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## EMPLOYMENT LAWYERS

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## The Employer's Guide to Covid-19 & the Workplace

The rapidly-spreading Novel Coronavirus (Covid-19) was declared an international pandemic by the World Health Organization (WHO) on March 11, 2020.<sup>1</sup> On that date, there were 118,000 cases reported globally. As of March 16, 2020, there were 172 confirmed positive cases of the virus in Ontario, and more than 1500 cases under investigation.<sup>2</sup>

Employers are understandably concerned about Covid-19's impact on the workplace, employee and client safety, and business continuity. Minken Employment Lawyers have put together this guide to answer the question: *As an employer, what do you need to know about Covid-19, and what are your responsibilities for keeping your workplace safe and your employees healthy?*

### **WHAT IS COVID-19?**

Coronaviruses are a large family of viruses that originate in animals but are known to cause respiratory illness in humans. Covid-19 is "novel" or new, meaning it had not been detected in animals or humans prior to December 2019.

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<sup>1</sup> <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>

<sup>2</sup> <https://www.ontario.ca/page/2019-novel-coronavirus#section-0>

Like other respiratory illnesses, the Coronavirus generally causes mild symptoms including a runny nose, sore throat, cough, and fever. The virus can be transmitted from person to person through respiratory droplets generated when a person, for example, coughs or sneezes. Older people (60 and above), and people with pre-existing medical conditions (such as diabetes, respiratory conditions, or cardiovascular disease) appear to be more vulnerable to becoming severely ill with the virus or developing pneumonia.<sup>3</sup> In rare cases the virus can be deadly.

Currently, there is no specific treatment for most people with coronavirus infection, and in most of these cases people will recover on their own.<sup>4</sup>

### **GENERAL WORKPLACE SAFETY – WHAT ARE MY RESPONSIBILITIES AS AN EMPLOYER?**

Under the *Ontario Occupational Health and Safety Act* (“OHS”), an employer is responsible for ensuring the health and safety of their workers; employers must take every precaution reasonable in the circumstances for the protection of a worker.<sup>5</sup> This can include provision of information and provision of protective devices (which will likely be relevant if you are in the health care industry). The duty to provide information could require employers to advise employees of the risk of contracting Covid-19 in the workplace.

Keeping your workplace safe during the Covid-19 pandemic looks a lot like keeping it safe and clean during regular flu season. Encourage everyone to:

- Stay home from work if they are sick, particularly if they have a fever;
- Wash their hands with soap and water or alcohol-based sanitizer frequently;
- Maintain ‘social distancing’ – keep at least 2 meters (or 6 feet) distance between yourself and others;

- Refrain from shaking hands;
- Cover their mouth with their flexed elbow or a tissue when sneezing or coughing – don’t sneeze or cough into their hands;
- Keep their hands to themselves and away from their eyes, nose and mouth;
- Disinfect frequently touched surfaces like doorknobs, counters, desks, boardroom tables, computer keyboards, and cell phones; and
- If they have a fever, cough, or difficulty breathing, seek medical attention and disclose their travel history to medical professionals.<sup>6</sup>



### ***How do I determine if my workplace is safe?***

The safety of any given workplace will depend on a lot of factors, and most legal analysis of the OHS standards of ‘workplace safety’ deal with mechanical, structural, or infrastructural safety. Determining whether a workplace is ‘safe’ from Covid-19 will be difficult and will require a case-by-case analysis as every workplace is different.

### **CLOSURE – DO I NEED TO CLOSE MY BUSINESS?**

Now that Covid-19 has reached pandemic level, both employers and employees may be thinking beyond basic workplace safety and considering when to avoid the workplace or shut down the workplace. In the next few days or weeks, an

<sup>3</sup> <https://www.who.int/news-room/q-a-detail/q-a-coronaviruses>

<sup>4</sup> <https://www.canada.ca/en/public-health/services/diseases/2019-novel-coronavirus-infection/symptoms.html>

<sup>5</sup> Occupational Health and Safety Act, R.S.O. 1990, c. O.1 (“OHS”), s. 25.

<sup>6</sup> <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public>

employer's obligation to take reasonable steps to ensure a safe workplace may include asking employees to stay home.

