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COVID-19
Frequently Asked Questions to Assist Employers

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As the 2019 novel coronavirus (COVID-19) continues to spread around the globe, employers need to know their legal rights and obligations as it relates to the Canadian workplace.

The following are some of the most pressing **Frequently Asked Questions**.

We have organized this Briefing Note in Sections. Most Sections apply to all or the vast majority of businesses. In addition, we have included Sections that provide further information for select industries such as Construction and Healthcare.

Please Note: Information changes daily (sometimes within a day), including the details of the various government initiatives, announcements and regulations. As such, it is important to carefully review each updated Briefing Note to ensure you are aware of current information. Some content in older Briefing Notes may no longer be accurate.

If you have questions or need assistance, please contact your Sherrard Kuzz LLP lawyer or, if you are not yet a Sherrard Kuzz LLP client, our firm at info@sherrardkuzz.com with the re: line: COVID-19. We'll respond promptly.

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Diagnosis of or Close Contact with COVID-19; Self-Isolation; Screening

Q. Can an employer require an employee to advise if he or she has been diagnosed with COVID-19?

Yes. According to human rights case law, an employer is generally not entitled to ask for an employee's *diagnosis* (only the *prognosis* as it impacts the workplace). However, in the present circumstances it is reasonable to require proactive disclosure due the risk of transmission.

Remember… an employer should ensure any medical information provided about an employee is kept in a separate and secure location and not broadly disclosed to others. It some cases it will be necessary to advise other employees there has been a case of COVID-19 confirmed in the workplace. However, any disclosure should avoid identifying information and be limited to the extent it is necessary to take precautions to protect health and safety.

Unfortunately, there is no cookie-cutter answer to how much information must be disclosed and to whom. Every workplace functions differently from the next. Further, some workplaces are virtual, fluid and/or mobile (*e.g.*, employee may travel *to* clients to service them; or travel routinely as a component of the job, *etc.*). **When in doubt, consult with your employment lawyer about best practices for your organization.**

Q. Can an employer require an employee to advise if he or she has been in close contact with someone diagnosed with COVID-19 or travelled outside of Canada?

Yes. An employee can be required to disclose if he or she has been in close contact with someone diagnosed with COVID-19, or travelled outside of Canada, or on a cruise ship within the past 14 days. This includes indirect travel, such as a plane "stopping-over" in an area, because new passengers and service individuals from that area may come into contact with existing passengers and crew. Attendance at large gatherings is also currently prohibited and should be monitored.

Employers and employees should check the Government of Canada and provincial websites regularly, and adjust protocols and policies accordingly.

Q. Can an employee be required to self-isolate?

Yes. The Government of Canada has stated the following people need to self-isolate for at least 14 days:

- Effective March 25, 2020 the Government invoked its power under the *Quarantine Act* to mandate that an individual returning from international travel (including a cruise) must self-isolate for 14 days.
- Anyone who, within the past 14 days, had close contact with a person diagnosed with, or suspected to have, COVID-19.
- Anyone diagnosed with COVID-19, or waiting for results of a COVID-19 test, or advised to isolate at home by a Public Health Authority.

Special rules may apply to healthcare workers and other essential service workers.

Q. Can an employer implement a "temperature check" screening protocol for an individual entering its facility?

In certain circumstances, an employer may be entitled to screen employees for an elevated temperature prior to granting access to a facility. The employer should take steps to ensure the screening measures are implemented in the least intrusive manner necessary and that adequate steps are taken to protect employee privacy. **For more information on how to appropriately implement a temperature screening policy in your workplace, contact Sherrard Kuzz LLP**.

Work Refusal

Q. Can an employee refuse work due to a fear of contracting COVID-19?

Certain groups of employees are not entitled to refuse to perform work on health and safety-related grounds. This includes employees for whom danger is an inherent part of their work or where their withdrawal of services would directly endanger the life, health or safety of another person | (*e.g.*, police, firefighters, and hospital, long term care or group home employees, *etc.*).

