

CONFIDENTIAL MEMORANDUM

To: Firm Clients

From: Norm Keith

Date: April 13, 2020

Re: **Occupational Health and Safety (“OHS”) and Workers Compensation (“WC”) Law Relating to the COVID-19 Pandemic**

In response to growing OHS concerns during the COVID-19 pandemic, the following is a general review of OHS law, due diligence principles and the responsibilities of employers, rights of workers and liability under OHS and WC legislation. This memorandum is not intended to provide specific legal advice, but rather general guidance in light of the declaration of a COVID-19 Pandemic by the World Health Organization (“WHO”) and unprecedented action taken by all levels of government across Canada to control the spread of the virus. The Canadian Emergency Management and Response Manual¹ online and in our library, provides a further summary of crisis planning and pandemic response.

Part I. OHS Legal Duties & Responsibilities

Q. What duties do employers have under Canadian OHS legislation when it comes to protecting workers from COVID-19 exposure?

A. There is no specific legal duty in Canadian OHS law on how to address the risk of a pandemic in a Canadian workplace. The legal duty that best addresses this question is the “general duty clause” found in every provincial, territorial, and federal OHS statute. The Ontario general duty clause, for example, places responsibility on all employers and supervisors to take “every reasonable precaution in the circumstances for the protection of a worker”.²

The most recent guidance from the Court of Appeal for Ontario, regarding the broadly worded general duty clause held that the provision does not depend on the existence of a specific regulation prescribing particular conduct to place a legal duty on an employer. The court also said, “s.25(2)(h)... establishes a standard, rather than a rule, for requirements of which are tailored to suit particular circumstances. Employers must take every reasonable precaution in the circumstances in order to protect workers. Reasonableness is a well-known legal concept that is

¹ *Canadian Emergency Management and Response Manual*: Norman A. Keith, (Carswell) loose leaf service updated annually. Pp. c-1, 2, c-22, inclusive.

² *Occupational Health and Safety Act*, R.S.O., c.o.1, s. 25(2)(h).

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interpreted and applied in a wide variety of legal contexts.”³ The general duty clause, therefore, clearly requires employers to assess the risk that COVID-19 poses to its workers and take reasonable precautions to either eliminate or mitigate that risk.

Q. What steps should be taken to satisfy the “every reasonable precaution” component of the general duty clause?

A. The answer to this question, of course, depends on the nature of the workplace, the type of work performed by the employer and its workers and potential sources of exposure to the virus. For example, healthcare workers in a hospital, who are assessing, diagnosing and treating patients infected with the COVID-19 virus are at extreme risk of exposure to the virus. Therefore, an employer in that circumstance must take extreme measures to protect its workers. Other, lower risk workplaces should also take appropriate measures to protect workers, further to a risk assessment.

Q. Under OHS legislation, what responsibilities do employers have to establish and communicate a policy and program to mitigate exposure risk to COVID-19?

A. Employers have a legal duty to establish a policy and program, which includes appropriate procedures to implement the policy in order to comply with, *inter alia*, the applicable general duty clause. Also, all Canadian OHS legislation contains requirements for employers to provide information, instruction and supervision to its workers in relation to workplace hazards. This would include hazards related to COVID-19 exposure at work. The level of engagement of the joint health and safety committee and/or worker health and safety representative must be part of this engagement of the internal responsibility system under OHS legislation.

Q. What precautions and steps are employers required to take to ensure that workers attend the workplace free of symptoms of COVID-19 infection or otherwise ensure that workers do not infect other workers or the public?

A. There is no specific direction in OHS law regarding this issue. Employers may choose to screen workers by asking them questions related to the known symptoms of COVID-19. Other employers are screening workers by taking their body temperature prior to entering into the workplace. There is concern that this type of mandatory health assessment is a potential breach of the privacy and dignity rights of workers found in applicable human rights legislation. However, OHS law is important public welfare legislation, that in many cases has a superseding provision, such as that found in the Ontario OHS statute, that says “despite anything in any general or specific Act, provisions of this Act and the regulations prevail”.⁴ This issue arose in the Toronto Transit Commission injunction drug testing case, when Justice Morocco made it clear that when there are competing values of dignity and privacy rights found in human rights legislation, and those of the life, health, and safety of both workers and members of the public, found in the OHS legislation, the latter will ultimately prevail over the former.

³ *Ontario (Ministry of Labour) v. Quinton Steel (Wellington) Ltd.*, 2017 ONCA 1006, para 44.

⁴ *Supra*, note “s.25(2)(h)... establishes a standard, rather than a rule, for requirements of which are tailored to suit particular circumstances. Employers must take every reasonable precaution in the circumstances in order to protect workers. Reasonableness is a well-known legal concept that is interpreted and applied in a wide variety of legal contexts.”.

