

IS THERE A LIGHT AT THE END OF THE COVID-19 TUNNEL?

STRATEGIES AND PITFALLS TO CONSIDER AS EMPLOYERS PREPARE FOR THE NEW NORMAL



Slowly, but surely, Canada's economy is reopening. This article presents employers with strategies for reopening their business and ensuring employee safety.

Under the *Occupational Health and Safety Act*, employers must "take every precaution reasonable in the circumstances for the protection of a worker." Employers are required to provide information to their employees so that employees are better informed of any health risks or hazards in the workplace. This obligation is now more important than ever, and employers should implement social distancing policies within their workplaces and encourage hygienic practices. Such steps are crucial to ensuring a safe and healthy workplace.

Layoffs and Recalling Employees

- The Ontario Government has enacted a new regulation under the *Employment Standards Act* ("ESA") which allows employers to lay-off employees for an indefinite

period of time in response to the COVID-19 pandemic. This affects all layoffs since March 1, 2020 until six weeks after the government ends the current state of emergency. Such layoffs will be deemed to be infectious disease emergency leaves.

- Now, under the *ESA*, any employee whose hours or wages have been cut because of COVID-19 is not deemed to have been constructively dismissed/terminated.
- An important stipulation is that, in order to legally layoff an employee, the employee's employment contract or agreement must expressly state that the employer has the right to layoff the employee. Absent this, an employee can claim that they have been constructively dismissed, and, as such, pursue a claim for wrongful dismissal damages.
- Employees can still bring a civil claim for constructive dismissal as a result of an improper layoff or reduction in hours/pay.

New COVID-19 Leave Entitlements

- Employers should be aware that the Federal and Provincial government have now extended employee leave entitlements to account for issues related to COVID-19.
- COVID-19 leaves are job protected, meaning that an employer cannot terminate or rehire against an employee for taking such a leave.
- Generally, employers should maintain benefits for employees on such leaves.
- Employees who are under investigation, quarantine, self-isolation or treatment for COVID-19 are entitled to take unpaid leave.
- Employees who are caring for someone due to COVID-19 (e.g. parents caring for children due to day care and school closures) are also entitled to unpaid, job protected leave.
- Employers cannot request medical notes from employees taking infectious disease leaves.
- Employees continue to be entitled to sick leave, family medical leave, family caregiver and family responsibility leave, and critical illness leave under the *ESA*.

Work Refusals, Human Rights Considerations, and the Duty to Accommodate

- Employees can refuse to return to work if they believe doing so would compromise their safety or the safety of their co-workers. Keep in mind that the onus of demonstrating that the workplace is unsafe rests with the employee. Employers who make changes to their workplace and follow recommended safety measures would be proactive in addressing such claims; thereby precluding employees from refusing to attend work outright.
- Note that the refusal to work must be based on something tangible rather than simply an employee who expresses fear. It is noteworthy that since the beginning of the pandemic, the Ministry of Labour has only upheld one (1) COVID-19- related employee work refusal.
- Unreasonable work refusals should generally not be tolerated, although employers are cautioned against formal discipline or termination at this time. Less severe measures and ongoing dialogue with concerned employees should be prioritized.
- Employers cannot discipline or terminate an employee who has been diagnosed with COVID-19 or has been deemed to be a presumptive case. While this is so, employers can expect that employees will continue to/return to work unless they have a legitimate reason for not being able to do so i.e. the employee is immunocompromised.
- Employees that have been required to self-isolate should not face any form of discrimination or adverse consequences.
- Genuine employee accommodation requests should be considered.
- It is important to bear in mind that employees may face greater difficulty obtaining supporting medical or other documentation due to pandemic related closures.
- Under Ontario's Human Rights Code, an employer cannot discriminate against an employee based on their family status obligations or if they have a disability. COVID-19 has been specifically recognized by the Human Rights Commission as a human rights concern. COVID-19 has been deemed to be a potential ground of disability discrimination.

- Employees facing childcare issues due to school and daycare closures and those caring for ill family members should be accommodated to the extent possible i.e. to the point of undue hardship based on health and safety or cost. This may mean that some employees are permitted to continue to work from home.

Practical Tips for Reopening: Not Business as Usual

- Employers should implement measures to adapt to the ‘new normal’.
- Return to work for remote and laid off employees should be gradual. Employers should not rush to recall their employees if they have not taken proactive steps to ensure safety. A plan of action is crucial for any business.
- To the extent possible, employers should consider continuing remote work arrangements. Indeed, Twitter announced that all of its employees would be permitted to work from home, indefinitely.
- If remote work is not an option, employers could consider staggered shifts.
- Desks and workspaces should be separated, with cubicle walls being reintroduced.
- Through cleaning of all workspaces and amenities is extremely important.
- Employers should consider conducting temperature checks for returning employees to ensure they are not symptomatic. Tim Hortons has implemented such practices.
- Sanitizers should be available to all employees and employees should be educated on proper handwashing techniques.

Conclusion

While COVID-19 has presented many issues for Canadian workplaces, there are several proactive measures employers can implement to ensure a safe transition for employees coming back to work.

If you have any questions about the topics covered in this article or general employment law issues, please do not hesitate to reach out to one of our lawyers.