
Managing in a Time of Pandemic: Employer Considerations When Business Reopens

Michael Sherrard and Gerald Griffiths

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250 Yonge Street Suite 3300
Toronto, Ontario M5B 2L7
Tel 416.603.0700
Fax 416.603.6035
24 Hour 416.420.0738
www.sherrardkuzz.com

Agenda

- Ontario Reg. 228/20
- Recall and Rehire
- Incentive Compensation
- Vacation Scheduling
- Health and Safety Considerations
- Managing Illness and Absenteeism

Ontario Reg. 228/20

- A temporary layoff is,
 - (a) a lay-off of not more than 13 weeks in any period of 20 consecutive weeks.

- On May 29, 2020, a new regulation was enacted placing non-unionized employees on *Infectious Disease Emergency Leave* during COVID-19 if their hours of work are temporarily reduced or eliminated by their employer due to COVID-19.

Ontario Reg. 228/20

- Retroactive to March 1, 2020 and continued in effect until six weeks after the declared emergency under *EMPCA* is terminated or disallowed.

- As such, an employee is not:
 - Laid off for the purposes of the *Employment Standards Act*
 - Considered to have been constructively dismissed

- Benefits to remain *status quo*

Recall and Rehire

How to approach recall or rehire

- Assess your needs:
 - Has business evolved during the pandemic?
 - Do you need every employee, or only certain departments, positions or skills?
 - Can your existing workforce meet your needs?

- If you choose to recall existing employees, additional considerations may apply.

Recall and Rehire

- In a unionized workplace, the recall order is likely determined by the collective agreement.
 - Often, length of service is the governing factor, provided the employee has the requisite skill, ability and/or experience (or other factors identified in the agreement).
- If you determine it is necessary to recall employees other than based on length of service, you may need to negotiate this with the union.

Recall and Rehire

- In a non-unionized workplace, you have more flexibility:
 - Length of service is not a governing factor
 - You may recall based on performance or skill
 - But... ensure any recall decision is not influenced by discriminatory factors such as age, sex, disability (including underlying medical condition), family status (employee has young children), *etc.*

Recall and Rehire

- These concerns may be better addressed by:
 - Soliciting volunteers to remain on recall (if you are less concerned with which employees return)
 - Informing employees of COVID-19-related leave entitlements/options

Recall and Rehire

- Establish factors to guide recall decisions:
 - ❑ Need
 - ❑ Documented skill and ability
 - ❑ Adaptability/versatility (must the employee be able to “multi-task” during initial recall phase)
 - ❑ Length of service
 - ❑ Productivity

Recall and Rehire - New Hires

- When business reopens, you may need to bring on new employees, if:
 - ❑ Business needs have changed
 - ❑ All or part of your workforce was terminated at the outset of the pandemic
 - ❑ Employees on recall elect not to return

Recall and Rehire - New Hires

- Great opportunity to:
 - Review and update workplace policies
 - Implement an enforceable employment agreement that:
 - Enhances your ability to manage your business
 - Limits entitlement on termination
 - Prepare and train employees (new and returning) on policies and protocols to reduce COVID-19 transmission in the workplace

Recall and Rehire - New Hires

- If new employment agreement implemented, consider including a temporary layoff provision.
 - Historically, despite provisions of ESA, layoff may trigger constructive dismissal if no contractual right to do so.
 - An express layoff provision protects against this risk.
 - Might be less applicable to current COVID-19-related layoffs due to the ESA amendment, but still applicable to future layoffs.

Recall and Rehire – Government Programs

- During layoff, employee may have received Canada Emergency Response Benefit (CERB):
 - ❑ \$2000 paid out in four-week blocks
 - ❑ Employee attestation they do not expect to earn more than \$1000 during four-week period

- Employee may have obligation to repay if rehired for a period when CERB received.

