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MANAGING COVID-19 ISSUES AT WORK (AN HR PERSPECTIVE)

Guidance Note and Q&A

WHAT IS THE CORONAVIRUS?

The World Health Organization explains that coronavirus (CoV) is a large family of viruses that cause illness ranging from the common cold to more severe diseases such as SARS (Severe Acute Respiratory Syndrome).

This particular strain has been named “COVID-19” and first appeared in December of 2019 in Wuhan, China.

WHAT ARE THE SYMPTOMS?

Symptoms of COVID-19 include fever, cough, shortness of breath and loss or change to the sense of smell or taste. Some people who contract the virus suffer from mild symptoms and recover easily, while others could experience more severe symptoms that turn into pneumonia. Reports suggest that the elderly, those with weakened immune systems, diabetes, cancer, and chronic lung disease are the most susceptible to serious illness and death.

Symptoms can appear within two days after infection but can sometimes take up to 24 days.

Employees who experience symptoms should follow government advice on contact tracing, quarantine and continued social distancing and mask wearing.

HOW IS THE VIRUS SPREAD?

The virus is most likely spread from person to person through:

- Direct contact with a person while they are infectious;
- Contact with droplets when an infected person coughs or sneezes; or,

- Touching objects or surfaces (such as drinking mugs or desks) that were contaminated by droplets from secretions coughed or sneezed from an infected person and then touching the mouth or face.

EMPLOYER CONSIDERATIONS

Duty of care

Employers have a duty of care to their employees which includes not exposing them to unnecessary risk. In this case, that may include not putting them in a position in which they could become infected by the virus without taking all reasonable precautions.

Wellbeing

It is important to acknowledge that employees will be worried about the virus and that, in most cases, their concerns will be valid. In addition to having a duty of care to preserve health and safety, employers also need to consider the wellbeing of their employees. Employers should remind employees of any wellbeing initiatives in place and encourage communication between staff and management.

Business travel

On March 18, 2020, the Government of Canada advised against all non-essential foreign travel and put new initiatives in place to restrict air travel in an effort to stop the spread of COVID-19.

Employers should assess whether work related travel is essential. If it is deemed that business travel is absolutely necessary, employers should ensure; employees are given clear instructions on hygiene to reduce the risk of contracting the virus, and that the travelling employee is going on the business trip voluntarily in order to reduce the liability of the employer. Lastly, there should be a plan in place before the employee leaves on the



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trip setting out what to do if the employee feels ill while away.

Working from home

When the initial “lockdown” announcement came in March 2020, many businesses implemented a temporary remote work arrangement where workers were advised to work from home if possible.

Since then, there have been several adjustments to the advice on working from home in Canada.

During the current lockdown, workers should work from home unless they are unable to do so. With this being said, employers in Canada have an obligation to accommodate their employees under the applicable human rights legislation. If an employee is at high risk for COVID-19 (elderly populations, women who are pregnant and those who have an underlying health condition such as diabetes, asthma, heart disease etc.) the employer should accommodate that employee by providing alternative work, introducing added safety measures or letting the employee work from home if possible.

While the employees listed above should be accommodated when possible, there is no direct order from the government stating these employees cannot go into the office. This means that where it is not feasible for employees to work from home, they may go into work but the workplace must have measures put in place to protect staff. If employees wish to work from home but it is not possible to do so given the nature of their work, they would be technically withdrawing their services and would not be entitled to pay from the employer.

However, if it is not possible for an employee to do their job from home but they cannot come into work for designated reasons such as childcare obligations due to school closures or taking care of a relative with COVID-19, they may be eligible to take one of the COVID-19 designated leaves under the applicable employment standards legislation. These leaves include the Infectious Disease Emergency Leave in Ontario, modified Personal and Family

Responsibility Leave in Alberta and COVID-19 Leave in British Columbia.

As the vaccine starts to rollout across Canada, more and more employees will begin to return to the office. If the employer starts to recall employees back into the physical workplace – and is continuing to provide a safe workplace – employees will likely have to return and will not have the option to choose to remain working remotely unless an accommodation is needed or the employer agrees to such an arrangement.

Quarantine and pay

The Government of Canada states that if someone is returning from travel outside of Canada, had close contact with someone who has or is suspected to have COVID-19, or has been told by public health that they may have been exposed to the virus, they need to quarantine, also known as self-isolating, for 14 days.

