



# What's New in HR Law

## Ontario Passes Legislation Introducing Temporary Paid COVID-19 Leave

April 30, 2021

### Bottom Line

On April 28, 2021 the Ontario Government [announced](#) it would be introducing legislation to temporarily provide up to three paid leave days to eligible workers for reasons relating to COVID-19, and published a [backgrounder](#) providing additional information relating to its proposal. The following day, on April 29, 2021, [Bill 284, COVID-19 Putting Workers First Act, 2021](#) (“Bill 284”) was tabled and received Royal Assent. This update sets out the details of the new temporary paid leave entitlement for eligible Ontario workers.

### Paid Leave Introduced by Way of Amendment to the ESA

Bill 284 introduces the paid sick leave benefit by way of amendment to the *Employment Standards Act, 2000* (“ESA”). Specifically, Bill 284 adds a “leave of absence with pay” to the Emergency Leave provisions of the ESA. This new paid leave entitlement is in addition to the entitlement to unpaid leave already provided for under this section.

**This update is for general discussion purposes and does not constitute legal advice or an opinion.**

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## Eligibility

Bill 284 provides that employees who are unable to work for one of following reasons relating to a designated infectious disease will be eligible for a leave of absence with pay:

1. The employee is under individual medical investigation, supervision or treatment related to the designated infectious disease. This includes receiving a vaccine and recovery from any associated side effects.
2. The employee is acting in accordance with an order under section 22 or 35 of the *Health Protection and Promotion Act* that relates to the designated infectious disease.
3. The employee is in quarantine or isolation or is subject to a control measure, and the quarantine, isolation or control measure was implemented as a result of information or directions related to the designated infectious disease issued to the public, in whole or in part, or to one or more individuals, by a public health official, a qualified health practitioner, Telehealth Ontario, the Government of Ontario, the Government of Canada, a municipal council or a board of health, whether through print, electronic, broadcast or other means.
4. The employee is under a direction given by their employer in response to a concern of the employer that the employee may expose other individuals in the workplace to the designated infectious disease.
5. The employee is providing care or support to an individual because: (i) the individual is under individual medical investigation, supervision or treatment related to the designated infectious disease; or (ii) the individual is in quarantine or isolation or is subject to a control measure and the quarantine, isolation or control measure was implemented as a result of information or directions related to the designated infectious disease issued to the public, in whole or in part, or to one or more individuals, by a public health official, a qualified health practitioner, Telehealth Ontario, the Government of Ontario, the Government of Canada, a municipal council or a board of health, whether through print, electronic, broadcast or other means.

## Evidence

Despite the Government's backgrounder stating that employers would not be able to require employees to provide a certificate from a doctor or nurse as evidence of their eligibility to take the leave, this restriction does not appear to be explicitly addressed by Bill 284. That said, given the government's earlier statement, and the current restrictions on requiring medical notes to justify infectious disease emergency leave, employers should be very cautious about requiring a medical certificate to justify the new paid leave. It is also noteworthy that, at present, and as is outlined further below, it does not appear that the WSIB will require a medical certificate to process an employer's application for reimbursement. Practically speaking, this may reduce the need or desire among employers to request a doctor's note in the first place.

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## **Duration**

Eligible employees are entitled to take up to a total of three (3) paid leave days. This is a temporary benefit, which will apply retroactively from April 19, 2021 to September 25, 2021, or such later date as may subsequently be prescribed. However, where an employee is eligible for paid leave between April 19, 2021 and April 29, 2021, they must advise their employer in writing of their election to take the paid leave before May 13, 2021.

Of note, if an employee is entitled, as of April 19, 2021, to take paid leave under an employment contract for any of the prescribed reasons for the paid leave, entitlements under the ESA shall be reduced by the employee's entitlement under the contract.

In other words, so long as an employer already has a paid leave program in place that: (i) allows employees to take at least three (3) paid leave days thereunder for reasons relating to COVID-19, and (ii) provides pay at a rate equal to or greater than the daily rate of pay afforded under the ESA, an employer will not be required to provide the new paid ESA days in addition to what is already provided.

If an employee takes any part of a day as a paid leave under the ESA, the employer may deem the employee to have taken a full day of paid leave. Bill 284 also provides that an employee is entitled to take their paid days under the ESA before any of the unpaid leave days.

## **Benefit Amount**

An eligible employee who exercises their right to take paid leave will receive the *lesser* of \$200 per day and,

1. either: (i) the wages the employee would have earned had the employee not taken the leave; or (ii) if the employee receives performance-related wages, including commissions or a piece work rate, the greater of the employee's hourly rate, if any, and the minimum wage that would have applied to the employee for the number of hours the employee would have worked had they not take the leave; or
2. If some other manner of calculation is prescribed, the amount determined using that manner of calculation.

In other words, subject to any employment contract which provides otherwise, no employer will be required to pay to employees entitled to the paid leave more than \$200 per day, to a total maximum payment of \$600.

Bill 284 makes clear that employees will not be entitled to receive overtime or shift premiums for days on which they exercise the right to take paid leave. Similarly, if a paid leave day falls on a public holiday, the employee will not be entitled to premium pay.

Employees will not be entitled to simultaneously receive both paid leave under the ESA and benefits through the WSIB in respect of the same days.

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## Employer Reimbursement through WSIB

Employers will not be required to foot the bill for the temporary paid leave benefit. Rather, employers can apply to the Workplace Safety and Insurance Board (“WSIB”) for reimbursement of payments made to employees in connection with the new paid leave provisions under the ESA. Eligible employers who make an application will be reimbursed up to a maximum of \$200 per day per employee.

However, employers who administer their own paid leave program and made payments to an employee under a contract of employment will **not** be entitled to reimbursement.

1. Eligible employers can apply for reimbursement through the WSIB within 120 days of the payment in respect of which the application is made by filing:
2. an application form to be approved by the WSIB;
3. an attestation in a form to be approved by the WSIB;
4. record of the payment made to the employee in a form to be approved by the WSIB;
5. information about claims filed with the WSIB in respect of the employee; and
6. any other information required by the WSIB.

As of the time of writing this update, the relevant WSIB application forms and any related instruction materials are not yet available.

Applications will only be accepted by the WSIB until **January 25, 2022**, unless a later date is subsequently prescribed.

The WSIB will advise employers in writing of the outcome of their application for reimbursement. Decisions rendered by the WSIB will be final and employers will not have the right to reconsideration or appeal.

## Check the Box

The introduction of this temporary paid leave marks the latest in a seemingly endless series of changes for employers. Employers are advised to carefully review the new statutory amendments and paid leave of absence provisions to assess what, if any, impact they will have on their workplace policies and processes.

## Need More Information?

For more information about workplace management amidst the COVID-19 pandemic, please contact [Ashley Brown](#) at 416.408.5563 or your regular lawyer at the firm.



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