
EMPLOYER OBLIGATIONS AND CONSIDERATIONS IN RESPONSE TO THE COVID-19 PANDEMIC

*By Barry W. Kwasniewski**

A. INTRODUCTION

Ever since COVID-19 was declared as a pandemic by the World Health Organization (“WHO”) on March 11, 2020,¹ there has been a great deal of uncertainty about, among other things, an employer’s obligations towards its employees. In this unprecedented time, employers need to take into account their obligations and the rights of employees in making operational decisions, and to ensure that they are complying with the most up-to-date legislative requirements and government directives. This *Bulletin* provides an overview of some of the legal requirements and considerations that, as employers, charities and not-for-profits should be aware of, including the recently announced legislative changes by the federal government, as well as the Ontario government.

Given the fast pace at which changes are being announced by the various governments, in addition to the unprecedented situation that employers are placed in due to this pandemic, this *Bulletin* is limited to the proposed and implemented legislative changes made by the federal and Ontario governments at the time of writing, and does not cover all of the relevant legal requirements for a particular charity or not-for-profit. It is the responsibility of an employer to make informed decisions based on the most recent information available and seek legal advice as necessary.

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¹ World Health Organization, “WHO Director-General’s opening remarks at the media briefing on COVID-19 - 11 March 2020” (11 March 2020), online: <<https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>>.

B. PROVIDING A SAFE WORKPLACE ENVIRONMENT

Under the *Occupational Health and Safety Act (Ontario)* (“OHS”),² employers have the duty to take all reasonable precautions to protect the health and safety of their employees, in addition to providing them with the information and training them to protect against hazards.³ Conversely, employees have the right to refuse work if they have “reason to believe” that the workplace is unsafe to work in (with exceptions for workplaces where risk is inherent as part of the job), and an employer may not discipline or retaliate against the employee.⁴ Violations of the OHS can lead to an employer being penalized.

In the current pandemic situation, the following are especially relevant considerations:

- Staying informed with the recommendations and guidance provided by the WHO, Public Health Agency of Canada, and the provincial health agencies, such as Ontario Ministry of Health and Long-term Care.
- In Ontario, Premier Doug Ford announced on March 23, 2020 that all non-essential businesses must be closed for a period of 14 days, commencing at 11:59 p.m. on March 24, 2020.⁵ The Ontario Government has published a list of essential businesses that may remain open.⁶
- Prior to yesterday’s important announcement, it had been recommended that employers implement social distancing measures, which include encouraging all employees to work remotely,⁷ making use of telephones or videoconferencing, and if that is not possible, to avoid close contact if physically present at the workplace.

² RSO 1990, c O.1.

³ Ontario Ministry of Labour, Training and Skills Development, *Health and Safety*, “Rights and Duties: FAQs” (last reviewed October 2013), online: <<https://www.labour.gov.on.ca/english/hs/faqs/rights.php>>.

⁴ Government of Ontario, *Guide to the Occupational Health and Safety Act*, “Part V: Right to refuse or to stop work where health and safety in danger” (last updated 4 November 2019), online: <<https://www.ontario.ca/document/guide-occupational-health-and-safety-act/part-v-right-refuse-or-stop-work-where-health-and-safety-danger#section-0>>.

⁵ Office of the Premier, “Ontario Orders the Mandatory Closure of All Non-Essential Workplaces to Fight Spread of COVID-19” (News Release, 23 March 2020), online: Government of Ontario <https://news.ontario.ca/opo/en/2020/03/ontario-orders-the-mandatory-closure-of-all-non-essential-workplaces-to-fight-spread-of-covid-19.html?utm_source=ondemand&utm_medium=email&utm_campaign=p>.

⁶ Office of the Premier, “List of Essential Workplaces” (Backgrounder, 23 March 2020), online: Government of Ontario <<https://news.ontario.ca/opo/en/2020/03/list-of-essential-workplaces.html>>.

⁷ For a further discussion of COVID-19’s implications for remote work, see Theresa L Man, “article”.

