

COVID-19
**What you missed
on your summer
vacation and what
happens next**

While you may have taken some time off during the summer, COVID-19 did not.

Masks. Social distancing. Screening. Hot spots (and we're not talking about the temperature).

The summer of 2020 was unlike any other as the world continued its social isolation and embraced a new type of summer vacation.

As we turn our attention to the fall and back to school, employers continue to navigate through a web of uncertainty. To help Canada's employers manage these uncertain times, we are providing an update on some of the most important developments that have occurred over the summer and some guidance on what may happen next.

What's the status of the Provincial/Territorial States of Emergency?

To date, the following provinces and territories have declared a state of emergency:

| | |
|-----------------------|---|
| Ontario | State of Emergency Ended July 24, 2020* |
| British Columbia | State of Emergency Extended until September 15, 2020 |
| Saskatchewan | State of Emergency Extended until September 16, 2020 |
| New Brunswick | State of Emergency Extended until September 17, 2020 |
| Manitoba | State of Emergency Extended until September 12, 2020 |
| Nova Scotia | State of Emergency Extended until September 20, 2020 |
| Prince Edward Island | State of Emergency Ended June 28, 2020 |
| Northwest Territories | State of Emergency Ended July 8, 2020 |
| Yukon Territory | State of Emergency Extended September 9, 2020 for 90 days |

Canada Emergency Wage Subsidy (CEWS)

Applications received

1,036,450

Total approved applications

1,024,340

Dollar value of subsidies paid

\$33.71 billion

Source: <https://www.canada.ca/en/revenue-agency/services/subsidy/emergency-wage-subsidy/cews-statistics.html> as of September 6, 2020

In addition, while Alberta ended its declared public health emergency on June 15, 2020, the following provinces/territories have extended their declared public health emergencies: Nunavut (September 17, 2020), Newfoundland and Labrador (September 13, 2020), Prince Edward Island, Québec (September 16, 2020), Northwest Territories (September 15, 2020).

* Although Ontario's state of emergency ended on July 24, 2020, Ontario passed a new statute that effectively continues many of the emergency Orders. Although most businesses are now permitted to open, there are ongoing restrictions that apply to a number of types of businesses. In addition, one continuing Order requires all workplaces that are "open" to "operate the business or organization in compliance with the advice, recommendations and instructions of public health officials, including any advice, recommendations or instructions on physical distancing, cleaning or disinfecting." As a result, Ontario employers should carefully monitor local and provincial public health guidance.

What's the latest on the Canada Emergency Wage Subsidy (CEWS)?

On July 17, 2020, the federal government announced changes to the CEWS. The highlights are as follows:

- Employee eligibility expanded to no longer exclude employees that are "without remuneration in respect of 14 or more consecutive days."
- The CEWS program now consists of two parts as of July 5, 2020:
 - A **base subsidy** is available to all eligible entities that are experiencing a decline in revenue. The amount of the base subsidy available will vary depending on the scale of the revenue decline. The base CEWS rate would apply to the amount of remuneration paid to the employee for the eligibility period, on remuneration of up to \$1,129 per week. Please refer to the Dentons' "[Legal backgrounder on the CEWS](#)" for details on how to calculate the base subsidy for claim periods starting July 5, 2020 and onwards.

