

Coronavirus (COVID-19): Legal update for Canadian employers – Legislative employment changes you need to know

May 1, 2020

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Meet our presenters



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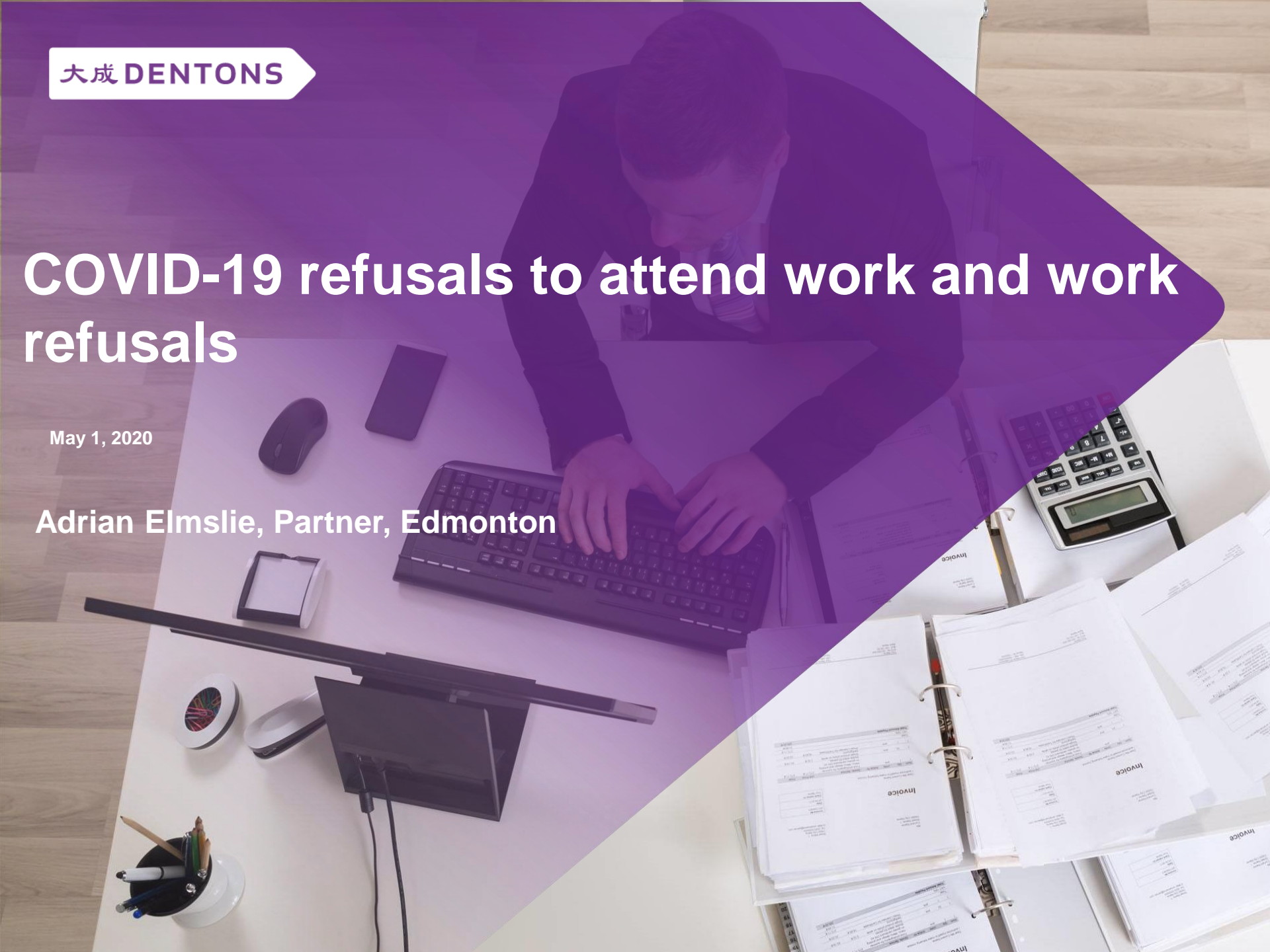


