

If we decide to lay off an employee, do I complete the Record of Employment (ROE) as normal and enter what I believe to be an expected return date? If that date comes and we are not ready to recall the employee, what then?

Yes, enter the ROE as you would enter any temporary layoff. In Block 14 on the ROE, there is a field labelled "Expected Date of Recall." This is an optional field, and you may use it to indicate a potential return date. If you are unsure of the return date, there is a box labelled "Unknown" that you may use.

Use Code A, for "Shortage of Work," which includes reducing or shuttering operations. Use Code D, for "Sickness," if the employee is self-isolating due to potential exposure.

If you have employees who cannot come to work because they are self-isolating or need to provide care to their families, consider issuing them a temporary layoff, as this will enable them to apply for unemployment.

Please note: Currently in Ontario and other jurisdictions, there are usually time limits for how long someone can be temporarily laid off before it is considered permanent. We anticipate that some of these provisions will change as Canada continues to respond to COVID-19.

When issuing temporary layoffs, be mindful to check your jurisdiction and collective agreement (if this applies) to align with requirements.

Which employees can and can't be laid off?

Businesses may still issue temporary layoffs during this time. A temporary layoff is essentially putting the employer–employee relationship on hold for a limited period of time without severing it. Temporarily laying off an employee says, "We don't have work available right now, but we want to keep you as an employee, and once work resumes you will be recalled."

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Are there any special notices that I need to send out?

No. For provincially regulated organizations under Ontario’s *Employment Standards Act, 2000*, all an employer must do is inform the employee they are being temporarily laid off and given an ROE (note: please check the applicable employment standards legislation if you operate in any locations other than Ontario). The employer does not need to provide a reason for the layoff. At this point, the employee can apply for EI. However, you should confirm whether your collective agreements or employment contracts lay out a specific clause for layoffs. If an employment contract or collective agreement provides a more generous clause than employment standards legislation, the employment contract or collective agreement supersedes the applicable employment standard.

In normal circumstances, if the employment contract does not stipulate a temporary layoff and the employer issues one, this could cause a claim from constructive dismissal. However, based on the current climate and rapid changes in Canada, the claim for constructive dismissal would be a harder one to make. Businesses should still be mindful of this and attempt to work with staff, improve their communication strategies, and look at all options including remote work, reduced hours, and flexible schedules, but even with these measures, a temporary layoff may be necessary.

While legislation may not require you to provide employees with notice during a temporary layoff, **we encourage all employers to develop a communication strategy**, even just a weekly update on the status of the business and planned next steps. With more and more employees and individuals isolating and practising social distancing, any efforts we can make to connect remotely and keep communicating will be critical to support individual wellness and foster continued commitment.

Do employees submit their own applications for EI when laid off? What action has the government taken to make this process easier during the pandemic?

Yes. Employees can apply for EI benefits through the EI Sickness Benefit.

The government of Canada is taking the following actions to support Canadians:

- Waiving the one-week waiting period for EI sickness benefits for new claimants who are quarantined, so they can be paid for the first week of their claim;
- Establishing a new dedicated toll-free phone number to support enquiries related to waiving the EI sickness benefits waiting period;
- Granting priority application processing for EI sickness claimants under quarantine;
- Waiving medical certificate requirements for people claiming EI sickness benefits due to quarantine; and
- Backdating claims delayed due to quarantine; that is, people who cannot complete their claim for EI sickness benefits due to quarantine may apply later and have their EI claim backdated to cover the period of delay.

Currently, if employees are temporarily laid off, the one-week waiting period still applies. The waiting period waiver only applies to persons under quarantine.

What entitlements are employees due while laid off?

During a temporary layoff, you do not need to pay out vacation accounts. You may want to look at providing employees with access to their banked time accounts, sick leave accounts, vacation accounts, and so on to help reduce their financial stress.

We encourage businesses to provide each employee with an update on their accounts, so that they can make informed decisions.

For example, an employee may ask to use their banked time, sick leave, and vacation time before moving to a temporary layoff. We discourage forcing employees to take time off if doing so is inconsistent with your existing policies, but you should inform and support your employees to make intelligent decisions about how to best use their vacation accounts and so on.



Does the company have responsibility to keep benefits active?

The Corona Virus COVID-19 outbreak and recent public health announcements from federal and provincial governments has resulted in extraordinary impacts to Canadians at home and abroad, as well as to our travel and tourism industries.

We know that business owners face many difficult decisions to keep employees safe and balance the challenges ahead for business continuity. We have faced many difficult questions from employers who have had to issue temporary layoffs until things get back to normal after the public health emergency is over.

Group Life and Health policies have benefit extensions for employee temporary layoffs for up to 120 days. Temporary layoffs are clearly defined, in terms of employment standards which we have included below. These layoff periods are unique as they are also considered emergency leaves. They are just like other legislated leaves such as maternity leaves where benefit extensions apply. Premier Ford declared a state of emergency for the Province of Ontario to protect employees.