Recall and Rehire – Government Programs

- Canada Emergency Wage Subsidy (CEWS) may also impact decision regarding when to recall:
 - CEWS is calculated over pre-determined four week block
 - Employer not eligible for CEWS for an employee if employee not paid eligible remuneration for a period of 14 or more days

Recall and Rehire – Government Programs

- If you want to access CEWS, set a recall date to trigger eligibility for the subsidy (if possible).

Example: **CEWS Period 4 = June 7 to July 4**

Return to work date: **June 30**

- Not eligible (employee off for **23 days**)

Return to work date: **June 14**

- Eligible (employees off for **seven days**)

Recall and Rehire – Government Programs

- Alternatively, consider recall to inactive employment with pay starting earlier than the date when the employee will actually begin work:
 - Example, if **June 30** start date renders employer ineligible, consider recall to inactive employment with pay by **June 19**

Important to seek advice from accountant/tax advisor.

Incentive Compensation

- Can be used to encourage employees to return to work; and promote attendance after recall.

- Various forms:
 - Retention bonus
 - “Hero Pay” (separate from government benefit)
 - Increased vacation entitlement or other benefit in late-2020 or beyond

Incentive Compensation

- Government also introduced temporary pandemic pay for certain workplaces (hospitals, long-term care homes, retirement homes, *etc.*).

Incentive Compensation - Transportation

- To address a barrier to return to work, such as concern for use of public transportation.

- Consider:
 - Ride share program (*e.g.*, Uber)
 - Parking stipend
 - Mileage reimbursement

- Benefit vs. cost and difficulty “rolling back” later.

Incentive Compensation

- In unionized workplace, generally need union agreement.

- In non-unionized workplace, ensure program is in writing:
 - ❑ Who is eligible?
 - ❑ What is the time period covered?
 - ❑ Temporary only, does not change base salary or wage under employment agreement
 - ❑ May be ended at employer discretion

Incentive Compensation

- Consider impact on entitlement to:
 - Vacation pay
 - Public holiday pay

- Likely included in calculation of vacation and statutory holiday pay under ESA.
 - Review applicable collective agreements

- Arguably, it should also be considered in calculation of overtime pay under ESA.

Incentive Compensation

- Overtime is based on “regular rate of pay”.

- Regular rate calculated differently for hourly and salaried employees:
 - Hourly - amount paid for an hour of work in employee’s usual work week (excluding overtime)
 - Salaried - amount earned in a given work week divided by number of non-overtime hours worked

Vacation Scheduling

- Employer has discretion to schedule (subject to collective agreement or policy restriction).
- Cannot ask employee to forfeit vacation time without agreement and approval of Director of Employment Standards.
- If employee working remotely, can schedule vacation time before return to the workplace.

Vacation Scheduling

- If employee on layoff, can recall early and place on paid vacation before required back in the workplace.

- Be aware of ESA restrictions:
 - Must be scheduled in complete weeks
 - Can be scheduled in lesser periods if requested by employee in writing

- If “ramping up”, may offer option to take one day of vacation/week, with employee agreement.

Health and Safety Considerations

- Develop a return to work plan before employees are back at work.

- Consider:
 - Practices to reduce potential transmission
 - Source and require use of personal protective equipment
 - Protocols if an employee is ill, symptomatic, travels outside of Canada, *etc.*

Health and Safety Considerations

- Educate and train employees on the policy.
- Consider and plan how you will address a refusal to wear personal protective equipment.
- Follow public health guidelines and recommendations.

Health and Safety Considerations

- General OHSA obligation to take all reasonable steps to protect the health and safety of workers.
- Reg. 82/20 extends this obligation to include the following:

“the person responsible for a place of business that is open shall operate the business in compliance with the advice, recommendations and instructions of public health officials, including any advice, recommendations or instructions on physical distancing, cleaning or disinfecting.”
- Consider who in your organization will be responsible for monitoring and compliance.

