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DROIT DU TRAVAIL ET DE L'EMPLOI

*CORONAVIRUS (COVID-19)*

# GUIDE FOR FEDERAL SECTOR EMPLOYERS

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# CORONAVIRUS (COVID-19)
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## A. PURPOSE OF THIS GUIDE

Emond Harnden LLP has been monitoring the developments relating to COVID-19 and is continuously advising clients in the federal sector as more information becomes available. In the interest of helping all employers working in this industry in their efforts to provide safe and healthy workplaces, and to manage the many challenges that have followed the outbreak of COVID-19, our lawyers have prepared the following Guide for federal sector employers. This Guide provides an overview of some of the key legal considerations federal sector employers should consider in their ongoing efforts to manage this unprecedented situation. This Guide is based on and refers to Federal legislation applicable to federal sector employers, and summarizes our recommended "best practices" for promoting and operating safe and healthy workplaces during these challenging times. For ease of reference, in the remainder of this Guide Federal sector employers are referred to simply as "employers".

Having the proper plans and policies in place to address COVID-19 in the workplace, and with respect to service, will assist in business continuity, and protect employees, customers, and clients.

## B. COVID-19 TRANSMISSION PREVENTION PRACTICES

By necessity, many Federal-sector employees will continue to work under conditions with a higher risk of COVID-19 transmission. To reduce the risk of transmission, and comply with applicable legislative obligations (see e.g. Section G), employers should adopt the following recommended practices.

### i. Hygiene Practices

While at work, employees should comply with recommended hygiene practices to help reduce the risk of infection or the spread of infection to others. Employers should encourage the following practices, in accordance with Public Health guidelines:

- Wash your hands often with soap and water for at least 20 seconds or use alcohol-based hand sanitizer if soap and water are not immediately available;
- Avoid touching your eyes, nose, or mouth unless you have just washed your hands;
- Cover your cough and sneeze with a tissue or the bend of your arm, not your hand (dispose of any tissues you have used as soon as possible in a lined waste basket and wash your hands afterwards);
- Clean high-touch surfaces (such as toilets, phones, electronics, door handles, etc.) frequently with cleaners or diluted bleach (in a ratio of 1 teaspoon (5mL) per cup (250mL)).

### ii. Physical (Social) Distancing

Where possible, employers should encourage employees to adopt physical (social) distancing measures as identified by the Public Health Agency of Canada ("PHAC") to help reduce and delay

the spread of COVID-19 in the community. Physical distancing is one of the most effective ways to reduce the spread of illness during an outbreak. It involves making changes to everyday routines to minimize close contact with others, including avoiding common greetings, such as handshakes or hugs; keeping a distance of at least two arms-length (approximately two metres) from others; avoiding all in-person interactions with people who are sick; and staying home when sick.

### iii. Quarantine (Self-isolation) and Isolation for COVID-19

A primary method by which the Government of Canada has sought to reduce COVID-19 transmission is through requiring and/or recommending that individuals quarantine (self-isolate) or isolate where they may have COVID-19 or may have come into contact with someone who does. Quarantine (self-isolation) is less restrictive than isolation, and means that an individual must stay at home, avoid contact with other people, and practice physical distancing while at home. Individuals must quarantine (self-isolate) for fourteen days even if they have no symptoms of COVID-19, if any of the following apply:

- the individual is returning from travel outside of Canada (mandatory quarantine, barring exemptions for certain classes of individuals[1]);
- the individual had close contact with someone who has or is suspected to have COVID-19; or
- the individual has been told by the public health authority that they may have been exposed and need to quarantine.

In contrast, isolation means going directly home and/or staying at home in the following circumstances:

- where the individual has been diagnosed with COVID-19, or is waiting to receive the results of a lab test for COVID-19;
- the individual has any symptoms of COVID-19, even if mild;
- the individual has been in contact with a suspected, probable or confirmed case of COVID-19; or
- the individual has been told by public health that they have been exposed to COVID-19.

PHAC has provided the following guidance for distinguishing between quarantine (self-isolation) and isolation to protect the health and safety of Canadians:

- https://www.canada.ca/en/public-health/services/diseases/2019-novel-coronavirus-infection/prevention-risks.html#self

[1] On March 26, 2020, the Government of Canada put into a place a mandatory 14-day self-isolation for all persons entering Canada, even if they do not have COVID-19 symptoms. An exception to this Order exists for workers who are essential to the movement of goods and people, which includes crew on any plane crossing the border.

Employers should respect all government and health authorities' recommendations and requirements regarding when to quarantine (self-isolate), and isolate and encourage employees to follow such guidelines, even if it means missing work.

## C. Employer Practices, Policies and Procedures for Pandemic Preparedness and Response

Some employers may already have policies or procedures regarding employee absences due to personal illness or injury, or to care for others. These policies will generally apply to employees infected by COVID-19 as usual, both in terms of eligibility and procedure. However, employers should also recognize that employees' ability to obtain a medical note has been curtailed by recent legislative amendments and public health guidelines, and so flexibility may be required. Employers should also carefully consider whether requiring a medical note (even in situations unrelated to COVID-19) is necessary, since hospitals and doctors' offices will likely be overburdened and requiring employees to attend these locations may increase the likelihood of them becoming sick or infecting others.

