

Back-to-Work in the Wake of COVID-19:

A Step-by-Step Employer's Plan
for Reopening Ontario Workspaces

Goodmans^{LLP}



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1 Introduction

Canada's provincial and federal governments are entering the later stages of their plans to reopen the Canadian economy. Although in some industries normal operations may have resumed, in others employers may still be considering how best to reopen their physical workspaces. In both cases, implementing comprehensive, carefully-considered back-to-work plans is critical in ensuring that employers meet their duties to protect the health and safety of workers, as well as others in the workplace.

This template Back-to-Work Plan sets out basic step-by-step considerations for employers as they reopen their physical places of business and welcome workers back to workplaces which must now function in the context of the ongoing COVID-19 pandemic. These policies will serve employers well both as they initially reopen their physical places of business, and as they transition into the new reality of operating a workplace in the midst of a pandemic. In implementing any back-to-work plans, employers will need to customize their plans to reflect the demands and risks specific to their business and industry, as well as the physical environment of their particular workplace. As the situation surrounding the COVID 19 pandemic is always evolving, employers also need to ensure that their reopening plans reflect ongoing guidance and requirements issued by governments and public health authorities.

For more information on any of the topics addressed in this Back-to-Work Plan or for assistance in customizing a return-to-work plan, please contact a member of [Goodmans Employment and Labour Group](#). Contact information for members of the Group has been provided on the final page of this Plan.



Executive Summary

This Back-to-Work Plan is divided into six sections:

1. Assessment: Deciding whether to reopen physical workspaces

Employers contemplating reopening their physical workspaces will need to determine whether the reopening would be both (i) legally permitted and (ii) safe. This section sets out a thorough, documented decision-making process that employers may follow to efficiently answer both of these questions, taking into account current government and public health restrictions and protocols, and the circumstances relevant to the employer's physical workplace, workers and any limitations on meeting the duty to provide a safe workplace under occupational health and safety legislation.

2. Reopening: Policy guidelines for reopening physical workspaces to workers

Employers who have decided to reopen their physical workspaces should refer to this section for various policies and best practices designed to minimize the risk of COVID-19 transmission at work, to support the mental health of workers, and to respond to cases of sick and compromised workers. Best practices include changes to the workspace to promote physical distancing, pre-entry screening for temperature, symptoms and contact with other symptomatic persons, workspace hygiene (including elevator, washroom and kitchen/lunchroom protocols), workspace changes to limit communal areas, shared equipment and in-person meetings, providing workers with personal protective equipment, promoting continued work from home, where possible, and consideration of a staggered return to work as well as rotations and shifts or changes in worker hours in the workspace to limit the numbers of workers physically present at any time.

3. Recall: Legal and practical considerations for recalling laid-off employees in Ontario

This section sets out information employers should bear in mind when contemplating recalling temporarily laid-off employees in Ontario, the timeframes within which a temporary lay-off becomes a permanent termination in the absence of a recall notice, and the consequences to employers if it cannot recall employees within the time limits of a temporary lay-off. It also addresses situations in which recalled employees fail to return to work, statutorily-protected job leaves which would prevent a recall of certain employees, and outlines how employers should approach recall notices. Finally, this section addresses the interaction of various governmental incentives such as Canada's Emergency Wage Subsidy ("CEWS") and Canada's Emergency Response Benefit ("CERB"). It explains whether employers, if otherwise eligible, can claim CEWS for workers who are recalled and whether workers may be required to repay CERB benefits already received following recall.

4. Work Refusals: Dealing with workers who refuse to return to work

This section describes various situations in which workers might be permitted to refuse to return to work, including job-protected leaves, workers with heightened risks of contracting COVID-19, workers with COVID-19-related caregiver responsibilities to children, older adults or infected persons, and workers who have expressed a general fear about a return to work. This section also sets out steps employers can take to respond to and minimize the occurrence of refusals of this kind.

5. Resources: Government resources for employers contemplating reopening

This section contains a hyperlinked list of government resources applicable to Ontario employers contemplating reopening their physical workplaces.

6. Templates: Model documents employers may consider using when reopening their businesses

We have included the following documents which any member of our employment law team would be happy to discuss with you or customize for your business: (1) [Workplace Safety & Prevention Services' Post Pandemic Business Resumption Checklist](#); and (2) [The City of Toronto's Pre-Entry Screening Questionnaire](#).



1. Assessment:

Deciding whether to reopen physical workspaces

In deciding whether to reopen their physical workspaces, employers need to bear in mind their obligations under applicable occupational health and safety legislation (“OHS Legislation”). Under OHS Legislation, employers are not to expose their workers to conditions which might harm their health or jeopardize their safety. Failure to comply with obligations imposed by OHS Legislation can lead to fines, administrative penalties, and even criminal prosecution.

Employers considering reopening their physical workspaces should consider two questions:

1. *Is reopening permitted?*

In assessing this question, employers must review and stay updated on any applicable (i) governmental restrictions on reopening, (ii) provincial plans for reopening the economy, and (iii) guidelines issued by public health authorities. The latest information regarding workplace operating restrictions can be found here: <https://www.ontario.ca/page/stopping-spread-covid-19#section-1%20as%20a%20>.

If reopening an employer’s physical workspace does not violate any applicable orders, restrictions, or guidelines, that employer should then consider whether it can reopen safely.