Other employees have the right to refuse to perform work if they hold a *bona fide* belief a "physical condition" in the workplace constitutes a risk to their health or safety. Generally, this involves concern over equipment or machinery. However, it is possible "physical condition" may also include concern for the spread of a serious illness such as COVID-19.

In the event of a work refusal, an employer has an obligation to place the refusing employee in an area where he or she is safe, and perform an investigation into the circumstances surrounding the refusal. Such an investigation must include a worker representative of the Joint Health and Safety Committee, as applicable.

In the case of a COVID-19 related refusal, this would involve investigating the refusing employee and the employee or work practice thought to be causing the risk. If it is determined there is no objective risk, but the refusing employee maintains his or her refusal, the Ministry of Labour must be contacted to perform its own investigation. Should the Ministry of Labour confirm the absence of risk, the refusing employee may be disciplined if he or she continues to refuse to return to work.

Reporting

Q. Must an employer report a suspected case of COVID-19 to Public Health or the Ministry of Labour?

Generally, an employer is not legally required to report a suspected case of COVID-19 to a local Public Health Unit. Reporting will fall to the medical practitioner treating the patient. However, certain employers (*e.g.*, retirement homes) may have an obligation to report an outbreak of COVID-19 to the appropriate regulatory body.

Initially, the Ontario Ministry of Labour appeared to take the position an employer should report any confirmed employee COVID-19 case to the Ministry (in addition to the joint health and safety

committee or representative and trade union, if any). **This was not consistent with the reporting requirement under the *Occupational Health and Safety Act* and the Ministry has since amended the publication in which this reference was initially made.**

At it currently stands, in accordance with the obligations under the *Occupational Health and Safety Act* an employer is only required to report a case of COVID-19 in the workplace to the Ministry of Labour (in addition to the joint health and safety committee or representative and trade union, if any) if it is advised a worker has an **occupational illness** or a claim in respect of an occupational illness has been filed with the WSIB. Under the *Occupational Health and Safety Act*, occupational illness is defined as a condition that results **from exposure in a workplace** to a physical, chemical or biological agent to the extent that the normal physiological mechanisms are affected and the health of the worker is impaired.

If you unsure of whether you are required to report a suspected or potential COVID-19 case to the Ministry of Labour, please contact Sherrard Kuzz LLP.

Protected Leaves; Disability Under Human Rights Legislation

Q. What protected leave is available to an employee with COVID-19 or who is no longer able to attend work for COVID-19 related reasons?

On March 19, 2020, the Ontario *Employment Standards Act, 2000* ("ESA") was amended to include a new Emergency Leave: Declared Emergencies and Infectious Disease Emergencies.

The new leave combines the provisions of the existing Emergency Leave, Declared Emergencies with new measures to provide job-protected leave for reasons related to COVID-19 or any other prescribed infectious disease.

Leave for a Declared Emergency

An employee is entitled to a leave of absence without pay if the employee is not performing the duties of the employee's position because of an emergency declared under section 7.0.1 of the *Emergency Management and Civil Protection Act* and,

(i) because of an order that applies to him or her made under section 7.0.2 of the *Emergency Management and Civil Protection Act*,

(ii) because of an order that applies to him or her made under the *Health Protection and Promotion Act* (such as a quarantine order),

(iii) because he or she is needed to provide care or assistance to a prescribed individual.

If leave is taken for a declared emergency, an employer is entitled to require an employee to provide evidence reasonable in the circumstances to demonstrate an entitlement to leave.

On March 17, 2020, the Government of Ontario declared a state of emergency, which was then extended such that an eligible employee may take leave for the reasons prescribed above until at least May 12,2020, or a later date if the emergency declaration is extended further.

Leave for Infectious Disease

To address the current COVID-19 pandemic, the new leave provisions entitle an employee to a leave of absence without pay if the employee is not performing the duties of the employee's position because the employee:

(i) is under individual medical investigation, supervision or treatment related to the designated infectious disease (including COVID-19).

(ii) is acting in accordance with an order under section 22 or 35 of the *Health Protection and Promotion Act* that relates to the designated infectious disease (such as a quarantine order).

