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COVID-19
Frequently Asked Questions to Assist Employers

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As the 2019 novel coronavirus (COVID-19) continues to spread around the globe, employers need to know their legal rights and obligations as it relates to the Canadian workplace.

The following are some of the most pressing **Frequently Asked Questions**.

If you have additional questions, please contact your Sherrard Kuzz LLP lawyer, or our firm at info@sherrardkuzz.com with the re line: COVID-19. We'll respond promptly.

Q. Can an employer require an employee to advise if he or she has been diagnosed with COVID-19?

Yes. Although human rights case law has generally held an employer is not entitled to ask for an employee's *diagnosis* (only the *prognosis* as it impacts the workplace) in the present circumstances it is reasonable to require proactive disclosure due the risk of transmission.

Remember… an employer should ensure any medical information provided about an employee is kept in a separate and secure location and not broadly disclosed to others. It may be necessary to advise other employees there has been a case of COVID-19 confirmed in the workplace. However, any disclosure should avoid identifying information and be limited to the extent it is necessary to take precautions to protect health and safety.

Unfortunately, there is no cookie-cutter answer to how much information must be disclosed and to whom. Every workplace functions differently from the next. Further, some workplaces are virtual, fluid and/or mobile (*e.g.,* employee may travel *to* clients to service them; or travel routinely as a component of the job, *etc.*). **When in doubt, consult with your employment lawyer about best practices for your organization.**

Q. Can an employer require an employee advise if he or she has been in close contact with someone diagnosed with COVID-19 or travelled outside of Canada?

Yes. An employee can be required to disclose if he or she has been in close contact with someone diagnosed with COVID-19. Similarly, an employee can be required to disclose travel outside of Canada or on a cruise ship within the past 14 days. This includes indirect travel, such as a plane "stopping-over" in an area, because new passengers and service individuals from that area may come into contact with existing passengers and crew. Attendance at large gatherings is also discouraged and should be monitored.

Employers and employees should check the Government site regularly, and adjust protocols and policies accordingly.

Q. Can an employee be required to self-isolate?

Yes. The Government of Canada has stated that anyone who returns to Canada from abroad, including from the United States, must **self-isolate** and **stay at home** for 14 days. In addition, anyone arriving from Hubei province in China, Iran or Italy must report to local public health within 24 hours of arriving in Canada (Health Canada). Special rules may apply to healthcare workers and other essential service workers.

Q. Can an employee refuse work due to a fear of contracting COVID-19?

Certain groups of employees are not entitled to refuse to perform work on health and safety-related grounds. This includes employees for whom danger is an inherent part of their work or where their withdrawal of services would directly endanger the life, health or safety of another person (*e.g.*, police, firefighters, and hospital, long term care or group home employees, *etc.*).

Other employees have the right to refuse to perform work if they hold a *bona fide* belief a "physical condition" in the workplace constitutes a risk to their health or safety. Generally, this involves concern over equipment or machinery. However, it is possible "physical condition" may also include concern for the spread of a serious illness such as COVID-19.

In the event of a work refusal, an employer has an obligation to place the refusing employee in an area where he or she is safe, and perform an investigation into the circumstances surrounding the refusal. Such an investigation must include a worker representative of the Joint Health and Safety Committee, as applicable. In the case of a COVID-19 related refusal, this would likely involve investigating the refusing employee and the employee or work practice thought to be causing the risk. If it is determined there is no objective risk, but the refusing employee maintains his or her refusal, the Ministry of Labour must be contacted to perform its own investigation. Should the Ministry confirm the absence of risk, the refusing employee may be disciplined if he or she continues to refuse to return to work.

Q. Must an employer report a suspected case of COVID-19 to Public Health?

No. An employer is not legally required to report a suspected case of COVID-19 to a local Public Health Unit. Reporting will fall to the medical practitioner treating the patient.

Q. What protected leave is available to an employee with COVID-19?

If an employee or a member of his or her family contracts COVID-19, there are a number of unpaid leave entitlements under employment standards legislation. Leave entitlements vary between jurisdictions. For example, in Ontario, the *Employment Standards Act, 2000* (the "ESA") provides the following:

- **Family Medical Leave** – up to 28 weeks in a 52-week period to care for or support a family member suffering from a serious medical condition and who is at significant risk of death within 26 weeks

- **Family Caregiver Leave** – up to eight weeks to care for or support a family member suffering from a serious illness

- **Critical Illness Leave** – up to 37 weeks to care for or support a critically ill minor child, or 17 weeks to care for or support a critically ill adult family member

- **Sick Leave** – up to three days in each calendar year due to employee illness, injury or medical emergency

- **Family Responsibility-** up to three days in each calendar year due to the illness, injury, medical emergency or other urgent matter of a prescribed family member

- **Declared Emergency Leave** – if an employee cannot perform his or her duties as a result of an emergency declared under the *Emergency Management and Civil Protection Act* or other similar legislation. This leave is currently **in force** until at least March 31, 2020.

