



CORONAVIRUS (COVID-19)

GUIDE FOR HOTEL AND HOSPITALITY INDUSTRY EMPLOYERS

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A. PURPOSE OF THIS GUIDE

Emond Harnden LLP has been monitoring the development of COVID-19 and is continuously advising clients in the Hotel and Hospitality industry as more information becomes available. In the interest of helping all employers working in this industry in their efforts to provide safe and healthy work and guest environments, as well as manage the many challenges that have followed the outbreak of COVID-19, our lawyers have prepared the following Guide for Hotel and Hospitality industry employers. This Guide will provide an overview of some of the key legal considerations and important issues that all Hotel and Hospitality industry employers should consider in their ongoing efforts to manage this unprecedented situation. Please note that while this Guide is based on and refers to Ontario legislation, it also provides a compilation of our recommended “best practices” for Hotel and Hospitality industry employers for the promotion of operating safe workplaces during these challenging times. For ease of reference in the remainder of this Guide, we will refer to Hotel and Hospitality industry employers as “Employers” and/or “Hotels”.

B. BACKGROUND

On March 11, 2020, the World Health Organization (“WHO”) officially changed their classification of COVID-19 from a public health emergency of international concern to a pandemic. As of April 3, 2020, according to the WHO, there were 972,303 confirmed cases globally and 50,322 deaths. As of April 3, 2020, there were 12,519 confirmed cases in Canada (with the majority of cases in Quebec (6,101) and Ontario (3,255)) and 187 deaths. However, these numbers are unfortunately continuously increasing rapidly (daily). There is also an increased risk of more severe outcomes for Canadians who are aged 65 and over and those who have compromised immune systems and/or underlying medical conditions. As the instances of COVID-19 continue to increase throughout Canada and the world, Hotels should be prepared for this ongoing pandemic. Having the proper plans and policies in place to address COVID-19 in the workplace, but also with respect to the service of guests, will not only assist in business continuity but will also protect employees and Hotel guests.

C. WHAT ARE CORONAVIRUSES?

Coronaviruses are a family of common viruses usually associated with mild illnesses such as the common cold. A “novel coronavirus” is a strain of coronavirus that has not been previously identified in humans. Examples of these include Middle East Respiratory Syndrome (“MERS”) and Severe Acute Respiratory Syndrome (“SARS”). Human coronaviruses cause infections of the nose, throat and lungs. They are spread from an infected person through: (i) respiratory droplets generated when you cough or sneeze; (ii) close, prolonged personal contact, such as touching or shaking hands; or (iii) touching something with the virus on it, then touching your mouth, nose or eyes before washing your hands. The symptoms associated with COVID-19 include fever and respiratory symptoms such as coughing, difficulty breathing and/or pneumonia in both lungs. Those who are infected with COVID-19 may have little to no symptoms. You may not know you have symptoms of COVID-19 because they are similar to a cold or flu. Symptoms may take up to 14 days to appear after exposure to COVID-19. In severe cases, infection can lead to death. Coronavirus infections are diagnosed by a health care provider based on symptoms and are confirmed through laboratory tests. At this time, there is still no vaccine for COVID-19.



D. WORKING TO PREVENT TRANSMISSION OF COVID-19 WHILE OPERATING A HOTEL

i. Hygiene Practices

While at work, it is important that employees comply with public recommendations regarding hygiene practices to help reduce the risk of infection or spreading the infection to others. Hygiene practice guidelines that Hotels can provide to employees include the following:

- Wash your hands often with soap and water for at least 20 seconds or use alcohol-based hand sanitizer if soap and water are not immediately available;
- Avoid touching your eyes, nose and mouth unless you have just washed your hands;
- Cover your cough and sneeze with a tissue or the bend of your arm, not your hand (dispose of any tissues you have used as soon as possible in a lined waste basket and wash your hands afterwards);
- Clean high-touch surfaces frequently with cleaners or diluted bleach (one-part bleach to nine-parts water).

ii. Physical (Social) Distancing

Where possible, Hotels should encourage employees and guests to adopt physical (social) distancing measures, which have been identified by the Public Health Agency of Canada (“PHAC”) to help reduce and delay the spread of COVID-19 in the community. Physical distancing is one of the most effective ways to reduce the spread of illness during an outbreak. It involves making changes in your everyday routines to minimize close contact with others, including avoiding common greetings (e.g., handshakes), keeping a distance of at least 2 arms-length (approximately 2 metres) from others and avoiding all in-person interactions with people who are sick and staying home when you are sick.

iii. Quarantine (Self-isolation) and Isolation for COVID-19

PHAC has provided useful information to distinguish between advice/requirement to quarantine (self-isolate) and isolate to protect the health and safety of Canadians, which can be found at:

- <https://www.canada.ca/en/public-health/services/diseases/2019-novel-coronavirus-infection/prevention-risks.html#self>