2. *Is it possible to reopen safely?*

Even if the reopening of a physical workspace is permitted under applicable laws, an employer may wish to refrain from proceeding if it determines that it cannot reopen safely. In making this determination, employers should consider whether their physical workspaces can resume operating in a way that meets their statutory duty to provide a safe and healthy workplace and whether sufficient safety measures can be implemented to reduce the risks of contracting and transmitting COVID-19 in the workplace. Employers should conduct a thorough assessment of the likelihood of COVID-19 contraction and transmission in their workspaces, involving some or all of the following elements:

- Consult with local public health authorities or review public health guidelines to identify appropriate risk mitigation measures;
- Dialogue with workers and/or worker representatives (including joint health and safety committees) to identify perceived areas of risk and potential solutions;
- Conduct a walkthrough of the workspace and a systematic review of daily operations in order to consider the potential and any risk areas for COVID-19 contraction and transmission; and

- Review public health guidelines and recommendations to consider their application to the specific workspace and industry in question.

Employers are advised to maintain a written record of the decisions made with respect to reopening their physical workspaces and the rationale for those decisions. A written record documenting the decisions made, as well as the precautions implemented and maintained in connection with reopening the workplace, may assist an employer in reducing the risk of liability for claims associated with contracting or transmitting COVID-19 that may occur at the employer's place of business, or assist an employer in responding to any such claims.

Once an employer has decided that reopening its physical workspaces is both legally permitted and can be achieved safely, that employer should develop and implement policies and procedures designed to minimize the risk of COVID-19 transmission between workers, clients and all other persons who might visit the workplace. The following section sets out a range of best-practice policies and procedures employers should consider.



2. Reopening:

Policy guidelines for reopening physical workspaces

Employers who have decided to reopen their physical workspaces to workers should consider implementing a wide variety of policies and best practices designed to minimize the risk of COVID-19 contraction and transmission at work by reducing physical contact between workers and others. Employers should keep these objectives in mind:

1. *Minimize the number of persons in the workspace and stagger the physical return to work of workers;*
2. *Promote physical distancing in the workspace;*
3. *Allow workers to continue to work from home to the greatest extent possible, at least on a transitional basis;*
4. *Ensure that workspace infrastructure is as hygienic as possible;*
5. *Promote safety-conscious personal hygiene in the workspace;*
6. *Support the mental health of workers;*
7. *Respond effectively to sick workers at home and in the workspace;*
8. *Implement a flexible and adaptive approach to operating a workspace in the wake of COVID-19; and*
9. *Adopt industry-specific guidelines issued by the Ministry of Labour, Training and Skills Development or by health and safety associations.*



This section discusses policies designed to achieve the above objectives.

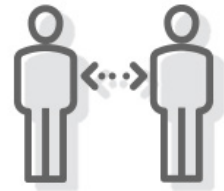
1. **Minimize the number of persons in the workspace and stagger the physical return to work of workers**

In an effort to prevent the spread of COVID-19, employers should take steps to minimize the number of persons present in their physical workspaces. The following policies should be considered:

- Operate physical workspaces with the only the minimum number of staff required;
- Control entry to the workspace to regulate the number of workers present;
 - *Employers should note that the implementation of this policy may require the revision of emergency evacuation plans and procedures*
- Implement pre-screening processes such as temperature checks by qualified third parties and questionnaires regarding cold or flu-like symptoms (to include fever, cough, sore throat, respiratory illness, difficulty breathing, nausea or vomiting), recent travel, and recent contact

with persons who have tested positive for COVID-19 or have recently exhibited cold or flu-like symptoms, and deny entrance to the workplace to workers who present a health risk based on these pre-screening processes;

- *Pre-screening questionnaires can be in the form of an interactive app or an online questionnaire which can be completed from home, or a hard copy questionnaire to be filled out before being granted access to the premises*
- Stagger or rotate the initial return of workers to the workspace, recalling those workers who are highest priority to return to work first while bearing in mind physical distancing requirements (including where returning workers will be performing their duties within the workplace);
- Schedule shifts and working hours to reduce the number of workers on-site at any given time;
- Minimize the number of workers required to be physically present at multiple workspaces;
- Consider the health and safety of workers in travelling to and from work and whether to subsidize or pay for parking or ride-sharing services to minimize the use of public transportation by workers;
- Consider whether to require workers and/or clients and non-workers to sign a waiver of liability or voluntary assumption of risk form before being granted access to the workspace (note, however, that this is not a substitution for the duty to maintain a safe workspace); and
- Control entry to the workspace to regulate the number of clients and non-workers present and implement pre-screening procedures similar to those implemented for workers.
 - *Employers should note that the implementation of this policy may require the revision of emergency evacuation plans and procedures*



2. Promote physical distancing in the workspace

In order to minimize the number of occasions on which persons come within two meters of each other, consider the following policies:

- To minimize work stations, furniture, and floor plans to establish sufficient physical distance between persons, including removing furniture to increase physical separation and closing waiting rooms or delineating physically-separated waiting areas;
- Implement signage and physical guidelines designed to promote physical distancing;
 - *For example, (i) use taped arrows and signage to encourage efficient, one-way travel through hallways and chokepoints, (ii) use tape to delineate no-go areas around work stations, shared equipment, and communal fixtures and furniture, and (iii) use signage to set out elevator and washroom protocols (such as limiting the number of persons permitted to be in an elevator, taping off every second urinal in the men's washrooms, and limiting the number of persons in the washroom at any one time)*
- Regulate and restrict access to elevators and confined work environments to essential personnel, limit the number of people who can be in an elevator at the same time (generally no more than three persons), and provide guidance on where to stand (generally in a triangular formation);