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COVID-19 refusals to attend work and work refusals

May 1, 2020

Adrian Elmslie, Partner, Edmonton



Type of refusal

- The steps an employer should take will depend on the type of refusal the employer is dealing with
- A “Refusal to Attend Work” will generally relate to an employee’s refusal to attend the workplace due to potential or imagined exposure to the COVID-19 or an obligation or restriction related to COVID 19 that prevents the employee from attending work
- A “Refusal to Perform Work” will relate to an employee’s refusal to perform a particular task because the employee believes that the task is unsafe

Refusal to attend work

Important to first understand the employee's reason for refusing to attend work as different reasons require different responses from the employer

- 1) General Anxiety About Exposure
- 2) Disability Related Restrictions / Risks
- 3) Family Obligations

Refusal to attend work

1) General anxiety about exposure

- Provided the anxiety is not related to a disability, no specific legal obligation to allow the employee to refuse to attend work
- Possible solutions:
 - Clear communications regarding the precautions put in place in the workplace to ensure employee safety
 - Providing additional safety precautions to alleviate the employee's fears
 - Allow the employee to take a voluntary unpaid leave of absence / take unused vacation time
 - Disciplinary measures (last resort / be very careful)

Refusal to attend work

2) Disability related restrictions / Risks

- Employee suffers from an anxiety or mental health disorder or has a medical condition that makes them particularly vulnerable to risks associated with COVID 19
- Triggers the employer's duty to accommodate under human rights law:
 - Alternate work arrangements (working from home etc.)
 - Modifying duties or workspaces
 - Additional precautions / protective measures in the workplace
 - Medical / disability leave

Refusal to attend work

3) Family obligations

- Employee has children home from school or is caring for a family member who is ill
- Triggers job protected leaves
- Consult provincial legislation and abide by requirements

Refusal to perform work

- Occupational Health and Safety legislation allows workers to refuse to perform work if the worker reasonably believes that their work is dangerous, hazardous or unsafe.
- It is illegal for employers to penalize workers for legitimately refusing unsafe work
- Work refusal triggers an obligation on the employer to investigate the hazard

Refusal to perform work

- For a COVID 19 refusal, the employer should consider:
 - The current scientific understanding of COVID-19 transmission and risk
 - The specific exposure risks presented by the nature of the work
 - The particular workplace
- If a hazard is confirmed, the employer is required to adopt preventative measures to eliminate or reduce the workplace danger