Employers should respect government and health authorities’ recommendations and requirements regarding when to quarantine (self-isolate) and isolate and encourage employees to follow such guidelines, even if it means missing work. If a Hotel comes to understand that a guest is in the category of individuals required to self-isolate, additional care should be taken with respect to cleaning protocols and other operational considerations. The Hotel Association of Canada offers specific guidance on best practices for managing hotel guests in self-isolation, which can be found at:

- <http://www.hotelassociation.ca/wp-content/uploads/2020/03/Hotel-Operating-Procedures---Self-Isolation.pdf>



Further, Hotels should be cognizant of the importance of balancing a guest's individual interests with employer obligations regarding health and safety. Hotels should coordinate with local health authorities, in particular if they become aware that a guest is exhibiting symptoms of COVID-19 or has tested positive. However, while Hotel staff can be notified of the guest's room to ensure appropriate protocols are being taken, any disclosure should avoid identifying information about the guest (unless necessary in the circumstances) and be limited to the extent it is necessary to take reasonable precautions to protect health and safety. It is also worth noting that the *Quarantine Act* allows the Canadian Government to take over hotels for housing quarantined Canadians in certain circumstances. As this may occur on short notice, Hotels should consider in advance what special strategies they may need to take in such circumstances from a health and safety perspective, and on the communications front.

E. HOTEL PRACTICES, POLICIES AND PROCEDURES FOR PANDEMIC PREPAREDNESS AND RESPONSE

Most Hotels may already have policies and procedures setting out the requirements for employees that are absent due to sickness or to care for others. These policies should be applied in the normal manner, both in terms of eligibility and procedure, to employees that are infected by COVID-19; while recognizing that the ability to request a doctor's note has been curtailed by recent legislative amendments and public health guidelines, which are referenced in more detail in sections F and J of this Guide. Furthermore, and even beyond situations related to COVID-19, Employers generally need to carefully consider any requirements for doctor's notes as hospitals and doctors' offices will likely be overburdened and requiring employees to attend these locations may increase the likelihood of them becoming sicker or infecting others.

In addition to whatever policies, practices and procedures are already in place, Employers may wish to implement a workplace infection control policy or plan with the specific objective of preventing the spread of COVID-19 in the workplace. Hotels can promote good hygiene practices through the plan by implementing the following measures:

- Clearly advising employees to abide by the general hygiene practices, referenced in section D above, through verbal direction, written policies and signage;
- Providing employees with the proper cleaning solutions, tools and personal protective equipment (where required/available), and ensuring that objects and areas in the workplace that are touched/used frequently are cleaned and disinfected regularly; and
- Reducing the number of objects in the workplace that are frequently touched (for example, magazines in Hotel receptions/lobbies or common areas can be removed).

Physical (social) distancing is also highly recommended to minimize contact or face-to-face interactions during peak pandemic phases. Examples of physical distancing have already been provided in section D of this Guide, but it is important to remember to: (i) keep a distance of at least 2 arms-length (approximately 2 metres) from others, including for guests at check-in and check-out; (ii) avoid common greetings, such as handshakes; (iii) conduct meetings by phone or videoconference (if possible); (iv) permit employees to work non-standard hours to avoid travelling to or from work at peak times (if possible); (v) implement a rotation for shift changes and break times;



and (vi) encourage people to ride the elevator alone or in small groups (consider waiting for the next ride or use the stairs, if possible).

Hotels may also consider if specific work procedures can be adapted for different positions to better promote hygiene and physical distancing. For example, advising front desk personnel to avoid handling credit cards, identification and other items from guests. Instead, guests can hold up any required identification so that their photo is visible and confirm their reservation using their reservation number and/or by reading out the last four digits of their credit card number. Room keys can be slid across the desk to guests to avoid contact. A box can be left at the front desk for key return, and have staff clean keys, one at a time, with peroxide disinfectant per prescribed protocol.

Public health officials are encouraging employers to allow employees to work from home, whenever possible. While front-line employees would not have this option, Hotels may consider whether office or administrative positions could be performed remotely. For Hotels that consider implementing work from home policies, it may be useful to first identify which job responsibilities lend themselves to working from home. Hotels should clearly set out the duties and expectations for such employees including the hours of work and any deadlines.

Hotels should provide employees with the latest company news including any revised policies and procedures, health and safety protocols, and business continuity decisions that have been reached or are being considered (such as whether to temporarily suspend operations or to stay open) and any HR policies regarding pay and leaves. Hotels will have to consider the best method of communication and ensure that they have accurate contact lists. Hotels with unionized workforces should follow the collective agreement protocols for such communications. Hotels throughout the world have also been publishing statements on their respective websites to provide their guests with current and relevant information regarding their response to COVID-19. For instance, many online statements will highlight key information with respect to the following: (i) reservation cancellation policy for existing and new reservations; (ii) information about commitment to health and safety, and hygiene practices/cleaning protocols to reassure guests; and (iii) precautions that guests can take to protect themselves and others from COVID-19.

