

# Coronavirus (COVID-19): Legal update for Canadian employers – Return to work issues

May 8, 2020

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# Meet our presenters



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# COVID-19 Return from Temporary Layoffs in Ontario

May 8, 2020

Julia Dales, Associate, Ottawa



# Layoffs

Ontario employees can be placed on the following periods of layoff without being deemed terminated:

- A layoff of **not more than 13 weeks within a period of 20 consecutive weeks**; or
- A layoff of **less than 35 weeks within a period of 52 consecutive weeks** if employer meets prescribed requirements.

The above time limits do not apply to unionized employees who have contractual recall rights and who are recalled in accordance with those rights.



# Layoffs

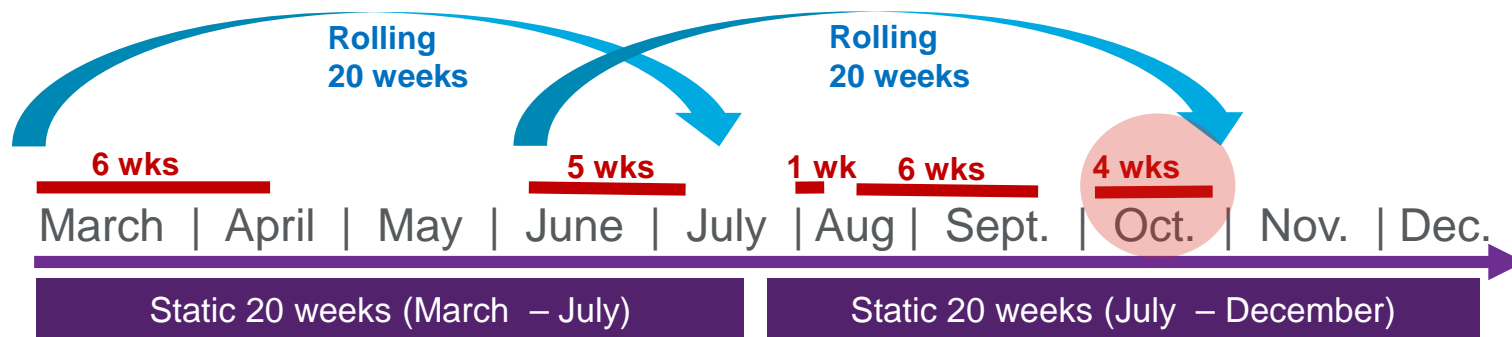
## Prescribed requirements for layoffs less than 35 weeks

If employer has met one of the following conditions throughout the entire layoff period, the employee's layoff can continue **less than 35 weeks in a period of 52 consecutive weeks**:

- Employer provides substantial payments to employee;
- Employer continues payments for employee to a legitimate retirement plan, or pension plan, or a legitimate group/employee insurance plan);
- Employee receives SUBs, or would have but obtained alternative employment;
- Employer and employee have agreed to recall date in writing; **OR**
- Recall date was approved by Director of Employment Standards.

# Layoffs

- The consecutive weeks are **rolling**. Here is an example of a layoff period that would cause a deemed termination:



Employee is laid off without benefits, payments, etc., as follows:

- March-April for 6 weeks
- June-July for 5 weeks
- August for 1 week
- August-September for 6 weeks
- Employee is then laid off for longer than 1 week in October.**

**Employee will be deemed terminated in October because, from June to October, Employee will have been laid off for more than 13 weeks in a 20-week rolling period.**

# Recall

- Provide written notice of recall to employee.
- If employee returns to work, they return to their original position under same employment contract.
- If employee does not return to work “within a reasonable time” of being recalled, employee may forfeit termination entitlements.

# Deemed Termination

- If the employee's layoff exceeds the maximum allowable layoff period, their employment is **deemed terminated**.
- Upon a deemed termination, employer must provide employee with all termination entitlements owing as of day 1 of the layoff period:
  - Severance if applicable;
  - Notice;
  - Benefits continuance throughout the notice period;
  - Any vacation accrual; and
  - Any unpaid wages.



# Contractual recall rights

- If employee has contractual recall rights (generally in union context), they must be provided with the option to elect to retain their recall rights or be deemed terminated.
- Termination pay and applicable severance pay is held in trust if recall rights are retained.

