

**This notice contains a condensed and full version of McLennan Ross FAQ's for employers as a guideline only. For advice specific to each individual circumstance please consider consulting with legal counsel.*

McLennan Ross Truncated COVID Employer FAQ pp 1 and 2

1. The Government of Alberta announced that a new 14-day paid job-protected leave for employees who are required to self-isolate or are caring for a family member with COVID-19. Are we required to provide employees with this paid leave?

There will be no requirement to have a medical note for this leave or to have worked for an employer for 90 days to qualify for the leave.

The details of how these changes will be administered have not yet been announced, nor has the legislation been tabled. As such, these changes are not currently in effect.

The payment obligations for these leaves will fall to employers, the provincial government, the federal government, or some combination. We expect that government will take steps to reduce or remove this burden from employers, who are also facing financial distress.

Employers should wait for the new leave provisions to be enacted before gratuitously extending 14 days of paid leave. In any event, employees should be encouraged or directed to take a combination of any existing paid leave they may be entitled to by virtue of their employment contract or an applicable collective agreement (i.e., banked time, sick leave, or paid personal days) prior to accessing the new 14-day leave. (see full detail at the end of FAQ)

2. Schools are closed. How do we balance our ability to run our operations with our employee's responsibility to provide care to their children?

Employees should be granted some flexibility to adjust to this significant and impactful change. Employees who have children should be afforded an opportunity to make alternate childcare arrangements, as this circumstance raises potential family status implications under human rights legislation.

Employers should be clear with employees about the extent of the accommodations that can be provided without causing undue hardship. Employees who cannot be accommodated at work at this time should be granted an unpaid leave. (see full detail at the end of FAQ)

3. Can I conduct temporary layoffs?

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Sections 62-64 of the *Employment Standards Code* (Alberta) permit employers to temporarily lay off employees so long as the appropriate notice is provided. If an employee is laid off for 60 days in a 120-day period, the employee will be deemed terminated and termination pay will be owing under the *Employment Standards Code*. (see full detail at the end of FAQ)

4. Can I terminate an employee without notice?

Employers should, wherever possible, take proactive steps to identify whether terminations need to occur and to provide affected employees with notice of same. In the interim, employers should be communicating with its employees on the impact of the pandemic on business. If circumstances do arise in which an employer is facing a situation of immediate termination or layoff, without notice, seek legal advice. (see full detail at the end of FAQ)

5. When do I have to issue a Record of Employment (ROE)?

An ROE needs to be issued each time an employee experiences an interruption in earnings in excess of 7 days, or when Service Canada requests one. However, for part-time, on-call, or casual workers, employers do not have to issue an ROE every time there is an interruption of earnings of 7 days or more. (see full detail at the end of FAQ)

6. Can an employer mandate unpaid leaves of absences or furloughs?

A compulsory leave of absence, without a contractual right to mandate such a leave, may amount to a constructive dismissal. That is especially so when it is unpaid with no guarantee of eventual employment and is of an indefinite duration and presents legal risk to an employer. (see full detail at the end of FAQ)

7. Can an employer mandate the use of banked time or vacation leave?

The *Employment Standards Code* permits the used of banked time instead of overtime pay. Banked time in lieu of overtime pay only exists by written agreement between the employer and the employee – known as an “overtime agreement”. To have effect, the employer must provide the employee with a copy of the overtime agreement. (see full detail at the end of FAQ)

8. My business is experiencing hardship. How can I reduce my wage-related expenses short of terminating or laying off employees?

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Any reduction in compensation creates a risk of constructive dismissal claims, particularly if over 10% of an employee's total compensation package (e.g., wage reduction; elimination of an RRSP matching program; elimination of incentive pay) is reduced. Across the board reductions of 5% to 10% have been allowed by courts in some cases. (see full detail at the end of FAQ)

By [McLennan Ross Labour & Employment Team](#)

As of March 16, 2020, there are 324 reported cases of COVID-19 in Canada, 56 of those appeared in Alberta alone. Moments ago, Prime Minister Trudeau announced that the Canadian border would close to most non-Canadian citizens or permanent residents. That announcement comes at the heels of the Government of Alberta's decision to cancel all classes for students in K-12 and at post-secondary institutions. It is obvious that Canada's and Alberta's response to the COVID-19 pandemic changes day to day, if not hour by hour.

In our publication of March 9, 2020, we answered several questions on pandemic planning in the workplace and provided guidance on what employers should be doing now. For a link to our previous publication, please [click here](#). Further to that publication, we want to provide our answers to some commonly asked questions by our clients on COVID-19, pandemic planning, and business continuity strategies.