Refusal to perform work

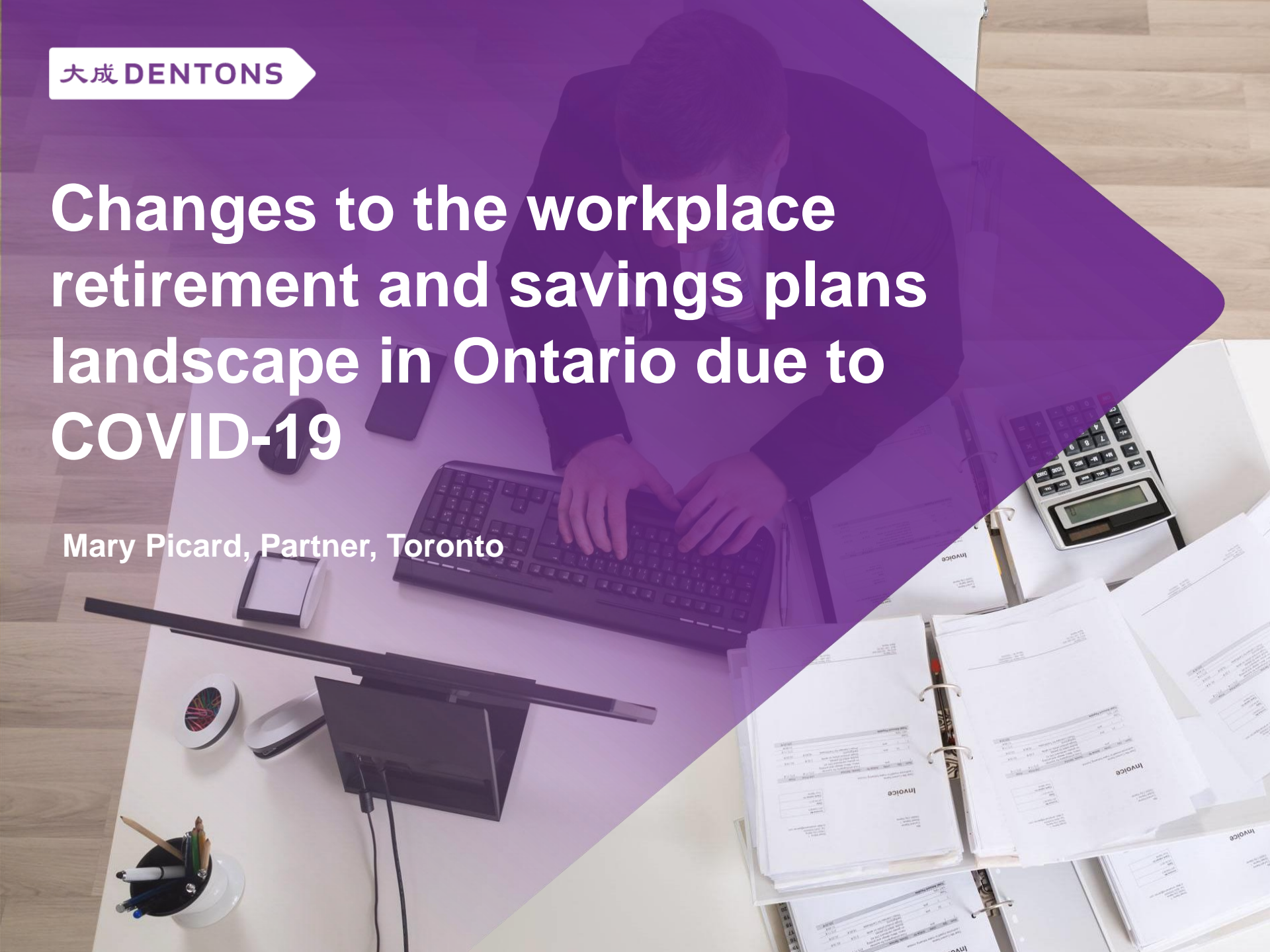
Where a COVID 19 hazard cannot be completely eliminated, employers should consider the typical hierarchy of controls

- 1) Engineering Controls – control the hazard at the source (e.g. barriers or partitions between staff and the hazard and ventilation)
- 2) Administrative Controls – change the way workers and patrons interact (e.g. physical distancing, staggered shifts, limited hours of operations, respiratory etiquette and hand hygiene)
- 3) PPE – controls the hazard at the worker level (e.g. gloves, eye protection, face protection and masks)

Most governments have published specific workplace related guidelines that must be followed

Changes to the workplace retirement and savings plans landscape in Ontario due to COVID-19

Mary Picard, Partner, Toronto



Group RRSP advice for employers

Reducing contributions: how to do it

- ask your service provider for help
- find out what your “plan text” is, and change it (everywhere!)
- no regulatory filings
- no prescribed format or content to notify employees
- prior notice should be provided to employees

Group RRSP advice for employers...*cont'd*

Regardless of whether you're reducing the contribution rate in your Group RRSP, take the following actions to manage risk + assist your employees:

- check in with your service provider
- ask your service provider, consultant or lawyer to confirm that they're not aware of any reason to make immediate changes to the investment fund line-up
- read what your service provider is giving to your employees
- consider easing up on withdrawal penalties (if you have any)
- consider letting your terminated employees leave their accounts in the plan

What are employers doing with their defined contribution (DC) registered pension plans?

