

## **FREQUENTLY ASKED QUESTIONS IN A WORK ENVIRONMENT IMPACTED BY COVID-19**

*Prepared for the Ontario Association of Veterinary Technicians*

### **WORK REFUSALS**

**QUESTION:** I am worried about COVID-19 and going to work, as I don't feel it's safe. Will I still be protected if I refuse to go to work?

**ANSWER:** If an employee refuses to attend the workplace without a reasonable basis, the employer is within its right to start the disciplinary process. However, occupational health and safety laws allow workers to refuse to perform work if the worker reasonably believes that their work is dangerous, hazardous or unsafe. It may be reasonable to refuse to attend work if the nature of the job results in a reasonable and realistic risk of exposure to COVID-19. Workers who are concerned about safety should raise the issue with their health and safety representative or manager and attempt to start a dialogue. There may be reasonable solutions that do not require the employee to avoid the workplace entirely (e.g., personal protective equipment and social distancing measures). There is no legal risk from raising the issue, as it is illegal for employers to penalize workers for legitimately refusing to perform unsafe work, even if it is ultimately determined that the risk was not present.

**QUESTION:** I am, or I have family members that are, immune-compromised or have existing health risks. I don't want to go into work. Can I refuse?

**ANSWER:** The Provincial Government passed the *Employment Standards Amendment Act (Infectious Disease Emergencies), 2020*, which created job-protected leave for employees who need provide care to another person for a reason related to COVID-19. This protection extends to workers who care for other individuals with a compromised immune system. Buying groceries and helping with day-to-day tasks is likely to meet the definition of providing care (i.e., it is not restricted to medical care). This form of job-projected leave is unlikely to be available to workers who do not provide regular care to the individual with a compromised immune system (i.e., it is not available if your interaction is merely social).

**QUESTION:** My kids are home from school and I no longer have childcare. I can't go into work. What can I do?

**ANSWER:** The *Employment Standards Amendment Act (Infectious Disease Emergencies)*, 2020 created job-protected leave for workers providing support for family, including support that become necessary as a result of the closure of daycares and schools. The Canada Emergency Response Benefit (CERB) will pay \$2,000.00 per month for workers who must stay home to care for children. The CERB should be available in April and will be backdated to March.

**QUESTION:** If I refuse to go to work due to concerns about Covid-19 or pre-existing health issues, can I still file for EI?

**ANSWER:** Employers are required to accommodate a medical condition. This can include such measures as working from home or, where no other option is available, permitting the employee to go on leave. The Canada Emergency Response Benefit (CERB) and the EI Sickness Benefit will likely apply. Your family doctor should be able to provide a recommendation over the phone (e.g., self-isolation) based on your pre-existing health condition. This will remove all doubt about the correctness of your decision to request a leave (although employers are not permitted to ask for a doctor's note).

### **GOVERNMENT SUPPORT PROGRAMS**

**QUESTION:** I am out of work and I don't qualify for EI. Are there any other programs I can access?

**ANSWER:** The Canada Emergency Response Benefit (CERB) is a unique benefit available to individuals who have lost their income due to COVID-19, including workers who do not qualify for traditional EI. There are some qualifications that apply but they are less onerous than regular EI (e.g., the loss of income must relate to the COVID-19 crisis and the employee must have earned at least \$5,000.00 in 2019)

**QUESTION:** If I am laid off, can I apply for the new government benefit (CERB) or do I need to apply for EI? How does CERB vs EI work?

**ANSWER:** The Federal Government is encouraging workers to apply for the Canada Emergency Response Benefit (CERB) rather than regular EI if the loss of income is related to COVID-19. Unrelated leaves of absence (such as parental leave) continue to be governed by the regular EI regime. If the worker remains unemployed when the CERB expires (which is currently a 16-week program), the worker will still be eligible for regular EI (if she or he qualifies).

**QUESTION:** I have been instructed to self-isolate by Public Health and can't work, can I apply for support?

**ANSWER:** Yes. The Canada Emergency Response Benefit (CERB) is available to individuals in self-isolation. The EI Sickness Benefit may also be available to qualifying workers, although the Government has instructed that new applications for the Sickness Benefit will be re-directed to the CERB.

**QUESTION:** What do I do if I get sick from COVID-19 and can't go to work?

**ANSWER:** After seeking medical care, you should notify your employer and ask about benefits coverage. If you have no applicable benefits coverage, you should apply for the Canada Emergency Response Benefit (CERB).