F. DEALING WITH COVID-19 RELATED ABSENCES

i. Sick Leave Benefits

Employees unable to work due to illness caused by COVID-19 may be eligible to claim sick leave benefits under a collective agreement or a sick leave policy/plan. Such employees should be treated like any other sick employee for eligibility purposes.

A more complicated question has arisen with respect to employees who are quarantined (self-isolating) but who are not themselves ill or exhibiting symptoms of COVID-19. PHAC has provided clear advice for quarantine (self-isolation), namely to quarantine for 14 days if you have no symptoms and you: (i) are returning from travel outside of Canada; (ii) had close contact with someone who has or is suspected to have COVID-19; and (iii) have been told by the public health authority that you may have been exposed and need to quarantine. While other employers outside of the Hotel and Hospitality industry may have work available for employees to perform remotely while in self-isolation, the reality for Hotels is that the work performed by front-line staff cannot be done from home. Whether



sick leave benefits would cover such a situation will depend on the scope of the language in the collective agreement or sick leave policy.

When interpreting whether an employee in self-isolation is eligible for sick leave entitlements under policies or collective agreements, Employers should verify whether local or municipal public health authorities have issued any guidance on the subject which may influence their analysis. For example, some public health authorities (such as Ottawa Public Health and Toronto Public Health) are discouraging employers from requesting sick notes from employees who are absent from work due to COVID-19 related reasons and have posted alternate guidance for employers in such circumstances.

ii. Statutory Leaves of Absence

Generally, the Ontario *Employment Standards Act, 2000* (“ESA”) contains a number of unpaid leave provisions that could apply in a pandemic situation like COVID-19:

- **Sick Leave** (up to three days in each calendar year due to illness, injury or medical emergency);
- **Family Responsibility Leave** (up to three days in each calendar year due to the illness, injury, medical emergency or other urgent matter of a prescribed family member);
- **Family Caregiver Leave** (up to eight weeks to care for or support a family member suffering from a serious illness);
- **Family Medical Leave** (up to 28 weeks in a 52-week period to care for or support a prescribed family member suffering from a serious medical condition with a significant risk of death occurring within a 26-week period);
- **Declared Emergency Leave** (if an employee cannot perform their duties due to an emergency declared under the *Emergency Management and Civil Protection Act* (“EMCPA”) or other similar legislation).

More specifically, however, on March 19, 2020, the Ontario Legislature convened an emergency sitting to, among other things, amend the *ESA* to provide for job-protected leave in light of the ongoing pandemic. The *ESA* provisions dealing with Declared Emergency Leave were amended to repeal much of its former provisions and to replace it with a new leave called “**Emergency leave: declared emergencies and infectious disease emergencies**”. In addition to a job-protected leave of absence without pay for an employee who cannot perform their duties due to an emergency declared under the *EMCPA* or other similar legislation, the amendments also provide the same unpaid leave for the following reasons:

- The employee is under medical investigation, supervision or treatment for COVID-19;
- The employee is acting in accordance with an order under the *Health Protection and Promotion Act*;
- The employee is in isolation or quarantine (includes self-isolation) in accordance with public health information or direction;



- The employer directs the employee not to work due to a concern that COVID-19 could be spread in the workplace;
- The employee needs to provide care to a prescribed person for a reason related to COVID-19 such as a school or day-care closure;
- The employee is prevented from returning to Ontario because of travel restrictions.

A Hotel may require an employee who takes such leave to provide evidence reasonable in the circumstances, at a time that is reasonable in the circumstances, that the employee is entitled to the leave, but cannot require an employee to provide a doctor's note as evidence. It is important to note that there is retroactive application to January 25, 2020, the date the first presumptive COVID-19 case was confirmed in Ontario. Details on the amendments to the *ESA* can be found in our Focus Alert at the link provided in this Guide at section J.

iii. Work Refusals

Under the Ontario *Occupational Health and Safety Act* (“*OHSA*”), Hotels as employers are required to take every precaution reasonable in the circumstances for the protection of their employees. The *OHSA* also gives most employees, including Hotel staff, the right to refuse work that they believe is unsafe to themselves or other employees. While this will typically involve concerns over equipment, machinery or physical aspects in the workplace, it is possible that Hotels may encounter a situation where an employee may trigger a work refusal related to concerns regarding COVID-19. There are two levels of investigation to a work refusal – the first level is conducted by the employer, while the second is conducted by an inspector from the Ministry of Labour (“Ministry”). If an employee exercises a work refusal due to COVID-19, Hotels should immediately investigate and include the health and safety representative or joint health and safety committee, as applicable, in order to assess the work refusal. The refusing employee must remain available to the employer or supervisor for the purposes of the investigation. If, after the investigation, the refusing employee has reasonable grounds to believe the workplace is still a danger to their safety, the employee may continue to refuse to work. In these circumstances an inspector from the Ministry must be notified to investigate. If an inspector from the Ministry confirms the absence of danger, Hotels may consider discipline if the refusing employee continues to refuse to return to work. Each work refusal will have to be investigated and individually assessed based on all surrounding circumstances. Therefore, if an employee attempts to exercise the right to refuse unsafe work due to COVID-19, it is recommended that Hotels consult with one of our lawyers regarding the potential application of the work refusal procedures under the *OHSA*.

