

# CAVALLUZZO

## **Can my employer terminate my employment because of COVID-19? What does this mean for me?**

Yes. In a non-union workplace, an employer can terminate an individual's employment due to a shortage of work or an economic downturn related to the COVID-19 pandemic. Such circumstances amount to a without cause termination and the employee will be entitled to advance notice of termination or pay in lieu of notice (sometimes called "severance"). The exact amount of notice or severance that an employee will be entitled to receive will depend on a number of factors, including but not necessarily limited to the following: (a) the terms of any written employment contract; (b) your age; (c) the duration of your employment with the employer; (d) the nature of your job; and, (e) the availability of similar alternative work.

If anything, the fact the job market is so poor right now means that the amount of notice you would be entitled to might actually increase.

The answer to this question and those that follow will likely be different for unionized employees working under the terms of a collective agreement. Most collective agreements contain restrictions on an employer's ability to terminate an individual's employment without cause, impose layoffs, or require employees to access certain employment benefits. In those circumstances, the terms of the applicable collective agreement will set out the employee's entitlements. Unionized employees are therefore encouraged to contact their bargaining agents for further information.

## **Can my employer reduce my hours of work and/or pay due to the COVID-19 outbreak?**

With one exception, the short answer is no, not without causing a breach of contract. An employer cannot unilaterally alter a fundamental term of the employment relationship. Significant alterations to pay or hours of work would be a fundamental change and if an employer were to do so, that would be considered a constructive dismissal. The one exception is that, if you already agreed in the past that your employer can lay you off without pay, then your employer can do that.

If your employer has reduced your hours or pay, how to respond to this can be very complicated. It requires a practical solution and a careful strategy, considering a number of options. Some employees might welcome the situation as an opportunity to leave the organization with a negotiated severance payment. But this needs to be handled delicately. Our lawyers are available to assist employees who find themselves in this situation and who require practical advice and creative solutions.

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### **Can my employer put me on a temporary layoff or unpaid leave of absence during the COVID-19 outbreak?**

Similar to the answer above, and subject to any express terms in a written employment contract, an employer cannot temporary layoff an employee or require that an employee take an unpaid leave of absence without triggering a breach of contract and constructive dismissal. Employees in such a situation could consider a temporary layoff a constructive dismissal and bring a claim for severance. Alternatively, there may be other options available depending on the individual's unique circumstances.

For more information about the options available in your particular case, we encourage you to contact our employment law group.

### **Can my employer require that I use my vacation days during a shutdown due to COVID-19?**

This situation is really no different than that of a temporary layoff or unpaid leave discussed above. The only additional factor is that the employer proposes to allow the employee to fund part of or all of the workplace absence by using their vacation entitlements, which will then be exhausted once they return to work. An employee may have good reason to agree to this sort of arrangement as an alternative to accepting an unpaid absence or leaving the employer and pursuing a severance claim. However, absent the employee's consent, a requirement that an individual use their vacation days during a shutdown could amount to a breach of contract and constructive dismissal.

### **Am I entitled to Employment Insurance if I am laid off or terminated?**

If you are an employee and have been laid off or terminated through no fault of your own, you will likely qualify for regular Employment Insurance benefits. You can apply online for Employment Insurance benefits through Service Canada. To qualify, you must have worked between 420 and 700 insurable hours in the 52 weeks leading up to your claim. The exact insurable hours required depends on the unemployment rate where you live. Employees who qualify for Employment Insurance benefits can receive up to 42 weeks of income replacement benefits, paid at 55% of their insurable earnings, up to a maximum of \$54,200 a year. This means the maximum EI benefit for those earning \$54,200 or greater is a taxable benefit of \$573 per week.

Your employer must issue your Record of Employee (ROE) within five business days of any interruption in your earnings, such as a termination, layoff or an unpaid leave of absence. This allows the employee to make a claim for EI benefits. If your employer delays in providing you with your ROE, you can start your EI claim anyways and file your ROE at a later date. Sometimes Service Canada will request the ROE from your employer on your behalf.

Unfortunately, unless they are contributing voluntarily, Employment Insurance benefits are not readily available to workers who are independent contractors. If you believe you

are an employee who has been misclassified as an "independent contractor", you can make a claim for Employment Insurance benefits, however, you will likely require legal assistance to prove in law to Service Canada that you are in fact an employee.

