

Features | June 2020

Amendments to the Employment Standards Act in Response to the COVID-19 Pandemic

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Both the provincial and federal governments have made sweeping changes in response to the COVID-19 pandemic in an effort to support businesses and individuals. One of those changes includes the BC government's amendments to the Employment Standards Act [RSBC 1996], c. 113 (the "ESA") with the aim to support employees during the pandemic and in the long term.

In late March of this year, the BC government introduced and passed Bill 16 — 2020: Employment Standards Amendment Act (No. 2), 2020, which provides employees with unpaid, job protected leave due to illness or injury. It also outlines a new section that is specifically related to leave during the COVID-19 pandemic.

Illness or injury leave

Section 49.1 of the *ESA* states that after 90 days of consecutive employment with an employer, an employee is entitled to up to three days of unpaid leave in each employment year for personal illness or injury. The legislation requires the employee to provide the employer with sufficient proof of being entitled to illness or injury leave.

This section will stay in place after the COVID-19 pandemic is over.

COVID-19-related leave

Section 52.12 specifically explains the circumstances under which an employee qualifies for leave related to the COVID-19 pandemic.

An employee is entitled to unpaid leave under this section if:

- the employee has been diagnosed with COVID-19 and is acting in accordance with the instructions or advice of a medical health officer, or advice of a medical practitioner, nurse practitioner or registered nurse;
- the employee is in quarantine or self-isolation in accordance with an order of the provincial health officer, an order under the Quarantine Act (Canada), guidelines of

the British Columbia Centre for Disease Control, or guidelines of the Public Health Agency of Canada;

- the employer, due to the employee's exposure to others has directed the employee not to work;
- the employee is providing care to an "eligible person" (defined below) because of the closure of a school or daycare of similar facility;
- the employee is outside the province and cannot return to BC because of travel or border restrictions; or
- a prescribed situation exists relating to the employee.

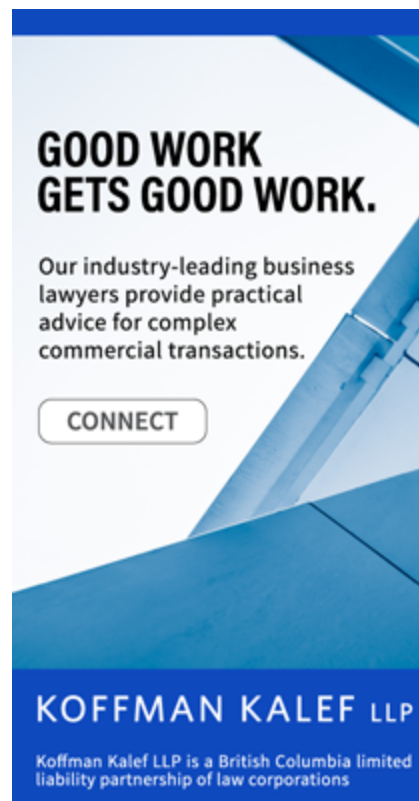
An "eligible person" includes: (a) a child who is under the day-to-day care and control of the employee; (b) a person who is 19 years of age or older, and is unable, because of illness, disability or another reason, to obtain the necessities of life or withdraw from the charge of the person's parent or former guardian, and is under the day-to-day care and control of the employee, who is the person's parent or former guardian; and (c) a prescribed person.

The leave for an employee is not limited in time, but if requested by their employer, an employee must, as soon as practicable, provide the employer with reasonably sufficient proof of the circumstance that applies to the respective employee. The employer must not request, and an employee is not required to provide, a note from a medical practitioner, nurse practitioner, or registered nurse.

These provisions are in force from January 27, 2020. Thus, if an employer terminated an employee due to one of the COVID-19 circumstances described above, between January 27, 2020 and March 23, 2020, the employer must offer the employee re-employment in the same or a comparable position.

Unlike Section 49.1, which pertains to illness or injury leave, the provisions under Section 52.12 are temporary measures that are tied to the COVID-19 emergency and they will be repealed when the pandemic is over.

It is important for employees and employers to be aware of their rights and obligations under the latest *ESA* amendments, particularly, given the potential liability which may arise if one party fails to follow these provisions. As this area of law is in a state of almost constant growth, it is crucial that employment law counsel stays abreast of developments and, where practical, communicate the same to their clients. For business owners and employees struggling with the ever-changing realities of their duties and obligations at this time, the revised *ESA* is one more set of messages that needs to be clearly communicated by both the legal profession and the government.



NEXT

COVID-19: How the BC Provincial Court is Adapting to the Pandemic