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Q. What rights and responsibilities do workers have under OHS legislation regarding the COVID-19 Pandemic?

A. All OHS legislation across Canada places legal duties on workers, and in some jurisdictions, only direct employees. These duties include following an employer's OHS policy, program, training, instruction and supervision. Therefore, all workers must follow all reasonable instructions from their employer in crises such as the COVID-19 pandemic, at and related to the workplace.

Q. Is an employer subject to liability for not taking steps to protect its workers from COVID-19 exposure at work?

A. All Canadian OHS legislation has enforcement provisions. The two primary means of enforcement are orders/directions and regulatory, quasi-criminal prosecutions. For example in Ontario, an employer may be fined up to \$1,500,000 plus a 25% surcharge, upon a conviction.

There is the potential for employers to be subject to enforcement action resulting from a failure to perform their duties under the OHS legislation. This could result from an inspection from a regulator or following a work refusal which may involve an investigation by a regulator.

Part II. OHS Legislative Rights of Workers to Refuse to Do Unsafe Work Arising from the COVID-19 Pandemic

Q. What if an employee refuses to work because they are afraid they will contract the COVID-19 virus at the workplace?

A. OHS legislation in all provinces, territories and at the federal level, have provisions for work refusals if an employee believes that their health and safety is endangered. An employee may exercise their right to refuse unsafe work if they believe they will contract the COVID-19 virus at the workplace. Keep in mind that the right to refuse work is generally not available to employees who provide essential services, for example if the work being refused involves a risk that is an inherent part of their job.

An employer should have policies and procedures in place for the investigation of work refusals. In the event an employer does not have these provisions in place, they need to investigate each claim of work refusal and determine if there is evidence that a hazard exists and will endanger an employee.

If the investigation proves that there is no hazard, the employee is required to return to work. If the employee continues to refuse, there needs to be objective evidence for continuing with the refusal. For example, a co-worker or visitor to the workplace has tested positive for the virus. If objective evidence exists, then the employee may continue to refuse work until the hazard for contracting the virus is eliminated or controlled.

Q. Can an employer test its employees for COVID-19 if there has been a work refusal for working with employees who are thought to have the virus?

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A. Measures and procedures advising employees what to do if they have symptoms of the virus should be circulated by the employer. If an employer learns that an employee has a medical certification advising the positive result of COVID-19, all employees should be advised of this development. Any person who was in contact with that individual should immediately be advised, quarantined and tested for the virus by medical authorities, not the employer.

OHS legislation provides the duty for an employer to limit the exposure of employees to biological hazards, such as the COVID-19 virus. Employers may use other means such as work rotation, working from home, or any other measures and procedures to limit exposure to employees that do not require testing.

Q. Can a worker refuse to travel if that it is a requirement of the job?

A. At this time, most travel has been suspended and many workplaces are closed. An employee may refuse to travel if they believe there is subjective evidence that their health may be jeopardized by travelling. In this case, other measures such as teleconferences, webinars, or electronic communication should be implemented.

Part III. Incorporating Pandemic Plans into your OHS Management System

Q. What should be included in an Infectious Disease Preparedness and Response Plan?

A. Plans should consider and address the level(s) of risk associated with the workplace and job tasks. Such considerations may include:

- Where, how, and to what sources of COVID-19 might workers be exposed, including the following:
 - General public, customers, clients and coworkers and those individuals who are at particularly high risk of infection such as international travelers who have visited locations with widespread sustained (ongoing) COVID-19 transmission.
 - Non-occupational risk factors at home and in community settings.
 - Workers' individual risk factors (e.g., older age; presence of chronic medical conditions, including immunocompromising conditions; pregnancy).
- Controls measures to address those risks.
 - Follow federal, provincial and local recommendations regarding development of contingency plans for situations that may arise as a result of outbreaks including but not limited to the need for social distancing, delivering services remotely, and other exposure-reducing measures.

Q. How can an employer implement infection prevention and control measures?

A. Employers should ensure that policies are in place to implement hygiene and infection control practices, including:

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- Promotion of frequent and thorough hand washing, including effective hand washing techniques.
- Providing workers, clients, customers and visitors with a place to wash their hands with soap and water.
- Providing alcohol-based hand rubs containing at least 60% alcohol, if soap and water to wash hands is not available.
- Encouraging workers to stay home if they are sick.
- Encouraging respiratory etiquette, including covering coughs and sneezes.
- Discourage workers from using other workers' phones, desks, offices, or other work tools and equipment, when possible.
- Maintain regular housekeeping practices, including routine cleaning and disinfecting of surfaces, equipment, and other elements of the work environment. When choosing cleaning chemicals, employers should consult information on Environmental Protection Agency (EPA)-approved disinfectant labels with claims against emerging viral pathogens.

