FTR Now

Update on COVID-19 for Employers: Ontario to Amend the ESA to Protect Jobs

Date: March 16, 2020

Note to our Readers: Information regarding COVID-19 is rapidly evolving. This article is updated from its original publication and will be continually updated as new information becomes available. Please visit our website for these updates. Updated March 16, 2020 at 8:30 p.m

The Ontario government has announced that it will be introducing legislation to amend the *Employment Standards Act, 2000* (ESA) in light of COVID-19. In addition, the federal government announced, among other things, that the Canadian border will be closed to foreign nationals, with some exceptions.

Further direction has also been issued from the Ontario Chief Medical Officer, who has advised against public gatherings of over 50 people and is requesting the closure of certain settings, as soon as possible. These settings include all recreational programs and libraries, all private schools, all daycares, all churches and other faith settings, and all bars and restaurants (except for those that can switch to takeout/delivery mechanisms). Similarly, the Toronto Medical Officer of Health is strongly recommending the closure of all bars, dine-in restaurants (subject to takeout and delivery options), nightclubs and theatres.

In a further update, we outline the data and cybersecurity risks that employers should be aware of, particularly with the rapid adoption of increased teleworking.

Learn more in this *FTR Now.*

Proposed Changes to the *Employment Standards Act, 2000* (ESA)

On March 16, 2020, Premier Ford announced that the Ontario government will be tabling legislation to amend the ESA in light of COVID-19. As stated in government's new release, if passed the legislation would provide job protection for employees unable to work because:

- the employer directs the employee not to work
- 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* or is acting in accordance with public health information or direction
- the employee is in isolation or quarantine

- 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 legislation will also prohibit employers from asking employees to provide a medical note if they take this leave. If passed, these proposed amendments would apply retroactively to January 25, 2020.

The Ontario legislature is not currently sitting and is set to resume on March 23, 2020.

Federal Initiatives

On March 14, 2020, the Public Health Agency of Canada listed all countries outside of Canada as Level 3 Risk and all persons returning from any country are now asked to self-isolate for 14 days after their return to Canada. Late on March 13, 2020 an advisory from Toronto Public Health recommended the same measures.

On March 16, 2020, Prime Minister Trudeau announced various initiatives, including the closure of the Canadian border to foreign nationals. To date, exceptions to this closure exist for U.S. citizens, diplomats, flight crews and family members. In addition, it appears that the 14-day self-isolation period (discussed above) will not apply to essential cross-border workers (e.g. truck drivers, air / rail crews).

We are continuing to monitor the information issued by the federal government and will provide updates on an ongoing basis.

Further Developments Employers Should Know About

As noted above, the Ontario Chief Medical Officer is advising against public gatherings of over 50 people and is requesting the closure of certain settings, as soon as possible. These settings include all recreational programs and libraries, all private schools, all daycares, all churches and other faith settings, and all bars and restaurants (except for those that can switch to takeout/delivery mechanisms).

The Toronto Medical Officer of Health is also strongly recommending the closure of all bars, dine-in restaurants, nightclubs and theatres. Although this has been stated as a recommendation, she states that “if businesses fail to comply with the recommendation, she will issue orders to individual establishments under Section 22 of the *Health Protection and Promotion Act*.” This enforcement mechanism will not be placed on businesses who provide food takeout and delivery options, which are encouraged to keep these options available. Dine-in aspects of their operations will, however, have to be closed.

We are closely monitoring these developments and will provide further information as it becomes

available.

What Employers Need to Know

On March 11, 2020, the World Health Organization (WHO) declared the COVID-19 to be a pandemic, which means that it has spread globally.

Health officials in Canada continue to state that the risk of contracting the COVID-19 remains low. However, as this situation continues to develop, it is important for employers to consider their options and understand potential impacts of COVID-19 on their business.

Sick Leave Benefits

Employees unable to work because of illness caused by the COVID-19 may be eligible to claim benefits under an applicable sick leave policy. These individuals should be treated like any other sick employee, and the eligibility and procedural requirements of the policy should be applied in the same manner to these claims.

The more difficult question arises around employees who are subject to self-isolation or quarantine but who are not themselves ill. It is possible that a broadly-worded sick leave policy may provide benefits for such a situation. If the policy does not provide for such coverage, employers should consider extending benefits on a gratuitous basis rather than having employees apply for employment insurance (if employment insurance benefits are made available). Employers may also consider letting employees use their vacation time to cover absences or make up the time at a later date. Further, where employees are under quarantine or are still contagious but able to work, they could be permitted to work from home, where operationally feasible.

