



FAQ COVID-19: Layoffs, salary, EI and more

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Employment lawyer Daniel Lublin answers frequently asked questions from workers

Coronavirus and employment questions answered

Q. I don't feel safe going into the workplace because of COVID-19. Can I stay home?

This depends on whether your presence at the workplace presents a reasonable likelihood that you will become infected with COVID-19.

You have the right to refuse to perform your job if it is likely to endanger you. Whether you face a clear and present danger depends on the circumstances and the type of work you perform. A work refusal is only justified when the situation remains unsafe. If you work in an office and an employee near to you is complaining of symptoms similar to COVID-19, you may be justified in leaving that airspace and, if there is no other alternative, staying home until that threat of a potential infection is removed. You do not have an unlimited right to simply stop working or return home whenever you feel like there could be a risk. It has to be a real risk.

Although you cannot be fired for exercising a COVID-19 work refusal due to a good-faith belief that you may become infected, if you stop working without that good faith and reasonable belief, your wages and job may be placed in jeopardy.

Whether your COVID-19 refusal to work is justifiable will depend on whether it is founded upon recommendations of public-health authorities or founded upon unreasonable fears. Stay informed by following municipal, provincial and federal health recommendations posted on official government websites.

The provincial government also recently announced job-protection legislation to protect the job security of employees away from work because of COVID-19. The precise scope of the legislation is not yet known.

Q. Can my employer require me to accept a reduced wage or fewer hours due to COVID-19?

The answer is no, as you cannot be forced to accept any significant and harmful changes to your employment, including your rate of pay, hours of work or the elimination of other perquisites you are normally entitled to (such as benefits, commissions, bonuses, allowances). If the changes are significant and harmful, it represents a constructive termination, which allows you to claim damages for the loss in pay, or severance while you look for another job. However, this may require you to actually leave the workplace and look for another job in order to pursue your claim, which seems far more difficult and risky to do now as a result of COVID-19. For this reason, many employees are choosing to accept temporary pay reductions if it means keeping their jobs as an alternative to these types of legal claims.

Furthermore, it remains to be seen how Canadian courts will handle situations where employers opted to reduce hours and pay instead of terminating employees. I suspect that employers will be given additional leeway in these challenging times in order to maintain business operations rather than shutting down.

Q. If my employer shuts down because of COVID-19, am I entitled to severance?

Yes. As long as your employer does not declare bankruptcy, then the closing represents a termination of your employment and you would be entitled to claim a severance package if one was not presented to you.

Severance must be calculated with reference to employment standards legislation, your employment contract, your age, your tenure, your position and precedents. There is a debate right now about whether employers or employees will be afforded more protection by the courts in disputes about severance pay. During the 2008 financial crisis, there were several judges who felt that employees should receive longer than normal severance packages owing to the difficulty they faced in finding other comparable work.

Q. My child's school is closed. Does my employer have to give me time off so I can care for my child?

Human-rights laws require that employers accommodate your child-care needs. Employers must determine whether the nature of your role enables you to perform work from home and, if so, to provide you with remote work. Employers and employees must also work together to determine if there are other arrangements for child care that can be implemented or any other adjustments to your role, such as different hours of work so your spouse or other family member can care for your children while you work, which enables you to perform your regular duties.

If there are no other reasonable options available, then you are entitled to unpaid time off to stay home to watch your children. However, you would be eligible for employment insurance. You also cannot be fired if you must stay home to care for your children owing to a school closing.

Q. If I have COVID-19, am I entitled to my salary while I'm quarantined?

If you have COVID-19 or are otherwise required to self-isolate, then you are not entitled to your regular salary, although you should make a claim under your disability insurance policy or sick-leave policy through your employer, if it provides those benefits. If not, you should be able to use paid vacation time. You would also be entitled to employment insurance immediately.

You cannot be terminated because you are sick with COVID-19 and you cannot be terminated because you self-isolate owing to the possibility that you have COVID-19.

Q. If my workplace tells me not to come into work because it is closing down for several weeks, will I be paid for the time off?

Your employer has no obligation to pay you when you are not working. But it is an implicit part of any employment contract that the employer must provide work to employees. Where your

wages and work are suspended, even for a few weeks, it is technically a constructive dismissal or implied termination. Employees could claim termination pay or severance pay under employment standards legislation or their employment contract. To avoid this liability, some employers are paying employees during this time off. Others aren't. Still, many employees may be reluctant to assert constructive dismissal claims right now as the uncertain job market may mean more risk and uncertainty for them. The unprecedented circumstances created by the COVID-19 outbreak may also implicitly introduce an employer's right to temporarily lay off employees.

