

TORYS

Corporate Management in the Economic Resumption: Health and Safety, Privacy and Employment Law Considerations (Ontario)

July 29, 2021

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- Returning employees to the office and work-from-home considerations
- Health and safety concerns in light of COVID-19
- Regulatory, legislative and travel snapshot

Returning employees to the office and work-from-home considerations

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- Recap of the results of the JETRO survey
 - Over 50% of surveyed companies will continue to have some element of work-from-home on an indefinite basis
 - Statistics Canada survey from July 2021
 - Huge increase in work-from-home compared to 2016: 33% of Canadian employees work mostly from home
 - 90% report being at least as productive
 - 80% reported wanting to work at least half of their hours from home once the pandemic is over
 - 42% want an even split, 38% want to be mostly or all at home and 20% want to be mostly/all at the office
 - Positive correlation between productivity and preference

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- Ontario is currently in Step 3 of its reopening plan
 - Step 3 still requires workplaces follow public health rules of general applicability including posting signs re: screening, mask mandates (AODA/OHRC/2-metre private workspace exception) and distancing requirements
 - Step 3 no longer explicitly requires that employees continue to work-from-home if their work can be done remotely
 - Workplaces required to maintain a safety plan describing measures and procedures implemented in the business to reduce transmission risk which may include continued work-from-home
 - Government orders and public health guidance provide appropriate “standards” for determining when employees should be recalled to work (if employers wish)
 - Encourage vaccination
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- General rule is that employers are legally entitled to ask employees to return to the office
 - It does not matter that an employee moved cities
 - Exceptions to the general rule include
 - If continued hybrid or work-from-home has become an implied or express term of employment
 - Employers should communicate to employees that the current arrangement is temporary and related to government orders and that the employer reserves the right to recall employees once appropriate
 - As a result of accommodations under human rights or accessibility legislation
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- Ultimately, it is an employer's decision how to organize its workforce and workplace
 - Other than legal considerations, employers will likely consider productivity, culture, retention and competitiveness
 - If employers retain a work-from-home element, consider
 - Health and safety of the at-home workplace (health and safety legislation does not specifically address at-home arrangements but employers encouraged to do their due diligence when it comes to home office set-up and equipment used by employees)
 - Accommodations may require employers pay for certain specialized equipment
 - If registered with WSIB, eligible work-related injuries can still occur while working-from-home

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- However an organization decides to structure its workforce and workplace, adjustments to employee handbooks may be necessary to describe approaches to
 - Working-from-home, including payment for supplies, health and safety issues, and other related considerations
 - Leaves of absences in light of (potentially permanent) infectious disease emergency leaves
 - Business trips, health and safety and other aspects

Health and safety concerns in light of COVID-19

- Employer liability difficult to establish if employers implement the health and safety measures recommended by public health guidance
 - Very difficult to establish causation and that employer breached the standard of care

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- How should employers ensure the health and safety of the workplace?
 - Always stay apprised of public health guidance (which currently continue to require mask mandates)
 - Ontario employers still under obligation to maintain a safety plan describing measures and procedures implemented in the business to reduce transmission risk
 - Encourage vaccination
 - Employers cannot generally limit what employees do on their own time but employers may be able to request that an employee take an *Infectious Disease Emergency Leave* if they have concerns about workplace transmission

- Can employers require vaccines?
 - Probably not
 - Mandating vaccines raises a host of competing legal issues, including human rights, privacy and occupational health and safety issues
 - At this stage, employers with the best argument for mandating vaccines are congregate living/care settings and other workplaces that interact closely/regularly with populations who are at a heightened risk of developing a severe reaction to COVID-19

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- Can employers ask for the vaccination status of employees?
 - Asking employees on a strictly voluntary basis (i.e., they have the option not to answer) is likely permissible, provided that there are no negative repercussions to employees for failing to answer
 - Employers, however, still need to be alive to their employees' privacy rights and disclose how information that is gathered will be used, etc.
 - Requiring employees to disclose their vaccination status is more problematic than simply requesting the information on a voluntary basis
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- Can employers ask for the vaccination status of employees?
 - To the extent a decision is made to ask employees about their vaccination status, an employer should ensure they are asking for no more information than is necessary to achieve the purpose of the collection
 - Employers should not, generally, ask for proof
 - Employers should refrain from sharing the vaccination status of employees to any third party