Employers should keep in mind that any policies dealing with employee absenteeism (including a sick leave policy) need to be sufficiently flexible to reflect the realities of the pandemic and should not be punitive in any way. For example, requiring a medical note when employees are sick with flu-like symptoms during a pandemic may be onerous when healthcare providers and medical facilities are extremely busy and overburdened.

Employment Insurance Benefits

In the absence of company paid sick benefit coverage or where benefits are exhausted, employees may be entitled to sickness benefits under the *Employment Insurance Act* (Act). Under the Act, employees who face a reduction in “normal weekly earnings” of at least 40% because of illness, injury or quarantine are eligible for EI sickness benefits, provided they have accumulated sufficient insurable hours.

On March 11, 2020, the federal government announced that it will be waiving the mandatory one-

week waiting period for Employment Insurance (EI) sickness benefits for those workers who are in quarantine or who have been directed to self-isolate as a result of the COVID-19. The announcement did not specify what evidence will be necessary in order to qualify for the waiver, and appears not to cover voluntary self-isolation. This one-week waiver does not apply to employees who are out of work due to temporary lay-offs or store closures.

During the 2003 outbreak of SARS, the federal government implemented special loss of income relief for certain affected employees. It is unknown whether similar measures will be adopted in light of COVID-19.

Statutory Leaves of Absence

The *Employment Standards Act, 2000* (ESA) contains a number of leave provisions that could apply in a pandemic situation (these are in addition to the proposed legislation announced on March 16, 2020).

Once an employee has worked for an employer for at least two consecutive weeks, the ESA provides for three days of unpaid leave each calendar year due to personal illness, injury or medical emergency.

Employees may also be entitled to use family responsibility leave days for absences relating to a pandemic situation. Once an employee has worked for an employer for at least two consecutive weeks, the employee has the right to take up to three days of unpaid leave each calendar year because of an illness, injury, medical emergency or urgent matter relating to their:

• spouse (includes both married and unmarried couples, of the same or opposite genders)

• parent, step-parent, child, step-child, foster child, grandparent, step-grandparent, grandchild or step-grandchild of the employee or the employee's spouse

• spouse of the employee's child

• brother or sister of the employee, or

• relative of the employee who is dependent on the employee for care or assistance.

If an employment contract provides for something similar to sick leave or family responsibility leave (for example, paid "sick days" or "family responsibility days"), and if the employee takes one of these leaves under their employment contract, the employee is considered to have also taken sick leave and/or family responsibility leave under the ESA.

Subject to the criteria set out below, employees may be able to claim entitlement to a "declared

emergency” leave. This leave gives employees the right to a leave of absence where an employee is unable to perform the duties of their own position because of a declared emergency.

In order to qualify for entitlement under these provisions of the ESA, either the Lieutenant Governor in Council or the Premier must declare an emergency under the *Emergency Management and Civil Protection Act* (EMCPA). Further, employees must be unable to work because:

1. they are subject to an order under the EMCPA
2. they are subject to an order under the *Health Protection and Promotion Act* (HPPA), or
3. they are needed to provide care or assistance to a specified individual.

With respect to the first point, the government may make orders under the EMCPA to: regulate or prohibit travel to, from or within any specified area; evacuate individuals and animals, or remove personal property from a specified area; and close any place, whether public or private, including any business, office, school, hospital or other establishment.

The second point relates to section 22 of the HPPA, which gives medical officers of health the power to order individuals to take, or refrain from taking, any action specified in such orders. These orders can be quite broad and can include: orders to be quarantined; orders to submit to an examination by a physician; or orders to conduct oneself in such a manner so as not to expose another person to infection.

The third point applies to the same list of employees covered under the family responsibility leave.

A declared emergency leave generally ends the day the declared emergency is terminated or disallowed. The employee’s right to the leave will usually end at the same time. This is subject to a few exceptions, including where an employee is exercising the right to declared emergency leave to care for a specified individual.

