

INFECTIOUS DISEASE EMERGENCY LEAVE (IDEL): Job-Protected Leave of Absence (October 25, 2021)

This information is solely for informational purposes. We urge you to consult with us at info@connectingottawa.com if you have any specific legal questions about a client's situation.

WHAT IS IDEL?	<p>On March 19, 2020, the <i>Employment Standards Act</i> (ESA) was amended to include an unpaid, job-protected infectious disease emergency leave (IDEL) (see <i>Note 1</i>).</p> <ul style="list-style-type: none"> • The only disease for which IDEL applies at this time is COVID-19. • IDEL is retroactive to January 25, 2020 (see <i>Note 2</i>). <p><i>Note 1: Most employees and employers in Ontario are covered by the ESA, whether they work full-time, part-time, are students, temporary help agency assignment employees, or casual workers. IDEL does not apply to independent contractors or those whose employment falls under federal jurisdiction: employees working for banks, airports, inter-prov and int'l rail, and federal Crown corps.</i></p> <p><i>Note 2: You can retroactively designate absences from work between January 25, 2020 and March 18, 2020, as IDEL if the reason for the absence(s) meets the criteria below. Absences <u>do not</u> have to be taken consecutively.</i></p>
WHO CAN TAKE IDEL?	<p>You can take IDEL if you cannot do your job for any of these reasons:</p> <ul style="list-style-type: none"> • You are under medical investigation, supervision, or treatment for COVID-19 in Ontario or in another province, territory, or country (see <i>Note 3</i>). • The employee is following a COVID-19 related order issued under section 22 or 35 of the Health Promotion and Protection Act. • You are in quarantine, isolation (voluntary or involuntary), or are subject to a control measure, <u>and</u> the quarantine, isolation, or control measure was implemented as a result of information or directions related to COVID-19 issued: <ul style="list-style-type: none"> • By a public health official, including the Chief Medical Officer of Health or the Associate Chief Medical Officer of Health, a medical officer of health or an associate medical officer of health • By a doctor or nurse in Ontario or in the jurisdiction where the employee is located and who has provided care or treatment to the employee, whether or not the care or treatment was related to COVID-19, such as an employee who has an immune deficiency was told by their physician to self-isolate and not go to work during the infectious disease outbreak • By Telehealth Ontario • By the government of Ontario or Canada • By a municipal council, or a board of health – including an employee of a board of health • To the public, in whole or in part • To one or more people through any means, including print, electronic, or broadcast • You are told to self-isolate by your employer because you might expose others to COVID-19 (see <i>Note 4</i>). • You are caring or supporting any individuals listed below because of COVID-19 (see <i>Note 5</i>). • You are caring for your child whose school or daycare closed because of COVID-19 or because you did not send your child to school or daycare out of fear the child would be exposed to COVID-19. • You are caring for a child who was sick with COVID-19 or who stayed home because of COVID-19 protocols at the school or daycare (e.g. the child was showing signs of illness and the school or daycare advised the child to isolate and get tested before returning). • You are caring for your child because you were concerned that the symptom(s) may relate to COVID-19 and chose to keep them home as a precautionary measure (see <i>Note 6</i>). • You cannot be <u>reasonably</u> expected to travel back to Ontario due to travel restrictions (see <i>Note 7</i>). • You are subject to an order that relates to COVID-19 under the <i>Reopening Ontario (A Flexible Response to COVID-19) Act, 2020</i> (ROA) (see <i>Note 8</i>). • You are a non-unionized employee whose employer has temporarily reduced or eliminated your hours of work because of COVID-19 and are deemed to be on IDEL (see section below). <p><i>Note 3: Examples include: due to having contracted COVID-19 or because of mental health reasons relating to COVID-19. An employee is not performing the duties of their position because they left work in order to get a COVID-19 vaccination or are experiencing a side effect from the COVID-19 vaccination.</i></p> <p><i>Note 4: For example: where an employee is told to stay home because they recently travelled internationally and the employer is concerned that they may expose others in the workplace to COVID-19.</i></p> <p><i>Note 5: You can provide care or support in Ontario or in another province, territory, or country.</i></p> <p><i>Note 6: Other examples include: providing care to a child because their babysitter is in quarantine or isolation because of COVID-19, or is sick because of it, or providing care to a child because their summer camp closed down due to COVID-19.</i></p> <p><i>Note 7: This provision applies only when the employee is caught by travel restrictions while outside of Ontario.</i></p> <p><i>Note 8: The ROA order must be directed at the employee, either individually, or as part of a group. For example: an order that requires restaurants to close down applies to owners of restaurants - not employees even though they are affected by the closure. However, this does apply, for example, to an employee who is subject to a ROA order that prohibits employees who work in a long-term care home from also working for another health service provider. If an employee who has two jobs – one at a long-term care home and one at a retirement home – who is not working at one of the homes as a result of this order, is entitled to take IDEL from the employer that they are temporarily not working for.</i></p>

