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ARTICLE

Coming out of the COVID-19 lockdown: issues and challenges facing Canadian employers

As Canadian employers anxiously await the "re-opening" of the local economy, they face numerous legal and logistical challenges. Health and safety, privacy and human rights issues will abound, and further uncharted waters lie ahead. Employers emerging from this "lockdown" should therefore plan ahead and, as much as possible, be ready to tackle these issues out of the gate.

Our [Labour and Employment](#) team provides a non-exhaustive list below of issues and challenges employers need to keep in mind as they look forward.

Compliance with employee health and safety and public health requirements

Until effective vaccines and/or therapies for COVID-19 become available, employers will need to continue taking all reasonable steps to ensure that their workplaces are compliant with public health guidelines and requirements as well as their obligations to protect the health and safety of employees. Employers will need to remain current and proactively assess their workplaces, and make modifications in planning for the return of their employees. This will affect physical workspaces and require that employees are properly informed, equipped and monitored to ensure compliance.

Employers should already be examining all aspects of their workplaces (ergonomics, hygiene, health, legal, etc.) and putting together a return to work plan in consultation with appropriate professionals.

For each employer, it will be a case-by-case analysis and the crafted return to work plan and policy should take into account several factors, including:

- zero-tolerance policy and non-compliance
- reporting policy violations
- business needs, including client or third party-facing activities
- scheduling to respect physical distancing requirements (modifying shifts, start times, teams, alternating office presence, etc.)
- common areas
- type of work location (e.g. standalone or shared building)
- shared building owner's policies and measures
- region (e.g. affected or less affected area)
- safety supply availability
- cleaning availability

Testing and other screening methods

Many employers want to know if they can implement screening tests, including taking employees' temperature, before allowing them to enter the work premises, as is already being done in certain jurisdictions and certain industries locally. Furthermore, as other forms of testing (e.g. serological and antibody testing) become commercially available and more reliable, employers may have an interest in mandating such testing to minimize the risks of spreading the virus. Such testing and how it may be carried out (if at all) raise a variety of privacy and human rights issues, requiring careful examination and a balancing of the rights and obligations of both employer and employees. Such testing is unlikely to be a complete solution and will therefore need to be coupled with questionnaires and screening protocols as part of a broader process to be established in consultation with health professionals and legal counsel: Will employees need to "consent" to such testing? What if they refuse? Will employees be entitled to pay while waiting on site to be tested? Will employees be entitled to pay if sent home? These are all questions that will need to be addressed.

Employers who proceed with such testing will inevitably face refusals or questions on the part of employees or their unions. Employers should be proactive and strategic in how they roll out such measures and careful and consistent in how they deal with questions and/or refusals.

Protocols for dealing with confirmed COVID-19 cases or employees displaying symptoms or returning post-infection or from abroad

Although employers already faced such situations prior to the shutdown, having proper protocols in place will be critical to minimize the risk of transmission and future outbreaks, in order to avoid future shutdowns and a loss of production. Both public health guidance and industry best practices, as well as legal compliance measures should inform such protocols.

Recalling employees in a non-unionized setting

While collective agreements contain the ground rules for recalling laid-off employees, no such roadmap typically exists in a non-unionized environment. Employers will be well advised to establish procedures for selecting employees to be recalled that do not conflict with applicable legislation and which minimize the employer's exposure to possible human rights or other employee claims.

Dealing with employee refusals to return or to remain at work

Employers, particularly those considered as "essential services" or "priority sectors", have already had some experience dealing with this issue. However, it will only be magnified as unprecedented numbers of employees are called back to work, and this issue will be even more challenging as school and daycare re-openings are delayed or their attendance optional, thus confronting parents with competing professional and family obligations.

Employees have certain limited statutory rights to unpaid leaves, but these are not indefinite or unlimited and will not apply to many situations where employees refuse to return to the workplace. It can be expected that many employees will feel uneasy leaving their home or remote working environment to be around others who may be vectors of the COVID-19 virus. Employers who have taken all appropriate measures in compliance with public health requirements and followed best practices will be less tolerant, if at all, towards such individuals who still refuse to return to work simply out of fear. Employers need to be prepared to deal with these situations.

