

FTR Now

Ontario Enacts Legislation to Provide Paid Leave for Reasons Related to COVID-19

Date: May 6, 2021

On April 29, 2021, the Ontario government tabled and passed Bill 284, [COVID-19 Putting Workers First Act, 2021](#) (Bill). The Bill amends the *Employment Standards Act, 2000* (ESA) to provide eligible employees with up to three days of paid emergency leave in circumstances of absences relating to a designated infectious disease (Paid IDEL). As readers are aware, COVID-19 is already a [designated infectious disease](#) for the purpose of the unpaid infectious disease emergency leave (Unpaid IDEL) under the ESA.

The Paid IDEL was deemed to have come into effect on April 19, 2021 and will end on September 25, 2021, unless extended by regulation. Employers may be reimbursed for payments made to employees for the new paid leave by the Workplace Safety and Insurance Board (WSIB). (Note that while this leave is being called “paid sick leave” in the media, we refer to it as Paid IDEL in this update as it covers a wider range of potential absences than just sickness.)

In this *FTR Now*, we provide a brief overview of the new paid leave, along with a series of questions and answers about concerns already being raised by employers.

Note that this *FTR Now* has been revised from its original version, published on May 3, 2021.

Overview of Paid IDEL

Paid IDEL applies to any employee who is covered by the ESA. The new leave will be available in a range of circumstances that are nearly identical to those currently in effect for Unpaid IDEL, subject to a few differences. For example, Paid IDEL is not available to employees who cannot work due to travel restrictions preventing their return to Ontario. A full list of the circumstances for claiming Paid IDEL is set out in the Q&A below.

Amount of Infectious Disease Emergency Leave Pay

An employer is required to pay the employee the lesser of \$200.00 and the employee’s regular rate of pay for the hours the employee would have worked had they not taken the Paid IDEL. In circumstances where an employee receives performance-related wages, the employee will be entitled to receive the lesser of \$200.00 and the greater of either (i) the employee’s hourly rate or (ii) the minimum wage for the hours the employee would have worked had they not taken the Paid IDEL.

Where Employees have a Contractual Entitlement to Paid Leave

If, as of April 19, 2021, an employee is entitled to take paid leave under an employment contract for any of the reasons which would give rise to an entitlement for Paid IDEL, the number of days they are entitled to receive as Paid IDEL are reduced by their contractual entitlement (see the more detailed discussion in the Q&A, below). This only applies if the wages provided to the employee under the contract are equal to or greater than the infectious disease emergency leave pay, as calculated under the new provisions.

If an employer amends an employment contract on or after April 19, 2021 to remove an employee’s entitlement to a paid leave that would have covered the same circumstances as the Paid IDEL, the employer will not be entitled to reimbursement from the government.

Applying for Reimbursement through the WSIB

Employers may apply to the WSIB for reimbursement of up to \$200.00 for three days for each employee who takes Paid IDEL. The ESA sets out the general reimbursement process, the specifics of which have not yet been released. Importantly, employers will be required to complete the application process within 120 days of the date on which the Paid IDEL was provided to the employee in order to be reimbursed. Employers will not be reimbursed where an employee uses a contractual paid leave day in lieu of a Paid IDEL day.

Interaction with the Canada Recovery Sickness Benefit (CRSB)

The federal CRSB is a weekly sickness benefit of \$500.00 per week (which starts on a Sunday) for up to four weeks paid to eligible employed and self-employed individuals who cannot work for at least 50% of the time that they would have otherwise worked in the week for which they claim the benefit because they: (i) may have contracted COVID-19, (ii) have contracted COVID-19, (iii) have been advised to self-isolate for reasons related to the COVID-19 pandemic, or (iv) have underlying conditions or are undergoing treatments that make them more susceptible to COVID-19.

A person may apply for the CRSB on the Monday after the one-week period for which they are applying has ended. Direct deposit of the payment takes about three to five business days.

Although a person may apply for the CRSB even if they have access to other paid sick leave through their employer, a person is ineligible for the CRSB in a given one-week period if they are receiving paid leave from their employer for the same period. As a result, an employee who receives infectious disease emergency leave pay from their employer in a week might not be able to claim the CRSB in respect of that same week, even if the maximum \$200.00 payment does not cover all of the pay they missed that week.