In addition to any policies, practices, or procedures already in place, employers may wish to implement a workplace infection control policy or plan with the specific objective of preventing the spread of COVID-19 in the workplace. Such a policy or plan will likely include measures such as clearly and repeatedly directing employees to abide by the practices referred to in Section B, above; providing employees with proper cleaning solutions, tools, and personal protective equipment, as applicable and available; ensuring that objects and areas that are touched, used, and accessed frequently are cleaned and disinfected regularly; and reducing the opportunities for contact with individuals and items, among others.

Public health officials have encouraged all employers to allow employees to work from home, whenever possible. While many public-facing employees cannot work from home, employers should consider whether office or administrative positions could be performed remotely. Employers considering implementing work from home policies should first identify which job responsibilities lend themselves to working from home, and then clearly set out the duties and expectations for such employees including the hours of work and any deadlines. For further guidance regarding remote work, please consult our guide: https://www.ehlaw.ca/remote-work-considerations-an-employers-guide/

Employers should provide employees with the latest company news including any revised policies and procedures, health and safety protocols, and business continuity decisions that have been reached or are being considered (such as whether to temporarily suspend operations or to stay open) and any human resources policies regarding matters such as pay and leaves. Employers should consider the best method of communication and ensure that they have accurate contact lists. Employers with unionized workforces should follow the collective agreement protocols for such communications, and consult with the unions as applicable.

## D. DEALING WITH COVID-19 RELATED ABSENCES

### i. Sick Leave Benefits

Employees unable to work due to illness caused by COVID-19 may be eligible to claim sick leave benefits under an applicable collective agreement or sick leave policy or plan. Such employees should be treated as any other sick employee for eligibility purposes.

A more complicated question has arisen with respect to employees who are quarantining (self-isolating) but who are not themselves ill or exhibiting symptoms of COVID-19. PHAC has provided clear advice for quarantine (self-isolation): everyone who

(i) is returning from travel outside of Canada, except for exempted individuals;

(ii) has had close contact with someone who has or is suspected to have COVID-19; and

(iii) has been told by the public health authority that they may have been exposed and need to quarantine must quarantine for fourteen days, regardless of whether they are experiencing symptoms.

In these circumstances, employees' eligibility to access sick leave benefits will depend on the scope of the language in the collective agreement or sick leave policy.

### ii. Statutory Leaves of Absence

In addition to leaves set out in applicable collective agreements or employer policies or plans, the *Canada Labour Code* ("CLC") presently contains a number of paid and unpaid leave provisions that federally-regulated employees may be entitled to access in the COVID-19 pandemic situation:

- **Medical Leave Protection** (up to seventeen weeks unpaid leave due to personal illness or injury, or medical appointments during working hours);
- **Personal Leave** (up to five days paid leave each calendar year due to illness, injury, care for prescribed family members, or any urgent matter concerning employee or prescribed family members);
- **Compassionate Care Leave** (up to 28 weeks unpaid leave per 52-week period to provide care or support to a family member of the employee with a serious medical condition with a significant risk of death); and
- **Leave Related to Critical Illness** (up to 37 weeks in a 52-week period unpaid leave if family member has a critical illness (meaning their health has changed and their life is at risk as a result of an illness or injury) and is under 18 years of age; 17 weeks in a 52-week period if family member is over 18 years of age).

In addition, on March 25, 2020, the Federal Government passed Bill C-13, which introduced a **Leave Related to COVID-19**. This leave provides employees with up to sixteen weeks unpaid leave or longer as fixed by regulation where they are "unable or unavailable to work for reasons related to COVID-19". Employment and Social Development Canada has provided that this leave may be used where employees are:

- being quarantined or asked to self-isolate as a result of COVID-19;
- being required to provide care to a family member as a result of COVID-19, or
- otherwise unable to work for reasons related to COVID-19.

The language of this leave and the applicable guidance is therefore notably broad and open-ended, such that borderline cases may exist where it is unclear whether an employee will be entitled to this leave.

Additionally, Bill C-13 also amends the CLC to permit employees to access compassionate care leave, critical illness leave and medical leave without a medical certificate until September 30, 2020.

Finally, employers should keep in mind that protections for statutory leaves of absence apply equally to the new leave, including anti-reprisal provisions, the right to continue to participate in benefits unless the employee opts not to continue to pay their share of the premiums (if any), and the right to reinstatement.

### iii. Employees' Rights to a Safe Workplace

Employers should be cognizant of three primary rights stemming from Part II of the CLC, in relation to the health and safety of employees in the workplace.

First, employees have a **Right to Know** about known or foreseeable hazards under Part II of the CLC. This right requires employers to:

- inform their employees of known and foreseeable hazards in the workplace;
- provide employees with information, training, and supervision necessary for them to be protected from these hazards, including any information about Personal Protective Equipment (PPE) where determined to be necessary to protect employees.

Part XII of the *Canada Occupational Health and Safety Regulations* sets out specific requirements for training for any type of PPE, including respirators and gloves.

