

Coronavirus: COVID-19 Update April 1, 2020

## What Employers Should Consider - FAQs

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On April 1, 2020 Finance Minister Bill Morneau released further information regarding the Canada Emergency Wage Subsidy for all businesses (except for publicly funded). The Prime Minister has recalled Parliament to have these changes passed through legislature. This means that the announced changes are not yet final. Refer to number 9. below for more information.

On March 23, Premier Doug Ford announced that all non-essential business would be shutdown to reduce the spread of COVID-19. Essential businesses will continue to operate; while ensuring the health and safety of employees (please see Question 23 of this publication). It is increasingly important for businesses continuing to operate to implement measures to prevent the spread of COVID-19.

On March 18, Prime Minister Trudeau announced several employer/employee-related financial supports and clarifications around Employment Insurance eligibility. Many of the initiatives announced require Royal Assent to be enacted. Parliament will be recalled soon, and we understand that opposition is likely to support the initiative.

Employers are faced with several options about its employees: layoff, work-sharing, top-up employment insurance, leaves of absence, shut-downs, records of employment, wage subsidies and so on. Contact us to discuss the options available to maximize opportunities and your employee's contributions.

### 1. My business is considered non-essential: what do I do now?

If you haven't already put measures in place to enable employees to work from home (where possible), employers have until midnight of March 24 to shut down. Currently, this is a 14-day shutdown and it may be extended. The list of essential services can be reviewed at: <https://www.ontario.ca/page/list-essential-workplaces>. It is unknown as of today what enforcement/repercussions will be implemented for business that do not shut down. For affected businesses, employees will be put on leave/layoff. See our table in Question 5. Below regarding the Record of Employment and possible benefits available to your employees.

If you have additional questions about the mandated closures, the government has established a toll-free line to provide support to Ontario business: **1-888-444-3659**.

[https://news.ontario.ca/opo/en/2020/03/stop-the-spread-business-information-line-now-open-at-1-888-444-3659.html?utm\\_source=ondemand&utm\\_medium=email&utm\\_campaign=p](https://news.ontario.ca/opo/en/2020/03/stop-the-spread-business-information-line-now-open-at-1-888-444-3659.html?utm_source=ondemand&utm_medium=email&utm_campaign=p)

### 2. What does it mean that Ontario has declared an Emergency?

Employees may qualify for a job protected leave for a declared emergency under the Employment Standards Act.

Also, the Ontario government's announcement on March 17 impacts the following:

- All facilities providing indoor recreational programs;

- All public libraries;
- All private schools as defined in the Education Act;
- All licensed child care centres;
- All bars and restaurants, except to the extent that such facilities provide takeout food and delivery;
- All theatres including those offering live performances of music, dance, and other art forms, as well as cinemas that show movies; and
- Concert venues.
- Further, all organized public events of over fifty people are also prohibited, including parades and events and communal services within places of worship.

Organizations and events listed above are ordered to close immediately. This order will remain in effect until March 31, 2020, at which point they will be reassessed and considered for extension, unless this order is terminated earlier.

**3. Can I have an employee work during a government-imposed shut down?**

Yes, all **non-essential** businesses must close, but employees can continue to work from home wherever possible.

**4. Who can apply for EI Sickness benefits (COVID-19 Related)?**

EI Benefits will be available to employees who:

- a. Are absent from work as a result of a need to quarantine on recommendation or requirement of Public Health\*
- b. One week waiting period waived for those absent from work due to illness, injury or quarantine related to COVID-19 starting March 11, 2020
- c. Records of Employment will be required/no medical note is required
- d. The link for this specific EI leave benefit is: <https://www.canada.ca/en/employment-social-development/corporate/notices/coronavirus.html>

\*Employees will be required to provide a declaration that they were quarantined 1) under law 2) ordered by a Public Health Official or 3) Recommended by a Public Health Official.

**5. Will my employees qualify for EI benefits?**

There are requirements for individual employees to be eligible for EI; in particular they must have accumulated the minimum insurable hours: <https://www.canada.ca/en/services/benefits/ei/ei-regular-benefit/eligibility.html>.

We are unclear who will qualify for EI benefits or for the Emergency Support/Care Benefits; the following table provides our understanding today. \*Employers should be careful NOT to provide employees with guarantees as to their eligibility for EI or the recently announced Emergency Care/Support Benefits under CRA. Employees will need to individually apply for these benefits and the Employer has no control over their eligibility.



