

A NOT SO BRIEF HISTORY OF IDEL

September 10, 2020



If you are confused about the current status of Infectious Disease Emergency Leave (IDEL), you are not alone. In this article we will map out the origins, additions and “extensions” related to the leave and clarify employer’s current obligations.

Executive Summary

The following are the key points regarding IDEL as of the date of publication¹:

- IDEL remains in effect. Among other reasons, IDEL permits employees to take a leave of absence to care for family members due to daycare or school closures. A majority of employees who took IDEL earlier this year did so because the schools and daycares were closed.
- Daycare and schools are now open.
- The Ministry of Labour has taken the position that parents who choose to keep their children home from school due to fear of COVID-19 are entitled to IDEL
- Some frontline workers are exempt from IDEL.
- “Deemed IDEL” has been extended until January 2, 2021 which means that the reduction or elimination of hours of work by employers due to COVID-19 are not layoffs or constructive dismissals under the *Employment Standards Act, 2000* (ESA) This does not apply to non-union employees. It also does not apply if the business is permanently closed.

¹ Note that this summary does not consider family status accommodation under the *Human Rights Code*



- Employees who are not recalled before January 2, 2021 will change status from protected leave to layoff at that point. Under the ESA, employers may temporarily layoff employees for a period of 13 weeks in 20, or 35 weeks in 52 if the employer meets certain criteria for continuing benefits or other payments such as a SUB Top up during the layoff. This means that employers with employees laid off due to COVID-19, the termination and severance obligations may not arise until April 3, 2021 or September 24, 2021.

The Detailed History

- Pre-Pandemic – the original IDEL Leave

In 2006, the *Employment Standards Act, 2000* was amended to include “Emergency Leave, Declared Emergencies” (ELDE). ELDE was available to employees who were unable to work where:

- (a) an emergency was declared under the *Emergency Management and Civil Protection Act* (EMCPA), and
 - a. an order applied to the employee under EMCPA
 - b. an order applied to the employee under the *Health Protection and Promotion Act*
 - c. the employee was required to provide care an assistance to a family member
 - d. other prescribed reasons (Ed note, there were no prescribed reasons)

ELDE continued only until the state of emergency has ended or been disallowed.

- March 14, 2020 – Schools in Ontario Closed
- March 17, 2020 – State of Emergency Declared under EMCPA

On March 17, 2020, Premier Doug Ford declared a state of emergency in Ontario due to the Covid-19 pandemic. The Order granted the government extensive powers to make orders that the Lieutenant Governor in Council believes are necessary and essential in the circumstances to prevent, reduce or mitigate serious harm to persons or substantial damage to property. As we know, the government went on to issue over 100 orders under this Emergency Legislation.

Declarations of states of emergency under EMPCA do not continue indefinitely. The legislation gives the government sweeping powers to implement orders to address the emergency without the usual legislative process. To balance out this broad power, the orders issued under the legislation are time limited (mostly 14 days) and



must be renewed. The declaration of the state of emergency is also time limited and can only be renewed by resolution of the Legislature. The legislature approved extensions 5 times after the initial order was made.

The declaration of the state of emergency on March 17, 2020 meant that the ELDE leave described above became available to employees. As it turns out, that only lasted for two days.

- [March 19, 2020 – Bill 186 Amends the ESA to introduce IDEL](#)

On March 19, 2020 the Ontario Government passed Bill 186, the *Employment Standards Amendment Act (Infectious Disease Emergencies)*. The Bill eliminated ELDE leave and replaced it with two new leaves, “Emergency Leave: Declared Emergencies and Infectious Disease Emergencies” (IDEL). The new leaves applied retroactively to January 25, 2020 (when the first presumptive case of COVID-19 was confirmed in Ontario). The first leave under IDEL essentially mirrors the prior ELDE in terms of the circumstances where the leave is available. The only significant difference between the new leave and ELDE was the prohibition on employers requesting medical certificates from employees as evidence they are entitled to the leave. As with ELDE, this first leave under IDEL only continues for as long as the declared emergency is in effect.

The second leave under Bill 186 relates to designated infectious diseases. COVID-19 was declared a designated infectious disease under [Regulation 66/20](#) along with other novel coronavirus diseases including Severe Acute Respiratory Syndrome (SARS) and Middle East Respiratory Syndrome (MERS).

This second IDEL provides a job protected leave for employees for a broad range of reasons related to designated infectious diseases:

- The employee is under individual medical investigation, supervision or treatment related to the designated infectious disease.
- The employee is acting in accordance with an order under the *Health Protection and Promotion Act* that relates to the designated infectious disease.
- The employee is in quarantine or isolation or is subject to a control measure (which may include, but is not limited to, self-isolation), and the quarantine, isolation or control measure was implemented as a result of information or directions related to the designated infectious disease issued to the public, in whole or in part, or to one or more individuals, by a public health official, a qualified health practitioner, Telehealth Ontario, the Government of Ontario, the Government of Canada, a municipal council or



- a board of health, whether through print, electronic, broadcast or other means.
- The employee is under a direction given by his or her employer in response to a concern of the employer that the employee may expose other individuals in the workplace to the designated infectious disease.
 - The employee is providing care or support to an individual from the list below because of a matter related to the designated infectious disease that concerns that individual, including, but not limited to, school or day care closures.
 - The employee is directly affected by travel restrictions related to the designated infectious disease and, under the circumstances, cannot reasonably be expected to travel back to Ontario
 - Such other reasons as may be prescribed

As with the first IDEL, employers are not permitted to ask for a medical note if employees choose to take infectious disease emergency leave. However, the employer may require employees who take the leave to provide other evidence that is reasonable in the circumstances, at a time that is reasonable in the circumstances. This could include requests for a note from the daycare or evidence that the airline cancelled a flight.

