

■ Employment Law Update: Return to 'Normal' Operations and Ongoing Lessons from Covid

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September 23rd, 2020



ALEXANDER
HOLBURN

AGENDA

1

Update Legislative Changes
(Provincial + Federal)

2

Return to the Office

3

Changes to Employment +
Downsizing

4

Q&A

■ Update Legislative Changes (Provincial + Federal)



New Changes to BC Employment Standards

Changes to BC Employment Standards



Temporary Layoff Ends



COVID-19 Leave Continues



Domestic Violence Leave Added



Minimum Wage Increased



New Regulations for Federally Regulated Employers

Workplace Harassment and Violence Prevention Regulations

- For federally regulated employers who are subject to the Canada Labour Code.
- Will replace Part XX (violence prevention) of the Canada Occupational Health and Safety Regulations.
- New regulations in part address fragmentation between violence and sexual harassment under current legislation.

Changes Under the Regulations

- ✓ Workplace Violence and Prevention Policy
- ✓ Workplace Assessment
- ✓ Emergency Procedures
- ✓ Training
- ✓ Support Measures
- ✓ New Resolution Process
- ✓ Records and Reports



Changes to Federal Benefit Programs

Topics

01

CEWS Changes

02

Transition from CERB to EI

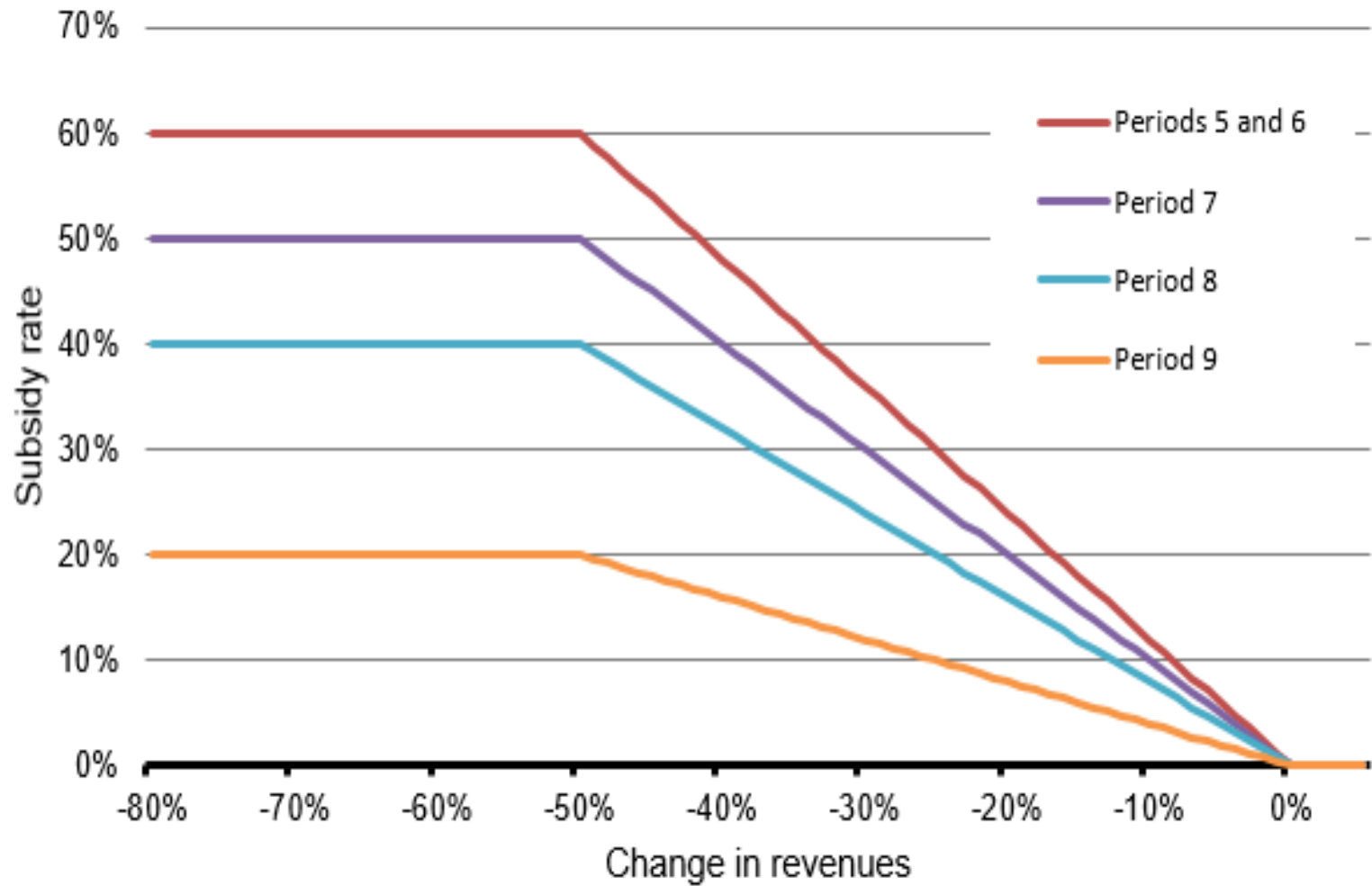
03

New Programs

CEWS Changes

- CEWS has been extended until November 21, 2020.
- Eligible employers who had any drop in revenue can now qualify for the wage subsidy as of the claim period which began July 5, 2020. However, subsidy will be more modest for most.
- Base subsidy and top-up subsidy
- Safe Harbour Rule





**Department of Finance Website:
Rate Structure of Base CEWS, without the Top-Up**

Transition from CERB to EI

**28
Weeks**

CERB extended to
28 weeks

9/27/20

A new simplified EI program
will be effective September
27, 2020

New, temporary measures to help access:

120 HRS

120 hours of work
required to qualify

\$400

Minimum benefit rate of
\$400 per week

**26
Weeks**

At least 26 weeks of
regular benefits

New Programs Effective September 27, 2020

03

1

Canada Recovery Benefit

- Taxable benefit of \$400/week for up to 26 weeks