# COVID-19: OHS Liability Risks in Re-opening

Adrian Miedema, Partner, Toronto



# OHS Liability Risks in Re-opening

## Re-opening Risks

- Claims by employees who contract COVID-19 at work
  - WCB
  - Non-WCB
- Claims by employees' family members
- Claims by third parties

# OHS Liability Risks in Re-opening

## Re-opening Risks

- Compliance orders from government safety inspectors
- Charges under OHS legislation
- Criminal negligence charges
- Fines or charges for failing to report to WCB / labour ministry

# OHS Liability Risks in Re-opening

## Re-opening Risks

- Violation of “closure of non-essential business” Orders?
- Public health Orders
- Charges under public health legislation

# OHS Liability Risks in Re-opening

## Re-opening Risks

- Are employers required to follow government re-opening “guidance”?



# COVID-19: Developing Your Re-opening Plan

Chelsea Rasmussen, Senior Associate, Toronto



# Developing Your Re-opening Plan

## Plan for your Plan

- Create a re-opening plan team
  - Do you need external expertise?
- Locate current, correct messaging from a trusted source as basis for plan (e.g. public health guidance, Ministry of Labour guidance, World Health Organization, Centre for Disease Control, etc.)
- Consider and take into account your specific workplace
- Training of employees
- Communication to clients

# Developing Your Re-opening Plan

Your plan should be:

- Evidence-based
- Responsive
- Clearly communicated

# Developing Your Re-opening Plan

## Major Considerations for Plan:

- Demographics of your employees and clients
- Workplace infrastructure
- Access to the workplace
- Staffing your workforce
- Dealing with symptomatic individuals in the workplace
- Creation of policies and procedures

# Developing Your Re-opening Plan

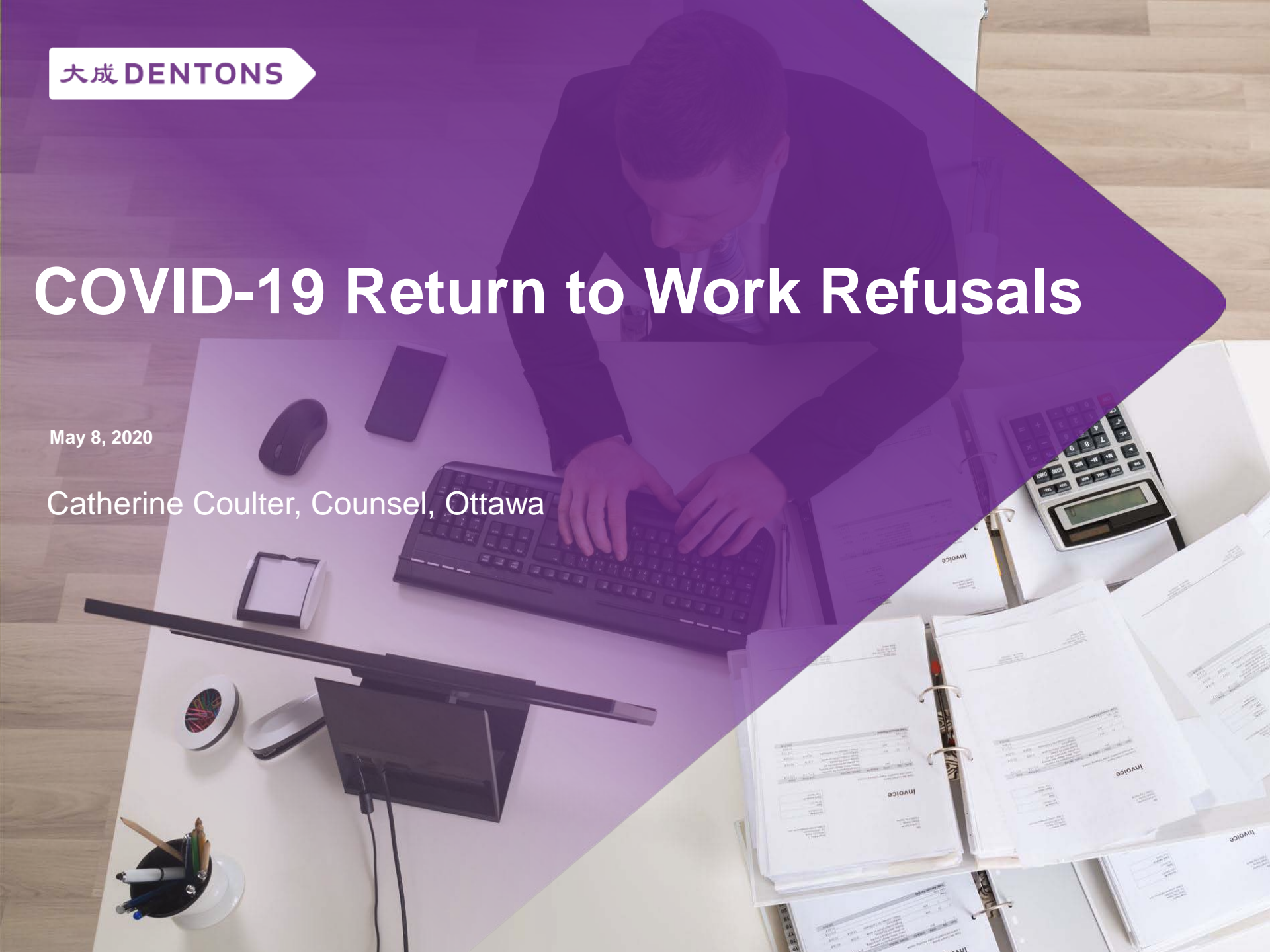
## Resource:

- Government of Canada "Risk-informed decision-making guidelines for workplaces and businesses during the COVID-19 pandemic"
- <https://www.canada.ca/en/public-health/services/diseases/2019-novel-coronavirus-infection/guidance-documents/risk-informed-decision-making-workplaces-businesses-covid-19-pandemic.html>

# COVID-19 Return to Work Refusals

May 8, 2020

Catherine Coulter, Counsel, Ottawa





# Potential Reasons for Work Refusals

- Employee is ill; unknown what the illness is
- Employee has COVID-19
- Employee is in a COVID-19 high risk category
- Employee has a family member who needs to be cared for and who is ill or has COVID-19
- Employee has a family member in the same household who is in a COVID-19 high risk category
- Employee has children whose school or daycare is not open
- Employee may have been exposed to COVID-19
- Employee has a family member in the same household who may have been exposed to COVID-19
- Employee prefers working from home
- Employee is worried about using public transit

# Employee Protections

- On March 19, 2020, the Ontario Government passed the *Employment Standards Amendment Act (Infectious Disease Emergencies), 2020 (ESA Amendment Act)*. The ESA Amendment Act provides job-protected leave to employees who, among other things: (i) are under quarantine or isolation in relation to COVID-19; (ii) need to provide care to a designated family member for a reason related to COVID-19 school or daycare closures; or (iii) need to provide care to a designated family member due to COVID-19.

## Employee Protections, con't.

- For so long as this protected leave is in place, employees cannot be terminated due to an inability to work because of childcare closures.
- For so long as this protected leave is in place, employees cannot be terminated due to having to care for a family member with COVID.

**However**, the legislation does not protect: (i) an employee who doesn't want to return to the workplace because they are in a COVID-19 high risk category; or (ii) an employee who doesn't want to return to the workplace because they have a designated family member in the same household who is in a COVID-19 high risk category.

## Employee Protections, con't.

- Even though the *ESA Amendment Act* does not overtly protect employees who are in a COVID-19 high risk category, the termination of an employee with underlying health issues could potentially raise a claim of discrimination due to disability.
- Likewise, even though the *ESA Amendment Act* does not overtly protect employees who have a designated family member in the same household who is in a COVID-19 high risk category, it's possible that the employee might be able to raise a claim of discrimination due to family status.
- Finally, Section 50.1(1.1)(b)(iii) of the *Employment Standards Act, 2000* (Ontario) (“ESA”) may provide protections to those in a high risk category.