The Ontario Government has also announced it will introduce legislation to provide job-protected leave if an employee:

- is under medical investigation, supervision or treatment for COVID-19
- is acting in accordance with an order under the Health Protection and Promotion Act
- is in isolation or quarantine
- is acting in accordance with public health information or direction
- needs to provide care to a person for a reason related to COVID-19 such as a school or day-care closure
- is directed by the employer not to work.

The proposed legislation will also restrict an employer from requesting a medical note to substantiate the need for this leave. The measures would be retroactive to January 25, 2020, the date that the first presumptive COVID-19 case was confirmed in Ontario.

If you would like to learn about protected leaves in other Canadian jurisdictions, contact us.

Q. Is COVID-19 a "disability" under human rights legislation, requiring accommodation?

It is not certain whether COVID-19 will be considered a "disability" under the Ontario *Human Rights Code* or human rights legislation in other jurisdictions (a "disability" is generally considered to have longer term impact). That said, an employer may wish to treat any confirmed case of COVID-19 as a disability and accommodate the employee even if the employee has exhausted his or her applicable leaves of absence under the ESA. Accommodation would include providing the employee with an extended unpaid leave if medically required.

Q. If an employee has been placed in quarantine for COVID-19, is the employer under an obligation to pay the employee while he or she is off work?

No. There is no legal obligation to continue an employee's pay if he or she is unable to attend work due to illness or quarantine, unless a workplace policy or collective agreement provides otherwise (*e.g.*, paid sick leave). The employee may be able to access short-term disability benefits, if available, or Employment Insurance sickness benefits (see below).

Q. Can an employee be laid off due to shortage of work during he COVID-19 crisis?

The ESA entitles an employer to lay off an employee for a prescribed period of time, after which the layoff is deemed to be a termination of employment and the employee is entitled to **termination** and **severance** pay (if severance pay applies).

A temporary layoff is deemed a termination of employment if the layoff lasts longer than 13 weeks in any period of 20 consecutive weeks. However, a temporary layoff may last for up to 35 weeks in any period of 52 consecutive weeks if:

- the employer continues the employee's coverage under a group or employee insurance plan or retirement or pension plan
- the employer provides substantial payments or supplementary unemployment benefits to the employee during the layoff period (or would have if the employee was not employed elsewhere)
- the employer recalls the employee within the time approved by the Director of Employment Standards
- the employer and a non-unionized employee have agreed to the period of layoff in writing
- in a unionized workplace, the employer recalls a laid off unionized employee with a right of recall under a collective agreement within the 35 week period.

It is important to recognize a reduction in employee hours may also be considered a layoff for purposes of the ESA, even though the employee continues to work. An employee is considered to be laid off for a week if the employee earns less than 50% of the amount the employee would earn at their regular rate of pay in a regular work week.

For the purpose of establishing an employee's entitlement to **severance** pay, an employee is considered to be laid off for a week if the employee earns less than 25% of the amount the employee would earn at their regular rate of pay in a regular work week. An employee is entitled to severance pay if laid off for more than 35 weeks in a 52 week period.

If an employee works an irregular schedule, the ESA establishes a formula to determine when an employee is considered to have been laid off . This means that, over time, a work reduction may eventually be considered a termination, triggering entitlement to termination and severance pay (if it applies).

Q. What needs to be included in a layoff notice?

There are no specific requirements. In fact, the ESA does not expressly require written notice of layoff be provided. However, as a best practice, an employer should clearly should provide written notice of layoff. It should state when the layoff will start, who the employee should be in contact with during the layoff, and if there is an expected date of recall, include the date (or an anticipated date).

Q. Does the layoff notice need to include a definite return to work date?

An employer is not required to have a return to work date for a temporary layoff. However, the layoff will turn into a termination once the period of layoff is no longer considered to be a "temporary layoff". In this case the employee is deemed to have been terminated on the first day of the layoff.

The layoff provisions of the ESA can be tricky and, and if not implemented correctly, can expose an employer to considerable liability. If you need assistance, contact Sherrard Kuzz LLP.