- *Consider using key card access to limit the number of workers in the office or on any one floor of the office at any time*
- Where possible, install physical barriers such as plexiglass panels between workers who must routinely interface with each other or the public;
- If possible, eliminate the need for cash-based transactions;
- Eliminate the sharing of equipment such as computers, work stations, keyboards, photocopiers, and printers during shifts and arrange for the disinfection between shifts of any equipment that must be shared;
- Limit or eliminate any food service in meetings or staff lunchrooms and close communal spaces such as kitchenettes, coffee rooms and lunchrooms to the extent possible, or reduce the number of people who can use such common areas by scheduling available times for small groups of workers;
- Remove all unnecessary communal furniture and fixtures which might promote unsafe socializing in the workspace, as well as communal items, such as newspapers, magazines, water or coffee stations, and candy or snack bowls; and
- Cancel all non-essential in-person meetings, events and appointments.
 - *Make use of alternatives such as video conferencing applications and digital document-sharing programs*
 - *If in-person meetings are required, limit the size of the meetings to no more than ten people and ensure an appropriately-sized meeting space is available to safely accommodate all attendees*



3. Allow workers to continue to work from home

Allowing at least some workers to work from home is the most effective way for employers to minimize the risk of COVID-19 transmission at their physical workplaces. Consider the following policies:

- Even after reopening, mandate or encourage certain workers to work from home, at least for a transitional period; and
- Prepare a remote work or work-from-home human resources policy to govern workers working from home and to make clear that working from home is a temporary measure (if you do not wish to implement a broader work from home option on a post-pandemic basis).

4. Ensure that workspace infrastructure is as hygienic as possible

To ensure the physical workspace is itself a place that inherently promotes safe and sanitary behaviour among persons on the premises, consider the following policies:

- Install handwashing facilities and alcohol-based sanitizer stations throughout the workspace, and guarantee that persons on the premises will have convenient and consistent access to soap, water and alcohol-based sanitizer;

- *Carefully consider the location of these facilities to ensure their effectiveness is maximized*
- Ensure your workspace is sufficiently well-ventilated to address the aerial transmission of COVID-19;
 - *Consider increasing the air intake on building heating, ventilation and air conditioning systems to improve air flow*
- Arrange for the cleaning of your workspace with increased frequency, especially with respect to high-contact items such as shared equipment, washroom infrastructure, appliances, keyboards, handles, and doors; and
- Remove all non-essential communal items, such as shared recreational newspapers and literature, furniture in common areas, and shared food and beverage stations.

5. Promote safety-conscious personal hygiene in the workspace

In order to promote safety-conscious and sanitary behaviour by persons in your workspace on a personal level, consider the following policies:

- Provide workers with appropriate personal protective equipment (“PPE”);
 - *Appropriate PPE will vary on a case-by-case basis, but may include face masks, gloves, and eye protection*
 - *Note that the Canadian government is currently advising most employers not to make use of N95 medical masks, which should be reserved for frontline healthcare and long-term care facility workers*
 - *Although employers may not be obliged to provide workers with PPE, requiring workers to supply their own may be damaging from both employee relations and public relations perspectives*
- Promote the appropriate use of PPE;
 - *Note that the Ontario government has recommended that PPE only be used in conjunction with other preventative measures designed to impede the spread of COVID-19*
 - *If used on its own, PPE may give workers a false sense of security and encourage unsafe behaviour – for this reason, educating workers is critically important*
 - *Employers should therefore adopt policies requiring the mandatory education of their workers as to (i) the correct uses of PPE, (ii) the proper cleaning and maintenance of PPE, and (iii) the limitations of PPE*
- Install informational posters around the workspace promoting safe and sanitary behaviour, including rules surrounding sneezing and coughing;
- Forbid, or at least regulate and monitor, the sharing of tools and equipment;
- If the sharing of tools and equipment is unavoidable, implement mandatory procedures for the regular sanitization of any shared items;



- Distribute copies of all health and safety policies and protocols to workers; and
- Require workers and other persons entering the workspace to provide signed confirmation that they have reviewed and agree to be bound by all health and safety protocols in place.

6. **Support the mental health of workers**

The COVID-19 pandemic may have placed certain workers under unprecedented psychological stress. Making an effort to be accommodating and conscientious with respect to the mental health of your workers is advisable for a number of reasons, including the salutary impact it may have on the workplace as a whole, as well as helping to reduce the prospect of claims should any workers contract COVID-19 while at work. Consider the following policies:

- Provide access to mental health support services;
- Consider asking for volunteers to be the first to return to work;
 - *This allows more reluctant or anxious workers time to adjust to the reality of working in a post-COVID-19 workspace*
- To the extent possible, schedule commuting workers who rely on public transit such that they may avoid travel during peak commuting hours;
- Ensure that you have a reliable, effective, and convenient way to communicate with your workers at all times, such that you can quickly respond to requests for accommodation and can efficiently disseminate important information to your workers;
- To the extent possible, be flexible with respect to accommodating work-from-home and scheduling requests; and
- To the extent possible, review the COVID-19-related policies of any suppliers or vendors with whom your workers regularly interact.
 - *This may give your workers comfort that they are not regularly interacting with any high-risk persons*