G. CONSIDERATIONS FOR HOTELS UNDERGOING WORKFORCE REDUCTIONS AND/OR TEMPORARY SUSPENSION OF OPERATIONS

i. Temporary Layoffs

Unfortunately, Hotel occupancy levels have been significantly impacted by the ongoing COVID-19 pandemic, resulting in Employers having to layoff staff due to work shortages and/or temporary suspension of operations. Below, we have summarized some of the key legal considerations when dealing with temporary layoffs under the *ESA*. Hotels may invoke a temporary layoff in accordance



with the provisions of the *ESA*, which does not amount to a termination or severance of employment pursuant to the *ESA*. Under the *ESA*, a temporary layoff is the following:

- a) A layoff of not more than 13 weeks in any period of 20 consecutive weeks;
- b) A layoff of more than 13 weeks in any period of 20 consecutive weeks, if the layoff is less than 35 weeks in any period of 52 consecutive weeks and:
 - i. the employee continues to receive substantial payments from the employer;
 - ii. the employer continues to make payments for the benefit of the employee under a legitimate retirement or pension plan or a legitimate group or employee insurance plan;
 - iii. the employee receives supplementary unemployment benefits;
 - iv. the employee is employed elsewhere during the layoff and would be entitled to receive supplementary unemployment benefits if that were not so;
 - v. the employer recalls the employee within the time approved by the Director of Employment Standards;
 - vi. in the case of an employee who is not represented by a union, the employer recalls the employee within the time set out in an agreement between the employer and the employee; or
- c) In the case of an employee represented by a union, a layoff longer than a layoff described in clause (b) above where the employer recalls the employee within the time set out in an agreement between the employer and the union (i.e., recall rights in a collective agreement).

The *ESA* specifies that an employer who temporarily lays an employee off without specifying a recall date shall not be considered to terminate the employment of the employee, unless the period of the layoff exceeds that of a temporary layoff. If a layoff exceeds the above-noted period for a temporary layoff, however, an employee will be deemed to have been terminated for *ESA* purposes and will therefore be entitled to *ESA* termination pay and severance pay, if applicable. Many unionized Hotels have express layoff and recall terms setting out procedures and obligations for temporary layoffs in their collective agreements. Unionized Hotels should review their collective agreements so they can become familiarized with the applicable terms and how their collective agreements may require notice prior to a layoff and/or permit a longer period of layoff in cases where employees elect to retain recall rights under the collective agreement.

It is also important to note the current state of employment law in Ontario which is that, notwithstanding the permissive provisions in the *ESA*, absent a term in an employment agreement (express or implied) permitting temporary layoffs (or in some cases a clear and binding policy and/or established and regular employer practice relating to temporary layoffs), a layoff, even if intended to be temporary, may result in the risk of constructive dismissal claims. In other words, even if a temporary layoff under the *ESA* is carried out properly such that employment is not deemed terminated under the *ESA*, absent an agreement to the contrary and/or a well established practice, a unilateral layoff by an employer may result in the triggering of a termination of employment by virtue of the common law in Ontario.



That being said, there is currently much debate amongst employment lawyers as to whether in the time of crisis, such as the unprecedented COVID-19 pandemic, there may be an implied term in the employment agreement that an employer can place an employee on a temporary layoff. We also note that employers who already have an established practice of implementing layoffs and recalls on a temporary basis of certain positions from time to time (particularly in the case of a previous temporary suspension of operations) may be better situated to defend allegations of constructive dismissal at the time of a temporary layoff in response to the COVID-19 crisis.

There has also been discussion about whether an employment contract can become “frustrated” as a result of the COVID-19 crisis and the mass temporary suspensions of operations that have followed. Frustration is a legal doctrine which essentially involves an unforeseen change to the circumstances underlying the contract, through no fault of the parties, that renders the contract incapable of performance.

Additionally, an employee claiming constructive dismissal has an obligation to mitigate any damages they allege to have suffered, which means that if a laid off employee is recalled to work and declines, a court may later find that the employee failed to mitigate their damages (in whole or in part), therefore reducing the value of their claim.

