial assistance is available, how to maintain safety while operating during the pandemic, and what to do if an employee shows symptoms of COVID-19.

Many are wondering:

Can we lay people off?

If we instruct staff to stay home, do we have to pay them?

Are we allowed to cut employees' hours (or salaries)?

This global pandemic is unprecedented - resulting in questions and uncertainty. It can also result in risk and legal liability. In this context, the situation is evolving so rapidly that even the information available a few weeks ago may have since changed or been updated or elaborated.

It's important to note that the information that we (and others) provide online can be useful and informative but does not replace legal advice. Employers are encouraged to stay informed of developments in the COVID-19 pandemic, and when necessary, to seek appropriate legal advice before making decisions. In this context, the situation is evolving so rapidly that even the information available a few weeks ago cannot necessarily be relied upon.

QUICK LINKS TO QUESTION TOPICS:

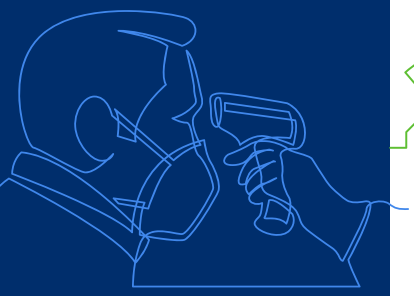
EMPLOYEES AT WORK

1. Can an employee refuse to work due to concerns over COVID-19? If yes, how do we handle this?

Every province or territory in Canada has health and safety legislation in place designed to ensure all reasonable steps are taken by employers to support the safety of workers. This legislation also provides employees with the right to refuse work if they feel it is unsafe. This process may differ slightly across jurisdictions. For example, in Ontario, an employer is required to investigate the situation and advise the employee whether the safety risk has been resolved. If the employee continues to believe there is a safety concern, the Ministry of Labour can be called in to investigate. Recently, several provinces have increased the resources available to respond to workplace safety concerns as a result of the COVID-19 pandemic.

There must be reasonable and legitimate grounds for the employee to believe there is a safety risk in the workplace. Fear of getting sick, if there are no current incidents in the workplace or other risk factors, is likely not sufficient. However, in situations where a co-worker has been diagnosed with COVID-19, where the employee is regularly interacting with the public, or where the employer has not taken any steps to mitigate the risk of infection, there may be a legitimate risk that must be addressed 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 health or personal circumstances (for example, any employees who are immunocompromised). In these cases, the employer likely has a duty to accommodate the employee up to the point of undue hardship. This can include allowing an employee who does not feel safe coming to work to remain at home on an unpaid leave of absence.



2. Can we require temperature-taking of employees each day when they enter the workplace?

Generally speaking, this would fall under the category of "medical testing" of employees at work which is, in ordinary circumstances, rarely permissible given the breach of privacy that it creates.

However, these are exceptional circumstances. We must balance privacy concerns against an employer's duty to take all reasonable precautions for the health and safety of its workers. In many cases, the former will take precedence over the latter.

Whether implementing mandatory temperature checks is "reasonable" or not will depend on several factors, such as the nature of the business. For example, organizations in food supply and preparation will likely be able to take more aggressive health testing measures. How closely employees must work together and whether they interact directly with customers/clients are also important factors to consider.

Employers also must keep in mind the inherent limitations of temperature testing for COVID-19. For one, it will not prevent asymptomatic carriers of the virus from entering the workplace. Employees who are worried about being sent home could take over- the-counter medication to help reduce or eliminate their fever to pass the testing. In other words, temperature testing is not going to eliminate the need for an employer to implement additional safety measures that may be necessary to protect their employees.

Employers who determine that testing is reasonably necessary as a precautionary health and safety measure in the circumstances should keep the following points in mind:

Best Practices

- Any checks should be conducted using the least intrusive methods available (e.g., non-contact infrared thermometers vs. contact thermometers).
- Qualified individuals would need to be available to administer the test and ensure that the test is conducted safely, such that there is no enhanced risk of employees being infected by each other or by the test administrator.
- Advance written notice of the temperature check requirement should be provided to workers, including how the check will be conducted and for what purpose.
- Medical advice may be required to determine which body temperatures are of concern.
- Keep in mind your privacy obligations when handling employee medical information; records of individuals who test negative and therefore within normal temperature ranges (as determined by a medical expert) should be destroyed. Positive test results should be stored securely and accessible only by designated individuals.
- Kndividuals who test at a level that concerns a medical expert should not be allowed access to the workplace, but instead discreetly asked to leave the facility. Employees should be treated with dignity and respect at all times.