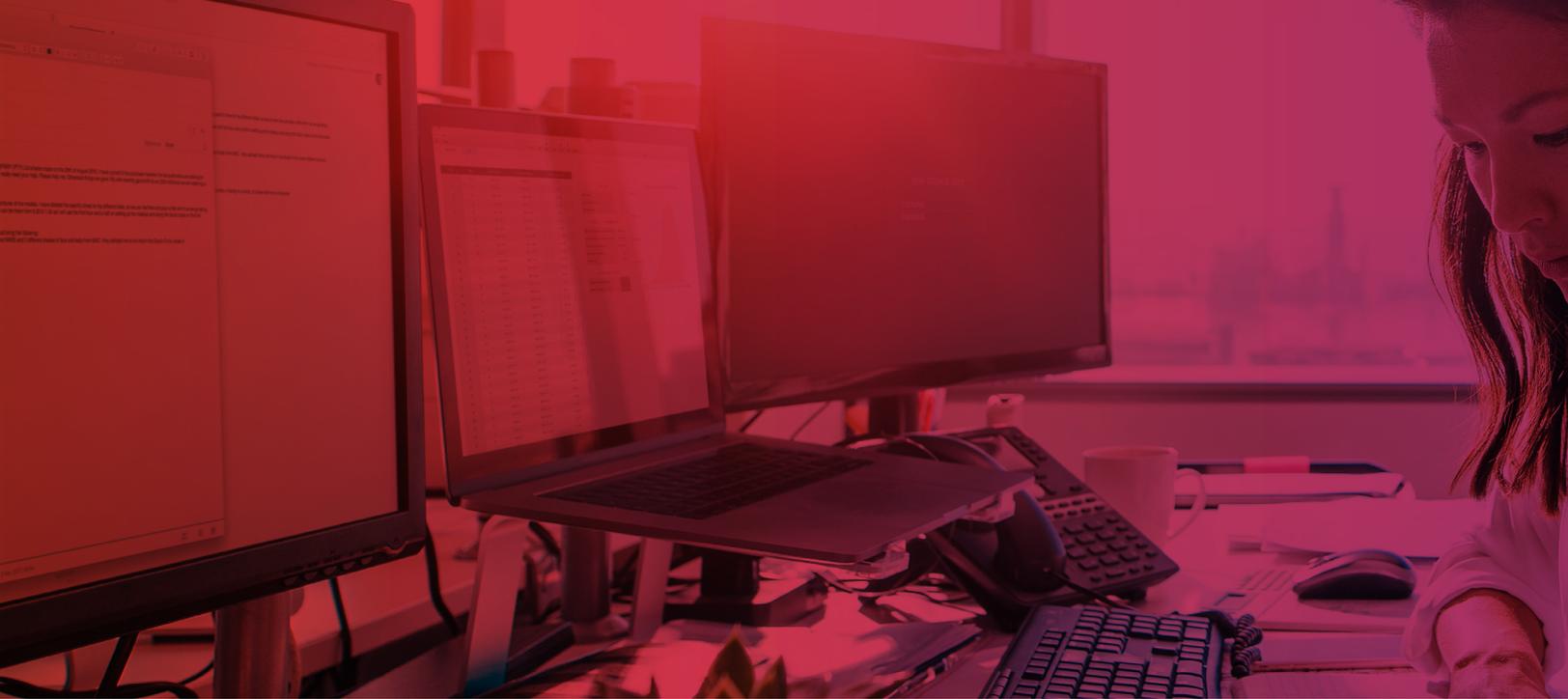
- A **top-up subsidy** of up to an additional 25 percent is available for eligible entities that have been most adversely affected by the COVID-19 pandemic. Generally, an eligible entities' top-up CEWS would be determined based on:
 - The revenue drop experienced when comparing revenues in the preceding three months to the same months in the prior year; or
 - The revenue drop experienced when comparing average monthly revenue in the preceding three-months to the average monthly revenue in January and February 2020.
- There is now an appeal process that allows for an appeal to the Tax Court of Canada.
- Deadline to submit applications for the CEWS extended to January 31, 2021.

What is happening to the Canada Emergency Response Benefit (CERB)?

The CERB is ending. The final payment period ends on September 26, 2020, though eligible workers have until December 2, 2020 to make a claim in relation to the CERB program.

After the termination of the CERB program, the Federal Government will transition recipients of the CERB who still require income support after September 26, 2020 to a "simplified" employment insurance (EI) program. The intention behind this simplified program is to increase access to EI in light of the impact COVID-19 has had on the Canadian economy.

On August 20, 2020, the Federal Government announced that it will lower the number of hours required to qualify for EI to a minimum of 120 hours of work. EI claimants will also receive a one-time insurable hours credit (available for one year) of 300 insurable hours (for regular benefit claims) or 480 hours (for special benefit claims). These credits will be retroactive to March 15, 2020. New EI claimants will receive a minimum benefits rate of \$400 per week (or \$240 for extended parental benefits) if this amount is higher than what their benefits would otherwise be.



In addition, to help individuals transition from the CERB back to the EI system, a minimum unemployment rate of 13.1% will be used for all EI economic regions for the period beginning on August 9, 2020 and ending September 5, 2020. Regions with a rate higher than 13.1% will have their benefits calculated using the actual higher rate.

To provide support to Canadians that do not qualify for EI, on August 20, 2020, the Federal Government also announced three new benefits. The following proposed benefits will be available starting September 27, 2020, and for one year after:

- **Canada Recovery Benefit:** Will provide \$400 per week for up to 26 weeks for workers who are not eligible for EI (mainly, the self-employed, including those in the gig economy).
- **Canada Recovery Sickness Benefit:** Will provide \$500 per week, for up to 2 weeks, for workers who are unable to work because they are sick or must self-isolate due to COVID-19.
- **Canada Recovery Caregiving Benefit:** Will provide \$500 per week, for up to 26 weeks, per household to eligible Canadians who are impacted by the closure of schools and other daycare and day program facilities.

