

Manitoba Introduces Temporary Changes To The Employment Standards Code In Response To The Covid-19 Pandemic

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There are many employment related challenges created by the COVID-19 pandemic. On April 15, 2020, the Manitoba government introduced temporary changes to the province's employment standards legislation - *The Employment Standards Code* (the "Code"). The changes create a new form of protected leave for employees who are unable to work as a result of the COVID-19 pandemic. This follows on the heels of a recent amendment to the *Employment Standards Regulation* (the "Regulation") which allows provincially-regulated employers to lay-off employees during the provincial state of emergency without triggering entitlement to statutory notice of termination. Further details of these recent changes follow



Temporary interruption in employment not included in lay-off calculation

A lay-off is a temporary break in employment where employees are likely to return to work. Under the Code, employers do not need to provide notice to employees who are being laid off. Normally, subject to a few exceptions, if the lay-off lasts longer than 8 weeks in a 16 week period, the lay-off becomes a termination for the purposes of the Code. This triggers a number of obligations under the Code, including the requirement that the employer must then provide statutory notice (or pay in lieu thereof). Where the employment of fifty or more employees is terminated within a four week period, the group notice of termination provisions would apply.

The impact of the COVID-19 pandemic was immediate for many workplaces, and the duration of temporary lay-offs necessitated by it is uncertain. In the absence of a change to the Regulation, many employers were faced with the consequence of deemed terminations of

their employees, even with an intention to bring the employees back to work when circumstances permitted.

The Regulation has been amended so that any period of a lay-off from March 1, 2020 to the day on which the state of emergency that was declared under *The Emergency Measures Act* concerning COVID-19 is terminated, will not count towards determining if an employee has been laid off 8 weeks within a 16 week period. The government of Manitoba declared a thirty day province-wide state of emergency on March 20, 2020, and it was extended on April 20, 2020 for another thirty days. Further extensions are possible should the Manitoba government deem them appropriate.

If the lay-off commenced prior to March 1, 2020, any period of time prior to March 1, 2020 will be counted towards the 8 weeks. Similarly, any time that an employee is on a lay-off once the state of emergency is terminated will count towards the accumulation of the 8 weeks.

Public Health Emergency Leave

The recent changes to the Code introduced a new form of COVID-19 related protected leave. Employees are entitled to unpaid public health emergency leave if, in relation to the COVID-19 pandemic, they are unable to perform their work because:

- They are under medical investigation, supervision or treatment;
- They are, as a result of information or directions issued by a health officer, health professional (physician, registered nurse or nurse practitioner), Health Links-Info Santé, the Government of Manitoba or the Government of Canada:
 - required to quarantine or isolate themselves, within the meaning of *The Public Health Act*; or
 - subject to self-isolation or any other measure that results in their inability to work;
- Their employer, due to concerns about the employee's exposure to others, has directed the employee not to work;
- They are providing care or support to a family member (as that term is defined by the Code) including care or support needed to be provided as a result of the closure of a school or premises where child care is provided;
- They are directly affected by travel restrictions and cannot reasonably be expected to travel to their workplace;
- They are subject to an order made under *The Public Health Act*; or
- They are acting in accordance with an order made under *The Emergency Measures Act*.

The same general protections apply to public health emergency leave as to other protected leaves recognized under the Code. For example, an employer may not lay-off or terminate an employee because the employee intended to or has taken public health emergency leave. After the leave, the employer must reinstate the employee to the position the employee occupied when the leave began or to a comparable position with the same wages and benefits, unless the employer lays off, terminates, or fails to reinstate an employee for

reasons unrelated to the leave. The public health emergency leave ends when none of the above circumstances apply to the employee.

An employer can request “reasonable verification” of the necessity of the leave from the employee; however the employer is not entitled to require a certification from a health officer or a health professional, or a physician’s certificate or medical certificate.

The effects of these provisions are retroactive in that they apply to an employee who was employed by an employer on or after March 1, 2020 and was unable to perform their work due to one of the reasons set out above.

Temporary suspension of physician’s certificates and medical certificates

Typically, an employer may ask for a physician’s certificate or medical certificate to verify an employee’s entitlement to certain forms of protected leave under the Code. The ability to request medical documentation has been suspended retroactive to March 1, 2020. An employer will no longer be allowed to request a physician’s certificate or medical certificate in respect of an employee taking maternity leave, compassionate care leave, unpaid leave for organ donation, leave related to critical illness, or long-term leave for serious injury or illness, as well as public health emergency leave.

These temporary measures will be in place until the government of Manitoba determines they are no longer required. There are provisions to repeal the changes to the Code which may be enacted upon proclamation.

We will continue to monitor for further legislative changes that may impact employers in Manitoba, and will update our clients as more developments arise.

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