*Types of Absences from Work Due to COVID-19*

Absence	Reason	Government Benefit <i>*No guarantee of qualification</i>	Record of Employment Reason Code
Temporary Layoff	Due to slowdown in work/operations related to COVID-19	<ul style="list-style-type: none"> <li>Regular EI benefits, one-week waiting period</li> <li>Canada Emergency Response Benefit (see Question 7.)</li> </ul>	Reason Code A: Shortage of Work
Shut-down	Due to Shut down: mandated by Public Health or other governing body	<ul style="list-style-type: none"> <li>Regular EI benefits, one-week waiting period</li> <li>Canada Emergency Response Benefit (see Question 7.)</li> </ul>	Reason Code A: Shortage of Work
Non-Essential Services Shutdown	14-day period starting March 25 initiated by the Ontario government for all non-essential business	<ul style="list-style-type: none"> <li>Regular EI benefits, one-week waiting period,</li> <li>Canada Emergency Response Benefit (see Question 7.)</li> </ul>	Reason Code A: Shortage of Work
COVID-19 Infection	Ordered to self-isolate/quarantine by Public Health or other governing body or to self-isolate due to illness or possible exposure to COVID-19 (including return from travel out of country including US)	<ul style="list-style-type: none"> <li>EI Sickness Benefits, one-week waiting period waived only if Employee calls Service Canada,</li> <li>Canada Emergency Response Benefit (See Question 7.)</li> </ul>	Reason Code D: Illness/Injury
Caring for Family members	Due to closure of schools/daycares	<ul style="list-style-type: none"> <li>Regular EI Benefits</li> <li>Canada Emergency Response Benefit (See 7.)</li> </ul>	Reason Code N: Leave
Self-Isolation	Not ordered by Public Health, Employee opts to remove themselves from the workplace.	<ul style="list-style-type: none"> <li>Regular EI Benefits</li> <li>Canada Emergency Response Benefit (see 7.)</li> </ul>	Reason Code N: Leave

**6. How can I top up my employees' Employment Insurance Benefits?**

A supplementary unemployment benefit plan (SUBP) is a plan established by an employer or group of participating employers to top up employees' employment insurance (EI) benefits during a period of unemployment due to a temporary or indefinite layoff.

Service Canada has streamlined the registration process. SUBs will be considered Registered upon receipt by Service Canada. Once registered, employers can begin topping up employees on EI.

For more information, please visit the following link:

<https://www.canada.ca/en/employment-social-development/programs/ei/ei-list/reports/supplemental-unemployment-benefit.html>

**7. What if my employee/contractor won't qualify for EI Benefits because they have not accumulated insurable earnings? (i.e. Self-employed) and cannot work due to COVID-19?**

As of March 25, Trudeau announced what were previously the Emergency Care and Emergency Support, will now be consolidated into the **Canada Emergency Response Benefit (CERB)**.

- Canadians who have already applied/been approved for EI benefits cannot apply for the CERB and will continue to receive EI benefits.
- For more immediate access to money, Canadians who have lost their source of income, regardless of whether they qualify for EI benefits can apply to the CERB and participate for up to 16 weeks.
- Canadians will be able to apply for EI benefits if they continue to be unemployed beyond the CERB's 16 weeks.

<https://www.canada.ca/en/department-finance/news/2020/03/introduces-canada-emergency-response-benefit-to-help-workers-and-businesses.html>

**Canada Emergency Response Benefit (CERB)**

To support workers and help businesses keep their employees, the government has proposed legislation to establish the Canada Emergency Response Benefit (CERB).

- This taxable benefit would provide \$2,000 a month for up to four months for workers who lose their income as a result of the COVID-19 pandemic.
- The CERB would be a simpler and more accessible combination of the previously announced Emergency Care Benefit and Emergency Support Benefit.
- The CERB would cover Canadians who have lost their job, are sick, quarantined, or taking care of someone who is sick with COVID-19, as well as working parents who must stay home without pay to care for children who are sick or at home because of school and daycare closures.
- The CERB would apply to wage earners, as well as contract workers and self-employed individuals who would not otherwise be eligible for Employment Insurance (EI) due to school closures and are unable to earn employment income.

Applications for the CERB will be available April 6th, 2020 and will require Canadians to attest that they meet the eligibility requirements. Payouts are expected 10 days after application.