7. **Respond effectively to sick workers at home and in the workspace**

Implement a set of infection control procedures designed to minimize the exposure of your workforce and physical workspace to persons who have tested positive for COVID-19, are symptomatic, or who have been in contact with such persons. Consider the following policies:

- Prohibit any workers who (i) have tested positive for COVID-19, (ii) are displaying cold or flu-like symptoms, or (iii) have knowingly come into recent contact with someone who has tested positive or is symptomatic, from coming in to work;
- Require such persons to self-isolate for at least 14 days, or until they test negative for COVID-19 (subject to availability of testing);

- Require workers to complete daily self-assessment questionnaires (including taking and reporting their own temperature) designed to screen for potential cases of COVID-19 before leaving their homes for work;
 - *The government of Ontario's recommended questionnaire may be accessed here: <https://covid-19.ontario.ca/self-assessment/>*
 - *Recommend that workers complete these questionnaires before leaving their homes rather than upon arrival at your workspace, as this will reduce contact with persons who may test positive*
 - *If the worker is not entering the workspace and presents no risk to other workers, then their personal health information should be kept confidential*
- Require workers to take daily temperature tests before coming into work;
 - *Note that this policy carries with it certain risks surrounding privacy and the rights of workers – these risks can be mitigated by (i) providing advance written notice of the tests, (ii) obtaining employee consent to testing, (iii) explaining the purpose of the tests, and (iv) clearly explaining the way in which the tests will be conducted*
 - *Ensure that qualified personnel conduct the tests before on-site access to the workplace in the least intrusive way possible (for example, non-contact thermometers are preferable to contact ones) and, if possible, engage a third-party service provider to do the testing to avoid exposing your own workers to potential infection*
 - *Select a medically-approved temperature threshold above which workers will not be allowed in to work*
 - *Workers who fail these tests should be asked to leave the premises and seek medical attention immediately*
 - *Ensure test results are not recorded, stored, disclosed or used for any reason beyond determining whether an employee is deemed to be at risk and asked to leave the premises or to meet a reporting duty or a duty to protect other workers who may have had contact with the infected or symptomatic worker in the workplace*
 - *As a best practice, ensure that all test results which do not meet the approved threshold are destroyed – if an employer feels that the recording of positive test results is necessary, ensure that all such recorded information is made anonymous except to the extent necessary to protect other persons in the workplace who may have had close contact*
- Establish an area at the workspace where persons may be quickly and privately isolated should they begin to present symptoms at work; and
- If someone who has recently been in your workspace tests positive for COVID-19 or begins presenting symptoms, notify all workers who may have been in contact with that person and require them to self-isolate for at least 14 days.



- *For confidentiality and privacy reasons, do not reveal the identity of the person who tested positive, except to any workers who need to know in order to determine whether they may have had contact (an employer's duty to keep its workers safe likely outweighs the privacy rights of an infected employee during a pandemic)*
- *As an employer you may have an obligation to report the contraction or transmission of COVID-19 in your workplace to public health authorities*

8. Implement a flexible and adaptive approach to operating a workspace in the wake of COVID-19

As government responses to the COVID-19 pandemic are changing on an ongoing basis, it is critical for employers to be able to adjust their policies in response to future requirements. Consider the following practices:

- Implement a record-keeping system to track and document whether all workers remain fully-trained on all COVID-19-related educational materials and procedures;
- Make use of a suggestion system to enable workers to suggest refinements to policies related to COVID-19 on an ongoing basis;
- Conduct regular checks with landlords, suppliers and other persons with whom the employer does business to stay current on measures these third parties are taking to address risks related to COVID-19;
- Investigate any relevant occupational health and safety issues and complaints related to COVID-19 thoroughly and take prompt corrective action as needed to prevent the spread of COVID-19 in the workplace; and
- Conduct regular inspections of workspaces and worker conduct to ensure that all workers are complying with policies and procedures related to COVID-19, record the results of such audits, and promptly take all necessary or advisable corrective actions to prevent the spread of COVID-19 in the workplace.



9. Adopt industry-specific guidelines issued by the Ministry of Labour, Training and Skills Development or by health and safety associations

Employers should consider adopting any relevant industry-specific guidelines issued by the Ministry of Labour, Training and Skills Development (the “Ministry”) or by health and safety associations in order to comply with applicable OHS legislation. The Ministry has already issued industry-specific guidelines relating to the following sectors:

- Construction;
- Food processing;
- Restaurant and food services;
- Agriculture;

- Retail;
- Health care;
- Education;
- Manufacturing; and
- Child care.

In addition, health and safety associations have released industry-specific guidelines for almost thirty sectors.

The industry-specific guidelines provide useful recommendations that can assist employers in certain industries to prevent or limit the transmission of COVID-19 in the workplace. For example, in the construction sector, employers are encouraged to track their workforce to assist with contact tracing in the event that a worker has contracted COVID-19.

As new sectors begin to reopen, additional guidelines will be released and employers should monitor for updates relevant to their sector. All industry-specific guidelines issued by the Ministry and by health and safety associations are available here: <https://www.ontario.ca/page/resources-prevent-covid-19-workplace>.