Before implementing testing, employers should always consider whether less intrusive means of ensuring workplace safety are available. For example, employers can implement policies making it clear that all employees have a duty to advise their manager if they have symptoms indicative of COVID-19 or if they are unwell and are required to remain at home in these circumstances.

3. In order to maintain adequate staffing levels, we need all our employees to come to work if they are healthy and able. What can we do to ensure they feel safe and protected at work and won't refuse to come in?

Employers are required to maintain a safe work environment, and employees have a right to refuse unsafe work. In the current climate, employers would be wise to follow the advice being given by our government officials and medical officials.

Isolation is the ideal solution, so if employees can work from home, they should be allowed to. Otherwise, social distancing and frequent cleaning are critical. All efforts should be made to separate employees from each other and from customers and suppliers, and to minimize contact where that is not possible. Similarly, there should be procedures in place to keep the workplace clean, and Personal Protective Equipment should be provided as appropriate.

We encourage employers to take steps such as:

Best Practices

- Reminding employees of best practices to limit the spread of the virus, such as hand washing, sanitizing, avoiding touching the face, etc.
- Limiting in-person meetings and imposing a minimum barrier for personal space.
- Ensuring that all employees who have recently travelled abroad self-isolate for 14 days.
- Substantially increasing the frequency of cleaning and disinfection of common surfaces.
- Conducting regular Health & Safety Committee meetings (remotely if possible).

The Health & Safety Committee should be actively engaged in monitoring the situation and developing policies and procedures. They should also assist in disseminating information to the workforce. As is often the case, it is important not only to do the right thing, but to ensure that your employees are aware of what is being done.

We also encourage employers to establish a clear mechanism for employees to raise any safety concerns, and a process for them to be addressed.

Of course, every workplace is different, so you should assess the specific issues and needs of yours.

4. For employees who usually work in an office but are now working from home, does the employer have to provide or reimburse office supplies or internet for the home office?

This will depend on what the employment agreement says, if anything, about reimbursement of expenses of this nature, or the employer's policies in this regard. If there is no agreement, express or implied, to pay such expenses, an employer would not have a legal obligation to do so. However, an employer may want to consider whether reimbursement of such expenses is appropriate given the circumstances (and, if so, the extent to which such reimbursement would apply).

5. What if an employee could do their job from home but says they are not able to or don't want to because of childcare/family care/other personal reasons?

Employees who are unable to work remotely because they must care for children or other family members may be entitled to take an unpaid leave of absence. Many provinces have amended their employment standards legislation to include new leaves of absence or expand on existing leaves in response to the COVID-19 crisis. In addition, human rights legislation may require an employer to accommodate an employee who is unable to work as a result of the impact of COVID-19, including by allowing them to take a leave of absence, up to the point of undue hardship. Employees who refuse to work, but who are not otherwise eligible to take a leave of absence under employment standards or human rights legislation may be disciplined for such refusal, and eventually may be deemed to have abandoned their employment. While employers should be respectful of legitimate concerns, without a valid reason to be absent from work, employees are expected to carry out their duties.

6. Some employers are offering pay increases to employees on the frontlines and in essential services. If we do that now, can we go back to their original pay when the pandemic is over?

Yes, some employers are offering temporary pay increases, but there is no obligation to maintain those increases beyond the current situation.

As is often the case, proper documentation is critical. Simply increasing an employee's compensation could suggest a permanent change, and decreasing it in the future could then lead to a claim of constructive dismissal. Any temporary (or permanent) change should be clearly documented, and such documentation should explicitly state when it will take effect, how long it will last (if not permanent), and any other terms or requirements. Any ambiguity will work to the detriment of the employer.

7. How does accommodation fit into this COVID scenario? For example, with employees who are now working remotely, are there requirements for accessibility? Can we ask everyone to communicate via video call? Is this a violation of human rights in any way? What about employees who are not "technologically savvy" and don't know how to use web-conferencing solutions?

Your duty to accommodate an employee applies in any context of the employment relationship. Remember, however, that this duty arises only if there is a request for accommodation; in certain circumstances, the employer may have a duty to inquire even if the employee does not explicitly request accommodation.

If, for example, an employee is visually impaired, then requiring that they communicate via video call may not be appropriate. Another example might be an employee with a hearing impairment that requires specialized equipment.

