

## COVID-19 UPDATE FOR BUSINESSES IN THE DEVELOPMENT INDUSTRY

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COVID-19 has had a significant impact on Canadian workplaces. This article addresses some of the pressing issues facing the development industry and the most recent developments and announcements from our governments.

### **CAN I STILL OPERATE MY BUSINESS (aka AM I AN ESSENTIAL SERVICE)?**

The provincial government published its list of essential services on March 26<sup>th</sup>. Construction work (including construction firms, skilled trades and professionals, construction and light industrial machinery and equipment rental) and critical infrastructure service providers are deemed an “essential service”. Essential services are workplaces that are encouraged to stay open by the provincial government. Notwithstanding this designation, essential services must adapt their workplace to meet the standards and orders required by the Provincial Health Officer.

A list of essential services can be found here: <https://www2.gov.bc.ca/gov/content/safety/emergency-preparedness-response-recovery/covid-19-provincial-support/essential-services-covid-19#non-health>

Non-essential workplaces are permitted to remain open provided they comply with the standards and orders established by the Provincial Health Officer, and they have not otherwise been ordered to shut down (e.g., bars and hair salons).

While the distinction between essential and non-essential services appears arbitrary (i.e., both are permitted to remain open provided they comply with the orders of the Provincial Health Officer), the distinction may become important if the government orders additional businesses to suspend operations during the state of emergency. In this scenario, it is more likely that the government will order the closure of non-essential workplaces.

Workplaces deemed essential services in the current context differ from workplaces designated as essential services under the *Labour Relations Code*. The latter is narrower and requires unionized employees to provide basic services during a strike or lockout.

### **EMPLOYMENT ISSUES IMPACTING THE DEVELOPMENT INDUSTRY**

#### **Layoffs**

Although the terms “layoff” and “termination” are sometimes used synonymously, they are separate concepts. A layoff is temporary. The employee is expected to come back to work following a brief hiatus. A termination of employment is final.

With respect to temporarily laying off employees, the British Columbia *Employment Standards Act*, provides that a temporary layoff occurs where an employee’s weekly working wages are reduced by 50%. A layoff is only permitted where:

- The layoff is part of an employment contract
- The layoff is a normal part of the industry; or
- The employee agrees to the layoff.

A temporary layoff is not indefinite. Temporary layoffs can be up to 13 weeks in a 20-week period. Any layoff in excess of that amount results in a termination of employment. Large employers will want to pay attention to the length of a layoff and number of employees who are laid off as the termination of more than 50 employees in a two-month period results in additional liability under the group termination provisions of the *Employment Standards Act*.

Temporary layoffs are unpaid unless a collective agreement, workplace policy or employment agreement states otherwise. However, employees who have been temporarily laid off are entitled to collect employment insurance benefits. An employer must issue a Record of Employment for employees who are temporarily laid off.

The permissibility of a layoff is going to differ in every workplace. Notwithstanding the *Employment Standards Act*, a layoff – unless agreed to by the parties – may result in a constructive dismissal (i.e., termination of employment) at common law as employees generally have a right to work. Similarly, collective agreements may not permit a temporary layoff. Given the potential severance obligations, we strongly encourage employers to get legal advice if they intend to layoff a portion of their workforce.

### **Prohibition against terminating employees after quarantine and new sick leave benefits for employees**

The *Employment Standards Act* was amended to provide job protection to persons who are ill, need to self-isolate, need to care for their child or other dependent, or whose employer is concerned that the employee may expose others to risk as a result of the COVID-19. An employer must not request, and an employee is not required to provide, a medical note substantiating the absence.

The *Employment Standards Act* was also amended to provide employees with up to three days of annual unpaid leave for personal illness or injury after 90 days of employment.

The amendments followed a three-hour emergency session at the legislature and are retroactive to January 27, 2020.

Both amendments are “leaves” under the *Employment Standards Act*. Employees who take such leaves are provided with the same protections as employees who avail themselves of other statutory leaves, such as pregnancy and parental leaves. An employer must place an employee in the position the employee held before taking leave or in a comparable position upon an employee’s return to work. Given this change, employers will want to exercise caution when terminating a person’s employment who has recently been on leave as a result of COVID-19.

### **Terminations of Employment in the Development Industry**

If a termination of employment is deemed necessary, employees are entitled to notice or pay in lieu of notice of termination. The *Employment Standards Act* expressly states that notice or pay in lieu of notice

under that legislation is not applicable to employees employed at one or more construction sites by an employer whose principal business is construction. Notwithstanding this, not all employees employed in the construction industry will satisfy the exception for construction employees (for example, employees who work in an office at a construction firm). Further, regardless of whether an employee meets the “construction work” exemption, employers likely have additional severance obligations under contract or the common law.

Employers will also want to be aware that the *Workers Compensation Act* prohibits employers from retaliating against workers who raise a health and safety issue in the workplace. Given this and the new leave protections outlined above, employers will want to be careful to ensure that the reason for termination is not in any way related to the employee expressing a concern about health and safety in the workplace – regardless of whether that concern is expressed on the worksite or in the office.

