



BCDA Member Bulletin - Legal Update

New ESA Paid Sick Leave (Updated)

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The Government of British Columbia announced details of the new paid sick leave for employees in the Province who are governed by the *Employment Standards Act* (“ESA”). Below we answer some frequently asked questions to assist you with understanding and complying with this new employment standard.

Q: When does the new ESA paid sick leave come into effect?

A: January 1, 2022.

Q: Which employees are entitled to paid sick leave?

A: The ESA sets out the minimum employment standards that apply to employees of provincially regulated businesses in British Columbia. Dental offices in British Columbia are provincially regulated and governed by the ESA.

The ESA prescribes employment standards which apply to “employees”, but the ESA does not apply to all categories of workers in British Columbia. For example, the ESA does not apply to independent contractors. Some professionals, including Registrants of the College of Dental Surgeons of British Columbia, are expressly excluded from the operation of the ESA while they are performing their profession. This means that “employees” working in a dental office will be entitled to paid sick leave under the ESA, but other workers in the same office will not be.

Q: Is there a waiting period for new employees?

A: Employees become eligible for paid sick leave after completing 90 consecutive days of employment with their employer.

Q: How many paid sick days are employees entitled to each year?

A: As of January 1, 2022, eligible employees are entitled to up to 5 paid sick days in each employment year. “Employment year” refers to the specific employee’s employment year and is based on the employee’s start date.

For example, if an employee was hired on May 1, 2021, their first employment year runs from May 1, 2021 to April 30, 2022. In this example, the paid sick leave entitlement will be interpreted as entitling this employee to 5 paid sick days from January 1, 2022 (when this leave first came into effect) to April 30, 2022. This employee would also be entitled to up to 5 paid sick days for use in the next employment year, between May 1, 2022 and April 30, 2023.

Q: Is the number of paid sick leave days pro-rated for part-time employees?

A: No. Part-time and full-time employees are each entitled to 5 paid sick leave days.

Q: Do unused sick leave days carry over from year to year?

A: No. The ESA does not require carry over of unused sick leave time.

Q: Who bears the cost of this paid sick leave entitlement?

A: Employers are required to bear the cost of paid sick leave.

Q: How do I determine how much I need to pay my employee on a paid sick day?

A: The amendments to the ESA set out a formula for calculating the amount of sick leave pay owing to an employee who takes paid sick leave. An employee who takes paid sick leave must be paid “an average day’s pay” for each day of leave taken. The formula is:

$$\text{amount paid} \div \text{days worked}$$

“Amount paid” is the amount paid or payable to the employee for work that is done during and wages that are earned within the 30 calendar day period preceding the leave, including vacation pay that is paid or payable, less any amounts paid or payable for overtime.

“Days worked” is the number of days the employee worked or earned wages within that 30 calendar day period. ▶

Q: Can employees use this ESA paid sick leave when a child or dependent is sick, or for a “personal day”?

A: No. The paid and unpaid sick leave entitlements are for “personal illness or injury.”

Q: Can I request a medical note from an employee who requests a paid sick day?

A: Yes. The ESA provides that if requested by the employer, an employee must “as soon as practicable” provide reasonably sufficient proof that the employee is entitled to sick leave. Employees are not required to give any specific amount of advance notice to their employer in order to qualify for paid sick leave.

Q: What records should an employer maintain concerning paid sick leave?

A: Employers should maintain records of the employee’s request to take sick leave; records of the absence; and records of the amount of sick leave pay paid to the employee.

Q: Will employees continue to be eligible to receive unpaid sick leave under the ESA?

A: Yes. Currently, the ESA provides for an entitlement to 3 days of job protected unpaid sick leave. As of January 1, 2022, employees are eligible for both 5 days of paid sick leave and 3 days of unpaid sick leave each year.

Q: Will employees continue to be eligible for COVID-19-related paid leave under the ESA?

A: No. The COVID-19-related paid leave set out in section 52.121 of the ESA will expire on December 31, 2021.

Q: Do employers have an obligation to protect the job of an employee who takes sick leave?

A: Yes. This is a job protected leave. Section 54 of the ESA provides that an employer must not, because of a pregnancy or leave in Part 6 of the ESA, terminate employment or change a condition of employment without the employee’s written consent. An employee who takes sick leave must be returned to the position held prior to taking leave, or a position that is on the whole comparable to the position held prior to commencing leave.

Q: If an employee is not able to return to work after using their 5 paid sick days/3 unpaid sick days under the ESA, do I have to grant any additional sick leave time?

A: If an employee has exhausted their ESA sick leave entitlement, this does not mean that the employer has no further obligations to the employee. Employment law is made up of a web of statutes and common law principles. The ESA is only one of many employment law statutes which govern the employment relationship.

Under the British Columbia *Human Rights Code*, employers also have a duty to accommodate employees who are not able to work due to disability. Where an employee is not yet able to return to work for medical reasons after exhausting ESA sick leave, the duty to accommodate under human rights law may require accommodation of this employee through a further unpaid leave of absence. Employers need to be aware that terminating an employee, or imposing adverse employment consequences, for reasons related to an employee’s disability/health/sick leave exposes the employer to additional risk of liability for discrimination under the *Human Rights Code*.

Q: Are any other benefits available to employees who are required to self-isolate due to COVID-19?

A: The Canada Recovery Sickness Benefit (CRSB) is a government benefit currently available to employees (and self-employed individuals) provided they meet the eligibility criteria. This benefit has been extended to May 7, 2022.

Employees who miss at least 50% or more of their work week for any of the following reasons are eligible for the CRSB: the employee (a) is sick with COVID-19 or may have COVID-19; (b) has been advised to self-isolate by their employer, a medical or nurse practitioner, government or public health authority; or (c) has an underlying health condition that puts the employee at greater risk of contracting COVID-19. Accordingly, this benefit is available to those who are sick or self-isolating due to COVID-19. The CRSB is \$500/week before taxes.

More information about the eligibility criteria and how to apply is available online at: <https://www.canada.ca/en/revenue-agency/services/benefits/recovery-sickness-benefit.html>

Q: Are any other benefits available for employees who are not able to work because a child/dependent is sick, or due to school/daycare closures?

A: Yes. The Canada Recovery Caregiving Benefit (CRCB) is a government benefit currently available to provide income support to employees (and self-employed individuals) who are unable to work because the employee is caring for a child under age 12, ▶

or a family member who requires supervised care because (a) a school, daycare or care facility is closed or unavailable due to COVID-19; or (b) their regular care services are unavailable due to COVID-19; or (c) the person under their care is sick with or has symptoms of COVID-19, has been advised to self-isolate by a medical or nurse practitioner, government or public health (or other) authority, or is at serious risk of health complications as determined by a medical professional. This benefit has also been extended to May 7, 2022 and pays \$500/week before taxes.

More information about the eligibility criteria and how to apply is available online at: <https://www.canada.ca/en/revenue-agency/services/benefits/recovery-caregiving-benefit/crcb-who-apply.html>

This Member Bulletin is informational in nature and should not be relied on as legal advice. Members who have questions regarding their legal obligations under the ESA or otherwise are encouraged to seek independent legal advice.