Second, employees have a **Right to Participate** in keeping the workplace safe. This right enables employees to either participate in the workplace health and safety committee, and/or monitor and report unsafe conditions or activities.

Finally, employees have the **Right to Refuse** dangerous work if the employee has reasonable cause to believe it presents a danger. However, in order to meet the threshold of "danger," the identified hazard must reasonably be expected to pose an imminent or serious threat to the life or health of the person exposed to it.

In a work refusal case arising from the Severe Acute Respiratory Syndrome ("SARS") crisis, two airport ticket agents refused to work due to SARS because they were not provided with, or permitted to use, protective personal equipment. Both the employer and the health and safety officer concluded there was no "danger" justifying the work refusal. The employees appealed the decision to an Appeals Officer pursuant to the CLC. On reviewing the finding of the health and safety officer, the Appeals

Officer confirmed that there was an absence of danger for the employees, mainly because the best information at the time was that SARS was emerging in clusters connected with health care workers in a hospital setting and with family members giving home care to a family member suffering from SARS, and the ticket agents did not provide any evidence to dispute this conclusion. The present circumstances around COVID-19 are distinguishable, however, insofar as there is local community transmission, which suggests a real possibility that public-facing employees may come into contact and become infected with COVID-19. Therefore, employees with a higher risk of severe illness from COVID-19 (i.e. employees who are older, have pre-existing medical conditions, or are immunocompromised) may have a better argument that exposure to COVID-19 rises to the level of "danger," which could ground a work refusal. To reduce the risk of a successful refusal to work complaint, employers should:

- comply with the measures as set out in Section B, above;
- be transparent in communications with employee groups regarding the measures in place, including any that are over and above mandated baselines;
- provide public-facing employees with personal protective equipment, which will reduce the risk that a health and safety officer would conclude that a danger exists, and train employees on the use of such equipment, in accordance with applicable statutes and regulations; and
- review and revise safe work practices as new facts about COVID-19 are discovered, in accordance with the *Hazard Prevention Program Regulations*.

Finally, while normal circumstances would dictate that an employee must be at work to legitimately refuse to do work, due to the unique nature of the COVID-19 situation, employees may have the right to refuse to physically report to work to make the refusal.

## E. Considerations for Employers Undergoing Workforce Reductions and/or Temporary Suspension of Operations

### i. Temporary Layoffs

Unfortunately, many Federal-sector employers' revenues have been negatively impacted due to the ongoing COVID-19 pandemic, resulting in employers having to layoff staff due to work shortages and/or temporary suspensions of operations. Below, we have summarized some of the key legal considerations when dealing with temporary layoffs under the CLC. Employers may invoke a temporary layoff in accordance with the provisions of the CLC, which does not amount to a termination or severance of employment pursuant to the CLC. Under the CLC, a layoff is not a termination where the layoff:

a) lasts less than three months;

b) lasts more than three but less than six months, provided the employer notifies the employee in writing that they will be recalled on a specific day or within a fixed period of time and actually recalls them at that time; or

c) lasts between three and twelve months, if the employer continues to make payments as prescribed by the *Canada Labour Standards Regulations*.

In addition, for unionized employers, a layoff will not be a termination where the layoff is more than three months but not more than twelve months and the employee, throughout the term of the layoff, maintains recall rights pursuant to a collective agreement. Employers with unionized workforces should review their collective agreements for the applicable terms, including notice requirements and permitted layoff length.

In any circumstance, a layoff will be a termination for CLC purposes if its duration exceeds twelve months.

It is also important to note that currently, notwithstanding the permissive provisions in the CLC, absent a term in an employment agreement (express or implied) permitting temporary layoffs (or in some cases a clear and binding policy and/or established and regular employer practice relating to temporary layoffs), a layoff, even if intended to be temporary, may result in a successful constructive dismissal claim. Employers who already have an established practice of implementing layoffs and recalls on a temporary basis of certain positions from time to time (particularly in the case of a previous temporary suspension of operations) may be better situated to defend allegations of constructive dismissal at the time of a temporary layoff in response to the COVID-19 crisis. In other words, even if a temporary layoff under the CLC is carried out properly such that employment is not deemed terminated under the CLC, absent an agreement to the contrary and/or a well established practice, a unilateral layoff by an employer may trigger a termination of employment by virtue of the common law. Such a termination would entitle the employee to section 240 unjust dismissal rights under the CLC, which may include reinstatement, and common law remedies such as reasonable notice, typically in the range of three to five weeks per year of service.

That said, there is currently significant debate among employment lawyers as to whether in these unprecedented pandemic circumstances, a court may find an implied term in the employment agreement that an employer may initiate a temporary layoff.

There has also been discussion about whether an employment contract can become “frustrated” as a result of the COVID-19 crisis and the mass temporary suspensions of operations that have followed. Frustration is a legal doctrine that essentially involves an unforeseen change to the circumstances underlying the contract, through no fault of the parties, that renders the contract incapable of performance.