(iii) is in quarantine or isolation or is subject to a control measure (which may include, but is not limited to, self-isolation), and the quarantine, isolation or control measure was implemented as a result of information or directions related to the designated infectious disease issued to the public, in whole or in part, or to one or more individuals, by a public health official, a qualified health practitioner, Telehealth Ontario, the Government of Ontario, the Government of Canada, a municipal council or a board of health, whether through print, electronic, broadcast or other means.

(iv) is under a direction given by his or her employer in response to a concern of the employer that the employee may expose other individuals in the workplace to the designated infectious disease.

(v) is providing care or support to a prescribed family member because of a matter related to the designated infectious disease that concerns that individual, including, but not limited to, school or day care closures.

(vi) is directly affected by travel restrictions related to the designated infectious disease and, under the circumstances, cannot reasonably be expected to travel back to Ontario.

An employer is entitled to require an employee to provide evidence reasonable in the circumstances to demonstrate an entitlement to leave for an infectious disease related purpose (including COVID-19). However, this evidence **cannot** include a medical certificate.

The Government can, by regulation, prescribe individuals not entitled to this leave. As such it remains to be seen whether the leave will be restricted at all, particularly regarding health care and other essential workers (note: it currently does not apply to police officers).

The effective date for the new leave for infectious disease is retroactive to **January 25, 2020**, the date the first presumptive COVID-19 case was confirmed in Ontario.

In addition, in Ontario there are existing leaves that may apply to COVID-19 related circumstances. The ESA provides the following:

- **Family Medical Leave** – up to 28 weeks in a 52-week period to care for or support a family member suffering from a serious medical condition and who is at significant risk of death within 26 weeks
- **Family Caregiver Leave** – up to eight weeks to care for or support a family member suffering from a serious illness
- **Critical Illness Leave** – up to 37 weeks to care for or support a critically ill minor child, or 17 weeks to care for or support a critically ill adult family member
- **Sick Leave** – up to three days in each calendar year due to employee illness, injury or medical emergency
- **Family Responsibility-** up to three days in each calendar year due to the illness, injury, medical emergency or other urgent matter of a prescribed family member

If you would like to learn more about protected leaves in Ontario or other Canadian jurisdictions, contact us.

Q. Is COVID-19 a "disability" under human rights legislation, requiring accommodation?

It is not clear whether COVID-19 will be considered a "disability" under the Ontario *Human Rights Code* or human rights legislation in other jurisdictions. A "disability" is generally considered to have longer term impact, although a short term ailment may constitute a disability if it is not a pervasive illness and there is a stigma attached to the diagnosis. An employer may wish to treat any confirmed case of COVID-19 as a disability and accommodate the employee even if the employee has exhausted his or her applicable leaves of absence under the ESA. Accommodation would include providing the employee with an extended unpaid leave if medically required.

Compensation

Q. If an employee has been placed in quarantine for COVID-19, is the employer under an obligation to pay the employee while he or she is off work?

No. There is no legal obligation to continue an employee's pay if he or she is unable to attend work due to illness or quarantine, unless a workplace policy or collective agreement provides otherwise (*e.g.*, paid sick leave). The employee may be able to access short-term disability benefits, if available, or Employment Insurance sickness benefits or the Canada Emergency Response Benefit (see below).

Layoff (including constructive dismissal considerations)

Q. Can an employee be laid off due to shortage of work during the COVID-19 crisis?

The ESA entitles an employer to lay off an employee for a prescribed period of time, after which the layoff is deemed to be a termination of employment and the employee is entitled to **termination** and **severance** pay (if severance pay applies).

A temporary layoff is deemed a termination of employment if the layoff lasts longer than 13 weeks in any period of 20 consecutive weeks. However, a temporary layoff may last up to 35 weeks in any period of 52 consecutive weeks if:

- the employer continues the employee's coverage under a group or employee insurance plan or retirement or pension plan
- the employer provides substantial payments or supplementary unemployment benefits to the employee during the layoff period (or would have if the employee was not employed elsewhere)
- the employer recalls the employee within the time approved by the Director of Employment Standards
- the employer and a non-unionized employee have agreed to the period of layoff in writing
- in a unionized workplace, the employer recalls a laid off unionized employee with a right of recall under a collective agreement within the 35 week period.