Finally, the recent *ESA* amendments referenced at sections F and J of this Guide, have also created a new factor to be considered at the time of a temporary layoff. The usual *ESA* protections for statutory leaves of absence apply equally to the new 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. Employers should always proceed with caution and seek advice before seeking to temporarily lay off an employee who may be eligible for an *ESA* leave.

Given the severe impact of COVID-19 on hotel and hospitality operations, Employers are faced with having to make difficult decisions related to their workforce quickly. While certainty may not be possible in these unprecedented circumstances, there are several steps Employers can take to try to mitigate the risk to the extent possible, and we recommend that Hotels consult with one of our lawyers for assistance when faced with having to make such difficult choices.

ii. Canada Emergency Response Benefit

The new Canada Emergency Response Benefit (“CERB”) provides financial support to employed and self-employed Canadians who have been directly affected by COVID-19. It provides a payment of \$2,000 for a four-week period (equivalent to \$500 a week) for up to 16 weeks.

The CERB will be available to workers:

- residing in Canada, who are at least 15 years old;
- who have stopped working because of COVID-19 or are eligible for Employment Insurance (“EI”) regular or sickness benefits;
- who had income of at least \$5,000 in 2019 or in the 12 months prior to the date of their application; and



- who are or expect to be without employment or self-employment income for at least 14 consecutive days in the initial four-week period (for subsequent benefit periods, they expect to have no employment income).

The CERB is only available to individuals who stopped work and are not earning employment or self-employment income as a result of reasons related to COVID-19. Workers will also not be eligible if they quit their employment voluntarily. Each payment of the CERB covers a four-week period, beginning on March 15, 2020. The CERB is available for the period from March 15, 2020 to October 3, 2020 (four periods of four weeks in total). Applications for the CERB will begin the week of April 6, 2020. Hotels can find more information about the CERB at:

- <https://www.canada.ca/en/revenue-agency/services/benefits/apply-for-cerb-with-cra.html#who>
- <https://www.canada.ca/en/services/benefits/ei/cerb-application.html>

iii. **Employment Insurance Benefits and Supplemental Unemployment Benefit Plans**

In the event of a temporary layoff, Hotels will have to issue a Record of Employment for each of the employees that are on a temporary layoff so that they may apply for Employment Insurance (“EI”) benefits. Also, if an employee has contracted COVID-19 and has exhausted any paid sick leave through the Employer (or any other applicable benefits), a Record of Employment may be issued so that the employee can apply for EI sickness benefits.

However, it is important to note that the Canadian Government has just released some important information with respect to EI benefits. More specifically, the Government has indicated that if an individual became eligible for EI regular or sickness benefits prior to March 15, 2020, their claim will be processed under the pre-existing EI rules. However, if an employee became eligible for EI regular or sickness benefits on March 15 and onward, their claim will be automatically processed through the CERB. Therefore, if an employee is already receiving EI benefits, they will continue to receive such benefits. The Government has advised that employees will retain their eligibility to receive EI benefits after they stop receiving the CERB, and the period for which they received the CERB will not impact their EI entitlement.

For those who became eligible for EI benefits prior to March 15, 2020 or who will later claim EI after they stop receiving the CERB, the basic rate for calculating EI benefits is 55% of their average insurable weekly earnings, up to a maximum amount. The duration of benefits varies from 14 weeks up to a maximum of 45 weeks, depending on the unemployment rate of the applicable geographic area and the number of insurable hours the employee has accumulated. EI sickness benefits provide up to 15 weeks of income replacement and is available to eligible claimants who are unable to work because of illness, injury or quarantine, to allow them time to restore their health and return to work. The Canadian government is waiving the one-week waiting period for those individuals in quarantine that can still claim EI sickness benefits so they can be paid for the first week of their claim. However, this waiver does not apply to employees laid off for a shortage of work and claiming regular EI benefits (i.e., for those who became eligible prior to March 15, 2020).



Supplemental Unemployment Benefit (“SUB”) plans may be an option for some Employers in the event they have the ability to fund such plans at this time. A SUB plan permits an employer to increase employees’ weekly earnings when they are unemployed due to a temporary stoppage of work. Payments from SUB plans that are registered with Service Canada are not considered as earnings and are not deducted from EI benefits. Many Employers may be familiar with SUB plans for the purpose of an employer providing a “top-up” to employees on pregnancy or parental leave. SUB plans also exist for permitting employers with the ability to fund such plans to provide additional earnings to employees who are on temporary layoff under the *ESA* and in receipt of EI benefits.