During the 14-day quarantine period, the isolating person must stay home, avoid contact with other people, practice physical distancing within the home if they live with others, monitor themselves for symptoms, record their temperature daily and avoid using fever-reducing medications as they could mask early signs of COVID-19. If the isolating person develops symptoms during their quarantine they should continue to isolate and immediately call the local public health authority to discuss the situation and follow their instructions.

On March 25, 2020, the Minister of Health announced an Emergency Order under the *Quarantine Act* (the “Act”) that requires anyone entering Canada by air, land, or sea to quarantine for 14 days whether or not they are showing COVID-19 symptoms. This order is enforced by the Government of Canada and failure to comply could result in fines up to \$750,000.00 and/or imprisonment for 6 months. Additionally, anyone who causes a risk of imminent death or serious bodily harm to another person while wilfully or recklessly going against the Act could receive a fine of up to \$1,000,000.00 and/or imprisonment for up to 3 years.



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Due to the strict conditions pertaining to quarantine, employers cannot request their employees to be physically present at work while they are isolating for the 14-day period. The employer and employee can either agree to a remote work arrangement if possible, or the employee can commence one of the COVID-19 related leaves detailed below.

Ontario: Infectious Disease Emergency Leave (“IDEL”)

If a provincially regulated employee in Ontario needs time off to quarantine, amongst other reasons, they can commence a leave under IDEL. This leave is an unpaid, job protected leave but the employee can still receive payment during their time off under employment insurance or other federal government financial supports. There is no specified limit of days an employee can be on IDEL, and the entitlement to the leave is retroactive to January 25, 2020.

Alberta: COVID-19 Leave

As of March 5, 2020, all employees regulated under Alberta’s *Employment Standards Code* who are in quarantine due to COVID-19 are eligible for 14 days of unpaid leave. In order to continue to receive pay while on leave, the employee can request to use their available vacation pay, banked overtime, or apply for financial support through the Federal Government.

British Columbia: COVID-19 Leave

Provincially regulated employees in B.C. are entitled to take an unpaid, job-protected leave if they are quarantining due to COVID-19 or experiencing other issues related to COVID-19 that prohibits them from working. Similar to IDEL in Ontario, there is no specified limit to the number of days an employee can be on leave, and the entitlement to the leave is retroactive to January 27, 2020.

Employers are not able to request a doctor’s note for any of the 3 leaves listed above, and employees are not required to provide one as evidence to commence a COVID-19 related leave.

If an employee has a confirmed case of COVID-19

The response to dealing with an employee who has tested positive for COVID-19 can vary and is highly dependent on the circumstances surrounding the situation. Some businesses may not need to shut down at all, while others may have to temporarily close to have the workplace sanitized before receiving approval to reopen. The likely steps that will be taken in the event of an employee testing positive for COVID-19 are as follows:

- Once the employee receives the positive test result, contact tracing will occur.
- Public health will reach out to the employer so they can inform the rest of their employees. Other employees would likely then be advised to monitor themselves for symptoms, unless they worked closely with the infected employee, in which case they may be advised to quarantine.
- A thorough sanitation of the workplace is then conducted and the public health authority will give the business permission to reopen; this is a quick process and usually occurs in 24 hours or less. Alternatively, the business may not be required to close at all if the sanitation can occur fast enough.

Employers who have concerns about a worker’s exposure to COVID-19

Where an employer has concerns about a non-symptomatic employee (for example, where it is known or suspected that the employee has had contact with someone known to have COVID-19 but does not live with them) then the best course of action may be to play it safe with a brief layoff on precautionary grounds. This layoff will often last the length of the quarantine period (14 days).

Where the employer chooses to temporarily suspend an employee as a precaution, the employer will be required to pay the employee during the leave unless otherwise stated in an employment contract. Alternatively, the employer could consider agreeing to a period of



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annual leave with the employee to cover the absence or a period of remote work if feasible.

Employees who Refuse to Come to Work Due to Concerns

If an employee is worried about contracting COVID-19 and refuses to come to work, the employer should listen to the employee's concerns and offer reassurance. The employer should take all reasonable steps to protect the health and safety of workers and talk the worried employee through the steps that have been taken to ensure the workplace is safe and compliant. If the employee still refuses to come to work, this may be dealt with through disciplinary action.

Alternatively, employers may decide to offer a period of paid or unpaid leave or allow the employee to work from home if it is possible.