## Employee Protections, con't.

- Employee is ill; unknown cause ***[protected from returning to work]***
- Employee is in a COVID-19 high risk category ***[potential discrimination claim if forced to return to work]***  
***[potential protection under s. 50.1(1.1)(b)(iii) of the ESA]***
- ***Employee has COVID-19 [protected from returning to work]***
- Employee has a family member who needs to be cared for and who is ill or has COVID-19 ***[protected from returning to work]***
- Employee has a family member in the same household who is in a COVID-19 high risk category ***[potential discrimination claim if forced to return to work]***

## Employee Protections, con't.

- Employee has children whose school or daycare is not open ***[protected from returning to work]***
- Employee may have been exposed to COVID-19 ***[potential protection under s. 50.1 (1.1)(b)(iii) of the ESA] [potential health and safety considerations under OHSA]***
- Employee has a family member in the same household who may have been exposed to COVID-19 ***[not protected from returning to work; but potential health and safety considerations]***
- Employee prefers working from home ***[not protected]***
- Employee is worried about using public transit ***[not protected]***



# COVID-19: The Interaction of Various Flexible Work Arrangements



# Flexible Work Arrangements

## Working on Claim

- Employees collecting Employment Insurance (EI) due to temporary layoffs can earn extra money by Working on Claim.
- Employees who work a full week, regardless of the amount earned, are not eligible to receive EI benefits.
- If the eligible employee earns more than 90 percent of their previous weekly earnings, then the EI benefits received are deducted dollar for dollar.
  - As a result, a balance must be struck for those Working on Claim, in terms of providing them with some work but not too much work.

# Flexible Work Arrangements

## Canada Emergency Relief Benefit (CERB)

- The CERB is available to employees who are not on temporary layoff or Working on Claim, provided that the eligibility requirements for the CERB are met.
- Employees are only allowed to earn up to \$1,000 per fixed four-week period and remain eligible for the CERB. As of now, the \$1,000 threshold for employees appears to be gross earnings.
- The fixed four week periods are:

March 15 – April 11, 2020

April 12 – May 9, 2020

May 10 – June 6, 2020

June 7 – July 4, 2020

July 5 – August 1, 2020

August 2 – August 29, 2020

August 30 – September 26, 2020

# Flexible Work Arrangements

## Canada Emergency Relief Benefit (CERB)

- The employee will need to repay the CERB if they receive more than \$1,000 for a period of two consecutive weeks in the first four-week period for which they applied.
- For subsequent four-week periods, the employee will need to repay the CERB if they earn more than \$1,000 in the entire four-week period.
- If employees on the CERB are to be recalled to work, the employer should consider whether they will be able to make \$3,000 or more per month. If not, then it's more advantageous to the employees to remain on the CERB until the end of their 16 week period.

# Flexible Work Arrangements

## Work Sharing

- Employees who are receiving EI benefits and who are called back to work can stop receiving EI benefits through the regular EI channel in order to participate in Work-Sharing. Instead, they will receive EI benefits through the Work-Sharing program. EI benefits under a Work-Sharing agreement are up to a maximum of \$573 a week, rather than the \$500 a week entitlement under the CERB.
- For employees who are participating in a Work-Sharing program, the EI benefits received by employees through the Work-Sharing program will reduce the benefit that the employer is entitled to receive for each employee under the Canada Emergency Wage Subsidy (CEWS).

# Flexible Work Arrangements

## SUB Plans

- Supplemental Unemployment Benefit (SUB) plan (i.e. EI top-up) payments can be made to employees in the Working While on Claim program. The weekly payment under a SUB plan, when added to the weekly EI benefit rate, cannot exceed 95 percent of the employee's normal weekly earnings.
- However, employees in receipt of EI benefits must report all earnings, including those earned Working While on Claim. Therefore employers must consider how all of those earnings will impact the amount received through the SUB plan.
- SUB payments may not form part of a Work-Sharing agreement.
- At present, the federal government has not allowed employer contributions to a SUB plan to top up the amount that employees receive through the CERB.



# Flexible Work Arrangements

## Canada Emergency Wage Subsidy

- Employees who have been temporarily laid off can have the Canada Emergency Wage Subsidy (CEWS) paid retroactively. However, if an employee was in receipt of the CERB during the period in which the retroactive CEWS payment is being provided, and the employee is no longer entitled to the CERB as a result of that retroactive payment, the employee will be required to pay back the CERB received for that retroactive period. It should also be noted that employers must recall and pay employees before they can be included in the employer's calculation for the CEWS.
- An employee who has received the CERB can still qualify for the CEWS, provided the employee has not been without remuneration from an eligible employer for 14 or more consecutive days in the period claimed.

# Thank you



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