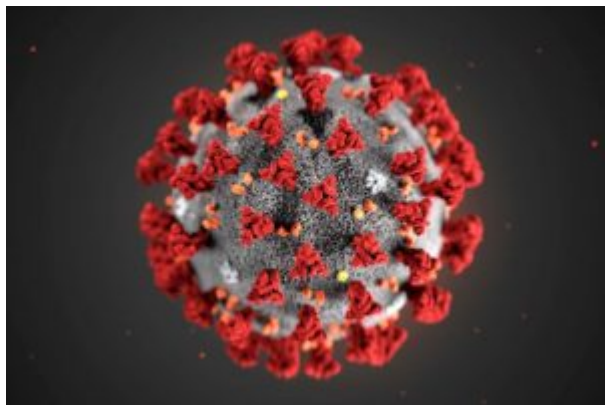


Bill 195: Ontario Ends Declared Emergency, Continues Some Emergency Orders



On July 21, 2020, the province of Ontario gave Royal Assent to Bill 195, Re-opening Ontario (A Flexible Response to COVID-19) Act, 2020 ("**Bill 195**"). Bill 195 came into force on July 24, 2020, bringing an end to the declared State of Emergency in Ontario.

Although the declared Emergency has ended, almost all orders made under Ontario's *Emergency Management and Civil Protection Act* ("**EMPCA**") will remain in effect as orders under Bill 195. Emergency orders currently in force under the EMPCA (as of July 24, 2020) will remain in effect for an initial period of thirty days. Existing emergency orders may be subject to extension by the province.

Bill 195 will have an impact on certain provisions under Ontario's *Employment Standards Act, 2000* ("**ESA**"):

1. **Infectious Disease Emergency Leave ("IDEL")** – for further information on the IDEL, refer to the Ministry of Labour's Guide to the Employment Standards Act. Bill 195 has no effect on an employee's entitlement to an IDEL. Employees who cannot work due to any of the reasons listed in the IDEL sections of the ESA will continue to be entitled to job protected leave, including:
 - a. Being under individual medical investigation, supervision or treatment related to COVID-19;
 - b. Following a COVID-19 related order issued under section 22 or 35 of the Health Promotion and Protection Act ("**HPPA**");
 - c. Remaining in quarantine, isolation (voluntary or involuntary), or subject to a control measure as a result of being advised to remain away from work by their physician;
 - d. Refraining from attendance at work under direction of the employer in response to the employer's concern that the employee might expose other individuals in the workplace to a designated infectious disease;
 - e. Providing care or support to certain individuals because of a matter related to COVID-19;

- the employee's spouse (of the same or opposite sex, whether or not married)
 - a parent, step-parent or foster parent of the employee or the employee's spouse
 - a child, step-child or foster child of the employee or the employee's spouse
 - a child who is under legal guardianship of the employee or the employee's spouse
 - a brother, step-brother, sister or step-sister of the employee
 - a grandparent, step-grandparent, grandchild or step-grandchild of the employee or the employee's spouse
 - a brother-in-law, step-brother-in-law, sister-in-law or step-sister-in-law of the employee
 - a son-in-law or daughter-in-law of the employee or the employee's spouse
 - an uncle or aunt of the employee or the employee's spouse
 - a nephew or niece of the employee or the employee's spouse
 - the spouse of the employee's grandchild, uncle, aunt, nephew or niece
 - a person who considers the employee to be like a family member, provided the prescribed conditions, if any, are met (currently there are no prescribed conditions)
 - any individual prescribed as a family member for the purposes of this section (currently, there are no additional prescribed family members);
- f. equiring time away from work to care for their child whose school or day care was closed because of COVID-19. Employees will continue to qualify for an IDEL for as long as COVID-19 remains a designated "infectious disease", as defined by the ESA. An employee's entitlement to an IDEL will not end on the expiry of the emergency orders, or at the expiry of six weeks from July 24, 2020 (see below discussion regarding Deemed IDEL), unless the ESA is further amended.

1. **Declared Emergency Leave ("DEL")** – for further information on DEL, refer to the Ministry of Labour's Guide to the Employment Standards Act. Unlike IDEL, an employee can only qualify for a DEL if they are not performing the duties of their position ***because of a declared Emergency***, and:

- An emergency order is made under section 7.0.2 of the EMCPA that applies to the employee and causes them to not perform the duties of their position;
- An order is made under the HPPA directed at the employee that prevents them from performing the duties of their position;
- The employee needs to provide care or assistance to certain individuals (e.g. parent, child, spouse, etc.) because of the declared emergency.

Because qualifying for a DEL depends upon the existence of a declared State of Emergency, an employee's entitlement to remain away from work on a job protected DEL would have ceased effective **July 24, 2020**.

However, when contemplating whether employees on expiring DELs are obligated to return to work, employers should be mindful of individual circumstances and the potential for overlap between DEL and IDEL. An employee who may have claimed entitlement to DEL because they were "providing care or assistance" to an immunocompromised child may also meet the entitlement criteria for job protected

IDEL (refer to “Reasons an employee may take IDEL” on the Ministry’s website). These issues should be dealt with on a case-by-case basis.

1. **Deemed IDEL under Regulation 228/20** – On May 29, 2020, the province amended the ESA by deeming employees whose hours / wages were reduced or eliminated due to COVID-19 to be on IDEL. This temporary change, discussed in our previous Insight article, resulted in employees’ temporary layoffs converting into IDEL for the duration of the “COVID-19 Period” (*i.e.* March 1, 2020 until 6 weeks after the end of the declared State of Emergency). The Ministry of Labour indicates that during an employee’s deemed IDEL, the “layoff clock stops ticking towards becoming a termination of employment”. Because of Bill 195, and the end of the declared State of Emergency, certain relief provisions introduced by Regulation 228/20 will expire six (6) weeks after July 24, 2020, on **September 4, 2020**.

If employers cannot recall employees back to work or restore their wages by September 4, 2020, the standard temporary layoff rules under the ESA will be re-engaged, and employees can be terminated if laid off beyond the permitted temporary layoff timeframes under the ESA. The Employment Standards Branch of the Ministry of Labour has indicated that, starting September 4, 2020, employers may be able to temporarily lay off employees for up to 13 weeks in a 20-week period, which can be extended up to 35 weeks in a 52-week period.

Essentially, the first week of layoff would be the week after September 4, 2020; weeks that would otherwise have been “weeks of layoff” between March 1, 2020 and September 4, 2020 (*i.e.* the “COVID-19 Period”) did not count toward the temporary layoff calculation because of Regulation 228/20.

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Ontario continues to transition more public health unit regions into Stage 3 of its Framework for Re-opening. Based on current public health indicators, it is likely that, by September 4, 2020, most employers across all regions will be legally permitted to re-open (subject to applicable, strict health and safety requirements).

However, many businesses experiencing substantial disruptions due to the COVID-19 pandemic will not be in a position to support full-scale re-opening / recall of all staff as of September 4, 2020, even if all restrictions are lifted.

If full-scale recall is impossible, and if permitted to do so by an employee’s terms of employment (*i.e.* employment contract, offer letter, *etc.*), affected businesses may transition an employee from deemed IDEL to a temporary layoff effective September 4, 2020. However, unless the province offers further targeted relief to businesses that are incapable of recalling staff, employers will no longer be able to defer their termination-related liabilities under the ESA.

It remains to be seen whether the province will elect to offer further, targeted relief to employers most affected by the declared State of Emergency. For the time being, we will continue to monitor key developments relating to Bill 195, including any further legislative changes that may assist employers during the COVID-19 pandemic.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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