

We know that your business is dealing with a lot of uncertainty and anxiety right now considering COVID-19, and its effects on your operations and employees. We are hearing from many clients who are anxiously trying to balance the safety and security of their employees with the needs of their business now and into the future.

As you know, things are changing daily, sometimes hourly, and we certainly do not have all of the answers, but we wanted to share the answers to some of our most frequently asked questions, and invite you to contact us to discuss any of these issues further, at any time. In this time of crises, the need for immediate information is paramount, and we will respond to your inquiries as soon as possible.

***Please feel free to reach out with any questions at any time and we will get back to you as soon as we can.***

**Q1: Are we required to pay our employees who are required to self-isolate for whatever reason?  
What about sick days and vacation / holiday days?**

At this time, employers are not required to provide paid sick leave to their employees. The government has extended the period of statutorily protected leaves from 5 to 14 days (ie: employees cannot be terminated) but has not made the necessary changes to the law to obligate employers to pay employees for these leaves.

As you may have heard, the UCP government recently announced that it was extending 14 days of “paid” sick leave to employees in Alberta who are unable to work, or are required to self-isolate, as a result of COVID-19. These changes affect the current statutorily protected sick leave under the *Employment Standards Code*, and in light of the crisis, employees will not need doctor notes, nor will they have had to work for 90 days previously to qualify.

However, there is some uncertainty with respect to the government’s implementation of “paid” leave – most importantly, who is going to pay for it? It appears that the UCP is hinging its declaration of paid sick leaves to a possible future extension of EI benefits by the federal government. The government is currently clarifying some of the ambiguity around this and we are hoping to have more information some time later this week.

We have been advising businesses that, in the long run, it is better for them to keep potentially sick people at home, rather than run the risk of the virus spreading through the workplace and potentially requiring a full scale shut down of operations. As such, for your employees who cannot work remotely, consider using accrued sick days to cover the difference between whatever EI benefits they receive and their regular salary. Some employers have voluntarily chosen to “top up” their employees’ EI sick leave benefits to cover the remaining 45%.

**USE OF VACATION OR HOLIDAY DAYS:** Given the recent amendments to the ESC regarding protected paid sick days, it is currently unclear if an employer will be able to use these days. If an

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employer is requiring employees to stay at home, then it may seem unfair to require the employee to use their vacation days to do so. However, there does not appear to be any impediment to requiring employees to use their accrued vacation currently.

**Q2: Are employees required to work from home if we ask them to?**

Yes, employees who can work from home can be required to do so, save in exceptional circumstances.

Pursuant to the *Occupational Health and Safety Act*, businesses are required to provide a safe and hazard-free workplace to their employees as much as possible. In light of the current concerns regarding COVID-19, businesses have been advised by the government and other agencies to take reasonable steps to encourage self-isolation among their staff, and to implement as many work-at-home scenarios as they can. Unless your employees are actually on medical leaves of absence due to the virus or otherwise, a business is at liberty to require those employees who have chosen or been asked to self-isolate to perform their work duties remotely, if that is possible. An unreasonable refusal or neglect to perform those duties should be dealt with in accordance with your standard disciplinary policies.

**Q3: Our business is struggling, and we need to temporarily lay off some of our employees. The *Employment Standards Code* says that we need to give one- or two-weeks' written notice of a layoff to our employees. Do we need to give that notice in these circumstances?**

Maybe - the one or two weeks lay off notice may be shortened if there are "unforeseeable circumstances", such as the current situation of an international pandemic. If the current situation makes it impossible to provide the required notice period, notice as soon as possible is required.

The *Employment Standards Code* requires any employer who wishes to implement a temporary layoff of its employees (ie. 60 days or less) to provide advance written notice to their employees of either one or two weeks, depending on the employee's length of service. However, there is an exception to this requirement if there are "unforeseeable circumstances" which prevent giving earlier notice, when notice must be given "as soon as practicable". We believe that there would be little dispute that the current health crises constitutes "unforeseeable circumstances" for the purpose of the Code. In this situation, giving notice of the layoffs as soon as practicable would likely be seen to be an acceptable compliance with the Code.

In any event, many businesses are trying to wade through all the uncertainty right now that it is probable that a lot of leeway will be given for this period. In any event, we recommend discussing options with legal counsel as there may be further obligations involved, such as when 50 or more employees are subject to layoff.

However, if your business has any employees who are on self-isolation leave for medical reasons, you may want to consider treating them somewhat more cautiously given that the 14-day sick

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leave period is protected by statute. Pursuant to the *Employment Standards Code*, an employer cannot layoff or terminate someone on a period of statutorily-protected leave. There is a great deal about these situations that we do not really know right now, and everything seems to be changing minute to minute, but we are recommending as a best practice to wait for the 14-day statutory period to elapse prior to giving your employees on self-isolation a layoff notice. Presumably, you will be issuing or have already issued a ROE for those employees, and they would be entitled to have the waiting period waived in those circumstance for the purpose of receiving EI benefits. While we are currently unsure if such a waiver will be implemented for regular layoffs caused by the COVID-19 outbreak, those rules may be changing as well. After the 14-day statutorily protected sick leave period expires, you can issue a standard ROE for the layoff.

