

## **WORK REDUCTION OPTIONS AND CONSIDERATIONS (DUE TO COVID-19)**

### **1. Can an employer temporarily lay off an employee for lack of work due to COVID -19?**

Yes, but there is a risk of a constructive dismissal claim (meaning you actually terminated employment and are liable for termination and severance pay) if:

- the right to lay off is not a usual practice in your workplace, or
- the right to lay off is not specified in the employee's employment contract

We honestly don't know how courts are going to deal with constructive dismissal claims in these circumstances. Due to the global nature of this uncontrolled and unique circumstance, it is likely that claim volumes will be low and courts may give more leniency to employers than normal.

The risk of a constructive dismissal claim is lower if the employee on lay off is paid full salary or the employer enters in to an EI benefit top up plan. (SUB Plan). Both of which are discussed below.

I anticipate that in many cases, primary health care employers will work with their employees and come to a mutual agreement on lay-offs or reduced hours. Some employees may want to stay at home, especially for childcare reasons due to school closures. Any mutual agreements or employee requests to stay off work, should be confirmed in writing. I suggest a confirming email to the employee.

Employers who are concerned about possible constructive dismissal claims, should obtain legal advice before proceeding. Unionized Employers should seek legal advice from their labour lawyers.

### **2. What payment options do employers have if they are considering lay-offs**

There is no one option or set of options for every employer. The option(s) you choose will depend on various factors such as:

- the number of layoffs you are contemplating
- how many employees want to remain off work for other reasons
- how many employees can work from home
- your funding model

- and countless other considerations that you will keep surprising me with (as much as I try, I can't predict all the scenarios that present themselves)

Here are some options for you to consider.

A. KEEP EMPLOYEES WORKING

This is the most obvious answer. Take advantage of any slowdowns to get work done; work that you could never get to before. One Family Health Team client is using the downtime by having staff contact all their elderly patients to advise them of self-isolation protocol and to ask if they have any needs or questions. Rock stars!

B. PAID SICK DAYS AND LIEU TIME

Require employees to use up sick days or accrued lieu time before laying them off. You can also mandate the use of vacation time, but this might not be a very popular idea. People are likely to need a vacation once things return to normal (and they will return to normal).

C. PAY EMPLOYEES FULL WAGES DURING THE LAYOFF

- For some employers, this is simply not feasible and their employees will have to apply for Employment Insurance benefits ("EI" benefits) (see the discussion below).
- Employers who are solely Ministry funded should seriously consider this option, at least for the next 3 weeks. That would alleviate the pressure on the Federal employment insurance system. This position can be re-evaluated at the end of the 3 week period. Note; this 3 week period is arbitrary; based on speculation as to when we might be able to accurately project where we stand with COVID-19.
- Employers with mixed funding (Ministry and non-Ministry funding) may need to seek legal advice. Employers may create a serious morale issue if some, but not all employees, are fully paid during a lay-off.

D. REDUCE EMPLOYEES' WAGES

Employers could keep all employees working and reduce their wages by a percentage across the board.

The risk is a potential constructive dismissal action once the smoke clears from all this. The risk is lower during this period. but not all together eliminated.

Note, generally courts have stated that reductions between 10 and 15% do not constitute constructive dismissal.

E. EI BENEFITS ONLY

Do not pay employees on lay off. Instead, require the employee to apply for EI benefits.

Employees can apply for regular Employment Insurance Benefits or apply for the new Canada Emergency Response Benefit ("CERB"). Please see <https://www.canada.ca/en/department-finance/economic-response-plan/covid19-individuals.html> for more information. [CUPE National has also published a good source of information CERB.](#)

If eligible, employees will receive 55% of their weekly wage, up to \$573 per week.

F. EMPLOYER PAID TOP UP TO EI BENEFITS - SUPPLEMENTARY UNEMPLOYMENT BENEFIT PLAN (SUB PLAN)

Employees claim EI benefits **AND** the employer pays a top up to the employee.

- The amount of the top up plus the EI benefit cannot exceed 95% of the employee's regularly weekly earnings
- The top up must be paid periodically (weekly or bi-weekly) and not in a lump sum.
- Payments must be reported by employer and by employer
- A SUB Plan must be registered with Service Canada. This is a simple process. It will take less than 30 minutes of your time. I have set out the procedure below and attached the forms you will need to file.
- There is no waiting period, once you register (email or fax in the forms) and the employee begins to receive the EI benefit, you can begin to pay the top up. Service Canada acknowledged that many employers pay the top up to the employee before benefits are received. There is no penalty to employers for doing this, according to Service Canada. However, you may have to wait to be certain of the amount of the EI benefit, as this will affect the calculation of the employer top up.

The following is an example of how the top up payment.

