

# COVID-19 AND OCCUPATIONAL HEALTH AND SAFETY WHITEPAPER

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## Background and Introduction to the COVID-19 Crisis

The emergence of COVID-19 (also known as the Novel Coronavirus or SARS-CoV-2) is truly an unprecedented public health crisis in modern times. While many people were aware of the 1918 Spanish Flu pandemic and are familiar with the Black Death or Bubonic Plague (which killed hundreds of millions of people in Europe and Asia), as a society, we had become largely complacent regarding the risk of major global pandemics in recent years. Part of this relates to an overconfidence in modern medicine and the sense that we had somehow become immune to widespread infections due to modern hygiene practices, vaccines and pharmaceutical treatments. Notwithstanding the SARS (Severe Acute Respiratory Syndrome) crisis of 2003, the H1N1 influenza (“Swine Flu”) pandemic in 2009 and the spread of MERS (Middle Eastern Respiratory Syndrome) in 2012, most people living today would have had a difficult time conceptualizing the realities of a serious worldwide pandemic until very recently. While we had been hearing for several years that we were due for a major global pandemic, previous pandemic scares turned out to be relatively short-lived and isolated to certain parts of the world.

Nevertheless, certain crises in recent history had given businesses and governments an opportunity to conduct disaster recovery and business continuity planning and prepare for largescale emergencies. These crises included the Y2K panic relating to computer glitches surrounding the year 2000, the 9/11 terrorist attacks on September 11, 2001, and the 2016 wildfires in Fort McMurray, Alberta, which forced the mass evacuation of the entire city. While these crises shared certain similarities with pandemics and other public health emergencies and forced many organizations to re-evaluate their preparedness for emergencies and natural disasters, pandemics by their very nature have certain characteristics that other types of crises lack. For one thing, they are

contagious and ongoing in nature, meaning they have the potential to impact a large portion of the workforce and can result in major disruptions to businesses and the economy for a lengthy period.

Further complicating matters is the fact that the COVID-19 pandemic is global in nature, unlike those other disasters and previous public health emergencies, which were much more limited in their geographic scope and impact. COVID-19 is truly unprecedented in recent history and will ultimately affect every country on earth. Hundreds of thousands or perhaps millions of people will ultimately die (even more will get sick and will be unable to work for a period of time) and the impact on the global economy is likely to be severe if not catastrophic. Some organizations may not survive the crisis, but with prudent planning, ongoing awareness, effective risk management, appropriate communications, government assistance and suitable responses, many employers will be able to emerge from this pandemic with enhanced employee morale and engagement and a greater sense of teamwork and loyalty among employees.

Employers in Canada have an obligation to provide a safe and healthy work environment, both under the common law and the governing occupational health and safety legislation. Therefore, it is of paramount importance to ensure an organization’s employees, managers, contractors, customers/clients, suppliers, visitors and other stakeholders remain safe and healthy during this pandemic. It is also important to consider employees’ concerns relating to their pay and job security (particularly in the case of quarantines, temporary layoffs and/or plant/office closures). Employee morale and wellness and social and psychological concerns are also important. Employers should consider what they can do for employees who are unable to attend work due to quarantine or closure of the business. Options include

working from home or an off-site location, taking sick days, personal days or vacation time, using short-term disability leave, claiming Employment Insurance (EI) or the Canada Emergency Response Benefit (CERB) and unpaid leaves of absence. It may be prudent in such situations to relax requirements relating to sick leave, short-term disability, medical notes and telecommuting policies. Some employers may decide just to pay employees even if they are unable to attend work, although a pandemic situation can result in serious financial difficulties for employers and not every organization will have sufficient resources to support such measures. Nevertheless, the Federal Government has stepped in to help provide relief and subsidies to employers, as well as benefits for individuals. In particular, the new Canada Emergency Response Benefit (CERB) provides a benefit of \$500 per week for up to 16 weeks for those individuals who are without work as a result of the crisis, and the Canada Emergency Wage Subsidy (CEWS) provides a 75% wage subsidy (to a maximum of \$847 per week) to qualified employers for a period of 12 weeks (this program was extended to the end of August as of May 15, 2020).

Employers may also need to deal with employee work refusals and remember that most workers in Canada are entitled to refuse unsafe work where there is a reasonably held belief that the work in question could be hazardous. The organization's health and safety committee should be involved in such investigations. Employers should also be mindful of the requirements of any governing collective agreements, individual written employment contracts and employment policies and avoid contravening those provisions. Otherwise, there may be a potential for a grievance in a unionized environment or constructive dismissal claims in the case of non-union employees. It is also important to ensure that policies are up to date, reflect the current situation and are consistently enforced. The distribution of one-off communications and additional short policy documents may also

be necessary as the situation changes. Employers must maintain compliance with legislation and regulatory requirements of the various federal, provincial and municipal governments. This includes orders relating to the mandatory closure of businesses and social/physical distancing measures relating, for example, to the prohibition of public gatherings and the requirement to maintain a safe distance of two metres from others wherever possible. Where organizations operate in multiple jurisdictions, it is necessary to maintain awareness of all the relevant legal and regulatory requirements. In some cases, these can change frequently.

To help make the right decisions that impact your business and people, you can follow our coverage of COVID-19 on Reuters.com or the Reuters App. Additionally, we encourage all customers to closely follow developments through trusted sources such as the Government of Canada website, the World Health Organization (WHO) and provincial/territorial government websites. Many law and consulting firms also have excellent resources such as fact sheets, white papers, bulletins, circulars, articles, blog posts and webinars (both paid and unpaid). Several law firms continue to track legislation and other legal and regulatory developments on their website and update them on a regular basis.

