
Pandemic Planning: Is your Workplace Ready?

By: Erika Montisano, Ryan Conlin and Jeremy Schwartz

For the first time since the 2009 H1N1 swine flu, the World Health Organization (“WHO”) has declared a pandemic. As of mid-March, over 90 cases of 2019 novel coronavirus (2019-nCov) (“COVID-19”) have been confirmed in Canada, with hundreds of others currently under investigation. Like other coronaviruses (SARS or MERS, for example), COVID-19 can cause mild to severe respiratory infections in patients and is easily transmitted to others via droplets from coughs and sneezes. So far worldwide, almost 4,300 people have died from COVID-19 and over 120,000 people have been infected in more than 110 countries.

As an employer, there is no better time to prepare your workforce. While the risk to most Canadian employees remains low at this time, it is important for employers to be prepared in advance to deal with issues that may arise from a rapid spread of COVID-19.

To help prepare employers respond to this novel coronavirus outbreak, Jeremy Schwartz and Ryan Conlin will discuss workplace pandemic planning in greater detail at a Complimentary Lunchtime HR-Law Webinar on March 27. Registration for the event is now open!

Maintaining a Healthy and Safe Working Environment

The obligation on Ontario employers to provide workers with a safe workplace, free of hazards that may put an employee’s health at risk, primarily arises from the **Occupational Health and Safety Act** (“OHSA”). Similar language exists in all other provincial and federal health and safety legislation. During a pandemic, there are general proactive measures that employers can take to ensure that their duties under occupational health and safety legislation are met. These include, for example, advising employees of the risks associated with the COVID-19, performing routine cleaning of the workplace and, if feasible, allowing flexible working arrangements for employees.

In the midst of COVID-19 anxieties, it is foreseeable that some employees may raise legitimate health and safety concerns at work. Employers are urged to be proactive and put in place pandemic preparedness, prevention and response plans so that managers and supervisors are in a better position to respond to any such health and safety concerns that may arise, whether in response to COVID-19 or future public health emergencies. Further, employers should maintain a reliable, internal communications system for sharing key information and public health updates on preventing the spread of infectious diseases in the workplace. Employers should consider including links to the official government and health authorities in those communications, including:

- City of Toronto: <https://www.toronto.ca/community-people/health-wellness-care/diseases-medications-vaccines/coronavirus/>
- Government of Ontario: <https://www.ontario.ca/page/2019-novel-coronavirus>
- Government of Canada Travel Advisories: <https://travel.gc.ca/travelling/advisories>
- Public Health Ontario: <https://www.publichealthontario.ca>
- World Health Organization: <https://www.who.int/emergencies/diseases/novel-coronavirus-2019>

Under the general duty clause of the OHS Act (section 25(2)(h)), employers must take every precaution reasonable in the circumstances for the protection of a worker. Again, similar language is found in all Canadian jurisdictions. While most Canadians are not at significant risk of infection, employers can remind employees of the standard sanitary precautions to follow while at work and at home for minimizing the spread of germs. Employers should send symptomatic employees home immediately and request that they remain off work or work remotely, for at least 14 days. The same should apply for asymptomatic employees who have recently travelled to high risk areas or who have come into close contact with individuals exposed to COVID-19.

Further, an employee with a genuine, objective belief that the condition of the workplace – such as the spread of an infectious disease – is likely to endanger him or herself is entitled to refuse unsafe work. For example, genuine concerns of unsafe work may arise in circumstances where an employee's job requires them to come into close contact with travelers. Limited exceptions to the work refusal provisions exist, however, for those working in occupations where danger is a normal part of their job or if refusing work would put someone else in danger, such as nurses and police officers.

In Ontario, to lawfully refuse work, the employee must first report the unsafe work to their supervisor (subject to emergencies which make this unsafe). A series of investigations is triggered, starting with the employer's duty to investigate. Following the employer's investigation, if the employee has reasonable grounds to believe that the danger still exists, he or she can continue to refuse the work. At this point, the employer will notify the Ministry of Labour, which will then conduct their own investigation of the hazards.

If the work is, in fact, deemed unsafe by the Ministry of Labour, the inspector will make the appropriate orders (the failure to comply with such can result in significant fines for employers). Of course, employers that believe the inspector's orders are based on erroneous conclusions or are otherwise invalid, may appeal the orders before the Ontario Labour Relations Board within 30 days, and may even seek to suspend the orders pending appeal.

Employers may also want to consider delaying or seeking reasonable alternatives to any work-related travel, especially to high risk areas. Where this is not feasible, employers should provide travelling employees with the relevant safety information and the appropriate contact information in the case of an emergency. An employee may refuse to embark on work-related travel if he or she has a genuine belief that the travel is likely to endanger them, which would initiate the work-refusal process described above.

Now that the WHO has declared a pandemic, employers should check with benefits and travel insurance providers before permitting employee travel, to ensure travel-related coverage is unaffected.

Available Time Off Due to Illness

It is an implied condition of every employment contract that an employee attending work must be fit for duty. Should the situation arise where an employee exhibiting signs of the illness attends work, employers can (and should) request that the employee remain off work for at least 14 days, or until they have sought medical attention and are cleared to return to work.

When sending symptomatic or potentially COVID-19 exposed employees home to self-quarantine, there is generally no obligation to pay them unless specified by contract (which may include employment

agreements, policies, collective agreements and benefit plans, for example); though, obligations to provide a handful of paid sick days do exist in some jurisdictions, such as Québec.

To encourage employees to voluntarily report symptoms and other risks that may trigger such self-quarantine measures, employers should be flexible when administering leaves of absences and should consider whether to continue to pay employees on imposed or self-imposed leave.