As employers we recognize that our business success has been based on the service of our valued employees. In these challenging times we need to support their health and the health of their families including these benefit extensions until they can return to work when this public health emergency is over, and our lives and business prosperity can return to normal.

There is some hope that the next 2-3 weeks of stay at home Emergency health directives will curb the outbreak so that health services are not overwhelmed. We know that employers can make a short-term commitment to benefit extensions during temporary lay offs. In these unprecedented times we need to value of our personal health, the health of others and those of our employees and their families first.

The alternative, without employment benefits extended, is termination of employment and related severance requirements. A temporary lay off without a benefit extension can create the legal liability of constructive dismissal. If employees contract the virus during a lay off without an extension who bears the risk? The consequences of an employee's death, disability, hospitalization, and drug costs due to the Corona virus would be legally challenged and the liability thrown back to the employer for terminating coverage.

Below are the applicable Employment Standards that apply.



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TERMINATION OF EMPLOYMENT

Temporary lay-off

- (2) For the purpose of clause (1) (c), a temporary layoff is,
- (a) a lay-off of not more than 13 weeks in any period of 20 consecutive weeks;
 - (b) a lay-off of more than 13 weeks in any period of 20 consecutive weeks, if the lay-off is less than 35 weeks in any period of 52 consecutive weeks and,
 - (i) the employee continues to receive substantial payments from the employer,
 - (ii) the employer continues to make payments for the benefit of the employee under a legitimate retirement or pension plan or a legitimate group or employee insurance plan,
 - (iii) the employee receives supplementary unemployment benefits,
 - (iv) the employee is employed elsewhere during the lay-off and would be entitled to receive supplementary unemployment benefits if that were not so,
 - (v) the employer recalls the employee within the time approved by the Director, or
 - (vi) in the case of an employee who is not represented by a trade union, the employer recalls the employee within the time set out in an agreement between the employer and the employee;
 - (c) in the case of an employee represented by a trade union, a lay-off longer than a lay-off described in clause (b) where the employer recalls the employee within the time set out in an agreement between the employer and the trade union. 2000, c. 41, s. 56 (2); 2001, c. 9, Sched. I, s. 1 (12).

Temporary lay-off not termination

- (4) An employer who lays an employee off without specifying a recall date shall not be considered to terminate the employment of the employee, unless the period of the lay-off exceeds that of a temporary lay-off. 2000, c. 41, s. 56 (4).

Deemed termination date

- (5) If an employer terminates the employment of an employee under clause (1) (c), the employment shall be deemed to be terminated on the first day of the lay-off. 2000, c. 41, s. 56 (5).

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LEAVES OF ABSENCES - EMERGENCY LEAVE, DECLARED EMERGENCIES

Emergency leave, declared emergencies

50.1 (1) An employee is entitled to a leave of absence without pay if the employee will not be performing the duties of his or her position because of an emergency declared under section 7.0.1 of the *Emergency Management and Civil Protection Act* and,

- (a) because of an order that applies to him or her made under section 7.0.2 of the *Emergency Management and Civil Protection Act*;
- (b) because of an order that applies to him or her made under the *Health Protection and Promotion Act*;
- (c) because he or she is needed to provide care or assistance to an individual referred to in subsection (8); or
- (d) because of such other reasons as may be prescribed. 2006, c. 13, s. 3 (3).

Advising employer

(2) An employee who takes leave under this section shall advise his or her employer that he or she will be doing so. 2006, c. 13, s. 3 (3).

Same

(3) If the employee begins the leave before advising the employer, the employee shall advise the employer of the leave as soon as possible after beginning it. 2006, c. 13, s. 3 (3).

Evidence of entitlement

(4) An employer may require an employee who takes leave under this section to provide evidence reasonable in the circumstances at a time that is reasonable in the circumstances that the employee is entitled to the leave. 2006, c. 13, s. 3 (3).

Limit

(5) An employee is entitled to take a leave under this section for as long as he or she is not performing the duties of his or her position because of an emergency declared under section 7.0.1 of the *Emergency Management and Civil Protection Act* and a reason referred to in clause (1) (a), (b), (c) or (d), but, subject to subsection (6), the entitlement ends on the day the emergency is terminated or disallowed. 2006, c. 13, s. 3 (3).

Same

(6) If an employee took leave because he or she was not performing the duties of his or her position because of an emergency that has been terminated or disallowed and because of an order made under subsection 7.0.2 (4) of the *Emergency Management and Civil Protection Act* and the order is extended under subsection 7.0.8 (4) of that Act, the employee's entitlement to leave continues during the period of the extension if he or she is not performing the duties of his or her position because of the order. 2006, c. 13, s. 3 (3).