Similarly, in the current circumstances, employees may have childcare obligations that will limit their ability to be available throughout the regular workday. Such limitations may need to be accommodated.

An employee that is not "technologically savvy" is not entitled to accommodation or protection under human rights legislation. However, we encourage employers to provide the equipment, training, and support necessary so that employees can carry out their duties successfully.

8. We believe our company falls into the category of an essential service. How do I confirm that? How do I make sure it's defensible?

Employers should ensure they review the updated list of essential businesses that are permitted to continue operating in the applicable jurisdictions. These lists are being updated as the situation develops. In Ontario, employers can also contact the "Stop the Spread Business Information Line" at 1-888-444-3659 for questions relating to what qualifies as an essential service.

For more information on essential businesses in your province or territory, see the Additional References at the end of this document.

9. What's the best practice for hiring temporary workers during COVID? (Our business has in fact grown due to the pandemic.)

Most of the best practices are the same now as in ordinary times. Employers should avoid inadvertently entering into verbal contracts of employment and should avoid using offer letters as replacements or supplements to proper contracts. When making an offer, it should be made based on the terms and conditions set out in a detailed contract of employment. Furthermore, it should be clear that the employee is not officially hired until 1) they execute the agreement, and 2) any conditions (such as reference checks) are satisfied. To be clear, employees should not be presented with the contract or asked to sign it on their first day of employment (or later); all of that be should completed before their employment is confirmed.

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With respect to hiring temporary workers, the contract should indicate the term of the agreement and confirm that there will be no automatic renewal. Employers should then be careful to avoid a common mistake: allowing a temporary employee to continue working after their temporary contract expires. If that occurs, then the terms of that temporary contract no longer apply. The employee becomes an employee of indefinite duration and if their employment is terminated, then they will be entitled to reasonable notice pursuant to common law.

EMPLOYEES WITH COVID SYMPTOMS

10. Are we able to disclose the name of an infected employee to other employees who may have been exposed to the coronavirus from that person? Is it a breach of privacy?

Employers should try to avoid disclosing the name of an infected employee to other employees, even if they may have been exposed to the virus from that person, as it is likely to constitute a breach of privacy.

Employers who continue to operate during the COVID-19 pandemic have the obligation to take reasonable steps to protect the health and safety of their workers under the *Occupational Health and Safety Act*. Despite the pandemic, however, privacy laws continue to apply, and employers should be mindful of how those privacy laws may limit what can be asked of employees and what personal information can be revealed. There is often a tension between the duty to provide a safe workplace and the duty to respect employee privacy. Which right takes priority depends upon the particular circumstances.

To comply with Canadian privacy statutes, employers should not disclose the reasons for an employee's leave or remote working arrangements, except to those employees who require that information to carry out their employment duties or to maintain a safe workplace. The purpose is to maintain a balanced approach: provide potentially exposed employees with enough information to protect themselves from the risk while infringing on privacy rights in the least intrusive manner possible. In carrying out such notifications, employers would be wise to make reasonable efforts not to disclose information that might (whether by itself or along with publicly available information) identify the specific individual(s) who may have caused the risk of COVID-19 transmission in the workplace.

While maintaining this balanced approach, employers should note that it may not always be possible to provide notice of a risk of COVID-19 transmission without implicitly or explicitly identifying the individual(s) at the source of such risk.

Best Practices

As a best practice, employers should notify employees that their personal information will (or may) be collected, used, or disclosed for the purpose of fulfilling the employer's health and safety obligations and to manage the workplace, especially considering the COVID-19 pandemic. Where possible, obtaining consent from employees may be helpful. However, Canadian private sector privacy statutes generally do not require such consent where collection, use, or disclosure of personal information is necessary to manage the employment relationship, provided the employee is notified as indicated above.

11. If an employee self-isolates because they have COVID symptoms – but hasn't been tested yet – would they qualify for Employment Insurance (EI) sickness benefits?

Yes, if they meet the other eligibility criteria.

In order to qualify for EI sickness benefits, the employee needs to demonstrate that:

- They are unable to work for medical reasons
- Their regular weekly earnings from work have decreased by more than 40% for at least one week
- They accumulated 600 insured hours* of work in the 52 weeks before the start of their claim or since the start of their claim, whichever is shorter (*As an example, 600 hours are equivalent to 20 weeks of work at 30 hours a week.)

