

HUMAN RESOURCES DECISION MAKING FAQ – COVID-19

Extraordinary measures are required to contain and control the growth of COVID-19. This includes emergency orders by the provincial government with similar steps to be taken by the federal government. These measures will interrupt our daily lives including day-to-day operations of businesses such as medical offices. The public has been told to practice social distancing and self-isolation, which will result in people only traveling to a medical clinic for necessary face-to-face treatment. The reduction in patient volumes has raised practical questions for physicians who own or operate clinics, including what should be done with their office staff as patient volumes currently do not require the same number of staff, and staff may not be comfortable working and travelling to and from work until the spread of COVID-19 is managed.

The information in this FAQ and the accompanying flow chat on HR decision making is to assist members with staffing decisions.

For individual situations please consider contacting an employment lawyer for specific advice.

CAN I LAY OFF STAFF?

An employee is on temporary layoff when an employer cuts back or stops the employee's work without ending his or her employment (e.g. laying someone off at times when there is not enough work to do). A temporary layoff is an unpaid leave for a term not longer than the prescribed time as set out in the [Employment Standards Act](#) (s. 56).

Generally speaking, laying off an employee is considered constructive dismissal unless there are specific provisions in a written contract permitting the layoff.

If you must layoff staff due to financial or practical considerations, you will run the risk of a constructive dismissal claim (e.g. amounts related to notice (or pay in lieu thereof) that should have been paid to the employee for termination without cause).

Given the current pandemic and its widespread impact on labour markets, risks related to wrongful dismissal claims may be reduced.

Generally, employees on temporary layoff are entitled to collect Employment Insurance. For more information on EI and other steps you can take to mitigate the impact on staff, keep reading this FAQ.

WHAT DO I DO IF I WANT TO RESCIND AN OFFER OR LAY OFF A NEW HIRE?

Rescinding Offers: An individual has not yet started, yet you may want to end the relationship already due to current circumstances. Rescinding the offer will run the risk that the individual will allege breach of contract. Damages may be limited in the absence of any long-term guarantee of wages or work in the written contract. There is likely no termination or severance owed given the individual has not yet started to work. However, there are other risks, such as where the individual resigned from a previous job in reliance on the offer. In this scenario, the individual may seek damages (e.g. termination and severance) as if you had terminated them from their prior employment.

Delaying Start Date: Deciding to delay the start date of an incoming employee presents less risk than rescinding an offer. However, given that you may not know how long the delay will be, there is always the ultimate risk of incurring damages should the individual's start continued to be delayed.

Risk to EI: Note that there could be a risk to the individual's EI entitlements if you rescind or delay employment. For example, if the new hire left the previous employer voluntarily and has not been terminated from a new position, they would be ineligible for EI due to the delay or rescinded offer.

DOES MY EMPLOYEE QUALIFY FOR THE NEW "DECLARED EMERGENCY" UNPAID JOB PROTECTION LEAVE?

The new unpaid declared emergency leaves should be considered when making staffing decisions, as you may have staff who are considering voluntary leaves due to COVID-19.

New provincial amendments to the [Employment Standards Act](#) create an **unpaid job leave** ([Emergency Leave: Declared Emergencies and Infectious Disease Emergencies](#)) to address COVID-19. This new leave provides an unpaid leave of absence for those unable to perform work duties because of a declared emergency, such as COVID-19. In Ontario, the term of the COVID-19 declared emergency is January 25, 2020 to March 31, 2020; however, it may be extended by the government at any time.

To qualify for job protection entitlement under these new provisions, employees must be unable to work because of one of the following:

- They are subject to an order under the [Emergency Management and Civil Protection Act](#)
- They are subject to an order under the [Health Protection and Promotion Act](#)
- They are needed to provide care or assistance to a specific individual, or
- Such other reasons as may be prescribed.

If your employee is entitled to declared emergency leave, you may consider assisting them take such an unpaid leave. You should determine whether your employee is covered under the new emergency leave provisions prior to issuing any work-related notices. As you will see, the provisions are broadly worded and include those who need to provide care or assistance to a specific individual, such as childcare for the young and care for the sick or elderly.

Note that, generally, ESA protections related to most other job protected leaves apply to declared emergency leaves, including a prohibition against reprisals, benefit continuation requirements, etc. While you do not have to pay staff who are on a declared emergency leave, you must hold their job and abide by the other ESA protections that apply to leaves. For more information, see the [government's guide to the ESA](#)

WHAT ABOUT REDUCED HOURS/PAY, WORK FROM HOME, OR OTHER ALTERNATIVES?