We invite the public to attend our upcoming webinars during which we will provide further information on COVID-19, the impact to employers, and the education sector:

- [Webinar: COVID-19: Workplace Readiness and Pandemic Planning](#)
- [Recess Break: COVID-19 Pandemic Planning for School Boards](#)

Our most received Frequently Asked Questions are as follows.

1. The Government of Alberta announced that a new 14-day paid job-protected leave for employees who are required to self-isolate or are caring for a family member with COVID-19. Are we required to provide employees with this paid leave?

On March 13, 2020, Premier Kenney announced there will be changes to the *Employment Standards Code* to address COVID-19. Specifically, employees who are required to self-isolate or are caring for a loved one with COVID-19 are now permitted to take 14 days of paid job-protected leave to cover the self-isolation period being recommended by Alberta's Chief Medical Officer of Health. There will be no requirement to have a medical note for this leave or to have worked for an employer for 90 days to qualify for the leave.

https://mross.com/law/Firm/Publications/Email_Alerts/COVID-19_Frequently_Asked_Questions_by_Employers.cid2467

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The details of how these changes will be administered have not yet been announced, nor has the legislation been tabled. As such, these changes are not currently in effect. We expect to see further information on these leaves and any payment obligations associated with the leaves in the coming days, possibly as soon as tomorrow. The payment obligations for these leaves will fall to employers, the provincial government, the federal government, or some combination. We expect that government will take steps to reduce or remove this burden from employers, who are also facing financial distress.

In the interim, employers should be assessing absences related to COVID-19 on a case-by-case basis. Employers should wait for the new leave provisions to be enacted before gratuitously extending 14 days of paid leave. In any event, employees should be encouraged or directed to take a combination of any existing paid leave they may be entitled to by virtue of their employment contract or an applicable collective agreement (i.e., banked time, sick leave, or paid personal days) prior to accessing the new 14-day leave. As we have previously discussed in our prior publication, employers can also make arrangements for employees to use accrued vacation entitlement or work remotely during the self-isolation period if he or she is not sick.

We are also being asked what happens if an employee decides to leave the country now (as in tomorrow, the next day, or the day after that, etc.). Given the recent announcement that all international air travel for leisure purposes is restricted and unnecessary, this will become less of a concern for employers. However, employers should ensure that they have implemented a policy restricting leisure travel abroad (for when the travel restrictions are lifted by the federal government). Employees should be advised that if they choose to undertake international travel at that time, and there is still a requirement to self-isolate upon their return, the isolation period will be unpaid. Employers should also be confirming with their third party benefit providers whether coverage will be extended to employees who choose to engage in international travel, despite federal and provincial travel restrictions and advisories. It is also our hope that the 14-day paid leave will not apply to people in these circumstances.

For employees who are returning from international travel, and who commenced travel prior to the travel restriction, employers should be prepared to extend paid leave during the self-isolation period (either through gratuitous paid days off or by requiring an employee to utilize other paid leave entitlements, such as accrued bank time, paid personal days, or vacation time). Again, employers can also make arrangements for employees to work remotely during the self-isolation period if they are not sick.

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What remains unclear at this time is what happens if an employee decides to engage in non-essential air travel between cities or provinces in Canada. Given Prime Minister Trudeau's comments that Canadians should stay home, it is reasonable to suspect that restrictions between cities and provinces may also occur in the coming days. Employers may need to discourage or prohibit such travel plans by employees.

2. Schools are closed. How do we balance our ability to run our operations with our employee's responsibility to provide care to their children?

Since the announcement at 4:30 p.m. on Sunday, March 15, 2020 that all schools in Alberta would close effective immediately, employees should be granted some flexibility to adjust to this significant and impactful change. Employees who have children should be afforded an opportunity to make alternate childcare arrangements, as this circumstance raises potential family status implications under human rights legislation.

In the short term, employers should consider whether it is feasible for employees to:

- work from home;
- use vacation or banked time;
- bring their children to work;
- modify shift schedules; and/or
- allow employees time off work on an unpaid basis.

As in each family status accommodation case, employers should assess each employee's circumstances and requests for accommodation on a case-by-case basis. Employers should be clear with employees about the extent of the accommodations that can be provided without causing undue hardship. Employees who cannot be accommodated at work at this time should be granted an unpaid leave. Over the long term, there will be an increased obligation on the part of the employee to secure alternate childcare.

