



COVID-19 Pandemic: Fact Sheet for Dentists and Dental Practices



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As we are sure you are aware by now, as a result of the risks and challenges presented by COVID-19, the Royal College of Dental Surgeons of Ontario (the “RCDSO”) has strongly recommended that **all non-essential and elective dental treatment should be suspended** immediately until at least the first week of April. The RCDSO has advised that all practices should limit services to emergency cases only. We note that dental regulators in other provinces have issued similar statements, including the British Columbia College of Dental Surgeons, the Alberta Dental Association & College, the New Brunswick Dental Society and the Ordre des dentistes du Québec, while the Manitoba Dental Association has said that dentists may choose to avoid non-essential and elective procedures.

Feedback from the RCDSO indicates that what constitutes an emergency case is being narrowly interpreted to include issues such as oral-facial trauma, significant infection, and prolonged bleeding or pain which cannot be managed by over-the-counter medications. Further, the RCDSO is stressing that, in order to protect staff and reduce the spread of the virus, **only offices which have proper personal protective equipment for staff, including N-95 masks, should be treating patients displaying symptoms of COVID-19.**

Even in the case of asymptomatic patients with dental emergencies, the RCDSO is recommending that dental professionals take proper contact/droplet precautions, maintain a 2-metre distance from the patient, collect a verbal history of the patient’s condition and, where possible, manage emergency cases by telephone.

Although these precautions are being taken with the intent of ensuring the health and safety of all dental professionals and their staff, the unfortunate side effect is that many dental offices will be experiencing a significant decrease in patients over the next several weeks.

The purpose of this document is to try to address some of the main questions and concerns you may have as an employer in the face of the COVID-19 pandemic. Since the situation is evolving so rapidly, we encourage you to follow our blog and, in particular, the post we have set up to track developments relating to COVID-19.

We hope that you will find this general information useful, but want to stress the importance of obtaining independent legal advice with respect to your individual circumstances.

We encourage you to contact our team so that we can provide you with advice regarding your particular situation.



IF I HAVE TO TEMPORARILY CLOSE MY PRACTICE, CAN I LAY OFF MY HYGIENISTS AND OTHER STAFF?

Under the *Employment Standards Act, 2000* (the “**ESA**”), employers can temporarily lay off employees for a period of up to 13 weeks (in some cases this can be extended to 35 weeks). However, although temporary layoffs are contemplated in the ESA, an employer is not permitted to lay off an employee unless the contract of employment between the parties explicitly or implicitly gives the employer the authority to do so.

For dentists, the first step is to review your employment agreements with staff to determine if a temporary layoff is available to you as an option. If you do not currently have employment agreements with your staff, or your agreements are silent with respect to layoffs, then you will need to ask your staff to agree to a temporary layoff. An employee’s agreement must be obtained before this option will be available to employers.

It is important to note that if your staff does not agree to a temporary layoff, you may have to consider terminating the employee’s employment and providing them with their entitlements on dismissal. We can work with you to address this and explain that the choice may be either a temporary layoff or permanent loss of employment.

In addition, you should be aware that if the layoff extends beyond the time limits specified by the ESA, the employee will be deemed to have been dismissed as of the first day of the layoff.

Just like oral hygiene,
prevention is the best cure.



WHAT IF I DON'T WANT TO LAY OFF MY EMPLOYEES, BUT WANT TO SUBSTANTIALLY REDUCE THEIR HOURS TO ACCOMMODATE EMERGENCY DENTAL CASES ONLY?

Some dental practices intend to remain open with reduced hours and staff. Depending on how significant the reduction is, this may still constitute a layoff as that concept is defined under the ESA. A reduction in hours will trigger a layoff in any week where the employee is receiving 50% or less of their regular or average weekly compensation. As a result, in a situation where a dentist wants to reduce their hygienists hours by more than 50%, this will still qualify as a layoff and the requirements set out above will apply.

If the reduction in hours is not so extensive to reach the 50% threshold, then it will not constitute a layoff under the ESA. However, it could still represent a significant change to an employee's terms of employment with the practice. It is important to understand that employers cannot unilaterally make substantial changes to a fundamental term or condition of an employee's employment. There must be a mutual agreement between the dentist and staff for any such changes to be effective.

In other words, your staff would need to agree to the reduction in their hours. If they refused to agree, and you implemented the changes anyway, the employee could pursue a claim of constructive dismissal. This would entitle them to all the same entitlements they would otherwise have on dismissal.