- Not eligible for new simplified EI
- Gig economy or self-employed individuals.

2

Canada Recovery Sickness Benefit

- Taxable benefit of \$500/week for up to 2 weeks
- Sick or must self-isolate due to COVID-19
- Cannot be receiving paid leave for same period.

3

Canada Recovery Caregiving Benefit

- Taxable benefit of \$500/week for up to 26 weeks per household
- Due to COVID-19 related closures, must care for a child under 12 or a dependent family member
- Cannot be receiving paid leave for same period.

Return to the Office

Update: Plans for a Safe Workplace

1

Safety Plans: Developed and in place.

2

Requirements: Involvement of workers, health and safety committee members and supervisors; posted in workplace; communication and training; monitor and update.

3

Inspections: In person or call from officer; be ready with copy of plan and list of steps taken to protect workers.

4

Questions: Policy to address illness in the workplace (reporting; tracing; cleaning)? Be prepared to show steps taken to complete, implement and monitor plan.

Anxiety and Mental Health



Mental Health: Should this be a concern for employer?



Preference vs. Justified Concern?
Is public transit a justified consideration?



R. 3.12: Possible work refusal due to safety concerns

Statutory Leaves of Absence Available to Employees (BC):



COVID-19 Leave: unlimited time until pandemic is over; to care for child or dependent adult; or diagnosed, quarantined or self isolation



Personal Illness or Injury: 3 days per year after 90 days of employment



Family Responsibility Leave: 5 days per year to care for child



Others (Critical illness; compassionate care)



Leaves unpaid

Work from Office or Home?



Dealing with general refusal of employee to return to office.



Specific concerns with workplace safety? Discuss and remedy.



Concerns with commute or office building outside of employer control? Support, and refer to guides.



Request to work from home? Consider willingness to allow for some or all days, and on what terms.



Need for health and safety policy for working from home (assessment / reporting).

Remote Work

If allowed, develop or review policy for safe (home) workplace.

