



# What's New in HR Law

## Ontario's Declared Emergency Ends: Implications for Employers

July 29, 2020

### Bottom Line

[Bill 195, Reopening Ontario \(A Flexible Response to COVID-19\) Act, 2020](#) ("Bill 195") was proclaimed into force on July 24, 2020; the same day on which the provincial declaration of emergency established under [O. Reg. 50/20](#) came to an end.

Under Bill 195, the Ontario Government is able to amend, extend, or revoke orders made under the *Emergency Management and Civil Protection Act* ("EMCPA"), even though the provincial declaration of emergency has expired.

The Government has exercised its authority under Bill 195 to extend various orders, including those relating to labour redeployment in long-term care and retirement homes, stages of reopening, compliance with public health advice, and public gatherings. A full listing of the orders that remain in force can be found on the Government's [website](#).

This update is for general discussion purposes and does not constitute legal advice or an opinion.

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## Implications for Employers

While the extension of various orders made under the *EMCPA* has implications for employers, so too does the end of the declaration of emergency. In particular, the expiry of the declared emergency impacts various leave entitlements and employer responsibilities under the *Employment Standards Act, 2000* (“*ESA*”).

Of particular note, and as outlined in our earlier [update](#), O. Reg. 228/20 (the “Regulation”) allowed employers to implement temporary wage or hours reductions for reasons related to the pandemic without triggering a layoff or constructive dismissal under the *ESA*. Instead, employees so affected were deemed to have been placed on a job-protected Infectious Disease Emergency Leave (“IDEL”).

The relief afforded under the Regulation is temporary in nature and applies only to wage or hours reductions that occur during the “COVID-19 Period”. Under the Regulation, the COVID-19 Period is defined as running from March 1, 2020 until 6 weeks after the provincial declaration of emergency is terminated. Given that the declared emergency ended on July 24, 2020, the COVID-19 Period under the Regulation (as it is currently drafted and absent further amendment) will end on September 4, 2020.

As such, over the course of the coming weeks, Ontario employers that implemented wage or hours reductions in the wake of the COVID-19 pandemic will need to determine whether, among other available options, to:

1. continue to hold employees out of work beyond September 4, 2020 on temporary layoff;
2. recall employees to work, whether to active employment or to an inactive paid leave, while potentially also availing themselves of the recently expanded Canada Emergency Wage Subsidy (CEWS) program; or
3. recognize employees as continuing to qualify for IDEL, or another authorized leave of absence.

## Wage or Hours of Work reductions *after* September 4, 2020

Where employers opt to continue temporary wage or hours of work reductions *after* September 4, 2020, the usual *ESA* provisions governing temporary layoffs, as well as those pertaining to termination and severance of employment, will apply as in the normal course. The same is true where such wage or hours of work reduction measures are implemented afresh after September 4, 2020. Our earlier update outlining key considerations around temporary layoffs can be found [here](#).

Under the *ESA*, a temporary layoff is: (a) a layoff of not more than 13 weeks in any period of 20 consecutive weeks; or (b) a layoff of more than 13 weeks in any period of 20 consecutive weeks but less than 35 weeks in any period of 52 weeks where certain prescribed conditions are met.

Employers should note that because reductions in wages or hours of work between March 1, 2020 and September 4, 2020 are deemed under the Regulation to be periods of IDEL, such period of time will **not** count toward the temporary layoff time limitations noted above. However, any such reductions in effect *before* March 1, 2020 and/or *after* September 4, 2020 **will** be considered in the computation of time for this purpose.

Employers should therefore consider whether to issue fresh notices to employees in order accurately record periods of IDEL versus periods of temporary layoff. Such notices may also be useful in clarifying any questions or misunderstandings employees may have about the differing characterizations of their absence and the effects thereof.

## **Recalling Employees to Work**

When contemplating whether to return employees to work on or before September 4, 2020, employers should consider whether they are able to avail themselves of the newly expanded CEWS program. Our update summarizing the redesigned program can be found [here](#).

Although some employers may be in a position to recall employees to work, they should nevertheless be aware of the fact that some employees may have a legitimate basis upon which to decline to return.

Certainly, illegitimate work refusals should be dealt with appropriately and, to the extent necessary, by disciplinary means. However, where employees have ongoing childcare obligations due to school or daycare closures, or other obligations that would entitle them to IDEL or another type of leave, employers may not be able to compel them to return to work immediately.

## **Ongoing Leave Entitlements**

Declared Emergency Leave under the *ESA* is generally available only during a period of declared emergency under the *EMCPA*. Given the expiry of the provincial declaration of emergency as of July 24, 2020, with limited exceptions, employees will not be able to avail themselves of Declared Emergency Leave beyond this date.

However, the expiry of the provincial declaration of emergency does not impact the availability of IDEL under the *ESA*, other than deemed IDEL due to a reduction in wages or hours under the Regulation as discussed above.

As outlined in our earlier [update](#), in response to the COVID-19 pandemic, the *ESA* was amended to provide for a new type of leave: IDEL. So long as COVID-19 is designated as an infectious disease under the *ESA* (which it is as of the date of this update), employees may be able to avail themselves of a job-protected IDEL where they are unable to work for any of the following reasons:

- The employee is under medical investigation, supervision or treatment for COVID-19;

- The employee is acting in accordance with an order under the *Health Protection and Promotion Act*;
- The employee is in isolation or quarantine in accordance with public health information or direction;
- The employer directs the employee not to work due to a concern that COVID-19 could be spread in the workplace;
- The employee needs to provide care to a person for a reason related to COVID-19, such as a school or day-care closure; or
- The employee is prevented from returning to Ontario because of travel restrictions.

In addition to potential entitlement to IDEL, employees may also qualify for other periods of leave, whether under the *ESA*, another statute, contract, or company policy. As in the normal course, employers should meaningfully consider and assess employee leave requests and clearly communicate the approval or denial thereof, as may be appropriate.

## Future Updates

The end of the declared emergency in Ontario has significant implications. While employers are encouraged to undertake business planning and staffing decisions with the above considerations in mind, we appreciate that these new developments are likely to be particularly challenging for employers who have yet to resume their full business operations.

Our firm continues to closely monitor the developments relating to COVID-19, including any future legislative and regulatory amendments that may afford employers further relief amidst the ongoing pandemic. We will continue to provide further updates as new information becomes available.

## Need more information?

For more information regarding workplace management amidst the COVID-19 outbreak, contact [Ashley Brown](#) at 416-408-5563, or your regular lawyer at the firm.



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