Note: While the individual is receiving EI sickness benefits, they must remain available for work if it was not for their medical condition.

To qualify for sickness benefits, employees usually need to get a medical certificate showing that they are unable to work for medical reasons. However, in light of COVID-19, the requirement for a medical certificate has been waived.

12. We understand that it's no longer required to have a doctor's note when someone contracts the novel coronavirus. But what about the return to work? Can we request a medical note, or how do we know they have recovered?

As is often the case, it depends.

For example, on March 19, 2020, Ontario passed Bill 186, *Employment Standards Amendment Act (Infectious Disease Emergencies)*, 2020, which provides that an employee will not be required to provide a medical note if they need to take a leave related to COVID-19.

Because of the COVID-19 pandemic and the new legislation, the Ontario Human Rights Commission (OHRC) released a policy statement, which states in part that employers "should be flexible and not overburden the health care system with requests for medical notes. Unnecessarily visiting medical offices increases risk of exposure for everyone."

While employers are not legally prohibited from requesting a medical note prior to the employee's return to work, there should be a legitimate and reasonable basis for doing so. Also consider that many medical offices and clinics are closed for in-person appointments and are advising patients only by phone or video call. Accordingly, a doctor's note may not be that helpful at this time.

Where an employer is concerned about an employee's recovery from COVID-19 before their return to work, the employer may be able to perform a medical test for COVID-19, such as taking the employee's temperature, as a condition for working. This strategy will allow the employer to assess whether the employee has recovered from COVID-19 and to reduce the risk of allowing an employee who still has COVID-19 to return to work. However, employers need also to be mindful of an employee's privacy rights and balance that with the employer's obligation to maintain a safe and healthy work environment under the *Occupational Health and Safety Act*. Where an employer has reasonable grounds to suspect that an employee has COVID-19 or knows that the employee contracted the virus, it is likely going to be able to justify the privacy infringement.

On the other hand, if the employer attempts to test employees arbitrarily, it would likely pose privacy and perhaps even human rights concerns. In fact, the OHRC's policy position states that "medical assessments to verify or determine an employee's fitness to perform on the job duties may be permissible in these circumstances under the Code. However, information on medical tests may have an adverse impact on employees with other disabilities. Employers should only get information from medical testing that is reasonably necessary to the employee's fitness to perform on the job and any restrictions that may limit this ability while excluding information that may identify a disability."

In any event, employers are advised to consult their local legislation and seek legal advice regarding how best to proceed with requesting supporting documentation and/or medical testing.

LAYOFFS, LEAVES OF ABSENCE AND TERMINATION

13. How do we find information about the legislation regarding leaves and layoffs for each province?

This information is available online. Please see the links in the Additional References we have included in this document. You can also follow Rudner Law's running blog for updates on COVID-19 workplace issues.

14. If we temporarily lay off employees, do we have to pay out their accrued vacation pay now?

A temporary layoff is not a termination. As a result, it does not trigger the requirement to pay out accrued and unpaid vacation to an employee. However, employers may wish to allow employees to use their vacation time if requested.

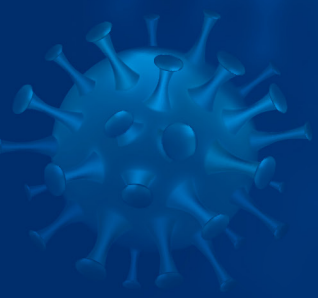
15. We are NOT deemed an essential service and have had to close temporarily. We really hope we can bring back all our employees after the pandemic, but we can't be sure. Should we lay them off, or terminate right away?

A temporary layoff can be an excellent solution for employers who are not able to continue employing staff now, but fully intend to recall them to work at a later time. In addition, a temporary layoff will not trigger your obligations as an employer to provide notice/pay in lieu of notice, which can be substantial in certain circumstances. **However, an employer does not have an automatic right to lay off an employee.** If you already have an agreement with your employees, whether express or implied, that gives you the right to impose a layoff, then you are free to do so in accordance with the terms of the applicable employment standards legislation. If no such agreement exists, you must ask the employees to agree to accept a temporary layoff. If they do not agree, and you impose the layoff anyway, your employees may have a claim for constructive dismissal.

If you do not have the option to lay off your staff (and employees refuse to agree to a temporary layoff), or where you already know you will not recall the employees to work in the future, dismissal (termination) may be the better option.