UPDATE: Employers who must reduce employee hours may wish to consider taking advantage of the EI Work Sharing Program, which provides EI benefits to workers who agree to reduce their normal working hours as a result of developments beyond the control of their employers, by extending the eligibility of such agreements to 76 weeks, easing eligibility requirements, and streamlining the application process. More information on the Work Sharing Program can be found [here](#).



CAN MY HYGIENIST REFUSE TO WORK ON THE BASIS THAT THE WORKPLACE IS UNSAFE DUE TO COVID-19?

In Ontario, employees are entitled to refuse work if they feel it is unsafe. If that happens, an employer is required to investigate the situation and advise the employee whether the safety risk has been resolved or not. If the employee continues to believe there is a safety concern, the Ministry of Labour can be asked to come in to investigate.

There must be reasonable and legitimate grounds for the employee to believe there is a safety risk in the workplace. If the employer has taken all reasonable safety precautions as recommended by the RCDSO to ensure the safety of their employees, there may not be a basis on which an employee could refuse to work. However, if, for example, a dentist wanted to take on an emergency case who was displaying symptoms of COVID-19, but the practice was not equipped with sufficient personal protective equipment or other resources to ensure the safety of the hygienist, there may be a legitimate objection. In that case, the dentist would need to address the safety issue before asking the hygienist to continue working.

Dentists should also be alert to the fact that some employees may have legitimate safety concerns as a result of their personal health or circumstances (for example, any employees who are immunocompromised). In these cases, you may have a duty to accommodate the employee up to the point of undue hardship.



IF I AM HANDLING EMERGENCY CASES, IT IS VITALLY IMPORTANT THAT I CAN COUNT ON MY HYGIENISTS AND STAFF TO SHOW UP TO WORK. CAN I DISMISS OR DISCIPLINE AN EMPLOYEE WHO CANNOT ATTEND AT WORK DUE TO COVID-19?

No. An employer cannot discipline or dismiss an employee who is unable to work as a result of COVID-19. This could constitute discrimination pursuant to the Ontario *Human Rights Code* (the “**Code**”). In addition, an employer is prohibited from repriming against an employee who must take time off work due to COVID-19.

A dentist may be able to dismiss an employee who is unable to work due to COVID-19 if they can demonstrate that accommodating the employee, whether in the workplace or by allowing them to take an unpaid leave of absence, would meet the standard of undue hardship.

UPDATE: On March 19, 2020, the Ontario government enacted the *Employment Standards Amendment Act (Infectious Disease Emergencies), 2020*, which expressly provides employees who cannot work due to COVID-19 with a right to take a job protected leave of absence.

CAN I REQUIRE A STAFF MEMBER TO STAY HOME DUE TO CONCERNS RELATING TO COVID-19? DO I HAVE TO PAY THEM DURING THIS TIME?

It depends on whether or not you have a legitimate reason to be concerned.

An employer is not entitled to arbitrarily prevent an employee from attending at work. Interfering with an employee’s ability to work and requiring that they remain at home without a valid reason can constitute a constructive dismissal.

In addition, treating an individual differently because of ethnicity, race or place of origin is prohibited by the Code. An employer cannot single out an employee, who otherwise has no additional risk factors, due to any of the protected grounds under the Code and require that they remain at home.



The Ontario Human Rights Commission recently released a [policy statement on COVID-19](#) which confirms the OHRC's position that the Code ground of disability is engaged in relation to COVID-19. As a result, negative treatment of employees who have, **or are perceived to have**, COVID-19, is discriminatory and prohibited under the Code.

Where an employee has not been advised by a medical or health professional to remain at home, they are entitled to attend at work. If an employer insists on the employee remaining at home, the employer will have to pay the employee for this time. Forcing an employee to take an unpaid leave when there is no indication that the leave is necessary could expose the employer to a claim for constructive dismissal and/or discrimination.

However, in circumstances where there is a legitimate safety risk in allowing the employee to return to work, including where a) the employee is displaying symptoms or is feeling unwell, b) the employee is returning from travel outside of Canada, or c) the employee has been in contact with someone who has traveled outside of Canada or who may have COVID-19, then the employer may be able to require that the employee remain home on an unpaid leave. You should explore all options, including allowing the employee to work remotely, as a best practice.

Negative treatment of employees who have, **or are perceived to have**, COVID-19, is discriminatory and prohibited under the *Human Rights Code*.