3. Can I conduct temporary layoffs?

Sections 62-64 of the *Employment Standards Code* (Alberta) permit employers to temporarily lay off employees so long as the appropriate notice is provided. If an employee is laid off for 60 days in a 120-day period, the employee will be deemed terminated and termination pay will be owing under the *Employment Standards Code*.

To be valid, a temporary layoff notice must:

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- Be in writing;
- State that it is a temporary layoff notice and its effective date; and
- Include the text of sections 62 to 64 of the *Employment Standards Code*.

There is no requirement that a temporary layoff notice be hand delivered, but employers would want to take proactive steps to confirm that an employee has received the notice.

The notice periods for temporary layoffs are as follows:

- 1 week if the employee has been employed for less than 2 years;
- 2 weeks if the employee has been employed by the employer for 2 years or more.

In certain circumstances, the employer does not need to give notice of the temporary layoff if the circumstance is unforeseeable. In such situations, the employer should give notice "as soon as practicable.". The impact of COVID-19 may fall within this exception. The situation with COVID-19 is ever changing, and it is always best to give notice to avoid possible violations of the *Code*.

Employers should be aware that the term "layoff" in the non-union setting has no technical meaning and is simply a euphemism that connotes loss of employment without attribution of wrongdoing to the employee. There is case law in Alberta (and other provinces) that supports the notion that because employment standards legislation may authorize temporary layoffs does not affect common law rights and obligations concerning dismissal. However, at least in Alberta, the temporary layoff provisions in the *Employment Standards Code* have been amended since those decisions were released, and the new provisions have not been litigated. Note: if the temporary layoff period expires and termination pay becomes owing, an employee may be able to assert an entitlement to common law reasonable notice and claim wrongful dismissal.

The period of temporary layoff can be extended beyond 60 days if an employer makes regular payments to or on behalf of the employee, such as continuing to pay wages, employee pensions, or benefits and the employee agrees to these payments. A good practice is to have an employee sign a letter of understanding in which he or she expressly acknowledges and agrees to an indefinite layoff period in exchange for continuation of benefits.

There are certain obligations related to group terminations under the *Code*. Specifically, if you are intending to terminate the employment of 50 or more employees at a single location within a 4-week period, the employer must give the Minister of Labour and the affected employees the following amount of written notice according to the number of employees affected:

- 8 weeks - 50 or more employees but less than 100

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- 12 weeks - 100 or more employees but less than 300
- 16 weeks - 300 or more employees.

These notice requirements only become applicable in a layoff scenario if you have 50 or more employees on temporary layoff and then decide that the layoff will become permanent.

4. Can I terminate an employee without notice?

Section 55(2)(h) of the *Employment Standards Code* provides that termination notice is not required if the contract of employment is or has become impossible for the employer to perform by reason of unforeseeable or unpreventable causes beyond the control of the employer. It is notable that this section of the *Employment Standards Code* has been in force since at least 2000, yet “unforeseeable” and “unpreventable” have not been defined or judicially considered in this section. There are no reported decisions from either the courts or the Employment Standards Umpire interpreting this section even though Alberta has seen such major disasters such as the Calgary floods and the Wood Buffalo fires.

In other legal contexts outside employment law, proving that a contract has been impossible to perform has to meet a high standard. Contracts becoming difficult or more expensive to perform due to delay from temporary suspension of work typically do not meet the threshold. The availability of business interruption insurance may also be a consideration in this context.

Finally, the *Employment Standards Code* explicitly states that nothing in it affects any civil remedy of an employee. Reasonable notice or pay in lieu thereof may still be available to employees terminated without notice.

As such, employers should, wherever possible, take proactive steps to identify whether terminations need to occur and to provide affected employees with notice of same. In the interim, employers should be communicating with its employees on the impact of the pandemic on business. If circumstances do arise in which an employer is facing a situation of immediate termination or layoff, without notice, seek legal advice.

5. When do I have to issue a Record of Employment (ROE)?

An ROE needs to be issued each time an employee experiences an interruption in earnings in excess of 7 days, or when Service Canada requests one. However, for part-time, on-call, or casual

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workers, employers do not have to issue an ROE every time there is an interruption of earnings of 7 days or more. For these employees, employers must issue an ROE when:

- an employee requests an ROE and an interruption of earnings has occurred;
- an employee is no longer on the employer's active employment list;
- Service Canada requests an ROE; or
- an employee has not done any work or earned any insurable earnings for 30 days.

