

# Ontario expands ESA job-protected leaves for COVID-19

**Date :** March 20, 2020

On March 19, 2020, the Ontario Legislature met in an emergency session and passed Bill 186 – the *Employment Standards Amendment Act (Infectious Disease Emergencies), 2020*, to amend the job-protected leaves of absence under the *Employment Standards Act, 2000* (ESA). Bill 186 repeals much of the existing Declared Emergency Leave provisions and replaces it with a new leave called “Emergency leave: declared emergencies and infectious disease emergencies.” These measures are retroactive to January 25, 2020, the date the first presumptive COVID-19 case was confirmed in Ontario.

## Declared Emergencies

The amended declared emergency leave remains available if an employee cannot perform their job duties as a result of a declared emergency under the *Emergency Management and Civil Protection Act* (EMCPA) and:

1. because of an order that applies to the employee under the EMCPA;
2. because of an order that applies to the employee under the *Health Protection and Promotion Act*;
3. because the employee is needed to provide care or assistance for a specified individual (as set out below); or
4. any other reason that may be prescribed by regulation.

The declared emergency leave is unpaid and will be available for the duration of the declared emergency.

## Infectious Disease Emergencies

The new infectious disease emergencies leave is available only for “designated infectious diseases,” which means that the particular disease must be designated in a regulation under the ESA. Once a disease is designated, the unpaid, job-protected leave is available if an employee will not be performing their job duties as a result of one or more of the following reasons related to the designated infectious disease:

- the employee is under individual medical investigation, supervision, or treatment;
- the employee is acting in accordance with an order by a medical officer of health or by the

Ontario Court of Justice under the *Health Protection and Promotion Act*;

- the employee is in isolation, quarantine, or subject to some other control measure (including self-isolation) where the employee is acting in accordance with public health information or directions issued by a public health official, a qualified health practitioner, Telehealth Ontario, the government of Ontario or Canada, a municipal council, or board of health;
- the employee is acting in accordance with a direction of the employer in response to a concern of the employer that the employee may expose other individuals in the workplace to the designated infectious disease;
- the employee needs to provide care or support to a specified individual (as set out below), for example because of a school or daycare closure;
- the employee cannot return to Ontario as a result of travel restrictions related to the designated infectious disease; or
- any other reasons that may be prescribed by regulation.

COVID-19 has been designated as a designated infectious disease.

## **General**

For both declared emergencies and designated infectious disease emergencies, the leave is available if the employee cannot perform their job duties as a result of having to provide care or support for a specified individual. Bill 186 significantly expands the list of specified individuals to increase the availability of the leave. The specified individuals for the purposes of these leaves are:

1. The employee's spouse.
2. A parent, step-parent or foster parent of the employee or the employee's spouse.
3. A child, step-child or foster child of the employee or the employee's spouse.
4. A child who is under legal guardianship of the employee or the employee's spouse.
5. A brother, step-brother, sister or step-sister of the employee.
6. A grandparent, step-grandparent, grandchild or step-grandchild of the employee or the employee's spouse.
7. A brother-in-law, step-brother-in-law, sister-in-law or step-sister-in-law of the employee.
8. A son-in-law or daughter-in-law of the employee or the employee's spouse.
9. An uncle or aunt of the employee or the employee's spouse.
10. A nephew or niece of the employee or the employee's spouse.
11. The spouse of the employee's grandchild, uncle, aunt, nephew or niece.
12. A person who considers the employee to be like a family member, provided the prescribed conditions, if any, are met.
13. Any individual prescribed as a family member for the purposes of this section.

Employers are permitted to request supporting evidence of entitlement from an employee who

takes the leave; however, this right is somewhat qualified. The evidence requested must be “reasonable in the circumstances” and must be provided at a time that is also “reasonable in the circumstances.” For a designated infectious disease emergency leave, the employer is not permitted to request a medical certificate as evidence of entitlement to the leave.

On March 17, 2020, Ontario passed an Order-in-Council declaring the COVID-19 outbreak to be an “emergency” under the *Emergency Management and Civil Protection Act* (EMCPA). This declaration enables the government to access a broad number of general powers set out under the EMCPA to respond to the emergency. The government used these powers to issue two orders to assist in reducing the spread of COVID-19. The first order requires the following establishments to remain closed until March 31, 2020:

1. All facilities providing indoor recreational programs;
2. All public libraries;
3. All private schools under the *Education Act*;
4. All licensed child care centres;
5. All bars and restaurants (except takeout food and delivery);
6. All theatres and movie cinemas; and
7. All concert venues.

The second order prohibits all “organized public events of over fifty people.” This order includes parades, events, and communal services within places of worship, and will also extend to March 31<sup>st</sup>, 2020, unless terminated earlier.

## **In our view**

Employers should be aware that the usual ESA protections for statutory leaves of absence apply equally to these emergency leaves, including anti-reprisal provisions, the right to continue to participate in certain benefits unless the employee opts not to continue to pay their share of the premiums (if any), and the right to reinstatement. COVID-19 continues to have a significant impact on Canadian workplaces resulting in employers having to layoff staff due to work shortages and temporary closures. Employers should proceed with caution and obtain legal advice before seeking to temporarily layoff an employee who may be eligible for an ESA leave. The amendments also provide flexibility to employees in terms of providing supporting evidence of the entitlement to the leave. It is conceivable that in certain circumstances, it would be reasonable for an employee to provide evidence after the leave is taken.

The rapid introduction and passing of Bill 186 to provide job-protected, unpaid leave entitlements to employees is part of the Ontario government’s response to manage the ongoing impact of the COVID-19 pandemic. We will continue to update our Focus readers with COVID-19 developments

as they occur.

For further information or advice on your rights and obligations as an employer when dealing with COVID-19 and similar issues, please contact [André Champagne](tel:613-940-2735) at [613-940-2735](tel:613-940-2735), [Joël Rocque](tel:613-563-7660) at [613-563-7660](tel:613-563-7660) ext.310, [Jennifer Birrell](tel:613-940-2740) at [613-940-2740](tel:613-940-2740), [Lynn Harnden](tel:613-940-2731) at [613-940-2731](tel:613-940-2731), [Steven Williams](tel:613-940-2737) at [613-940-2737](tel:613-940-2737), [Raquel Chisholm](tel:613-940-2755) at [613-940-2755](tel:613-940-2755) and [Vicky Satta](tel:613-940-2753) at [613-940-2753](tel:613-940-2753).