\*The Government has set up a CERB website; though the application hasn't yet launched. For more information go to: <https://www.canada.ca/en/services/benefits/ei/cerb-application.html>

**8. What if my business slows down due to COVID-19? Can I lay my employees off?**

*\* Consider offering your employees the option to take 2020 vacation before resorting to a layoff; in order to continue their regular pay for longer and to reduce vacations when business returns to normal.*

The Employment Standards Act allows Employers to temporarily lay off employees for up to 13 weeks within 20 consecutive weeks.

While it is hoped that the government will intervene under these extreme circumstances, employers risk triggering common law termination of employment/termination costs where there are no written and signed employment agreements, allowing layoffs. Common law termination costs are significantly higher than the minimum termination requirements under the Employment Standards Act.

To mitigate these common law risks, we recommend that employers find ways to keep employees “whole” for as long as possible before resorting to layoff; maintaining normal pay and benefits and minimizing impact on employees. Some employers may be able to pay out 2020 vacation, sick days or bonuses early. Employers may be able to keep employees working with the Canada Emergency Wage Subsidy or the Federal Work Share program (see # 9 and #10 respectively).

Employers may wish to consider seeking written lay off agreements with their employees before proceeding with layoffs. Call us to discuss your risks and how best to establish these agreements.

#### **9. Is there any support to businesses who are trying not to lay off their people?**

On April 1, the Federal Government announced the **Canada Emergency Wage Subsidy**. The goal of this subsidy is to keep employees working. Businesses, except for public sector entities, that show gross revenue decreased by at least 30% in comparison with the same period in 2019 will be eligible.

Benefit: 75% wage subsidy on first \$58,700 a worker earned with a maximum amount of \$847 per week for a 12-week period from March 15, 2020 to June 6, 2020.

- Businesses must attest that they are doing everything they can to cover the remaining 25% of the worker's salary.
- The Wage Subsidy will be available for March, April and May.
- Employers will have to reapply each month.
- Application will be through a CRA online portal

Organizations that do not qualify for the **Canada Emergency Wage Subsidy** may continue to qualify for the previously announced **Temporary Business Wage Subsidy** of 10% from March 18 to before June 20, up to a maximum subsidy of \$1,375 per employee and \$25,000 per employer.

### **Temporary Business Wage Subsidy**

Eligible businesses must employ at least one person, be registered for payroll March 18 or before with CRA, have payroll remittance and be one of the following business types:

1. Canadian-controlled private corporations (CPC) with taxable capital employed in Canada for the preceding taxation year of less than \$15 million
2. An individual (other than a trust)
3. A partnership comprised of members who are described in 1, 2 or 5.
4. Non-profit organizations
5. Registered charities.

### **10. What is the Work Share Program, and can my business apply?**

Work-Sharing is an adjustment program designed to help employers and employees avoid layoffs when there is a temporary reduction in the normal level of business activity that is beyond the control of the employer.

The employer and the employees (and the union, if applicable) must agree to participate in a Work-Sharing agreement and must apply together. Service Canada has announced that applications will be significantly streamlined. Employers facing a longer-term (beyond a year) recovery should consider applying for the Work Share Program. For latest news: <https://www.canada.ca/en/employment-social-development/corporate/notices/coronavirus.html#h4.07>

Employers should consider the longer-term implications of the COVID-19 virus and continued requirements for social distancing on the workplace. Employers may want to proactively apply for the Work Share program as a means of having fewer people in the workplace, yet continuing operations into the next year and a half.

### **11. What other relief is available to me as an employer due to COVID-19?**

The WSIB has initiated a plan to help businesses by deferring premium reporting and payments until August 31<sup>st</sup>, 2020. All businesses that have active accounts are automatically eligible, including Schedule 1 and Schedule 2 employers; there is no application required. No interest or penalties will be charged during this deferral period. For more information visit the WSIB website:

<https://www.wsib.ca/en/financialrelief>

### **12. Can you tell an employee not to come to work without evidence that they are a risk to the organization?**

Yes, you can send an employee home if you believe an employee's presence at work poses a risk to the health and safety of others. Depending on the circumstances, you may be obligated to pay the employee for their time away from work. If you offer paid sick time, apply any available paid sick time to this type of absence.

