

JETRO Toronto/Toronto Shokokai/Pallett Valo LLP

COVID-19 WEBINAR SERIES – Part 2

REOPENING YOUR BUSINESS DURING COVID-19 – EMPLOYMENT RELATED ISSUES AS BUSINESSES REOPEN AND EMPLOYEES RETURN TO THE WORKPLACE

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Workplace Policies

Employers should review all of their workplace policies to determine whether they need to be updated due to the COVID-19 pandemic such as:

- Accommodation Policy
- Telecommuting Policy
- Privacy Policy
- Human Rights Policy
- Health and Safety Policy
- Emergency Plans and Emergency Closing Policy

Telecommuting Policy

Where remote work is a possible option, develop a telecommuting policy which should include the following:

- eligibility criteria - might include a mandatory service period, performing duties that do not require physical presence, positive performance and discipline records, adequate home office space, etc.
- procedure for requesting approval to telecommute
- direct employees to the employer's accommodation policy for those who request remote work as an accommodation for a disability or other protected ground
- detail employee responsibilities and expectations (such as work hours, timekeeping, accessibility, secure remote access procedures and work expenses)
- set out employer responsibilities (for example, technical support, equipment and expense reimbursement and
- remind employees that they are expected to comply with all employer policies, including health and safety policies and information security policies

Telecommuting – Other Policies

Employers should review other workplace policies to address remote work such as:

- **Accommodation policies** - Remote work is often a reasonable accommodation for employees who are unable to attend the physical workplace due to a protected *Human Rights Code* ground, such as a disability or family care obligations
- **Emergency plans and emergency closing policies** - Remote work may be a business continuity option where the workplace is closed due to an emergency
- **Provide training on relevant policies** - Ensure employees receive, review and understand policies relevant to remote work

Telecommuting – Record Time

Develop a timekeeping system - employers are required to keep records of hours of work (including overtime hours) performed by employees. Failure to keep accurate records may lead to the inability to defend an employee's claim for unpaid wages

Examples may include the following:

- track log on/log off times for employee access to employer computer systems
- require employees to complete electronic time sheets accounting for their time
- establish fixed business hours and require employees to strictly adhere to those hours, while also ensuring work is not performed outside of those hours

Telecommuting – Record Time

Adopt firm scheduling rules - employees must be paid for time worked

Excess working hours may incur additional wage or overtime pay liability, or may attract complaints, investigations, fines and compliance orders. To avoid these outcomes:

- ensure employees understand working time expectations
- pay employees at the appropriate rate for all time worked
- track working time and maintain accurate records
- require authorization for work outside normal hours

Telecommuting – Human Rights

Make telecommuting decisions fairly - ensure that decision is made on a non-discriminatory basis.

- procedures for employee telecommuting requests should assess only *bona fide* occupational requirements. Employees should not be required to disclose information about characteristics protected by human rights legislation (including family status, disability, age, etc)

Consider remote work as a potential accommodation - Remote work may be considered as a human rights accommodation (eg. where an employee is recovering from a disability or must attend to family care obligations)

- follow the same steps applicable to any accommodation request – confirm the employee's request for accommodation, obtain evidence of the reasons for accommodation and the extent of the employee's needs, survey reasonable accommodation options and work with the employee to implement those options

Telecommuting – Health & Safety

Health and safety measures - treat remote working environments like an extension of the workplace. Employers are required to keep their employees safe while they are working

Hazard mitigation - a remote workspace may have ergonomic, electrical, fire or other hazards. Employers should take steps to minimize hazards in their remote workspace. This may include:

- ensuring all materials and equipment used by the employee meet relevant safety standards
- providing ergonomic devices
- providing guidance on upgrading or renovating the workspace

Telecommuting – Tips

Take steps to ensure remote workers are engaged and productive

- encourage regular communication among team members
- set goals and measurable outcomes
- establish regular meetings between an employee and manager

Maintain a sense of professionalism - remind employees they are expected to maintain the same standards of behaviour in working from home that they would be expected to meet in the physical workplace. For example:

- when teleconferencing employees should minimize background noise or unsightly visual clutter to the extent possible
- employees should dress appropriately for video calls

Telecommuting – Risks

Consider violence and harassment risks - remote employees may not have the security of a physical workplace and the support of peers. The employee may be exposed to an increased risk of domestic violence if required to stay at home with an abusive family member

Any accident, illness or injury that an employee suffers in the course of remote work must be investigated and reported to the WSIB. The fact that the incident occurs in an employee's home or other remote location does not change the employer's obligations

Telecommuting - Risks

Determine insurance coverage - both employer and employee should review relevant insurance coverage for application to the employee's telecommuting arrangement

Watch out for legal restrictions on employee's home workspace - ensure building codes, fire codes, municipal bylaws or condominium bylaws permit the activities the employee will be carrying on at home. Employees who simply use a computer and participate in phone calls or video conferencing likely will not face restrictions. Restrictions may apply to employees who see clients in their home, store employer materials, work with machinery or physical goods, or display signage.

