

A Novel Type of Leave in the Wake of COVID-19: The Ontario Government's Changes to the *Employment Standards Act, 2000*

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On March 19, 2020, in response to the COVID-19 pandemic, the Ontario Legislature passed Bill 186, the *Employment Standards Amendment Act (Infectious Disease Emergencies), 2020* ("Bill 186").

The Act amends the emergency leave provisions of the *Employment Standards Act, 2000* (the "ESA") by providing job-protected leave for employees impacted by COVID-19.

The amendments have important implications for both employers and employees, and will significantly impact the way in which employers choose to respond to this public health emergency. Employers should make themselves aware of new obligations that apply both during and after their employees' job-protected leave.

Who qualifies for job-protected leave?

Effective March 19, 2020, provincially regulated employees will qualify for a job-protected leave of absence without pay in the following situations:

1. employees under medical investigation, supervision or treatment for COVID-19;
2. employees acting in accordance with an order under the *Health Protection and Promotion Act* that relates to COVID-19;
3. employees in quarantine or isolation or subject to a control measure (which may include, but is not limited to, self-isolation), and the quarantine, isolation or control measure was implemented as a result of information or directions related to COVID-19 issued by a public health official, qualified health practitioner, or the provincial or federal government;
4. employees under direction by their employer in response to a concern that the employees may expose other individuals in the workplace to COVID-19;
5. employees providing care or support to a prescribed family member because of matters related to COVID-19, including, but not limited to, school or daycare closures; and
6. employees directly affected by travel restrictions related to COVID-19, and who, under the circumstances, cannot reasonably be expected to travel back to Ontario.

The job-protected leave does not apply to federally regulated employees, including employees who work for banks, airports and airlines, radio and television broadcasters, the federal public service, and federal crown corporations. The provincial government also has the ability to exempt certain classes of employees from the emergency leave provisions.

Are employees required to provide a medical note to qualify for job-protected leave?

Employees are not required to provide a medical note. However, employers may require employees to provide other evidence reasonable in the circumstances, at a time that is reasonable in the circumstances, that the employee is entitled to the leave. According to the government's press release, this evidence may include documents such as a note from a daycare indicating that it has closed due to COVID-19, or evidence that an airline has cancelled an employee's flight back to Ontario.

How long are employees permitted to remain on leave?

The measures set out in Bill 186 are retroactive to January 25, 2020, the date that the first presumptive COVID-19 case was confirmed in Ontario.

Employees are entitled to remain on leave for as long as they are not performing their duties because of an emergency declared under the *Emergency Management and Civil Protection Act*. The leave will end on the day the emergency has ended.

What implications will Bill 186 have on employers?

The new emergency leave provisions under the ESA have significant implications for employers. Specifically, employers should be aware of the following new obligations:

1. During an emergency leave, employers must continue to allow employees to participate in their benefit plans, including pension plans, life insurance plans, accidental death plans, extended health plans, and dental plans
2. During an emergency leave, employers must continue to make contributions to their employees' benefit plans, including pension plans, life insurance plans, accidental death plans, extended health plans, and dental plans.
3. Employers must allow employees to defer taking vacation until the emergency leave expires, unless the employer and employee agree to a later date, subject to specific criteria set out in the ESA.
4. After the leave expires, employers must reinstate employees to their positions, if they still exist, or to comparable positions, if they do not exist.
5. After the leave expires, employers must pay their employees at a rate that is no less than the rate they most recently earned before the leave commenced.
6. Employers must include the duration of the emergency leave in their calculation of employee service, length of employment, and seniority. (Note that this requirement does not apply in determining whether an employee has completed a probationary period.)

COVID-19 presents an evolving challenge for employers, particularly as governments adopt new legislation in response to the pandemic. For more information on how to respond to COVID-19 in your workplace or organization, please contact any one of our authors.

You can also visit our [COVID-19 Resource Centre](#) where there are a number of bulletins addressing many issues related to the issues facing the business community.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

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