COVID-19 and the workplace: FAQs for employers

March 16, 2020

As schools and businesses close down across the country, employers are dealing with unprecedented challenges. Below are answers to some of the more common questions our team has been receiving from employers. As this issue is evolving rapidly, so will the questions. Please note that this article is for informational purposes only and does not constitute legal advice. To understand how this applies in the context of your particular circumstances, please contact the individuals listed at the end of this article.

What can we do to keep our employees safe?

As much as possible, employees who can work from home should be permitted and encouraged to do so. Many employers are not giving employees a choice and making working from home mandatory.

For employees who cannot work from home, follow the advice of your public health authority and take prudent steps, including the following:

- Limit social contact as much as reasonably possible;
- Regularly clean and disinfect work areas;
- Provide opportunities for hand washing;
- Stagger work schedules in shifts to limit contact and limit the number of individuals who may use resting areas simultaneously (e.g. cafeterias and break rooms);
- Sanitize common areas more frequently; and
- Facilitate good hygiene.

For additional relevant information on this topic, please see our articles, Novel Coronavirus Outbreak: Legal and Practical Insights and Perspectives and Employer Strategies for Managing Novel Coronavirus Risks in the Workplace.

What steps should I take if an employee tests positive for COVID-19?

Consult your provincial public health authority. If an employee tests positive, public health will be involved, tracking contacts and issuing orders and directives, including orders about the workplace. Employers, like all members of the public, are expected to facilitate the work of public health authorities at this time.

In the time before public health intervenes, employers should seal off any work areas where the employee worked. This may mean sending other employees home, closing stores and temporarily closing down workplaces.

Can we temperature check our employees who come to work?

This is a complex matter. In normal times, routine temperature checking of employees in most work environments would almost certainly be seen as an unjustified invasion of privacy (outside of the healthcare sector). We are not in normal times, however.

There are, unsurprisingly, no relevant case law on temperature checking employees. However, an analogous situation arose in British Columbia and Ontario in the hospital sector. In both provinces, hospitals imposed a rule on nurses and other front-line workers that they either have had the flu shot or wear a mask during influenza season. In B.C., this rule was upheld by an arbitrator who determined that there was a real and serious patient safety issue, and the rule was helpful in promoting patient safety. In contrast, two Ontario decisions struck down an identical rule, holding that there was no strong evidence that the vaccination or mask rule protected patient safety.

Employers who undertake temperature checks in this crisis may be challenged at a later date. They will have to weigh the risk of such a challenge against the benefits. While temperature checking will not catch every case of COVID-19, as it is possible for someone with no symptoms and no fever to test positive, it will catch some cases. Employers also have to weigh the costs of such a program as, in most provinces, they will have to pay employees who report for work but are sent home.

What if we need to temporarily shut down all or part of our business?

The rules will differ from province to province and federally.

By way of example, in Ontario, an employer may invoke a temporary layoff. A temporary layoff is not a termination or severance of employment for the purposes of the *Employment Standards Act, 2000* (ESA). A temporary layoff is defined as a period of 13 weeks in a 20-week period, or 35 weeks in a 52-week period where an employer continues benefits. Subject to any employment agreement or collective agreement, an employer does not need grounds to invoke a temporary layoff. Employees on a temporary layoff are not entitled to termination pay or severance pay under the ESA. However, non-unionized employees may elect to treat the temporary layoff as a constructive dismissal, unless their employment agreements permit it.

Employees on a temporary layoff will likely be eligible to apply for employment insurance benefits. Moreover, it should be noted that in the light of present

circumstances, the federal government has waived the one-week waiting period for Employment Insurance sick benefits for new applicants who are in quarantine, in order that they can be paid from the first week of their application.

In Québec, a temporary layoff suspends an employee's contract of employment until he or she can be recalled to work. A temporary layoff becomes a permanent rupture of the employment relationship after six months. It is important to note that the payment in lieu of the legal notice and of accumulated vacation pay will become due only after the six-month layoff period. For the same reason, a temporary layoff does not give rise to the application of the provisions on collective termination until the situation becomes a final termination.

