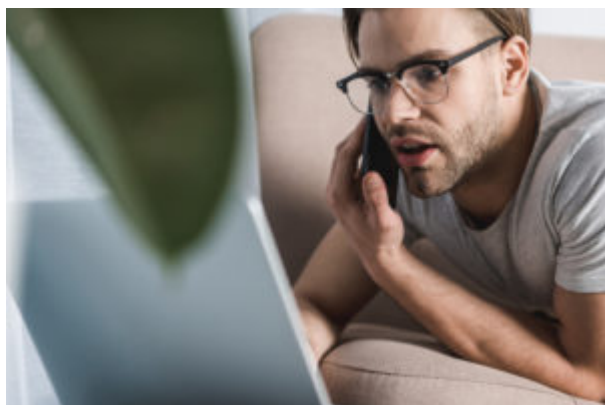


# Compliance Alert: Ontario Arbitrator Nixes Paid Sick Leave for Precautionary COVID-19 Self-Isolation



Do you have to pay employees who have to go into self-isolation as a result of COVID-19?

This is a question employers have been asking almost from the moment the crisis began. And in late May, an Ontario arbitrator issued the first ruling to directly address the issue. Here's the rundown.

## The Case

The case was a grievance by the Ontario nurses' union claiming that all nurses that had to go into self-isolation as a result of COVID-19 should be paid in accordance with the paid sick leave requirements of the collective agreement. The employer, the owner of nursing homes where the nurses worked, acknowledged that nurses in self-isolation were in line for paid sick leave, but only if they were actually ill.

## The Ruling

The Ontario arbitrator sided with the employer. First, the arbitrator noted that COVID-19 (or, more precisely, infectious disease emergency leave) and sick leave under the Ontario ESA are both unpaid. Consequently, the nurses' entitlement to paid leave came down to what the collective agreement did or didn't say. After looking at those paid sick leave provisions, the arbitrator concluded that to qualify for paid sick leave benefits, a nurse actually had to be sick.

As a result, the nurses in self-isolation because they were ill or had COVID-19 symptoms had a valid claim for paid sick leave; but nurses that had to go into self-isolation as a precaution, e.g., because they had close exposure to a resident diagnosed with COVID-19, didn't have the right to be paid for their time away from work because they weren't actually ill. Being on leave because of the *possibility of having* COVID-19 wasn't enough, the arbitrator concluded.

*Participating Nursing Homes v Ontario Nurses' Association*, 2020 CanLII 36663 (ON LA), May 26, 2020

### 3 Takeaways

Although you can't take too much from one case, the ruling is instructive because it shows how other arbitrators and courts are likely to approach the question of whether COVID-19 self-isolation time is reimbursable. The key points:

#### 1. COVID-19 Leave Under Employment Standards Law Is Unpaid

Most Canadian jurisdictions have adopted new employment standards laws to ensure that employees who must miss work due to COVID-19 can take time off without losing their jobs. But without exception, all of these leaves were unpaid. So, employees can't rely on the ESA to get paid for their self-isolation time.

#### 2. Paid Sick Leave Under Employment Standards Law Not Enough to Cover Self-Isolation

Another possibility is paid sick leave. There are only 2 provinces where *paid* sick leave is required by employment standards laws:

- PEI, where employees who've completed 5 years of service with an employer are entitled to one paid day of sick leave per year; and
- Québec where employees get 2 paid sick days per year.

But under current public health guidelines, COVID-19 self-isolation and quarantine is required for 14 days. So, even if an employee is in one of those provinces, the employment standards paid sick leave won't cover time in self-isolation.

#### 3. Unionized Employees May Be Entitled to Paid Leave Under Collective Agreements

What all this means is that if employees are entitled to be paid for being in COVID-19 self-isolation, it has to be as a result of either a company policy or their employment contract. Paid sick leave isn't a standard provision of individual employment contracts who aren't executives or members of upper management. However, it is something that unions sometimes seek to include in a collective agreement. But as the Ontario case illustrates, courts and arbitrators are apt to interpret sick leave provisions as requiring actual illness or symptoms. And that may work to the disadvantage of employees who are in self-isolation after returning from travel or exposure to a person with COVID-19 but aren't actually ill or symptomatic.