3. Recall:

Legal and practical considerations for recalling laid-off employees in Ontario

Given the economic burden the COVID-19 pandemic and government response has imposed upon many employers, a significant number of employers have temporarily laid-off all or a portion of their workforce. As governments gradually reopen the Canadian economy, employers should consider (i) the status and rights of these workers should the employer wish to recall them to work, and (ii) whether they are eligible to apply for government assistance programs (including CEWS) to assist them in meeting their payroll obligations to their recalled employees. The following summary of key considerations applies to employers and employees within the province of Ontario. For information on temporary lay-offs in other Canadian jurisdictions, please contact a member of [Goodmans Employment and Labour Group](#).

1. *What is the impact of recall on a temporarily laid-off employee?*

If an employer recalls an employee before the end of the applicable statutory lay-off period (as described below), the employment relationship between the parties continues as contemplated in their employment agreement.

If an employer fails to recall an employee before the end of the applicable statutory lay-off period, the employment relationship in question is deemed to have been terminated, and the employee becomes entitled to their contractual and statutory termination rights, as applicable, or to “reasonable notice” under common law in the absence of a written employment agreement containing termination rights on a termination without cause.



2. *How long can temporary lay-offs last?*

The *Employment Standards Act, 2000* (the “ESA”) provides that a temporary lay-off can last for up to 13 weeks in any given consecutive 20-week period. However, the ESA further provides that a temporary lay-off may be extended for as long as 35 weeks in any given consecutive 52-week period so long as:

- The employee continues to receive substantial payments from the employer;
- 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;

- The employee receives supplementary unemployment benefits;
- The employee is employed elsewhere during the lay-off and would be entitled to receive supplementary unemployment benefits if that were not so;
- The employer recalls the employee within the time approved by the Director of Employment Standards; or
- 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.

In the case of an employee represented by a trade union, the employer must recall the employee within the time set out in the collective agreement between the employer and the trade union.

3. *What happens if a recalled employee fails to return to work?*

Employees who have been temporarily laid-off are required to return to work within a reasonable period of time after their employer has requested they do so. The definition assigned to “reasonable” in this context will depend upon the circumstances of each case, and will include the consideration of factors such as the geographical location of the employee upon receipt of the notice of recall.

Should a temporarily laid-off employee fail to return to work within a reasonable period of time after receiving an employer request to do so, that employee is deemed to have quit and may be terminated. In Ontario, employers are exempt from providing notice of termination or pay in lieu of notice in such cases, providing they can establish that:

- A recall notice was received by the employee (for this reason, employers are advised to make all recall notices in writing);
- The employee was capable of reading and understanding the terms of the recall notice; and
- The employee did not attend work within a reasonable time after receiving the recall notice.

Employers are obligated to use best efforts to contact temporarily laid-off employees for the purposes of recall. Employers who satisfy this requirement but are unable to contact temporarily laid-off employees will be able to terminate these employees without providing notice of termination or pay in lieu of notice.



4. *What information should a recall notice contain?*

A recall notice sent to temporarily laid-off employees should contain the following information:

- Confirmation that the recipient will be returning to work at their pre-layoff position;
- Confirmation of the date by which the recipient must return to work;

- Confirmation of the recipient's expected hours and payment terms upon their return to work, including confirmation that these hours and terms comply with their pre-layoff employment agreement and any statutory requirements;
- Express notice of any reduced hours and corresponding pay cuts which may apply to the recipient in the short term;
- Confirmation that employees with reduced hours and pay will be returned to normal scheduling and compensation as soon as possible;
- Express notice that the duration of the recall is unknown, and is subject to future developments with respect to the COVID-19 pandemic and government response; and
- A reminder to employees of their obligation to notify the federal government of their change in employment status, as this may impact their entitlement to the Canadian Emergency Response Benefit and/or employment insurance, if applicable.

5. *Job-Protected Leave*

A worker who is on a job-protected leave, as set out in the ESA, cannot be recalled or terminated for failing to return to work following a recall. Under amendments to the ESA made on March 19, 2020, unpaid, job-protected emergency leave ("**Infectious Disease Emergency Leave**") was made available to workers whose hours of work had been temporarily reduced or eliminated or who were otherwise unable to perform their duties for certain reasons relating to COVID-19, including:

- Personal illness, quarantine or isolation in specified circumstances;
- Concerns by the employer that the worker may expose other individuals in the workplace to COVID-19;
- To provide care or support to certain family members for a reason related to COVID-19, including school or day care closures; or
- Due to certain travel-related restrictions.



6. *Changes caused by the termination of Ontario's declaration of emergency*

On July 24, 2020, the emergency period declared by the Ontario government in response to COVID-19 terminated, resulting in several changes relevant to the treatment of employees whose hours of work have been effected by the pandemic.

Under the March amendments to the ESA, employees whose hours or compensation were reduced or eliminated due to COVID-19 were deemed to be on Infectious Disease Emergency Leave, as opposed to having been temporarily laid off. However, after September 4, 2020, these employees will again be considered temporarily laid off under the ESA should their hours of work or compensation continue to be reduced or non-existent. As a result, these employees will become subject to ESA restrictions on the maximum length of a temporary lay-off as described above.

For clarity, it should be noted that Infectious Disease Emergency Leave will remain available to employees who are unable to perform their duties for the reasons described under the heading *Job-Protected Leaves*, above. However, employees whose hours or compensation are reduced or eliminated due to COVID-19 will no longer be *deemed* to be on Infectious Disease Emergency Leave.

Also after September 4, 2020, employees who continue to work reduced or non-existent hours, or who continue to work for temporarily-reduced wages, will once again be able to make claims for constructive dismissal under the ESA, even if the temporary reduction or elimination of hours or wages began during the provincial emergency period.