More information on the Federal Government's proposed changes to the EI system, as well as the proposed CERB-replacement benefits, is expected in the coming weeks.

What do I do if an employee refuses to wear a mask?

Mask use requirements in Canada generally apply only to indoor and some outdoor 'public spaces', with the definition of what constitutes a public space being set out in the applicable government legislation or public health guidelines. For those employers where the workplace is a public space, the applicable government legislation or public health guidelines must be followed. That generally means that mask use by employees is required, although most public health guidelines allow employees to not wear masks if they are behind a physical barrier.

Because face masks are generally not required in **private** indoor spaces where physical distancing can be maintained, it is up to the owner/operator of private indoor spaces to make the rules. For these employers, this then puts the decision squarely in company hands.

While companies which employ people within private indoor spaces do not need to comply with applicable provincial or municipal jurisdiction or public health guidelines relating to mask use, employees often mistakenly assume that the legislation or guidelines in their local jurisdiction applies. Therefore, companies may have employees refusing to wear masks due to health issues and refusing to provide a medical note because they believe that they are not required to do so.



Canada Emergency Response Benefit

Total applications received

24.68M

Total applications processed

24.72M

Total dollar value of CERB benefits paid

\$72.55B

Source: <https://www.canada.ca/en/services/benefits/ei/claims-report.html> as of August 30, 2020

The good news for employers is that medical notes can be sought in the context of mask use in private indoor spaces, since government legislation and public health guidelines currently do not apply there. However, employers do need to keep in mind both *Occupational Health & Safety* (OHSA) obligations as well as *Human Rights* obligations when determining the path forward.

Company rules about mask use should first be made having regard to best practices from an OHSA point of view. As OHSA requires employers to take all necessary steps to keep employees safe, this means that most employers will probably require mask use in common areas and open areas within their private workspaces. However, there will likely still be some employees who assert that they are unable to wear a mask for medical reasons.

For those employees, the course of action is to require that a medical note and possibly a medical questionnaire be provided by the employee's physician. This is meant to determine whether or not there is a legitimate medical issue and if so, whether it constitutes a disability, which requires accommodation by the employer. If accommodation is not required, then mask use can be demanded. If accommodation is required, then the employer will likely need to perform an assessment of competing legal rights – i.e., the right to keep everyone in the workplace safe, as compared to the right of one employee to not wear a mask. Generally speaking, the safety of the entire workplace will win out, in which case the employer needs to consider

whether there are any other steps which can be taken to accommodate the employee. If there are no such steps, then the employee can be asked to work from home or to take a leave of absence (which may be paid or unpaid, depending upon what sorts of benefits and leaves the employer offers).

The question has been asked as to whether face shield use is an appropriate accommodation for an employee who is medically unable to wear a mask. While each workplace will have different considerations depending upon such things as the size and layout of the workplace, as well as the number of employees, there is new law in Ontario to suggest that face shields are not an appropriate accommodation. In the July 14, 2020 Ontario Labour Relations Board case of [Inovata Foods Corp. v. Ontario \(2020 CanLII 49519\)](#), the adjudicator reviewed the law and the science to date around this issue, and determined that face shields were not a safe substitute in the workplace in place of face masks.

Can I make my employees sign a COVID-19 waiver?

Starting with basic principles and looking first at the law of waivers outside of COVID-19 workplace concerns, waivers can be difficult to uphold. Canadian courts do not like waivers that have been signed by parents or guardians on behalf of minors, and will usually strike them down. Moreover, while some waivers may be enforceable against some adults, they are not enforceable in the event of gross negligence and they are generally not enforceable if the person signing was not aware of the terms of the waiver. In short, Canadian courts do not generally like to hold people to waivers.

Moving into a world of COVID-19 claims, if the person being asked to sign a waiver is an employee, the chance of it being enforceable is even lower. For employers that are subject to coverage under the *Workplace Safety & Insurance Act* (Ontario) (the WSIA), the legislation dictates that employees who suffer from an 'occupational disease' are covered by the WSIA. The Workplace Safety & Insurance Tribunal has indicated that depending upon the facts in each case, COVID-19 may be an occupational disease. In turn, this means that employees subject to the WSIA may be eligible for coverage if they catch COVID-19 from their job, and they must therefore look to the WSIA for their remedy. If this occurs, the legislation does not permit them to make court claims against the employer.

