

FAQ: Return to School and Requests for Accommodation on the Grounds of Family Status in the Workplace

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Employers can expect that many parents whose children will be engaged in remote learning this coming school year, either on a part-time or full-time basis, will request accommodation in the coming months. Below, we address some of the most frequently asked questions arising in this context:

Am I required to accommodate an employee who wants to remain at home while their child engages in remote learning if that employee has not provided a specific reason for having to do so?

Typically, the duty to accommodate on the basis of family status arises only when workplace duties conflict with a genuine obligation relating to childcare. An employee's personal preference is not enough to trigger the duty.

While we do not yet know exactly how courts, arbitrators, and tribunals will interpret the duty to accommodate in the context of reopening schools during a pandemic, accommodation will likely be required where, for example, a parent has been advised by a medical professional to keep their immunocompromised or otherwise at-risk child home. However, accommodation may not be required where a parent simply prefers that their child engage in remote learning, rather than in-person attendance at school. General health and safety concerns, unrelated to any risk factors specific to the employee or their child, may not be enough to trigger the duty.

As always, accommodation requires an individualized approach. Each employee's circumstances must be considered on a case-by-case basis. Furthermore, even where accommodation is not legally required or is not possible without undue hardship, the employee may be eligible for a leave of absence, as detailed below.

In the event that accommodation is not required or is not possible without undue hardship, what other options does the employee have to remain at home while their child engages in remote learning?

Depending on the terms of the applicable employment contract or collective agreement, an employee may be eligible for temporary paid or unpaid leaves of absence to address COVID-19

related childcare obligations. Even where the employee has no such contractual entitlements, the *Employment Standards Act, 2000* provides for a variety of unpaid, job-protected leaves of absence that might apply to an employee in the context of COVID-19, depending on the specific circumstances. These include, for example:

- **Infectious Disease Emergency Leave (“IDEL”)**: IDEL is available to employees who are unable to perform their duties for a variety of reasons related to a designated infectious disease – such as COVID-19 – including but not limited to being under quarantine or self-isolation, being under a direction given by their employer in response to a concern that they might expose other individuals in the workplace to the infectious disease, or providing care or support to a specified individual (including a child) because of a matter related to the infectious disease, including but not limited to school or daycare closures.
- **Family Medical Leave (“FML”)**: FML of up to 28 weeks is available to employees who must provide care or support to a specified individual (including a child) who has a serious medical condition with a significant risk of death occurring within a period of 26 weeks.
- **Family Caregiver Leave (“FCL”)**: FCL of up to eight weeks is available to employees who must provide care or support to a specified individual (including a child) who has a serious medical condition.
- **Critical Illness Leave (“CIL”)**: CIL is available for up to 37 weeks to employees who must provide care or support to a critically ill minor child in their family, and for up to 17 weeks to employees who must provide care or support to a critically ill adult in their family. CIL is available to all employees who have been employed by their employer for at least six consecutive months.
- **Sick Leave**: Sick leave provides up to three days per year to deal with a personal illness, injury, or medical emergency, for all employees who have been with their employer for at least two consecutive weeks.
- **Family Responsibility Leave (“FRL”)**: FRL of up to three days per year is available for all employees who have been with their employer for at least two consecutive weeks and are absent from work because of the illness, injury, or medical emergency of a specified individual (including a child), or an urgent matter concerning a specified individual.

Although none of the above are explicitly intended to address the situation of an employee who simply prefers that their child engage in remote learning this coming fall, other circumstances, such as, for example, a child who is immunocompromised as a result of illness and therefore requires the care and support of a parent, or a child who becomes ill with COVID-19 following their attendance at school – may render an employee eligible for one or more of the above statutory unpaid, job-protected leaves of absence.

Is any income support available to those employees who take a temporary leave of absence from their employment?

Some employees may be eligible for temporary income support or other benefits. Currently, the Canada Emergency Response Benefit (“CERB”), which provides \$2,000 per four-week period to eligible individuals, remains available to claimants for up to 28 weeks. As of September 27, 2020, most claimants who qualify for CERB will be transitioned to a newly expanded and simplified Employment Insurance (“EI”) program. The Federal government has also announced that it intends to introduce legislation supporting the creation and implementation of three new proposed temporary recovery benefits for claimants who do not qualify for EI following the end of CERB. These proposed new recovery benefits would be available as of September 27, 2020, and remain available for a period of one year:

- The Canada Recovery Benefit (CRB), which would provide \$400 per week for up to 26 weeks to workers who are self-employed or are not eligible for EI, who still require income support, and who are available and looking for work;
- The Canada Recovery Sickness Benefit (CRSB), which would provide \$500 per week for up to two weeks to workers who are sick or must self-isolate for reasons related to COVID-19; and
- The Canada Recovery Caregiving Benefit (CRCB), which would provide \$500 per week for up to 26 weeks per household to eligible Canadians who cannot work because they must care for one or more specified individuals, including:
 - a child under the age of 12 whose school or daycare is closed or operates under an alternative schedule due to COVID-19;
 - a family member with a disability or a dependant whose day program or care facility is closed or operates under an alternative schedule due to COVID-19; or
 - a child, family member with a disability, or dependant who is not attending school, daycare, or other facilities under the advice of a medical professional due to being at high-risk if they contract COVID-19.