This answer will become more complicated and may change if businesses are required to shut down due to a government order or told that it is no longer safe to have any employees continue to work.

Q. Can my employer temporarily lay me off because of COVID-19?

Many employers are considering or implementing temporary layoffs as a response to a slowdown in business owing to COVID-19. Temporary layoffs of varying lengths are allowed under provincial legislation without it amounting to a termination, so long as you are recalled to work within a certain time period.

During a temporary layoff, you would be eligible to receive employment insurance, and, most of the time, your employee health benefits are continued.

Even though provincial legislation describes temporary layoff restrictions, the legislation does not create a complete right for an employer to implement a temporary layoff. Unless you have an employment agreement that explicitly permits a temporary layoff, then an employee can treat a temporary layoff as tantamount to an immediate termination of employment, giving rise to a claim for severance. But this approach could be risky in the context of the COVID-19 outbreak and given the current economic situation. The COVID-19 outbreak is unprecedented, and the law may imply an employer has the right to implement a temporary layoff as a health and safety measure or because of work shortages that arise in these unique circumstances.

Q. Can my employer force me to use my vacation time during a business closing?

This depends on the province you work in, but generally your employer can direct when you take your vacation time.

Q. What types of questions can my employer ask me related to COVID-19?

Employers have to ensure that the workplace is safe for employees. They are entitled to ask a number of questions designed to determine if you pose a health and safety risk, such as:

- Are you exhibiting symptoms of COVID-19?
- Were you in close personal contact with anyone who has exhibited symptoms of COVID-19?

- Were you in the same physical vicinity with anyone who is confirmed to have COVID-19 within the past several weeks?
- Have you travelled to an affected area where there was a COVID-19 outbreak?
- Were you in close personal contact with anyone who recently travelled to an area with a COVID-19 outbreak?
- Arguably, this list could also include the question “have you travelled outside of Canada at all?”

You cannot be fired if you answer yes to any of these questions.

However, you can be told to immediately leave the workplace and not to return until such time as there is no risk that you will infect the other workers.

Note that you cannot be targeted by your employer and asked certain questions due to your race, place of origin or ethnicity. Human-rights legislation recognizes the importance of balancing people’s rights to non-discrimination with public health and safety, including the need to address evidence-based risks associated with COVID-19. Questions that are founded upon reasonable health and safety concerns consistent with the recommendations of public-health authorities will be permissible. Questions that are founded upon misguided fears and stereotypes may be inappropriate and amount to discrimination.

Q. Can I apply for employment insurance sickness benefits if I self-quarantine without any symptoms?

A work refusal is only justified when the situation remains unsafe. If you work in an office and an employee near to you is complaining of symptoms similar to COVID-19, you may be justified in leaving that airspace and, if there is no other alternative, staying home until that threat of a potential infection is removed. You do not have an unlimited right to simply stop working or return home whenever you feel like there could be a risk. It has to be a real risk.

Employment Insurance sickness benefits are available to employees who are unable to work because of “illness, injury, or quarantine.” Even if you are not yourself sick or injured, you may qualify for sickness benefits if you are quarantined as a result of the COVID-19 outbreak.

A medical certificate is usually required for sickness benefits, but the federal government has waived this requirement for COVID-19 related claims.

For the purposes of a sickness benefits claim, a “quarantine” may be proved to Service Canada by providing a declaration that the quarantine was “imposed on the claimant by a public-health official for the health and safety of the public at large” or “recommended by such an official for the health and safety of the public at large and the claimant was asked by their employer, a medical doctor, a nurse or another similar person in authority to place themselves under quarantine.”

Someone who has recently returned from travel abroad would qualify under this definition of “quarantine” in light of the current self-isolation recommendations from public-health

authorities. Similarly, someone who cannot work because of restrictions against gatherings of 50 or more people could fit the definition of “quarantine.”

But there remains some doubt as to whether an entirely asymptomatic person, who has not recently travelled, and who hasn't been sent home by their employer can qualify for sickness benefits. If the voluntary self-isolation is purely fear-based without any connection to prevailing public health recommendations, such an employee may not qualify for EI sickness benefits while away from work.