Employers must take reasonable steps to ensure the safety of their employees, which would include providing notification to employees of steps they should take to ensure a safe workplace, and of actions taken by the employer to ensure safety. If Employers do nothing additional in the face of Covid-19 to take reasonable steps to ensure the safety of their employees, the employer may be vulnerable to a workplace safety complaint or work refusal on the part of their employees. Of course, what will qualify as 'reasonable' steps will entirely depend on the nature of the business. If your business has been mandated by the government to close or operate with restrictions, and you are unable to operate under those restrictions, you will likely have to close your business (at this stage, for an undetermined amount of time).



Employers may be obligated to limit interaction between the public and their employees by closing offices to the public, encouraging meetings to happen by teleconference or video-conference, or allowing employees to work from home. Employers may also be required to limit exposure among their employees by having employees work from home. Employers should look for alternative measures of conducting 'business as usual' to maximize 'social distancing' and minimize interaction.

## **TRAVEL – WHAT CAN I DO IF MY EMPLOYEES HAVE JUST RETURNED FROM INTERNATIONAL TRAVEL?**

It is reasonable at this time for employers to put in place a policy requesting that any employees who are returning from international travel self-isolate and avoid the workplace for 14 days after their return to Canada, based on the Public Health Agency of Canada's ("PHAC") recommendations.

### ***Can I ask my employees to travel for work?***

As of March 16, 2020, PHAC is urging Canadians to avoid all non-essential international travel.<sup>7</sup> Employers should be prepared to cancel all non-essential work-related travel outside of Canada for at least 6 – 8 weeks.

Examples of the type of employees who could be required to travel may include healthcare professionals, highly specialized individuals whose work cannot be completed by another employee (for example, a CEO with signing authority), or security personnel.

## **WORK REFUSALS – WHAT CAN I DO IF AN EMPLOYEE CLAIMS IT'S UNSAFE TO COME TO OR STAY AT WORK?**

Under *OHSA*, most workers have the right to refuse to work in a workplace they have reason to believe is likely to endanger them. It's likely that employees will be within their rights to refuse any business-related international travel while the Canadian government's travel advisories remain in place. Employees may also be within their rights to refuse to attend the workplace if a co-worker is known to have been exposed to the virus or is being screened for the virus.

If an employee refuses to attend work for fear of exposure to Covid-19, the employer's duty to investigate the safety of the workplace may be triggered. Employers generally cannot discipline or threaten an employee for exercising their right to refuse work. It is important for employers to know the work refusal and investigation

<sup>7</sup> <https://travel.gc.ca/travelling/health-safety/travel-health-notice/221>

provisions of *OHSA* applicable to their workplace, particularly if they are in the healthcare industry.

You may encounter employees who refuse to attend work if they know or believe that colleagues have recently been travelling internationally. This may trigger your duty to investigate under *OHSA*, but it also raises potential issues of human rights discrimination if assumptions are made based on employees' race, ancestry, place of origin, colour, ethnic origin, or citizenship.



***What if an employee refuses to attend the workplace due to fear of Covid-19?***

As noted above, under Ontario legislation most employees have the right to refuse to work in a workplace they have reason to believe is likely to endanger them. The work refusal must be reasonable, and the employee must provide a reason for the refusal to the employer. Circumstances are changing rapidly and new information is being provided by public health and government officials daily on recommended best practices for ensuring everyone's safety during the Covid-19 pandemic. Employers should consider the most recent official news and public health recommendations when considering and determining if an employee's request to avoid the workplace out of fear of Covid-19 is reasonable.

If an employee refuses to attend work for fear of exposure to Covid-19, the employer's duty to investigate the safety of the workplace may be triggered. While an employer is investigating the safety of the workplace, the employee who exercised their right to refuse work must remain available for the purposes of the investigation, and might be assigned alternative duties by the employer pending results of the investigation.

In the event that an employee who is refusing to attend the workplace due to fear of Covid-19 is able to work from home, employers should consider permitting the employee to work from home.

In the event that an employee who is refusing to attend the workplace due to fear of Covid-19 is not able to work from home due to the nature of their position (for example, they are a server in a restaurant or a dental hygienist), the employer may consider whether alternative duties can be offered pending investigation of the safety of the workplace. The employer can also consider paid or unpaid leave for the employee. If the employer decides to place the employee on unpaid leave, depending on public health and government recommendations at the time of the work refusal, the employee may be able to successfully argue that they should be covered by provincial legislation providing job protection for employees who are unable to work because they are acting in accordance with public health information or direction. This proposed provincial legislation is discussed further below.