You can always consider reaching a new agreement with your employee. Talking with staff to find a reasonable alternative can be an effective approach.

For example, an employer could seek to reduce an employee's working hours, perhaps down to a 4-day work week. This is technically constructive dismissal under the ESA, but may be more palatable for employees (and understandable given the current situation), and thus reduce the risk of any claim.

If feasible, you might also consider having employees work from home. You can also talk to staff about using vacation time to defer costs. These measures all attract some level of risk but exploring creative options has become necessary in many sectors due to the impact of COVID-19.

WORKERS' BENEFITS

Employment Insurance

Staff who are temporarily or permanently laid off should be aware of recent federal changes to EI benefits.

In response to the COVID-19 pandemic, the federal government recently amended the *Employment Insurance Act* to make it easier for eligible employees to access EI benefits.

Specifically:

- **Waiting Period Waived:** for employees in quarantine (March 15, 2020)
- **Medical Certificate:** "sick note" waived for employees in quarantine (March 11, 2020)

Quarantine Defined: to qualify, an employee must be in quarantine

- imposed under federal or provincial law,
- by a public health official, or
- recommended by a public health official and the claimant was asked to place self in quarantined by their employer, a medical doctor, nurse, or other person in authority.

The last category above is intended to target self-isolation, but it only applies where the quarantine is explicitly requested.

An employee need only declare to Service Canada that they fit into one of the three quarantine categories to qualify for these benefits.

Generally speaking, employees who are temporarily laid off are eligible for EI. Employees who are on reduced hours or pay are generally not eligible for EI.

Other Benefits: Supplemental Unemployment Benefit Plans

As EI will often be insufficient for most employees, you might consider topping up those payments.

SUB Plans are a mechanism for topping up EI for employees during a temporary stoppage of work, training, or illness, injury or quarantine. Under a SUB Plan, an employer can top up EI for an employee up to 95% of regular weekly wages.

SUB Plan **must** be registered with Service Canada and must meet certain criteria, including:

- The plan must be in effect for at least one year
- The plan must be entirely funded by the employer
- The plan must not reduce other income entitlements

How do I set up a SUB Plan?

If you are considering an application to register a SUB plan with Service Canada, note that there are specific steps, criteria and timelines. The OMA can provide you with more information on how to create and apply for a SUB plan if you are considering this as a solution to your staffing issues. If you make top up payments prior to registration of the SUB plan, there will be EI related financial repercussions.

You can access the government's website on the SUB Program here: <https://www.canada.ca/en/employment-social-development/programs/ei/ei-list/ei-employers-supplemental-unemployment-benefit.html>

WHAT IF MY EMPLOYEE DOES NOT QUALIFY FOR EI?

The Federal Government [recently announced income support](#) for those people who do not qualify for EI or Business Wage Subsidies:

<p>Canada Emergency Response Benefit</p>	<ul style="list-style-type: none"> ○ \$2,000 a month for up to four months for workers who lose their income as a result of COVID-19. ○ Simpler and more accessible combination of the previously announced Emergency Care Benefit and Emergency Support Benefit. ○ The CERB will cover: <ul style="list-style-type: none"> ▪ Canadians who have lost their job, are sick, quarantined, or taking care of someone who is sick with COVID-19. ▪ Working parents who must stay home without pay to care for children. ○ The CERB applies to: <ul style="list-style-type: none"> ▪ Wage earners, contract workers and self-employed individuals who would not otherwise be eligible for Employment Insurance (EI). ▪ Workers who are still employed but are not receiving income because of disruptions to their work situation. ○ The full details and application process have not yet been provided. We will continue to update members with information about this benefit as more information is released, including how it may be helpful to physicians and their staff. <p>More information about CERB can be found at the following Government of Canada websites:</p> <ul style="list-style-type: none"> ○ https://www.canada.ca/en/department-finance/news/2020/03/introduces-canada-emergency-response-benefit-to-help-workers-and-businesses.html ○ https://www.canada.ca/en/department-finance/economic-response-plan/covid19-individuals.html
<p>Temporary Business Wage Subsidy</p>	<ul style="list-style-type: none"> ○ For eligible small businesses, non-profits, and charities ○ In effect for 3 months <ul style="list-style-type: none"> ▪ 10% of remuneration paid during that period ▪ Up to \$1,375 per employee ▪ Up to \$25,000 per employer

Visit the government's website for more information on these programs:
<https://www.canada.ca/en/department-finance/news/2020/03/canadas-covid-19-economic-response-plan-support-for-canadians-and-businesses.html>