Employers should not feel like layoffs or dismissals are the only two options. It may be possible to work with your employees to agree to a temporary reduction in compensation, or a work-sharing arrangement which allows them to continue working, or for the business to take advantage of government support such as the Canada Emergency Wage Subsidy (**CEWS**).

The CEWS is intended to help reduce the number of layoffs. Many employers are taking advantage of it in order to keep employees "on the payroll" even if they are not working, as the government will pay up to 75% of their wages.



16. How can we avoid claims of constructive dismissal?

A constructive dismissal occurs when an employer makes a unilateral and substantial change to a fundamental term of an employee's employment (such as implementing a temporary layoff or significantly reducing hours or compensation).

If you have the legal right to impose a layoff, either through a collective agreement, an individual contract, or if it could be implied in your business or industry, then a layoff will not constitute a constructive dismissal.

Otherwise, the most effective way to avoid constructive dismissal claims is to have the employee(s) agree to any such changes, rather than imposing them. In most cases, employees are well aware that employers are struggling to operate through an unprecedented situation and are willing to work with their employer to cooperatively find solutions that will allow the employment relationship to continue.

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The same principle would apply to a reduction in hours or compensation. In the absence of a contractual right to impose the change, the most prudent approach would be to get the employee's agreement.

17. Can we terminate employees due to frustration of contract at this point due to COVID, with no pay in lieu or severance needed?

A contract becomes "frustrated" where, through no fault of either party, it becomes impossible to perform. It is possible that, as a direct result of COVID-19, an employment agreement could become impossible to perform. If a contract has truly been frustrated, then it effectively comes to an end, and neither party has any further obligation to the other.

However, employers must remember that frustration of contract is a challenging argument to make, and the legitimacy of such a claim will depend entirely on the specific facts of each case.

Overall, it is not clear that the impacts of COVID-19 will be deemed to rise to the level of frustration. This is particularly true where a business continues to operate during the pandemic. Even if they were ordered to shut down, the temporary nature of the situation is unlikely to be seen to render the continuation of the employment as an impossibility.

Further, employers should note that even if they can establish frustration of contract, there will be situations where an employee will still be entitled to some compensation under the applicable employment standards legislation.

Before pursuing a frustration of contract argument, employers should seek legal advice.

18. Our standard employment contract does not have a clause for layoffs. Should we make a separate agreement for layoffs during this time?

Yes. The most effective way to avoid a constructive dismissal claim is to have employees agree to a temporary layoff. This does not mean that employees have to sign an entirely new employment agreement. You can simply ask them to agree to accept a layoff in these particular circumstances by signing a letter that sets out the terms of the layoff, or otherwise confirms their agreement.

In the future, you may want to revise your employment agreements to put you in a stronger legal position.

19. Do employers still have to issue a Record of Employment (ROE) for COVID-related layoffs? What code should be used?

Best Practices

Yes. Contrary to popular belief, issuing a Record of Employment does not signal the end of the employment relationship. Employers are required to issue a ROE whenever there is an interruption of earnings that lasts or is expected to last for seven days or more. For a layoff, employers should use Code A (shortage of work). Other Codes that may be relevant for COVID-19 related absences include Code D (illness), Code N (leave of absence) and Code M (dismissal). Service Canada has asked employers to avoid adding comments to the ROE unless absolutely necessary.

20. We have an employee who got stuck out of the country (overseas) and cannot get back to Canada due to flight cancellations and closures from COVID-19. How do we handle this? Do we put them on unpaid leave? Do they still receive benefits?

If an employee is required to attend at work but cannot do so, then the most prudent approach would be to put them on an unpaid leave of absence. Whether they continue to receive benefits while on leave will depend on your policies and the terms of any applicable plans.

21. For an employee who has been on maternity leave and is scheduled to return to work, do they automatically go on Employment Insurance (EI)? We don't have work for them at this time due to the pandemic.

Generally speaking, no.

If there is no work available when the employee finishes collecting maternity/parental benefits, the employee is considered to have stopped working due to COVID-19. If they meet the other eligibility requirements, they may qualify to receive the Canada Emergency Response Benefit (CERB).

What the employee is eligible to receive depends on their unique circumstances. Therefore, you should advise them to investigate whether they would be eligible to receive CERB and/or EI benefits and apply accordingly. For example, the employee may be able to extend their maternity/parental benefits if otherwise eligible to do so or may qualify for regular EI benefits.