Finally, under the March amendments to the ESA, employees were temporarily unable to file complaints with the Ontario Ministry of Labour alleging that a temporary reduction in hours or wages constituted a termination, as long as that reduction occurred during the emergency period for reasons related to COVID-19. After September 4, 2020, employees will once again be permitted to file complaints with the Ontario Ministry of Labour alleging that a temporary reduction or elimination of hours or wages constitutes a termination.

Employers should bear these changes in mind as they consider how to approach employees whose hours or compensation may remain reduced or temporarily non-existent after September 4, 2020.

7. How does CEWS apply to recalled workers?

Employers will be able to claim CEWS in respect of wages paid to workers recalled from a temporary lay-off during the relevant claim period,¹ provided that both the employer and the worker meet the [eligibility criteria](#) for CEWS during the relevant claim period.

An employer will not be able to claim CEWS in respect of wages paid to a worker during a claim period if:

- There were 14 or more consecutive days in the claim period in respect of which the employer did not pay any wages to the worker; or
- The employer claims CEWS before paying wages to the recalled worker.

An employer can recall a worker and pay them retroactively in respect of a claim period, to be able to qualify for the wage subsidy.

¹ CEWS has been broadened and extended since its inception. Employers with a revenue decline of less than 30% are now eligible to claim CEWS, and eligible employers are now able to claim CEWS until November 21, 2020. The federal government has expressed its intent to provide further support until December 19, 2020. Further updates, as they become available, can be found [here](#).

8. *What happens to recalled employees who were receiving CERB?*

Recalled workers who received CERB while they were temporarily laid-off may need to repay all or a portion of the CERB they received upon their recall. The obligation to repay CERB is the responsibility of the workers and employers should direct workers to the [CRA website](#) if questions arise as to how to repay.

9. *Practical Considerations*

As employers prepare to recall temporarily laid-off workers, they should also:

- Ensure that all employee contact information is current; and
- Review the employment agreements, workplace policies, and collective agreements applicable to all returning workers to have a clear understanding as to their rights and obligations.



4. Refusals:

Dealing with workers who refuse to return to work

Given the severity and scope of the impact the COVID-19 pandemic has had on the lives of many workers, employers can expect to encounter workers who are reticent or unwilling to return to physical workspaces for a variety of reasons. Employers who have considered their approach to such workers in advance will be better able to address circumstances on a case-by-case basis while minimizing disruption and limiting any damage done to the employment relationship.

In general, where an employee has reason to believe that returning to work would be unsafe, that employee may be able to refuse to return to work under certain conditions. Broadly speaking, most workers who might refuse to return to work in the wake of COVID-19 may be divided into the following three categories:

1. **Workers at a heightened risk of contracting COVID-19**

The following groups of persons are subject to an elevated risk of contracting COVID-19 :

- The elderly;
- Persons with compromised immune systems; and
- Persons suffering from certain medical conditions (including cancer, diabetes, lung disease, hypertension (high blood pressure), and heart disease.)
 - *Employers may wish to have their employees fill out confidential self-disclosure assessments designed to discretely identify individuals who belong to one or more of these groups. Employers should take care not to require employees to provide sensitive medical information during this exercise, and should ensure that results remain confidential.*

Bearing in mind their statutory duty to protect the health and safety of their employees, employers should endeavour to accommodate high-risk individuals by permitting them to work from home. Given the elevated degree of risk they are subject to, employees in these categories are most likely to be able to succeed with a claim that they could not safely return to work on reasonable grounds.

2. **Workers who are on a job-protected leave**

In Ontario, workers are entitled to take unpaid, job-protected leave in accordance with the ESA. Under amendments to the ESA made on March 19, 2020, eligible workers are permitted to take Infectious Disease Emergency Leave if they are unable to perform the duties of their position for certain reasons relating to COVID-19, including:



- Personal illness, quarantine or isolation in specified circumstances;
- Concerns by the employer that the worker may expose other individuals in the workplace to COVID-19;
- To provide care or support to certain family members for a reason related to COVID-19, including school or day care closures; or
- Due to certain travel-related restrictions.

Employers cannot deny Infectious Disease Emergency Leave to workers who both request and qualify for it. Further, employers cannot terminate such workers for the duration of the leave. Whether an employee qualifies for Infectious Disease Emergency Leave is a fact-based determination. For example, an employee cannot refuse to return to work on the grounds that they are the “primary” caregiver for children, where another parent or guardian is currently working from home or if there are other childcare arrangements in place at an employee’s household.

Employers dealing with workers who are on Infectious Disease Emergency Leave may wish to propose temporary work-from-home arrangements. Employers may also wish to review their existing policies and employment contracts to determine if these workers are entitled to paid leave thereunder.

However, as discussed above, on September 4, 2020, certain temporary rules establishing Infectious Disease Emergency Leave will expire. At that time, employees who had previously been deemed to be on Infectious Disease Emergency Leave due to the reduction or elimination of their hours or compensation due to COVID-19 will begin to be considered temporarily laid off under the ESA, as long as their hours or compensation continue to be reduced or non-existent. As a result, these employees will become subject to ESA restrictions on the maximum length of a temporary lay-off and will be deemed terminated should the ESA maximum periods be exceeded.