Employers generally cannot discipline or threaten an employee for exercising their right to refuse work. It is important for employers to know the work refusal and investigation provisions of *OHSA* applicable to their workplace, particularly if they are in the healthcare industry.

***When can I insist that an employee stay in the workplace?***

Employees who are members of the police force; firefighters; employees in a hospital, long-term care home or residential facility, or employed in food, laundry or technical services associated

with such a facility, are not able to refuse to work in dangerous circumstances inherent in their work or which are normal conditions of their employment. These employees are also not permitted to refuse to work in situations where the refusal directly endangers the life, health or safety of another person.<sup>8</sup> Employees who fall into these categories can likely be told by their employer to remain at work throughout the Covid-19 pandemic.

If an employee is hired with full knowledge of the risks inherent in their job, an employer may ask that employee to stay at work despite the inherent danger caused by Covid-19. However, it is not likely that an employer can insist that employees who do not fall under the OHS section 43 exception above stay at work if the employee feels unsafe.

Employers should not sanction or threaten employees who refuse work based on safety concerns. Employers could consider incentive payments for employees to remain at work voluntarily to continue to provide services in industries that are necessary but not deemed 'essential' – such as grocery stores and pharmacies.

We recommend consulting counsel in the event an employee exercises their right to refuse work.

### **WORKING FROM HOME AND SELF-ISOLATION – WHEN CAN I ASK EMPLOYEES TO STAY HOME?**

Given the current state of the virus – and the Federal government's statement on March 16, 2020, that all Canadians, as much as possible, should "stay home" – if employees **are able to work from home**, it is reasonable for them to do so.

#### ***Am I still required to pay employees working from home?***

If an employee is able to complete their regular work and fulfill their regular duties from home, they should be paid as usual regardless of

their physical location. This would include employees who are asked by their employer to avoid the workplace and work from home. Certain employees may elect to self-isolate and work from home based on public health recommendations, family care obligations, or reasonable personal safety concerns. If an employee refuses to work at the workplace, despite the employer having taken reasonable steps to ensure a safe workplace, the employer should continue to pay the employee for work performed, unless the employer can establish that the employee's reasons for refusal were unreasonable.



In the event that an employee cannot work from home because of the nature of their position (for example, a deli counter worker at a grocery store, a retail employee, or a teacher), and the employee does not fall under the categories captured by Ontario's proposed legislation (discussed below), then they would be required to be at the workplace performing their duties as usual in order to be paid. If an employee simply refuses to attend work and stays home, it could be considered abandonment of their employment and the employee would not be entitled to pay for the time spent at home.

#### ***Am I required to pay employees who are home due to illness?***

If an employee has an illness, including Covid-19, unless the employer's sick leave policy

<sup>8</sup> OHS, section 43.

says otherwise, the employer is not required to pay the employee for time spent on sick leave. Employers should be aware of the following:

- Employees will have to request a Record of Employment (ROE) from their employer to receive Employment Insurance (EI) sickness benefits if the employee experiences an interruption in earnings due to illness or quarantine. Be prepared to issue Records of Employment for employees required to take more than 5 days off.



### ***Am I required to pay employees who I send home due to a shortage of work?***

If an employer sends an employee home and does not pay them, this would likely be considered a constructive dismissal thereby entitling the employee to statutory and common law notice. The employers options are outlined under the heading Ending Employment below.

### **NEW LEGISLATION FOR WORK INTERRUPTIONS**

As of March 17, 2020, the Ontario provincial government is preparing legislation that will address work interruptions. The proposed legislation would, if passed, provide job protection for employees who are unable to work for the following reasons:

- The employee is under medical investigation, supervision or treatment for Covid-19;
- The employee is acting in accordance with an order under the Health Protection and Promotion Act.;
- The employee is in isolation or quarantine;

- The employee is acting in accordance with public health information or direction;
- The employer directs the employee not to work; or
- The employee needs to provide care to a person for a reason related to COVID-19 such as a school or day-care closure.

The proposed legislation would also make it clear that an employee will not be required to provide a medical note if they take the leave. The measures would be retroactive to January 25, 2020, the date that the first presumptive COVID-19 case was confirmed in Ontario.