22. With the uncertainty of our future business, can we rescind an employment offer or defer a start date?

A binding contract exists only when an offer has been made and accepted and all conditions (if any) have been satisfied. So, if an offer has been made but not yet accepted, then it can be revoked.

Once the employee has accepted, and all conditions (if any) have been satisfied, an agreement is established. To alter the agreement, including pushing back the start date, you will need to reach a new agreement with the employee. You could simply terminate the existing agreement, but you may still be liable to provide pay in lieu of notice of termination to the employee, even if they have not yet started work, depending on the wording of the contract. Most candidates understand the challenges of the current situation and will be reasonable regarding changes such as deferring a start date.

SUPPORT FOR EMPLOYEES

23. Some of our employees are unionized. How do we navigate layoffs and reduction of hours with regards to the collective agreement?

You will need to work within the limits of the collective agreement and with the participation of the union to find solutions. Every collective agreement establishes criteria and procedures for layoffs and recalls.

24. I'm not sure if I should tell employees to apply for Employment Insurance benefits (EI) or apply for the Canada Emergency Response Benefit (CERB). How do I decide?

Best Practices

The key questions are:

- Did the individual stop working because of COVID-19?
- Did the individual become eligible for EI before or after March 15th?

If the employee stopped working because of COVID-19, they should apply for the CERB.

As of April 6, 2020, an online portal is available to assist individuals with the application process for both types of benefits. Individuals are asked to answer a few simple questions which help direct them to complete the one application best suited to their situation.

For anyone who became eligible for EI regular or sickness benefits on March 15, 2020 or later, their EI claim will be automatically processed through the CERB. Once the individual finishes receiving the CERB, they are still eligible to receive EI. Getting the CERB does not affect the employee's EI entitlement.

For other EI benefits, including maternity, parental, caregiving, fishing, and work-sharing, employees should continue to apply as usual.

On the other hand, if the employee became eligible for EI regular or sickness benefits before March 15th, their claim will be processed under the pre-existing EI rules, and they will not receive the CERB.

25. Is the $2,000/month for the CERB before or after taxes?

It's before taxes. The CERB is taxable, and individuals receiving the benefit will be expected to report it as income when they file their income tax for the 2020 tax year.

26. How do we know if our business is eligible for the 75% wage subsidy? If we are, are we obligated to pay the remaining 25% to employees (or the amount remaining from their usual salary)?

On April 11, 2020, Bill C-14 (also known as the COVID-19 Emergency Response Act, No.2), which formalizes the terms of the Canada Emergency Wage Subsidy program (the CEWS), received Royal Assent and became law.

The legislation sets out the eligibility criteria that employers must meet to be entitled to the CEWS. Specifically, an employer must:

1) be an "eligible entity";
2) have experienced at least a 15% decline in revenue in March 2020 or at least a 30% decline in revenue in April 2020 and May 2020 (note: the CEWS was recently extended until August 29, 2020 and the decline threshold may change in the coming months);
3) file an application with the Canada Revenue Agency before October 2020;
4) attest that the application is complete and accurate in all material respects; and
5) have had, on March 15, 2020, a business number registered with the CRA for the purpose of making tax remittances.

The legislation includes a very expansive definition of an "eligible entity" for purposes of qualifying for the wage subsidy. Essentially, any entity that is not a public institution may be eligible to receive the wage subsidy.

For purposes of determining whether an employer has experienced a decrease in revenue, the default reference period is the same month in the prior year (i.e., March 2019 compared to March 2020). Alternatively, an employer can elect to have January and February 2020 as the applicable reference period. If an employer elects January and February 2020 as the applicable reference period, this period will apply for purposes of determining an employer's entitlement for all three qualifying periods. Businesses that did not exist as of March 2019 will not have to make an election – the January and February 2020 reference periods will automatically apply.

Of significant interest to employers is the fact that the legislation confirms that if an employer is eligible for a particular "qualifying period," it will automatically qualify for the "immediately following qualifying period." For example, if an employer qualifies for the wage subsidy for the four-week period from March 15 to April 11, they will automatically qualify for the immediately following four-week period from April 12 to May 9.

Employers are expected to make their "best efforts" to top-up employees' salaries to pre-crisis earnings. In other words, employers are expected to do everything they can to pay the remaining 25% of the employee's salary that is not subsidized. However, if an employer is genuinely unable to provide a full top-up (or any top-up), it does not automatically disqualify them from receiving the CEWS. Employers are encouraged to do their homework to assess whether a top-up is possible and keep detailed records of the decision-making process so they are prepared if an audit occurs in the future.