CAN I SEND MY STAFF HOME WITHOUT PAY IF THEY ARE DISPLAYING SYMPTOMS OF COVID-19 (I.E. COUGH, FEVER, DIFFICULTY BREATHING)?

Yes, as long as the symptoms warrant concern. An employee sneezing or coughing once or twice in the office will not justify an employer sending the employee home. You should at all times keep your obligations pursuant to the Code in mind, and only act when an employee's symptoms present a legitimate safety risk to other staff members, visitors or clients.

Where a dentist believes that a staff member is displaying symptoms of COVID-19, they can ask them to remain at home on an unpaid leave. However, as noted above, if the staff member is cleared to work by a medical professional, the dentist must allow them to return to work or make other arrangements, such as allowing the staff member to work remotely or keeping them off work on a paid leave.

IF I HAVE A STAFF MEMBER WHO IS NOT DISPLAYING SYMPTOMS BUT IS SELF-ISOLATING DUE TO RECENT TRAVEL, OR BECAUSE THEY MAY HAVE COME INTO CONTACT WITH SOMEONE WITH SYMPTOMS, ARE THEY ENTITLED TO STAY HOME? DO I HAVE TO PAY THEM DURING THIS TIME?

The Government of Canada is now recommending that anyone who is returning from travel anywhere outside of Canada self-isolate for 14 days. If a dentist is aware that one of their staff has recently returned from travel, or if a staff member alerts the dentist to a potential risk of infection, the dentist should allow the employee to remain at home on an unpaid leave.

This will assist you to maintain a safe working environment for other staff, while also providing accommodation to the employee who may potentially be impacted.



We do not recommend that dentists insist on medical notes from employees at this time. As noted by the CHRC in its policy statement: “Employers should be flexible and not overburden the health care system with requests for medical notes. Unnecessarily visiting medical offices increases further risk of exposure for everyone.”

UPDATE: The *Employment Standards Amendment Act (Infectious Disease Emergencies)*, 2020 amends the *Employment Standards Act, 2000* to provide unpaid, job-protected leave to employees who are in isolation or quarantine due to COVID-19, or those who need to be away from work to care for children because of school or daycare closures or to care for other relatives. This amendment states that:

“An employee is entitled to take a leave under clause (1.1) (a) for as long as he or she is not performing the duties of his or her position because of an emergency declared under section 7.0.1 of the Emergency Management and Civil Protection Act and a reason referred to in subclauses (1.1) (a) (i) to (iv), but, subject to subsection (6), the entitlement ends on the day the emergency is terminated or disallowed.”

The act also makes it clear that an employee will not be required to provide a medical note if they need to take this leave. However, the employer may require the employee to provide other evidence that is reasonable in the circumstances, at a time that is reasonable in the circumstances. This could include such requests as a note from the daycare or for evidence that the airline cancelled a flight, but not a medical note.

Please note that this amendment is retroactive to January 25, 2020.

To be clear, this amendment does not require an employer to pay an employee who is unable to work due to COVID-19. However, it does provide job protection to employees who must take such a leave, meaning that employers will be expected to return the employee to work at the end of the leave.



IF MY HYGIENIST IS NOT SICK BUT SAYS THEY CAN'T COME TO WORK BECAUSE THEY NEED TO CARE FOR CHILDREN, ELDERLY PARENTS OR OTHER RELATIVES, CAN I REQUIRE THAT THEY ATTEND AT WORK?

You should never deny an employee's request to work from home arbitrarily, as you may have a duty to accommodate the employee. Under the Code, employees are entitled to accommodation on the basis of family status up to the point of undue hardship. This may include allowing an employee with care-giving responsibilities the ability to stay home on an unpaid leave from the workplace. Dentists can of course explore alternative options, including allowing employees to work remotely or to vary their hours to share caregiving responsibilities with other family members.

UPDATE: Employees who must remain at home to care for children or other relatives due to COVID-19 now have access to a job protected leave of absence pursuant to the Ontario government's amendments to the Employment Standards Act, 2000, as described above. This leave is identified as "Emergency leave: declared emergencies and infectious disease emergencies".

IF ONE OF MY STAFF MEMBERS IS DIAGNOSED WITH COVID-19 AND CAN'T WORK, DO I HAVE TO PAY THEM?

