

# Planning for COVID-19 in the workplace – obligations and considerations for employers

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COVID-19 was first identified in Wuhan City, China in late 2019. Initially known as “2019 Novel Coronavirus,” the first case was reported on December 31, 2019, with confirmation and identification occurring on January 7<sup>th</sup>, 2020. As of March 5, 2020, there were 34 confirmed cases in Canada (20 in Ontario, 13 in British Columbia and one in Quebec). On March 2, 2020, the [Ontario government announced](#) that it is implementing enhanced measures to safeguard the public from COVID-19 including a new response structure to ensure health system readiness.

As the instances of COVID-19 increase throughout Canada and the world, employers should become prepared for a wider outbreak or even a pandemic. Having the proper plans and policies in place to address COVID-19 in the workplace will not only assist in business continuity but will also protect employees. This Focus alert will set out some of the key legal obligations and important issues employers should consider in their preparations.

## What are coronaviruses?

Coronaviruses are a family of common viruses usually associated with mild illnesses such as the common cold. A “novel coronavirus” is a strain of coronavirus that has not been previously identified in humans. Examples of these include Middle East Respiratory Syndrome (“MERS”) and Severe Acute Respiratory Syndrome (“SARS”).

The route of transmission of these viruses is not always certain, but generally they spread from person to person through respiratory droplets when people are in close contact. “Close contact” occurs, for example, by:

- being within two metres of a person with the virus without wearing protective equipment;
- having direct contact with respiratory droplets (from a cough or sneeze) from an infected person; and
- making physical contact with a surface that is contaminated with infectious fluids.

## Symptoms of coronaviruses

While the effects of coronaviruses vary in severity, the common signs usually include respiratory

symptoms, fever, cough, and breathing difficulties. In severe cases infection can lead to pneumonia, kidney failure and sometimes death.

The symptoms associated with COVID-19 are typical of a coronavirus and include fever and respiratory symptoms such as coughing and difficulty breathing. Identification of COVID-19 is made through tests and patient history, particularly in terms of travel history.

## **Preventing transmission of a coronavirus**

The World Health Organization (“WHO”) provides [useful recommendations](#) to prevent the spreading of the virus. The WHO recommends that individuals:

- wash hands frequently using alcohol-based hand rub or soap and water;
- avoid touching their eyes, nose and mouth;
- cover their mouth and nose with a flexed elbow or tissue when coughing or sneezing (throw tissue away after use);
- avoid contact with anyone who has a fever or cough; and
- seek medical care early if they experience fever, cough and difficulty breathing.

For health care workplaces, the WHO recommends the use of personal protective equipment, such as gloves, long-sleeved gowns, surgical masks, visors or face shields.

## **Legislation relevant to employers in the event of a COVID-19 crisis**

### *Occupational Health and Safety Act*

Under the *Occupational Health and Safety Act* (“OHSA”) employers are required to take every precaution reasonable in the circumstances for the protection of a worker. The OHSA also provides most employees with the right to refuse or to stop work where health or safety is in danger. This right is limited for certain employees (e.g. police officers, health care workers, etc.) where:

- the danger is a normal condition of employment; or
- refusal would directly endanger the life, health or safety of another person.

Employees may exercise the right to stop work if they believe they will encounter COVID-19 in the workplace. At the first stage of a work refusal, the employee does not need to be correct or even reasonable in their belief. Even if the actual risk of contracting COVID-19 is quite low, where an employee has a genuine belief that he or she is at risk, the work refusal should be taken seriously

and dealt with in accordance with the procedures in the OHS Act. Only after a Ministry of Labour inspector has determined that the workplace is safe must the worker then objectively justify his or her continuing work refusal. Up to this point, the worker refusing to work is entitled to be paid in the normal fashion and an employer may not impose discipline.

### *Workplace Safety and Insurance Act, 1997*

If a worker is infected with COVID-19 in the course of employment, the worker may be entitled to compensation and services under the *Workplace Safety and Insurance Act, 1997* (“WSIA”). The WSIA covers personal injury arising out of and in the course of employment and impairment by an occupational disease that occurs due to the nature of one or more employments in which the worker was engaged. Although there may be difficulties for some workers in establishing that a COVID-19 infection arose in the course of employment, a number of health care workers made claims for compensation under the WSIA during the 2003 SARS outbreak. As with all claims under the WSIA, each claim relating to COVID-19 will be decided on an individual basis.

### *Employment Standards Act, 2000*

The *Employment Standards Act, 2000* (“ESA”) provides for a number of unpaid, job-protected leaves of absence of varying duration that could apply in the event of a wide-spread outbreak of COVID-19, for example:

#### Sick Leave

The sick leave provisions of the ESA permit an employee who has worked for the employer for at least two consecutive weeks to take three days of leave per calendar year in the event of “personal illness, injury or medical emergency”. Note that if an employee takes a leave of absence under an employment contract for the same circumstances that would have given rise to the entitlement to the ESA sick leave, the employee is deemed to have taken the ESA sick leave. This deeming provision applies whether the leave under the employment contract was paid or unpaid.