As of today, March 16, 2020, Employment and Social Development Canada (“**ESDC**”) is waiving the one-week waiting period for EI Sickness Benefits for those who are quarantined or have been directed to self-isolate. ESDC are establishing a new toll-free phone number to support those seeking EI Sickness Benefits and priority application process for those under quarantine. There is a dedicated toll-free number for those employees who wish to apply - 1-833-381-2725. It is also anticipated that there will be an expansion of the EI program to help address COVID-19.

6. Can an employer mandate unpaid leaves of absences or furloughs?

A compulsory leave of absence, without a contractual right to mandate such a leave, may also amount to a constructive dismissal. That is especially so when it is unpaid with no guarantee of eventual employment and is of an indefinite duration.

Even in the circumstance where a compulsory leave of absence is paid but at a reduced wage there is a risk of a constructive dismissal claim since not only has the employee's wage been impacted but so has his/her hours of work, duties, and responsibilities. The legal risk in such a circumstance, without the express agreement of an employee, is quite high, and as such, it is generally prudent to either effect a temporary layoff as contemplated by provincial employment standards legislation, or to terminate the employee on a without cause basis with either working notice or pay in lieu of working notice.

7. Can an employer mandate the use of banked time or vacation leave?

The *Employment Standards Code* permits the used of banked time instead of overtime pay. Banked time in lieu of overtime pay only exists by written agreement between the employer and the

employee – known as an “overtime agreement”. To have effect, the employer must provide the employee with a copy of the overtime agreement.

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The *Employment Standards Code* only sets out the minimum standard of what overtime agreements should include. First, the overtime agreement must stipulate that the employee will receive paid time off in lieu of overtime pay, which must be banked at a rate of at least one hour for each overtime hour worked. The overtime agreement must also stipulate that if time off in lieu of overtime is not provided, the employee will be paid overtime pay at an overtime rate of at least 1.5 times the employee's regular hourly wage.

In Alberta, there are no specific employment standards related to whether an employer can mandate when banked time (time off in lieu or pay) must be taken. For overtime eligible employees, banked time must be provided within at least 6 months of when the banked time is accrued. However, the employer is not prevented from mandating employees to take time off in lieu.

Unlike banked time, the *Employment Standards Code* specifically permits employers to mandate the use of vacation leave (section 38). However, the employer must give an employee two weeks' written notice of the date on which the employee's annual vacation is to start.

It is good practice to give employees notice of when the employee needs to take banked time or vacation leave. The employer should approach employees, explain the business circumstances, and attempt to obtain agreement from the employee that banked time or vacation leave will be used at a specific time. Failing agreement, the employer would then be able to exercise its strict rights under the *Employment Standards Code*.

8. My business is experiencing hardship. How can I reduce my wage-related expenses short of terminating or laying off employees?

Any reduction in compensation creates a risk of constructive dismissal claims, particularly if over 10% of an employee's total compensation package (e.g., wage reduction; elimination of an RRSP matching program; elimination of incentive pay) is reduced. Across the board reductions of 5% to 10% have been allowed by courts in some cases (although disallowed in others). We often recommend trying to reduce wage costs by reducing overtime or eliminating other expenses arising from an employee's duties (e.g., travel) prior to effecting an across the board compensation decrease.

Generally, a reduction in a bonus and/or benefit, as opposed to base salary, carries a lower risk of constructive dismissal claims, although bonuses would likely be viewed as an integral part of employee compensation.

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With any negative change that may constitute constructive dismissal, employers can lower the risk by doing the following:

1. Implementing the change in exchange for something positive for the employee (e.g., making changes at the time of a promotion, a pay increase, or some kind of new benefit);
2. Giving advance notice of the change in an amount similar to reasonable notice of termination. In reality, employers are terminating employment on the existing terms (at some later date) and offering new employment at slightly different terms the very next day. This type of notice needs to be carefully worded.
3. Getting employee buy in through effective communications.

Even if it is constructive dismissal, employees will be viewed as having acquiesced to the change if they do not object in a timely manner. Thus, sometimes the best strategy is for employers to be transparent in their communications as to why the change is being made and see if employees object (at which time the employer would need to decide how to respond). This is easier in some cases than others, and we recommend seeking legal advice in specific situations.

The test for constructive dismissal places the onus on the employee to demonstrate that a fundamental term and condition of employment was unilaterally changed by the employer. At this time, we do not see this pandemic changing the legal test for constructive dismissal. However, from a risk standpoint, should Alberta's and Canada's economy continue through a recession, we would expect that some employees may be more willing to agree to reductions in their working conditions if the alternative is unemployment. This means that should employers be required to implement unilateral changes, some employees may simply acquiesce to such changes, in ways they otherwise would not have even 2 to 3 months ago.