Concluding Thoughts

The introduction of Paid IDEL requires careful consideration by employers.

Because the new leave was given retroactive effect to April 19th, employers will need to review any time off taken by employees as far back as that date to determine whether the employees may have been entitled to Paid IDEL. Where that is determined to be the case, payment of the appropriate amount of infectious disease emergency leave pay will be required. As well, employers will need to carefully consider whether their employees have contractual entitlements to paid leave, which reduce the Paid IDEL entitlements of their employees.

We will continue to monitor any developments, including the release of further details on the WSIB reimbursement process. If you have any questions about Paid IDEL and how it will apply in your workplace, please contact your regular [Hicks Morley lawyer](#) for assistance.

Q&A

In this section, we will address a range of questions being raised by employers in light of the new Paid IDEL.

1. Under what circumstances is Paid IDEL available?

Paid IDEL is available in circumstances where an employee is unable to work for one of the following reasons related to COVID-19:

1. The employee is under individual medical investigation, supervision or treatment (including receiving a vaccine and recovery from that vaccine)
2. The employee is subject to an order under the *Health Protection and Promotion Act*

3. The employee is in quarantine or isolation or is subject to a control measure (which may include, but is not limited to, self-isolation) as a result of information or directions from a wide range of public health officials, medical practitioners, governments, Telehealth or municipal councils
4. The employee has been directed by their employer to not attend work in response to a concern of the employer that the employee may expose other individuals in the workplace to the designated infectious disease
5. The employee is required to provide care or support to a specified individual providing care or support to an specified individual, because:
 - the individual is under individual medical investigation, supervision or treatment (including receiving a vaccine and recovery from that vaccine)
 - the individual is in quarantine or isolation or is subject to a control measure (which may include, but is not limited to, self-isolation) as a result of information or directions from a wide range of public health officials, medical practitioners, governments, Telehealth or municipal councils.

(The individuals listed are identical to those for Unpaid IDEL, and include a wide range of family members.)

2. When calculating Paid IDEL, do you include premium payments?

No. As outlined above, an employer is required to pay the employee the *lesser* of \$200.00 and the employee's regular rate of pay for the hours the employee would have worked had they not taken the Paid IDEL. If the paid leave day falls on a day that the employee would normally be entitled to receive overtime pay, shift premium or premium pay for a public holiday, the employee will not be eligible to receive any of those premiums.

3. How does one calculate Paid IDEL for employees paid performance-related wages?

In circumstances where an employee is paid performance-related wages, including commissions or piece work, the employee will be entitled to receive the *lesser* of \$200.00 and the greater of either (i) the employee's hourly rate or (ii) the minimum wage for the hours the employee would have worked had they not taken the Paid IDEL.

For example, if an employee is paid an hourly rate of \$20.00 plus commissions, and would have worked seven hours on a day when they take Paid IDEL, the comparison will be between \$200.00 and (7 x \$20.00). Since 7 x \$20.00 = \$140.00, the employee would be paid this lesser amount as infectious disease emergency leave pay.

4. Who is responsible for payment?

The employer is required to provide the employee with payment, and may then apply to the WSIB for reimbursement.

5. What if my employees have a contractual entitlement to paid leave?

If an employee is entitled to take paid leave under an employment contract as of April 19, 2021, the employee's entitlement to Paid IDEL is reduced by the number of days of the contractual entitlement provided two conditions are met:

- the contractual paid leave must cover at least one of the circumstances for which the employee can take Paid IDEL, and
- the amount that the employee is entitled to be paid in respect of the contractual leave must be at least equal to the amount of infectious disease emergency leave pay that would be owing under the ESA.

For example, if on April 19, 2021 an employee had a contractual entitlement of two days' paid sick leave, payable at 100% of regular wages, that employee's Paid IDEL would be reduced by two days, meaning that the employee would have an

entitlement to only one day of Paid IDEL. If that same employee had a contractual entitlement of five days' paid sick leave on April 19, 2021, payable at 100% of regular wages, they would have no entitlement to Paid IDEL.