Similar leave protections exist under the *Canada Labour Code*. It also provides that an employer cannot dismiss, suspend, lay off, demote or discipline an employee with at least three continuous months of employment because of an absence due to illness or injury, where the absence does not exceed 17 weeks and where the employee provides a medical certificate within 15 days of request upon return.

Work Refusals

Under the *Occupational Health and Safety Act* (OHSA), most employees have the right to refuse work if a condition of the workplace “is likely to endanger” their health or safety. Employees encountering the COVID-19 in the workplace (or who fear that they may encounter it) may seek to exercise their right to refuse work in this regard.

The OHSA outlines a specific work refusal procedure that must be followed. Employers cannot threaten to discipline an employee exercising a work refusal. When faced with a work refusal, the employer should immediately investigate in the presence of a health and safety representative or joint health and safety committee member, consider this right to refuse work, and, failing resolution with the employee, notify a Ministry of Labour Inspector. Failure to comply with the OHSA may result in fines.

It is important to note that, under the OHSA, certain employees are exempted from the right to refuse work. These include employees whose work is inherently dangerous or circumstances where a work refusal would endanger another's life, health or safety. Some examples include police officers, firefighters, correctional officers, paramedics and hospital workers. The application of this exception is complex, and each potential work refusal situation would need to be carefully assessed.

WSIB Claims

The *Workplace Safety and Insurance Act, 1997* provides compensation for "personal injury or illness arising out of and in the course of employment" and provides compensation where "a worker suffers from and is impaired by an occupational disease that occurs due to the nature of one or more employments in which the worker was engaged." Therefore, workers infected with the COVID-19 in the course of employment may be entitled to services and benefits. These types of claims were made by healthcare workers during the 2003 outbreak of SARS.

Human Rights Issues

The Ontario *Human Rights Code* (Code) provides that everyone has a right to equal treatment in employment. The definition of disability in section 10 of the Code includes any degree of physical disability or infirmity. The Code also requires that accommodation be provided to a disabled employee. The *Canadian Human Rights Act* has similar provisions to the Code.

On March 13, 2020, the Ontario Human Rights Commission issued its position on COVID-19. It states in part:

"The OHRC's policy position is that negative treatment of employees who have, or are perceived to have, COVID-19, for reasons unrelated to public health and safety, is discriminatory and prohibited under the *Code*. Employers have a duty to accommodate employees in relation to COVID-19, unless it would amount to undue hardship based on cost, or health and safety.

An employer should not send an individual employee home or ask them not to work because of concerns over COVID-19 unless the concerns are reasonable and consistent with the most recent advice from medical and Public Health officials. In unique circumstances, an employer might have other health and safety concerns that could amount to undue hardship. They would need to be able

to show objective evidence to support such a claim.

Employer absenteeism policies must not negatively affect employees who cannot work in connection with COVID-19. An employer may not discipline or terminate an employee who is unable to come to work because medical or health officials have quarantined them or have advised them to self-isolate and stay home in connection with COVID-19."

The Canadian Human Rights Commission has not yet commented on how COVID-19 will be treated under the *Canadian Human Rights Act* but federal employers should be mindful of similar considerations.

Privacy Considerations

Employers should also consider management of medical information, including the medical information an employer will collect from an employee and how that information will be used, disclosed and kept secure. Clear direction to employees outlining why certain medical information is being collected will help employees understand why it is necessary and reasonable for the employer to collect, use and disclose their medical information in response to the situation.

Employers also need to consider what information they are entitled to require from employees and how they can use and disclose this information. Employers must consider what information they need in order to protect the health and safety of their workforce, and how they can achieve this protection in as minimally intrusive a manner as possible.

In ordinary times, employers are advised against requiring an employee to disclose a specific diagnosis. However, there is no absolute rule against obtaining a diagnosis from an employee. Indeed, some decision-makers have recognized that a diagnosis may be necessary information for an employer to have in order to fulfill its health and safety obligations to the entire workforce. During a pandemic, when employers have reason to believe that employees in a contagious state are in the workplace, it may be necessary to ask such questions in order to assess this point.

Although this type of screening may arguably be a necessary and appropriate part of pandemic management, it is not without risk. Those employers subject to private sector privacy legislation should take note that the federal, British Columbia and Alberta privacy commissioners have released publications that seem to preclude such action. Further, employers operating in unionized environments could expose themselves to potential grievances. It is therefore important that any such action be done in collaboration with an employer's unions, where possible.