Discrimination, bullying and harassment

With the COVID-19 vaccine beginning to roll out across Canada, employers are faced with the dilemma of how to handle employees who choose not to get vaccinated. Employers should take precautions and not ask employees about their choice to take up the vaccine as it could result in a claim under the applicable human rights legislation. Some employees may not receive the vaccine due to reasons such as religion or disability (pre-existing medical conditions for example). These employees must be accommodated and cannot be questioned as to why they did not get vaccinated. To be safe, employers should simply educate their staff about the benefits of receiving the vaccine and nothing more.

Arriving in Canada and quarantine

Currently, you can only travel to and enter Canada if you are a:

- Canadian citizen;
- Dual Canadian citizen with a valid Canadian passport or special authorization;
- Permanent resident of Canada;

- Person registered under Canada's Indian Act; or,
- Protected person.

Foreign nationals, including United States citizens, can travel to Canada only if they are eligible (eligibility criteria for these categories can be found on the Government of Canada's website).

As of February 21, 2021, travellers entering Canada have much more stringent "hotel quarantine" requirements to face. Travellers entering the country must:

- Reserve a government-authorized hotel for 3 nights prior to departure to Canada;
- Take a COVID-19 molecular test upon arrival in Canada;
- Stay in a government-authorized hotel while awaiting the results of the COVID-19 test taken upon arrival; and,
- Pay for the cost of the hotel stay, as well as all associated costs such as food and transportation.

Additionally, all mandatory pre-boarding and health requirements must be complied with, including temperature screening, health check questions, and wearing masks on board flights. More specifically, upon arrival to Canada travellers must:

- Wear a mask.
- Answer eligibility and health screening questions, including quarantine plans.
- Provide all required information and documents.
- Collect a test kit for use later during the quarantine.

Once all arrival criteria have been met, the traveller can go to their pre-booked hotel to await the results of the COVID-19 test taken upon arrival. If the test is negative, the traveller can continue on to the place, likely their home, where they will undergo the mandatory 14-day quarantine period. If the test is positive, the traveller will have to relocate to a designated



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quarantine facility or other suitable place of quarantine.

Alternatively, if the traveller has symptoms upon arrival or an unsuitable quarantine plan, the quarantine stay will be at a designated quarantine facility.

While the traveller is undergoing their 14-day quarantine period at their home or chosen place of isolation, they will likely be eligible to commence a statutory COVID-19 designated leave or set up an alternative arrangement with their employer to work from home.

Closure of business

Toward the end of March 2020, provincial governments across Canada started to close non-essential businesses as the COVID-19 cases began to rise. Since then, each province has established tiers, steps, or stages to reopen businesses while continuing to monitor public health.

Alberta

To establish a reopening plan for the province, Alberta has put in place a 4-step system entitled “A Path Forward” that is mainly dependent on hospital admissions. The first step is entitled “Early Steps” and eased restrictions to outdoor gatherings and personal services on January 18, 2021. On February 8, 2021, Alberta moved to “Step 1” which indicated they hit 600 COVID-19 hospitalizations and declining. On March 1, 2021, Alberta advanced to “Step 2” meaning the province reached 450 hospitalizations and declining. Alberta is currently still in the “Step 2” phase, which increases the capacity allowed in retail stores, reopens banquet halls, community halls and conference centres, and allows college and university athletics to resume. The province will enter “Step 3” when they reach 300 hospitalizations at least 3 weeks after March 1, 2021. Lastly, “Step 4”, the final step, will commence when there are 150 hospitalizations at least 3 weeks after “Step 3” begins.

Ontario

Ontario’s reopening plan is different than Alberta’s as it involves a regional plan for reopening. On November 3, 2020, Ontario established 5 colour-coded levels which make up the COVID-19 response framework. The colour with the most stringent restrictions is Grey and is also known as the “Lockdown” stage. In this stage, only essential businesses are open including supermarkets, pharmacies and retail stores operating at 25% capacity. Currently, most regions of Ontario have moved out of the Grey level with the exceptions of Toronto, Peel, Lambton, Sudbury & District and Thunder Bay District. The level above Grey is Red which is deemed the “Control” phase and allows for restaurants and gyms and fitness centres to open with limited capacity. As of today, 11 regions across Ontario, including areas in the GTA such as York and Halton regions, are in the Red level. The following level is Orange; the “Restrict” level. In Orange, gathering restrictions are eased and restrictions are further enhanced from the Red level. There are 9 regions in Ontario that are currently in the Orange stage. The Yellow “Protect” stage provides bars and restaurants to extend their closing time to midnight and further eases gathering restrictions. Currently, 6 regions in Ontario are in Yellow. The Green “Prevent” stage is last, providing the most relaxed rules allowing life to somewhat go back to normal (while mask wearing and physical distancing are still practiced). Only Grey Bruce, Hastings and Prince Edward Counties, and Kingston, Frontenac and Lennox & Addington are currently in Green. **It is important to note that there are frequent changes in the status of each region. In order to stay up to date, www.covid-19.ontario.ca should be consulted often.**