Additionally, an employee claiming constructive dismissal has an obligation to mitigate any damages they claim they have suffered, which means that if a laid off employee is recalled to work and declines, a court may later find that the employee failed to mitigate their damages (in whole or in part), therefore reducing the value of their claim. An additional consideration is present when laying off employees who are on averaging agreements. In accordance with section 6(11) of the *Canada Labour Standards Regulations*, an employee laid off before the averaging period ends is entitled to overtime owing based on the completed part of the averaging period, in the same manner as employees whose employment is terminated by the employer before the end of the averaging period.

Employers should always proceed with caution and seek advice before seeking to temporarily lay off an employee who may be eligible for a CLC leave, as such a layoff, if not supported by valid reasons, be may viewed a prohibited reprisal.

Given the severe impact of COVID-19 on the Federal sector, employers are faced with difficult decisions related to their workforce. While certainty may not be possible in these unprecedented circumstances, there are several steps employers can take to mitigate their risks to the extent possible, and we recommend that employers consult with one of our lawyers for assistance in such cases.

### ii. Canada Emergency Response Benefit

The new Canada Emergency Response Benefit ("CERB") provides financial support to employed and self-employed Canadians who have been directly affected by COVID-19. It provides a payment of $2,000 for a four-week period (equivalent to $500 a week) for up to 16 weeks.

The CERB will be available to workers:

- residing in Canada, who are at least fifteen years old;
- who have stopped working because of COVID-19 or are eligible for Employment Insurance ("EI") regular or sickness benefits;
- who had income of at least $5,000 in 2019 or in the twelve months prior to the date of their application; and
- who have not quit their job voluntarily.

The CERB is available to individuals who have stopped working and are not earning more than $1,000 in employment or self-employment income for more than 14 consecutive days in the four-week period of their initial claim. For subsequent claims, individuals cannot earn more than $1,000 in employment and/or self-employment income for the entire four-week period of the claim. Each payment of the CERB covers a four-week period, beginning on March 15, 2020. The CERB is available for the period from March 15, 2020 to October 3, 2020 (four periods of four weeks in total). Applications for the CERB began the week of April 6, 2020 and can be made retroactive to March 15, 2020, until December 2, 2020. Employers can find more information about the CERB at:

- https://www.canada.ca/en/revenue-agency/services/benefits/apply-for-cerb-with-cra.html#who
- https://www.canada.ca/en/services/benefits/ei/cerb-application.html
- https://www.canada.ca/en/services/benefits/ei/cerb-application/questions.html

### iii. Employment Insurance Benefits and Supplemental Unemployment Benefit Plans

Normally, in the event of a temporary layoff, employers must issue a Record of Employment for each of the employees that are on a temporary layoff so that they may apply for Employment Insurance ("EI") benefits. The same goes for employees who are unable to work due to sickness who have exhausted any paid sick leave through the employer and would be eligible for EI sickness benefits.

In these circumstances, the Government has advised that if an individual became eligible for EI regular or sickness benefits prior to March 15, 2020, an application for EI benefits will be processed

under the pre-existing EI rules. However, if an employee became eligible for EI regular or sickness benefits on or after March 15, 2020, their claim will be automatically processed through the CERB. Therefore, if an employee was already receiving EI benefits as of the date the CERB came into effect, they will continue to receive such benefits until they are exhausted. Otherwise, all employees who are unable to work for any reason related to COVID-19 are directed to apply for the CERB. The Government has advised that employees will retain their eligibility to receive EI benefits after they stop receiving the CERB, and the period for which they received the CERB will not impact their EI entitlement. EI regular and sickness benefits remain available under the ordinary rules for anyone whose claim is unrelated to COVID-19.

For those who became eligible for EI benefits prior to March 15, 2020, or who will later claim EI after they stop receiving the CERB, the basic rate for calculating EI benefits is 55% of their average insurable weekly earnings, up to a maximum weekly amount. The duration of benefits varies from fourteen weeks up to a maximum of 45 weeks, depending on the unemployment rate of the applicable geographic area and the number of insurable hours the employee has accumulated. EI sickness benefits provide up to 15 weeks of income replacement and are available to eligible claimants who are unable to work because of illness, injury, or quarantine. The Canadian government has waived the one-week waiting period for those individuals in quarantine who can still claim EI sickness benefits so they can be paid for the first week of their claim. However, this waiver does not apply to employees who were laid off because of a shortage of work and became eligible for regular EI benefits prior to March 15, 2020.

Supplemental Unemployment Benefit ("SUB") plans permit an employer to increase employees' weekly earnings when they are unemployed due to a temporary shortage or stoppage of work. Payments from SUB plans that are registered with Service Canada are not considered earnings and are not deducted from EI benefits. Many employers may be familiar with SUB plans for the purpose of an employer providing a "top-up" to employees on pregnancy or parental leave. SUB plans also exist to allow employers to provide additional earnings to employees who are on layoff and in receipt of EI benefits. Although SUB plans cannot be used in combination with the CERB, employers may be able to use them to top-up employees who become eligible for EI once they stop receiving the CERB.