3. *Workers with a generalized fear of returning to work in the wake of COVID-19*

Subject to applicable OHS Legislation, Canadian workers are entitled to refuse to work if they reasonably believe that the work in question will endanger their health and safety. Although the precise terms of this statutory right vary by jurisdiction, in Ontario, workers wishing to invoke it must generally report the workspace hazard they are concerned about to their employer. The employer must then investigate the hazard in a timely manner and take any remedial action required and might wish to consider requesting a health and safety inspection of the workplace. If the employee is not satisfied with their employer’s response, they may bring a complaint to local occupational health and safety authorities. These authorities may then investigate the issue, issuing any orders, violation tickets or administrative penalties they see fit. If a health and safety inspector determines that a workplace is safe, then an employee who refuses to return to work will be deemed to have quit and can be terminated by the employer.

Ultimately, the question of whether a refusal to return to work is reasonable will depend on the facts of the case, and any decisions made in respect of these refusals will be done on a case-by-case basis.

Employers should be aware that there is significant uncertainty tied to any decision-making process initiated by occupational health and safety authorities. Subject to the facts of the case at hand, employers may wish to consider taking remedial steps to address the concerns of an employee even in cases where the circumstances do not suggest a significant workspace hazard exists.

Employers may be able to reduce the number of workers who make complaints of this kind by adopting the following proactive approach:

- Use any recall notice to assure workers that their health and safety is the top priority;
- Provide detailed examples of the risk mitigation measures that will be enforced at the workers' workspace; and
- Ensure workers that the employer is complying with all applicable occupational health and safety laws and public health authority guidelines, and that the employer intends to remain in compliance.

If a worker exercises their right to refuse to return to work, employers should contact a member of our employment law team to assess their rights and obligations, including whether a particular employee concern or complaint justifies a refusal to return to work or may be considered a voluntary resignation.



5. Resources:

Government resources for employers contemplating reopening

The Government of Canada, the Government of Ontario, and various public authorities have published a variety of resources that may be relevant to Ontario employers who are considering reopening their physical workplaces. A list of these resources has been compiled below. For additional information related to any of the following, please contact a member of [Goodmans Employment and Labour Group](#).

Federal Resources

- [Risk-informed decision-making guidelines for workplaces and businesses during the COVID-19 pandemic](#)
- [Preventing COVID-19 in the workplace: Employers, employees and essential service workers](#)
- [Pandemic \(COVID-19\) Tip Sheets: Pandemic guidance for higher-risk and essential occupations and industries](#)
- [Advice for essential retailers during COVID-19 pandemic](#)
- [COVID-19 Symptom Self-Assessment Tool](#)
- [Cleaning and disinfecting public spaces during COVID-19](#)
- [Hard-surface disinfectants and hand sanitizers \(COVID-19\): List of disinfectants for use against COVID-19](#)
- [Hard-surface disinfectants and hand sanitizers \(COVID-19\): List of hand sanitizers authorized by Health Canada](#)
- [Coronavirus disease \(COVID-19\): Travel restrictions, exemptions and advice](#)
- [Provincial and territorial resources for COVID-19](#)

Provincial Resources

- [Reopening Ontario after COVID-19](#)
- [Resources to prevent COVID-19 in the workplace \(including sector-specific resources\)](#)
- [COVID-19 Guidance: Essential Workplaces](#)
- [COVID-19 Guidance for Employers, Workplaces and Businesses \(City of Toronto\)](#)
- [COVID-19: Stop the spread](#)
- [COVID-19 self-assessment](#)
- [Novel coronavirus \(COVID-19\) update \(Workplace Safety and Insurance Board\)](#)
- [OHRC policy statement on the COVID-19 pandemic \(Ontario Human Rights Commission\)](#)
- [COVID-19 and Ontario's Human Rights Code – Questions and Answers](#)
- [PPE Sourcing Resources](#)



6. Templates:

Model documents employers may consider using when reopening their businesses

Appended to this section are the following template documents:

- Workplace Safety & Prevention Services' Post Pandemic Business Resumption Checklist; and
- The City of Toronto's Pre-Entry Screening Questionnaire.

These templates may be used to guide your thinking as you prepare to reopen your physical workspace. Any member of our [Employment and Labour Group](#) would be happy to discuss them with you, and to customize them for your business.

POST PANDEMIC BUSINESS RESUMPTION CHECKLIST

This guidance document is a self-assessment tool intended for [Businesses Returning to the Workplace after Working Remotely](#) and includes links to credible resources and valuable information to assist you where you have identified gaps.

Businesses Returning to the Workplace after Working Remotely

1. Assemble a Team

- Establish a process to track or monitor alerts from credible organizations such as the [Public Health Agency of Canada](#), the [Ontario Ministry of Health](#) and the [World Health Organization](#)
- Establish a post pandemic business resumption team and chain of command comprised of members from various lines of business
- Consult with your JHSC, senior leadership, union leaders, human resources department and a health & safety professional (internal or external) to update your current pandemic plan to reflect resumption activities
- Establish a process for monitoring the new normal i.e. staff changes, new directives from government or public health organization, Scale back measures, vaccinations etc. and plan accordingly