On March 18, 2020, the federal government announced an Emergency Support Benefit for employees who do not qualify for employment insurance; this will likely include employees who are placed in quarantine or have to self-isolate, those who are ill with Covid-19, those who must stay home to care for someone with Covid-19, and those who need to stay home to care for children during school closures.

The federal government also announced on March 18, 2020, that it is proposing to provide eligible small employers a temporary wage subsidy for a period of three months; Employers benefiting from this measure will include corporations eligible for the small business deduction.

The federal government has waived the requirement to provide a medical certificate for employees to access EI sickness benefits, and has waived the 1 week waiting period for receipt of EI.

### **ENDING EMPLOYMENT – WHAT ARE MY OPTIONS FOR ENDING THE EMPLOYMENT RELATIONSHIP WITH AN EMPLOYEE?**

#### ***Termination***

An employer does not need a ‘reason’ to fire an employee, and in any event, a slow-down in business due to the Covid-19 pandemic or an employee’s inability to attend work when required could lead to termination.

Generally, however, an employer cannot terminate an employee without providing notice or pay in lieu of working notice ('termination pay') if there is no 'just cause' for termination. It's unlikely that missing work due to illness would constitute 'just cause' and excuse the employer from providing some sort of termination and/or severance pay.

### **Temporary Layoff**

If provided for in the employee's employment agreement, an employee can be placed on a temporary lay-off for up to 13 weeks in any period of 20 consecutive weeks without provision from the employer of termination or severance pay. It is at the employer's discretion whether to continue provision of benefits during a temporary layoff. If an employee has not been recalled to work at the end of the 13 week temporary layoff, the employer will likely be required to provide termination pay and perhaps severance pay. Employees placed on a temporary layoff should be issued an ROE within 5 days of the interruption of earnings.



Although employers are not required to continue provision of benefits during a temporary layoff, if an employer does continue to make payments for the benefit of the employee under a legitimate retirement or pension plan or a legitimate group or employee insurance plan, or if the employer provides supplementary unemployment benefits to the employee during the temporary layoff, the employer can extend the period of the temporary layoff up to 35 weeks in a year.

### **Frustration of Contract**

'Frustration' of contract occurs when, through no fault of either party, a contract becomes impossible to fulfill. For example, an employer could argue that an employment contract with an employee who has been deemed medically unable to ever return to work is frustrated. Whether an employer could argue that an employment contract is frustrated in the event an employee is absent from work for an extended time due to Covid-19 is yet to be seen.

However, employers may open themselves up to an employee's claim that their employment has been constructively dismissed if the employer argues a contract is immediately 'frustrated' when an employee is quarantined or falls ill. Employers should not unilaterally change the fundamental terms of an employment contract or demote employees who are temporarily ill if these actions can be avoided.

### **TIME OFF FOR ILLNESS OR CARE OBLIGATIONS – WHAT KIND OF LEAVE AM I REQUIRED TO GIVE TO EMPLOYEES?**

Now is a good time to remind your employees of your company's sick leave policy, including clarification of which circumstances and symptoms will require an employee to stay home from work, and when an application for short-term disability benefits (if available) is appropriate. You may wish to consider a new policy for extended leave (paid or unpaid) or accommodation for any employees who are affected by Covid-19.

Under the Ontario *Employment Standards Act, 2000* ("ESA"), employees who have been employed by their employer for at least two consecutive weeks are entitled to 3 unpaid sick days per calendar year. Employees are also entitled to 3 unpaid days off to care for certain family members with an illness or medical emergency. Some employees will be entitled to longer unpaid leaves to care for critically ill family members. Employers should ensure that their Sick Leave Policies accurately reflect their employees' entitlements under the *ESA*.

### **Medical Documentation**

Employers are likely entitled to require a certificate of good health before the employee returns to the workplace following any time off for illness or care obligations. However, requiring an employee to provide a doctor's note in order to be entitled to time off may defeat the purpose of self-isolation by compelling someone exhibiting symptoms to attend a doctor's office or public hospital while they may be contagious. As of March 16, 2020, the Ontario provincial government is working on legislation that will eliminate the need for a doctor's certificate to approve sick leave; we expect this legislation will be passed.

