



Emergency Leave and Covid-19

Overview

An amendment to the *Employment Standards Act* (Act) took place on April 17, 2020, which consisted of adding Emergency Leave provisions under the Act. This amendment allowed for the creation of a new regulation referred to as the Covid-19 Emergency Leave, giving all employees who are covered by the *Employment Standards Act*, the right to a leave of absence related to Covid-19. This regulation came into effect on April 23, 2020, however, the leave can be applied retroactively to March 12, 2020.

As is the case with all leaves under the Act, an employer cannot suspend, layoff, penalize, dismiss or otherwise terminate an employee or impose disciplinary measures or discriminate against an employee for taking or requesting an emergency leave, or;

- if these actions are in any way an attempt by the employer to evade any responsibility imposed on the employer under this Act or any other Provincial or Federal Act or regulation, or;
- to prevent or inhibit an employee from taking advantage of any right or benefit granted to the employee under this Act.

1. In what specific circumstances can a regulation be created under the provisions of the Emergency leave in the Act?

- a) When the Minister of Public Safety declares a state of emergency under the *Emergency Measures Act* in respect to all or any area of the Province;
- b) when the Governor in Council declares a public welfare emergency, a public order emergency, an international emergency or a war emergency under the *Emergencies Act* (Canada);
- c) when the Governor in Council makes an order under section 58 of the *Quarantine Act* (Canada);
- d) in any circumstance relating to;
 - a notifiable disease prescribed by regulation under the *Public Health Act* or declared to be a notifiable disease in an order of the Minister of Health or the chief medical officer of health, as the case may be,
 - a notifiable event prescribed by regulation under the *Public Health Act*, or
 - any other threat to public health.

2. What is COVID-19?

COVID-19 means the novel Coronavirus, declared as a notifiable disease by the chief medical officer of health under the *Public Health Act*.

3. Is the employer required to pay the employee while he or she is on a COVID-19 leave?

No, the employer is not required to pay the employee while he or she is on a COVID-19 leave. It is an unpaid leave.

4. Does an employee have other options for compensation during an emergency leave?

An employee who takes an emergency leave may be entitled to employment insurance benefits or to other federal government financial supports. For information, visit the federal government's [COVID-19 Economic Response Plan](#) website or contact Service Canada's Employment Insurance Automated Telephone Information Service at 1-800-206-7218.

The right to take time off work under the COVID-19 Emergency leave is not the same as the right to the payment of employment insurance benefits or federal government supports. An employee may be entitled to COVID-19 Emergency leave whether or not they have applied for or qualified for federal benefits or supports.

5. When does an employer have to grant the COVID-19 Emergency leave?

- a) When an employee is **under individual medical investigation, supervision or treatment** related to COVID-19.

For example, a person is under the care of a medical professional either because they are suspected of having COVID-19, or are being treated for COVID-19.

- b) When an employee is **acting in accordance** with an order of the *Public Health Act* related to COVID-19.

For example, a person who has been contacted by Public Health to inform them that through contact tracing, they have been exposed, and are ordered to self-isolate.

- c) When an employee who is **in quarantine or isolation or is subject to a control measure, which may include self-isolation**, and these measures were implemented as a result of information or directions related to COVID-19 issued or provided to the public, in whole or in part, or to

one or more individuals, through any appropriate means of communication, by;

- the medical officer of health appointed under the *Public Health Act*, or
- a medical practitioner, or
- a nurse practitioner or nurse, or
- Tele-Care, or
- the Government of New Brunswick or Canada or deriving from their departments or agencies, or
- a council of a local government.

For example, an employee's daughter who is 17 years old and by the advice given by a doctor directly to the daughter, not to the mother, is told that since she has just had cancer treatments and that her immune system is compromised, she is advised to quarantine herself and her mother to do the same thing. By relying on information provided to "an individual" (i.e. the daughter) the employee (i.e. the mother) can take leave.

d) When an employee is under **direction of his or her employer** in response to a concern of the employer that the employee may expose other individuals in the workplace to COVID-19.

For example, this would include the employer directing the employee to stay at home for a period of time if the employee has recently travelled internationally and the employer is concerned the employee may expose others in the workplace to a notifiable disease.

e) When an **employee provides care or support** to an individual with whom the employee shares a close family relationship because of a matter related to COVID-19 that concerns that individual, including school or daycare closures.

For example, an employee has lost access to child care because a day care closed due to COVID-19, there is no one else available to look after the children, and the children are not old enough to be left home alone. The employee is entitled to take the leave for so long as a reasonable alternative to child care is not available.

A close family relationship is defined in the *Employment Standards Act* as "the relationship between persons who are married to one another, between parents and their children, between siblings and between grandparents and their grandchildren, and includes a relationship between persons who, though not married to one another and whether or not a blood relationship exists, demonstrate an

intention to extend to one another the mutual affection and support normally associated with those relationships first mentioned".

f) When an employee is **directly affected by travel restrictions** related to COVID-19 and, under the circumstances, cannot reasonably be expected to travel back to New Brunswick.