### **What is the Canada Emergency Response Benefit?**

In response to the COVID-19 pandemic, the federal government has announced a new benefit, the Canada Emergency Response Benefit ("CERB"), which will provide \$2,000 per month for a period of four months, commencing in April 2020. The CERB is a robust benefit that applies to workers engaged in employment, self-employment or those who previously received pregnancy or parental benefits in the preceding year. Importantly, this benefit is available to workers who were on maternity or parental leave and who, as a result of COVID-19 layoffs, found themselves out of a job at the end of their maternity or parental leave. This is an important measure that provides income support to workers in the "gig economy" who are typically classified as contractors and not always eligible for Employment Insurance benefits.

Workers, which includes both employees and self-employed persons, will be eligible for the CERB if they lose their job, take an unpaid leave or otherwise cease working for a period of at least 14 days for reasons related to COVID-19. This includes situations in which a person has to self-isolate, is required to take a leave to care for children as a result of school or daycare closures due to COVID-19, or is sick or caring for others who are sick, or where they cease working for any other reason related to COVID-19.

The CERB is available to workers who have not been terminated but are not receiving income as a result of COVID-19 related reasons. The Government of Canada has stated that a policy rationale for the benefit is to "help businesses keep their employees as they navigate these difficult times, while ensuring they preserve the ability to quickly resume operations as soon as it becomes possible."

### **Can I request a leave of absence for reasons related to COVID-19?**

In response to the COVID-19 pandemic, the Ontario government has amended the *Employment Standards Act, 2000*, introducing a job protected emergency leave entitled "Declared Emergencies and Infectious Disease Emergencies." The new emergency leave provides for an *unpaid* job protected leave.

Under this new legislation, an employee is entitled to an unpaid leave in any one of the following circumstances, including where they are:

1. Under medical investigation, supervision or treatment for COVID-19
2. Providing care for someone under medical investigation, supervision or treatment for COVID-19

3. Self-isolating in accordance with public health information, order or directive, such as after travel or as a result of having come into contact with someone exposed to COVID-19, or for any other reason as directed by a public health official, Telehealth, a health professional or any provincial or federal government directives
4. Directed by an employer not to work in response to a concern that you might expose other individuals in the workplace to COVID-19, or
5. Providing care to children as a result of school or daycare closures for reasons related to COVID-19

This new job protected leave exists alongside other existing unpaid job-protected leaves in the *Employment Standards Act, 2000*. Importantly, the job protection introduced by this new legislative provision applies retroactively to January 25, 2020, meaning that workers who were laid off, terminated or forced to quit for COVID-19 related reasons from January 25, 2020 onwards, could claim reinstatement to their job once their requirement for a leave has ended.

The *Employment Standards Act, 2000* has also been amended to prohibit employers from requesting medical notes from employees requesting medical leave.

### **What benefits can I access if I am off work sick from COVID-19?**

Two options are available. First, employees with sufficient contributions to Employment Insurance can access up to 15 weeks of Employment Insurance Sickness Benefits by applying through Service Canada. The government recently waived the one week waiting period for Employment Insurance Sickness Benefits. This means that benefits can be paid for the period starting right away after you stop working as long as you call the special toll-free number and request this:

- Telephone: 1-833-381-2725 (toll-free)
- Teletypewriter (TTY): 1-800-529-3742

The federal government has also announced that priority is given to processing claims from workers who are quarantined, and is allowing claims to be backdated in the event that the individual was not able to apply right away because of being quarantined. For more information, see the Service Canada [website](#).

Second, beginning in April 2020, the Canada Emergency Response Benefit is also available to all workers, including employees, self-employed persons and independent contractors, regardless of whether they have contributed to Employment Insurance. As reviewed above, the CERB will provide a taxable benefit of \$2000 per month, for up to four months.

**What benefits can I access if I am taking care of my children due to COVID-19 school or daycare closures or if I am taking care of a family member who is sick?**

Workers in these situations can apply for the federal Canada Emergency Response Benefit, discussed above, which will provide a benefit of up to \$2000 per month. Workers in these situations are also entitled to a job protected leave under the *Employment Standards Act, 2000*, discussed above.

**Can I qualify for benefits if I am still working but my pay has been reduced due to COVID-19?**

An employee who has experienced a pay reduction in excess of 20 percent is likely entitled to consider this a constructive dismissal and seek a severance payment calculated on the basis of their regular compensation. Alternatively, the employee could consider accepting the temporary reduction of their pay in the hopes that their pay will be restored in the future and their employment relationship will be maintained.

Presently, the Canada Emergency Response benefit is available to those who "cease working" for COVID-19 related reasons. A worker who takes the position that they are constructively dismissed because of a COVID-19 related pay reduction would be entitled to the CERB benefit of \$2000 a month for up to four months. However, this benefit would arguably not be available to a worker who has not ceased working but has experienced a pay reduction.