For employers that are not subject to coverage under the WSIA, section 114 of the legislation provides that a worker of a employer without WSIB coverage has the right to make a claim against the employer for an injury that occurs, among other things: (i) by reason of a defect in the condition or arrangement of the ways, works, machinery, plant, buildings or premises used in the employer's business; or (ii) by reason of the employer's negligence. This means that employees who are not subject to the WSIA have a legal right to make claims against their employer if they catch COVID-19 in the workplace due to some fault of the employer. That is so, even if a waiver has been signed.

As a result of the impact of the WSIA, Ontario employers should think twice before asking their employees to sign COVID-19 waivers for work-related matters. Quite apart from enforceability issues, requests for waivers do not send a good message to employees, who want to know that they are being taken care of to the best of the employer's ability.

The best approach then, for employers that want to have something in writing signed by employees, is to have them sign an acknowledgement form. While they can take different forms, a standard COVID-19 acknowledgement form will usually include the following general points:

- A description of the ways in which the employer is making best efforts to protect employees from COVID-19, which may include a link to the employer's COVID-19 plan or protocol;
- An acknowledgment there is an inherent risk of COVID-19 in any workplace, even when best efforts to avoid it are undertaken;
- An acknowledgement by the employee that they may take an unpaid leave of absence if they are uncomfortable with those inherent risks and if remote work or some other form of protected work is not possible; and
- Confirmation by the employee that notwithstanding the inherent risks, they wish to return to work in the workplace.

The schools are now open; do I still need to accommodate my employees if they choose not to send their kids back to school?

Many parents grappled all summer with the question of whether or not they would be sending their kids back to school in September. As a result, depending on the nature of the workplace rule (e.g., a requirement that employees work from the physical office), employers could receive a request for accommodation from employees who are continuing to homeschool their children.

Under Ontario's *Human Rights Code*, employers cannot discriminate on the basis of "family status". The *Code* defines "family status" as "the status of being in a parent and child relationship." However, this definition has been broadly interpreted to mean a parent and child "type" of relationship such that blood or adoptive ties will not be determinative.

Given the current circumstances, as Ontario's schools and daycares are now open, an employee's decision not to send their child back to school will not automatically trigger an employer's duty to accommodate. Where an employee simply *prefers* to keep their child at home, the duty to accommodate will not be triggered. The law generally requires the childcare obligation at issue to engage the employee's legal responsibility for that child – it is not simply a matter of personal choice. Alternatively, where the employee's circumstances are such that they have no choice but to keep their child at home (e.g., the child has a medical condition that puts them at a heightened risk of contracting COVID-19 and the employee has provided supporting medical evidence), the employer will have a duty to accommodate. In those circumstances, the accommodation process requires the employer and employee to cooperate with one another in searching for an accommodation that does not impose undue hardship on the employer.

Regardless of the law, employers should be flexible and sympathetic to their employees when approaching these issues. COVID-19 has created a lot of stress for many families and employers should be treating each situation on a case-by-case basis.

What is the status of temporary layoffs in Ontario?

On September 3, 2020, the Ontario Government announced that it was extending the deemed Infectious Disease Emergency Leave for those employees who had previously been placed on temporary layoff. Employers will recall that in May 2020, the Ontario Government passed O Reg 228/20 under the *Employment Standards Act, 2000* (ESA), which converted temporary layoffs to a job-protected Infectious Disease Emergency Leave. As a result, non-unionized employees could not claim constructive dismissal under the ESA on the basis of eliminated or reduced work hours related to COVID-19.

The deemed Infectious Disease Emergency Leave was to end six weeks after the end of Ontario's declared State of Emergency. Given that Ontario's State of Emergency ended on July 24, 2020, this leave of absence was to end on September 4, 2020—or so we thought.

However, the Ontario Government has amended O. Reg 228/20 such that employees experiencing temporary reductions or elimination of work hours will continue to be considered on Infectious Disease Emergency Leave until January 2, 2021. This means that employers can continue temporary layoffs without risk of facing constructive dismissal claims under the ESA until the New Year. Effective January 3, 2021, temporary layoffs rules will apply once again but the temporary layoff clock will reset.



The number of Canadians on temporary layoff increased from 99,000 in February to a record 1.2 million in April, before falling to 460,000 by July. In August, the number of Canadians on temporary layoff continued to decline sharply, falling by half (-49.9%) to 230,000.

Source: <https://www150.statcan.gc.ca/n1/daily-quotidien/200904/dq200904a-eng.htm>, September 2020

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