

Employment-Related Questions and Answers Related to COVID-19



THE CANADIAN DENTAL
HYGIENISTS ASSOCIATION

L'ASSOCIATION CANADIENNE
DES HYGIÉNISTES DENTAIRES



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ATTENTION

Please be advised that Employment Standards are provincially legislated. The following responses reflect Ontario's Employment Standards Act.

This information was adapted from "COVID-19 Pandemic: Fact Sheet for Dentists and Dental Practices" developed by Rudner Law, which can be found in their running blog on COVID-19 and workplace issues.

The information below is general in nature and does not replace advice from an Employment Lawyer.



Q: CAN A DENTAL HYGIENIST BE TEMPORARILY LAID OFF?

An employer is not permitted to lay off an employee unless the contract of employment between the parties gives the employer the authority to do so. Otherwise, a temporary layoff can constitute a constructive dismissal.

If an employer does have the right to impose a temporary layoff, it must be done in accordance with applicable legislation. As an example, under Ontario's *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). For dental hygienists, the first step is to review your employment agreements. If you do not currently have an employment agreement that addresses layoffs or a written agreement at all, you must agree to the temporary layoff. An employer cannot temporarily lay off an employee unless the employee agrees.

It is important to note that if you do not agree to a temporary layoff, your employer may terminate your employment and then they must provide you with your entitlements on dismissal.

In addition, if you agree to a layoff and if the layoff extends beyond the time limits specified by the ESA, you will be deemed to have been dismissed as of the first day of the layoff and will be entitled to severance pay.



Q: WHAT IF A DENTAL HYGIENIST IS NOT LAID OFF BUT HIS/HER HOURS ARE REDUCED?

Some dental practices may intend to remain open with reduced hours and staff. Depending on how significant the reduction is, in Ontario 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 an employer wants to reduce their dental hygienist's 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 employer and staff for any such changes to be effective.

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



Q: WHAT ABOUT DISMISSAL AND CONSTRUCTIVE DISMISSAL?

As mentioned above, if you lay someone off or reduce their hours without the right to do so, that can constitute a constructive dismissal. Similarly, a lawful layoff that lasts more than the time allowed by legislation will be deemed to be a dismissal.

So what does that mean? If you dismiss an employee, constructively or otherwise, you must provide notice or pay in lieu thereof. Contrary to popular belief, notice is not limited to one week per year of service or whatever the legislation in your jurisdiction says. Rather, the common law requires “reasonable notice”, which can often be 3, 4 or even more weeks for every year of service, to a maximum of 24 months. Unless your contract specifically says otherwise, that is what is required.

Q: CAN A DENTAL HYGIENIST REFUSE TO WORK IF THE WORKPLACE IS UNSAFE DUE TO COVID-19?

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 Ontario Ministry of Labour or your equivalent provincial body 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 provincial regulatory body 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, an employer 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 dental hygienist, there may be a legitimate objection. In that case, the employer would need to address the safety issue before asking the dental hygienist to continue working.

Your employer should also be alert to the fact that you may have legitimate safety concerns as a result of personal health or circumstances (for example, if you are immunocompromised). In these cases, your employer may have a duty to accommodate up to the point of undue hardship.

Your employer 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.



Q: CAN AN EMPLOYER SEND A DENTAL HYGIENIST HOME WITHOUT PAY IF THEY ARE DISPLAYING SYMPTOMS OF COVID-19?

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. An employer should at all times keep their 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 an employer 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 employer 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.

Q: IS A DENTAL HYGIENIST ENTITLED TO STAY HOME IF THEY NEED TO SELF-ISOLATE BECAUSE OF RECENT TRAVEL, OR CONTACT WITH SOMEONE WHO HAS SYMPTOMS? IS THE DENTAL HYGIENIST ENTITLED TO BE PAID DURING THIS TIME?

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



This will assist in maintaining a safe working environment for other staff, while also providing accommodation to the employee who may potentially be impacted. Medical notes should not be required.

Q: CAN AN EMPLOYER REQUIRE THAT A DENTAL HYGIENIST ATTEND WORK IF THEY NEED TO CARE FOR FAMILY MEMBERS DUE TO COVID-19?

Under the Code, employees are entitled to accommodation based on family status up to the point of undue hardship. This may include allowing an employee with caregiving responsibilities the ability to stay home on an unpaid leave from the workplace. Employers can explore alternative options, including allowing employees to work remotely or to vary their hours to share caregiving responsibilities with other family members.

Q: IF A DENTAL HYGIENIST IS DIAGNOSED WITH COVID-19 DOES THE EMPLOYER 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 employers 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.



Some employers have made public statements confirming their intention to provide paid sick leave to employees who are unable to work due to COVID19. 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.

Q: WHAT DOES AN EMPLOYER HAVE TO DO TO ENSURE EMPLOYEES HEALTH AND SAFETY?

Employers must take all reasonable precautions to ensure the safety of their workers. Employers 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. Employers should also maintain the cleanliness of the workplace to every extent possible. It should be noted that members of a regulated health profession are ethically bound to follow all regulatory requirements and practice standards as set out by their provincial regulatory bodies.

Q: WHEN IS AN EMPLOYER REQUIRED TO ISSUE A RECORD OF EMPLOYMENT?

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).

Q: WHAT ABOUT DENTAL HYGIENISTS WHO ARE PAID AS “CONTRACTORS” OR SELF-EMPLOYED?

Contractors or self-employed dental hygienists are not employees and are 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 dental hygienist who is self-employed.

That being said, many people that are paid as contractors meet the legal definition of employees. Courts and government agencies such as CRA will examine the true nature of the relationship and will not simply accept what a contract or the parties say. If you think you are really an employee, you may have rights despite the fact that you have been paid as a contractor up to now.

Visit the Government of Canada website for more information:
[Employee or Self-Employed?](#)