British Columbia

The “B.C. Restart Plan” was introduced on May 6, 2020 and outlines the province’s four-step plan to reopen businesses. “Phase 1” enables essential services to operate and involves the most stringent restrictions. The province moved out of “Phase 1” relatively early on May 18, 2020 – only



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two weeks after the plan was put in place. The second phase of B.C.'s reopening plan, fittingly named "Phase 2" lasted for roughly one month from May 18, 2020 to June 23, 2020 and allowed retail stores, restaurants, offices, and personal service establishments to open with certain restrictions in place. The province is currently in "Phase 3" of the 4-step reopening plan and have been for some time. The third phase came into effect on June 24, 2020 and allowed for hotels and resorts to reopen along with select entertainment venues and schools. The province will likely not advance to the final phase, "Phase 4", until most of the province receives the COVID-19 vaccine. When B.C. does move into the last stage of the reopening plan, there will be little to no closures since the wider community will be vaccinated and immune to the virus.

Financial Supports

If a business is struggling and on the verge of closure, there are a number of different financial support mechanisms such as loans and access to credit available through the Federal Government.

The available programs are as follows:

- CEBA (Canada Emergency Business Account): provides interest-free loans for small businesses and not-for-profits;
- HASCAP (Highly Affected Sectors Credit Availability Program): provides low-interest loans to cover operational needs for businesses that have been hit hard by COVID-19;
- CERS (Canada Emergency Rent Subsidy): provides rent and mortgage support for qualifying organizations affected by the pandemic;
- CEWS (Canada Emergency Wage Subsidy): assists businesses with keeping or rehiring employees;
- BCAP (Business Credit Availability Program): offers credit to help cover operating costs due to COVID-19;
- RRRF (Regional Relief and Recovery Funds): provides help for businesses that are unable to access other support measures; applications can be submitted

through the business' Regional Development Agency;

- BEP (Black Entrepreneurship Program): opening May 2021, this loan fund will provide loans up to \$250,000.00;
- Support for Indigenous Businesses: short-term, interest-free loans and non-repayable contributions are available; and,
- Large Employer Emergency Financing Facility: offers bridge financing for Canada's largest employers facing financial challenges.

Other supports for struggling businesses may be available on the provincial/territorial level.

Closure of schools and essential workers

School closures have been in place from time to time as part of the pandemic response, but schools remain open for vulnerable children and children of essential workers.

Essential workers in Canada work in one of the 10 sectors classified by the Federal Government as "critical infrastructure". Critical infrastructure is defined as the processes, systems, facilities, technologies, networks, assets, and services essential to the health, safety, security or economic well-being of Canadians and the effective functioning of government.

The 10 sectors that are composed of essential workers are:

- Energy and Utilities
- Information and Communication Technologies
- Finance
- Health
- Food
- Water
- Transportation
- Safety
- Government
- Manufacturing

These sectors are considered to be essential to preserving life, health, and basic societal



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functioning. Workers in these professions include, but are not limited to, first responders, health care workers, critical infrastructure workers (e.g., hydro and natural gas), and workers who are essential to supply critical goods such as food and medicine.

Worker testing

Certain essential workers in Canada (as described above) are at an increased risk of exposure to COVID-19 and are placed in targeted testing campaigns in order to prevent the spread of the virus in the workplace and beyond. The workers listed below are some of the people considered high-risk for exposure and are thus tested frequently using the Point-of-care testing (“POCT”), also known as the rapid testing, method:

- Workers (including support workers), visitors (including caregivers) and government inspectors of long-term care homes;
- Workers (including support workers), visitors (including caregivers) and government inspectors of retirement homes;
- Workers in homeless shelters or other congregate settings;
- Farm workers;
- Individuals who are travelling into remote/isolated First Nation and Indigenous communities for work purposes;
- School staff inclusive of itinerant, supply, specialty teachers, childcare staff, and school bus drivers; and,
- Health care workers.