### **13. Can an employee opt not to come to work due to COVID-19?**

Employers should be respectful of an employee's request for time off and to understand their reasons for the request. Reasonable requests should be considered. Also refer to the guidelines for an

unpaid Job Protected Leave under the *Employment Standards Act* in 16. If an employee exercises their right to leave under the ESA, employers must allow them the leave and return them to work. If an employee has been advised by Public Health to self-isolate or quarantine themselves, they are legally obligated to follow these orders. Employers may not ask for a doctor note for absences related to COVID-19.

**14. Do I have to give employees time off to care for family members who are sick with COVID-19?**

Yes, upcoming changes to the Employment Standards Act will protect the jobs of employees who must take time off work due to COVID-19, including caring for family members due to illness and school closures. Again, please refer the number 16. below.

**15. Do I have to pay an employee who is absent due to COVID-19 (sick or quarantined?)**

Employers are not obligated to pay employees who are absent due to COVID-19; however, does your business offer: paid sick or personal time off work or short-term disability benefits? If so, your policy may enable employees to use paid time off. Check with your short-term disability provider to better understand how employees may qualify for benefits due to absence related to COVID-19.

**16. What can I ask an employee around their absence due to COVID-19?**

The Human Rights Code prohibits Employers from discriminating against employees on the basis of a disability or family status (including pregnancy). Employers need to ask questions to better understand how the employee's ability to work their usual job and hours of work are affected; but we discourage any discussion of the employee's diagnosis or exact nature of illness. Also, employers may not ask for evidence from employees who notify them of a leave due to COVID-19, see 16. below.

**17. Can I terminate an employee who is asking for time off due to COVID-19?**

No, employers cannot terminate employees who miss work due to COVID-19. The Province of Ontario has announced (March 16<sup>th</sup>) that they will make amendments to the Employment Standards Act providing Job Protection for Employees who must miss work due to COVID-19 either due to being ill, required to self-isolate or stay home to watch their children as a result of school closures. Employers risk having employees reinstated if they terminate an employee who misses time off due to COVID-19.

**18. Do I have to return an employee to work who has taken a leave of absence due to COVID-19?**

On March 19, the Ontario Employment Standards Act changes for job protected leave received Royal Assent. The *Employment Standards Act* will be changed (retroactive to January 2020) to include a Job-Protected Leave of Absence related to COVID-19; we advise all Employers to treat returning employees similar to that of maternity leaves; where the employee is entitled to return to the same/similar job/pay and seniority and benefits entitlements continue to accrue during the leave.

Employees must notify their employer as soon as possible if they need to take this leave. No evidence is required at this time.

This unpaid leave is for employees who are not able to work because they are:

- a) Being treated or tested for COVID-19
- b) Following an order from public health
- c) Following an order under the Health Protection and Promotion Act
- d) In isolation or quarantine
- e) Directed not to work by their employer
- f) Caring for a person due to COVID19, including school or day care closure

**19. Can I treat certain employees differently due to COVID-19?**

The Ontario Human Rights Code prohibits discrimination against employees for several grounds, including disability, family status, race, colour, creed, religion and so on. Employers should be careful to ensure treatment of employees is not punitive due to the COVID-19 virus. Employers should ensure all employees are treated with respect and dignity.

Visit this link for the OHRC's latest statement:

[http://ohrc.on.ca/en/news\\_centre/ohrc-policy-statement-covid-19-pandemic](http://ohrc.on.ca/en/news_centre/ohrc-policy-statement-covid-19-pandemic)

**20. What obligations do I have around protecting my employees from COVID-19?**

The Occupational Health and Safety Act governs most employers in Ontario and does require employers to put measures in place to protect the health and safety of their employees. This may include Personal Protective Equipment and policies and procedures to prevent the spread of COVID-19.

**21. What are the Policies I should review, update and communicate with my staff?**

- a. Sick Leave/Paid Time Off (identifies paid and/or unpaid absence from work due to illness)
- b. Return to Work (helps you return employees in a healthy and safe manner)
- c. Work Refusals (Right to refuse unsafe work under the Occupational Health and Safety Act)
- d. Travel for Work (Provide guidelines to ensure safe travel for work)
- e. Work from Home (Ability for your employees to work from home as appropriate)
- f. Layoffs/Reduction of Business (What to do if you experience a slowdown in business)
- g. Accommodation
- h. Bereavement
- i. Personal Protective Equipment
- j. Hygiene Procedure
- k. Evacuation Plan
- l. Employee Assistance Programs as an additional resource for employees

