

COVID - Ontario - Employment Law Flowchart

Are you an "employee"?



Reason the Employee is Not Working

Employer Ordered Closed

COVID ESA Leave
FERB, if eligible

Employer Orders Employee to Stay Home

COVID ESA Leave
FERB, if eligible.

Note: If EE is not sick or suspected of being sick, this could amount to a constructive dismissal (a termination) if the employee elects to treat it as such. The EE would have to quit and sue for damages, forfeiting right to be recalled. Risky.

This could also be a human rights code violation if decision based on belief EE has COVID & COVID is a "disability"

Or if employee hopes to be recalled, they can treat this as a temporary layoff. EE would be entitled to termination pay under common law and Employment Standards Act if not recalled after COVID emergency ends.

Terminated or Laid-off Due to Loss of Business

This would be an "essential" business that wasn't ORDERED to close (say a restaurant, retail store, nail salon).

EES who "qualify" are covered by COVID ESA Leave. Generally, think this way: if there had been work available, but the EE couldn't have worked because of COVID related reasons, they *probably* qualify (see Box below). [Creates odd scenarios. E.g. laid-off EE with school aged children covered by COVID ESA LEAVE, but not EE without such children]

BUT, if the EE is laid off due to lack of work, and WOULD have been able to work otherwise, THEN they are probably not covered by COVID ESA Leave. In that case, the EE is either on temporary lay off or terminated. This raises various issues about whether EE is entitled to notice/severance pay, and if so, whether this constructive dismissal (stuff I talked about in this post). They may have a right to be recalled if their job is still there when/if business picks up.

In any event, laid-off/terminated EE can apply for FERB and/or EI benefits in short term.

Employee can't work because they have virus or might have COVID

COVID ESA LEAVE (*but may have to show 'evidence' at a reasonable time that is not a physician's note. I don't know what that evidence would be.*)

May qualify for regular sick leave under ESA (only 3 days, again unpaid since Tories cut the paid sick benefits) (s. 50, ESA)

[May be protected by Human Rights Code if Employer terminates.](#)

May qualify for workers' compensation benefits if contracted the virus at work (it's an argument)

May qualify for EI sickness benefits, or FERB, if no other income replacement applies.

Employee Can't Work Because Caring for Sick Family or Watching Children During School Closures

COVID ESA Leave
FERB, if eligible.

[New Federal Emergency Response Benefit \(FERB\)](#)

Available if you earned at least \$5000 in prior 12 months, AND earn **NO income** for at least **14 consecutive day** during month for which you've applied AND **reason you didn't work was related to COVID19.** (see [s. 6 of Bill C-13](#))

Applies to employees and contractors.

Payment is \$2000 per month up to 4 months between March 15 and Oct. 3, 2020.

Employee was unemployed before COVID

If employee was already receiving EI, they continue to receive it as long as they qualify.

If employee isn't eligible for EI, they're screwed. Don't qualify for FERB, and job market just got far worse.

“COVID ESA UNPAID LEAVE” (s. 50.1, Amended ESA)

- Retroactive to January 25.
- Creates a protective bubble (can't be fired, can be ordered reinstated) around EE's who qualify
- Who qualifies:
 - Plain language: EE who can't work for listed reasons related to COVID ([read the news, 50.1 \(1.1\) in Bill 186 for full list](#))
 - Includes situations in which Employer is ordered to close by government, employer tells EE to stay home because of COVID risks, need for EE to stay home to care for family members, including kids whose school has closed, order by official for EE to stay home (this is ambiguous, because isn't clear if this would cover health official saying “people should stay home” for example (which they pretty much have said. But it includes order from Telehealth, so might be a good idea to call Telehealth, say you have a dry cough and headache, and have them say “stay home”).
- Leave last until government says emergency is over.

Other Random Thoughts

- **All the comments above are subject to any contract terms about sick leave, including short-term disability benefits found in employment contracts or collective agreements.**
- **There are other statutes (human rights, occupational health and safety) and common law doctrines for non-union employees (implied term preventing employers from ordering employees to break laws or engage in unsafe work, frustration, etc) that could enter the equation as well. This flowchart primarily only with ESA and federal emergency funding and EI issues.**
- The COVID legal model sits uncomfortably with the normal rules of employment law. Basically, the amendments to the ESA extend the protective bubble of legislated “sick leave” to other scenarios in which a person is not sick but unable to work due to COVID related reasons.
- BUT it is not always clear whether that bubble applies. For example, take an employee who feels feverish and doesn't want to come to work, or who is worried that the person who works beside her is sick. If she doesn't go to work, is she covered by the Emergency Leave provisions? The answer should be much clearer than it is for both employees and employers.
- Because only people who qualify for the Emergency Leave are protected by it, some weird outcomes will result whereby one employee is protected from termination and another isn't for somewhat random reasons. For example, an employee who has a relative who needs care because they might have COVID or who has school age children who need care is protected by the leave, but another employee who doesn't have these care requirement is not. Therefore, the law incentives employers to fire people based on family status, which is odd and possibly a Charter violation (but that's a whole other matter).
- Workers who are laid off or terminated and who don't qualify for the Emergency ESA COVID Leave are in the same boat as they were as if COVID did not exist. That is, they can be terminated or temporarily laid off, the only question being whether the law entitles them to notice (and possibly severance pay if they've been employed by 5 years or more by a large employer or there's been a mass termination). This is where difficult questions arise, about “frustration of contract” and when a temporary layoff becomes a termination, for example.