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COVID-19: What Employers Need to Know

Andrew Shaw and Shyama Talukdar | March 19, 2020



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INTRODUCTION

The Situation Thus Far...

- Things are changing rapidly. What is correct now, may not be correct tomorrow.
- Ontario has experienced the most cases of COVID-19 and consequently, has introduced the most expansive measures to combat the virus (see: <https://www.ontario.ca/laws/statute/90e09#BK12>)
- We will discuss employer obligations generally across Canada, with a special focus on Ontario, which is likely be the model most other provinces will follow in their fight to contain this virus.

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LEGAL FRAMEWORK

Relevant Legislation Part I

How Does it Apply?

- ***Employment Standards Act, 2000***: statutory leaves of absences (see: <https://www.ontario.ca/laws/statute/00e41#BK76>)
- ***Emergency Management and Civil Protection Act***: declared emergency leave (see: <https://www.ontario.ca/laws/statute/00e41#BK105>)
- ***Workplace Safety and Insurance Act, 1997***: financial entitlement for workers who contract COVID-19 through the course of their employment (see: <https://www.ontario.ca/laws/statute/97w16#BK7>)

Relevant Legislation Part II

Key Legislation At Play

- ***Employment Insurance Act***: workers who experience a reduction in normal weekly earnings of at least 40% because of “illness, injury or quarantine” are eligible for EI sickness benefits. (see: <https://www.canada.ca/en/employment-social-development/corporate/notices/coronavirus.html>)
- ***Occupational Health and Safety Act***: employee work refusals and employer’s obligations to maintain a safe workplace (see: <https://www.ontario.ca/laws/statute/90o01#BK81>)
- ***Human Rights Code***: asking employees to remain at home based on their place of origin or as a result of their illness may be discriminatory (see: http://ohrc.on.ca/en/news_centre/ohrc-policy-statement-covid-19-pandemic)

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Government Directives to Employers

Public Health Directives

What should employers do to stop the spread of the virus?

Employers should consider:

- allowing employees to work from home
- reminding employees that they will not suffer negative consequences for testing positive for COVID-19.

Employer should remember:

- proposed changes to the ESA have expanded job protections.
- not to ask for sick notes (this will likely become a legal requirement soon)
- See: https://www.ola.org/sites/default/files/node-files/bill/document/pdf/2020/2020-03/b186ra_e.pdf

Public Health Directives

Federal Government Initiatives

- **Self-Isolation:** anyone returning from abroad must self-isolate for 14 days.
- **Restrictions on Travel:** closure of the Canadian border to foreign nationals, including non-essential travel between US and Canada (see: <https://www.canada.ca/en/public-health/services/diseases/2019-novel-coronavirus-infection/latest-travel-health-advice.html>)
- **Changes to EI:** waiting period waived and expansion of eligibility criteria among many other changes. (see; <https://www.canada.ca/en/employment-social-development/corporate/notices/coronavirus.html>)
- **Small Businesses:** temporary wage subsidy equivalent to 10% of salary paid to employees for three months in a bid to keep staff on the company payroll (worth \$3.8b of the \$82b federal stimulus package) (see: https://www.canada.ca/en/departement-finance/news/2020/03/canadas-covid-19-economic-response-plan-support-for-canadians-and-businesses.html#Helping_Businesses_Keep)

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Employers Which Remain Open

What Can Employers Ask Employees?

Sample Questions

Employers can ask employees to self-declare if they have the virus or ask employees individually if they have the virus, including:

- Are you exhibiting any symptoms of the illness?
- Have you come into close personal contact with anyone who's exhibiting any of the symptoms?
- Have you travelled to an affected area?
- Have you been in close personal contact with anyone who has travelled to an affected area?