This white paper examines the crisis from legal, regulatory and best practice perspectives. It focuses on legal requirements under occupational health and safety legislation and the common law. Included within this paper is a Sample Emergency Pandemic Preparedness Policy you can customize and use in your own organization. This policy should also be supplemented with short one-off policy statements and employee communications that are cascaded as the situation changes and new legal and regulatory requirements are introduced. It is also necessary to consider the requirements in the jurisdictions where you operate, as well as any legal and regulatory requirements or business practices in your industry. As always, none of this information should be construed as legal

or financial advice, and you should always seek the advice of a competent legal, financial or other professional with respect to your situation.

### **COVID-19: Background, History and Timelines**

While the COVID-19 crisis hit China first (particularly Hubei province and the city of Wuhan, which was the epicentre of the pandemic in that country), the virus spread relatively quickly to other countries including Italy, Iran, Spain and South Korea, and eventually worldwide (at the time of writing, the United States had surpassed China and Italy to become the most severely impacted country worldwide). The virus is widely believed to have started in a “wet market” in the city of Wuhan. Such markets trade in wild animals, and these animals are kept in cages within close proximity of one another. Experts believe these markets can be breeding grounds for diseases due to the close quarters. The COVID-19 virus is similar in genetic makeup to a virus infecting bats, although bats are not sold in the Wuhan wet market. It is possible the virus mutated and jumped from bats to another type of animal, and eventually to humans. Early speculation pointed to snakes as the possible conduit of the virus, but that rumour seems to have died down at this point. Others believe the virus may have been released into the environment mistakenly as a result of scientific research, and some conspiracy-minded people even believe one or more governments had deliberately released the virus. The reality is we may never know the original source of this pathogen.

While there are still some questions about how the virus is spread and just how contagious it is, we do know that COVID-19 is a respiratory disease that appears to be transported primarily through droplets transmitted via airborne contact (although there is some evidence that the virus can remain on surfaces for several days). Despite the fact many people who contract the virus remain asymptomatic or have very mild symptoms at worst, the symptoms can

include fever, tiredness, dry cough, shortness of breath, weakness, aches and pains and sore throat. Some people also report a loss of taste or smell, diarrhea and a runny nose. In other words, the symptoms are very similar to those of seasonal influenza (flu). Like the flu, the Novel Coronavirus can be particularly dangerous for those who are sick or elderly, or who have underlying health conditions such as heart disease, high blood pressure or diabetes. While COVID-19 (officially known as SARS-CoV-2) is very similar genetically to the virus that caused the SARS outbreak in 2003 (SARS-CoV), the SARS virus generally led to a more severe illness but likely was less contagious than the COVID-19 virus (Tesini, 2020).

The first cases of COVID-19 in China were reported to the World Health Organization (WHO) on December 31, 2019. At the time, these were reported as cases of “pneumonia of unknown etiology.” The WHO officially classified COVID-19 as a pandemic on March 11, 2020. As of May 11, 2020, there were 4,123,316 confirmed cases of COVID-19 and 283,055 deaths, with 187 countries reporting cases of the disease (IPAC, 2020).

The first official case of COVID-19 in Canada was reported on January 15, 2020. The earliest reported cases were from people who had recently travelled abroad (Government of Canada, 2020c). It generally takes a week or two after initial infection to experience symptoms, so it is likely the first exposure was somewhat earlier than that. As of April 21, 2020, it was estimated that 21% of cases were the result of foreign travel or close contact with someone who had recently travelled abroad, while 79% had contracted it as a result of community exposure (Government of Canada, 2020c). Clearly, the virus is now being transmitted domestically and can no longer be blamed on those who had recently travelled abroad, although there are signs that we have reached peak rates of infection in Ontario and elsewhere in the country (Kirkey, 2020). As the shutdown continues, many governments, businesses and individuals

are shifting their focus to reopening the economy and getting people back to work.

## **The Canadian Response to the COVID-19 Crisis**

While Canada has been impacted by the crisis worse than some countries, on a per capita basis, we are doing better than several countries including the United States, Italy and Spain. Part of that relates to the relatively quick and decisive response of the Federal Government and the various provincial and municipal governments across the country. Because Canadians tend to be quite polite and civic-minded and are somewhat more collectivist in orientation than our American cousins, people have generally been compliant with government orders to maintain physical distancing and shut down non-essential businesses. Unlike in the U.S., where the virtual shutdown of the economy and social distancing measures have become partisan political issues, Canadians of all political stripes tend to agree that these measures are needed in the short-term in order to safeguard the long-term health and welfare of the country and its citizens.

Notwithstanding some criticism of Prime Minister Justin Trudeau's and Chief Public Health Officer of Canada Dr. Theresa Tam's alleged failure to close the border as soon as the magnitude of the crisis became apparent, there has been remarkable cooperation among politicians from different parties and at different levels of government. Most have been quite unified in their approach to tackling the pandemic and their messaging regarding the need to maintain closures and social/physical distancing. Overall, the message is that we must comply with government orders and maintain social/physical distancing in the short-term in order to shorten the timeframe for the shutdown and ensure a return to normalcy in the longer-term. Very few politicians in Canada advocate for an immediate return to business as usual, although, at the time of writing, several provinces had developed tentative plans to reopen their economies.