2. Assess Risks

- Complete a current state assessment to determine the number of staff members ready to return to work i.e. staff members needing additional time off due to sickness or personal issues related to pandemic
- Conduct Scenario planning for return to work i.e. gradual return of limited staff members, alternating shifts, remote meetings, smaller groups in training and public events, virtual delivery of services, screening process, chance of resurgence of virus etc.
- Review the [risk-informed decision](#) making guidelines for workplaces and businesses during pandemic
- Identify all high risk positions (high possibility of exposure or vulnerability) and develop specific work plans with controls in place
- Review critical positions and the need to upskill staff or cross functional training
- Review succession plan, short term contract staff needs, fulfill critical positions etc., if staff impacted by pandemic
- Develop and implement plan to encourage physical distancing at workplace and communicate accordingly

POST PANDEMIC BUSINESS RESUMPTION CHECKLIST

3. Plan to Return to Work

- Update any temporary policies and procedures to include return to normal activities i.e. -Travel policy, infection control, sick leave etc.
- Develop a contingency plan for potential resurgence of virus. i.e. reinstate the pandemic planning team and protocols
- Coordinate office/IT equipment return process and setup prior to opening business
- Establish and communicate protocol for cleaning and sanitization of returned items prior to setting up in workplace
- Establish **cleaning guidelines** and process for cleaning and disinfecting all public areas and workspaces
- Establish return to work protocols. i.e. visitor screening, **Self-assessments**, flexible hours, **social distancing** etc.
- Test the emergency response plan, Alarm testing, emergency lighting etc. prior to returning to work
- Establish return to work plans or work from home plans for staff still at home due to sickness or taking care of someone who might be sick
- Establish return to work plans or work from home plans for staff still at home due to school or daycare closure
- Continue screening of all staff similar to initial phase of pandemic and as per guidelines from health officials
- Ensure all infection control procedures such as hygiene practices and cleaning practices are in place at all external venues and work locations

4. Communication

- Develop a communication plan for all staff and managers with clear instructions on gradual return to work, safety measures and next steps
- Update social media and corporate website with messages related to resumption plan
- Establish contact with key vendors, suppliers and business partners to ensure they have operating capacity post pandemic and plan accordingly
- Contact all vendors, contractors, suppliers and customers currently in contract and inform them of measure being taken for ensuring health and safety of employees and customers

POST PANDEMIC BUSINESS RESUMPTION CHECKLIST

5. Health & Safety/Employee Mental Wellness

- Establish a process and complete screening for all staff prior to return to work
- Reinforce infection reduction/control procedures with staff (hand washing, cough/cold etiquette, physical distancing, post signage etc.)
- Manage distribution and stock of PPE amongst staff, if needed
- Develop safe work practice and communicate proper use of PPE including putting on and taking off PPE (masks and gloves). Provide educational material/training to employees on PPE/Bio Hazard disposal and use
- Provide mental health support for counseling needs and stress management via current benefit provider or utilizing mental health resources provided by credible sources:
 - [Mental health resources](#)
 - [Preparing for employee resistance to coming back to work](#)
 - [Anticipating changes to daily practices](#)
 - [Self-Care and Resilience Guide](#)
 - [WSPS COVID-19 Mental Health Resources](#)
- Establish HR policy/process to address needs of staff members who might need extended time off due to impact of pandemic i.e. mental health support and compensation, temporary staffing
- Provide resources for managers on coping strategies and supporting staff's mental health during pandemic
- Monitor and maintain all records of illness or incidents as it relates to pandemic i.e. sick days, hazard reports, incident reports, HR records etc.
- Determine any work related training needs for staff members resulting from being away from work
- Triage of postponed or new customer projects and prioritize based on urgency of work, availability of resources, and risk assessment of the work to be completed
- Establish and communicate safety measures and policies for staff visiting customer sites or public places

POST PANDEMIC BUSINESS RESUMPTION CHECKLIST

6. Business process

- Establish a process for knowledge management, so that key documents and information can be accessed when key individuals are absent
- Make plans (in consultation with unions and Senior management) for shifting staff from less critical jobs to more critical areas in the event of a staff shortage, or surging demands for some products or services
- Identify key suppliers and develop contingency plans to ensure a continuation of supplies
- Develop contingency plans for staff shortage when employees are caretakers of family or friends still recovering
- Evaluate impacts of pandemic response and resumption measures on business plans, market strategy, corporate and positional objectives, and take action in every division to revise and communicate any changes
- Determine which customer solutions/products/services can be gradually returned to normal delivery methods
- Determine new services or new ways of doing business which might be needed during resumption phase or as the new way of working
- Evaluate the effectiveness of pandemic planning activities, business continuity and emergency planning i.e. lessons learned, success stories, gaps etc.

For additional [pandemic resources](#) such as job aids, business resources please visit www.wsps.ca.

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COVID-19 NOVEL CORONAVIRUS

Please complete the following questions before beginning your work today.

Name: _____

Date: _____ Time: _____

Do you have any of the following:

Yes

No



Fever

Yes

No



Cough

Yes

No



Shortness of breath

Yes

No



Sore throat

Yes

No



Runny nose

Yes

No



Feeling unwell

Yes

No

Have you been in close contact with someone who is sick or has confirmed COVID-19 in the past 14 days?

Yes

No

Have you returned from travel outside Canada in the past 14 days?

If you answered YES to any of these questions, go home & self-isolate right away. Call Telehealth or your health care provider.

Contact Us

Goodmans Employment and Labour Group offers clients in the public, private, non-profit and charitable sectors the expertise required to provide strategic advice on an array of statutory and regulatory issues. By anticipating problems that arise for employers and employees in a wide range of commercial activities in both federal and provincial arenas, we create optimal and practical business solutions for our clients.



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