Employees can take this second IDEL to care for the following individuals:

- The employee's spouse.
- A parent, stepparent or foster parent of the employee or the employee's spouse.
- A child, stepchild or foster child of the employee or the employee's spouse.
- A child who is under legal guardianship of the employee or the employee's spouse.
- A brother, stepbrother, sister or stepsister of the employee.
- A grandparent, step-grandparent, grandchild or step-grandchild of the employee or the employee's spouse.
- A brother-in-law, step-brother-in-law, sister-in-law or step-sister-in-law of the employee.
- A son-in-law or daughter-in-law of the employee or the employee's spouse.
- An uncle or aunt of the employee or the employee's spouse.
- A nephew or niece of the employee or the employee's spouse.
- The spouse of the employee's grandchild, uncle, aunt, nephew or niece.
- A person who considers the employee to be like a family member, provided the prescribed conditions, if any, are met.
- Any individual prescribed as a family member for the purposes of this section.

On April 14, 2020, the Ontario Ministry of Labour posted a [guide](#) to the new Infectious Disease Emergency Leave.



Most full-time and part-time provincial employees in Ontario are covered by the provisions in this legislation, including students, temporary help agency assignment employees, and casual workers. The government may publish regulations exempting some employees from all or parts of the leave entitlement. A number of emergency orders were issued regarding front line workers that gave the employer the discretion to cancel leaves of absence. These include the following orders:

[O. Reg. 74/20](#): Work Redeployment for Certain Health Services Providers

[O. Reg. 116/20](#): Work Deployment Measures for Boards Of Health

[O. Reg. 77/20](#): Work Deployment Measures on Long-Term Care Homes

[O. Reg. 118/20](#): Work Deployment Measures in Retirement Homes

[O. Reg. 163/20](#): Work Deployment Measures for Mental Health and Addictions Agencies

[O. Reg. 145/20](#): Work Deployment Measures for Service Agencies Providing Violence Against Women Residential Services and Crisis Line Services

[O. Reg. 154/20](#): Work Deployment Measures for District Social Services

Administration Boards

[O. Reg. 157/20](#): Work Deployment Measures for Municipalities

[O. Reg. 121/20](#): Service Agencies Providing Services and Supports to Adults with Developmental Disabilities and Service Providers Providing Intervenor Services

Like all other protected leaves, employees who exercise their right to Infectious Disease Leave are entitled to the following protections:

- Employees cannot be subject to employer reprisal for accessing the leave;
- Employees are entitled to benefit continuation during the leave if the employee continues to pay their portion of the premiums;
- Employees are entitled to reinstatement to their position at the end of the leave, if it still exists, or to a comparable position, if it does not.

Note also that employees seeking time off work due to caregiving responsibilities may also be entitled to accommodation due to family status under the Ontario *Human Rights Code*.

- [May 19, 2020 – Announced that Schools Will Be Closed for Remainder of School Year](#)
- [May 29, 2020 – Regulation 228/20 – Infectious Disease Emergency Leave](#)

On May 29, 2020, the Ontario Government published [Regulation 228/20](#) under the *Employment Standards Act, 2000* (ESA) which fundamentally and retroactively altered the treatment of layoffs and reductions in hours occurring during the pandemic by deeming them to be job protected leaves and not layoffs. The



regulation also declared reductions in hours and wage reductions during the pandemic not to be a constructive dismissal. Note that regulation does not change any entitlements for unionized employees.

The government prescribed a new reason for a job protected leave:

1. The employee's hours of work are temporarily reduced or eliminated by the employer for reasons related to the designated infectious disease.

The only exception is if an employee is no longer working because there is a permanent discontinuance of all of an employer's business at an establishment.

In order to come within this deeming provision, the reduction in hours or wages must be related to COVID-19. Further, the reduction in hours or wages must occur during the "COVID-19 period" which was defined as the period beginning on March 1, 2020 and ending six weeks after the declared emergency has terminated or been disallowed.

The regulation states that the following does not constitute a constructive dismissal if it occurred during the COVID-19 period:

1. A temporary reduction or elimination of an employee's hours of work by the employer for reasons related to the designated infectious disease.
2. A temporary reduction in an employee's wages by the employer for reasons related to the designated infectious disease.

For more details regarding the introduction of Regulation 228/20, please see our prior publication [Infectious Disease Emergency Leave Regulation - Deemed Leaves and Layoffs](#).