SUB plans must be registered before their effective date and must comply with a specific set of requirements. The registration date of the SUB plan is the date on which it is submitted to the SUB Program, provided all the required conditions are met and all supporting documents are received. Until the SUB plan is registered, any amounts paid by an employer to a temporarily laid off employee will be treated as earnings and may be deducted from the employee’s EI benefits. Hotels can find more information about SUB plans in the *Guide for Employers Offering Supplemental Unemployment Benefits to Their Employees*, which can be found at:

- <https://www.canada.ca/en/employment-social-development/programs/ei/ei-list/reports/supplemental-unemployment-benefit.html>

However, for Hotels with existing SUB plans or for those thinking about registering, it is very important to consider the present confusion and lack of information generated from the Canadian Government’s current published information indicating an automatic transfer to the CERB, which seems to include employees who would otherwise be eligible for EI benefits (March 15, 2020 and onward). Since SUB top-up payments are provided where employees are otherwise in receipt of EI benefits, it is unclear whether employees in receipt of the CERB (instead of EI benefits) will be able to receive a top-up. We also reiterate that in order to qualify, employees must be or expect to be without employment income for at least 14 consecutive days in the initial four-week period (and expect to have no employment income for subsequent benefit periods). We will continue to monitor the situation and we hope that the Government will be providing much needed clarification in the near future.

iv. Work-Sharing

Work-Sharing (“WS”) is a program by Service Canada designed to help employers and employees avoid layoffs when there is a temporary decrease in business activity beyond the control of the employer. The program provides EI benefits to eligible employees who agree to reduce their normal working hours and share the available work while their employer recovers. The employer and the employees (and the union, if applicable) must agree to participate in a WS agreement. Effective March 15, 2020 to March 14, 2021, the Government of Canada is introducing temporary special measures.

To be eligible for WS, employees must:

- be year-round, permanent, full-time or part-time employees needed to carry out the day-to-day functions of the business (“core staff”);
- be eligible to receive EI benefits; and



- agree to reduce their normal working hours by the same percentage and to share the available work.

Employees that are not eligible for WS include:

- seasonal employees and students hired for the summer or a co-op term;
- employees hired on a casual or on-call basis, or through a temporary help agency;
- employees who are needed to help generate work and/or who are essential to the recovery of the business; for example: (i) senior management; (ii) executive-level marketing/sales agents; (iii) outside sales representatives; or (iv) technical employees engaged in product development;
- employees who hold more than 40% of the voting shares in the business.

Key program features include the following:

- An established WS unit: a WS unit is a group of employees with similar job duties who agree to reduce their hours of work over a specific period of time;
- Equal sharing of work: all members of a WS unit agree to reduce their hours of work by the same percentage and to share the available work;
- Expected work reduction: a WS unit must reduce its hours of work by at least 10% to 60%. The reduction of hours can vary from week to week, as long as the average reduction over the course of the agreement is from 10% to 60%;
- Agreement length and extension: a WS agreement has to be at least six consecutive weeks long and can last up to 26 consecutive weeks. Employers may be able to extend their agreements up to a total of 76 weeks.

Employers are requested to submit their applications ten calendar days prior to the requested start date. Provided the WS program is approved, employees would then be entitled to receive EI benefits to offset their losses from the reduction in their working hours.

While a WS agreement can work well in certain workplaces and circumstances, there are some challenges. First, it would involve significant time and effort to establish what work is available, how it can be shared, and who would be included in the unit(s). There are many limitations and restrictions involved, which mean that the program is neither flexible nor straightforward. It would not help Hotels to address situations where there is simply no work to be done, nor would it help in the case of employees who are ineligible. Finally, it would require the agreement of any unions involved and could not be implemented unilaterally.

v. Terminations

At common law in Ontario, an employee's employment can be terminated summarily (without notice) for just cause, while other terminations of employment must be on "reasonable notice". An Ontario employer is required to provide terminated employees with at least the statutory notice of termination pay or pay in lieu of notice that is owing to the employee in the circumstances under the *ESA*. There



are some exemptions from the provisions of the *ESA* in relation to certain positions and types of employers, so it is important to be aware of its application in the specific circumstances. For the employees that are covered by the notice provisions of the *ESA*, the minimum of notice owed in each case will be determined by the length of the employee's period of employment with the employer. However, it is important to note that such notice increases in the event of mass terminations (i.e., 50 employees or more being terminated within the same four-week period). Employers are also required to provide an additional amount for "severance pay" in certain circumstances such as if the employee has five years of service or more AND the employer has an Ontario payroll of \$2.5 million per annum. More detailed information about the requirements of the *ESA* on termination of employment (including mass terminations) can be found in the following Ontario Ministry of Labour Guide:

- <https://www.ontario.ca/document/your-guide-employment-standards-act-0/termination-employment>

Unionized Hotels must also consider collective agreement obligations at the time of carrying out the termination of bargaining unit employees. With respect to non-union Hotels or employees outside of a bargaining unit, unless an employee has signed a valid and legal employment agreement which limits the employee's entitlements on a termination of employment to the *ESA* minimum entitlements, then generally, pursuant to the common law in Ontario, an employer will owe the employee substantially more for common law reasonable notice of termination of employment. In determining what constitutes common law reasonable notice, courts consider the following factors: the employee's age, salary, position and length of employment, and the availability of similar employment. Employees have a duty to mitigate their damages following a termination. Any common law reasonable notice provided as pay in lieu can be indicated as being inclusive of statutory notice of termination and severance pursuant to the *ESA*. While *ESA* notice could be provided as working notice, any severance pay entitlements under the *ESA* must be provided as pay.