## **TENANCY ISSUES**

### **Moratorium on Evictions**

The provincial government announced that it is placing a moratorium on evictions during the state of emergency. The government is prohibiting landlords from issuing “a new notice to end tenancy for any reason.” Landlords are permitted to apply to the Residential Tenancy Branch for a hearing where an eviction is necessary to protect health and safety or prevent undue damage to property. The government has not fully outlined the extent of this moratorium but, given the broad language used in its press release, it can be assumed that this covers tenancies that end as a result of the termination of employment. Employers should exercise caution if evicting a resident caretaker following the termination of employment.

### **Rent Freeze**

The provincial government announced a freeze on annual rent increases during the state of emergency.

### **Rent Subsidy**

The provincial government announced a new temporary rental supplement of up to \$500 per month for renters unable to cover their rental expenses as a result of COVID-19. The supplement will be paid directly to landlords and is administered by BC Housing. The details have not been fully announced but renters will be able to apply online for the supplement shortly.

## **GOVERNMENT RELIEF**

### **Provincial Government Initiatives**

On March 23<sup>rd</sup>, the British Columbia government announced a \$5-billion economic relief plan to support families, businesses and economic recovery in response to COVID-19. A centerpiece of the plan is a

\$1,000 payment to workers who have been laid off, those who are sick or quarantined and those who have had to stay home to care for their children or sick family members as result of COVID-19. Individuals receiving employment insurance will be eligible to apply for this benefit.

As part of its economic relief plan, the province allocated \$2.2 billion in relief to help businesses recover after the outbreak. Details of how the \$2.2 billion will be dedicated have not been articulated as of this writing.

Additional aspects of the economic action plan impacting businesses include:

- Permitting businesses with a payroll over \$500,000 to defer their employer health tax payments until Sept. 30, 2020. Businesses with a payroll under this threshold are already exempt from the tax;
- extending tax filing and payment deadlines for the provincial sales tax, municipal and regional district tax on short-term accommodation, tobacco tax, motor fuel tax and carbon tax until Sept. 30, 2020; and
- delaying the scheduled April 1 increase to the provincial carbon tax, as well as the new PST registration requirements on e-commerce and the implementation of PST on sweetened carbonated drinks until September 30, 2020.

### Federal Government Initiatives

The Federal Government recently released its COVID-19 Economic Response Plan. A key feature of the plan is a 75% wage subsidy for societies and small and medium businesses. Last week, the Federal Government announced a 10% wage subsidy. This amount was criticized for being insufficient. In response, the federal government announced that it was increasing the amount of the wage subsidy to 75% to encourage employers to retain employees. Companies that experience a drop of at least 30% revenue may be eligible for the wage subsidy which will cover 75% of an individual’s salary up to \$58,700 (i.e., up to \$847 per week).The subsidy is slated to last for up to 3 months, retroactive to March 15, 2020. Additional details about the subsidy (including eligibility and the application process) are expected early this week. However, the government has stated that the number of persons employed will not determine eligibility.

Other features of the plan for businesses and employees are in the below table:

Initiative	Impact
Extending the Work-Sharing Program from 38 weeks to 76 weeks	Work-Sharing is a program that helps employers and employees avoid layoffs when there is a temporary decrease in business activity beyond the control of the employer. The program provides employment insurance benefits to eligible employees who agree to reduce their normal working hours and share the available work while their employer recovers.

Canada Emergency Response Benefit	A taxable benefit of \$2,000 a month for up to four months to eligible individuals who have lost income as a result of COVID-19.
Business Tax Deferral	Businesses may defer the payment of any income tax that becomes owing on or after March 18 and before September 2020 until after August 31, 2020.
Business Credit Availability Program	Export Development Canada and the Business Development Bank of Canada will provide more than \$10 billion in direct lending and other types of financial support at market rates to eligible businesses. It will provide interest-free loans of up to \$40,000 to small business and not-for profits to cover expenses during the pandemic.

Pushor Mitchell LLP is a full-service law firm with lawyers specializing in the areas of law impacting your business. We are happy to assist with any questions you may have about the effect of COVID-19 on the workplace.

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Colin advises and represents employers in labour and employment law, workers' compensation, occupational health and safety, privacy and human rights. He also assists clients with commercial litigation matters including shareholder disputes.

He takes pride in providing responsive, methodical and common-sense legal advice that assists clients in achieving their goals. He has appeared as counsel at all levels of court in British Columbia, the Federal Court, collective agreement grievance arbitrations and various administrative tribunals, including the Human Rights Tribunal, Employment Standards Tribunal, British Columbia Labour Relations Board, Workers' Compensation Board and Liquor Control and Licensing Branch.

Colin frequently presents and publishes on workplace law issues and conducts workplace investigations. He also regularly drafts a variety of employment-related documents including employment contracts, restrictive covenants, handbooks, and bullying and harassment policies.