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- Can employers institute rapid testing for employees returning to the office?
 - Rapid testing is only lawful from a privacy perspective if it is necessary and proportionate
 - Whether rapid testing is necessary and proportionate requires a contextual inquiry
 - There may be less invasive ways for employers to maintain the health and safety of the workplace (preferable)
 - If testing is determined to be necessary/proportionate, start with voluntary or at-home program
 - Escalate, if necessary and proportionate, to mandatory on-site program built on meaningful consent only if necessary
 - At this time, very few industries should implement mandatory on-site testing without meaningful consent

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- Should employers implement specific health and safety rules at the workplace for employees who are not vaccinated (or continue to request unvaccinated employees to work from home, if possible)?
 - Generally, employers should be following public health guidelines in developing their health and safety policies
 - At this time, employees who are vaccinated and employees who are not vaccinated are subject to the same health and safety obligations in Ontario (i.e., no distinction is drawn between vaccinated and unvaccinated employees)
 - Requiring unvaccinated employees to work from home could raise human rights issues and could also have the effect of “outing” individuals who are not vaccinated
 - Employers should protect all employees against harassment

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- Can employees refuse to come to work for fear of COVID-19 infections at the office, on transit and/or because they suspect other employees are not vaccinated?
 - Employees have the right to refuse work if they have a reasonable belief that their work is unsafe and/or endangered by workplace violence
 - There is a process an employee must follow if they want to assert a work refusal
 - So long as employers implement reasonable health and safety policies to prevent the spread of COVID-19 at the workplace, it is likely challenging for an employee to prove they have a reasonable belief that their work is unsafe
 - Employees may require accommodations (i.e., anxiety)
 - The “right to know” does not extend to colleagues’ vaccination status

Regulatory, legislative and travel snapshot

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- End to the *Declared Emergency Leave*
 - Continued 3 paid and unlimited unpaid *Infectious Disease Emergency Leave*
 - Broad list of potential reasons for taking the leave including if employer has concerns that an employee may spread COVID-19 at the workplace
 - Paid leave days are reduced by contractual entitlements to paid days for similar reasons
 - Paid statutory days may be refunded at \$200/employee/day (if the employer does not already provide paid leave)
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- End, on September 25, 2021, to the temporary changes to the ESA relating to temporary layoffs and “deemed” *Infectious Disease Emergency Leaves*
 - Employees who have been laid off due to COVID-19 or whose hours or pay have been reduced as a result of COVID-19 will no longer be deemed to be an *Infectious Disease Emergency Leave*
 - The temporary suspension of the regular rules relating to temporary v permanent layoffs and constructive dismissal under the ESA will resume

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- CEWS began its subsidy wind-down beginning July 4, 2021, and the program is ending on September 25, 2021
 - Transition to the Canada Recovery Hiring Program (CRHP)
 - Transition period in which employers can apply to either program
 - After of September 25, all applications for a wage subsidy are to the CRHP until November 20, 2021
 - Fixed rate subsidy for employers with a 10% revenue drop (beginning in Period 18) generally based on the increase in the amount you paid to active eligible employees for the claim period compared to how much you paid active eligible employees from March 14 to April 10, 2021

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- Inter-provincial travel in Canada allowed
 - Maritime provinces require visitors to be vaccinated (one dose) to avoid quarantine
 - Canadian residents permitted to return to Canada (quarantine not mandatory for fully vaccinated Canadian residents)
 - Fully vaccinated US citizens and permanent residents able to cross border as of August 9 and other fully vaccinated residents as of September 7
 - End to hotel quarantine for all incoming visitors as of same date
 - List of airports accepting international flights to grow to 9

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- Business travel informed by public health guidance and by border restrictions
 - Government of Canada still maintains a travel advisory discouraging non-essential travel
 - Whether business travel is essential is fact-specific
 - Companies unlikely to begin business travel until such time as border restrictions, quarantine obligations on non-vaccinated Canada residents and travel advisories are passed
 - Even then, it remains to be seen whether business travel ever recovers and whether employees will want to do it
 - Recall employees have a right to refuse work where there is a reasonable belief that the work is unsafe (some international travel may reasonably trigger that belief)
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