While plans have been made, for example, with respect to Ontario to reopen businesses and schools and relax social distancing requirements, no timelines have been attached to most of these plans at this point, and only limited relaxations of restrictions on certain types of businesses such as garden centres and golf course operations were implemented as of May 4, 2020, with further restrictions implemented later in May. Thankfully, protests against shutdowns, travel restrictions and physical distancing have been quite limited in Canada. Even in the United States, where such protests are considerably more widespread, the vast majority of the population continues to agree with the restrictions put in place by federal and state authorities.

Overall, the message from Canadian politicians has focused on promoting the concept of "flattening the curve." While some people appear to believe shutdowns and physical distancing should have the goal of trying to avoid any and all infection, the real objective of flattening the curve is to avoid large spikes in infection rates in order to allow the healthcare system to deal with the crisis over a longer period of time with fewer people being infected at any one point in time. This is important not only with respect to patients infected with COVID-19, but also for those requiring healthcare for other types of ailments and illnesses. If healthcare practitioners and resources are focused solely on fighting the pandemic, that leaves fewer resources available to deal with other healthcare emergencies and challenges. In other words, people with other types of health problems will still need healthcare during the pandemic.

## **Public Health and Quarantine Legislation**

Both the Federal Government and every province has legislation dealing with public health and/or quarantines. In many cases, the legislation empowers officials to make mandatory orders dealing with things like the closure of businesses, social and physical distancing measures and the quarantine of infected individuals.

Municipalities also have certain orders and bylaws that relate to quarantines, shutdowns and physical distancing, although many of those have been made under the authority of federal or provincial legislation.

The federal *Quarantine Act*<sup>1</sup> is a piece of legislation that allows for ticketing by police across the country as well as the laying of charges by way of summary procedure. Charges relate to non-compliance with orders issued under the *Act*. The *Quarantine Act*, which provides sweeping powers to the federal Health Minister to help stop the spread of communicable disease, applies to people entering or leaving the country and allows for screening of travellers and the provision of health assessments. These powers and penalties are in addition to provincial and municipal orders in many jurisdictions that allow for ticketing. The *Quarantine Act* also allows for quarantine stations and facilities, rules regarding conveyances, dead bodies, emergency orders and regulations under the *Act*.

On March 25, 2020, the Federal Government issued an order under the *Quarantine Act* requiring all travellers to go into isolation for a period of 14 days after returning to the country. This order is the broadest in Canadian history relating to quarantine under the *Act* (McQuigge, 2020).

In addition to the federal *Quarantine Act*, different provinces have legislation dealing with public health concerns and the promotion of public safety as a result of pandemics and communicable diseases. For example, Ontario's *Health Protection and Promotion Act* provides for the "organization and delivery of public health programs and services, the prevention of the spread of

disease and the promotion and protection of the health of the people of Ontario."<sup>2</sup> This piece of legislation empowers local health authorities to make orders relating to the closure of businesses, mandating isolation or quarantine of infected individuals, requiring the cleaning or disinfecting of property, mandating the destruction of property, requiring that individuals be examined by a physician, requiring individuals to seek medical attention and ensuring individuals conduct themselves in such a way as to avoid infecting others (Goldfinger, 2020).

Municipalities also have the power to issue orders, and many cities, towns and regions have passed bylaws regulating people's conduct during the pandemic. For example, under the *Physical Distancing Bylaw* in the City of Toronto, people are currently prohibited from congregating in parks and public squares.<sup>3</sup> This is in addition to provincial orders ordering the closure of non-essential businesses and banning organized social gatherings with more than five people. Under the *Health Protection and Promotion Act*, Toronto's Chief Medical Officer of Health has also ordered self-isolation of those with COVID-19 for a period of 14 days, as well as those with signs and symptoms of the disease or who had been in in close contact with someone exhibiting signs and symptoms. The Chief Medical Officer of Health also recommends that people stay indoors other than for obtaining food or medication, walking their dogs and obtaining daily exercise. In line with provincial guidelines, those over 70 are encouraged to stay home as much as possible (City of Toronto, 2020).

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<sup>1</sup> S.C. 2005, c. 20.

<sup>2</sup> R.S.O. 1990, c. H.7, s. 2.

<sup>3</sup> By-law 322-2020.

## Occupational Health, Safety and Wellness Issues

Legal and regulatory requirements under occupational health and safety legislation and case law present employers with some extremely important issues and concerns in relation to the COVID-19 pandemic. Several fundamental principles of Canadian occupational health and safety law apply to this pandemic and should be kept in mind by employers. These include the obligation to provide a safe work environment, the internal responsibility system (IRS), the concept of due diligence and the right to refuse unsafe work.

Employers have a duty, both under the common law and under the governing occupational health and safety legislation, to provide a safe and healthy workplace. While there are specific regulations in each jurisdiction that prescribe certain obligations with regard to specific industry sectors, activities, hazards and substances, the general duty to provide a safe work environment applies to all employees and applies specifically with respect to the COVID-19 pandemic. While it is impossible to eliminate risk entirely – and the very nature of a viral illness is such that it could be contracted literally anywhere – employers have a duty to try to minimize the risk through effective infection control protocols, engineering controls, policies and procedures and by accommodating vulnerable employees.

