



COVID-19 Tip Sheet

To assist you in navigating through the COVID-19 pandemic, we have summarized key information for employers to know.

MANDATORY CLOSURE OF NON-ESSENTIAL WORKPLACES

As of 11:59 p.m. on March 24, 2020, all non-essential workplaces in Ontario have been ordered to close.

You can find a list of “essential” workplaces, which are allowed to stay open, at <https://www.ontario.ca/page/list-essential-workplaces>

Businesses which are not on this list are required to close their physical workplaces, but they can continue operating with all employees working from home.

TEMPORARY LAYOFFS

You are allowed to impose temporary layoffs if your employees have signed contracts which specifically allow you to do so.

However, for employees who have not signed these kinds of contracts, employers do not have an inherent legal right to impose temporary layoffs at common law.

Due to their financial position, some employers will have no choice but to try temporary layoffs anyway. This means accepting the risk that the layoffs could be considered a constructive dismissal. Courts may relax this rule and be more lenient toward temporary layoffs given the pandemic, but we just don't know yet.

If you need to lay off employees because your workplace was ordered to be closed by the government, then we expect the risk of a successful constructive dismissal claim will be significantly lower than if the layoffs are due to business slowdowns.

Whether your employees have signed contracts which permit layoffs, or whether you are taking the risk of imposing layoffs without contracts, here are some tips to reduce the risk.

- Keep layoffs within the *Employment Standards Act, 2000* (“ESA”) limits. Temporary layoffs automatically become terminations if they last longer than 13 weeks in any 20 week period.
- Continue employee benefits during the layoff. Under the ESA, if benefits are continued, a temporary layoff can last up to 35 weeks in a 52 week period (instead of just 13 weeks). It’s also just kinder to continue health benefits during a medical crisis.
- Be clear about which benefits can and cannot continue during the layoff. This will depend on the terms of your benefits plans.
- If you do not offer employee benefits, the ESA still allows you to extend a temporary layoff to up to 35 weeks in a 52 week period with the employee’s written agreement.
- Keep layoff periods as short as possible. Provide a specific recall date if possible, with flexibility to change the date if circumstances require.
- Consider deferring (instead of cancelling) employees’ wages.
- If you choose, you may force employees to use vacation during the layoff period (employers can always decide when vacations will be taken), but consider allowing the employee to choose whether to use vacation or not.
- In your communications, tie the layoffs directly to a government-ordered shutdown (if applicable to your business) or the pandemic. This may help to set up future legal arguments that the contract was “frustrated” instead of constructively dismissed.
- Prepare a business justification for layoff decisions, to avoid claims that certain people were selected for layoffs for discriminatory reasons.
- Do not lay off employees on existing leaves of absence.
- Kindness goes a long way. Reassure employees that the layoff is only due to the pandemic and you genuinely want to bring them back to work as soon as possible. Show them how the entire team will be making sacrifices together. Make employees *want* to return to work for you after the layoff, instead of pursuing a severance package.

OTHER OPTIONS TO CONSIDER

- Wage subsidy: The federal government is offering a subsidy of up to 75% of the first \$58,700 of each employee's wages, retroactive to March 15, 2020. This works out to a subsidy of approximately \$847 per week per employee. To qualify, the business must be able to show that it has experienced a 30% decrease in revenues due to COVID-19. The government will provide additional details in the coming days.
- Work sharing: With the employees' agreement, reduce everybody's hours by the same percentage, instead of laying off that percentage of your workforce. Work sharing is an Employment Insurance program which requires Service Canada's approval. Once approved, employees will receive EI to compensate for their reduced hours. You must apply at least 10 days before the program will start (reduced from the normal waiting period of 30 days).
- Supplementary Unemployment Benefit (SUB) Plans: Top-up employees' EI to a maximum of 95% of their regular pay. The SUB plan must be properly registered with Service Canada and meet Service Canada's conditions, or else employees may be required to repay EI. SUB payments may begin as soon as you have submitted the plan for approval.

COVID-19 LEAVE

The Ontario government has introduced a new job-protected leave for employees who are in quarantine or self-isolation due to COVID-19, or who need to take time off work to care for children because of school or day care closures. The job protected leave will apply if:

- The employee is under medical investigation, supervision or treatment for COVID-19
- The employee is acting in accordance with an order under the *Health Protection and Promotion Act*
- The employee is in isolation (including self-isolation) or quarantine in accordance with public health information or direction
- The employer directs the employee not to work to avoid spreading COVID-19 in the workplace
- The employee needs to provide care to a person for a reason related to COVID-19, such as a school or day-care closure

Employees will not be required to provide a medical note. This law is retroactive to January 25, 2020, the date the first case was confirmed in Ontario.