- Employers should discourage business or personal travel of their employees, which has already been restricted with the federal government's imposition of travel bans on non-essential travel. In this regard, the Government of Canada travel directives should be reviewed and followed.
- All employees should be required to disclose any COVID-19 associated symptoms and be sent home for self-isolation. Further, if an employee discloses that they or a family member has been in contact with someone who was exposed to or tested positive for COVID-19, they should be sent home and required to self-isolate for 14 days.
- If the employee is working from home while quarantined, they should be paid. If unable to work from home, other options, such as temporary lay-offs, need to be considered. To assist affected employees, new initiatives by the governments have been introduced (as discussed under heading D, below).
- In collecting any personal information or precautionary screening for COVID-19, privacy implications should be taken into consideration.⁸ In a time like this, public health implications may supersede privacy obligations to a certain extent.
- Be mindful of human rights considerations when making operational decisions, such as accommodating employees that need to stay home, work remotely or work at modified hours, to take care of or supervise children due to school or daycare closures, which would be protected under the *Human Rights Code* (Ontario).⁹
- The OHSA imposes a duty to report "occupational illnesses" of employees to the Ministry of Labour, Training and Skills Development and the union, if present, within 4 days.¹⁰ The definition of occupational illness is broad enough that it would include COVID-19 if the employee contracted the illness while at work. There is also a duty in Ontario on the employer to report occupational illnesses

⁸ For a further discussion of privacy implications due to COVID-19, see Esther Shainblum, "article".

⁹ Ontario Human Rights Commission, "OHRC policy statement on the COVID-19 pandemic" (13 March 2020), online: http://ohrc.on.ca/en/news_centre/ohrc-policy-statement-covid-19-pandemic.

¹⁰ Government of Ontario, "Reporting workplace incidents or structural hazards" (last updated 24 December 2019), online: https://www.ontario.ca/page/reporting-workplace-incidents-or-structural-hazards?_ga=2.202725841.1990240297.1584845057-917920289.1584845057.

to the Workers' Compensation Board, if covered by it, within 3 days.¹¹ A record must also be kept regarding the same.

C. TEMPORARY LAY-OFFS

In light of the Government of Ontario's announcement on March 23, 2020 requiring all non-essential businesses to close for at least 14 days, charities and not-for-profits may be faced with the prospect of having to temporarily lay-off some or all of its employees. The Ontario *Employment Standards Act, 2000* (the "ESA")¹² does provide for temporary lay-off of employees. Such lay-offs can be for up to 13 weeks in any 20 week period, or up to 35 weeks in any 52 week period if certain obligations, such as benefits continuance, are met by the employer.¹³ Temporary lay-offs that meet these criteria are deemed to not constitute a termination of employment pursuant to the ESA.

However, in some judicial decisions, Ontario courts have ruled that even a temporary lay-off may constitute a form of wrongful dismissal at common law, unless the employee has agreed in advance to the lay-off. It remains an issue as to whether or not a temporary lay-off in the context of a declared pandemic and provincial emergency will also be viewed in the same light by the courts as other business related lay-offs as reviewed in the previous case law, so employers should be cautious with temporary lay-offs.

However, in order to mitigate the legal risks of temporary lay-offs, employers should limit the period of lay-off to as short a time as possible, while complying with all emergency measures imposed by governments, as well as the lay-off time limits in the ESA. Employers should also continue benefits coverage for the period of the lay-off, and make it known to employees that they will be recalled as soon as possible. Employers may also consider asking their employees for their written consent to a temporary lay-off to avoid allegations of wrongful dismissal. However, if consent is not received from the employee, financial circumstances may dictate that the temporary lay-off still proceed, despite the potential risks.

¹¹ Steps to Justice, "What is my employer supposed to do after I report a work injury?" (last reviewed 22 March 2018), online: Community Legal Education Ontario <<https://stepstojustice.ca/questions/employment-and-work/what-my-employer-supposed-do-after-i-report-work-injury>>.

¹² *Employment Standards Act, 2000*, SO 2000, c 41, ss 56(2) ["ESA"].

¹³ *Ibid*, ss 56(2).

D. GOVERNMENT ASSISTANCE MEASURES

Both the Ontario and the federal government have introduced measures to provide help to employees affected by COVID-19 related job losses, which are in addition to the pre-existing legislative provisions. Different provinces may provide for similar provisions, but only the Ontario and federal governments' initiatives are discussed below.