Depending on the industry in question, some of the things employers can do to help safeguard employees are as follows:

- Complying with all legislation and government orders relating to business shutdowns and social/physical distancing requirements.
- Keeping apprised of the situation as it changes and following the guidance of government and public health officials, healthcare practitioners, occupational health specialists and legal advisors.
- Instituting measures designed to facilitate social/physical distancing. This includes posting notices in the workplace requiring that employees and customers maintain a distance of two metres, controlling the flow of foot traffic in the workplace to maintain a safe distance and setting up waiting areas for customers that support distancing.
- Providing training to employees on healthy and safe work practices, infection control procedures, screening protocols and social distancing measures.
- Requiring employees who have travelled out of the country, who have been exposed to the virus or are exhibiting symptoms of COVID-19 to self-quarantine and self-isolate.
- Establishing screening procedures for the workplace and barring individuals showing symptoms of the disease from entering the premises.
- Sending employees home who are exhibiting symptoms of the disease and ensuring they self-isolate and self-quarantine.
- Instituting travel bans to all affected areas and postponing all business travel (particularly non-essential trips).
- Cancelling public gatherings, conferences, meetings and events and switching to virtual meetings wherever possible.
- Ramping up cleaning schedules and ensuring facilities are cleaned regularly with antiviral cleaning supplies.
- Instructing employees on proper hand washing techniques and/or displaying posters with those instructions.
- Communicating regularly with employees to keep them apprised of the situation and ensuring they are

aware of requirements and best practices to ensure their continued health, safety and wellness.

- Providing employees with alcohol-based hand sanitizer and antiviral cleaning supplies for their workstations and other work areas.
- Supplying personal protective equipment (PPE) to employees who are in close contact with customers, clients, patients, suppliers or the general public. This includes providing face masks and shields, gloves and plastic overalls to frontline healthcare workers and other employees who are at risk as a result of working within close proximity of others.
- Ensuring that employees have uniforms (where applicable) that are freshly cleaned, laundered and properly sanitized.
- Instituting effective infection control measures dealing with clothing and personal effects worn by potentially infected individuals (or those who have shown signs and symptoms of infection), as well as touchscreens, equipment, furniture and merchandise touched by those who may have been infected.
- Installing barriers and other engineering controls that separate employees from members of the public (plastic shields for cashiers, waiting areas for customers, imposing limits on the number of customers allowed on the premises at any one time, etc.).
- Developing, enhancing, updating, communicating and enforcing policies relating to occupational health and safety, pandemic preparedness, infection control and emergency management.
- Developing and communicating one-off/temporary policies and guidelines relating to the crisis.
- Allowing employees to work from home wherever possible.

- Instituting flexible work hours wherever possible to minimize travel (particularly on public transit) during rush hour.
- Moving to online service delivery or e-commerce solutions wherever possible.
- Investigating employee work refusals and taking the concerns of vulnerable employees seriously.
- Accommodating the needs of vulnerable employees pursuant to the governing human rights legislation.
- Ensuring there is no bullying, harassment or discrimination of employees, customers or other stakeholders because they are infected or have been, or because of their racial or ethnic origin.

### **The Right to Refuse Unsafe Work**

While there are certain exceptions such as police officers, firefighters and healthcare workers performing their normal duties, under Canadian law, most workers have a right to refuse unsafe work. This is enshrined in the governing occupational health and safety legislation in the jurisdiction in question. While the exact procedures for investigating a work refusal vary by jurisdiction, the principles are broadly similar. Generally, the process involves the employee (or possibly the union, where applicable) communicating the refusal to the employer. That is usually followed by an internal investigation, which will often involve the Joint Health and Safety Committee (JHSC) or equivalent. If the parties are unable to resolve the situation, a government inspector generally will then conduct an investigation to determine whether the work refusal is justified. Because government inspectors are so busy at the moment, there may be a significant delay before an inspector can get involved. In many cases, inspectors are conducting their investigations remotely and doing much of the work via telephone.

While the work refusal process is slightly different in each jurisdiction, the following is an outline of the process in Ontario under the *Occupational Health and Safety Act*<sup>4</sup> for dealing with such a complaint by an employee:

1. The worker reports the refusal to the supervisor or manager. The worker may also notify a Joint Health and Safety Committee (JHSC) member or safety representative. The individual remains in a safe place.
2. The employer or supervisor investigates the refusal in the presence of the worker and representative.
3. If the issue is resolved, the worker returns to work. If not, the investigation proceeds to the next step.
4. The worker remains in a safe place. The worker, employer or representative contacts the Ministry of Labour.
5. A Ministry inspector conducts an investigation and presents a report in writing.
6. Changes are made if required or ordered and the worker returns to work.

While the investigation is pending, the worker may be offered alternative work if it doesn't contravene the applicable collective agreement. The refused work may be offered to another worker, but that person must be informed of the fact that another worker has refused the work. This must be done in the presence of a worker member of the JHSC, a health and safety representative or a union representative (Government of Ontario, 2019).

One of the most important principles around work refusals is that the fear relating to unsafe work must be reasonably held. In other words, there must be a genuine fear or apprehension of a specific danger given the circumstances and not just a general fear of

being injured or contracting an illness on the job. In the case of COVID-19, it is unlikely that simply having a fear of contracting the disease would justify a valid work refusal under occupational health and safety legislation; something more is likely required. However, if there is a specific issue relating to an individual's vulnerability (e.g., because of an underlying health condition) or an identifiable hazard (for example, working directly with a person who is exhibiting symptoms of COVID-19), there may be some validity to an employee's work refusal.