H. PROVINCIAL AND FEDERAL EMERGENCY RESPONSE MEASURES

i. Ontario's Declaration of Emergency and Emergency Orders

On March 17, 2020, the Government of Ontario announced that it was making an order declaring an emergency under subsection 7.0.1(1) the *EMCPA*. As a result of this declaration and its associated orders, amongst other establishments, all bars and restaurants were required to close, except to the extent that such facilities provide takeout food and delivery. On March 23, 2020, the Government announced that it would order the mandatory closure of all non-essential workplaces effective on March 24, 2020 at 11:59 p.m. This order was made further to the emergency declared on March 17, 2020 under the *EMCPA*. A full list of businesses that were permitted to stay open was released by the Government and essential workplaces included: (i) restaurants and other food facilities that prepare and serve food, but only for delivery or takeaway, together with food delivery services; and (ii) hotels, motels, shared rental units and similar facilities, including student residences. On April 3, 2020, the Government updated the list of essential businesses, requiring that any businesses not listed close their physical locations by 11:59 p.m. on April 4, 2020. Although there were significant revisions, the areas which most impact the hotel and hospitality industry remain fundamentally unchanged (with one exception). Restaurants (take-out, drive-through and delivery service only) can



remain open, along with hotels, motels and other shared rental accommodation, **except** for any pools, fitness centres, meeting rooms and other recreational facilities that may be part of their operations. The new list also indicates that the person responsible for a place of business that continues to operate must ensure that the business operates in accordance with all applicable laws, including the *OHSA* and the regulations made under it. Further, the person responsible for a place of business that continues to operate must operate the business in compliance with the advice, recommendations and instructions of public health officials, including any advice, recommendations or instructions on physical distancing, cleaning or disinfecting.

Additionally, whereas the Government had previously issued an order wherein all organized public events of over 50 people were prohibited, including parades and events and communal services within places of worship, on March 28, 2020, the Government of Ontario announced that it was now prohibiting organized public events and social gatherings of more than five people, including parades and religious services, rites or ceremonies. This prohibition applies to an event or gathering even if it is held at a private dwelling, but does not apply to a gathering of members of a single household, or a gathering for the purposes of a funeral service that is attended by not more than ten persons.

The emergency declaration and associated orders have recently been extended and the revocation date is now April 13, unless further extended. This declaration of emergency has had a direct impact on Hotels who operate restaurants and who host conferences/events, albeit Hotels had already seen a significant increase in cancellations of events prior to the issuance of the emergency orders. For the time being, Hotels who operate restaurants will have to transition towards a takeout/take away model, while incorporating physical (social) distancing into these models. Hotels will also have to close any pools, fitness centres, meeting rooms and other recreational facilities that may be part of their operations.

ii. Canada Emergency Wage Subsidy

The Government of Canada recently announced the new Canada Emergency Wage Subsidy (“CEWS”) to help businesses keep and return workers to their payroll through the challenges posed by the COVID-19 pandemic. This wage subsidy aims to prevent further job losses, encourage employers to re-hire workers previously laid off as a result of COVID-19 and help better position Canadian companies and other employers to more easily resume normal operations following the crisis.

The CEWS will provide eligible employers with a temporary subsidy to assist in paying employees’ wages for a 12-week period, from March 15, 2020 to June 6, 2020. As the Canadian Government continues to iron out the details of the CEWS, many changes to the program have been announced over the past week. For example, although the initial announcement regarding a wage subsidy program back on March 18, 2020 indicated that it would have a cap of 10%, it has now been revealed that the CEWS will provide for up to 75% of wages paid to an employee on the first \$58,700 normally earned by an employee.

The Government has announced that the subsidy amount for a given employee on eligible remuneration paid between March 15 and June 6, 2020 would be the greater of:

- 75% of the amount of remuneration paid, up to a maximum benefit of \$847 per week; and



- the amount of remuneration paid, up to a maximum benefit of \$847 per week or 75% of the employee's pre-crisis weekly remuneration, whichever is less.

The Government is to provide further details in the coming days on how to define pre-crisis weekly remuneration. Eligible remuneration may include salary, wages and other remuneration (amounts for which employers would generally be required to withhold or deduct income tax). Not included in eligible remuneration is severance pay or items such as stock option benefits. Eligible employers include employers of all sizes and all sectors of the economy, except for public sector entities. This subsidy would be available to eligible employers that see a drop of at least 30% of their revenue. In applying for the CEWS, employers would be required to attest to the decline in revenue. To establish the 30% decrease, employers will be asked to compare their revenues from business carried on within Canada for each month during which they benefit from the subsidy with that same month in the previous year. Eligible employers will have to re-apply and re-establish the 30% decrease for each claim period during which they intend to benefit from the subsidy. The claim periods are from March 15 to April 11, April 12 to May 9, and May 10 to June 6.

