

Ontario Government Introduces Paid Infectious Disease Emergency Leave

April 30, 2021

On April 29, 2021, the Government of Ontario passed Bill 284, the [*COVID-19 Putting Workers First Act, 2021*](#). The legislation amends the Ontario *Employment Standards Act, 2000* (“ESA”) to provide time off (paid and unpaid) for COVID-19 related matters including vaccination. Bill 284 has important implications for Ontario employers. The key amendments, now in force, are set out below.

Time Off for Vaccination

Bill 284 amends the ESA to expressly provide that vaccination is considered “treatment related to a designated infectious disease”. This means an employee is entitled to Infectious Disease Emergency Leave (“IDEL”) (paid or unpaid) if they need time away from work to be vaccinated or because of an adverse side-effect related to vaccination.

Paid Leave

An employee is entitled to up to a **total** of three paid days of IDEL between April 19, 2021 and September 25, 2021. Leave need not be taken in consecutive days. As with the former Personal Emergency Leave under the ESA, an employee who takes part of a day as paid leave is deemed to have taken a full day of paid leave.

An employee is entitled to paid IDEL in the following circumstances:

- The employee is under individual medical investigation, supervision or treatment related to COVID-19. This includes being vaccinated and also dealing with any after-effect of the vaccine.
- The employee is acting in accordance with an order under Section 22 or 35 of the *Health Protection and Promotion Act* that relates to COVID-19.
- The employee is in quarantine or isolation or subject to a control measure (including self-isolation), and the quarantine, isolation or control measure was implemented as a result of information or directions related to COVID-19 issued to the public, in whole or in part, or to one or more individuals by a public health official, qualified health practitioner, Telehealth Ontario, the Government of Ontario or Canada, a municipal council or board of health, whether through print, electronic, broadcast or other means.
- The employee is under the employer’s direction to not attend at work in relation to a concern the employee may expose others to COVID-19.

- The employee is providing care and support to a prescribed family member because the family member is under individual medical investigation, supervision or treatment related to COVID-19, or is in quarantine, isolation or subject to a control measure (including self-isolation) for the same reasons as would entitle the employee to IDEL.

If paid IDEL is exhausted, the employee may take unpaid IDEL for the same purposes as set out above.

Under Bill 284, the default is that the three paid days are used before unpaid leave is taken. However, if an employee is entitled to both paid and unpaid IDEL, the employee can elect to take the day as an unpaid leave if the employee advises the employer in writing before the end of the pay period in which the leave occurs. In effect, this allows an employee to ‘save’ the paid IDEL days for later use.

If an employee took an unpaid day of IDEL between April 19 and 29, 2021 for a reason that would also entitle the employee to paid IDEL, the employee may elect to take the day as one of the three paid IDEL days if the employee advises the employer in writing by no later **May 13, 2021**. This amount is to be paid out on the pay day for the pay period in which the election was made.

Evidence of Entitlement

An employer is entitled to request evidence reasonable in the circumstances, at a time that is reasonable in the circumstances, to verify leave entitlement, but an employer cannot require an employee to provide a certificate from a qualified health practitioner as evidence. This does not prohibit an employer from requesting public health documentation to confirm a COVID-19 test result, a direction to isolate, or proof of vaccination.

Amount of Paid Leave

Pay for a leave day is the lesser of:

- \$200; or
- The wages the employee would have earned if they had not taken the leave. If an employee receives performance-related wages (including commission or a piece work rate) the entitlement is the greater of the employee’s hourly rate, if any, and the minimum wage applicable to the employee for the number or hours they would have worked if they had not taken the leave.

This means that if an employee’s daily rate of pay is more than \$200, the employee receives only the \$200 and not a regular full day’s pay.

If an employee would have been entitled to a shift premium and/or overtime pay if they had worked, they are not entitled to these amounts; the calculation is based on the employee’s regular rate only. Similarly, if the day of leave falls on a public holiday on which the employee would have otherwise worked, the employee is not entitled to premium pay in the calculation of the paid leave entitlement.

Impact on Bill 124

Paid IDEL is not to be considered an increase to existing compensation or a new compensation entitlement for the purpose of the *Protecting a Sustainable Sector for Future Generations Act, 2019*.

Exemptions Related to Existing Employment Policy or Contract

If, as of April 19, 2021, an employee was entitled to take paid leave under an employment policy or contract, in a circumstance in which the employee is also entitled to paid IDEL, the employee's entitlement to paid IDEL is reduced by the employee's entitlement under the policy or contract. This includes entitlement to paid time off under a sick leave policy, COVID-19 policy or collective agreement.

For example, if an employee is entitled to two days of paid time off under an employment policy or contract, the employee is entitled to one day of paid IDEL. If an employee is entitled to five days paid leave under a policy or contract, but as of April 19, 2021 all of those days have been exhausted, the employee is entitled to up to three days of paid IDEL.

This exemption only applies if the amount to which the employee is entitled under the policy or contract is equal to or greater than the amount of paid IDEL. For example, if the employment policy or contract caps entitlement at 66% of regular wages and that amount is less than the paid IDEL entitlement, the three days of IDEL entitlement will not be reduced by those leave days.

Reimbursement of Paid Leave Amount

An employer may apply to the Workplace Safety and Insurance Board ("WSIB") for repayment of paid IDEL. However, an employer cannot claim reimbursement for any payment made to an employee under an employment contract or policy. As such, if the employer has a sick leave or COVID-19 leave policy that already compensates the employee for this time off, these amounts will not be reimbursed by the WSIB.

Note: An employer cannot amend any employment policy or contract to eliminate an existing paid leave entitlement in order to claim reimbursement. If, as of April 19, 2021, an employee was entitled to such paid leave under an employment policy or contract, that is the critical date.

Finally, an employer is not entitled to be reimbursed if the employee also received benefits under the *Workplace Safety and Insurance Act* ("WSIA") for the days of leave.

Process to Claim Reimbursement

To claim reimbursement, an employer must file:

- A completed application form
- An attestation to:
 - confirm the employer made a payment for leave taken by the employee
 - specify the date and amount of payment
 - confirm that, on or after April 19, 2021 the employer was not otherwise required under an employment policy or contract to make the payment to the employee.

- A record of the payment made to the employee in a form approved by the WSIB
- Information about any claims filed with the WSIB in respect of the employee

A claim must be made within 120 days of the payment for which reimbursement is sought. However, no application shall be made or accepted after January 25, 2022 (unless a later date is prescribed).

The WSIB will advise an employer in writing whether reimbursement is approved. There is no hearing or right of appeal of this decision.

To learn more and for assistance, contact your Sherrard Kuzz lawyer or any member of our team at info@sherrardkuzz.com. We'll respond promptly.

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