

**INFECTIOUS DISEASE EMERGENCY LEAVE  
AND OTHER JOB PROTECTED LEAVES OF ABSENCE UNDER THE  
ONTARIO *EMPLOYMENT STANDARDS ACT, 2000*  
WHAT YOU MUST KNOW**

This communique provides you with:

1. An easy reference Summary for all current leaves of absence under the Ontario *Employment Standards Act* (the “**ESA**”).
2. An overview of the new Infectious Disease Emergency Leave (which covers COVID-19) under the ESA.
3. A discussion about exemptions (or not) from ESA leaves of absence for healthcare workers.
4. Options for employers to respond to questionable requests for Infection Disease Emergency Leave.
5. A recommendation not to provide paid leave or EI benefit top up during an Infectious Disease Emergency Leave.

**1. Summary of the current ESA Leaves of absence**

A summary of the ESA leaves is attached to the cover email for your ease of reference.

Employees who are eligible for the ESA leaves of absence, can decide to stay home and their job will be protected. Employees cannot be terminated, disciplined or otherwise disadvantaged because they exercised their right to take any one, or more, of the ESA leaves of absence.

A termination or layoff because someone has taken one of these leaves of absence is a violation of the ESA. The employee can be reinstated with backpay.

All ESA leaves are unpaid (except for 5 days of paid leave for Domestic and Sexual Violence Leave)

## 2. [Infectious Disease Emergency Leave](#)

On March 19, 2020, the Ontario Government introduced this new leave to respond to COVID-19. It also applies to SARS and MERS. I will only reference COVID-19 in this communique.

The Infectious Disease Emergency Leave gives all employees the right to take job-protected leave if the employee:

- Is in isolation/quarantine or receiving treatment for COVID-19
- needs to stay home to take care of children because of daycare or school closures due to COVID-19
- needs to provide support for family members because of any matter related to COVID-19. The list of family members is set out in this [link](#).

The provisions also allow an employer to order an employee to stay home if there is a concern about the spread of COVID-19.

The full list of circumstances that give an employee a right to take this leave can be reviewed in the attached Summary or at this [link](#).

Employees are not required to provide a medical note if they need to take the leave.

However, the employer may require the employee to provide other evidence that is reasonable in the circumstances, at a time that is reasonable in the circumstances. This could include such requests as a note from the daycare or for evidence that the airline cancelled a flight, but not a medical note.

This leave is unpaid. Employee who are on leave for isolation or illness, can apply for [Employment Insurance Sick Benefits](#). The Government has also introduced the [Emergency Care and Emergency Support](#) benefits of \$900 bi-weekly for up to 15 weeks, for employees who are sick, quarantined, forced to stay home to care for children or who are taking care of a family member due to COVID-19.

These measures are retroactive to January 25, 2020 and will remain in place until COVID-19 is defeated.

Further details of the Infectious Disease Emergency Leave are set out in the attached Summary.

## 3. **Exemptions (or not) from leave of absences provisions for healthcare workers**

All employees working for healthcare employers (admin and clerical staff) are entitled to the ESA leaves (including the new Infectious Disease Emergency Leave).

The only exemption or special rule from the ESA leave of absence provisions that exists is for registered health professionals (clerical, not admin staff), and it relates only to:

- a. Sick leave (3 day leave for personal illness)
- b. Family Responsibility Leave (3 day leave for family illness)
- c. Bereavement leave (2 day leave for death of family member)

Specifically, the exemption provides that regulated health professionals (as set out in Schedule 1 of the *Regulated Health Professions Act, 1991*), **cannot** exercise these three leaves (sick, family responsibility and bereavement leave) **if taking the leave would constitute an act of professional misconduct or a dereliction of professional duty.**

There is no current regulated health professional exemption for the Infectious Disease Emergency Leave or the other ESA leaves of absence, at this time.

However, the government has the power to exempt or apply special rules to any class of workers, including healthcare workers under the Infectious Disease Emergency Leave provisions. As such, the rules may change for healthcare workers if we are unable to flatten the curve and the healthcare system gets overwhelmed with COVID-19 cases.

#### **4. Options for employers to respond to questionable requests for Infection Disease Emergency Leave**

The Infectious Disease Emergency Leave can be interpreted broadly in favour of employees.

One of the qualifying criteria for the leave is summarized as follows:

*“The employee is providing care or support to a family member because of a matter related to COVID-19 that concerns that family member, including, but not limited to, school or day care closures.”*

This is not necessarily restricted to caring for relatives who have COVID-19 or to caring for children home due to school closures. This provision may give rise to some very creative reasons advanced by employees who want to stay home during this crisis.

Employers may have legitimate concerns about certain leave requests and want to deny the leave. This raises serious legal issues as the leave is a legislated mandatory right for employees. But at the same time, employees are only entitled to the leave if they meet the criteria.

Each case must be determined on its own facts and I recommend you obtain legal advice for options if you are considering refusing the leave or requesting evidence to support the request for leave.

But generally, your options in response to a questionable request might include the following:

- a. Allow the leave but perhaps with a caution that the leave may not qualify as an Infectious Disease Emergency Leave and the employee might be recalled in the future. Unpaid leave is recommended. This is a particularly attractive option if you don't need the person in the workplace at this time, due to shortage of work
- b. Work with the employee to try to assuage concerns and obtain his/her agreement to continue working. Perhaps remind health professionals of their responsibility regarding refusing work assignments. Various colleges have practice guides regarding professional responsibilities and work

- c. refusals. This is a link to the Ontario College of Nurses Practice [Guideline on Refusing Services and Discontinuing Practice](#). See especially, Scenario 3 on page 11.
- d. If the leave request clearly does not meet the eligibility requirements, advise the employee the leave is refused and why. Also advise the employee that if they fail to show up for work, they will be deemed to have abandoned their job. You can terminate now or wait until this crisis has been resolved. You may also decide to discipline, instead of termination. This is a significant decision and should not be taken without legal advice.

**5. Recommendation that Infectious Disease Emergency Leave be unpaid**

Employers (especially those that are publicly funded) may contemplate providing employees taking Infectious Disease Emergency Leave with paid leave or an EI top up.

I appreciate the goodwill behind this, but employers may face many requests for this leave. This could leave employers with a workforce shortage, especially if demand for services increases in the next weeks/months. As such, employers may need to reserve cash flow to hire other temporary workers or to provide bonuses/overtime to current workers who remain on the job.

As such, I recommend employers do NOT provide paid leave or top up EI benefit during the Infectious Disease Emergency leave.

Kind Regards

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