- June 12, 2020 – Daycares Permitted to Re-Open at Reduced Capacity

See [Regulation 261/20](#).

- July 15, 2020, Daycares Capacity expanded to approximately 90%

See [Regulation 368/20](#)



- [July 24, 2020 – Bill 195 – Re-Opening Ontario Act -State of Emergency Ends](#)

On July 24, 2020, [Bill 195](#) was proclaimed in force. Bill 195 transitioned orders under sections 7.0.2 and 7.1 of the EMCPA related to COVID-19, to be orders under the new Act the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020* (ROA). With the proclamation of the ROA, the state of emergency declared under the EMCPA ended.

A number of existing Orders, including all of the work redeployment order listed above, were transitioned to being Orders under the ROA. With respect to these orders, under the ROA, the government may:

- Extend emergency orders for up to 30 days at a time; or
- Amend most of the emergency orders (there are exceptions) where the amendments relate to:
 - Labour redeployment or management of workplaces, including credentialing processes in a health care facility;
 - Closing or regulating any place, whether public or private, including any business, office, school, hospital or other establishment or institution; and
 - Prohibiting or regulating gatherings or organized public events.

The new Act clarifies that in amending orders, the government can impose more onerous or different requirements and extend the application of the orders, including the geographic scope of the order and the persons it applies to.

The ability to extend orders by 30 days ends on the first anniversary of the Act unless the legislature approves further extensions.

The ROA effectively ends and extends the status quo under the current state of emergency. However, the government's ability to issue new orders related to the pandemic will end.

The ROA also had two other important impacts:

1. The end of declared emergency means that the first of the two IDELs (IDEL 1) is no longer available and only leaves related to the Infectious Disease (IDEL 2) continue to apply; and
2. The end of the declared emergency also started the 6 week countdown under Regulation 228/20 for reductions or elimination of hours of work due to COVID-19 to be deemed IDEL and not layoffs. The 6 week period was due to expire on September 4, 2020.



- July 30, 2020 – Government Announced Reopening of Schools for in-Person classes in September

Under the [announcement](#), elementary schools (Kindergarten to Grade 8) were to reopen provincewide, with in-class instruction five days a week. Secondary schools with lower risk were to reopen with a normal daily schedule, five days a week, while most secondary schools will start the school year in an adapted model of part-time attendance with class cohorts of up to 15 students alternating between attending in-person and online.

- August 24, 2020 – Amendment to Regulation 228/20 – Infectious Disease Emergency Leave

Ontario filed [Regulation 464/20](#) amending the [Infectious Disease Emergency Leave Regulation](#).

The amendment is retroactive to July 24, 2020. It adds to the list of reasons that someone may be absent from work and entitled to IDEL “orders under the [EMPCA] that are continued or amended under the [ROA]. The practical application of this amendment is quite limited as there are few reasons why someone might be absent from work due to an order under the ROA. One example is the prohibition on employees of long term care or retirement homes from working at more than one home.

- September 1, 2020 – Daycares Permitted to be Open to 100% Capacity

See [Regulation 442/20](#).

- September 3, 2020 – Deemed IDEL Extended to January 2, 2021

On September 3, 2020, [Regulation 492/20](#) amended Regulation 228/20 (Infectious Disease Emergency Leave) to change the definition of “COVID-19 Period” under the regulation from the period beginning on March 1, 2020 and ending six weeks after the declared emergency has terminated or been disallowed, to “the period beginning on March 1, 2020 and ending on January 2, 2021”. The effect of this amendment is to extend the period of time that reductions in hours of work (whether partial or entirely) will be considered IDEL and not lay-offs or constructive dismissals.



- [September 9, 2020 – Ministry of Labour Takes the Position that parents fearful of COVID-19 are eligible for IDEL](#)

On September 9, 2020, the Ministry of Labour [tweeted](#) “If you choose not to send your child to school for fear of COVID-19, your job is protected.” You have rights to an unpaid leave from work”. The [Guide](#) to Infectious Disease Emergency Leave was also updated to include this statement. Given this tweet, employers will be in a difficult position if they deny IDEL to employees who want to stay home with their children regardless of the schools and daycares being open. The Ministry of Labour’s position is not a binding legal interpretation of the legislation. However, Employment Standards Officers investigating claims submitted by employees, will be required to follow the Ministry’s policy. It will be interesting to see whether labour arbitrators or the Ontario Labour Relations Board will confirm the Ministry’s position.

Conclusion

As the COVID-19 pandemic evolves, the application of IDEL will continue to be an issue for employers to consider and apply. Schools and daycares are currently open, but that may change depending on whether there is a significant rise in infection rates. In addition, with continued travel restrictions, self-isolation requirements and potential infections, employers should plan for employees to be absent on IDEL for many different reasons.

Employers who are unable to recall employees due to a downturn in business caused by COVID-19 currently can benefit from what is essentially an extended temporary layoff period under Deemed IDEL.

If you have any questions regarding IDEL, please contact us at ahunter@hlllp.ca.

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