Workplace hygiene practices

Further, employees will inevitably not all adhere to the required workplace hygiene practices (e.g. social distancing, regular hand-washing, coughing into your elbow, etc.) with the necessary rigour, and those who do may not want to share a workplace with them. Similarly, some employees will report and possibly refuse, whether justified or not, to work around employees who have a cough or who are seen partaking in social events on social media, thus requiring timely and appropriate employer interventions.

Mental health issues

Given the high level of stress that returning (and refusing) employees will have experienced over the course of the shutdown, and will continue to experience, employers can expect an increase of mental health issues affecting its workforce. These issues may include post-traumatic stress disorder and phobias, including intensified germ phobias. How will employers be able or required to accommodate such issues?

Remote working

As employers manage the migration back toward the traditional workplace, remote working may remain something employers favour for certain types of employees, at least for a certain period of time, or it may be demanded by employees who have become accustomed to this new way of working. Aside from having to adjust HR and recruitment strategies in the new post-lockdown era, employers will want to ensure that they have appropriate remote working policies in place, and that existing policies are updated to give the employer sufficient control over the employee's work and productivity and to protect the employer's proprietary and confidential information and computer network.

Reviewing and updating human resources policies

In the context of a return to work, employers should implement, revise and update existing workplace policies in light of the new reality and potential risks of disease transmission, among other things. Most notably, the following will be of particular importance: policies regarding workplace health and safety, adherence to public health guidelines and requirements, including physical distancing, proper hand-washing hygiene, proper work methods and material handling, temporary layoff policies, leave of absence policies and expense reimbursement policies (considering the potential for ongoing remote working arrangements).

Updating employment agreement templates

As recent events have shown, employers need the maximum amount of flexibility possible in reacting to situations like global pandemics and their impact on operations. Employment contracts should be reviewed in light of these experiences and provide flexibility for the employer to implement changes to working conditions, as needed, to navigate through similar situations.

Union issues

It is imperative that employers go through their collective agreements and look at provisions which may impact their flexibility to operate as well as operation costs, including, without limitation, provisions preventing sub-contracting, allowing work to be performed by management employees or third parties only in limited circumstances, and provisions dealing with seniority. All provisions that may have a direct financial impact should be carefully scrutinized in order to determine whether they may be temporarily amended, suspended, delayed or even removed from the collective agreement, whether with or without the union's agreement or consent.

Vulnerability to unionization

Employers operating in a non-unionized context must be aware of the fact that their actions and the decisions they make in a time of crisis may make them highly vulnerable to unionization efforts, especially if proper attention is not given to the employees' needs and concerns. Trade unions are watching. It is even more critical at this time that employers be careful, mindful and attentive.

Privacy

Bringing employees back to work will also raise a myriad of issues that employers will need to consider in light of the employees' privacy rights. Particular attention will need to be given to any and all measures pertaining to the verification of the employees' medical condition, including, without limitation, body temperature checks and questions related to the employees' whereabouts and current medical condition. Proper policies and procedures, particularly with regard to employee consent and notifications, the types of data that will be collected, how the data is collected, and the purposes for which it will be used, etc., will need to be in place and communicated to employees in order to respect privacy rights and minimize associated risks.

While the employer's approach to these issues and the resulting policies and procedures will, to some extent, be informed by the constantly evolving guidance of our governments and public health authorities, being proactive and legally informed and understanding the boundaries of what they may do in these unprecedented circumstances will help employers stay ahead of the curve.

For employment law advice on workplace legal issues arising from COVID-19, our Labour and Employment team is ready and available to assist with navigating these unprecedented times. BLG has also created a [COVID-19 Resource Centre](#) to assist businesses on a variety of topics, including contractual risks, public disclosure requirements, education and criminal law.

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