

## COVID-19 UPDATE – MARCH 24, 2020

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Yesterday afternoon, the B.C. Legislature passed amendments to the B.C. *Employment Standards Act*, and last week, WorkSafeBC published a series of recommendations to employers and employees navigating the COVID-19 pandemic. This memorandum addresses these, and other, recent developments that will be of significance to employers operating in B.C. and elsewhere.

For further information relating to the COVID-19 pandemic and how it may impact your workplace, please look to our bulletins of March 18 and 19, 2020, which can be found here:

- [COVID-19 Update - March 18, 2020.](#)
- [COVID-19 Update – March 19, 2020.](#)

This memorandum is current to the morning of March 24, 2020, but the pandemic and the responses of federal and provincial governments continue to evolve, and this may impact the accuracy of the information in this bulletin. If in doubt about whether anything in this document is still current, please do not hesitate to contact us.

### I. **Amendments to the B.C. *Employment Standards Act* and the Provincial Response to COVID-19**

The emergency amendments to the B.C. *Employment Standards Act* have resulted in two new protected leaves of absences for employees: the COVID-19-Related Leave and the Illness or Injury Leave.

#### **COVID-19-Related Leave**

As promised by the B.C. Government late last week, the Legislature has now enacted an unpaid leave called COVID-19 Related Leave, which provides a right to an unpaid leave of absence for employees in the following circumstances (as well as circumstances that may later be “prescribed”, presumably by regulation or further amendment):

- (a) the employee has been diagnosed with COVID19 and is acting in accordance with the instructions of a medical professional;
- (b) the employee is in quarantine or self-isolation pursuant to a provincial order or the guidelines of the BC Centre for Disease Control or pursuant to a federal order or the guidelines of the Public Health Agency of Canada;
- (c) the employee is providing care to a child or to a dependent adult;
- (d) the employee is outside B.C. and cannot return to the province because of travel or border restrictions; or

- (e) they are directed not to report to work by their employer due to concerns about their exposure to others.

This last point is particularly significant, in that it indicates that employers now have the statutory right under the *ESA* to require employees to not report to work where there are concerns about exposure to others. While the right to require employees not to return to work where there are concerns about health and safety exists at common law and pursuant to the *Workers Compensation Act*, this is nonetheless a welcome development for employers, and should provide comfort for those who are in a position where they need to enforce employee leaves due to concerns about potential COVID-19 exposure

The duration of this leave is broad and open-ended: an employee is entitled to a leave for as long as they continue to satisfy the eligibility criteria. Also noteworthy is the fact that employers are not allowed to request medical documentation, but can otherwise request the employee to provide “reasonably sufficient proof” that an employee is eligible, and remains eligible, for the leave.

However, these amendments are also significant for what they **do not** provide. These amendments to the *ESA* do not provide a statutory right for employers to place their employees on a leave of absence where they have been ordered by government to shut down, or where they are temporarily economically unviable in light of the COVID-19 pandemic. What this means is that employers in such situations remain forced to consider the risks inherent with layoffs or forced imposition of leaves of absence. In short, notwithstanding these amendments, many significant challenges remain.

Very importantly, the leave is retroactive to January 27, 2020 and the Legislature has added specific language to address the circumstances of eligible employees who were terminated prior to the enactment of the leave. Employers are required to offer the terminated employee re-employment in the same or a comparable position. The employee’s absence from the workplace until re-employment is further deemed to be leave of absence.

We anticipate, given comments from the government, that this leave will be repealed once the current crisis is over.

### **Illness or Injury Leave**

The B.C. Government has also amended the *Employment Standards Act* to provide three days of unpaid leave for an illness or an injury to an employee on an annual basis (i.e. unpaid sick days).

All employees are eligible after 90 consecutive days’ employment. However, an employer can request that an employee later provide “reasonably sufficient proof” of the illness or the injury necessitating the leave.

While the government did not provide advance notice that this leave would be established, we anticipate that this leave will be permanent.

## **Other Provincial Responses to COVID-19**

The B.C. Government has also announced a \$5 billion COVID-19 Action Plan to supplement the Federal Government's multi-billion dollar package. This includes a new Emergency Benefit for Workers, which amounts to a tax-free \$1,000 payment to British Columbians who receive any of the following federal benefits because of COVID-19: Employment Insurance Benefits, the new Emergency Care Benefit, or the new Emergency Support Benefit, as well as a right for businesses with a payroll of over \$500,000 to defer payment of health tax premiums until September 30, 2020.

While we still await further details, the government has indicated that a significant portion of the plan will in particular be dedicated to assist hard-hit sectors of the economy, including tourism, hospitality, and culture sectors.

## **II. Guidance from WorkSafeBC & Information from Other Agencies**

Late last week, WorkSafeBC issued guidance to employers and employees as to [what steps they should be taking](#) in their workplaces in response to the COVID-19 pandemic.