Q. Will an employee be eligible for Employment Insurance benefits if temporarily laid off due to economic reasons?

An employee temporarily laid off for economic reasons may be eligible to apply for benefits. Benefits are paid at 55% of earnings, to a maximum of $573.00 per week (taxable income).

To qualify, an employee must meet the minimum number of "insurable hours" calculated over the previous 52-week period. The exact number of insurable hours required varies by region. Benefits are paid for a maximum period of time and this too varies by region.

At present, there is a one-week waiting period for benefits. This may be waived by the Government during the current COVID-19 pandemic, but this has not yet occurred.

To facilitate an employee's access to EI benefits, an employer should complete a Record of Employment (ROE) within five days from the interruption in earnings. The "Reason for Issuing" the ROE (Block 16) should be marked as "A" (shortage of work). Under the "Expected Date of Recall" (Block 14) the employer should indicate the anticipated return to work date, or mark "unknown" if no anticipated return to work date has been indicated in the layoff notice. The ROE may be completed online (if an employer wishes to issue it in paper form, the employer must order paper copies from Service Canada).

If an employer wishes to, it may "top up" the EI benefits provided to an employee during a temporary layoff through a Supplemental Unemployment Benefit Plan (SUB Plan). **Special rules apply to a SUB Plan, which must be registered with EI.**

Q. Will an employee be eligible for Employment Insurance benefits if ill or quarantined by government due to suspected illness?

An employee will be entitled to EI sickness benefits if ill for any reason (including COVID-19) or quarantined by public health. In addition, the Federal Government has indicated an employee will be entitled to EI sickness benefits if the employee is required to self-isolate by an employer for

reasons consistent with the directive of Public Health officials. At present, this would be in circumstances where an employee has returned from international travel and is to self-isolate for a 14 day period.

Sickness benefits are available for a 15-week period. The regular one-week waiting period to apply for these benefits has been waived. The amount of the benefit and the manner of calculation is the same as with regular benefits, as discussed above.

To facilitate an employee's access to EI benefits, an employer should promptly complete a Record of Employment (ROE). The "Reason for Issuing" the ROE (Block 16) should be marked as "D" (illness or injury").

Q. Could a layoff trigger a potential constructive dismissal?

Despite the provisions of the ESA, courts have held that, **unless an employment contract or other agreement includes an express or implied right to lay off an employee an employer has no right to do so.** If there is no express or implied right, a layoff may amount to a fundamental breach of the employment contract (whether or not that contract is in writing). In such a case, the employee is deemed to be constructively dismissed and entitled to notice of termination, or pay in *lieu* of notice, and possibly severance pay. Because notice (in this context) is based on what a court would award from a common law perspective, the amounts involved are generally considerably higher than those required by employment standards legislation.

If an employer unilaterally and significantly reduces an employee's hours of work this *may* be viewed as a constructive dismissal. In this case, the employee may be entitled to notice of termination, or pay *in lieu*, even if the reduction does not meet the threshold of a "layoff" under the ESA.

It is important to note that a constructive dismissal arises only if there has been a **unilateral** change by the employer to terms and conditions of employment. As such, if an employee **agrees** to the change in the terms of employment (either the temporary layoff or the reduction in hours) no constructive dismissal arises.

Similarly, if the change to terms and conditions of employment are not imposed by the **employer** but are the result of a Government directive to close operations, it is arguable an employee will not be able to successfully assert the layoff constitutes a constructive dismissal.

Even if an employee does not agree to the layoff, and claims it amounts to a constructive dismissal, the employee has an obligation to mitigate any damages they claim to have suffered. This means, if a laid off employee is recalled to work and declines, they may later be found to have failed to mitigate their losses (in whole or in part), dramatically reducing the value of their claim against their employer.

Q. What are an employer's liabilities on termination of employment?

If an employer terminates an employee there are two potential sources of liability: **employment standards legislation** and **common law**.

Employment Standards

Under the ESA, an employee is entitled to **notice** based on years of service, to a maximum entitlement of eight weeks of notice, or pay in *lieu*. In addition, an employee with five or more years of service may be entitled to severance pay approximately equivalent to one week's pay per year of service to a maximum of 26 weeks.[1]

There are additional termination entitlements on a "mass termination" which generally involves a termination of 50 or more employees within a prescribed time period. **If an employer is considering a mass termination it is critical to first consult with an experienced employment lawyer because the requirements are different and the potential liability is considerable.**

Common Law

In addition to employment standards entitlements, an employer may be required to pay a terminated employee common law reasonable notice. This is a term of art used by Canadian courts intended to be a rough estimate of how long an employee will take to find comparable, alternate employment. The length of reasonable notice owed to an employee varies depending upon a range of factors including type of work, degree of expertise or training, length of service, employee age, remuneration, availability of alternative employment, and the circumstances surrounding the hiring of the employee (*e.g.,* was the employee 'lured' from secure employment). When assessing the length of reasonable notice the employment standards notice period is included.