1. FEDERAL – Employment Insurance (“EI”)¹⁴

- **EI Regular Benefits:** Available to employees losing their jobs through no fault of their own, which would include shortage of work or temporary/mass layoffs. Unless an employer provides for paid leave entitlements, this is particularly helpful for employees that meet the EI insurable hours requirement and other eligibility criteria.
- **Supplemental Unemployment Benefit (“SUB”) Program:** This is a plan to enable an employer to top up employees' EI benefits during a period of unemployment due to a temporary or indefinite layoff for, among other things, illness, quarantine, or temporary stoppage of work. SUB plans should be registered with Service Canada, otherwise any top-up amounts paid by the employer would be considered insurable earnings and be deducted from the employee's EI benefits.¹⁵
- **EI Sickness Benefits:** The federal government now provides up to 15 weeks of income replacement to individuals that qualify for EI Benefits and are unable to work due to being ill or in quarantine. Applications need to be made to Service Canada, and the one-week waiting period that normally applies to EI sickness benefits has been waived. There is also no requirement for a medical certificate.

¹⁴ Employment and Social Development Canada, “Coronavirus disease (COVID-19) – Benefits and services” (last modified 21 March 2020), online: Government of Canada <<https://www.canada.ca/en/employment-social-development/corporate/notices/coronavirus.html>>. See also, Department of Finance Canada, “Canada’s COVID-19 Economic Response Plan: Support for Canadians and Businesses” (19 March 2020), online: Government of Canada <<https://www.canada.ca/en/department-finance/news/2020/03/canadas-covid-19-economic-response-plan-support-for-canadians-and-businesses.html>>.

¹⁵ Employment and Social Development Canada, “Supplemental Unemployment Benefit Program” (last modified 30 December 2019), online: Government of Canada <<https://www.canada.ca/en/employment-social-development/programs/ei/ei-list/ei-employers-supplemental-unemployment-benefit.html>>.

- **Emergency Care Benefit:** This has been newly introduced by the federal government (awaiting Royal Assent), providing \$900 bi-weekly, for up to 15 weeks in income support to: (i) employees (including self-employed) that are sick or quarantined due to COVID-19, but do not qualify for EI sickness benefits; (ii) employees (including self-employed) taking care of a family member who is sick with COVID-19; and (iii) parents with children requiring supervision or care due to school closures, and are unable to earn employment income. Applications will be available starting April 2020, and require attestation of meeting eligibility requirements, with re-attestation being required every two weeks. This will be done through the Canada Revenue Agency’s (“CRA”) MyAccount portal.
- **Emergency Support Benefit:** Another new income support benefit delivered through the CRA that provides up to \$5 billion in support for employees that are ineligible for EI and are facing unemployment. On March 22, 2020, Prime Minister Trudeau announced that the House of Commons is expected to meet on Tuesday, March 24, 2020 to pass emergency legislation to put the Federal Government’s economic support plans in place.¹⁶
- **Work-Sharing Program:** This Federal program involves implementing temporary special measures to support both employers and employees affected by a downturn in business to avoid layoffs. The new temporary special measures are available to employers facing business downturns that may directly or indirectly be due to COVID-19 and extends the Work-Sharing agreements from 38 weeks to 76 weeks, waves the mandatory waiting period between agreements, in addition to easing the recovery plan requirements.¹⁷

2. ONTARIO – ESA and Employment Standards Amendment Act (Infectious Disease Emergencies), 2020

- Employees have the right to take unpaid leaves of absence pursuant to various statutory leave provisions in Ontario, as governed by the ESA, which include sick leave, critical illness leave, personal leave, family caregiver leave, and bereavement leave, among others.

¹⁶ Justin Trudeau, Prime Minister of Canada, “Government requests recall of the House of Commons to help workers and businesses during COVID-19 crisis” (22 March 2020), online: <<https://pm.gc.ca/en/news/news-releases/2020/03/22/government-requests-recall-house-commons-help-workers-and-businesses>>.

¹⁷ Employment and Social Development Canada, “Work-Sharing – Overview” (last modified 13 March 2020), online: Government of Canada <<https://www.canada.ca/en/employment-social-development/services/work-sharing.html>>.

