
March 24, 2020

BULLETIN

CHANGES TO THE EMPLOYMENT STANDARDS ACT IN RESPONSE TO THE COVID-19 CRISIS

On Monday March 23, 2020, the provincial government held an emergency sitting of the legislature in response to the COVID-19 public health emergency, and passed *Bill 16 – 2020: Employment Standards Amendment Act (No. 2), 2020*, amending BC's *Employment Standards Act* ("BC ESA"). The BC ESA, which sets minimum standards for payment, compensation and working conditions in most workplaces, now provides for: (1) unpaid job-protected leave for those affected by COVID-19; and (2) an added three days of annual unpaid, job-protected general sick leave for those who cannot work due to illness or injury.

1. COVID-19 Leave

The first change to the BC ESA provides protections for those impacted by COVID-19, allowing workers to take immediate unpaid, job-protected leave, retroactive to January 27, 2020, the date the first presumptive case of COVID-19 was identified in BC. Employees qualify for this leave if they are unable to work for any of the following reasons related to COVID-19:

- they are diagnosed with COVID-19 and are following the instructions of a medical health officer, or the advice of a doctor or nurse;
- they are providing care to their minor child or dependent adult child, including because of school, daycare or similar facility closures;
- they are in quarantine or self-isolation and acting in accordance with an order of the provincial health officer, an order made under the *Quarantine Act (Canada)*, guidelines from the BC Centre for Disease Control, or guidelines from the Public Health Agency of Canada;
- their employer has directed them not to work due to concern about their exposure to others; or
- they are outside BC and unable to return to work due to travel or border restrictions.

Employees can take this job-protected leave for as long as they are eligible. If requested, an employee must reasonably demonstrate their eligibility, but an employer cannot require a doctor's note.

Additional circumstances in which an employee will be eligible for the leave may be prescribed by regulation. As of the writing of this post, that has not yet occurred.

If an employer terminated an employee on or after January 27, 2020, but before March 23, 2020, because one of the above circumstances applied to the employee, the employer is required to offer the employee re-employment in the same or a comparable position, and if the employee accepts the offer, the employee's absence after the termination is deemed to be an unpaid leave under the COVID-19 provision of the BC ESA. The obligation to offer re-employment will not apply to any eligible circumstances prescribed in the future.

The COVID-19 provisions are temporary, and may be repealed by order of the Lieutenant Governor in Council.

2. Annual Three Days Leave

In addition to leaves for those affected by COVID-19, the second change to the BC ESA is permanent. It provides employees, who are covered by the BC ESA and cannot work due to illness or injury, up to three days of unpaid, job-protected leave each year. Employees are eligible if they have worked for their employer for at least 90 days. If requested, an employee must provide enough information to satisfy their employer that they are ill or injured and therefore entitled to the leave.

3. Employer Duties

In accordance with Section 56 of the BC ESA, if an employee takes either type of leave, the employee's employment continues during the leave. The employee is entitled to any wage or benefit increases they would normally receive, and the employer must calculate annual vacation, termination entitlements, pension, benefits and length of service as if the employee had not taken the leave. The employer must also continue to make payments to benefit plans, if the employer pays the total cost of the plan, or if the cost of the plan is shared between the employer and the employee and the employee chooses to continue to pay their share of the cost.

Section 54 of the BC ESA prohibits an employer from terminating an employee, or changing their job conditions without their written agreement, for reasons related to the job-protected leave. When the leave ends, the employer must return the employee to their job or one like it. If the employer's operations are suspended or discontinued when the leave ends, the employer may lay off the employee, but must return the employee to their job or a comparable one as soon as its operations are resumed, subject to any

applicable seniority provisions of a collective agreement. Employees not covered by a collective agreement who are laid off at the end of their leave may be entitled to compensation for length of service under Section 63 of the BC ESA. The layoff may also constitute constructive dismissal at common law.

We encourage local governments to seek legal advice about their employment obligations during these uncertain and fast changing times.

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