**QUESTION:** What do I do if someone in my family is sick with COVID-19 and I can't go to work?

**ANSWER:** Workers who have come into direct contact with individuals infected COVID-19 have been directed to self-isolate. The *Employment Standards Amendment Act (Infectious Disease Emergencies), 2020* has created job-protected leave for individuals caring for sick family members. The Canada Emergency Response Benefit (CERB) is available for income support.

### **LAY-OFFS**

**QUESTION:** If I get laid off because of COVID-19 and go on government support, will I automatically get my job back when the clinic reopens? What if my boss wants to replace me with someone who makes less money instead?

**ANSWER:** The Provincial Government has implemented a right to reinstatement for employees forced on leave for various reasons related to COVID-19. No similar right exists for employees who are laid-off. Employees who are not recalled from lay-off, or who remain on lay-off beyond the statutory limit, are deemed to be dismissed and are entitled to termination pay.

**QUESTION:** What is a lay-off? Is it different from being fired?

**ANSWER:** The term "lay-off" (which is a temporary cessation of work) is often used interchangeably with "dismissal" or "termination" (which is a permanent cessation of work). During a lay-off, a worker experiences an interruption of earnings (and may be eligible for EI) but continues to hold a job with the employer. Permissible lay-offs can last for a

maximum of 13 weeks in most instances and up to 35 weeks if certain criteria are met. Thereafter, if the employer does not recall the employee, the temporary lay-off becomes a permanent dismissal and the employee is entitled to termination pay.

**QUESTION:** I don't have a written employment contract. Can my employer still lay me off?

**ANSWER:** Lay-offs are permissible if expressly or implicitly understood to form part of the contract of employment. Many employment contracts include a clause explicitly stating that lay-offs are permissible. In other instances, the nature of the work or the history of the workplace can make lay-offs permissible as an implied contractual term. The latter situation is rare, and usually applies to seasonal industries where lay-off is predictable. In the absence express or implied authority, a lay-off is only permissible if the employee consents. Employment law has traditionally recognized that a unilaterally imposed lay-off will entitle the employee to claim constructive dismissal. Many employers are responding to the current crisis by seeking consent from their employees before initiating a lay-off. Other employers are imposing lay-offs unilaterally and expecting that the Government will intervene to legalize their decision due to the uniqueness of the current crisis. It is important to note that employers have an obligation to protect the health and safety of their employees and this may provide legal justification for lay-offs that would not be present in the absence of a pandemic.

**QUESTION:** What is constructive dismissal?

**ANSWER:** Constructive dismissal occurs where an employee resigns as a result of the employer making a unilateral and substantial change to the terms of employment. An employee who demonstrates constructive dismissal becomes entitled termination pay and EI (if otherwise eligible).

**QUESTION:** Can an employer keep staff with less seniority and lay off senior staff to save money?

**ANSWER:** There are no seniority rights imposed by statute in non-unionized workplaces in Ontario. It is discriminatory to lay-off employees based on certain grounds as set out in the *Human Rights Code* (e.g., gender), but there is no protection based on seniority or relative level of income.

**QUESTION:** My boss has implied that she may not hire me back after the crisis. Is that legal?

**ANSWER:** It is illegal if you are on job-protected leave (e.g., due to covid-related illness, self-isolation, or family care). It may be legal in other scenarios, although termination pay will be owed to you.

## **REDUCTIONS IN HOURS OR INCOME**

**QUESTION:** My employer significantly cut my hours/changed my schedule without talking to me. What can I do?

**ANSWER:** A significant reduction in hours imposed without consent that is not permitted by the contract of employment will constitute constructive dismissal in most circumstances. However, the COVID-19 crisis is creating unique considerations and it may not be appropriate to apply legal standards that apply in normal circumstances. The Federal Government is introducing a 75% wage subsidy that should reduce the prevalence of reductions in hours. If you are facing reduced hours, you may consider discussing the government wage subsidy with your employer. It may be possible for your employer to save money without decreasing your hours and income.

**QUESTION:** My employer wants me to sign a document to voluntarily reduce my hours due to lack of business. If I don't agree to it, can they lay me off?

**ANSWER:** A unilateral reduction in hours is similar to a unilateral lay-off from a legal perspective. As stated above, an employer risks constructive dismissal by carrying out either action in normal circumstances. However, we are in a unique situation with the pandemic and standard legal concepts may not apply. In addition, the Government may pass legislation overruling the current state of the law (and thereby permit reduced hours without it being constructive dismissal). Constructive dismissal is not the guaranteed outcome from reduced hours and an employee who claims constructive dismissal and is proven wrong will be deemed to have resigned (which affects the employee's ability to claim unemployment benefits). It should be further noted that the Courts are not operating at full capacity and, therefore, it will be several months before disputed claims for constructive dismissal are heard and resolved.

