

# Ontario Introduces New “Infectious Disease” Leave Of Absence



On March 19, 2020, the Ontario Government introduced Bill 186 (An Act to amend the *Employment Standards Act, 2000*) (the “*Infectious Disease Leave Amendment*”) to introduce a new job protected unpaid leave of absence in relation to a designated infectious disease. Currently, the following diseases are designated infectious diseases for the purpose of this leave of absence: “Diseases caused by a novel coronavirus, including Severe Acute Respiratory Syndrome (SARS), Middle East Respiratory Syndrome (MERS) and Coronavirus (COVID-19).”

The unpaid leave of absence can be accessed by an employee, if the employee will not be performing the duties of his or her position because of one or more of the following reasons related to a designated infectious disease:

- The employee is under individual medical investigation, supervision or treatment;
- The employee is acting in accordance with an order under the *Health Protection and Promotion Act*;
- The employee is in quarantine or isolation or is subject to a control measure (which may include self-isolation) in accordance with a quarantine, isolation or control measure implemented in relation to the designated infectious disease;
- The employee is under a direction given by his or her employer in response to a concern of the employer that the employee may expose other individuals in the workplace to the designated infectious disease;
- The employee is providing care or support to certain designated family members because of a matter related to the designated infectious disease;
- The employee is directly affected by travel restrictions related to the designated infectious disease and, under the circumstances, cannot reasonably be expected to travel back to Ontario; or
- Other reasons as may be prescribed (currently, there are none).

We have prepared responses to commonly asked questions in relation to this new leave of absence. Please keep in mind that the responses are designed for general application. Employers are encouraged to seek advice from experts on issues that will impact the workplace

## **Are workers entitled to be paid while on this leave of absence?**

The *Infectious Disease Leave Amendment* provides only for job-protected leave of absence. It does not provide for any entitlement to pay during the leave of absence. However, employees may be entitled to employment insurance or other governmental benefits.

## **How long does the leave of absence last?**

An employee is entitled to take a leave of absence for as long as the employee is not performing the duties of his or her position and the infectious disease is designated by the regulations. There is currently no maximum number of days.

## **Can I ask an employee for a doctor's note to substantiate this leave of absence?**

Employers are entitled to request evidence that is reasonable in the circumstances from an employee who takes a leave of absence related to a designated infectious disease. However, the employee cannot be required to provide a certificate from a qualified health practitioner / doctor's note.

The evidence that can be requested will vary on a case-by-case basis. However, evidence that is reasonable in the circumstances may include:

- Proof that the employee is in quarantine, isolation or is subject to another control measure;
- Proof that the employee has a family member that requires care or support in relation to the designated infectious disease; or
- A written statement / attestation from an employee.

## **Can I ask for the evidence substantiating this leave to be provided before the employee is eligible for the leave?**

An employer may only ask for evidence substantiating the need for this leave at a time that is reasonable in the circumstances. Given the current COVID-19 pandemic, that may mean that the employee provides substantiating evidence before, during or after the leave of absence.

## **What "family members" have been designated for the purpose of this leave of absence?**

The "family members" that have been designated for the purpose of this leave of absence are:

- The employee's spouse;
- 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; or
- Any individual prescribed as a family member for the purposes of this section.

### **Do employees have any other rights or entitlements in connection with this leave of absence?**

Employees taking this leave of absence are entitled to the same rights and protections as other statutory leaves of absence, which includes:

- The right to be reinstated to the same position that he or she had before the leave began (or, if that job no longer exists, a reasonably comparable position);
- The right to be free from penalty in any way because the employee: (i) took a leave of absence; (ii) plans to take this leave of absence; (iii) is eligible to take this leave of absence; or (iv) will become eligible to take this leave of absence;
- The right to continued participation in certain benefit plans, which include: pension plans; life insurance plans; accidental death plans; extended health plans; and dental plans. The employer must continue to pay its share of the premiums for any of these plans that were offered before the leave, unless the employee tells the employer in writing that he or she will not continue to pay his or her own share of the premiums; and the right to earn credits for length of employment, length of service and seniority.

### **When does the new leave of absence come into effect?**

These measures are *retroactive* to January 25, 2020 (the date that the first presumptive COVID-19 case was confirmed in Ontario).

### **Does the Introduction of Bill 186 Prevent Me From Laying Off / Terminating Employees?**

This leave of absence does not prevent an employer from engaging in a legitimate layoff or termination of employment (or taking other adverse action). However, the burden falls on the employer to demonstrate that the decision to layoff or terminate the employment of an employee (or take any other adverse action) was for a legitimate reason unrelated to the leave of absence.

If you are an employer who decides to take any action that could be construed as adverse against such an employee (including a termination or layoff), you may want to seek legal advice.

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