27. Do we have to rehire those employees we previously laid off due to COVID if we want to qualify for the 75% subsidy of their salaries?

To be eligible for the CEWS, an employer must be paying wages to the employee. Specifically, employers are not eligible to receive the CEWS for employees who have been without remuneration for a consecutive 14-day period within any of the qualifying periods. The "qualifying periods" in which the CEWS may apply consist of three date ranges:

(a) the period that begins on March 15, 2020 and ends on April 11, 2020;

(b) the period that begins on April 12, 2020 and ends on May 9, 2020; and

(c) the period that begins on May 10, 2020 and ends on June 6, 2020.

Most recently, the CEWS has been extended until August 29, 2020

Employers who want to take advantage of the CEWS will need to recall employees from a layoff or offer to pay their employees even where they are unable to work. Note that an employer whose offices or facilities must remain closed or who do not have work available for staff can still recall employees from a layoff. In this case, employees remain at home while being reinstated to the employer's payroll.

28. We want to keep our employees for as long as possible and would like to reduce their hours and/or their pay in order to do so. Is this ok? And, up to what percentage can we cut?

Reminder: A constructive dismissal occurs when an employer makes a unilateral and substantial change to a fundamental term of an employee's employment, such as implementing a temporary layoff or significantly reducing hours or compensation. That is true unless the employer has the contractual right to impose such changes. For example, a contract might specify that the employer has the right to schedule the employee's hours of work and that there is no guaranteed minimum or schedule.

Otherwise, an employer cannot make substantial changes to an employee's hours or compensation without the employee's express agreement to such changes. Imposing changes without an employee's agreement can give rise to a claim of constructive dismissal. There is no exception for cases where the employer is dealing with financial hardship or other extraordinary circumstances.

When changes will be considered "substantial" will depend on the individual facts of each situation. **In general, if the change results in a reduction in compensation or hours of less than 5%, the risk of a successful constructive dismissal claim is significantly reduced.** However, to mitigate this risk, employers should work collaboratively with employees to reach agreements which will allow employees to continue working. Employers should also consider whether they can take advantage of government programs like the CEWS to help them avoid making layoffs and reductions in compensation.

RETURNING TO WORK

29. Does an employer have to recall all laid-off workers?

No. You should assess your needs and then determine how many people you will need. The return can be staggered as you resume business, bearing in mind the time limits set out in the applicable employment standards legislation (whether federal or provincial). For instance, in Ontario, the Employment Standards Act, 2000 ("ESA") sets out the parameters for temporary layoffs in Ontario. Pursuant to the ESA, a layoff cannot last more than 13 weeks in any 20-week period, although that can be extended to 35 weeks in any 52-week period in some circumstances, such as if the employer continues employee benefits or supplements their Employment Insurance benefits.

Once you reach the maximum time allowed, the temporary layoff is deemed to be a termination of employment. In that case, you would have to compensate the employee in the same way as if you had dismissed them on a without cause basis, which can involve a substantial cost.

30. What are an employer's duties to prevent the spread of the coronavirus?

Employers must take all reasonable precautions to ensure the safety of workers, which is a legal obligation outlined in health and safety legislation. As a result, you must put policies and practices in place to minimize risk. If you have a Health and Safety Committee or Representative, they should be activated.

As a part of this obligation to maintain health and safety, it may 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. Soap and hand sanitizer should be available. 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, such as providing proper PPE as well as training on how to wear PPE.

It is vital that employers communicate the rules and expectations to everyone, as well as the procedure for reporting safety concerns.

ABOUT THE AUTHORS

Rudner Law is a boutique law firm specializing in Canadian employment law.

ADDITIONAL REFERENCES

Government of Canada coronavirus disease information

Government of Canada Economic Response Plan

For individuals:

Canada Emergency Response Benefit (CERB)

Q&A on the CERB

For businesses:

Canada Emergency Wage Subsidy (CEWS) for Canadian Employers

Guidance on Essential Services During the COVID-19 Pandemic

COVID-19 provincial and territorial websites:

Alberta
British Columbia
Manitoba
New Brunswick
Newfoundland and Labrador
Northwest Territories
Nova Scotia
Nunavut
Ontario
Prince Edward Island
Quebec
Saskatchewan
Yukon

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