Protect sensitive information - Most businesses control some amount of sensitive information that is accessible to employees, including:

- confidential business information
- private personal information of employees, clients or the public
- Employees should be trained to identify this information and to use it or store it with a degree of care proportional to its sensitivity

Occupational Health and Safety Act

When reopening a workplace, employers must keep in mind that they have an obligation to keep their workers and others safe under the *Occupational Health and Safety Act* (the "OHSA")

If workers have tested positive for COVID-19 and wish to return to work, they should consult with their local public health office to receive proper guidance

If workers refuse to return to work and/or exercise their right to refuse to unsafe work under the OHSA, employers need to understand the appropriate process and legal rights

Occupational Health and Safety Act

Employees are entitled to refuse work that they believe is likely to endanger their health or safety

Where an employee reports a refusal to work, the employer must investigate the reported hazard (in the presence of a health and safety representative or joint health and safety committee member) and follow work refusal protocols

If there are “reasonable grounds” to conclude a danger exists, the employee may continue to refuse the work and the Ministry of Labour must be notified

The refusal must be reasonable. Fear and anxiety around COVID-19 is not, on its own, sufficient to refuse work

Occupational Health and Safety Act

Employers must:

- create workplace health and safety policies and procedures and make sure that everyone follows the policies and procedures
- make sure that supervisors know what is required to protect workers' health and safety at work
- take reasonable precautions to protect workers from being hurt or getting a work-related illness
- ensure workers wear the right protective equipment and are trained on how to use it

Employee Refuses Testing

If an employee refuses to be tested in a workplace where testing is essential, an employer can:

- refuse the employee entry to the workplace; and
- terminate that employee (but this is not recommended without seeking the prior advice of legal counsel)

Privacy Concerns

If an employer is advised that an employee or customer has tested positive for COVID-19, there may be a transmission risk in the workplace

The employer has an obligation to notify affected employees that they are at risk and take steps for hazard prevention

The employer should contact the local public health office to seek advice and direction about how to track the employee's contact with other employees or customers and develop a plan for a response

Privacy Concerns

The employer should collect only the information necessary to fulfill its notification and reporting obligations, and should request that the affected employee consent to the use and disclosure of their personal information for the purposes of:

- notifying any individual who may have been exposed to COVID-19
- reporting the case of COVID-19 to the applicable public health office or government institution

Privacy Concerns

The co-workers must self-isolate for 14 days

The employer should **not** inform its workforce of the identify of the employee who tested positive for COVID-19

Employers should provide sufficient details to allow the potentially exposed individual to ascertain

- the date(s) of their potential exposure; and
- the extent and circumstances of their potential exposure

Privacy Concerns

Due to COVID-19 implications, many businesses are collecting information about individuals' health, interactions with other individuals, or their travel history

This is "personal information" and it could include highly sensitive health information

It is important for businesses to comply with applicable privacy laws

A failure to do so can result in significant fines and reputational damage

Privacy Concerns

Employee medical information is considered highly sensitive information and must be protected

The employer has an obligation to protect the employee's medical information from inappropriate use or disclosure

Although an employer may have a right to access an employee's medical information, the scope of information that may be collected is limited to the minimum necessary to achieve a work-related purpose

The employee's consent should be obtained

Human Rights

All employees have the right to equal treatment in employment

Discrimination in employment on the basis of ethnicity, race, ancestry, place of origin, and disability is prohibited

Employers should refrain from treating employees that have COVID-19 differently, apart from taking recommended health and safety measures to reduce or prevent the spread of the virus

Human Rights

Under the Ontario *Human Rights Code*, employers are required to take steps to accommodate disabled employees. Someone who is infected with COVID-19 may be considered disabled within the meaning of the *Code*

The Ontario Human Rights Commission released a statement in January urging the public to refrain from stigmatizing, discriminatory, or harassing behaviour against individuals of East Asian descent, following reports of such conduct due to the COVID-19 outbreak