**QUESTION:** Can my employer decrease my pay? Or ask that I work with a pay decrease?

**ANSWER:** A unilateral reduction in rate of pay is usually grounds for claiming constructive dismissal. However, see the answer above for considerations related to the uniqueness of the current situation. Pay decreases should become less common as the Federal Government introduces wage subsidies. If your employer is proposing to reduce your pay, you should consider referring her or him to the government wage subsidy. It may be possible for your employer to save money without decreasing your income.

**QUESTION:** Can my employer cut my hours (and payment) if I am on salary?

**ANSWER:** A salary is guaranteed unless the contract of employment specifies situations when it might fluctuate. Therefore, a unilateral reduction in hours and salary would contravene the contract and may entitle the employee to claim constructive dismissal. However, see the answers above for considerations related to the uniqueness of the current situation. Pay decreases should become less common as the Federal Government introduces wage subsidies.

**QUESTION:** Does having seniority give me any added protection with respect to cutting hours? Or can my hours be cut equally with someone who hasn't worked here as long?

**ANSWER:** Seniority means nothing unless (a) the workplace is unionized; or (b) seniority rights are expressly incorporated into employment contracts or a workplace policy (which is quite rare).

**QUESTION:** Can I collect any compensation from the government (EI/CERB) if my hours are cut but I am still working?

**ANSWER:** Regular EI and the Canada Emergency Response Benefit (CERB) are not currently available to employees who are still working on reduced hours. This may change as the government responds to the situation day-by-day. The EI Sickness benefit is available to employees who have seen their regular earning decrease by at least forty percent (40%) and who otherwise qualify for that benefit.

**QUESTION:** What is work-sharing and how does it work? Can my employer mandate work-sharing without an employee agreement?

**ANSWER:** Work-sharing is utilized to avoid lay-offs where employees perform a similar function and there is not enough work to offer to pull time hours to all of them. With an approved work-sharing program, the government will provide EI payments for hours lost as a result of the work-sharing arrangement. The process requires the consent of all parties and the application is cumbersome and time-consuming. The work-sharing program is not expected to be widely utilized given the recent announcement that the government is subsidize wages up to 75%.

## LEAVE OF ABSENCE AND SICK TIME

**QUESTION:** I am home because I am immune compromised, I would be at work if it weren't for COVID-19. Will I have to use my sick time or vacation time?

**ANSWER:** In normal circumstances, employers can dictate when employees use their vacation time. However, where an employee is already on leave, the employer cannot insist that vacation time be used. In normal circumstances, sick time should be utilized before going on formal leave of absence, but if the leave has already commenced, this may not be possible. It often makes practical sense to use sick time and vacation time before initiating a formal leave of absence because the government support programs tend to cover only a fraction of one's wages.

**QUESTION:** If I go on family care leave/stress leave, could that impact my vacation time that I get?

**ANSWER:** According to statute, vacation time continues to accrue during a leave of absence, but vacation pay is tied to wages. Therefore, an employee who earned no wages may be entitled to vacation time but may not be entitled to vacation pay (or reduced pay). A written contract of employment may supplement or improve these entitlements.

**QUESTION:** How does this affect me returning after a maternity leave?

**ANSWER:** The government has advised that the Canada Emergency Response Benefit (CERB) will be available to individuals (who otherwise qualify) after the expiration of normal benefits.

**QUESTION:** Will applying for government benefits affect my upcoming maternity leave in August?

**ANSWER:** The Federal Government has not clarified how an application for the Canada Emergency Response Benefit (CERB) will affect a later application for parental benefits (EI). The trend has been that benefits can be stacked (i.e., received one after the other without deduction), but we have yet to receive confirmation for this specific scenario. To be eligible for full parental leave benefits, an employee must accumulate at least 600 hours in the preceding 52 weeks. There is some concern that Covid-related absences will prevent employees from qualifying. We anticipate that the government will address this issue in a manner that is generous to expecting parents.

## **GENERAL**

**QUESTION:** What should I do if someone else in my clinic isn't adhering to social distancing?

**ANSWER:** This should be reported to the workplace health and safety representative (or committee) and to management. If the issue is not corrected, it may be reasonable to refuse to work at the clinic. The *Occupational Health and Safety Act* mandates that the employer take certain steps when a safety issue is reported and when a work-refusal occurs.

*LEGAL DISCLAIMER: The content of this piece is intended to provide a general guidance rather than legal advice. Please also note that laws and policies are changing rapidly in response to the COVID-19 crisis and information contained in this piece may become outdated and inapplicable. Specialist advice should be sought regarding your specific circumstances.*