In some cases, an employer may seek confirmation of immunization (where available), particularly when the place of employment is a healthcare setting. Similarly, in the context of some outbreaks, an employer may wish to know whether an employee has travelled to an area that is experiencing

a high incidence of the disease in question. Different kinds of information may need to be collected, used and disclosed at various points throughout the course of a pandemic.

The necessity of the collection of this information does not mean that the employer can or should disclose this information in an unrestricted fashion. Rather, employers should use and disclose the health information on a “need to know” basis only, or as required by public health officials. Employers must carefully examine what information needs to be used or disclosed in the circumstances to fulfill their obligations to all of their employees, as well as to those to whom the employer provides services.

Four Data Security Points for Pandemic Planners Who are Addressing the COVID-19

Organizations currently engaged in pandemic planning ought to consider the data and cybersecurity risks associated with the rapid adoption of telework. Planning should start now, with the following considerations in mind.

Remote access risks. Secure remote access should continue to be a requirement. In general, this means access through a virtual private network and multi-factor authentication. Though understandable, “band aid” solutions to enable remote access that depart from this requirement represent a significant risk. Some departure may be necessary, though all risks should be measured. In general, any solution that rests on the use of remote desktop protocol over the internet should be considered very high risk.

Data leakage risks. Efforts should be made to keep all data classified as non-public on the organization’s systems. This can be established by issuing hardware to take home or through secure remote access technology. The use of personal hardware is an option that should used together with a well-considered BYOD policy. Printing and other causes of data leakage should be addressed through administrative policy or direction. Consider providing direction on where and how to conduct telephone calls in a confidential manner.

Credential risks. New classes of workers may need to be issued new credentials. Although risks related to poor credential handling can be mitigated by the use of multi-factor authentication, clear and basic direction on password use may be warranted. Some have said that phishing attacks may increase in light of an increase in overall vulnerability as businesses deploy new systems and adjust. While speculative, a well-timed reminder of phishing risks may help.

Incident response risks. Quite simply, will your incident response plan still function when the workforce is dispersed and when key decision-makers may be sick? Who from IT will be responsible for coming on-site? How long will that take? If decision-makers are sick, who will stand in? These questions are worth asking now.

Operational Concerns

The SARS outbreak in 2003 resulted in many employers having to make workforce adjustments. Employers should have contingencies in place for dealing with the impact of a health emergency on the continued operation of their business.

At a minimum, this may involve consideration of the core aspects of the business which must be carried on, identifying aspects of the operation that could be temporarily closed, identifying internal and external dependencies and identifying plans for employees. Any contingency will be unique to the business.

How the Ontario Government is Responding to the COVID-19

The Ministry of Health has reported that it is taking several steps to ensure the health and safety of Ontarians. These include:

- enhanced access to screening by establishing a number of dedicated assessment centres
- approved new physician billing codes for telephone assessments
- providing a COVID-19 self-assessment tool
- expanding lab capacity
- increased public education
- adding COVID-19 as a designated disease reportable under Ontario's public health legislation, enabling local public health units to quickly and effectively take all necessary measures to investigate, complete lab tests and do case and contact management to prevent and control further spread of the infection
- promoting awareness and providing guidance to health care providers
- closely monitoring the situation and coordinating with Public Health Ontario and Public Health Agency of Canada
- meeting with hospitals, paramedics and local public health units near Pearson International Airport to provide further information on the federal border screening measures.

On March 12, 2020 the government also closed all publicly funded schools until April 5, 2020.

There is legislation that the federal (*Emergencies Act*, *Quarantine Act*) and provincial governments (EMCPA, HPPA) can utilize to implement widespread strategies for the promotion of public good, health and safety in the event of a public emergency. Any actions taken under these laws may impact your workplace.

Conclusion

In responding to these issues, it is important for employers to attempt to balance a responsible approach to legitimate employee concerns while taking care not to act unreasonably, or based on

misinformation and unreasonable fears.

We will continue to provide timely updates as new information becomes available.

To further assist you, please consult our companion piece, “Update: COVID-19 – Questions and Answers for Employers” which sets out some of the emerging questions and answers, along with some key resources.

If you require further information, please contact Sarah Eves at 416.864.7254, Nadine Zacks at 416.864.7484, Amanda Cohen at 416.864.7316, or your regular Hicks Morley lawyer.