Q. What policies and procedures should employers have for prompt identification and isolation of sick people?

A. Prompt identification and isolation of potentially infectious individuals is a critical step in protecting workers and others at a workplace. Employers should inform and encourage employees to self-monitor for signs and symptoms of COVID-19 if they suspect possible exposure.

Employers should develop the following policies and procedures:

- Reporting protocols for employees that are sick or experiencing symptoms of COVID-19 or need to self-isolate or quarantine or those employees that need to care for family members.
- Isolation protocols to move potentially infectious people to a location away from other workers. Designated areas with closable doors may serve as isolation rooms until potentially sick people can be removed from the workplace.

Q. What measures should an employer have in place regarding workplace flexibilities and other protections?

- Ensure sick leave policies are consistent with federal/provincial/local public health guidance.
- If possible, establish policies and practices for flexible work arrangements such as telecommuting and flexible work hours such as staggered shifts or job sharing to increase

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the physical distance among employees if government health authorities recommend the use of social distancing strategies.

- Communicate with contractors and temporary agencies about the importance of their sick employees staying home.
- Discontinue non-essential travel to locations with ongoing COVID-19 outbreaks. Regularly check CDC travel warning levels at: www.cdc.gov/coronavirus/2019-ncov/travelers.
- Develop emergency communications plans, including a forum for answering workers' concerns and internet-based communications.⁵

In addition to these recommendations, employers should always follow the guidance and best practices established by government health officials. For further information:

- <https://www.who.int/emergencies/diseases/novel-coronavirus-2019>.
- <https://www.canada.ca/en/public-health/services/diseases/2019-novel-coronavirus-infection.html>.

Part IV. Workers' Compensation Risks for Employers Arising from the COVID-19 Pandemic

Q. Will a worker who contracts COVID-19 at work be entitled to Workers' Compensation benefits?

A. Workers who contract COVID-19 may be entitled to workers' compensation benefits, if it is determined that it arose out of and in the course of their employment. The worker's compensation boards across Canada appear to have taken a consistent approach with respect to this, indicating that, should claims be submitted by employers on behalf of their workers, or directly by workers for COVID-19, each claim will be adjudicated based on its own facts and circumstances.

The workers' compensation boards have confirmed that benefits only exist for conditions that arise out of and in the course of employment, including COVID-19. Should a worker be off work as a preventative measure, such as self-quarantining, entitlement under the workers' compensation regime would not be in order.

Employers should ensure that they follow the provincial reporting requirements for their respective workers' compensation boards. Should workers advise their employer that they have

1. ⁵ Getting your workplace ready for COVID-19. World Health Organization.

2. Guidance on Preparing Workplaces for COVID-19. U.S. Department of Labor. Occupational Safety and Health Administration. OSHA 3990-03 2020.

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contracted COVID-19, and they think it was contracted due to exposure at work, it is the employer's responsibility to report the claim, whether they agree that the condition is work-related or not.⁶

Q. If a worker is performing modified work and we close down due to COVID-19, will they be entitled to WC wage loss benefits?

A. These workers may be entitled to wage loss benefits, depending on the circumstances of the case, the circumstances surrounding why they cannot work, and each compensation board's policy surrounding payment of wage loss benefits.

Generally, workers are entitled to wage loss benefits if they suffer a wage loss due to their work-related injury or disease. Each case will need to be adjudicated on its own merits. While in "normal" circumstances, workers temporarily laid off due to a work shortage may seek employment elsewhere, under the current circumstances, they may not be able to.

Employers who are issuing salary continuance to other employees who are temporarily laid off due to the virus may consider doing the same for workers who are performing modified work due to a work injury. This should be discussed with the compensation board to ensure that they are aware that this will occur.

For further information please contact Norm Keith:nkeith@fasken.com or 416-868-7824 or 416-540-3435.

⁶ WorkSafeBC: <https://www.worksafebc.com/en/about-us/news-events/announcements/2020/March/covid-19-and-the-workplace>

Workplace Safety and Insurance Board: <https://www.wsib.ca/en/novel-coronavirus-covid-19-update>

Alberta Workers' Compensation Board - Employer Fact Sheet:
https://wcb.ab.ca/assets/pdfs/employers/EFS_COVID-19.pdf

Workers' Compensation Board of Nova Scotia: <https://www.wcb.ns.ca/About-Us/News-Room/News/COVID-19-Novel-Coronavirus.aspx>