### **THE ONTARIO HUMAN RIGHTS CODE – WHAT ARE MY OBLIGATIONS REGARDING ACCOMMODATION AND PREVENTION OF DISCRIMINATION?**

If employers are making decisions regarding self-isolation and quarantine based on an employee's recent travel history, employers must be conscious of their obligations under the Ontario *Human Rights Code* to ensure employees are not subject to discrimination in the workplace because of race, ancestry, place of origin, colour, ethnic origin, or citizenship. For example, a requirement that employees returning from travel in Asia self-isolate and work from home, but employees returning from travel in Europe are not subject to the same measures, could be difficult to justify.

Employers should also be aware of their duty to accommodate employees up to the point of undue hardship. Employees who are particularly vulnerable to contracting Covid-19 because of pre-existing conditions, illnesses or disabilities may require accommodation – such as permission to work from home – even if they have not contracted Covid-19.

Employees cannot be discriminated against on the basis of disability or family status, and employees who fall ill because of Covid-19 or who are required to take time off to care for a family member may fall into this category of protection.

Employers should also be mindful of their obligation to provide a harassment-free workplace, and cognizant of the potential for concerns over Covid-19 to result in harassment or discrimination among employees. Employers should be vigilant about responding to and investigating any complaints from employees regarding harassment or discrimination on prohibited ground such as disability, family status, ethnic origin, race, or ancestry.



### **WORKERS COMPENSATION – IS WSIB RELEVANT FOR EMPLOYEES WHO ARE ILL OR QUARANTINED?**

Under the Ontario workers' compensation system, most employees have a statutory entitlement to compensation for wage-loss benefits and medical coverage related to personal injury or illness that arises out of and in the course of their employment. Employees in the healthcare industry who are infected as a result of working with patients or members of the public with Covid-19, or employees who are required to travel to affected areas and contract Covid-19 in the course of their employment, may be eligible to make a claim for workers compensation benefits.

### **EMERGENCY ACTION – WHAT SHOULD I BE DOING AS AN EMPLOYER RIGHT NOW?**

You can start taking practical steps immediately to reduce the workplace risks associated with Covid-19 by doing the following:

- Ensure managers are aware of their duties and obligations under workplace legislation, including in the *ESA*, *Ontario Human Rights Code*, and *OHSA* as they relate to Covid-19;
- Review and update Sick Leave Policies and policies addressing communicable illnesses, and clarify the protocols that apply to Covid-19. Generally, these policies should address what illnesses are covered by sick days or short-term disability benefits; protocols for disclosure (of both symptoms and travel history) and protocols for when employees are required to stay at home; and the application of paid and unpaid leave entitlements to illness and quarantine-related situations;
- Review and update policies regarding work related travel, including within North America and within Canada;
- Develop or revise a broader policy to address how business operations will continue in the event of a more serious outbreak (or state of emergency). This should outline how core business functions and channels for decision-making will be maintained in such an event; succession plans for defined roles in the event of (short or long term) employee absences; whether and when employees will be expected to work from home; how to communicate with internal and external parties in the event that most employees are telecommuting and/or physically absent; how meetings, seminars, conferences, or events that would normally take place in person will be dealt with; and how the company's physical facilities will be dealt with; and
- Monitor the latest updates from public health authorities, including municipal, provincial, and federal public health agencies, and the WHO. You can find more information at the sources below. Remind your employees to check these sources of information regularly, and to only rely on official sources for the most current and objective information about Covid-19.

## THE GOOD NEWS

As employers, you are in an excellent position to help 'flatten the curve' of the epidemic and keep your employees, their families, and communities safe.

The WHO has stated that "All countries must strike a fine balance between protecting health, minimizing economic and social disruption, and respecting human rights."<sup>9</sup> Employers share this responsibility, and Minken Employment Lawyers are here to assist you.

Contact Minken Employment Lawyers for further information about your obligations as an employer under employment standards, human rights, occupational health and safety, workers compensation and privacy legislation. Contact us today at 905-477-7011 or [contact@minken.com](mailto:contact@minken.com).



The best, most reliable information on Covid-19 itself will come from public health authorities like Public Health Ontario, the World Health Organization, Health Canada, and the Ontario Ministry of Health. Check these sources regularly for trustworthy information and updates.

Please note that this guide is for informational purposes only and does not constitute legal advice.

<sup>9</sup> <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>