**Q4: What employment income replacement benefits are there for employees who cannot come to work because of COVID-19 and cannot work remotely?**

There are programs in place to assist employees who may suffer a loss of income as a result of self-isolation or even business closures, and more programs are sure to appear soon as governments grapple with this crisis.

EI has now changed its rules so that employees are able to access EI sickness benefits without the usual waiting period. However, we believe that these benefits will still only cover the usual 55% of regular wages up to a capped amount. Also, it is unclear if the waiver of the waiting period will extend to people who choose to self-isolate as a result of the illness of someone else in the house, or as a precautionary measure. More information on the program can be found at:

<https://www.canada.ca/en/employment-social-development/corporate/notices/coronavirus.html>

The UCP government has urged the federal government to extend enhanced EI benefits for all employees on self-quarantine, even without a doctor's note. Although changes to the programs and emergency federal funding have been announced to assist employees who have been affected by self-isolation and business closures, we are unaware of any new programs at this time.

In addition, the Alberta government has announced emergency financial assistance to those individuals who qualify – more information on this program can be found at:

<https://www.alberta.ca/emergency-financial-assistance.aspx?fbclid=IwAR0UWILDh6xD6ESbhgG5OVAZiHmaDzugTe7fJ8JGAgVI2LQTr9UqTzvsolQ>

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**Q5: Can we simply terminate employees?**

**Or if we temporarily lay off employees but cannot bring employees back to work after the 60-day temporary layoff because of the economic problems caused by COVID-19, are we still obligated to give them notice or pay in lieu of notice?**

*Please note that the following information relates to non-union employees only – if you have unionized employees in your workplace, please contact us and we will direct you to alternate sources of information.*

If an employee is being terminated or an employer cannot bring an employee back to work at the end of the 60-day layoff period, they must give those employees notice of termination or pay in lieu of notice. To determine this notice period, employer must consider the following.

The *Employment Standards Code* sets out the **absolute minimum** statutory notice periods, and employees are entitled to pay in lieu of notice in accordance with their years of service.

Employers are required to provide additional notice or pay in lieu of notice over and above what is required by the *Employment Standards Code*. This particular notice period is often referred to as “severance”, but it really forms part of an employee’s overall notice entitlement. In order to determine what severance amount over and above the statutory minimums is payable, the law considers two factors.

First, if there is an enforceable employment agreement with a valid termination clause which sets out the amount of notice to be given on termination, that clause will dictate how much notice or pay in lieu needs to be given. Please note that the law has very specific requirements for these clauses to be enforceable, therefore, we strongly recommend that employer review any termination clause with legal counsel prior to relying on same.

Second, if there is no written employment agreement, if that agreement does not expressly address the matter of termination notice, or if the termination clause is not enforceable, the law turns to the common law. The common law is judge-made law which has developed over years of cases with similar circumstances. Where a court has determined that an employee is entitled to reasonable notice of termination, the following factors, among others, are considered in determining what a “reasonable” notice period is for an individual employee:

- The type of position held;
- The length of employment;
- Employee’s age at time of termination;
- Availability of similar employment; and

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- Bars to finding replacement employment such as health issues or the state of the economy.

The potential impact of COVID-19 on the economy and individual searches for employment is still too speculative for us to fully realize the impact that this will have on the court's view of reasonable notice entitlements. However, it is best to be prepared for the worst and presume that the economic impact of COVID-19 may result in a period of economic instability and potentially long searches for new employment.

As such, it is our strong recommendation that if you are considering terminating some or all of your employees without cause during this time, that you have someone review your employment agreements and/or assess potential notice entitlements prior to taking any action.

A final factor to consider is that an employer who chooses to layoff or terminate employees who self-quarantine for any reason is running two additional risks:

1. Terminating an employee who is within a 14-day period of sick leave could potentially be considered a breach of the *Employment Standards Code*, given that the government has extended the period of statutorily protected sick leave, although it is hard to say for sure at this point; and
2. If these leaves are related to an illness, potential illness or family care responsibilities, a layoff or termination could be viewed as a failure to accommodate under the Human Rights Act, potentially leading to a complaint.

Overall, given the current uncertainty surrounding the situation, it is hard to say for certain what the outcome would be if an employer either terminates or lays off their employees, but given the significant challenges posed by this unique situation, we feel that a lot of leeway will be given to those employers who may not manage perfect compliance, but make their best efforts to manage their businesses together with the interests of their employees.

**Recognizing that things are changing rapidly and each business and workforce is unique, please do not hesitate to reach out with questions, concerns, or if we can be of assistance in any way.**

**Also, we note that this information is current as of business on March 20, 2020 and will be subject to change following this date.**

**From us and the Bishop & McKenzie team, please stay safe and healthy!**

*Tara Hamelin and Kerry Lynn Okita*

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