Illness and Absenteeism

- General principles remain the same, even during COVID-19:
 - Culpable conduct
 - Employee is responsible
 - Discipline to correct/modify behaviour
 - Non-culpable conduct
 - Employee is not responsible
 - Discipline is not appropriate
 - Commonly arises in context of disability

Absenteeism - Fear of COVID-19

- First determine why:
 - Fear of COVID-19 in the workplace?
 - Fear of COVID-19 in public, on commute, *etc.*?
 - Other?

- Ask employee to clearly state the basis of concern.

- Basis of concern may impact employer response.

Absenteeism - Fear of COVID-19

- If fear of COVID-19 at the workplace:
 - Confirm compliance with Reg. 82/20
 - Educate employee on precautions taken in workplace
 - If continues to refuse, treat as a work refusal under OHSA
- Some MOL inspectors have taken position employee must be at work to advance a work refusal, but don't bank on that...

Absenteeism - Fear of COVID-19

- Work refusal process:
 - Place employee in a safe area
 - Investigate refusal with Joint Health and Safety Committee worker representative
 - If a risk exists, address risk
 - If no risk exists, ask employee to return
 - If employee continues to refuse, contact Ministry of Labour to investigate
 - Reg 82/20 compliance will be treated as a minimum standard

Absenteeism - Fear of COVID-19

- If fear of COVID-19 in the public:
 - ❑ Educate employee on steps they may take to reduce risk (mask, hygiene, gloves, transportation options)
 - ❑ Advise employee of expectation to return
 - ❑ If non-union employee, advise that failure to return will be treated as resignation
 - ❑ If unionized employee, warn employee of application of ‘deemed termination’ provision if does not return from recall

Absenteeism - Childcare

- If schools and daycares are closed due to the emergency order, employee is entitled to the new *Emergency Leave, Declared Emergencies and Infectious Disease Emergencies* (“Emergency Leave”):
 - ❑ Unpaid leave, benefits continued
 - ❑ Right to reinstatement to most recently held position or comparable position (if most recent position no longer exists)

Absenteeism - Childcare

- If employee request does not fall under the Emergency Leave, it may be a family status accommodation request. For example:
 - Request for a leave to keep children home even once daycares open and summer camps operational
 - Request to work from home so employee can keep children home during summer months (or in September if/when school resumes)

Absenteeism - Childcare

■ Consider:

- Does the requirement to attend work result in a “real disadvantage to the parent/child relationship and the responsibilities that flow from that relationship”?
- Are “other supports” available to the employee (such as other family members)?

Illness - COVID-19 Diagnosis

- Employer is not entitled to medical documentation to support employee request for Emergency Leave, if employee is diagnosed with COVID-19 or if caring for family member with COVID-19.

- However, employer is entitled to confirm employee is medically cleared to return to work:
 - Negative test or clearance from doctor/public health

How Can SK Help?

- There is much that can and should be done now.

- We can assist you to:
 - Review and revise existing policies and procedures
 - Develop appropriate criteria for recall
 - Prepare employment agreements for new hires
 - Prepare amended employment agreements for existing employees

How Can SK Help?

- ❑ Develop a return to work plan
 - See, for example, SK's COVID-19 Return to Work Considerations Briefing Note (www.sherrardkuzz.com)
- ❑ Prepare an incentive compensation program for returning employees
- ❑ Respond to employee work refusals
- ❑ Manage leave and accommodation requests related to COVID-19

How Can SK Help?

- For additional resources, visit our website:
 - Work Reduction or Temporary Layoff During ‘COVID-19 Period’ Not Termination
(Briefing Note)

 - COVID-19 Frequently Asked Question
(various Briefing Notes)

 - COVID-19 Mitigating Workplace Risk and Leveraging Government Assistance
(recorded presentation)



250 Yonge Street, Suite 3300
Toronto, Ontario, Canada M5B 2L7

416.603.0700 Phone
416.420.0738 24 Hour
416.603.6035 Fax
www.sherrardkuzz.com



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