

What are your rights as you return to work in the middle of a pandemic? We asked two employment lawyers

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The [COVID-19 crisis](#) has caused profound changes in workplace practices.

So it's important to know your legal rights as an employee in this new world of work.

We'll take you through some of your legally defined choices that may arise due to COVID-19 if you're subjected to temporary layoff, or you're unable to work, or your employer is restarting operations and calls you back to work.

And we'll draw on the advice of two employment lawyers: Stuart Rudner, with Rudner Law based in Markham, who represents both employees and employers, and Louis Century, with Goldblatt Partners in Toronto, who represents employees. (Consult a lawyer before taking action to exercise employment rights.) We refer to rights that apply in provincially regulated workplaces in Ontario, whereas rights that apply to federally regulated workplaces such as banks and railways are somewhat different.

Your rights if you've been temporarily laid off

The COVID-19 crisis has caused employers to engage in mass temporary layoffs, as well as temporary reductions in hours, and cuts in pay.

You have rights to protect yourself in those situations, including new ones introduced in regulations on May 29 under the Ontario Employment Standards Act (ESA).

For now, temporary layoffs, reductions in hours, and cuts in pay are deemed to result in an "emergency leave" under the new regulations. The emergency leave provisions apply retroactively back to March 1 and continue to apply until six weeks after Ontario's emergency order is lifted.

"They've rewritten history and changed all those (temporary) layoffs into leaves of absence," says Rudner.

The emergency leave provisions require your employer to give you your old job back by the end of the emergency period. That makes job protections more explicit and directly linked to the duration of the COVID-19 crisis, compared with prior rights.

The regulations also require your employer to continue to pay benefits for new emergency leaves made after the regulations came into effect. However, they won't apply retroactively to layoffs made without benefits initiated prior to May 29, says Rudner.

The changes also curtail some employee rights to bring legal action for "constructive dismissal" during the COVID-19 period. Temporary layoffs, reduced hours, and cuts

in pay will not be considered “constructive dismissal” under the ESA during this period, which undercuts legal actions to obtain severance specified under the ESA.

However, the larger and more substantial legal actions for “constructive dismissal” usually proceed under common law, whereby employees sue for “wrongful dismissal” damages in the courts. Employees continue to have rights to take legal action in that form, says Rudner and Century.

Whether or not it makes sense to do so will depend on your situation. To understand whether you might have grounds to pursue a wrongful dismissal suit under common law, here’s some background.

Historically only a relatively small number of employers — typically in unionized or seasonal sectors — have made a common practice of temporary layoffs. Those employers have laid the legal groundwork that allows them to engage in this practice without the layoff being considered permanent and subject to termination-related payments. Their right to do so is recognized in their employment contracts with employees.

Now, because of the crisis, large numbers of employers are going the temporary layoff route for the first time without the right to do so established in employment contracts.

That puts those employers on dicey legal ground under common law, which means employees in those situations have a choice. They can accept the temporary layoff and hope to get their job back during the economic recovery. Or they can sue for wrongful dismissal damages in the courts. That legal action might eventually produce a payout, but it effectively entails treating the layoff as permanent and giving up hope of returning to the job when the economy starts up again.

In essence, in one form or another, you have to consent to the temporary layoff or any substantial change in the fundamental terms and conditions of work. “Generally there has to be agreement,” explains Rudner. “Either the agreement already exists where the employer already has the right to temporary layoff. Or there has to be an agreement now to accept a layoff or a substantial change.”

Of course your choice is affected by the fact other good jobs are hard to come by now. “What’s an employee going to do — sue for wrongful dismissal because of the temporary layoff in the middle of a pandemic?” asks Century. “Most employees — practically speaking — are better off going on CERB (government benefits) during the temporary layoff and maintaining the hope of returning to work when things get back to normal.” In addition, while the regulatory change to undercut wrongful dismissal actions under the ESA doesn’t directly impact common law actions, there is nonetheless the risk it might have an indirect influence on court decisions that reduces the likelihood of a successful legal action, Century said in an email.

The amount that one might hope to receive from a wrongful dismissal suit depends on length of service with that employer, age, nature of the job, availability of other employment and other factors. Sizable settlements in the order of one month of compensation for each year of service or more may be possible in some circumstances.

So it may be in the interests of some long-service employees to pursue a wrongful dismissal case if they’re not too attached to the job they have and they’re either

willing to accept retirement, OK with not working for a while, or think they can readily snag alternative employment. They also have to be prepared to go through a wrongful dismissal legal process that might be lengthy with results that are somewhat uncertain.

Temporary cuts in pay or other terms of employment may be grounds for a wrongful dismissal suit under the common law if they amount to a significant change to a fundamental term of the employee's contract.

However, there are sizable legal uncertainties about how big the change has to be to meet the threshold of significance, says Century. "There are debates in the best of times about whether a 10 per cent or 15 per cent or 20 per cent wage cut is constructive dismissal," he says. "In COVID times, there is some suggestion those changes might be considered acceptable (by the courts)."

Your right to initiate a job-protected leave

While employer actions may trigger an "emergency leave" during the COVID-19 crisis, employees also have the right to take unpaid, job-protected leave at their own initiative.

The province created sweeping new rights for employees to take leaves during the crisis under infectious disease emergency leave amendments to the ESA that were made in mid-March.

You can exercise this right if you've been potentially exposed to COVID-19 and are in quarantine or receiving medical treatment. But it also covers a broad set of circumstances including having to stay home to look after children (because schools or daycares are closed) or an elderly family member.

Your rights returning to work

As businesses restart operations, employees are gradually getting recalled to work. It's important to realize you have rights in this situation as well.

For starters, whether your leave is initiated by you or your employer, your employer is required to give you your old job back by the end of the COVID-19 crisis period. (For employer-initiated emergency leaves, that is defined as six weeks after Ontario's emergency order is lifted.)

While that gives you pretty strong job protection, it is important to realize that protection isn't absolute. "If the business goes under and there is no work to go back to, then that's not a breach of your job protected leave," explains Century.

Subject to time limits defined by the duration of the crisis, your employer has a lot of discretion as to how the recall happens. They aren't generally required to recall employees in any particular order. "Some people are convinced you have to recall people based on seniority or the first person laid off has to be the first person recalled," says Rudner. "None of that is true, unless you have a collective agreement."

If you're apprehensive about the safety of returning to the job, understand that you have rights to a safe workplace that comes in several forms.

Under occupational health and safety legislation, you have a right to refuse unsafe

work. However, you have to substantiate grounds for doing so. It can't just be a "generalized fear of being in the workplace" says Rudner.

If you have a safety issue, you should first bring the issue to the attention of management. Then management has a duty to investigate and respond. If the employee is unsatisfied with management's response, the employee can then raise the issue with the Ontario Ministry of Labour, Training, and Skills Development. The ministry then investigates and issues a ruling, which could include an order to make workplace changes.

The ministry and various industry safety associations have been busy producing industry-specific COVID-19 safety guidelines. While those guidelines aren't recognized under law, they are "certainly a strong suggestion" as to the kind of practices that employers will be expected to follow, says Rudner.

Human rights legislation may also provide grounds for challenging workplace safety practices, although the precise details of what COVID-19 issues might be covered are not yet clear. But, for example, someone who has a compromised immune system may have grounds to require reasonable accommodation of their special needs because of their heightened vulnerability up to the point of "undue hardship" to the employer.

Reasonable accommodation might entail modified hours, modified duties or working from home, says Rudner.

Century says: "If you have an employee and employer communicating about this issue openly and constructively, then they can often find practical solutions. But the employer's response cannot be 'my way or the highway' if there's a human rights issue."

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