SUB plans must be registered before their effective date and must comply with a specific set of requirements. The registration date of the SUB plan is the date on which it is submitted to the SUB Program, provided all the required conditions are met and all supporting documents are received. Until the SUB plan is registered, any amounts paid by an employer to a temporarily laid off employee will be treated as earnings and may be deducted from the employee's EI benefits. Employers can find more information about SUB plans in the *Guide for Employers Offering Supplemental Unemployment Benefits to Their Employees*, which can be found at:

- https://www.canada.ca/en/employment-social-development/programs/ei/ei-list/reports/supplemental-unemployment-benefit.html

### iv. Work-Sharing

Work-Sharing ("WS") is a program by Service Canada designed to help employers and employees avoid layoffs when there is a temporary decrease in business activity outside of the employer's

control. The WS program provides EI benefits to eligible employees who agree to reduce their normal working hours and share the available work while their employer recovers. The employer and the employees (and the union, if applicable) must agree to participate in a WS agreement. Effective March 15, 2020, to March 14, 2021, the Government of Canada has introduced temporary special measures.

To be eligible for WS, employees must:

- be year-round, permanent, full-time or part-time employees needed to carry out the day-to-day functions of the business ("core staff");
- be eligible to receive EI benefits; and
- agree to reduce their normal working hours by the same percentage and to share the available work.

The following employees are not eligible for WS:

- seasonal employees and students hired for the summer or a co-op term;
- employees hired on a casual or on-call basis, or through a temporary help agency;
- employees who are needed to help generate work and/or who are essential to the recovery of the business; for example: (i) senior management; (ii) executive-level marketing/sales agents; (iii) outside sales representatives; or (iv) technical employees engaged in product development;
- employees who hold more than 40% of the voting shares in the business.

Key WS program features include:

- an established WS unit: a WS unit is a group of employees with similar job duties who agree to reduce their hours of work over a specific period of time;
- equal sharing of work: all members of a WS unit agree to reduce their hours of work by the same percentage and to share the available work;
- expected work reduction: a WS unit must reduce its hours of work by at least 10% to 60%. The reduction of hours can vary from week to week, as long as the average reduction over the course of the agreement is from 10% to 60%;
- agreement length and extension: a WS agreement has to be at least six consecutive weeks long and can last up to 26 consecutive weeks. Employers may be able to extend their agreements up to a total of 76 weeks.

Employers should submit their applications ten calendar days prior to the requested start date. Provided the WS program is approved, employees will receive EI benefits to offset their losses from the reduction in their working hours.

While a WS agreement can work well in certain workplaces and circumstances, there are some challenges. First, it would involve significant time and effort to establish what work is available, how it can be shared, and who would be included in the unit(s). There are many limitations and restrictions

involved, which mean that the program is neither flexible nor straightforward. It would not help employers to address situations where there is simply no work to be done, nor would it help in the case of employees who are ineligible. Finally, it would require the agreement of any unions involved and could not be implemented unilaterally.

### v. Terminations

Under the CLC, employers cannot summarily dismiss without just cause federally-regulated employees in non-union, non-management positions who have more than twelve consecutive months of continuous employment with the employer, which includes long-term seasonal employees. Rather, under Division XIV of the CLC, employers can only terminate such employees for just cause or due to lack of work or discontinuance of function. Where an employer violates Division XIV , and is found to have unjustly dismissed an employee, the employee may be entitled to the following remedies:

- compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;
- reinstatement; and/or
- any other remedy that is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.

Those employees who are not covered by the unjust dismissal provisions may instead be entitled to the statutory notice of termination pay or pay in lieu of notice that is owing to the employee in the circumstances under the CLC. In addition, such notice increases in the event of group terminations (i.e., 50 employees or more being terminated within the same four-week period). Employers are also required to provide an additional amount for "severance pay" where an employee who has at least twelve months continuous service is terminated without just cause. While CLC notice could be provided as working notice, any severance pay entitlements under the CLC must be provided as pay. More detailed information about the requirements of the CLC on termination of employment (including group terminations) can be found in the following Employment and Social Development Canada Guide:

- https://www.canada.ca/en/employment-social-development/services/labour-standards/reports/code-summary-3.html

Unionized employers must also consider collective agreement obligations at the time of carrying out the termination of bargaining unit employees.

With respect to employees not covered by Division XIV of the CLC, unless an employee has signed a valid and legal employment agreement that limits the employee's entitlements on a termination of employment to the CLC minimum entitlements, then generally, pursuant to the common law, an employer will owe the employee substantially more for common law reasonable notice of termination of employment. In determining what constitutes common law reasonable notice, courts consider the following factors: the employee's age, salary, position, and length of employment, and the availability of similar employment. Employees have a duty to mitigate their common law damages following a

termination, but not their CLC entitlements, which are provided regardless of whether an employee finds another job. Any common law reasonable notice provided as pay in lieu can be indicated as being inclusive of statutory notice of termination and severance pursuant to the CLC.