Employment Insurance "work sharing benefits" are available to employees who experience a reduction in their hours. These benefits are available when there is an overall reduction in work which is distributed among the existing employees in the workplace. Employees who otherwise qualify for Employment Insurance can apply for work sharing Employment Insurance benefits through Service Canada. More information about this program is available [here](#).

**What if my employer is forcing me to take a leave of absence because of COVID-19?**

All employers have a duty to provide a safe and hazard-free work environment. The employer would have the right to force you to stay home in order to protect its other employees, if you are sick with COVID-19 symptoms, if you have been in contact with someone who is ill from the virus, or you have travelled internationally in the last 14 days.

In the event that your employment contract does not provide for paid sick leave, employees who cease working for a period of 14 days or more will qualify for the Canada Emergency Response Benefit, a benefit of \$2000 a month for up to four months.

**What if my employer is forcing me to come into work and I do not wish to go in because of COVID-19?**

In each jurisdiction, Occupational Health and Safety laws allow you to refuse to perform work if you reasonably believe that your work is dangerous, hazardous or unsafe. It is illegal for your employer to penalize you for legitimately refusing unsafe work.

Some workers have limited rights to refuse unsafe work including those in the healthcare sector, long-term care sector, firefighters, and correctional officers. If you work in these sectors and have questions, please seek legal advice or speak to your union.

Prior to refusing work you must raise the issue with your supervisor or a member of management. Your employer must investigate your concerns. If the work refusal is based upon the potential risk of exposure to COVID-19, the work refusal investigation should take into account:

1. The current scientific understanding of COVID-19 transmission and risk
2. The specific exposure risks presented by the nature of the work
3. The particular workplace
4. If a hazard is confirmed, the employer is required to adopt preventative measures to eliminate or reduce the workplace danger

If your employer is provincially regulated (i.e. a restaurant, warehouse, etc.) and they do not remedy your concerns and there are reasonable grounds to believe that your health and safety is at risk you may continue to refuse perform work and the matter will be referred to the Ministry of Labour, Training and Skills Development and an inspector will be appointed.

You must follow any orders made by the inspector, though you may appeal any order (or refusal to issue an order) with the Ontario Labour Relations Board within 30 days.

If you work for a federally regulated employer, such as an airline, bank, railway service, or the federal public service, you have the right to refuse work that poses a danger to you. The process for refusing dangerous work is similar; however, there is an intermediary step requiring the workplace committee to investigate a continuing work refusal before it can be referred to the Minister of Labour. There are exceptions to the right to refuse dangerous work and different procedures for employees on a ship or aircraft that is in operation. Contact your union representative and/or a lawyer for assistance.

If you do not know if your employer is provincially or federally regulated, please contact the Ontario Labour Relations Board or seek legal advice.

**Am I entitled to workplace accommodations due to my family obligations or because I or a member of my family is sick and/or immunocompromised?**

Ontario's *Human Rights Code* requires employers to accommodate workers up to the point of undue hardship on the basis of *Code*-protected grounds, such as family status,

disability, or association with a person with a disability. Practically speaking, in the context of COVID-19, employers must accommodate workers up to the point of undue hardship for family and caregiving responsibilities that have arisen as a result of COVID-19 related school and daycare closures. This may mean providing flexible hours or work arrangements, allowing workers to work from home or take a job protected leave of absence where they find themselves without childcare. An employer's obligation is to accommodate care-giving responsibilities up to the point of undue hardship.

The *Human Rights Code* defines "disability" quite broadly. So, where a worker themselves has a health issue such as a compromised immune system or other health issue, or lives or cares for someone with such a condition, then employers must also provide accommodations that are reasonably required as a result of the disability or health issue. The COVID-19 pandemic presents a unique and challenging situation for workers with health issues that leave them or their family members vulnerable to COVID-19. The Ontario Human Rights Commission has taken the position that employers should be sensitive to such factors and to any particular vulnerability an employee might have and provide reasonable accommodations in the circumstances. The duty to accommodate is triggered not just by ongoing "disabilities" but also by episodic illnesses such as COVID-19.

What a reasonable accommodation will look like may be different based on each worker's individual circumstances, but it could include the right to a unpaid leave of absence from work, the right to personal protective equipment on the job, the right to work from home, and so on. Workers who are denied accommodation or who face reprisals or termination from their employers for seeking COVID-19 related accommodations should consult with a lawyer for more information on how to pursue their rights under Ontario's *Human Rights Code*. A lawyer can assist you with pursuing accommodations and with pursuing a claim if your accommodation request is denied or results in adverse employment consequences.

The Ontario Human Rights Commission has prepared a policy statement on human rights and the COVID-19 pandemic which can be found [here](#).