Many employment lawyers believe simply having a general fear of contracting the disease is insufficient to warrant a valid work refusal under the legislation. However, it may be prudent to try to work with employees to address their concerns rather than taking a hard line. This could be done through an unpaid leave of absence, assigning them to another type of position, implementing engineering controls and/or infection control procedures, providing employees with personal protective equipment (PPE), working from home or moving to online service delivery. Again, it is important to remember that it may be difficult to obtain guidance from government health and safety inspectors given increased volumes of inquiries due to the current crisis. It is also important to remember the duty to accommodate under the governing human rights legislation. Employers are required to accommodate employees' protected characteristics (also known as the prohibited grounds of discrimination) up to the point of undue hardship. With respect to COVID-19, there is a duty to accommodate on the grounds of disability, age and family status (e.g., because of childcare obligations, especially with schools being closed). These obligations exist separately and apart from an employer's obligations under occupational health and safety legislation. Therefore, it may be prudent to consider accommodation even in situations where a work refusal might not be justified.

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<sup>4</sup> R.S.O. 1990, c. O.1.

Even if workers are deemed to be working in an essential industry, they still have the right to refuse unsafe work. The refusal must be based on reasonable grounds and can be related to a danger not addressed by normal controls, a danger that would normally stop work or a danger the worker is inadequately trained, equipped or experienced to handle. An employee can therefore refuse unsafe work if the employer fails to provide them with adequate personal protective equipment (PPE). An employee cannot be subject to reprisals for a work refusal where he or she indicates the reason for refusing to perform the work in question relates to health and safety concerns. Reprisals include things like disciplinary sanctions, warnings, suspensions, terminations, demotions or withholding pay (CUPE, 2020).

### The Due Diligence Defence

One of the fundamental principles of occupational health and safety law in Canada is the due diligence defence. This provides for a defence against so-called “strict liability offences” that the accused took all reasonable care to prevent the wrongful act from occurring.<sup>5</sup> If a party accused of a criminal or quasi-criminal offence such as occupational health and safety infractions can show they took all reasonable steps to prevent the commission of the offence, the party will often be acquitted of the charges.

From a best practice perspective, this means employers need take all practical steps to ensure they provide a safe workplace. This has obvious implications for the current crisis in that employers need to take all reasonable steps to protect their employees from the virus. Notwithstanding issues with determining causation of occupational illnesses and disease and the fact that people could easily contract the coronavirus through community transmission, frontline workers in essential industries may have an easier time proving,

on the balance of probabilities, that their illness was more likely than not caused by exposure in the workplace. For that reason, employers need to be able to protect frontline workers through engineering controls, social distancing measures, security measures and personal protective equipment (PPE). They may also need to take special precautions to protect older workers and those who are vulnerable with pre-existing conditions. If an employer can prove they took all necessary precautions under the circumstances, it may be able to escape liability in the event of prosecution.

### Workers’ Compensation Legislation and Programs

Most employers and employees are covered by provincial workers’ compensation programs, which are established by statute. Under Canadian workers’ compensation legislation, workers generally give up the right to sue their employers through the courts for injuries sustained or illnesses contracted out of and in the course of employment. In exchange for the right to sue, workers are provided with a significantly enhanced certainty of payment, various types of compensation programs and a less adversarial process. Employers receive coverage founded on insurance principles that pool risk and they do not need to get involved in expensive and time-consuming litigation in the event of a work-related accident or illness. Nevertheless, an employer’s insurance premiums will rise in the event of a large number of claims, and workers’ compensation boards do not accept every claim.

Determining causation can be a tricky issue. Workers’ compensation boards and tribunals will only provide compensation for injuries or illnesses that are work-related. The test is that the injury or illness must have been sustained out of and in the course of employment in order to be compensable. While there are issues surrounding the

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<sup>5</sup> *R. v. Sault Ste. Marie*, 1978 CarswellOnt 24, [1978] 2 SCR 1299 (S.C.C.).

determination of just what counts as being “in the course of employment,” it is generally easier to determine whether workplace accidents happened as a result of a worker’s employment than the case of occupational diseases. While there are legislative presumptions in relation to certain illnesses enshrined in some workers’ compensation legislation, it is much more difficult to determine whether a disease arose out of and in the course of employment than is the case with accidents. That is the main problem with COVID-19, since it would likely be very difficult to determine that it is a work-related illness in the case of an employee who contracted the disease. Because it is entirely possible to contract the disease in the community, via international travel or through a family member, it would be very difficult to establish that infection was the result of exposure to the virus in the workplace. However, there is likely greater chance of success in claiming benefits if an employee, for example, is a healthcare worker who is dealing directly with COVID-19 patients on a regular basis.

While every worker’s compensation board will have its own policy and stance on claims related to COVID-19, as an example, it is worth examining the perspective of the Workers Compensation Board of Manitoba with respect to such claims. The Board will consider a claim if it arose out of and in the course of employment, and the work-relatedness is determined based on each individual case. An individual’s employment activities, symptoms and specific diagnosis will help determine whether the case is work-related. The Board notes that nurses, healthcare aides and other direct care providers in hospitals or long-term care facilities may be at greater risk and are therefore more likely to have a successful claim. Note that the Board will not provide compensation in the absence of symptoms for quarantine or self-isolation on a precautionary basis (Workers Compensation Board of Manitoba, 2020).

## Effective Infection Control Protocols

In the case of essential sectors and industries and certain essential jobs even in businesses that have been shut down due to the pandemic, it will often be necessary for workers to work on the premises. Because of that necessity, effective infection control protocols are important to ensure workers remain safe and healthy and avoid passing on the infection to colleagues, customers, members of the public and other stakeholders.