#### Family Responsibility Leave

If an employee has worked for two consecutive weeks with the employer, they are entitled to three

days of leave per calendar year in the event of an illness, injury, medical emergency, or urgent matter involving any of the following individuals:

- the employee's spouse;
- a parent, step-parent or foster parent of the employee or the employee's spouse;
- a child, step-child or foster child of the employee or the employee's spouse;
- a grandparent, step-grandparent, grandchild or step-grandchild of the employee or of the employee's spouse;
- the spouse of a child of the employee;
- the employee's brother or sister; and
- a relative of the employee who is dependent on the employee for care or assistance.

A deeming provision similar to that of the sick leave applies to family responsibility leave. If an individual takes a family responsibility leave under an employment contract, whether paid or unpaid, they are deemed to have taken the ESA family responsibility leave.

### Family Caregiver Leave

Family caregiver leave is available to provide care and support for up to eight weeks per calendar year per specified family members where a qualified health practitioner has issued a certificate stating they have a serious medical condition. There is no requirement that an employee be employed for a particular length of time to be entitled to this leave. Specified family members are the same as those noted above under family responsibility leave.

### Emergency Leave, Declared Emergencies

The ESA also allows for emergency leave for government-declared emergencies under section 7.0.1 of the *Emergency Management and Civil Protection Act* ("EMCPA"). This leave applies where the employee will not be performing their job duties because of both the declared emergency and one of the following:

- an order that applies to the employee made under section 7.0.2 of the EMCPA (under this section, the Lieutenant Governor in Council has broad authority to issue orders relating to a number of things including travel, evacuations, and the closing of public and private spaces);
- an order that applies to the employee under the *Health Protection and Promotion Act* (HPPA) (under the HPPA, a medical officer of health has broad authority to issue orders in respect of a number of things including the closing premises, isolating persons that may

- have communicable diseases, and requiring persons to submit to examinations);
- the employee is needed to provide care or assistance to a specified individual (the same individuals listed in the family responsibility leave); or
- such other reason that may be prescribed.

Subject to a few exceptions, including where an employee is using the leave to care for a specified individual, the declared emergency leave will end on the day the emergency is terminated under the EMCPA.

The ESA also provides for several longer term unpaid, job-protected leaves:

- Family medical leave is available for up to 28 weeks in a 52-week period to provide care or support to a designated individual where a qualified health practitioner issues a certificate stating that the individual has a serious medical condition with a significant risk of death occurring within a period of 26 weeks.
- Critical illness leave allows an employee to take time off work to provide care and support to a critically ill family member, which is defined as someone “whose baseline state of health has significantly changed and whose life is at risk as a result of an illness or injury”. Employees who have been employed for at least six (6) consecutive months are entitled to: (i) 37 weeks of leave to care for a critically ill child; and/or (ii) 17 weeks of leave to care for a critically ill adult family member.

“Family member” is broadly defined for the purpose of family medical and critical illness leaves.

Finally, we note that during the SARS outbreak in 2003, the Ontario Legislature passed Bill 1, the *SARS Assistance and Recovery Strategy Act, 2003*, which established a special “SARS leave” entitlement for a defined period of time following the outbreak, in addition to the other leave entitlements already contained in the ESA. Though it has not happened yet, the Ontario Legislature could therefore pass new legislation specific to the COVID-19 outbreak creating additional temporary leave entitlements for employees, depending on the severity of the outbreak and other considerations.

### *Canada Labour Code*

For federally-regulated employers, the *Canada Labour Code* provides for some similar leave entitlements to those contained in the ESA, including an unpaid medical leave of absence not

exceeding 17 weeks due to illness or injury, provided that the employee has three months of continuous service with the employer.

### *Employment Insurance Act*

The *Employment Insurance Act* may provide benefits to employees that do not have company-paid sick leave/benefit coverage, or where such company-paid benefits are fully exhausted. Provided an employee has accumulated sufficient insurable hours, the Act provides for up to 15 weeks of benefits for employees who suffer a reduction of at least 40% of their normal weekly earnings because of illness, injury or quarantine.

### *The Ontario Human Rights Code*

The Ontario *Human Rights Code* ("Code") prohibits discrimination and harassment based on disability, race, place of origin and family status. While the common cold and flu have not been considered a disability for the purposes of the Code, in 2003 the Ontario Human Rights Commission stated that SARS should be treated as a disability. A COVID-19 infection would therefore likely also be considered a disability under the Code.