For more details on the changes to the EI program and the new proposed recovery benefits see our detailed Focus Alert – [Federal Government Announces Details of Winding Down of the CERB Program](#).

An employee has an immunocompromised child whose treating physician has indicated that the child would be at-risk if exposed to COVID-19 at school. The employee is requesting accommodation so that they can remain at home while their child engages in remote learning. On what grounds would the request for accommodation be based, and what steps should the employer take in addressing the request?

In the present case, the request for accommodation would be based on the ground of family status as it relates to the parent-child relationship.

If the employee did not submit any supporting documentation with their request, the employer can ask for such documentation, including any details that will assist the employer in examining the request for accommodation. Generally speaking, what is appropriate will depend on the circumstances of the situation and may, in some cases, even include medical documentation related to the family member's disability or illness. Consent for the disclosure of such medical documentation is always required but where the child is under the age of 16, the employee may be able to provide consent in the place of the child as their legal guardian.

The employer and employee should then work together to identify possible solutions to resolve any ongoing family/work conflict. Employers are required to accommodate to the point of undue hardship, which must be assessed in light of the cost, outside sources of funding (if any), and health and safety requirements (if any).

What kind of documentation should an employer request in support of a request for accommodation in the context of COVID-19?

Current public policy suggests that employers should not place additional burdens on the health care system at this time by requesting medical notes in support of accommodation requests. Instead, employee-provided documentation or information, including with respect to the details of the employee's caregiving responsibilities (i.e., the extent of the caregiving requirements, including but not limited to meal preparation and administration, medication preparation and administration, personal hygiene, virtual learning supervision and assistance, etc.), may be sufficient to allow an employer to assess whether or not accommodation will be possible. In all cases, employers should ensure that any discussion with employees on the issue of accommodation is sensitive, fulsome, and well-documented.

An employee sent their child to school and the child was subsequently diagnosed with COVID-19. How should I address the employee's request for accommodation while they deal with their child's illness?

Employees may request accommodation on short notice because they need to self-isolate for a period based on the potential of their child (and by extension, the employee themselves) having been exposed to – or tested positive for – COVID-19 as a result of the child's attendance at school. In these cases, the usual accommodation process will apply. Accommodation options may be limited, however, by any public health guidance (i.e., the employee would most likely not be able to attend the office for some period of time). Where accommodation is not possible, for example working from home, without undue hardship, the employee may instead be temporarily eligible for IDEL or other temporary leaves of absence, as well as income support or other benefits.

Following their child's recovery and a period of self-isolation, the same employee is no longer comfortable returning their child to in-person learning. What options are available to the employee that might allow them to remain at home while their child engages in remote learning?

Depending on the circumstances, the situation may initially be addressed either by way of accommodation or a leave of absence, as appropriate. In the case where accommodation is not required or is not possible without undue hardship; however, once the employee has used up their entitlement to all available contractual and/or statutory leaves of absence, they would be required to return to work unless the employer agrees otherwise.

What happens if schools close again? If an employee doesn't have anyone to take care of their child, are they still required to come into work?

While in the normal circumstances, employees may be able to explore alternate childcare options, in light of COVID-19 alternate childcare will be hard to come by. Accordingly, it is likely that if an employee finds themselves without childcare during a school closure, the employer will need to accommodate. Employers are entitled to request information about the specific childcare supports that the employee has considered in the context of the accommodation process. Appropriate accommodation may take the form of a work from home arrangement, flexible hours, or, if those options are not feasible, a leave of absence, whether under an applicable statute, employment agreement, or collective agreement. Of note, if a school is closed as a result of COVID-19, employees will be eligible for IDEL, as well as the CERB or other income support or caregiving benefits, depending on the timing of the closure.

For more information or tailored advice on your rights and obligations as an employer dealing with COVID-19 or other issues, please contact [Porter Heffernan](#) at [613-940-2764](#), [Colleen Dunlop](#) at [613-940-2734](#) and [Larissa Volinets Schieven](#) at [613-563-7660 #230](#).