No. Employees who are in quarantine or who have been advised by a medical or health official to self-isolate are entitled to take an unpaid leave of absence from the workplace. They can use paid sick time or vacation time to cover this period (if available), and dentists should also encourage their staff to apply for Employment Insurance ("EI") sick leave benefits. Some employers are offering paid sick days to employees to cover this time, but this is not legally required. Some employers are also advancing sick days or vacation days to staff, but this is also not legally required.

UPDATE: The Ontario government's amendments to the *Employment Standards Act, 2000* confirm that employees are entitled to unpaid leave if they are unable to work due to COVID-19.



WHY WOULD AN EMPLOYER OFFER PAID SICK LEAVE IF THEY ARE NOT LEGALLY REQUIRED TO DO SO?

Some employers have made public statements confirming their intention to provide paid sick leave to employees who are unable to work due to COVID-19. In this climate of uncertainty and fear, a commitment like this can create significant positive publicity for a company and endear them to their clients.

However, there is another legitimate reason why employers may offer paid sick leave to employees. The practical reality is that many employees are concerned about the financial impact that an unpaid leave would have on them and their families. As a result, employees may be dissuaded from reporting any COVID-19 symptoms or alerting their employer if they may otherwise be potentially at risk. Offering paid sick leave removes this barrier and makes it more likely that employees will report any concerns in a timely manner to their employer.

Of course, not all dentists are in a financial position to offer paid sick days to those staff members impacted by COVID-19. However, dentists should consider all options available to assist employees, including allowing them to use vacation time or to work remotely.



WHAT FINANCIAL SUPPORT IS AVAILABLE TO MY STAFF MEMBERS WHO ARE UNABLE TO WORK DUE TO COVID-19?

Aside from using paid sick days or vacation time, employees who are unable to work due to COVID-19 may be eligible for EI sick leave benefits or short-term disability benefits, if available through their employment benefits plan. Notably, the government has waived the one week waiting period for eligibility for EI sick leave benefits.

The Ontario government has announced that it is currently working on legislation that is aimed at “helping workers affected by the COVID-19 outbreak”. The legislation is still in development and it is not clear whether it will include paid leave provisions or who will qualify for such benefits.

The Alberta government has recently announced their intention to provide 14 days of paid leave for employees who must self-isolate as a result of COVID-19 or who are caring for someone impacted by the virus. However, it is not clear who will be responsible for paying for this leave. In particular, we do not know at this time whether employers will be expected to pay staff during the leave, or if the reference to “paid leave” refers only to an employee’s ability to apply for Employment Insurance benefits.

UPDATE: The *Employment Standards Amendment Act (Infectious Disease Emergencies), 2020* does not provide for any kind of paid leave to employees impacted by COVID-19. Prime Minister Justin Trudeau has announced a number of measures to assist employees including:

1) The Emergency Care Benefit, which will provide employees with up to \$900 bi-weekly, for up to 15 weeks. This flat-payment Benefit will be administered through the Canada Revenue Agency (CRA) and provide income support to:

- Workers, including the self-employed, who are quarantined or sick with COVID-19 but do not qualify for EI sickness benefits.



- Workers, including the self-employed, who are taking care of a family member who is sick with COVID-19, such as an elderly parent, but do not qualify for EI sickness benefits.
- Parents with children who require care or supervision due to school or daycare closures, and are unable to earn employment income, irrespective of whether they qualify for EI or not.

Application for the Benefit will be available in April 2020.

2) For Canadians who lose their jobs or face reduced hours as a result of COVID's impact, the Government is introducing an Emergency Support Benefit delivered through the CRA to provide up to \$5.0 billion in support to workers who are not eligible for EI and who are facing unemployment.

3) Implementing the EI Work Sharing Program, which provides EI benefits to workers who agree to reduce their normal working hours as a result of developments beyond the control of their employers, by extending the eligibility of such agreements to 76 weeks, easing eligibility requirements, and streamlining the application process.

4) The government is also proposing a one-time special payment in early May 2020 for low and modest income families through the Goods and Services Tax credit, which will be close to \$400 for single individuals and \$600 for couples.

5) The government has also proposed an increase in the maximum annual Child Care Benefit payments by \$300 per child.

Other measures are also being implemented, such as moratoriums placed on repayment of Canada Student Loans, which you can read about [here](#).



WHAT DO I HAVE TO DO AS AN EMPLOYER TO ENSURE THE HEALTH AND SAFETY OF MY STAFF?

Employers must take all reasonable precautions to ensure the safety of its workers. Dentists should ensure that employees are educated in terms of how to protect themselves, including washing their hands with soap and water thoroughly and often, coughing and sneezing into their sleeve or a tissue, keeping surfaces clean and disinfected and staying at home when they are sick. Dentists should also maintain the cleanliness of the workplace to the extent possible.

