

COVID-19: Infectious Disease Emergencies Leave (COVID-19 Leave) Now Available for Employees in Ontario

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Author: Christopher McClelland

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On March 19, 2020, the Ontario government enacted amendments to the Ontario *Employment Standards Act, 2000* (the “ESA”) allowing employees to take unpaid, job-protected leave for various reasons related to a designated infectious disease, such as COVID-19.

[Bill 186](#), the *Employment Standards Amendment Act (Infectious Disease Emergencies), 2020*, was fast-tracked through the legislature and it is now in force, amending the existing section 50.1 of the *ESA*, which previously had the heading “Emergency Leave, Declared Emergencies” but now also expressly references “Infectious Disease Emergencies”.

Who does COVID-19 Leave apply to?

The newly described infectious disease emergency leave (“COVID-19 Leave”) is available to most employees in Ontario. This includes all categories of employees, whether they are full-time, part-time, students, assignment employees or casual workers. As this is provincial legislation, it does not apply to employees who work for federally regulated employers, such as banks, airports and federal crown corporations.

Unlike certain other statutory leaves of absence provided for in the *ESA*, there is no minimum service requirement for COVID-19 Leave.

When is COVID-19 Leave available?

COVID-19 Leave applies in those types of situations that will be familiar to anyone who has been following the impact of the COVID-19 pandemic on Ontario workplaces.

Employees will be entitled to job protection when they are unable to work for the following reasons:

<p>The employee is under medical investigation, supervision or treatment for COVID-19.</p> <p>s. 50.1(1.1)(b)(i)</p>	<p>This will include individuals who have been diagnosed with COVID-19 or who are v... the results of a lab test for COVID-19.</p>
<p>The employee is acting in accordance with an order under the <i>Health Protection and Promotion Act</i>.</p> <p>s. 50.1(1.1)(b)(ii)</p>	<p>Under this legislation, medical officers have the power to require persons to take, o... from taking any action specified in such orders in respect of a communicable disea...</p>
<p>The employee is in isolation, quarantine or “subject to a control measure” in accordance with public health information or direction.</p> <p>s. 50.1(1.1)(b)(iii)</p>	<p>The legislation specifically references control measures such as “self-isolation” tha... implemented as a result of information or directions issued to the public by a public... official, a qualified health practitioner, Telehealth Ontario, the Government of Ontar... Government of Canada, a municipal council or a board of health, whether through... electronic, broadcast or other means.</p> <p>Presumably, this is in part intended to address the unique circumstances that have... during the COVID-19 pandemic whereby individuals with no symptoms are neverth... expected to self-isolate for 14 days if they have have travelled outside of Canada o... close contact with a person diagnosed with COVID-19. These types of proactive co... measures may be subject to change based on future guidance from public health a...</p>
<p>The employer directs the employee not to work due to a concern that COVID-19 could be spread in the workplace.</p> <p>s. 50.1(1.1)(b)(iv)</p>	<p>The legislation contemplates that an employee may be effectively “placed” on COV... Leave by their employer to protect the health and safety of other individuals in the... In this type of circumstance, the employee would nevertheless be entitled to have... resulting absence treated as a job-protected leave.</p>
<p>The employee needs to provide care to a person for a reason related to COVID-19, including but not limited to, school or day-care closures.</p>	<p>An employee will be able to take COVID-19 Leave to care for certain types of imm... extended family members (which are listed in the legislation) as well as a person w... considers the employee to be like a family member.</p> <p>As noted, the legislation specifically refers to the school and day-care closures tha... currently scheduled to continue until April 5, 2020 but that may be extended as con... change.</p>

s. 50.1(1.1)(b)(v)	
The employee is prevented from returning to Ontario because of travel restrictions.	This aspect of the legislation is clearly intended to address situations whereby the travel restrictions have resulted in the employee being stranded outside of Ontario
s. 50.1(1.1)(b)(vi)	
Other reasons as may be prescribed.	It is possible that additional reasons giving rise to COVID-19 Leave will be prescribed by the government as the steps being taken to respond to the COVID-19 situation continue to evolve.
s. 50.1(1.1)(b)(vii)	

[Can the employer ask the employee to provide evidence that they are entitled to take COVID-19 Leave?](#)

Yes, except that an employer is prohibited from requiring that the employee provide a medical note. This restriction avoids burdening health care providers and also minimizes the need for employees who may be impacted by COVID-19 to attend at a doctor’s office or hospital for purposes of obtaining a note.