Collection of Employee Medical Information

- Employers are usually not allowed to ask for a diagnosis, but may be able to in this instance in order to fulfill its health and safety obligations to its entire workforce.
- However, those employers who are subject to private sector privacy legislation should take note that the federal, British Columbia and Alberta privacy commissioners have released publications that seem to preclude such action (see: https://www.priv.gc.ca/en/privacy-topics/collecting-personal-information/consent/gl_omc_201805/)
- Employers should use and disclose the health information on a “need to know” basis only, or as required by public health officials.
- Creates a risk of grievances being filed for unionized employers.

Employees Who Contract COVID-19

What Should Employers Do?

- Send the employee home (see: <https://www.canada.ca/en/public-health/services/diseases/2019-novel-coronavirus-infection/being-prepared.html#a5>).
- Inform the relevant public health authority with the employee's consent. Preferably, the employer and employee inform the relevant public health authority together.
- Inform other employees and clients with the infected employee's consent. Provide dates and duration of exposure.
- Inform the employee of the potential sources of financial entitlement: the employer's disability policies, EI and WSIB claims.

Paying Employees

- Do employers have to pay ill employees even if they do not have COVID-19 after testing?
- Do employers have to pay employees who are directed by the employer to self-isolate?
- Do employers have to pay employees who are directed by the government to self-isolate?
- What if a company chooses to close or is forced to close by the government?

Sick Leave Benefits

- Employees who contract COVID-19 are most likely eligible for sick leave benefits under an applicable sick leave policy.
- For employees who are self-isolating or under quarantine, but are not ill, the situation is more complicated. The specific wording of the sick leave policy will determine their entitlements.

Addressing Employee Fears and Concerns

- Provide additional personal protection equipment.
- Develop a plan for additional safety steps.
- Increase communications with employees and keep them informed of the latest updates.
- Re-iterate the employer's commitment to upholding its obligations under the *Human Rights Code* and the *Occupational Health and Safety Act*.

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Business Shutdowns and Work Refusals

Voluntary Agreements with Employees

- Employers may be assisted by voluntary measures accepted by employees, including reductions in pay/hours, unpaid leaves of absences, or work sharing agreements
- All of these voluntary measures should be reduced into written agreements. Employers should provide “consideration” for these changes.
- Unilateral changes to the terms of employment without consideration creates the risk of constructive dismissal.
- See: <https://www.canada.ca/en/employment-social-development/services/work-sharing/guide-applicant.html#hd2>

Lay-Offs: Voluntary and Involuntary

- Employers can consider temporary lay-offs.
- Temporary lay-offs cannot be more than 13 weeks in a consecutive 20 week period in Ontario. If the lay-off exceeds this period, then it's a termination of employment and the employee is entitled to termination, and potentially severance pay. However, the government may adjust this.
- Lay-offs may be extended to 35 weeks in a consecutive 52 week period, under certain conditions.
- See: <https://www.ontario.ca/laws/statute/00e41#BK119>

Work Refusals

- Under the *Occupational Health and Safety Act* (OHSA), most employees have the right to refuse work if a condition of the workplace “is likely to endanger” their health or safety.
- Refusing to attend work because it would require them to interact with people who have travelled to an affected area is not a legitimate work refusal.
- See: <https://www.ontario.ca/laws/statute/90o01#BK81>

Termination of Employment

- Employers still have the right to terminate an individual's employment without cause in the event of economic slow downs, but this is not recommended at this time because it might result in additional damages. Employees are still entitled to statutory termination and/or severance pay, as well as potentially, common law reasonable notice.
- If an employee is put on a temporary layoff, is starting a Service Canada approved work sharing agreement, or has their employment terminated, employers must issue a Record of Employment (ROE).
- Employers may wish to provide employees top up payments while on layoff or during any period they are receiving employment insurance payments.



Questions

Baker McKenzie.

Andrew Shaw

Partner

Employment & Compensation Law

Baker & McKenzie LLP

Tel: +1 416 865 2303

Cel: +1 416 254 6567

andrew.shaw@bakermckenzie.com

Shyama Talukdar

Associate

Employment & Compensation Law

Baker & McKenzie LLP

Tel: +1 416 863 1221

Cel: +1 416-316-5228

shyama.talukdar@bakermckenzie.com

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