- On March 19, 2020, during an emergency sitting of the Ontario legislature, the *Employment Standards Amendment Act (Infectious Disease Emergencies), 2020*¹⁸ was passed to provide employees with job-protected leaves for employees who are quarantined, in self-isolation or directly affected by travel restrictions due to COVID-19, unable to work because of school or daycare closures, or due to their need to care for “specified individuals.” The list of “specified individuals”, which previously included close family members, such as the employee’s parent, foster grandparent, foster child, spouse, spouse of a child, sibling, or a relative of employee dependent on the employee for care or assistance, has now been broadened to even include extended family members including, for example, a person who considers the employee to be like a family member (provided any prescribed conditions are met), or any individual prescribed as a family member.¹⁹
- Previously, the ESA had provisions for an emergency leave, which was limited to **declared emergencies**, but now has been amended to include **infectious disease leaves**.
- These leaves last so long as the employee requires, or either the emergency declaration pursuant to the *Emergency Management and Civil Protection Act*²⁰ remains in place or the government prescribes an infectious disease for the purposes of the leave, whichever ends earlier. A state of emergency has been declared in Ontario until March 31, 2020,²¹ allowing employees to apply for the declared emergency leave. In addition, COVID-19 has been designated as an infectious disease, giving entitlement to employees to seek an unpaid leave of absence under the infectious disease provision because of a reason related to COVID-19, which is deemed to have started on January 25, 2020.²²

¹⁸ Bill 186, *An Act to amend the Employment Standards Act, 2000* (received Royal Assent 19 March 2020), online: Legislative Assembly of Ontario <https://www.ola.org/sites/default/files/node-files/bill/document/pdf/2020/2020-03/b186ra_e.pdf> [“*Employment Standards Amendment Act (Infectious Disease Emergencies), 2020*”].

¹⁹ *Ibid*, ss 4(3).

²⁰ *Emergency Management and Civil Protection Act*, RSO 1990, c E.9.

²¹ Government of Ontario, “Emergency Information” (last updated 18 March 2020), online: <<https://www.ontario.ca/page/emergency-information>>.

²² *Infectious Disease Emergency Leave*, O Reg 66/20.

- Employers are not permitted to ask for medical notes from employees but may require an employee “to provide evidence reasonable in the circumstances, at a time that is reasonable in the circumstances, that the employee is entitled to the leave.”²³

E. OTHER THINGS TO KNOW

On March 19, 2020, the Federal Government proposed to provide eligible small employers, including charities and not-for-profits, a **temporary wage subsidy** for a period of three months, which will equal “10% of remuneration paid during that period, up to a maximum subsidy of \$1,375 per employee and \$25,000 per employer.”²⁴ This proposal seeks to support businesses facing revenue losses and help prevent layoffs. This is to be implemented immediately and supporting legislation is to follow.²⁵

F. CONCLUSION

As the various governments’ responses to the COVID-19 pandemic are being announced on a daily basis, it is important for charities and not-for-profits to keep updated, so that the appropriate and informed decisions can be made on a timely basis.

²³ *Employment Standards Amendment Act (Infectious Disease Emergencies)*, 2020, *supra* note 18, ss 4(2).

²⁴ See section on *Helping Businesses Keep their Workers*, Department of Finance Canada, *supra* note 14, online: <https://www.canada.ca/en/departement-finance/news/2020/03/canadas-covid-19-economic-response-plan-support-for-canadians-and-businesses.html#Helping_Businesses_Keep>. See also, Canada Revenue Agency, “Frequently Asked Questions – Temporary Wage Subsidy for Employers” (last modified 20 March 2020), online: Government of Canada <<https://www.canada.ca/en/revenue-agency/campaigns/covid-19-update/frequently-asked-questions-wage-subsidy-small-businesses.html>>.

²⁵ See section on *Economic Response Plan – Cost and Implementation*, Department of Finance Canada, *supra* note 14, online: <https://www.canada.ca/en/departement-finance/news/2020/03/canadas-covid-19-economic-response-plan-support-for-canadians-and-businesses.html#Economic_Response_Plan>.