Some of this will obviously vary depending on the industry in question and the type of work being performed, but the following are some tips and strategies for effective infection control:

- Encourage hand washing and other hygiene practices. Consider the provision of sterile gloves, and ensure the gloves are changed frequently when handling merchandise and/or dealing with patients, customers or members of the public.
- Ensure surfaces remain clean and disinfected. Use antibacterial cleaning supplies and ensure surfaces are cleaned regularly – particularly those surfaces that are touched by customers and/or members of the public.
- Consider screening employees, patients, customers or members of the public to determine whether they have signs and symptoms of the disease. Checklists, questionnaires, warning signs and even temperature checks can be implemented as warnings and screening measures.
- Track infections and liaise closely with public health, healthcare providers and other government officials. Consider closing down facilities for a deep cleaning where one or more infections have occurred.

- Consider the provision of masks (and possibly face shields and plastic overalls) for employees who come in close contact with patients, customers, clients, members of the public or other stakeholders.
- Treat soiled garments and other contaminated items as hazardous. Ensure proper disposal or sterilization.
- Promote social/physical distancing where people are encouraged to maintain a safe distance of two metres (approximately six feet) wherever possible. This can be accomplished through training, by posting signs, painting/taping marks on the floor or ground for waiting areas to provide for physical distancing and allowing only a certain number of people into your facility at once.

### **Maintaining Health, Safety, Wellness and Security**

As mentioned above, employers have a legal obligation to provide a safe workplace, and the COVID-19 pandemic is no exception. Employers should implement safety and security protocols that help to maintain a health and safe environment not only for workers, but also for customers/clients, visitors and other stakeholders. One of the best ways for a business to maintain a safe facility is to implement security measures on the premises that seek to restrict entry of infected individuals and maintain adequate physical distancing. One option is to implement screening protocols where visitors to the facility are asked questions relating to any recent travel, contact with infected individuals or experience of any of the recognized symptoms of COVID-19. Some organizations have implemented daily temperature checks among employees. While some commentators have expressed concerns about the privacy implications of mandatory temperature checks, and this is not a foolproof means of diagnosis, such

measures may be justified in certain settings (healthcare facilities, long-term care homes, etc.).

Employee wellness concerns are also important. This includes not only issues relating to physical health and wellbeing, but also concerns surrounding mental and emotional health. These are trying times for many people, and employers need to provide support and encouragement. It is also a good idea to provide tips and strategies for promoting mental and physical health and wellbeing among employees. Simply being there for employees and being available to listen to and respond to their concerns is an important strategy for promoting employee wellness. This often consists of providing reassurance with respect to financial and job security concerns and informing employees about the measures the organization is taking to help safeguard their physical, mental, emotional and financial wellbeing. While it is never a good idea to lie or provide false reassurance to employees, if no plans for job cuts are planned in the near future, for example, communicating that information to employees can go a long way in helping to safeguard their psychological safety and wellbeing in these challenging times.

Employee wellness concerns also include communicating things like tips and strategies for exercise, healthy eating, hydration, adequate rest and relaxation, fresh air and avoiding substance abuse. In many cases, a benefits provider and/or employee and family assistance program (EFAP) vendor can provide resources, fact sheets, videos, webinars and counselling to help employees through these difficult times. It is a good idea to provide links to those resources and reminders about internal and external programs when communicating information relating to employee health, safety and wellness. With so many people feeling bored, isolated and lonely, mental health challenges will be particularly severe for many people who are forced to stay at home and are isolated from family, friends and coworkers as a result of COVID-19. For this reason, it is a best practice to try to maintain a sense of employee morale and

engagement and continue socializing with colleagues through online channels. Aside from work-related concerns, it is important to keep the lines of communication open among colleagues for team-building reasons and to avoid isolation. After all, socializing with colleagues may be the only direct contact some people will have with others during the pandemic. This is very important from a mental health perspective.

### **Employees' Homes as an Extension of the Workplace**

When employees work from home, their homes can be thought of as an extension of the workplace. This is important given that employers have a legal obligation to provide a safe workplace. Nevertheless, there are some problems with this given that employers generally have little to no control over their employees' homes.

Because the home can be viewed as an extension of the workplace when employees work there, employers have an obligation to try to ensure employees' home offices are safe and healthy. While it may not be feasible to inspect every employee's home office, it is a good idea to provide a checklist and some best practices to employees relating to health, safety and wellness while working at home.

In most cases, ergonomic issues are some of the most important considerations when working in an office-type job at home. Most people lack ergonomically designed office furniture in their homes. While it may be no big deal to slouch over a laptop while sitting on a couch for a day or two on an occasional basis, doing that for months on end could cause injuries, pain and strain.

A proper work from home setup should include a dedicated office area in a corner of the employee's home with a desk and chair that are ergonomically sound. Many organizations that have people work from home on a regular basis audit these workspaces in order to ensure they are healthy and safe. Another important consideration is ensuring there is a quiet

place where employees can work from with few distractions.

Recognizing, of course, that restrictions put in place as a result of COVID-19 were implemented with little to no warning, employers and employees will often need to make do with what they have. This is especially true for employees who live in small apartments or shared accommodations. It is also important to remember that coffee shops, libraries and coworking spaces are likely off limits for the duration of the pandemic. Still, it makes sense to issue guidelines relating to privacy, comfort, safety and the minimization of distractions.

In a professional business environment, it can be embarrassing when calls or online meetings are disrupted by children, pets, family members or other distractions in the home. Having a dedicated space away from the rest of the family can help, but it may not be possible to completely eliminate these sorts of distractions during the current crisis. Again, it is a good practice to issue guidelines, but employees should probably be reassured that colleagues and even customers/clients and suppliers are likely to be much more understanding about this sort of thing in the current climate. People are aware of the realities of working from home in the during the pandemic, and they should try to avoid thinking negatively of someone because they hear a dog barking in the background.