Given WorkSafeBC's responsibility for occupational health and safety in British Columbia, the provision of such guidance has been a welcome development for many employees and employers in the province, and we encourage all readers to review these materials in their entirety. However, note that other federal and provincial entities, namely the [B.C. Centre for Disease Control](#) and the [Public Health Agency of Canada](#), have also released information concerning such things as who should be self-isolating and not reporting to work. In some cases, the guidance does not perfectly align and this has raised a difficult question: what guidance should employers follow?

At this point, there is not a definitive answer.

In some respects, the issue of who to follow may be largely moot. The guidance provided by WorkSafeBC concerning employees who have travelled internationally or who have been diagnosed with COVID-19 is substantively the same as that provided by various health agencies. Similarly, the directions provided by WorkSafeBC to encourage employees to work from home where possible and to implement certain measures to keep the workplace safe for employees who do need to come to work (i.e. implementing social distancing measures such as limiting the size of meetings, curtailing work-related travel and reinforcing the message of personal hygiene) largely align with what has been advised by public health officials.

However, there are some important discrepancies.

For example, WorkSafeBC advises that employers should ensure that employees do not come to work if they are "ill" whether or not the illness has been confirmed as COVID-19, or if they have an "ill person" in their home. This language appears to apply more broadly than what is used by the Public Health Agency of Canada. While it may be the case that references to "ill" employees and "ill persons" is intended to mean someone with a COVID-19 symptom even if they have not been diagnosed, this is not yet clear.

Despite this ambiguity, the WorkSafeBC recommendations carry significant weight and should not be disregarded. Although they have not yet been adopted by regulation, they could still materially impact employers. For example, in the event someone is exposed to COVID-19 in the workplace, WorkSafeBC would very likely consider the extent to which the employer followed WorkSafeBC's guidance when determining an employer's "due diligence" in discharging its obligations to maintain a safe and healthy work environment.

With that in mind, until a definitive hierarchy or consistent set of guidelines is established, our advice is that employers **should err on the side of caution** when determining who can and cannot report to work. In the event of *any* uncertainty, employees and employers should be reaching out to 8-1-1 or using the self-assessment tool that has been developed by the B.C. Ministry of Health. Again, in these times the best action is to **err on the side of caution**. **When in doubt, contact the relevant health authorities, and defer to their guidance, even if it creates operational inconvenience or uncertainty.**

### **Work Refusals**

We remind you that workers in B.C. also have the right to refuse unsafe work if they believe it presents an undue hazard. In light of the current pandemic, work refusals are almost certain to increase, and questions about how to respond to such refusals are unquestionably going to become more complex.

The manner in which to respond is going to be highly fact-specific and context-dependant. Broadly speaking, in terms of process, once an employee has indicated that they are refusing to work because they feel that it is unsafe, an employer is obligated to immediately investigate and respond to the matter. Again, the specific manner in which to respond will be highly face-dependant, and we encourage employers to reach out for guidance on this complex issue.

### **III. Other Recent Developments and Information**

#### **Shutdown of non-essential business in Ontario and Quebec**

Yesterday, Ontario and Quebec announced that all non-essential businesses would shut down by midnight March 24, 2020. In Ontario, this shut-down is set to last for at least two weeks and in Quebec, at least three weeks. Lists of businesses considered essential have now been published by both provinces:

- For Ontario, please [click here](#).
- For Quebec, please [click here](#).

As of the issuance of this memorandum, the Province of British Columbia has not announced plans to shut down all "non-essential" businesses. However, given the steps taken in Ontario and Quebec, it is reasonable to expect that B.C., as well as other provinces, may take similar steps in the near future. To that end, it would be prudent for all employers to look at the lists of essential services provided by Ontario and Quebec and consider where they would likely be categorized if a similar list were implemented in the province or territory in which they work.



We encourage employers in B.C. and elsewhere to stay alert on this issue.

### **Suspension of Collective Agreement Obligations for healthcare employers in Ontario**

Another significant development coming from Ontario is the Provincial Government's [announcement of a temporary order](#) to suspend, for a period of fourteen days, certain collective agreement obligations of Ontario's health service providers. As indicated in the Ontario Provincial Government's news release announcing the order, this suspension provides health care providers with the broad ability to, among other things, redeploy staff to work in COVID-19 assessment centres, assign bargaining unit work to non-bargaining unit employees or contractors and defer or cancel vacations or leaves of absences.

### **Industry-Specific Information**

For readers in the construction and mining industries, please note that specific guidance has been published. We encourage any affected employer to review these materials and apply them to their workplace.

- For **construction industry** employers, the Government of B.C. has published [Guidance to Construction Sites Operating During COVID-19](#), and similar materials have been [published by WorkSafeBC](#)
- For **mining industry** employers, the Chief Inspector of Mines has also made a series of [recommendations regarding COVID-19](#)

### **Navigating COVID-19 in the Workplace**

The situation continues to evolve by the day and by the hour, and we recognize that the guidance being provided by government authorities (and law firms) can be overwhelming. If you have any questions about any of these programs, or any questions at all about how your workplace should be addressing the COVID-19 pandemic, please do not hesitate to [contact us](#).

Please note that this information bulletin is current to the morning of **March 24, 2020**. As this situation is evolving rapidly, we urge you to remain informed to the greatest extent you can.

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