Provided an employer has directed an employee to remain off work, unpaid, for 14-days, for bona fide reasons in good faith, and without unlawful discrimination (and in accordance with any statutory and contractual restrictions and obligations), such reasonable precautions should not trigger a constructive dismissal.

Employees who contract COVID-19 or have similar symptoms can take advantage of a number of available statutory leaves of absence, the most common being sick leave.

In Ontario, under the Ontario **Employment Standards Act, 2000**, sick leave allows employees to take up to three unpaid days due to a personal illness, injury or medical emergency. While employers are entitled to request evidence reasonable in the circumstances that an employee is entitled to the leave, it may be appropriate for employers to forego requesting medical evidence during the COVID-19 outbreak in order to avoid placing more stress on employees who will have to attend a doctor's office or a hospital, where they may be at risk of further illness and will place unnecessary strain on healthcare providers during this busy time. Family responsibility leave, which entitles employees to three unpaid days of leave, is also available to employees needing to care for certain prescribed ill family members.

Longer-term leaves of absence are also available to employees needing to take time off work to care for an ill family member. These include family caregiver leave, family medical leave and critical illness leave. Family caregiver leave entitles employees to take an unpaid, job protected leave of absence for up to eight weeks to provide care or support to family members with a serious medical condition. Family medical leave is similar, entitling employees to take an unpaid, job protected leave of absence for up to 28 weeks to provide care to those ill family members with a significant risk of death occurring within a period of 26 weeks. Critical illness leave is available in circumstances where a family member's baseline state of health has significantly changed and whose life is at risk as a result of an illness or injury. An unpaid leave of absence for up to 17 weeks for a critically ill adult and up to 37 weeks for a critically ill minor child is available under this leave.

In special circumstances, declared emergency leave is available to employees who will not be working because of an emergency. Under this leave, the provincial government must declare an emergency under the **Emergency Management and Civil Protection Act**, and in addition, the workers seeking the leave must either be subject to an order under the Act, be subject to an order under the **Health Protection and Promotion Act**, or be needed to provide care or assistance to a family member. The government may make various emergency orders under these Acts, including orders regulating or prohibiting travel, establishing facilities for the care, welfare, safety and shelter of individuals, and closing establishments as necessary to respond to or alleviate the effects of an emergency.

Note that, where an emergency order is in place that precludes employees from attending the workplace, the employer is likely under no obligation to pay them. Employers should consult with their benefits and insurance providers, to determine what coverage, if any, may apply in such circumstances.

Workplace Safety and Insurance Board

In Ontario, the **Workplace Safety and Insurance Act, 1997** provides benefits to workers who suffer an occupational disease in and of the course of employment. Other Canadian jurisdictions have their own, similar legislative schemes.

Ontario's Workplace Safety and Insurance Board (WSIB) awarded benefits to workers who contracted SARS in the workplace. Similarly, workers who contract COVID-19 as a result of a workplace exposure will most likely be entitled to benefits. It should also be noted that workers who contract the virus while travelling on business will, generally, also be entitled to benefits.

Human Rights Issues

COVID-19 is unlikely be considered a disability under the Ontario **Human Rights Code** (the "Code"). As a result, although any adverse treatment of sick employees compared to other employees may receive scrutiny under the Code, except for employees who present with the more serious, life-threatening symptoms, in the vast majority of cases present jurisprudence would not support a conclusion that the Code applies.

Depending on the applicable terms and conditions of employment, some employers may compel an employee to submit to a medical examination when there are bona fide concerns about fitness for duty or hazards in the workplace. However, all employers, subject to any contractual protocols or restrictions, may require proof reasonable in the circumstances of fitness to return to work in appropriate circumstances.

In some cases, requiring employees to refrain from attending work due to a possible COVID-19 infection, while necessary to maintain a healthy and safe workplace for others, can raise other human rights concerns. For example, employers may find themselves subject to pressure from their staff to implement policies or actions that disproportionately affect certain employees on the basis of race, citizenship, or ethnic origin. Instead, employers should assess an employee's circumstances on a case by case basis. Unless there is objective evidence that a particular employee presents a risk to health and safety by displaying symptoms of illness, or is asymptomatic but has been in close contact with an individual diagnosed with COVID-19 or recently returned from a hot spot, they should not be forced to take a leave or work from home.

It would not be unreasonable, however, to require an employee who exhibits symptoms or has recently travelled to a high-risk area (or been exposed to someone who has) to self-quarantine for at least 14 days.

Business Continuity

While a business cannot necessarily control a downturn in the economy as a result of a pandemic, it can prepare to deal with its effects in other ways. The following are some tips to minimize business disruption in during a pandemic:

- develop and maintain a pandemic plan well in advance;
- ensure that all employees are receiving the most up-to-date and reliable information from governmental and official health authorities;
- assess whether working remotely is feasible for employees who have contracted the illness or may have been exposed to the illness, and put in place (or at least identify the) infrastructure to make that possible (with adequate security safeguards);

- provide employees with contact information for human resources or management personnel in the event of an emergency;
- ‘triage’ aspects of business operations in advance from expendable to essential, and ensure that a plan is in place for dealing with high levels of absenteeism in these areas;
- assess whether certain business operations place employees at a greater risk of contracting illness and whether reasonable precautions can be taken to eliminate or manage the risks, including whether these functions can be paused or carried out in a different method; and
- ensure adequate communication with stakeholders, including suppliers and customers, if a disruption to operations is anticipated. Depending on the nature of the organization, internal and external public relations strategies and communication plans should also be readied.

As the adage goes: ‘fail to plan – plan to fail’. It is not too late for management to task a working group to tackle the many issues arising in the wake of this pandemic.

If your organization has human resources law questions, or you need help getting your plan and policies ready, **please contact:**

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