

Coronavirus – Employer Legal Considerations

During this time of uncertainty, while you are focused on the wellbeing of your staff and clients, you also may have questions about your obligations and options as the results of the coronavirus pandemic impact your business.

We are proud to have NV Chamber member, [Yeager Employment Law](#), share the following information they prepared regarding employer duties, rights, and options for dealing with the workplace effects of widespread infectious disease. The following information is a general overview of the relevant legal considerations, and is not intended to be used as legal advice in a specific employment situation. You should review the information below and, if you need legal advice, contact an employment lawyer.

1. Your Obligations

Duty to provide a safe workplace

Under the *BC Workers' Compensation Act* and *Occupational Health and Safety Regulation*, every employer is required to provide a safe workplace. This means taking sensible steps to prevent the spread of infection in the workplace. Likewise, employees are entitled to refuse unsafe work, without recrimination from their employer for doing so.

The BC Centre for Disease Control recommends the following measures:

- Practice “hand hygiene” by frequently washing hands with soap and warm water for 20 seconds, and avoiding touching your mouth, nose, or eyes;
- Practice “respiratory etiquette” by coughing or sneezing into your elbow or a tissue (and then washing hands after discarding the tissue);
- Practice “social distancing” by maintaining physical distance from others, and by staying at home if experiencing any symptoms of illness at all – not just those associated with COVID-19.

Employers should implement policies promoting these behaviours. Employers should also ensure employees have access to the tools they need to put these steps into practice, such as hand washing stations, disinfecting wipes and sprays, tissues, proper garbage disposals, and hand sanitizer.

In order to provide a safe workplace, employers will need to consider excluding sick employees from the workplace. This is discussed below.

Duty to accommodate

Under the *BC Human Rights Code*, employers have a duty to accommodate their employees’ protected characteristics, as well as a duty not to discriminate against their employees.

Duty to accommodate: an employee who contracts COVID-19 may fit the definition of “physical disability” found in the *Human Rights Code*. While it is not discriminatory to prevent such an employee from

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attending at the workplace, it would be discriminatory to take permanent steps like dismissing them, or cutting their pay or changing their job upon their return to work.

Duty not to discriminate: The coronavirus is associated with parts of the world where it has become prevalent. Currently these places include China, South Korea, Japan, Iran, and Italy. Employers must be sure not to adopt policies that single out employees because of their race, place or origin, or ethnicity.

Duty to provide statutory leaves

Under the BC *Employment Standards Act*, employees are entitled to take certain unpaid leaves of absence. The employer is not required to pay the employee for taking these leaves, unless the employment contract expressly gives the employee such a right (our contracts typically do not do this unless you have specifically instructed us to include it).

The employer must allow the employee to take the following sorts of unpaid leave, if requested (in some cases a medical certificate is required):

- Up to five days of “family responsibility leave” to care for the health of a child or other member of the employee’s immediate family;
- Up to 27 weeks of “compassionate care leave” to care for family members who suffer from a serious medical condition with a significant risk of death within 26 weeks (likely related to elderly family members or those with chronic respiratory conditions);
- Up to 36 weeks of “critical illness or injury leave” to care for a minor family member (under 19 years) who fits certain medical criteria, or up to 16 weeks for a family member over 19;
- Certain kinds of bereavement leave in the event of the death of a family member;

UPDATED (March 24): Employees are now entitled to take unpaid leave resulting from Covid-19 related absence. This leave is available to employees for so long as the employee:

- is sick with Covid-19,
- may have been exposed to it,
- must self-isolate in compliance with public health recommendations,
- must stay home to care for a dependent family member who is impacted by Covid-19, or
- has been excluded from the workplace because of the employer’s concern that they have been exposed to Covid-19.

Covid-19-related leave is available at the initiative of the employee. The wording of the updated legislation is not yet posted on the BC Laws website but we have reproduced it here: <https://employright.ca/covid-19-related-leave/>.

Aside from these new provisions, other medical leaves are not protected under the *Employment Standards Act*, but it is usually protected by the *Human Rights Code*. There is no expiry date for medical leave, so long as it is supported by the employee’s treating physicians. If an employee sends a doctor’s note indicating they are disabled from working by any contagious illness, first, encourage them to stay away from the workplace as long as they need to recover, and second, allow them to take the time they need and then return one cleared to do so by their doctor. For all other purposes, you should treat an employee on medical leave just the same as an employee on any of the leaves protected under the *Act*.

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Terminating an employee for taking medical leave, or refusing to allow an employee to take a legitimate medical leave, could also lead to a claim of wrongful or constructive dismissal and could be in violation of the *Workers' Compensation Act*.

Duty to provide work

Employees are entitled to do their jobs and get paid. This is a common law entitlement that can be limited by express contractual wording. Without contractual wording that allows you to keep an employee out of the workplace without pay, any exclusion from the workplace (and any cut in pay) may be a termination. For this reason, you must act cautiously to avoid accidentally dismissing your employees by forcing them to stay home from work. The conflict here is that your obligation to provide a safe workplace involves encouraging employees to stay home if they have any symptoms of illness, while your duty to provide work and pay means this course of conduct may incur severance liability for your company. The easiest solution is to temporarily lay off the employee, if the contract allows.

Do I have a duty to pay employees while they're not at work?