Assess hazards; ergonomic considerations; evacuation and contact in emergency; report injuries; procedure if employee cannot be contacted; check in if work alone; training.

Duty to Accommodate

- Substantive and procedural component to the duty - take requests seriously, gather information, review and decide
- Discuss request and reasons - why is required? Other options considered?
- Request supporting documents - may request medical note (unless for statutory COVID leave)
- Be reasonable and individual - similar requests treat same, but individual assessment; Do duties require office attendance at this time?

Family Status Accommodation

- Family status accommodation under BC HRC
- Test: change to term or condition of employment result in serious interference with a substantial parental or other family duty
(*Campbell River*)
- Envirocon *Environmental* - requirement to manage project in Manitoba interfering with desire to stay at home with new born not violation
- *Campbell River* - son's specific needs due to behavioural issues required mother to care and shift change serious interference
- Options: work from home; modify duties (and pay?); time limited; layoff or termination/resignation

■ Changes to Employment + Downsizing

Review of Acceptable Changes – Lay-offs

Employment Standards Act:

“Temporary Layoff” means...

- (a) in the case of an employee who has a right of recall, a layoff that exceeds the specified period within which the employee is entitled to be recalled to employment, and
- (b) in any other case, a layoff of up to 13 weeks in any period of 20 consecutive weeks;

“Termination of Employment” Includes a layoff other than a temporary layoff

REVIEW OF ACCEPTABLE CHANGES - LAYOFFS

Common Law:

... it is difficult to understand how an "indefinite term lay-off" does not amount to "repudiation by the employer of the employment contract". In an employment contract, the essential elements are the offer by the employee to work and by the employer to provide work and to pay compensation. Absent a provision permitting the employer to suspend the obligation to provide work for an indefinite term... the effect on an employee is really no different than in a termination ...

...the employer is not to be permitted to avoid responsibility for providing the employees with the reasonable periods of notice long recognized to be the right of employees under indefinite term contracts, even in times of economic adversity, by the simple expedient of calling the termination a "lay-off until further notice", or even a "temporary lay-off until further notice", rather than what it really is, the cessation of the employee's rights under the contract until the employer decides otherwise.

Review of Acceptable Changes – Lay-offs

Employment Standards Act

Sections 63 and 64 (termination notice and pay obligations) do not apply to an employee ... employed under an employment contract that is impossible to perform due to an unforeseeable event or circumstance...

Interpretation Guidelines

If a business closure or staffing reduction is directly related to COVID-19 and there is **no way** for employees to perform their work in a different way ... the exception may apply in terminations resulting from the COVID-19 emergency.

This exception is **not** automatic for all layoffs that have occurred during the time of the COVID-19 emergency. If an employer terminates an employee for reasons that are not **directly related** to COVID-19 or if the employee's work could still be done ... the exception would not apply.

REVIEW OF ACCEPTABLE CHANGES - LAYOFFS

Common Law:

Frustration occurs when a situation has arisen for which the parties made no provision in the contract and performance of the contract becomes "a thing radically different from that which was undertaken by the contract"....

The court is asked to intervene ... to relieve the parties of their bargain because a supervening event ... has occurred without the fault of either party. For instance, in the present case, the supervening event would have had to alter the nature of the appellant's obligation to contract with the respondent to such an extent that to compel performance despite the new and changed circumstances would be to order the appellant to do something radically different from what the parties agreed to under the tendering contract....

Review of Acceptable Changes – Lay-offs

Employment Standards Act

“**week of layoff**” means a week in which an employee earns less than 50% of the employee's weekly wages, at the regular wage ...

Common Law

... the failure to pay an employee up to approximately 9-10% of his or her average salary without more does not amount to a fundamental breach: A failure to pay between 14-17% can amount to a fundamental breach, but only in conjunction with some other significant unilateral change to the employment contract: A reduction in remuneration amounting to anywhere between 20-46% (and presumably anything greater) by itself has been held to amount to a fundamental breach.

Pavlis v. HSBC Bank Canada, 2009 BCSC 498

 **Questions?**

Thank you



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