- decreasing employer contributions - temporarily? resist the urge to make promises about the future
- tax rule re minimum employer contribution rate of 1%
- risks of reducing the employer contribution rate to zero
- Ontario pension regulator's guidance on April 24th: if the employer contribution rate temporarily goes to zero the regulator will not order the wind-up of the pension plan solely because of that change (“...*subject always to our ability to act upon the facts of any particular case*”)
- “adverse amendment”: a take-away on a go-forward basis only

Tips on how to implement reduced employer contributions to DC registered pension plans

- assess risks of constructive dismissal + risks of breach of collective agreements, fixed-term employment contracts and severance arrangements
- plan text will set out the current employer contribution rate -- get that plan amended correctly!
 - check plan amendment provisions in the registered plan text
 - consider using a shareholder declaration to adopt the amendment if directors aren't available
 - prior notice (“adverse amendment”) must be given to employees of the change
 - the “adverse amendment” *must* comply with content requirements set out in the Ontario pension benefits legislation – e.g. it must invite employees to contact the pension regulator to comment on the amendment

A softer approach to reducing employer contribution costs regarding DC registered pension plans

- mandatory employee contributions? amend the plan to make them optional
- optional employee contributions? amend the plan to remove employer matching
- be creative with your messaging: build helpful HR messaging in the notice of “adverse amendment” that goes to the employees – it is not a prescribed form and does not have to be a legalistic form
- highlight the advantages of the low fees, investor information and other positive features of the plan that employees may not be aware of

What's happening with Ontario registered defined benefit (DB) registered pension plans?

- payouts to terminating employees: pause before paying out lump sums if the “transfer ratio” may have deteriorated by 10% or more since the most recently determined transfer ratio
- there is no financial hardship relief for sponsors of Ontario pension plans: **must continue to make contributions to DB plans in the normal course**
- off-cycle actuarial valuation reports: ask your actuary to advise on the possibility of selecting a valuation date that is *earlier than the next due date*, in order to lock in pre-pandemic asset values and other advantages

Incentive payments made by employers during the pandemic

- does the payment fall within the “earnings” definition in the DC or DB pension plan?
- If there’s any doubt, amend the pension plan to exclude it
- take care with the exact wording of employee communications about the incentive payment – align the language of the good-news messaging about the incentive/bonus/reward payment with the “earnings” definition in the text of your registered pension plan

See the Ontario pension regulator’s April 24, 2020 “Pension Sector Emergency Management Response” [here](#)

Getting back to business

New legislated leaves and family-care obligations

May 1, 2020

Kyle Isherwood, Associate, Toronto



Things are opening up?

Ford government to unveil plans to reopen Ontario's economy

BY THE CANADIAN PRESS AND NEWS STAFF

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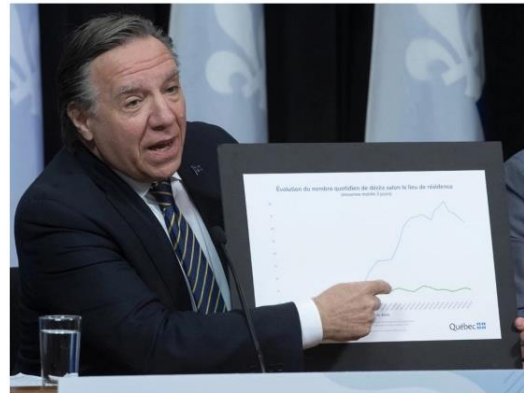


"Ford government to unveil plans to reopen Ontario's economy", Canadian Press, 27 Apr. 2020, <<https://toronto.citynews.ca/2020/04/27/ontario-quebec-reopening-plan-coronavirus>>

"Premier François Legault says COVID-19 situation is 'under control' in Quebec", Philip Authier, Montreal Gazette, 30 Apr. 2020 <<https://montrealgazette.com/news/quebec/premier-legault-to-announce-plan-to-reopen-quebec-businesses-economy/>>