Example 1:

- Employee's normal weekly earnings before lay off: \$1200
- 95% of normal weekly earnings: \$1,140 (95% of \$1000)
- EI benefit: \$573 (maximum EI payment)
- Maximum sub payment employer can make is \$567 (\$1,140 - \$573)
- Total for week = \$567 (employer top up) + \$573 (EI) = **\$1140**

**NOTES:**

1. The employer does not have to pay the maximum amount (95% of weekly earnings). It can pay any amount, provided the amount does not exceed 95% of regular earnings.
2. There is a slightly different calculation if the employee is working elsewhere. Check out the [Service Canada Page](#) for the calculation of the Top Up if the employee has EI benefits and alternate employment income.
3. The employee will have a one week waiting period before getting EI benefits (unless, the employee is claiming benefits for illness or quarantine). Employers can choose whether to pay any amount to the employee, up to 95%, during this one week waiting period.

**The Process for registering a SUB Plan**

- As far as government programs go, this does appear to be a simple process (at least according to the SUB Plan Representative I spoke to, to obtain this information.
- Employers must submit two (2) documents to Service Canada. If you are unionized, you must also attach a copy of your collective agreement.
- The first document is the SUB PLAN.
  - It is attached as Attachment 1
  - Simply cut and paste to organization letter head and sign the letter at the bottom
  - Please note that my comments on the SUB Plan are set out **in red italicized font**. Please delete my comments before finalizing the letter.

- The second document is Form SC-NAS5036.
  - It is attached as Attachment 2
  - It is a simple form to complete This is basically asking for organization contact information and your business number.
  - Question 7 asks if your SUB plan is contained in an insurance policy. This relates **only** to short term disability policies (and not to long term disability or other policies).
  - If you do not have a short term disability policy, answer “no” in question 7. If you do have a short term disability policy, state yes in question 7 and attach two pages from the policy.
    - The page with the name of your organization and the policy number
    - The page with a summary of the short term disability benefits
- Send the signed Sub Plan (on your letter head) and the completed Form SC-NAS5036 to Service Canada by:
  - Email at [sub-psc@servicecanada.gc.ca](mailto:sub-psc@servicecanada.gc.ca)
  - Fax at 506-548-7473
- You do NOT have to mail the originals.

For information on the SUB plan, please visit [Service Canada](#). Or you can contact the SUB Plan department at 1-800-561-7923. Please note, they open at 7 am and it was easy to reach a representative at that time in the morning. If you call later, you will encounter longer wait times.

#### G. [FEDERAL WORKSHARE PROGRAM](#).

This government plan is designed to allow:

- a. an employer to reduce the hours of work for a group of employees' hours of work, so that they are sharing the work, **AND**
- b. the employee can collect EI benefits for the lost hours and collect pay for the reduced hours of work

For example, instead of laying off 2 medical receptionists and keeping 1; you retain all 3 medical receptionists but reduce their hours equally. The 3 medical receptionists get paid for the hours they work and they can collect EI for the lost hours of work (55% of the lost earnings or the new CERB benefit coming out next week).

The EI benefits are **not** reduced by the earnings received from the employer.

There are many eligibility requirements but generally:

- a. The work share must be between a group of workers, who perform similar duties. This is called a Work- Share unit (“WS Unit”)
- b. All the workers in the WS Unit must agree to the Work-Share Agreement.
- c. The reduction in hours for each employee must be between 10% (one half day) to a maximum of 60%.
- d. Each worker in the WS unit must reduce their hours by the same percentage.
- e. The WS agreement has to be signed by all the employees and the employer
- f. The WS agreement must be at least 6 weeks long. It can last up to 38 weeks, with possibility for extension to another 38 weeks (total 78 weeks).

To apply, you have to submit:

1. [Application](#)
2. [The attachment to the application](#)
3. A recovery plan, which must demonstrate that the employer will implement activities during the period of the Work-Sharing agreement to alleviate the work shortage in order to return the Work-Sharing unit(s) to normal working hours by the end of the agreement.

The following information regarding the application/approval process was obtained from the Work-Sharing Program Rapid Response Team.

- Applications do not need to be submitted 30 days in advance.
- The Work-Share cannot commence until the application is approved.
- The Department will attempt to render a decision on the application collected within 10 days of receipt of application.
- Once a Work-Sharing agreement is approved, employee and employer representatives are provided with an EI Reference Code, which employees then use to apply for benefits.
- There is no one week waiting period for Work-Share benefits. But it will take a few weeks for the first benefits to arrive.
- Every two weeks, the employer must verify each claimant's EI report card after it has been filled out.
- This EI report card is used to determine the claimant's bi-weekly entitlement to Work-Share benefits.

You can find more information by clicking on the [Government Website](#).

#### **DISCLAIMER**

The information in this blog is NOT legal advice. Specifically, the information regarding the EI SUB Plan and Work Share Program was obtained from Service Canada Websites and speaking with a SUB Plan representative. I do not profess to be an expert in layoffs or EI matters as this is such an uncommon occurrence with my healthcare employers. My goal here is to provide you with some information about the options and processes involved and to reduce the amount of work you need to do to review your options and apply (if you choose) for the SUB Plan or Work Share Program. But the rules and requirements of Service Canada will govern any application to the SUB Plan or Work Share Program.

Kind Regards

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