6. What if the contractual leave does not cover all of the possible reasons an employee can take Paid IDEL?

Provided that the two conditions outlined in Question 5 are met, there would still be a reduction in an employee's Paid IDEL entitlement. The ESA provision should be engaged as long as the contractual paid leave would apply to at least one of the circumstances giving rise to Paid IDEL.

7. What if my employees have contractual paid leave but it pays less than what they would be paid under the ESA?

If the amount that would be payable to the employee in respect of the contractual paid leave is less than the amount that would be payable to the employee under the ESA, the employee's entitlement to Paid IDEL would not be reduced. Therefore, the employee would have both a contractual leave entitlement and an entitlement to three days of Paid IDEL.

8. If an employee has utilized all of their paid leave under their contract before April 19, 2021, are they still entitled to Paid IDEL?

While the ESA amendments are not express on this point, it appears that the employee would have an entitlement to three days of Paid IDEL in these circumstances.

9. Do employees still have entitlement to unpaid infectious disease emergency leave?

Yes. The Paid IDEL is in addition to an employee's entitlement to Unpaid IDEL under the ESA. Where an employee qualifies for both forms of the leave, the employee is entitled to receive the Paid IDEL before the unpaid leave, unless the employee makes an election in writing to receive the Unpaid IDEL first. It is important to note that if an employee does not have an entitlement to Paid IDEL because of the conditions discussed in Question 5 (or has a reduced entitlement), they will continue to have entitlement to Unpaid IDEL under the ESA.

10. Does the employer have to be registered with the WSIB in order to qualify for the reimbursement?

No. An employer does not need to be registered with the WSIB in order to qualify for the reimbursement. The WSIB is just being used to facilitate the reimbursement.

11. If an employer is not registered with the WSIB are they required to provide their employees with Paid IDEL?

Yes, an employer is required to provide its eligible employees with Paid IDEL as long as the employee's employment is governed by the ESA and is otherwise eligible.

12. How does an employer apply for reimbursement?

The details of the WSIB's reimbursement process have not yet been published, but the ESA states that an employer will be required to provide the following:

- a completed Application Form
- an Attestation confirming that the employer provided the Paid IDEL to the employee, including the specific dates that the Paid IDEL was taken, the date payment was made, the amount of the payment and confirmation that the employer was not otherwise required to pay the employee under the terms of an employee's contract of employment
- a record of payment made to the employee

information about claims filed with the WSIB in respect of the employee
any other required information.

An employer will be required to complete the Application Process within 120 days of the date on which the Paid IDEL was provided to the employee.

The WSIB's determination of the reimbursement application is final, and there is no right of reconsideration or appeal either internally with the WSIB or to the Workplace Safety and Insurance Appeals Tribunal.

13. Will an employer's request for reimbursement have any impact on the company's WSIB rating?

Based on the available information, we do not believe that an employer's request for reimbursement will have any impact on the company's WSIB rating as the reimbursement is not issued out of the WSIB Insurance Fund.

14. Is the Paid IDEL available to contractors?

No. The Paid IDEL is available only to employees governed by the ESA.

15. Are temporary employees and part time employees entitled to the Paid IDEL?

Yes. There is no requirement that employees be full-time or permanent.

16. Can I adjust the terms of my existing contractual sick leave entitlements to exclude the circumstances that would qualify for the Paid IDEL in order to claim the reimbursement?

No. An employer is not entitled to reimbursement for the Paid IDEL in circumstances where it has adjusted the terms of its existing contractual paid leave entitlements on or after April 19, 2021 to remove the circumstances that would qualify for Paid IDEL.

17. If an employer is closed down under a section 22 order made under the *Health Protection and Promotion Act*, are all employees eligible for the Paid IDEL?

Yes. Any employee who is not performing the duties of their position as a result of a section 22 order is eligible for Paid IDEL.

18. Are unionized employees entitled to the Paid IDEL?

Paid IDEL is available both to unionized and non-unionized employees, subject to any potential reductions in entitlement for contractual paid leave, as discussed above.

19. Does Paid IDEL count towards our 1% limit on compensation increases under Bill 124?

No. The ESA was amended to specify that any payments associated with Paid IDEL are neither new compensation entitlements nor increases to existing compensation for Bill 124 purposes.