

## WHAT ARE YOUR OPTIONS AS AN EMPLOYER DURING THE COVID-19 PANDEMIC?

By [Diana F. Saturno](#) and [Catherine Hart](#)\*

COVID-19 has created an unprecedented and uniquely devastating situation in Canada and throughout the world. As the government encourages social distancing and staying at home, and in an effort to curb the spread of the disease, employers have to make tough decisions to ensure the long-term health of their businesses. Below are some options for employers when deciding how to manage their business in the coming weeks.

### Employers May Lay-off Employees

A lay-off occurs when an employer temporarily suspends an employee's employment. In effect, the employee is not working, but remains employed. During the lay-off period, the employee may have access to Employment Insurance benefits ("EI benefits").

The *Employment Standards Act, 2000*, as amended (the "Act"), provides for a temporary lay-off. Specifically, the Act provides that a temporary lay-off is a lay-off of not more than 13 weeks in any period of 20 consecutive weeks. However, an employer may lay-off an employee for a period of not more than 35 weeks in any period of 52 consecutive weeks if certain requirements are met. Continuing an employee's health and benefit package will allow an employer to be able to lay-off an employee for not more than 35 weeks in any period of 52 consecutive weeks.

Following the lay-off period, the employee may be called back to work or terminated. If the employee is not recalled before the end of the 13<sup>th</sup> or 35<sup>th</sup> week of the lay-off, as applicable, the employee will be deemed to have been terminated by the employer as of the first day of the lay-off and will be entitled to termination and, if applicable, severance pay as provided for in the Act or notice at common law.

Employers should note that if the employee does not have a specific provision in their employment agreement or employment offer which stipulates that the employer can place them on a lay-off, there is case law to support the position that the employee was constructively dismissed, and therefore entitled to their termination notice (or pay in lieu of notice), and severance (if applicable). This means that if an employee's employment contract is silent with respect to lay-offs, there is a risk that the employer will be found liable for a wrongful termination if the employee brings a claim against the employer, and the employer will have to pay the employee termination pay and severance (if applicable). At this time, we are of the view that the risk to the employer is low in this climate, although employers are encouraged to speak to counsel in this circumstance.



[Diana F. Saturno](#)  
Associate

t: 416.864.7624  
[dsaturno@foglers.com](mailto:dsaturno@foglers.com)

[Catherine Hart](#)  
Student-at-Law

416.864.7612  
[chart@foglers.com](mailto:chart@foglers.com)

---

## Obligations of an employer when laying-off an employee

An employer must provide written notice of a lay-off to the affected employee. As well, the employer must provide the employee with a Record of Employment.

### Impact of a lay-off

During the lay-off period, an employer does not have to pay the employee any amounts for wages, but they can continue to pay benefits if they choose to do so. However, an employee is entitled to EI benefits, including but not limited to regular and sickness benefits. The federal government is also introducing a new Emergency Care Benefit, set to take effect in April 2020, that would extend EI benefits to individuals not able to qualify for sickness benefits but who are, due to COVID-19, quarantined, sick, or caring for family members.

Generally, the basic rate for calculating EI benefits is 55% of the employee's average insurable weekly earnings, up to a maximum amount of \$573 per week. Employees can receive EI for a period of time, ranging from 14-45 weeks, depending on the unemployment rate in the region. In Toronto, employees can expect to receive benefits for 14 weeks.

Importantly, the federal government has recently stipulated that Service Canada, who manages EI benefits, would waive any waiting period and that any employee who is placed on a lay-off due to COVID-19 or in some way connected to COVID-19, would be entitled to receive EI benefits immediately, if they otherwise meet the requirements.

### Other options to employers

Alternatively, another route available to employers during financially tight times is to provide employees with the option between working at reduced hours/pay or going on a lay-off.

If you have any questions about your options as an employer, please contact a member of Fogler, Rubinoff LLP's employment group.

*Diana F. Saturno is a lawyer in the employment group and can be reached at [dsaturno@foglers.com](mailto:dsaturno@foglers.com)*

*\*Catherine Hart is a student-at-law with Fogler, Rubinoff LLP*