FOR MORE INFORMATION ON INFECTIOUS DISEASE EMERGENCY LEAVE:

<https://www.ontario.ca/document/your-guide-employment-standards-act-0/infectious-disease-emergency-leave>

WHO CAN I PROVIDE CARE AND SUPPORT TO?	<p>You can provide care or support to any of these individuals because of a matter related to COVID-19:</p> <ul style="list-style-type: none"> • Your spouse (of the same or opposite sex, whether or not married) • A parent, step-parent, or foster parent of you or your spouse • A child, step-child, or foster child of you or your spouse • A child who is under legal guardianship of you or your spouse • Your brother, step-brother, sister, or step-sister • A grandparent, step-grandparent, grandchild, or step-grandchild of you or your spouse • Your brother-in-law, step-brother-in-law, sister-in-law, or step-sister-in-law • A son-in-law or daughter-in-law of you or your spouse • An uncle or aunt of you or your spouse • A nephew or niece of you or your spouse • The spouse of your grandchild, uncle, aunt, nephew, or niece • A person who considers you to be like a family member • Any individual prescribed as a family member for the purposes of this section (currently, there are no additional prescribed family members)
WHAT ARE MY RIGHTS IF I TAKE IDEL?	<p>You are generally entitled to the same rights as a person who takes pregnancy or parental leave. These rights, which apply to absences from January 25, 2020 onward, include:</p> <ul style="list-style-type: none"> • Right to reinstatement of the same job, or a comparable one if your old job no longer exists (see <i>Note 9</i>). • Right to be free from penalty for taking or asking about IDEL. • Right to continue to participate in benefit plans, unless you tell your employer in writing that you will not continue to pay your own share of the premiums. • Right to earn credits toward length of employment, length of service, and seniority. <p><i>Note 9: If you are dismissed for legitimate reasons that are totally unrelated to the fact that you took IDEL, then your employer does not have to reinstate you. For example: your workplace goes out of business or was forced to downsize during your leave.</i></p>
HOW MUCH NOTICE DO I HAVE TO GIVE MY EMPLOYER?	<p>You must generally advise your employer - either in writing or verbally - before taking IDEL. If you cannot give advance notice, you must inform them as soon as you can after starting IDEL (see <i>Note 10</i>).</p> <p>Your employer cannot require you to provide a medical note from a physician or nurse as evidence (see <i>Note 11</i>). However, your employer may require you to provide evidence of your eligibility for IDEL that is reasonable in the circumstances and at a time that is reasonable in your situation. For example: if you are in isolation or in quarantine, it is not reasonable to require evidence during the quarantine or isolation period if you would have to leave home to obtain the evidence (see <i>Note 12</i>).</p> <p>If it is reasonable in the circumstances, evidence may take many forms, such as a:</p> <ul style="list-style-type: none"> • An email from a pharmacy or from a public health department indicating the employee's appointment date and time to receive a COVID-19 vaccination. • A copy of the information issued to the public by a public health official advising of quarantine or isolation (ex. a print out, screen shot, or recording of the information). • A copy of an order to isolate that was issued to the employee under s. 22 or s. 35 of the <i>Health Protection and Promotion Act</i>. • A note from your daycare provider stating that the centre is closed because of COVID-19. <p>What is reasonable in the circumstances depends the duration of the leave; whether there is a pattern of absences; or whether any evidence is available and the cost of the evidence.</p> <p><i>Note 10: While you are required to tell your employer before starting IDEL (or, if this is not feasible, as soon as possible after starting the leave), you will not lose the right to take IDEL if you fail to do so. Also, note that an employee who is deemed to be on IDEL is not required to advise their employer of the deemed leave. They are simply considered to be on leave.</i></p> <p><i>Note 11: Employers are not prohibited from requiring medical notes in the context of issues such as return-to-work situations or for accommodation purposes.</i></p> <p><i>Note 12: If electronic evidence can be sent from home, it may be reasonable to require you to send it during isolation or quarantine.</i></p>
HOW LONG CAN I TAKE IDEL?	<p>There is no maximum IDEL days. However, you have the right to take IDEL only for as long as the event that triggered your entitlement to this leave lasts. After the triggering event is over, you are obligated to return to work. You also must return to work once COVID-19 stops being a designated infectious disease.</p>
WHAT IF I AM FIRED?	<p>Your employment cannot be terminated for taking IDEL for any of the reasons noted above. If you are terminated for taking IDEL you can be reinstated to the job you recently held if it still exists (or to a comparable job if it doesn't) by filing an ESA claim with the Ministry of Labour: https://www.labour.gov.on.ca/english/es/forms/claim.php.</p>
DOES MY EMPLOYER HAVE TO PAY ME IF I TAKE IDEL?	<p>Your employer is not required to pay you while you're on IDEL. However, you can use your sick days, vacation time, or personal time if you have any. You can also apply for federal government financial supports if you meet the eligibility criteria (see <i>Note 13</i>).</p> <p><i>Note 13: The right to take IDEL is not the same as the right to the payment of employment insurance benefits or federal government supports. You are entitled to IDEL whether or not you have applied for or qualified for federal benefits or supports.</i></p>