### **Return to Work Preparations and Challenges**

Now that we appear to have reached peak infection rates (at least in some parts of the country) and some businesses are being allowed to reopen, the focus is shifting to the gradual and eventual return to work, albeit with some restrictions remaining in place. In the case of some retailers, this is happening sooner rather than later. Therefore, employers need to start thinking about what the workplace will be like moving forward after restrictions are lifted.

One of the most important parts of the planning process is the development of risk assessments and determining whether it is safe for workers to return to the workplace. If not, what is required to make the workplace safer for employees, customers/clients, suppliers, visitors and other stakeholders? Part of this is determining risks of exposure for various types of employees. This includes not only the type of work employees are performing, but also with respect to health risks of individual employees. In particular, it is important to consider older employees and those who have health risk factors or are immunocompromised. Nevertheless, it is important to avoid discrimination, refrain from making assumptions and be mindful of the duty to accommodate. In general, it is important to remember the human rights implications of working in a pandemic.

Employers are required to take all reasonable steps to ensure the work environment is safe (see above with respect to The Due Diligence Defence). It is impossible to eliminate *all* risks. However, risk levels should be categorized for different types of employees (e.g., frontline retail workers, office workers, logistics and warehouse workers). It may be a good idea to appoint a taskforce, committee or project team to oversee the return to work. As part of the committee's mandate, it will be important to examine your current processes, policies and procedures and the way work is handled and completed. Does it make sense for some employees to continue working from home? Are new or reduced service levels necessary? Do new measures need to be implemented that are designed to comply with physical distancing requirements and public health orders?

The following are some additional recommendations of the types of things that should be considered in relation to the post-shutdown work environment:

- Consider transportation to and from work as well as the actual workplace itself.
- Investigate infection control and cleaning processes. Consider the

- physical premises, parcels, etc. (including parcels being delivered).
- Develop protocols for working with people who appear to be ill or infected. This includes sanctions for non-compliance.
- Consider training requirements with respect to meetings, handshakes, new business processes, etc.
- Plan communications to employees explaining what the company has done and is doing to prepare for the return to work. Set out expectations and explain how issues will be dealt with as they arrive.
- Consider requirements relating to personal protective equipment (PPE), including masks, gloves, face shields, aprons, etc.
- Develop rules relating to safe hygiene practices (e.g., hand washing).
- Consider recall procedures. Be mindful of the requirements of any collective agreements. Plan for recall notices and responses in the event an employee fails to return to work.
- Consider whether employee testing and/or screening makes sense.
- Prepare to deal with employees' anxieties and concerns (some will be reluctant to return to work).
- Develop plans relating to work refusals. Be mindful of the duty to accommodate with respect to disability, age, family status, etc.
- Review and update pandemic planning, OH&S, working from home, layoff, leave of absence, travel and performance management policies.
- Consider the impact of work shortages and the possibility of automation and whether more work could be done from home.
- Consider the effect of relationships among colleagues and with customers/clients. It may also be necessary to repair relationships (BLG, 2020b).

Most experts agree that employees will generally be required to return to work if requested to do so by their employers – provided the employer has done its due diligence by making the workplace as safe as possible and considered the needs of vulnerable workers. Nevertheless, some people may be worried about taking public transit, and that is something the employer should probably consider. Employers should remind employees that they need to disclose

if they were recently diagnosed with COVID-19, are currently experiencing symptoms or recently came into close contact with someone who has the disease. Employers also need to be aware of government restrictions and rules relating to the reopening of certain businesses. For example, at the time of writing, some retailers in Ontario were still restricted to curbside pickup (Thompson, 2020).

## Emergency Pandemic Preparedness Policies

Now that the reality of a major pandemic caused by the COVID-19 virus has been accepted by most experts, it is prudent to develop, review, update and enhance policies on Emergency Pandemic Preparedness (or something similar). Such a sample policy appears below and is designed to help employers deal with this crisis, as well as other future pandemics. Because the situation changes frequently, and each industry, organization and workforce are different, this policy is designed to be supplemented with regular communications and one-off policy updates as the need arises. Employers should keep apprised of any situations arising with respect to potential pandemics and work closely with governments, public health officials, healthcare practitioners, occupational health specialists, legal advisors, unions, employees and other stakeholders to monitor situations as they arise. Organizations need to keep their employees in the loop and be prepared to answer their questions and deal with any issues or concerns.

### Sample Emergency Pandemic Preparedness Policy

In recent years, many experts were warning that we were due for a serious worldwide pandemic. Recent outbreaks of Severe Acute Respiratory Syndrome (SARS), Avian

Flu (“Bird Flu”), the H1N1 virus (“Swine Flu”) and COVID-19 (“Coronavirus”) remind us that we are not immune from such dangers even in the present day. Yet there are precautions which can be taken to help ensure that the effects of serious contagious illnesses are minimized and that our employees, managers, contractors and their families, as well as our customers, suppliers, business partners and visitors, remain as safe and healthy as possible, and so that our business continues to operate as normally as possible during such an outbreak.

As an employer, some of the precautions we have taken, or may take in the future, to minimize the spread of pandemic influenza or any other potentially contagious illnesses include the following:

- Developing this Emergency Pandemic Preparedness Policy.
- [Preparing Pandemic, Disaster Recovery and Business Continuity Plans.]
- [Identifying key positions and personnel, cross-training employees and providing for the sequestration and isolation of essential employees where necessary.]
- [Instituting protocols and procedures for working from home or at an off-site location or transferring operations to another location in the

event of a pandemic or other public health emergency.]