For example, this would include an employee who is on a cruise ship that is not permitted to dock in any country because of the concern that passengers are infected by a notifiable disease.

There may be some situations where an employee is affected by travel restrictions (for example where there are no international commercial airline flights available) but the employee has other options available to travel back to New Brunswick. This condition will be met if it would not be reasonable to expect the employee to use alternative options.

What is reasonable will depend on the circumstances. For example, an employee was vacationing in Mexico City when Canada banned all flights from Mexico for two weeks. The employee could rent a car or take a series of buses and trains to return to New Brunswick, but this would not be a reasonable expectation in the circumstances.

*This provision applies only where the employee is **directly** affected by the travel restrictions. In other words, it applies only where the **employee's** travel back to New Brunswick is affected.*

*This provision applies only when the employee is caught by travel restrictions while **outside** of New Brunswick.*

6. When an employee is requesting or has requested an emergency leave, is he or she required to give notice to the employer?

An employee intending to take an emergency leave shall notify the employer in writing as soon as possible of his or her intention to take the leave, the anticipated commencement date and the duration of the leave.

When an emergency leave of an employee was taken between March 12, 2020 and April 22, 2020, the employee shall notify the employer in writing as soon as possible of the anticipated duration of the emergency leave.

The written notice should include the purposes for which the emergency leave is taken, with reference to one or more of the purposes set out in question 5. above.

7. Can an employer demand a certificate or proof of medical condition from the employee?

No, an employer shall not request from an employee any certificate or other proof by a medical practitioner, nurse practitioner, nurse or any other person that states that the employee is incapable of working due to COVID-19.

8. How is the employer to deal with documents or other material obtained from the employee?

All documentation or other material received in relation to an emergency leave taken by the employee is **confidential** and shall not be disclosed unless,

- a) the employee has consented in writing to the disclosure,
- b) the disclosure is made to an officer, employee or agent of the employer who needs the record in the performance of his or her duties, or
- c) the disclosure is authorized or required by law.

9. What is the duration of emergency leave?

The duration of an emergency leave shall end on one of the following dates, whichever occurs first:

- a) the date on which the employer and employee agree;
- b) the date on which the purpose for taking the emergency leave referred to in a written notice, no longer exists; and
- c) the date on which this Regulation is repealed.

Despite the duration of the emergency leave referred to in a notice provided by an employee, the employer shall extend the emergency leave if the employee notifies the employer;

- a) that the purpose for taking the emergency leave referred to in a notice still exists, or
- b) that another purpose set out in question 5 above, now exists.

10. For employees who have been or who are currently on leave due to COVID-19, what is the eligibility date?

Although the *Employment Standards Act* and regulations was amended at a later date, for those employees eligible to be granted the emergency leave they shall be deemed to have been eligible on or after March 12, 2020.

11. If an employer took action with regards to an employee's employment on or after March 12th, 2020, what should he or she be aware of?

An employer who, on or after March 12, 2020, suspends, lays off, dismisses or otherwise terminates an employee eligible or deemed eligible to be granted an emergency leave shall be deemed to have granted the employee an emergency leave.

12. When does an employee NOT QUALIFY for the Covid-19 Emergency leave?

An employee does not qualify for the COVID-19 Emergency leave if he or she does not meet one or more of the purposes set out above. Such as when the employee;

- Is not individually affected by the notifiable disease
- Is not acting according to Public Health
- Is not in quarantine or isolation or similar control measures
- Is not directed by the employer
- Is not providing care and support to someone in a close family relationship
- Is not affected by daycare or school closures

For example, an employee who lost work because their employer was not allowed to operate during the State of Emergency, and who is not otherwise affected by COVID-19, and does not meet the conditions of eligibility.

13. When an employee does not qualify for the Covid-19 Emergency leave and an employer lays off an employee for reasons related to Covid-19 is he required to provide this employee with notice?

An employer is not required to provide notice to an employee who he lays off for reasons related to COVID-19 because this notifiable disease is as a result of an unforeseen reason, as such falls within the exemption of the requirement of notice. However, the onus is on the employer to prove that a reduction of work exists and that it is related to the COVID-19 outbreak. Further, questions should be directed to the Employment Standards Branch.

14. Does the employee have options regarding annual vacation which has been affected by COVID-19?

Yes, an employee may interrupt or delay an annual vacation for which he or she qualifies in order to take an emergency leave.

15. What happens during an approved COVID-19 leave or any other approved leaves under the Act?

An employee granted a leave of absence under the *Employment Standards Act* is deemed to have been continuously employed with the same employer during the leave of absence. Furthermore, the employee retains seniority accrued up to the commencement of the leave and continues to accrue seniority during the leave at the same rate of accrual that would have occurred had the employee worked during the leave.