Human Rights

Negative treatment of employees who have, or are perceived to have, COVID-19 is discriminatory and prohibited under human rights legislation

If an employee is required to self-isolate for legitimate reasons, the employer should explore alternative options to allow the employee to continue working (e.g. working from home)

It is not discriminatory to lay off employees if there is no work for them to do due to the impact of COVID-19

Liability to Employees

Most employees will not be successful if they sue their employer if they contract COVID-19 at work

Workers' compensation legislation provides for a no-fault compensation plan to workers who have work-related illnesses or injuries. If the worker qualifies for workers' compensation leave, they will be able to collect workers' compensation benefits during their leave and will not be able to bring a legal action against their employer

Layoff converted to Statutory Leave

Retroactive to March 1, 2020, any reduction or elimination of a non-unionized employee's hours of work for reasons related to COVID-19 will be treated as a Declared Emergencies and Infectious Disease Emergencies Leave under section 50.1 of the *Employment Standards Act, 2000* ("ESA")

This removes the application of Ontario ESA's temporary layoff rules, which normally deem a layoff to be a termination after a defined period

Layoff converted to Statutory Leave

Employers have a duty to recall employees back to work

Employees on unpaid statutory leave have the right to be reinstated to their former position when the leave ends, or to a comparable position if the former position does not exist

Employees Refusing to Return

If an employee refuses to attend the workplace due to fears about COVID-19 in the workplace, employers should consider the following:

- does the employee have a medical condition (such as anxiety) that requires accommodation?
- can the workplace be modified to address the employee's fears? The employee may be able to work in a room or area that is isolated from others
- will additional safety precautions alleviate the employee's fears?
- can the employee work from home?

Disciplining Employees

The normal disciplinary rules need to be adjusted to reflect the current pandemic realities. For example, employers should:

- allow ill employees to take sick leave
- allow an employee to take time off to provide support to a family member who has contracted COVID-19
- allow an employee to take time off to care for children who are affected by day care or childcare closures
- allow the employee to work from home, where possible

Sending an Employee Home

If an employee poses such a risk of infecting others with COVID-19, the employer has the right and obligation under health and safety legislation to protect its workforce

A reasonable precaution to protect the safety of the workforce from COVID-19 infection is to bar that employee from the workplace pending confirmation that the employee is fit for work

If the employee does not voluntarily refrain from attending work, offer the employee an opportunity to take a leave of absence or the opportunity to work remotely to avoid a loss of income

Can Employer force Employees to Take Unused Vacation Time?

If employees are required to use their vacation now they will be unable to take time off at typical vacation times later in the year (e.g. summer or December).

The employer may consider offering unpaid leaves later in the year if employees want time off for travel or family gatherings that are not possible under COVID-19 restrictions

Can Employer force Employees to Take Unused Vacation Time?

In Ontario, vacation must be completed no later than ten months after the end of the vacation entitlement year for which it is given

- 1-4 years of employment - 2 weeks vacation
- 5+ years of employment - 3 weeks vacation

Duty to Pay Employees While Self-Isolating

If the employee is:

- working from home while self-isolating - the employer must continue to pay them
- not working during self-isolation - the employer is not required to pay the employee unless required to do so by statute, the employment contract, the employer's workplace policies or a collective agreement (there is no requirement to pay in Ontario)

Changing Working Conditions

Employers may be faced with claims of constructive dismissal if they change an employee's working conditions, including:

- temporarily suspending an employee who presents a risk of infection
- transferring an employee to an alternate work location
- changing an employee's hours of work; and
- changing an employee's work duties

COVID – Insurance Coverage

Most businesses have many different insurance policies that may help mitigate their financial losses related to COVID-19

Insurance policies vary widely in scope and coverage and ultimately the specific language of each policy and the facts of each claim will determine if there is coverage. Businesses should carefully review their policies to determine the extent of any COVID-19 coverage

COVID – Insurance Coverage

Businesses should review their insurance policies if a third-party is claiming damages related to the company's actions or inactions during the COVID-19 pandemic.

For example:

- customers claims that they were exposed to COVID-19 at the company's place of business

Limitation Periods for Litigation

By order made under section 7.1(2) of the *Emergency Management and Civil Protection Act*, R.S.O. 1990, c. E.9, the Ontario government has temporarily suspended limitation periods and procedural deadlines for the duration of the COVID-19 pandemic emergency

The suspension is retroactive to March 16, 2020

The limitation period and deadline suspension has been extended to September 11, 2020

Questions?

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For clarification or for legal or other professional assistance, please contact Pallett Valo LLP.