## F. FEDERAL EMERGENCY RESPONSE MEASURES

### i. Canada Emergency Wage Subsidy

One of the measures introduced by the Federal Government as part of its COVID-19 Economic Response Plan is the Canada Emergency Wage Subsidy ("CEWS"). The CEWS, which came into effect on April 11, 2020, is designed to assist employers to continue to pay their employees and thereby avoid layoffs during the COVID-19 pandemic. The CEWS will provide eligible employers with a subsidy of up to 75% of wages for eligible employees for the twelve-week period from March 15, 2020, to June 6, 2020. The federal government announced on April 21, 2020, that the CEWS application portal will open on April 27, 2020, and that all applications received between April 27 and May 3, 2020, will be processed on May 4, 2020. Successful applicants can expect to receive their money within the first two weeks of May. More information on how employers can apply for the CEWS can be found here:

- https://www.canada.ca/en/revenue-agency/services/subsidy/emergency-wage-subsidy.html

Eligible employers include individuals, taxable corporations, partnerships, non-profit organizations, and registered charities of all sizes that have experienced a decrease in revenues of at least 15% in March 2020 and decreases of at least 30% in April 2020 and May 2020 and whose employees remain on the payroll. This does not mean that employees have to be performing work. Rather, employees who are unable to perform work for their employer can be designated as though they are on a paid leave of absence, part of which is subsidized by the CEWS.

Eligible employees are those employed in Canada who have been paid wages by the employer for a period of 14 or more consecutive days during the relevant eligibility period.

The 75% subsidy will be on the first $58,700 in remuneration paid to an eligible employee, to a maximum benefit of $847 per week, calculated on an employee's "baseline remuneration," which is the employee's average weekly earnings for the period of January 1 to March 15, 2020. Any period of seven or more consecutive days during which the employee did not receive remuneration will be excluded. There is no limit on how much an employer can receive under the CEWS.

Eligible remuneration may include salary, wages, and other remuneration such as taxable benefits. These are amounts for which employers are generally required to withhold or deduct amounts to remit to the Receiver General on account of the employee's income tax obligation. Eligible remuneration does not include severance pay, or items such as stock option benefits or the personal use of a corporate vehicle.

Employers who have already laid off employees in response to decreases in revenues from COVID-19 may consider recalling employees to benefit from the CEWS.

To demonstrate a decrease in revenues, employers may compare their revenues from the relevant claim period against the same month in 2019, or against their average revenues from January and February 2020. The claim periods for the CEWS are March 15 to April 11, April 12 to May 9, and May 10 to June 6. Employers will have to choose their reference period when they first apply for the CEWS, and must then use the same approach for the duration of the program. Employers have the choice to calculate their revenues under the accrual method or the cash method, but not a combination of both. An employer will be required to use whichever method is used when first applying for the CEWS for all subsequent qualifying periods.

To qualify, employers must demonstrate a decrease of 15% in gross revenues for March, 2020, and a 30% decrease in each of April and May, 2020. Employers who qualify for a particular claim period will be deemed to meet the conditions in respect of the following qualifying period; however, employers should be prepared to prove that they meet the eligibility criteria for subsequent periods in case of an audit in the future. Employers who receive the CEWS but do not meet the eligibility requirement will be required to repay the amount received, and those who engage in artificial transaction to reduce their revenue to benefit from the CEWS will also be subject to a penalty equal to 25% of the amount received.

### ii. Subsidy for Employer-Paid Contributions

The CEWS also includes a 100% refund for certain employer-paid contributions to Employment Insurance, the Canada Pension Plan, the Quebec Pension Plan, and the Quebec Parental Insurance Plan. The refund covers 100% of employer-paid contributions for eligible employees for whom the employer is eligible to claim the CEWS, for each week during which they are on paid leave with pay. This refund is not available for employees who are on leave with pay for only a portion of the week.

This refund is not subject to the weekly maximum of $847 per employee that an eligible employer may claim in respect of the CEWS. There is no overall limit on the amount of the refund.

### iii. Temporary 10% Wage Subsidy

The 10% Temporary Wage Subsidy for Employers ("TWSE") is separate from the CEWS and is a measure meant to provide additional support to small businesses. The TWSE is a three-month measure that allows eligible employers to reduce the amount of payroll deductions required to be remitted to the Canada Revenue Agency ("CRA").

Eligible employers are individuals (excluding trusts), partnerships, non-profit organizations, registered charities, and Canadian-controlled private corporations ("CCPCs"), including cooperative corporations, that had an existing business number and payroll program account with the CRA as of March 18, 2020 and who pay salary, wages, bonuses, or other remuneration to an eligible employee.

Partnerships are eligible only if all members meet the definition of an eligible employer. CCPCs are only eligible if they have a business limit for their last taxation year that ended before March 18, 2020, greater than nil, as determined without reference to the passive income business limit reduction.

The TWSE is equal to 10% of the remuneration paid by an eligible employer from March 18, 2020, to June 19, 2020, up to a maximum of $1,375 for each eligible employee, to a maximum of $25,000 per employer.

The subsidy is calculated manually by the employer or whoever is responsible for the employer's payroll remittances and is based on the total number of eligible employees employed at any time during the three-month period.

Employers do not need to apply to receive the TWSE. Rather, employers continue deducting income tax, Canada Pension Plan contributions, and Employment Insurance premiums from salary, wages, bonuses, and other remuneration as usual. The subsidy is then calculated when the employer makes their remittances to the CRA. Once the subsidy is calculated, employers reduce their payroll remittance of federal, provincial, or territorial income tax that would normally go to the CRA by the amount of the subsidy.