- Making alcohol-based hand sanitizers available to employees and visitors.
- Providing antiseptic wipes to employees for cleaning their workstations.
- Temporarily closing and/or sanitizing facilities in the event of one or more employees or other visitors to the premises being diagnosed with a contagious pandemic illness.
- Providing posters which promote proper hygiene including effective hand washing practices.
- [Providing seasonal influenza and H1N1 vaccinations to employees/Providing paid time off work to obtain seasonal influenza and H1N1 vaccinations.]
- Instituting travel bans to any affected countries, regions or areas in the event of a pandemic.
- Banning non-essential business travel [and banning attendance at large public events within the organization or by employees elsewhere] in the case of a pandemic.
- Quarantining employees who exhibit symptoms of pandemic illnesses or who have recently visited affected countries or areas and asking those who are exhibiting symptoms to voluntarily self-disclose and self-quarantine. Employees who self-disclose or are required to leave the premises due to a pandemic illness should contact their physician and/or the proper public health authorities for further information.
- Screening people who enter onto the premises in the event of a pandemic. As an organization, we reserve the right to refuse entry to individuals or ask them to leave when they are experiencing symptoms of a pandemic illness.
- Working with the members of our Joint Health and Safety Committee (JHSC), [Company physicians,

occupational health nurses and other health and safety practitioners] and ensuring employees' concerns are considered and taken seriously.

- Providing regular communications to employees and other stakeholders regarding pandemic preparedness and any special procedures or policies instituted as a result of escalated severity levels or the emergence of new information from government officials, public health authorities or healthcare providers.
- Recognizing that individual circumstances may require us to temporarily change, relax, suspend or introduce policies with regard to such issues as sick time, vacations, emergency leave, working from home and at off-site locations, doctor's notes, mass gatherings and business travel.

As an individual, there are also certain precautions you can take to minimize the risk of infection to yourself, colleagues and your family:

- Wash your hands with soap and warm water for at least 20 seconds, especially after using the washroom or prior to handling food. Use hand sanitizer where soap and water are not available.
- Cough or sneeze into a tissue or your sleeve (around your elbow).
- If you are ill (especially if you are exhibiting flu-like symptoms such as fever, body ache, sore throat, chills, extreme nausea or vomiting) do not come into work. Instead, you should take a sick day [or work from home] until you feel better.
- Wherever possible, avoid contact with people who appear to be sick with the flu or other contagious illnesses.
- Get vaccinated against seasonal influenza and the H1N1 virus. Studies show that the flu shot is effective in

preventing influenza in healthy individuals 70-90% of the time.

- Avoid any non-essential travel to areas subject to travel restrictions and/or advisories. Follow government and public health agency guidelines.
- Be aware of the symptoms of pandemic diseases and other serious contagious illnesses.
- Maintain health, physical fitness and well-being.
- Practice healthy eating habits, manage stress and get sufficient rest.
- Prepare for the possibility of being quarantined by stocking up on non-perishable food items and other essential supplies.
- Consult a healthcare practitioner in the event of serious illness, unless advised otherwise.
- [Wear personal protective equipment (PPE) in the event of a pandemic. Such gear includes masks, face shields, plastic gowns and latex gloves, particularly where physical distancing is difficult or impossible.]

### **In the Event of a Pandemic**

In the event that Management decides a serious pandemic exists, or that the threat of such an emergency is imminent, managers and employees will be notified [via e-mail and through the HR Intranet] that a state of pandemic emergency exists. Other relevant information will also be communicated to you as it becomes available [via e-mail, the HR Intranet and through broadcast voicemail messaging]. Due to the existence of multiple strains of potentially pandemic causing viruses, specific illnesses will necessitate individualized responses from us as an employer, and different obligations will apply to employees in different situations. These requirements will be communicated to you as necessary in the event of a pandemic or other serious public health emergency.

We regard the spread of communicable diseases in our business as being an issue

of workplace health and safety. As such, we are legally responsible for providing employees with a safe work environment. This includes minimizing any risk through exposure to infected individuals. Therefore, if you appear ill with the flu or similar illness while at work and a Supervisor instructs you to go home, you must comply with such instructions, return home as soon as possible and await further instructions.

It is also necessary to follow the instructions of public health officials, particularly those of a Quarantine Officer or Environmental Health Officer under the federal *Quarantine Act*. Failure to comply with such instructions, either from a Supervisor or a public health official, will give rise to disciplinary sanctions up to and including termination of employment, and may even constitute an offence under the *Quarantine Act* or other federal or provincial legislation.

Similarly, during a pandemic, it is vital that you notify your Supervisor or the Human Resources Department if you or someone in your household becomes ill with a pandemic illness and await further instructions. Such information will be kept in the strictest confidence wherever possible.

As an organization, we will not tolerate any discrimination or harassment of any employees or other individuals based on racial or ethnic grounds, the fact they have contracted an illness, or any grounds for that matter. While we understand that pandemic illnesses may have originated from or be particularly prevalent in certain parts of the world – and it is simply prudent to institute screening measures relating to individuals who have recently visited those areas – singling out employees for their racial or ethnic origin is unacceptable, particularly where those individuals have not recently visited any areas of concern. It is also important to be compassionate and empathetic towards those who have contracted a pandemic illness and ensure such individuals are not ostracized, discriminated against or treated as pariahs.

Remember that everyone deserves to be treated with dignity and respect!

***Further information is available by contacting a representative from the***

***Human Resources Department. [Failure to comply with this policy will result in disciplinary sanctions up to and including termination of employment.]***

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