

CLIMATE CHANGE & PRECARIOUS EMPLOYMENT

Legal Factsheet

This factsheet provides general information to workers employed in British Columbia. It presents information related to how severe weather related to climate change can impact workers' rights and employers' obligations as set out by the **B.C. Employment Standards Act** ("the *ESA*"), the **B.C. Workers Compensation Act** ("the *WCA*"), the **B.C. Occupational Health and Safety Regulation** (the "*OHSR*"), the **BC Human Rights Code** ("the *HRC*"), and the common law (law made by judges in court). This project was completed for the **Worker Solidarity Network** by members of the **Pro Bono Students Canada University of Victoria Chapter**.

Disclaimer: *PBSC at the Faculty of Law, University of Victoria, cannot provide legal advice. This document contains general discussion of certain legal and related issues only. It is not legal advice. Please consult a lawyer if you require legal advice.*

The information in this factsheet does not apply to unionized workers and independent contractors.

TERMINATION RIGHTS

What are an employee's rights if they are terminated due to a weather-related event?

All employees are entitled to notice upon termination. Notice can be written or monetary (i.e. severance pay). The *ESA* provides minimum mandatory entitlements for notice in subsection 63(3). Under the common law, you are presumed to have additional entitlements to notice: a very rough rule of thumb is one month of notice per year of service.

There are exceptions to the *ESA*'s minimum mandatory notice, but extreme weather events are unlikely to meet this threshold. Subsection 65(1)(d) provides an exception to the *ESA*'s mandatory notice requirements when your job becomes "impossible to perform due to an unforeseen event or circumstance".

"Impossible to perform" is a very high standard to meet: the weather event would need to completely destroy your entire workplace (including secondary locations), or something similar so you could not perform your job (or a variation of it) at any of your employer's business operations.

"Unforeseeable event or circumstance" is an easier threshold to meet. For example, COVID 19 was recognized as unforeseeable.

To qualify for this exception, however, both requirements must be met.

An exception to the common law doctrine of reasonable notice is "frustration of contract", but extreme weather events are unlikely to meet this threshold. This is similar to the *ESA*'s exception but applies only to the additional notice you are presumed to have under the common law (1 month notice per year of service). Your employment contract is deemed "frustrated" when it is changed so fundamentally that you cannot perform your job anymore (for example, an extreme weather event destroys your entire workplace). Temporary closures do not meet this standard.

A final exception to either form of notice is termination for "just cause". It is very unlikely that an employer would have "just cause" for termination based solely on an employee not making it to work due to an extreme weather event. Dismissal with "just cause" is not defined in the *ESA*, but from the common law we know that it requires a pattern of prolonged serious misconduct with repeated interventions by the employer, OR a single egregious event such as theft. It's unlikely that missing work due to a weather-related event will fit into either category. Lacking any "just cause", an employer will owe you notice if they terminate you.

HEALTH & SAFETY RIGHTS

How can severe weather events impact health & safety at work?

Severe weather events can create hazards. Wildfire smoke can impact workplace air quality, an extreme heat dome can cause risk of heat stress, a cold snap can cause risk of cold stress, and extreme weather events can cause environmental disasters such as flooding or landslides.

You have a right to refuse unsafe work. The *WCA* protects your right to raise concerns and have the issue remedied. Your employer may not punish you for doing this. If an employer takes a retaliatory action in response to a safety concern raised by a worker, the employer has committed an unlawful prohibited action. If you refuse unsafe work and then experience a layoff, demotion, reduced hours, or any other penalty – and you have good reason to think it's related – you should file a complaint to the Worker's Compensation Board.

Employers need to maintain a safe workplace. This includes conducting regular inspections of the workplace and responding to worker safety concerns. Regarding temperature and air quality, the employer needs to respond if any of the following occur:

if complaints are raised by workers regarding air quality or if any problems are noted about the air ventilation system; if the temperatures in the workplace become such that a worker's core body temperature can exceed 38° OR that a worker could experience **heat stress**; or if the temperatures could cause a worker's core body temperature to fall below 36°C OR could cause **cold stress**.

Employers need to respond to hazards as set out by the OHSR.

There is a hierarchy of approaches. The employer should start with the most effective one and move down the list only if the control suggested is not practical or feasible in their particular workplace.

> BEST: Elimination or substitution.

Can the job be done in an alternative environment?

> BETTER: Engineering controls. This would include a physical modification to the workplace, for example, installing an air conditioner.

> GOOD: Administrative controls.

This involves changing practices and policies at work to manage the risk to workers. Examples: signs warning workers, increased frequency of breaks to allow workers to cool down, provision of water, provision of cool-down or

warm-up areas. Note: If an employee is working in -7°C, a heated shelter must be available to them at all times.

> OKAY: Personal Protective

Equipment. This is not the best option and can be relied on only in conjunction with another control.

Employers need to keep an emergency preparedness plan.

This plan needs to account for any potential environmental hazards that are possible based on their geographic location and have an outline for how an emergency evacuation would go.

ACCOMMODATION RIGHTS

What are your rights during a climate-related event if you have a disability?

The HRC at s.13(1)(b) sets out that a person must not be discriminated against in employment because of any physical or mental disability.

Severe weather events can exacerbate certain disabilities or chronic illnesses. For example, wildfire smoke can impact someone with asthma more than someone without asthma;

or a heat wave could present more significant danger to someone with high blood pressure. Workers are entitled to accommodation for these conditions.

If you have a disability, your employer must:

> 1. Investigate what your needs are, with your participation.
> 2. Investigate how to accommodate that need to the point of undue hardship. This is based on "reasonable" accommodation: it doesn't have to be perfect or based on your preferences.

If you think you've been discriminated against because of a disability, the common law provides a test for that.

This test asks, on a balance of probabilities (i.e. more likely than not, or with at least 51% certainty):

> 1. Does the employee have a disability?
> 2. Has the employee suffered adverse treatment?
> 3. Is there evidence to reasonably infer that the disability was a factor in the adverse treatment?

If you've proven the three criteria above, your employer will have to justify their actions (or inactions) to rebut your presumed discrimination.

Resources & further reading

Guide to the BC Employment Standards Act: <https://www2.gov.bc.ca/gov/content/employment-business/employment-standards-advice/employment-standards/forms-resources/igm>

Guide to the BC Workers Compensation Act: <https://www.worksafebc.com/en/law-policy/occupational-health-safety/searchable-ohs-regulation/workers-compensation-act>

Guide to the BC Occupational Health & Safety Regulation: <https://www.worksafebc.com/en/law-policy/occupational-health-safety/searchable-ohs-regulation/ohs-regulation>

Guide to the BC Human Rights Code: <http://www.bchrt.bc.ca/law-library/guides-info-sheets/guides/human-rights.htm>

WorkSafe BC – "Raising an issue or complaint": <https://www.worksafebc.com/en/about-us/fairness-privacy/fair-practices-office/raise-issue-complaint>

WorkSafe BC – "Preventing Heat Stress at Work": <https://www.worksafebc.com/en/resources/health-safety/books-guides/preventing-heat-stress-at-work?lang=en>

WorkSafe BC – "Cold Stress": <https://www.worksafebc.com/en/health-safety/hazards-exposures/cold-stress>

WorkSafe BC – "Is your workplace prepared for an emergency?": <https://www.worksafebc.com/en/about-us/news-events/campaigns/2022/February/is-your-workplace-prepared-for-an-emergency>