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DO I EARN VACATION TIME ON IDEL? WHAT ABOUT PUBLIC HOLIDAYS?	<p>Because there is no break in the employment relationship while an employee is on IDEL, the time on leave counts toward the completion of a vacation entitlement year or stub period.</p> <p>Where an employee's contract provides that "paid vacation" is earned through active service (for example, 1.5 paid vacation days for each month of service or three weeks paid vacation for each year of service) an employee on leave may not earn either vacation time and/or pay while on leave. However, at the end of the vacation entitlement year or stub period, the employer must ensure the employee receives the greater of what was in fact earned under the contract and the minimum vacation time and vacation pay they would have earned under the ESA.</p> <p>Under the ESA, employees are not entitled to public holiday pay entitlements if they fail without reasonable cause to work all of their last regularly scheduled day of work before the public holiday or all of their first regularly scheduled day of work after the public holiday. This is referred to as the "last and first rule."</p> <p>An employee who is on IDEL when a public holiday occurs will meet the "first and last rule" if they worked their last scheduled day of work before the leave and their first scheduled day of work after the leave. If the employee failed to work either of those days, they will meet the "first and last rule" if they had reasonable cause for failing to work on the day.</p>
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INFECTIOUS DISEASE EMERGENCY LEAVE (IDEL): Update to ONTARIO REGULATION 228/20

WHAT IS THE NEW REGULATION?	<p>The Ontario government extended Regulation 228/20 until January 1, 2022. Therefore, during the period March 1, 2020 until January 1, 2022, a non-unionized employee is deemed to be on job-protected IDEL any time their hours of work are temporarily reduced or temporarily eliminated due to COVID-19, and an employee is not considered to be laid off or constructively dismissed under the <i>Employment Standards Act</i> (ESA) if their employer temporarily reduces or temporarily eliminates their hours of work or wages for reasons related in whole, or in part, to COVID-19. The rights that apply to IDEL also generally apply to deemed leave, including the right to reinstatement, to be free from penalty, and to earn credits for length of employment, length of service and seniority.</p> <p>Beginning on January 2, 2022:</p> <ul style="list-style-type: none"> • Employees in this situation are no longer deemed to be on IDEL (see Note 14). • The rules around constructive dismissal will resume. This means a significant reduction or elimination of an employee's hours of work or wages may be considered a constructive dismissal, even if it was done for reasons related to COVID-19. • The ESA regular rules around temporary layoff will also resume, and an employer can place an employee on a temporary layoff for up to 35 weeks, thus moving their return date to as late as September 2022 (see Note 15). • Employees will be able to file termination and severance claims with the Ministry of Labour, Training and Skills Development based on their employer temporarily reducing or temporarily eliminating their wages and/or hours of work on or after January 1, 2022, even if the reduction or elimination is for reasons related to COVID-19. <p>An employee deemed to be on IDEL is exempt from the notice of leave requirements for IDEL (see section on notice requirements for IDEL above).</p> <p>Even though an employee is deemed to be on IDEL under this regulation, they may qualify for, and take, IDEL for another reason. They can also take any other leave under the ESA that they may qualify for.</p> <p>*IMPORTANT NOTE: Thanks to two cases with completely different outcomes (<i>Coutinho v Ocular Health</i> and <i>Taylor v Hanley Hospitality</i>), it is now unclear whether deemed IDEL bars a non-unionized employee from pursuing a constructive dismissal claim and their full severance under common law (see Note 16). Any person who wants to know more about their right to pursue a constructive dismissal claim under the common law should seek legal advice from an employment lawyer.</p> <p><i>Note 14:</i> However, IDEL may remain available to unionized and non-unionized employees after January 1, 2022. Paid infectious disease emergency leave is also available until December 31, 2021.</p> <p><i>Note 15:</i> Temporary layoffs that exceed the permitted length of time under the ESA can result in costly payouts for employers. If an employee is laid off for a period longer than a temporary layoff (13 or 35 weeks), the employer is considered to have terminated their employment and the employee would generally be entitled to termination pay (and in certain cases severance pay).</p> <p><i>Note 16:</i> A constructive dismissal may occur when an employer makes a significant change to a fundamental term or condition of an employee's employment (like significantly reducing their hours of work or wages) without the employee's consent. The employee would have to resign in response to the change within a reasonable period of time in order for the employer's actions to be considered a termination of employment for purposes of the ESA.</p>
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