Other companies in industries such as energy, air transportation, manufacturing, professional sports, and TV and movie production are also utilizing workplace rapid testing in order to effectively screen employees to prevent the spread of COVID-19.

Contact tracing

Contact tracing is a notification and follow up process that is used to identify, educate, and monitor individuals who have had close contact

with someone who is infected with the virus that causes COVID-19. These individuals are at a higher risk of becoming infected and sharing the virus with others. Contact tracing can assist individuals who have been in contact with a case of COVID-19 understand their risk and limit further spread of the virus. The way in which contact tracing works is detailed below:

1. When a person tests positive for COVID-19, they become a “case.”
2. A public health nurse interviews the case to identify people they have spent time with. These people are “contacts.”
3. Public health gets in touch with the contacts and asks them about symptoms of COVID-19.
4. Not every contact needs to be identified: only those who could have been exposed to the case’s respiratory droplets from coughing, sneezing, or speaking.
5. Public health maintains the case’s privacy. A case can choose to tell others about their diagnosis but should not do their own contact tracing.
6. Contacts with symptoms are sent for testing.
7. If they test positive, they become a ‘case’ and the process repeats.
8. Contacts with no symptoms are asked to self-isolate and monitor for symptoms for 14 days after their last contact with the case.

Contact tracing helps people get diagnosed earlier and reduces the chance of spreading the virus.

Hygiene measures

The World Health Organization’s standard infection control measures are:



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- Frequently cleaning hands by using alcohol-based hand rub or soap and water;
- When coughing and sneezing, cover mouth and nose with flexed elbow or tissue – throw tissue away immediately and wash your hands;
- Avoid close contact with anyone who has a fever and cough; and,
- If you have a fever, cough and difficulty breathing, seek medical care early and share previous travel history with your healthcare provider.

WIDER EFFECT ON EMPLOYMENT LAW

Constructive Dismissals

A constructive dismissal may occur when an employer makes a significant change to a fundamental term or condition of an employee's employment without the employee's actual or implied consent. A constructive dismissal may also occur when an employer harasses or abuses an employee, or an employer gives an employee an ultimatum to "quit or be fired" and the employee resigns in response. In both of these cases, the employee is deemed to have been terminated and is owed termination pay.

The COVID-19 pandemic has altered employees' rights to claim constructive dismissal as the terms of their employment, such as pay and/or hours, can be altered if the business is struggling as a result of the pandemic. Ontario's *Employment Standards Act* ("ESA") explicitly details constructive dismissal and has put in place new rules to accommodate employers during COVID-19.

O. Reg. 228/20 establishes that there is no constructive dismissal under the ESA where a non-unionized employee's wages or hours of work are temporarily reduced or temporarily eliminated by their employer for reasons relating to COVID-19 from March 1, 2020 to July 3, 2021.

Temporary layoffs

Alberta and British Columbia do not have the same constructive dismissal section in their employment standards legislation as Ontario but do have sections on temporary layoffs.

Layoffs are related to constructive dismissals due to the fact that if an employee is laid off for longer than the time designated in the legislation, they could be deemed to have been constructively dismissed as the fundamental terms of their employment have been changed. In order to protect struggling employers from constructive dismissal claims during COVID-19, the Ontario ESA, the Alberta *Employment Standards Code* ("ESC") and the British Columbia *Employment Standards Act* ("BC ESA") have altered their temporary layoff provisions.

In Alberta, it is normally 60 days in a 120 consecutive day period. This has been temporarily extended to 180 days due to COVID-19.

In B.C., the usual period is 13 weeks in a 20 consecutive week period. Due to COVID-19, the layoff time was extended for layoffs that began before June 1, 2020. This extension has since expired and the original limit has come back into effect unless the employer has applied for a variance.

In Ontario, during the COVID-19 period (March 1, 2020 – July 3, 2021), non-unionized employees are not considered to be laid off under the ESA if they are not performing the duties of their position because their wages or hours have been temporarily reduced or eliminated by their employer for reasons related to COVID-19. The employee is deemed to be on job-protected IDEL (as detailed earlier) during the time the employee is not performing their duties because of the reduction or elimination in hours.