Additional information on the TWSE can be found on the Canada Revenue Agency's website:

- https://www.canada.ca/en/revenue-agency/campaigns/covid-19-update/frequently-asked-questions-wage-subsidy-small-businesses.html

### iv. Government Support for Indigenous Peoples and Businesses

The Federal Government has also taken several steps towards providing relief for Indigenous peoples. On March 18, 2020, the Federal Government announced that it would provide $305 million for a new distinctions-based Indigenous Community Support Fund to address immediate needs in First Nations, Inuit, and Métis Nation communities. These funds could be used for measures including, but not limited to:

- support for Elders and vulnerable community members;
- measures to address food insecurity;
- educational and other support for children;
- mental health assistance and emergency response services; and
- preparedness measures to prevent the spread of COVID-19.

In addition, on April 18, 2020, the Prime Minister pledged up to $306.8 million in funding to help small and medium-sized Indigenous businesses, and to support Aboriginal Financial Institutions that offer financing and business support services to First Nations, Inuit, and Métis businesses. This funding will allow for short-term, interest-free loans and non-repayable contributions through Aboriginal Financial Institutions.

This financial support will be provided through Aboriginal Financial Institutions, and administered by the National Aboriginal Capital Corporations Association and the Métis Capital Corporations in partnership with Indigenous Services Canada.

Additional information on Government of Canada programs with the objective of supporting Indigenous communities can be found at the following links:

- https://www.sac-isc.gc.ca/eng/1581964230816/1581964277298
- https://www.canada.ca/en/department-finance/economic-response-plan.html

### v. Canada Summer Jobs Program

The Federal Government has introduced temporary changes to the Canada Summer Jobs program in recognition of the challenges faced by young people finding work during a pandemic. The temporary changes include:

- an increase to the wage subsidy, so that private and public sector employers can receive up to 100% of the provincial or territorial minimum hourly wage for each employee;
- an extension to the end date for employment to February 28, 2021;
- allowing employers to adapt their projects and job activities to support essential services;
- allowing employers to hire staff on a part-time basis.

The government anticipates that these changes will create up to 70,000 jobs for youth between the ages of 15 and 30.

For more information on the Canada Summer Jobs Program, including the temporary flexibilities for COVID-19, visit the Government of Canada's website:

- https://www.canada.ca/en/employment-social-development/services/funding/canada-summer-jobs.html

## G. Other Legal Considerations

### i. COVID-19 Medical Information Considerations

Case law has generally held that an employer is not entitled to request an employee's diagnosis (only prognosis). However, the Government of Canada has recently published guidance that provides that since COVID-19 constitutes a workplace hazard under the CLC, employers are entitled to lawfully request that employees provide information regarding COVID-19, to the extent that it directly relates to ensuring the health and safety of employees in the workplace.

Employment and Social Development Canada ("**ESDC**") has therefore accepted that an employer can request the following information from employees:

- whether an employee is exhibiting symptoms of COVID-19 in the workplace (so that the employee can be asked to go home to self-isolate);
- whether an employee is undergoing COVID-19 testing, and the result of that testing, if the employee was present in the workplace while potentially infected;

- whether an employee was in close contact with someone diagnosed with COVID-19, as it is recommended that such a person would have to self-isolate; and
- whether an employee has travelled internationally in the last 14 days.

Employers can then follow up with employees to ensure a return to work when it is safe for the employee to do so.

Additionally, we would suggest that, given employees' "right to know" about any potential hazards to which they may be exposed in the workplace, it may be necessary to advise other employees where there has been a case of COVID-19 confirmed in the workplace. However, any disclosure should avoid identifying information and should be limited to the extent necessary to take reasonable precautions to protect health and safety. Employees have a role to play in reducing the risks of transmission in the workplace and should follow the advice/requirements from the PHAC and local public authorities and stay updated with the latest information.

### ii. COVID-19 Privacy Considerations

As the economy begins to restart, employers may consider employing a variety of procedures to screen employees, customers and clients (e.g. using temperature checks) to minimize the risk of COVID-19 infection in the workplace. While the COVID-19 pandemic and its significant public health risk may justify a larger number of circumstances in which employers may collect, use, and disclose individuals' personal information, employers are still subject to certain obligations under applicable privacy laws.

To help federally-regulated organizations understand their continuing obligations under applicable privacy statutes, the Office of the Privacy Commissioner of Canada has released guidance to address the special privacy considerations associated with balancing individuals' privacy interests against both public- and private-sector organizations' interests in the safety of their workplaces:

- https://www.priv.gc.ca/en/privacy-topics/health-genetic-and-other-body-information/health-emergencies/fw_covid/
- https://www.priv.gc.ca/en/privacy-topics/health-genetic-and-other-body-information/health-emergencies/gd_covid_202003/

### iii. Human Rights Considerations

The Canadian Human Rights Commission has, to date, refrained from addressing the question of whether COVID-19 constitutes a "disability" for the purposes of the *Canadian Human Rights Act* ("*CHRA*"). The Commission's policy statement on the COVID-19 pandemic can be found at:

- https://www.chrc-ccdp.gc.ca/eng/content/statement-covid-19

However, both the Ontario and British Columbia Human Rights Commissions have confirmed their view that COVID-19 does amount to a disability, with its attendant protections. This is consistent with the Ontario Human Rights Commission's finding in the 2000s that SARS, another coronavirus, was

a disability. We expect the Canadian Human Rights Commission will soon follow suit in its recognition of COVID-19 as a disability, whether by policy statement or in a decision raising this issue.