Employers must ensure that any precautionary measures taken in the workplace are not discriminatory. This means that employers should be careful not to subject an employee with COVID-19, or who is perceived to be at risk of contracting COVID-19, to differential treatment beyond that which is required to ensure a safe workplace. Employers owe employees that are disabled or perceived to be disabled from COVID-19 a duty of accommodation. The extent and nature of the duty to accommodate will vary depending on the circumstances of the employee's disability.

The Code may also apply should an employee take time off to care for a family member. The Code protects against discrimination on the basis of "family status," which has been interpreted to include an employee's family care obligations to children and parents. This means that employers may have to accommodate an employee's family care obligations to the point of undue hardship.

### *Health Protection and Promotion Act*

As discussed above in the context of the ESA leave for declared emergencies, the authority to place individuals in quarantine comes from the *Health Protection and Promotion Act* ('HPPA').

The HPPA gives medical officers of health broad powers to restrict the mobility and conduct of individuals.

## **Workplace Practices, Policies, and Procedures for Pandemic Preparedness**

### *Business continuity, absenteeism and staffing*

In the event of a COVID-19 pandemic, the only thing that may be certain is that absenteeism will increase. Employers who are faced with a high degree of absenteeism will have to address staffing and business continuity concerns and may have to find alternative sources to replace personnel such as temporary employees. To ensure that the business can continue to function, employers should identify key positions in the organization and provide cross-training to employees to ensure that those key positions can be adequately “back-filled”. Targeted and strategic cross-training can provide employers with the flexibility and agility to reorganize the workplace to handle unexpected and prolonged absences.

Most employers will already have policies and procedures setting out the requirements for employees that are absent due to sickness or to care for others. These policies should be applied in the normal manner, both in terms of eligibility and procedure, to employees that are infected by COVID-19. Employers should also consider whether their existing sick leave policy applies to employees that are not infected, but who are subject to quarantine.

Policies should indicate how the employee is to notify the workplace in the event of a COVID-19 related absence and whether there is a requirement for a doctor’s note. Such a requirement could be waived by an employer in the event of a pandemic, as hospitals and doctors’ offices will likely be overburdened.

Employers may also wish to implement a workplace infection control policy or plan to prevent the spread of COVID-19 in the workplace. This could include providing employees with:

- clean hand washing facilities;
- alcohol-based hand sanitizers;
- boxes of tissues; and
- proper-working ventilation systems.

Employers can promote other good hygiene practices through the plan by ensuring that objects in the workplace that are touched frequently are cleaned and disinfected regularly. This includes doorknobs, handles, railings, kettles, water-coolers, etc. Employees should be reminded not to share glasses, cups dishes and cutlery and to thoroughly wash those items after use. Employers can also attempt to reduce the number of objects in the workplace that are frequently touched. For

example, magazines in waiting rooms or common areas can be removed.

If an employee has been identified with an infection, their workstation and other areas in the workplace that they have been in, should be thoroughly disinfected.

### *Social Distancing*

Social distancing means minimizing contact or face-to-face interaction during peak pandemic phases. This may include:

- allowing employees to work from home;
- limiting staff meetings and gatherings;
- conducting staff meetings remotely;
- limiting or restricting travel;
- eliminating unnecessary travel; and
- permitting employees to work non-standard hours to avoid travelling to or from work at peak times.

For employers that consider implementing work from home policies, it may be useful to first identify which job responsibilities lend themselves to working from home. Employers should clearly set out the duties and expectations for such employees including the hours of work and any deadlines. Employers may also consider various supervision options.

Technological options should also be examined. For example, employers may wish to provide remote networking to provide home access to work e-mail and files. Employers should ensure that employees working from home have adequate hardware, software and internet connections. This may also require employers to develop adequate security and privacy safeguards.

Social distancing may also include restricting workplace entry by employees, customers, clients and suppliers who have been exposed to COVID-19 or who exhibit symptoms.

### *Communication Plans*

Employers should provide employees with the latest company news including any revised policies and procedures, health and safety protocols, and business continuity decisions that have been reached or are being considered (such as whether to temporarily close or to stay open) and any HR policies regarding pay and leaves. Employers will have to consider the best method of communication and ensure that they have accurate contact lists. Employers with unionized



workforces should follow the collective agreement protocols for such communications.

## **In our view**

This article has offered a summary view of some of the significant employment-related obligations and issues raised by the threat of a COVID-19 pandemic. Further information and daily updates on COVID-19 can be obtained from the following resources:

[Public Health Agency of Canada](#)

[Ontario Ministry of Health and Long Term Care](#)

[Public Health Ontario](#)

[World Health Organization](#)

For further information or advice on your rights and obligations as an employer when dealing with COVID-19 and similar issues, please contact [Vicky Satta](#) at [613-940-2753](#) or [Marianne Abou-Hamad](#) at [613-563-7660](#) ext. 259.