**22. Should I have new employees starting during the COVID-19 declared Emergency?**

Employers and candidates should consider the following factors/risks in determining an appropriate start date:

1. Seek agreement with the candidate regarding a delayed or unspecified start date.
2. Set a date to follow up (March 31) and keep communication open.
3. Allow them to give working notice of resignation to their current employer once you have established a start date.
4. Consider that the impact of COVID-19 could continue for months
5. Consider the risk of losing the candidate requiring recruitment efforts to begin again
6. Be clear about expectations if the candidate gets sick/quarantined once they have given notice to their current employer.
7. Keep an eye on continuing new developments

### 23. How do I complete ROE's for employees on leave/layoff?

Please visit the following link for full instruction on completing a Record of Employment (ROE).

<https://www.canada.ca/en/employment-social-development/programs/ei/ei-list/reports/roe-guide.html>

### 24. What if one of my employees refuses to work because of COVID-19?

Workers do have the legal right to refuse work that they genuinely believe poses a threat to their health and safety. This right includes the condition of the workplace, equipment, violence, or contravention of the act that poses serious and imminent danger. (note there are limited rights to refuse for essential service workers and some industry sectors such as law enforcement, health care, first responders, and education).

If a worker refuses unsafe work, the employer must follow the procedure as described in the Occupational Health and Safety Act: <https://www.ontario.ca/document/guide-occupational-health-and-safety-act/part-v-right-refuse-or-stop-work-where-health-and-safety-danger>

The approach to the investigation of the refusal may need to be modified due to current situations of social distancing and isolation. Your worker health and safety representatives may not be available, the Ministry of Labour officials may not be attending workplaces in person, etc.

Ideally, in this case, the investigation will include reliable scientific information about COVID-19, and the risk of exposure to the worker. A risk assessment should be completed that includes the probability of exposure including the frequency, and any controls you have in place for prevention.

Consider the following factors (this list is not exhaustive):

- Does the worker, or a family member, have a compromised immune system or underlying health condition that could make exposure have more serious consequences?
- Is the worker's age a factor? Are they part of a more vulnerable demographic?
- Is it essential for the worker to have face to face contact with the public?
- Can you reasonably suspend some operations?
- Can you provide adequate PPE?
  - This may or may not be a viable solution based on the recommendations of health officials and infection prevention protocols



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P.O. Box 127, 145 Main Street East  
Listowel, ON N4W 3H2  
Tel: (519) 291-3040 Fax: (519) 291-1850  
Email: [info@w-u.on.ca](mailto:info@w-u.on.ca)  
[wardanduptigrove.com](http://wardanduptigrove.com)

- Is there another worker that can perform those duties?
- Can the worker maintain at least 6 feet of distance from customers?
- Can you control the condition of the workplace / location?
- Do you know the health status of the people the worker will interact with?
  - Is it possible to pre-screen these people in a respectful and appropriate manner?

Note that you may not be aware of the underlying health issues of employees, and do not have the right to inquire about their diagnosis. However, in these exceptional situations it is wise to communicate with employees and encourage them to share this information with you, confidentially, so that you can implement protective measures for their safety.

You will have to assess the risk in the framework of the situation as they evolve in real time, as things are changing rapidly. Workers may be at risk in their personal lives as well such as when grocery shopping; however, as the employer you have a duty to mitigate the risk in the workplace. The worker also has a duty in this case, to social distance as much as possible.

The question is if you can provide sufficient measures to reduce the risk of exposure to as low as reasonably possible and if the work is essential. Remember that risk is subjective, and each person has their own risk tolerance. Employers need to be objective and reasonable when assessing the risk, respect employee concerns, and communicate clearly to employees to explain the measures being taken and how the risk is being reduced.

This is likely to be a recurring issue as we work through the implications of this virus and the messages from health officials and government agencies. There is no “one size fits all” answer. Each case will need to be assessed on its own merit and circumstances. And creative solutions may be required to mitigate the risk and ease the concerns of all parties.

If the worker will be exposed to a person that:

- Has tested positive for COVID-19;
- Is in mandatory quarantine or self-isolation because of:
  - Travel,
  - Contact with a person who as traveled,
  - By order of public health or other government/health officials,
  - Or showing symptoms;

then the right to refuse MAY be substantiated – depending on the job duties of the worker.