We understand that the RCDSO has also outlined safety precautions for dentists and their staff in an effort to reduce the spread of COVID-19, even where patients appear to be asymptomatic. Dentists should ensure that they are complying with all professional obligations with respect to maintaining health and safety in the workplace, and that their staff have access to, and are trained on, necessary personal protective equipment and safety practices.

UPDATE: The Ontario and Federal governments have repeatedly emphasized the importance of social distancing. Employers should consider all reasonable options available to them to ensure that employees can remain safe distances away from each other, and from customers or clients. This may include having employees work rotating shifts to reduce the number of employees in the office at any given time, reducing hours during which the business is open, or spreading out work stations.

DUE TO THE NATURE OF MY BUSINESS, MY STAFF CANNOT WORK REMOTELY. AM I REQUIRED TO CREATE WORK THAT STAFF CAN DO REMOTELY SO THEY CAN WORK FROM HOME?

No. A dentist does not have to invent a different job or create work for an employee in order to allow them to work remotely. However, as a best practice, you should ensure that you have explored all options to determine whether remote work is possible in the circumstances.



IF ONE OF MY STAFF MEMBERS WHO HAS BEEN IN THE WORKPLACE DEVELOPS COVID-19, DO I HAVE TO SHUT DOWN MY ENTIRE PRACTICE?

Your response will necessarily depend on the amount of exposure and the safety risk to other staff and your clients. All employees who came into contact with the worker should be sent home to mitigate against a further spread of the illness.

In some cases, this may mean that all employees in the workplace will need to be sent home. In others, it may mean that only those employees who were in the office that day will need to self-isolate for a period of time.

CAN I BAN MY EMPLOYEES FROM TRAVELING OUTSIDE OF CANADA?

As noted above, the Government of Canada is currently recommending that Canadians avoid **all non-essential travel outside of Canada** to reduce the spread of COVID-19, and are recommending that anyone who does travel self-isolates for 14 days upon their return. You cannot ban personal travel, but you can develop a policy which strongly recommends that employees avoid traveling at this time, and which imposes a positive duty on employees to report any travel to you.

The policy can also make it clear to your staff that, if they choose to travel, they will be required to remain at home for 14 days after they return and, if remote work is not available, that this will be an unpaid leave.

UPDATE: On March 16, Canada announced it was closing its borders and denying entry to anyone who is not a Canadian citizen or permanent resident, except for immediate family members of Canadian citizens, airplane crew members, diplomats, and US citizens.

On March 18, the United States and Canada entered into a joint agreement to suspend non-essential travel between the two countries. Trade will not be affected.

Starting March 18, most international flights to Canada will be directed through four airports. The Canadian government continued to urge Canadians to return home while they still can.



WHEN DO I HAVE TO ISSUE A RECORD OF EMPLOYMENT FOR MY STAFF?

An employer must issue a Record of Employment for an employee whenever there is an interruption in the employee's regular earnings. An interruption of earnings occurs when an employee is anticipated to have seven consecutive calendar days with no work and no earnings from the employer, or where an employee's salary falls below 60% of their regular weekly earnings because of illness, injury, quarantine, pregnancy, the need to care for a newborn or adopted child, or to provide support to a family member who is critically ill.

A Record of Employment must be issued within five calendar days of the first day of the interruption of earnings (or the day the employer becomes aware of an interruption of earnings).

A Record of Employment should only be filed for **employees**. They should not be completed for contractors, who are not entitled to Employment Insurance benefits.

WHAT ABOUT DENTISTS, HYGIENISTS OR STAFF PAID AS "CONTRACTORS"?

Genuine contractors are not employees and not entitled to the same protections that employees enjoy, such as vacation, overtime, severance pay and Employment Insurance benefits. No Record of Employment should be issued for a contractor.

Of course, many people are paid as contractors when they are employees in all but name. That exposes both parties to risk and liability. It is possible that an individual being treated as a contractor will object once they realize the rights they have given up, such as Employment Insurance benefits. That can result in legal disputes and potential liability.



CONCLUSION

This document is intended for information purposes and to provide some helpful hints. It does not replace legal advice.

We encourage you to contact the team at Rudner Law so we can discuss if and how we can help.

We should also note that although the information in this document refers primarily to legislation in Ontario, we work with clients across the country.

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