Premier François Legault says COVID-19 situation is 'under control' in Quebec

Philip Authier · Montreal Gazette
14 hours ago · 4 minute read



Toronto

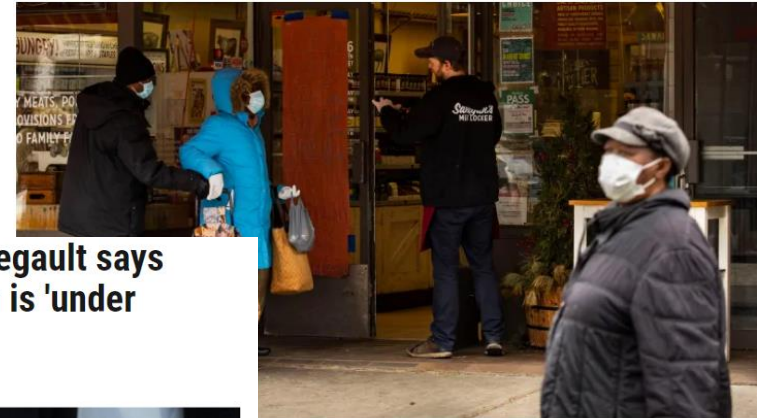
How Canada plans to open up: Provinces outlining plans to ease COVID-19 restrictions



Ontario released its framework Monday, following New Brunswick and Saskatchewan in recent days



Adam Carter · CBC News · Posted: Apr 27, 2020 4:48 PM ET | Last Updated: April 27



"How Canada plans to open up: Provinces outlining plans to ease COVID-19 restrictions", Adam Carter, CBC, 27 Apr. 2020 <<https://www.cbc.ca/news/canada/toronto/canada-covid19-opening-up-1.5546665>>

Agenda

- Returning to work and family responsibilities
- Job-protected leaves for COVID-19
 - Ontario
 - BC
 - Alberta
 - Other Provinces
- Human rights obligations

What about the family?

- Provinces beginning to plan to re-open
 - Dates and details are still uncertain and subject to change
- School/daycare and business re-openings may not be simultaneous
- Potential conflict between work obligations and family responsibilities
- Various provinces have addressed this through COVID-19 related leaves of absence

Ontario - Emergency leave of absence

- Job-protected unpaid leave
- Eligibility based on variety of COVID-19 related reasons
 - Including caring for designated family members
- Emergency Leave is as long as necessary
- Employers can require evidence “reasonable in the circumstances”
- In addition to Ontario’s 3 day Family Responsibility Leave

British Columbia - COVID-19 related leave of absence

- Job-protected unpaid leave
- Eligibility based on a variety of COVID-19 related reasons
 - Including caring for child or dependent adult
- COVID-19 leave is as long as it applies
- Employer's can request "reasonably sufficient proof" that the leave applies
- In addition to BC's 5 day family responsibility leave

Alberta – Family responsibility leave

- Job-protected unpaid leave
- Family responsibility leave amended for COVID-19
 - Includes leave for obligations to care for children due to school closures
- Leave is for as long as recommended or directed by the Chief Medical Officer
- Employer can require documentation “reasonable in the circumstances”
- In addition to standard 5 day Family Responsibility Leave and COVID-19 leave.

Other provinces

- Saskatchewan, Manitoba, Newfoundland, New Brunswick all have implemented similar leaves
- Nova Scotia had a pre-existing Emergency Leave
- Quebec's existing family obligation leaves continue to apply
- The Federal Government has introduced a COVID-19 related leave for employees “unable or unavailable to work for reasons related to COVID-19”

More information

- A summary of the various new provincial leaves and other Employment Standards Amendments, including provinces not covered in detail above can be found here:

<https://www.dentons.com/en/insights/alerts/2020/april/23/provincial-employment-standards-amendments>

Human rights obligations

- Separate from the legislative leaves
- All provinces have some protections from discrimination based on family status
 - Must accommodate to the point of undue hardship
- Law is unsettled and varies substantially from Province to Province.
- Multiple judicial tests with different requirements

General applicable principles

- Duty to accommodate applies to needs that are known or ought to be known
- Must be a “family relationship”
- Employers do not need to accommodate “personal preferences”
- Employers can require the employee participate in the accommodation

Thank you



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