Therefore, we expect that discrimination, including harassment, against any persons or communities related to COVID-19 is likely prohibited under the CHRA. However, as provided by the Ontario Human Rights Commission's policy statement, relevant human rights laws recognize the importance of balancing people's right to non-discrimination and civil liberties with public (and workplace) health and safety, including the need to address evidence-based risks associated with COVID-19. The policy statement further stated that employers should ensure that any restrictions imposed are consistent with the most recent advice from medical and public health officials, and are justified for health and safety reasons.

In addition, the COVID-19 pandemic has created family-related obligations for employees, as a result of school and childcare closures across the country. Employers will be required to accommodate employees' family obligations to the point of undue hardship where they rise to the threshold for family status protection under the *CHRA*. This might occur where, for example, an employee must care for an ill family member, or where their child's school is closed due to COVID-19 and alternative childcare options are unavailable. In such situations, employers may be required to accommodate employees (such as by allowing employees to work remotely or on a reduced basis), to the point of undue hardship.

The above guide may not all apply to Crown Corporations and/or First Nations Governments, so we recommend employers consult with their Emond Harnden lawyer regarding specific questions about rights and responsibilities

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## APPENDIX: COVID-19 BACKGROUND INFORMATION

### i. Background

On March 11, 2020, the World Health Organization ("WHO") officially changed their classification of COVID-19 from a public health emergency of international concern to a pandemic. As the cases of COVID-19 continue to rise throughout Canada and the world, employers should remain up to date on the developments to be prepared for this ongoing pandemic.

### ii. What are Coronaviruses?

Coronaviruses are a large family of viruses. Some coronaviruses cause respiratory illness in people, ranging from mild common colds to severe cases of pneumonia, while others cause illness in animals only. Rarely, animal coronaviruses can infect people, and, more rarely, these can then spread from person to person through close contact. *Novel Coronavirus (COVID-19)* is a new strain of the virus that has not previously been identified in humans. It spreads between humans.

There have been two other specific coronaviruses that have spread from animals to humans, and that have cause severe illness in humans: Middle East Respiratory Syndrome (MERS) and Severe Acute Respiratory Syndrome (SARS).

Human coronaviruses cause infections of the nose, throat, and lungs. They are most common spread from an infection person through:

- respiratory droplets generated when a person coughs or sneezes;
- close, prolonged personal contact, such as touching or shaking hands; and
- touching something with the virus on it, then touching one's mouth, nose, or eyes before washing one's hands.

Those who are infected with COVID-19 may have few or no symptoms, and may not know that they have symptoms of COVID-19 because symptoms can be similar to those of a cold or flu. Symptoms may take up to 14 days to appear after exposure to COVID-19. The most common symptoms associated with COVID-19 include:

- fever;
- cough; and
- shortness of breath or difficulty breathing.

Less common symptoms can include:

- extreme tiredness;
- sore throat; and
- runny nose.

In severe cases, infection can lead to death. Individuals aged 65 and older and those with compromised immune systems are at an increased risk of more severe symptoms and outcomes. Coronavirus infections are diagnosed by a health care provider based on symptoms and are confirmed through laboratory tests. At this time, there is still no vaccine for COVID-19.

## iii. Additional COVID-19 Resources From Emond Harnden LLP

- Applications Open for the Canada Emergency Wage Subsidy on April 27, 2020
    - https://www.ehlaw.ca/applications-open-for-the-canada-emergency-wage-subsidy-on-april-27-2020/
- Federal Government Announces Expanded Eligibility Rules for the Canada Emergency Response Benefit
    - https://www.ehlaw.ca/federal-government-announces-expanded-eligibility-rules-for-the-canada-emergency-response-benefit/
- Federal Government Launches Canada Emergency Response Benefit on April 6th
    - https://www.ehlaw.ca/federal-government-launches-canada-emergency-response-benefit-on-april-6th/
- Federal Government Introduces Increased Canada Emergency Wage Subsidy
    - https://www.ehlaw.ca/federal-government-introduces-increased-canada-emergency-wage-subsidy/
- COVID-19 Emergency Response Act receives Royal Assent
    - https://www.ehlaw.ca/covid-19-emergency-response-act-receives-royal-assent/
- Remote Work Considerations: An Employer's Guide
    - https://www.ehlaw.ca/remote-work-considerations-an-employers-guide/
- Canada's COVID-19 Economic Response Plan
    - https://www.ehlaw.ca/canadas-covid-19-economic-response-plan/
- Planning for COVID-19 in the workplace – obligations and considerations for employers
    - https://www.ehlaw.ca/planning-for-covid-19-in-the-workplace-obligations-and-considerations-for-employers/

Our Covid19 Information Hub is updated on an ongoing basis, and can be accessed at:

- https://www.ehlaw.ca/covid-19-information-hub/