Eligible employers would have to keep records demonstrating their reduction in arm's-length revenues and remuneration paid to employees. The Government has stated that eligible employers are expected to cover the remaining 25% of employees' wages, where possible, and that eligible employers will be required to attest to the fact that they are doing everything in their power to pay the balance of their employees' income.

As mentioned above, the Government had previously announced a temporary 10% wage subsidy. This subsidy provides eligible employers with a temporary wage subsidy for a period of three months in the form of deemed income tax remittances. Eligible employers include those eligible for the small business deduction. The Government has announced that those organizations that do not qualify for the CEWS may continue to qualify for the previously announced wage subsidy of 10% of remuneration paid from March 18 to June 19, 2020, up to a maximum subsidy of \$1,375 per employee and \$25,000 per employer. For employers that are eligible for both the CEWS and the 10% wage subsidy for a period, any benefit from the 10% wage subsidy for remuneration paid in a specific period would generally reduce the amount available to be claimed under the CEWS in that same period.

Considering the urgency surrounding the Canadian Government's announcement of the creation of the CEWS, it is not surprising that certain details continue to remain unclear at this time. For example, it is not currently known whether employers will be permitted to implement a WS program and still access the CEWS.

Additional information on the CEWS can be found in our recent Focus Alert at the link provided in this Guide at section J.

I. OTHER LEGAL CONSIDERATIONS

i. COVID-19 Medical Information Considerations

While case law has generally held that an employer is not entitled to request an employee's diagnosis (only prognosis), considering the ongoing COVID-19 pandemic and its severity, it is likely reasonable in the circumstances to require proactive disclosure due to the risks of transmission. This information may be necessary in order to fulfill a Hotel's health and safety obligations to the entire workforce.

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Furthermore, given employees' "right to know" about any potential hazards to which they may be exposed in the workplace, it may be necessary to advise other employees where there has been a case of COVID-19 confirmed in the workplace. However, any disclosure should avoid identifying information and be limited to the extent it is necessary to take reasonable precautions to protect health and safety. Employees have a role to play in reducing the risks of transmission in the workplace and should follow the advice/requirements from the PHAC and local public authorities and stay updated with the latest information.

ii. Human Rights Considerations

While the common cold and flu have not been considered a disability for the purposes of the Ontario *Human Rights Code* ("Code"), it has yet to be determined whether COVID-19 will be considered a "disability" under the Code. The Ontario Human Rights Commission ("OHRC") has issued a policy statement which provides its position that discrimination, including harassment, against any persons or communities related to COVID-19 is prohibited when it involves a ground under the Code, in the areas of services, housing, employment, vocational associations and contracts. At the same time, the policy statement confirms that the OHRC and relevant human rights laws recognize the importance of balancing people's right to non-discrimination and civil liberties with public (and workplace) health and safety, including the need to address evidence-based risks associated with COVID-19. The OHRC has also stated that employers and service providers, which would include Hotels, should ensure that any restrictions imposed are consistent with the most recent advice from medical and public health officials, and are justified for health and safety reasons. The OHRC policy statement on the COVID-19 pandemic can be found at:

- http://www.ohrc.on.ca/en/news_centre/ohrc-policy-statement-covid-19-pandemic

J. ADDITIONAL COVID-19 RESOURCES FROM EMOND HARDEN LLP

- Ontario further reduces list of essential workplaces in response to pandemic
 - <https://www.ehlaw.ca/ontario-further-reduces-list-of-essential-workplaces-in-response-to-pandemic/>
- Federal Government Introduces Increased Canada Emergency Wage Subsidy
 - <https://www.ehlaw.ca/federal-government-introduces-increased-canada-emergency-wage-subsidy/>
- COVID-19 Emergency Response Act receives Royal Assent
 - <https://www.ehlaw.ca/covid-19-emergency-response-act-receives-royal-assent/>
- Remote Work Considerations: An Employer's Guide
 - <https://www.ehlaw.ca/remote-work-considerations-an-employers-guide/>



- Ontario orders mandatory closure of non-essential workplaces
 - <https://www.ehlaw.ca/ontario-orders-mandatory-closure-of-non-essential-workplaces/>
- Canada's COVID-19 Economic Response Plan
 - <https://www.ehlaw.ca/canadas-covid-19-economic-response-plan/>
- Ontario expands ESA job-protected leaves for COVID-19
 - <https://www.ehlaw.ca/ontario-expands-esa-job-protected-leaves-for-covid-19/>

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