Otherwise, an employer may ask for evidence that is “reasonable in the circumstances”. The [Backgrounder](#) put out by the government suggests that this could include a note from the daycare or evidence that the airline cancelled a flight. However, in both of these cases the underlying reasons for the requested COVID-19 Leave are matters of widespread public knowledge, so it may be that employers may elect not to ask for evidence in many cases.

[How long can the COVID-19 Leave last and is it retroactive?](#)

The government Backgrounder indicates that COVID-19 Leave will remain available “until COVID-19 is defeated”. All current indications are that this period will be measured in months.

The length of an employee’s COVID-19 Leave may vary widely depending on their particular circumstances. An employee who takes COVID-19 Leave in order to remain in self-isolation may only require a 14-day leave. An employee who is caring for a child as a result of a COVID-19-related school closure may require a significantly longer leave if those closures are extended. An employee who is suffering from the effects of COVID-19 may require a lengthy leave of unknown duration.

COVID-19 Leave has been made retroactive to January 25, 2020, the date that the first presumptive COVID-19 case was confirmed in Ontario.

[What are the notification requirements?](#)

An employee taking a COVID-19 Leave is required to advise their employer that they are doing so either before the leave or as soon as possible after beginning it. As the legislation applies retroactively, it is likely that many, if not most, employees who are currently absent from work for

COVID-19 related reasons will be able to have that leave “converted” to a COVID-19 Leave under the *ESA*.

What are an employee's entitlements while on COVID-19 Leave?

The general provisions in the *ESA* concerning other types of statutory leaves, such as pregnancy/parental leave or family medical leave, also apply to COVID-19 Leave. This includes:

- The right to reinstatement (subject to the caveat that if an employer has dismissed an employee for legitimate reasons that are totally unrelated to the fact that the employee took COVID-19 Leave, the employer does not have to reinstate the employee);
- The right to be free from penalty or “reprisal”;
- The right to continue to participate in benefit plans (provided any applicable employee contributions are made); and
- The right to earn credits for length of employment, length of service and seniority (as applicable).

What are an employer's other obligations?

The government's Backgrounder notes that employers have the following reporting obligations:

- to report all occupational illnesses, including COVID-19, to the Ministry of Labour, Training and Skills Development in writing within four days; and
- to notify their workplace's joint health and safety committee or a health and safety representative and a trade union, as applicable.

Are there other implications for employers?

As noted above, one aspect of COVID-19 Leave that is unique is the apparent ability of an employer to “trigger” an unpaid statutory leave of absence by directing the employee not to work due to COVID-19 related concerns. This provides some helpful clarity regarding the employer's right to exercise control over the issue of COVID-19 in the workplace.

Employees that take a COVID-19 Leave may be eligible to receive employment insurance benefits or other types of benefits that are being made available by the Government of Canada to individuals affected by COVID-19. Some situations may be relatively straightforward; an employee who is receiving treatment for COVID-19 will likely qualify for EI sickness benefits. Other situations giving rise to a COVID-19 Leave, such as an employee providing care to a child during a school closure, may require the employee to consider applying for the recently introduced Emergency Care Benefit. Employers should seek advice about how to characterize an employee's absence from the workplace in order to avoid negatively impacting an employee's ability to obtain these benefits.

If you have any questions about COVID-19 Leave, temporary lay-offs or terminations related to employees on COVID-19 Leave or on how employers should be adapting to these changes, please contact one of the members of our Labour & Employment Group.

The information contained in this article is intended to provide information and comment, in a general fashion, about recent cases and related practice points of interest. The information and

views expressed are not intended to provide legal advice. For specific legal advice, please contact us.