Unfortunately, there is no hard and fast formula to determine reasonable notice. The analysis often starts with a frequently referenced estimate of "one month per year of service" to an approximate maximum of 24 months, although there have been exceptional cases in which courts have exceeded this number. In reality, "one month per year of service" is a guidepost and each case requires individualized assessment.

Following termination from employment, an employee typically has an obligation to mitigate their losses during the period of reasonable notice by actively seeking comparable employment. As noted above, if an employee is recalled to employment following a layoff, and refuse to return, the employer may take the position the employee has failed to mitigate their losses, either in whole or in part, depending on the amounts at issue.

If an employer has a properly drafted and enforceable employment agreement with an employee, this will limit the amount of notice, or pay in *lieu*, to which an employee is entitled to as little as the ESA

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[1] An employee is only entitled to severance pay where the employer has an annual payroll in Ontario of $2.5 million or more, or the employee is one of 50 or more employees terminated at an employer's establishment in a six-month period.

minimum entitlements. As such, it is **important** an employer reach out to experienced employment counsel to determine whether any of its employment agreements will limit potential liability should it be necessary to terminate an employee.

Q. If an employee contracts COVID-19 at work is the employee entitled to WSIB benefits?

Typically, an infectious disease claim is adjudicated through the WSIB's Occupational Disease and Survivor's Benefits Program, a specialized team at the Workplace Safety and Insurance Board that deals with infectious diseases, such as SARS and H1N1.

To obtain WSIB benefits a worker must be diagnosed with COVID-19 **as a result of a work-related exposure**. If a worker is entitled to benefits, he or she may be eligible for wage loss benefits which includes any period in quarantine pre-diagnosis, healthcare benefits, and permanent impairment benefits as a consequence of the disease. In the case of a fatality the worker's survivors would receive benefits from the WSIB.

If a worker stayed away from work due to stress or anxiety resulting from the risk of contracting COVID-19, a claim for benefits may be made under the Chronic Mental Stress policy. The worker would have to provide a DSM diagnosis of an anxiety or stress disorder and prove, on the balance of probabilities, the work related stressor, fear of COVID-19 and/or quarantine, arose out of and in the course of the worker's employment and was the **predominant cause** of the diagnosed mental stress injury. Practically speaking the "predominant cause" test is a significant hurdle to most chronic mental stress claims.

Q. What should an employer include in a COVID-19 (infectious diseases) policy?

As noted earlier, every workplace functions differently from the next. Further, some workplaces are virtual, fluid and/or mobile *(e.g.,* employee may travel *to* clients to service them; or travel routinely as a component of the job, *etc.*). As a result, no two workplace policies will be exactly the same.

At the very least, consider the following topics:

Communication

- How will the employer communicate with employees or other contractors?
- Does the employer have the information and technology required for efficient communication (*e.g.,* mass text)?

Reporting

- When must an employee report exposure or suspected exposure to COVID-19?
- To whom must the employee report and how: HR, Public Health, *etc.*

Self-Quarantine/Isolation

- When, for how long, and to whom to report?

Working from Home

- Is this possible given nature of the work, technology, legal considerations, *etc.*?
- If not, what if anything can be put into place to facilitate this? Can this be done proactively?
- What are the expectations of an employee working from home?
- If an employee cannot work from home, what is the impact on the employee's status in the workplace?

Return to Work

- When and how?
- Medical certification (will the employer pay for the certificate)?

Business Travel

- Reporting: when and to whom?
- Will there be no obligation to travel for business?
- What is "non-essential" travel?

Personal Travel

- Reporting: when and to whom?

Visitors to the Workplace

- Visitors' log
- Pre-screening questions
- Privacy considerations

Internal Reporting and No Reprisal

- Encourage internal reporting and reinforce that there will be no-reprisal for doing so.

Bottom line: There are many issues at play in this serious and evolving situation. If you have any questions about how COVID-19 may impact your workplace or would like assistance, contact your Sherrard Kuzz LLP lawyer or a member of the Sherrard Kuzz team.

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