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FAQ: COMMON EMPLOYMENT QUESTIONS ARISING FROM THE CORONAVIRUS CRISIS

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BACKGROUND

COVID-19 has resulted in hundreds of thousands of workers being laid-off across the country, affecting employees in all walks of life. In the last few weeks, we have heard from retail workers, dental hygienists, administrative staff, trade workers, and corporate executives, all of whom have the same concerns about being able to provide for their families in these uncertain times.

We at UPFH want you to know that, even in a state of emergency, **you have options and rights upon lay-off by your Employer**. It is important to become informed. It might be important to advocate. Simply accepting a lay-off could affect your ultimate entitlement to severance or pay *in lieu* of notice of termination. Conversely, resigning and claiming constructive dismissal in the age of a pandemic is risky, and, if unsuccessful, may disentitle a worker from EI benefit entitlement.

In this article we try to answer some common employment questions arising out of COVID-19. **This information is general in nature and is not a substitute for legal advice**. Every employment relationship is unique and it is important to consult an employment lawyer to get advice on your specific rights and entitlements.

Q1. MY EMPLOYER HAS LAID-OFF ITS WORKFORCE BUT IT SAYS THE LAY-OFF IS TEMPORARY. CAN IT DO THAT?

This is actually a very complicated question.

While the *Employment Standards Act, 2000* allows for temporary lay-offs for stipulated periods of time, an employee may still be entitled to treat such a lay-off as a constructive dismissal under their contract of employment, triggering the right to claim termination and severance pay. However, practically speaking, searching for alternative employment may be quite challenging in a COVID-19 world. It is also possible a Court could find there is an implied right to temporarily lay-off an employee in the unprecedented circumstances caused by COVID-19. Ultimately, how an employee responds to a lay-off notice might be influenced by a number of different factors, including their years of service, the terms of their employment contract, their industry and position, and their likely ability to secure comparable employment during their notice period.

It is important to get the advice you need to weigh the pros and cons of claiming constructive dismissal. Our employment lawyers are here to review the options with you so you can make an informed choice.

Q2. IF I AM LAID-OFF, WILL I BE ENTITLED TO EMPLOYMENT INSURANCE BENEFITS OR SOME OTHER FORM OF INCOME REPLACEMENT?

Not all workers are eligible for EI. The Government has a plain-language guide to benefit eligibility that can be found [here](#).

Employees may not be entitled to EI for a number of reasons: they are self-employed, they do not have enough insurable hours in the 52 week qualifying period (i.e. if they just returned from parental leave), they work in specific industries that are subject to special rules.

Employees should know that EI is not the only option in these trying times. On March 25, 2020, the Government of Canada enacted legislation that created the Canada Emergency Response Benefit, which is specifically targeted to those who will lose income or are laid-off because of COVID-19.

According to the latest Government announcements, employees will be able to apply online for the CERB benefit starting on **April 6, 2020**.

The CERB will provide \$2000 / per month per recipient for a four-month period.

Workers, including employees, contractors, or the self-employed, will be eligible for a CERB income support payment if:

- They are residing in Canada, and are at least 15 years old;
- They have stopped working because of COVID-19 or are eligible for Employment Insurance regular or sickness benefits;
- They had income of at least \$5,000 in 2019 or in the 12 months prior to the date of their application; and
- They are or expect to be without employment or self-employment income for at least 14 consecutive days in the initial four-week period. For subsequent benefit periods, they expect to have no employment income.

This benefit **does not** apply to workers who quit their employment voluntarily.

Employees can receive CERB if they are eligible for EI, however they cannot receive both CERB and EI payments simultaneously.

For more information on CERB, see the Government's website [here](#).

Q3. CAN I BE LAID-OFF OR FIRED BECAUSE I HAVE TO STAY HOME AND TAKE CARE OF MY CHILDREN WHILE SCHOOLS ARE SHUT-DOWN?

On March 19, 2020, Ontario amended the *Employment Standards Act, 2000* to guarantee a leave of absence without pay to employees who are unable to attend work because of COVID-19 in certain prescribed circumstances, including where they are

required to care for children because of school and daycare closures. These amendments also prohibit employers from intimidating, dismissing, or otherwise penalizing employees for taking such a leave, which means that a layoff targeted only at employees who have to childcare responsibilities may violate the Act.

Relatedly, under Ontario's *Human Rights Code*, employers have a duty to accommodate employees with family obligations, which means they may have to allow employees to work from home in these circumstances. An Employer's obligations will depend on the alternate childcare arrangements available, the nature of the employee's work, and the reasonableness of the request in the circumstances. You should seek advice from an employment lawyer if your Employer is demanding you attend work or refusing to allow you to work-from-home while you have young children in your care.

Q4. I AM SELF-ISOLATING BECAUSE A FAMILY MEMBER HAS THE SYMPTOMS OF COVID-19, BUT HAS NOT BEEN FORMALLY TESTED. AM I ENTITLED TO SICK PAY DURING MY PERIOD OF ISOLATION? HOW ABOUT MY REGULAR PAY?

This will depend on the terms of your employment contract or sick leave plan. Generally speaking, sick pay is traditionally provided when an employee is unable to perform their regular duties because they are ill or injured. However, COVID-19 is an unprecedented public health crisis and courts will have to interpret sick leave provisions in light of the surrounding context. It may be relevant whether you are self-isolating pursuant to the latest public health recommendations, which unfortunately vary by location.

When in doubt, apply for sick leave. If your request is denied, seek the advice of an employment lawyer.

Q5. CAN MY EMPLOYER REDUCE MY SALARY BECAUSE OF A LOSS OF PROFITS CAUSED BY COVID-19?

Generally speaking, a reduction in pay, particularly a substantial one, would entitle an employee to claim they have been dismissed, and to claim any severance or termination pay that is owed. However, as mentioned, claiming constructive dismissal is risky in an uncertain job market, particularly if it is possible the Employer's business will resume after the crisis period has passed. As always, it is best to get advice from an experienced employment lawyer on your specific options.

For advice on any of these circumstances or any other employment inquiry arising from COVID-19, please fill out our intake form or contact one of our experienced employment lawyers:

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