It must be emphasized, however, that according to some of the case law, employees who are paid on an annual salary basis could regard a period of temporary layoff as a constructive dismissal, except for those whose contracts of employment authorize temporary layoffs.

On March 15, 2020, the Québec Government ordered the closing of the following businesses and public places, until March 30, 2020:

Libraries, museums, theatre; concert halls, swimming pools, spas and water parks; recreational places (ski resorts, theme parks, trampoline centres, etc.); movie theatres and arcades, physical training centres, dance, spinning, zumba and yoga centres; arenas and indoor soccer facilities; zoos; aquariums; bars and night clubs; buffet-type restaurants; sugar shacks, as well as any similar premises.

The Québec Government is asking restaurant owners to limit customers to 50 per cent of the capacity of their restaurants, *i.e.* half the tables. Buffet-type restaurants and sugar shacks are required to close temporarily. Take-out orders, deliveries and drive-through services are still allowed, however.

Can I require employees to use vacation days to cover work absences?

Generally, employers in Ontario have a right to determine when an employee takes vacation. However, that general right is often circumscribed by a contract, policy, collective agreement or practice.

In Québec, employees are entitled to be advised of their vacation dates at least four weeks in advance. Employers may request that an employee use vacation on shorter notice, but they cannot impose it.

What if an employee refuses to come into work over fear of COVID-19?

In most provinces, employees have a right to refuse unsafe work, including where they could potentially be exposed to a virus. The refusal must be reasonable.

Under the Ontario *Occupational Health and Safety Act*, for example, a worker has the right to refuse unsafe work. Where a worker exercises this right in Ontario, the supervisor must investigate and attempt to resolve the issue. The worker is to remain in a safe place during the investigation. If the issue is not resolved, the matter will be escalated to an inspector from the Ministry of Labour. No other worker is permitted to work in the area pending the outcome of the investigations, unless that worker is advised of the situation and consents to continue working.

Do *force majeure* clauses apply to employment terms?

Force majeure is a legal concept referring to unforeseeable circumstances that prevent a party from fulfilling their contractual obligations. Some collective agreements have *force majeure* clauses or language that speaks to unexpected events. Depending on the specific language of the clause, the employer may not have to fulfill all of the obligations under the agreement, such as notice before layoffs. A thorough review of the collective or employment agreement is required before making decisions related to notice or layoffs, as well as the current directives and requirements of the health authority in the province where the business is operating. The determination as to whether the concept of *force majeure* applies may require a legal opinion.

What should I consider for employees working from home?

If your employee can work from home, some questions to consider are:

1. How are you going to verify/record hours?
2. How are you going to manage performance?
3. How are you going to protect confidential information?
4. Is specific equipment required?
5. Do you have enough remote access licences for all employees?
6. Does the employee have a dedicated home office? (and is a risk assessment required?)
7. Does the employee have adequate insurance?
8. Do you need to enter the employee's property to check the workspace, retrieve equipment, *etc.*? (and if so, will you need to obtain permission?)
9. Do you need to check if the employee is allowed to work from their home from a land-use perspective?

What are options other than work from home or layoff?

Consider:

1. If there are any statutory leaves of absences that may apply to the situation.
2. If any employees would be prepared to agree to a period of temporary unpaid leave.

3. If any employees would be prepared to reduce their work hours (*e.g.* to four days a week).
4. Splitting work teams in two and alternating weeks in which those teams work from the office and work from home.
5. A supplementary unemployment benefit plan. An employer is entitled to top up EI benefits for employees who are off work receiving EI sick benefits. These plans are not just for pregnancy and parental leaves.

For employment law advice with respect to workplace legal issues arising from COVID-19, our contacts below are 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, schools and criminal law.

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