Subject to express contractual wording, you are not required to pay the employee while they are on leave due to illness or as permitted under the *Employment Standards Act* (i.e. absences initiated by the employee). Whether you can initiate the exclusion of the employee from the workplace, and from their pay, is a different question. At common law, any interruption to the employee's pay could be treated as a termination necessitating severance pay.

In other words, your employment contract is very important here. If you do not have an employment contract that permits you to interrupt the employee's work and pay, please speak with us about implementing one as soon as possible.

2. Your Rights

Right to layoff

If your employment contract allows you to lay off your employees, then you may do so in accordance with the *Act*. Some employers anticipate shutting down their whole business and laying off all of their employees, others expect to lay off only some employees but to keep operations running at a reduced level. *If you have reserved the contractual right to lay off your employees*, you may do so for up to 13 weeks (in a 20-week period) without having to pay severance. The proper procedure is to issue a Record of Employment indicating the first day of layoff and expected date of recall (no more than 13 weeks in the future). The federal government has indicated it will waive the one-week qualifying period for employees with COVID-19 related illnesses to access medical EI benefits. To help your employees access EI benefits as quickly as possible, you may wish to indicate in the Record of Employment that the layoff is related to a reduction in business resulting from COVID-19. The guidelines for employee eligibility for EI are found here: <https://www.canada.ca/en/services/benefits/ei/ei-sickness/qualify.html>.

If there is no contractual right of layoff, any temporary layoff can be treated as a termination at common law. **We strongly recommend you contact us prior to temporarily laying off any employees, to confirm that you are on strong contractual ground to do so.**

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Right to reasonable medical information

Along with your responsibility to provide a safe workplace, you have a *limited* right to obtain medical information concerning your employees. This right is not well defined unless you have a contract with express wording concerning employee medical information. At a minimum, in the case of employees who have been off work due to illness and are attempting to return, you have a right to prevent that employee from returning to work until they provide a doctor's certificate clearing them of contagious illness or other disabilities that could impact their ability to work safely, or the safety of those around them. We recommend you obtain this medical clearance prior to permitting any employee back to work who has been off for more than 5 business days due to illness.

UPDATED: Right to put employee on unpaid Covid-19 leave

On March 23 the legislature passed a temporary amendment to the *Employment Standards Act* creating unpaid leave for employees impacted by Covid-19. This new section does not apply to employees generally in the case of business shutdown, but to individual employees who have been infected with Covid-19, may have been infected, are required to self-isolate, or who need to stay home to care for minors whose school or daycare has been closed due to Covid-19. Importantly, the employer is able to initiate this unpaid leave in the case of employees whom the employer suspects may have been exposed to Covid-19, i.e. may pose a health risk in the workplace. This gives employers a new right to exclude sick employees from the workplace without pay. It is likely this section of the *Act* will be repealed once the Covid-19 situation has passed, so this should be considered a temporary right for the employer.

3. Your Options

Remote work arrangements

If possible, you should consider having employees work from home. Your employees will likely request this accommodation if they have children whose schools are closed. Be proactive now: spend time anticipating how your employees can do their jobs while minimizing the risk of contagion.

If your employees cannot do their jobs from home, implement stricter measures to maintain “social distancing” in the workplace, and plan for how to deal with employees who self-isolate voluntarily.

Excluding affected employees

Some employees should be prevented from attending at work at all. You can minimize financial disruption by:

- Allowing them to work from home if possible;
- Allowing them to access short-term disability benefits, if your company offers these;
- Allowing them to use paid vacation days;
- Allowing them to access pay in lieu time, if your company has a time bank agreement in place;
- Supporting them to access Employment Insurance by promptly providing an accurate Record of Employment and cooperating with correspondence from Service Canada.

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Employees usually do not react well when they are made to stop working (and their pay is stopped accordingly). To assuage their concerns, we recommend adopting the following sort of preface:

“As an employer, we’re responsible to provide a safe workplace for all our employees. We are mindful of the outbreak of coronavirus globally and locally, as well as the directions of the provincial and federal health authorities. In light of the circumstances, we have temporarily adopted a policy concerning employee illnesses ...”

UPDATE: Statutory leave for exposed employees

As discussed above, as of the legislative amendment of March 23, you now have the option to exclude workers who may have been exposed to Covid-19. It is not clear whether this applies to employees who are sick with other illnesses, such as a cold, but given current guidelines encourage anyone with signs of illness to stay home, you may wish to rely on the new Covid-19 Leave to keep any sick employee out of the workplace. This leave is not limited to any number of weeks, but the employee can remain on the leave until the circumstances putting them out of the workplace (illness or suspected exposure) no longer apply.

Temporary layoffs

As discussed above, business exigencies may require you to temporarily lay off some or even all of your employees. While your contract may allow you to do this, we strongly recommend that you contact your lawyer in advance of undertaking any employee layoff. With any layoff there can be a risk of termination, and a severance obligation; in present circumstances, human rights liability is also a risk.

If your employment contracts do not specifically allow you to temporarily lay off your employees, any temporary layoff can be treated as a termination. The layoff provisions of the *Act* do not automatically apply – you must contract for them.

Policies

Now is a good time to implement policies concerning medical absences, mandatory exclusions from the workplace, remote work arrangements, and adjustments for increased childcare obligations. We have a number of template policies that you can implement in your workplace right away. Please contact us to learn more and get these in place.

For more information regarding this important topic, please contact Yeager Employment Law at 604-988-1000 or info@employright.ca.