It is important to recognize a reduction in employee hours may also be considered a layoff for purposes of the ESA, even though the employee continues to work. An employee is considered to be laid off for a week if the employee earns less than 50% of the amount the employee would earn at their regular rate of pay in a regular work week.

For the purpose of establishing an employee's entitlement to **severance** pay, an employee is considered to be laid off for a week if the employee earns less than 25% of the amount the employee would earn at their regular rate of pay in a regular work week. An employee is entitled to severance pay if laid off for more than 35 weeks in a 52 week period.

If an employee works an irregular schedule, the ESA establishes a formula to determine when an employee is considered to have been laid off . This means that, over time, a work reduction may eventually be considered a termination, triggering entitlement to termination and severance pay (if it applies).

Q. What needs to be included in a layoff notice?

There are no specific requirements. In fact, the ESA does not expressly require written notice of layoff. However, as a best practice, an employer should provide written notice of layoff, including when the layoff will start, with whom the employee should be in contact during the layoff, and if there is an expected date of recall, include the date (or an anticipated date).

Q. Does the layoff notice need to include a definite return to work date?

An employer is not required to have a return to work date for a temporary layoff. However, the layoff will turn into a termination once the period of layoff is no longer considered to be a "temporary layoff". In this case the employee is deemed to have been terminated on the first day of the layoff.

Q. Could a layoff trigger a potential constructive dismissal?

Despite the provisions of the ESA, courts have held that, **unless an employment contract or other agreement includes an express or implied right to lay off an employee an employer has no right to do so.** If there is no express or implied right, a layoff may amount to a fundamental breach of the employment contract (whether or not the contract is in writing). In such a case, the employee is deemed to be constructively dismissed and entitled to notice of termination, or pay in *lieu* of notice, and possibly severance pay. It is important to keep in mind - because notice (in this context) is based on what a court would award from a common law perspective, the amounts are generally considerably higher than those required by employment standards legislation.

If an employer unilaterally and significantly reduces an employee's hours of work this *may* be viewed as a constructive dismissal. In this case, the employee may be entitled to notice of termination, or pay *in lieu*, even if the reduction does not meet the threshold of a "layoff" under the ESA.

It is important to note that a constructive dismissal arises only if there has been a **unilateral** change by the employer to terms and conditions of employment. As such, if an employee **agrees** to the change in the terms of employment (either the temporary layoff or the reduction in hours) no constructive dismissal arises.

Similarly, if the change to terms and conditions of employment are not imposed by the **employer** but are the result of a government directive to close operations, it is arguable an employee will not be able to successfully assert the layoff constitutes a constructive dismissal.

Even if an employee does not agree to the layoff, and claims it amounts to a constructive dismissal, the employee has an obligation to mitigate any damages they claim to have suffered. This means, if a laid off employee is recalled to work and declines, they may later be found to have failed to mitigate their losses (in whole or in part), reducing the value of their claim against the employer.

Q. What are an employer's potential liabilities on termination of employment?

If an employer terminates an employee there are two potential sources of liability: **employment standards legislation** and **common law**.

Employment Standards

Under the Ontario ESA, an employee is entitled to **notice** based on years of service, to a maximum entitlement of eight weeks of notice, or pay in *lieu*. In addition, an employee with five or more years

of service may be entitled to severance pay approximately equivalent to one week's pay per year of service to a maximum of 26 weeks.[1]

There are additional termination entitlements on a "mass termination" which generally involves a termination of 50 or more employees within a prescribed time period. **If an employer is considering a mass termination it is critical to first consult with an experienced employment lawyer because the requirements are different and the potential liability considerable.**

Common Law

In addition to employment standards entitlements, an employer may be required to pay a terminated employee common law reasonable notice. This is a term of art used by Canadian courts intended to be a rough estimate of how long an employee will take to find comparable, alternate employment. The length of reasonable notice owed to an employee varies depending upon a range of factors including type of work, degree of expertise or training, length of service, employee age, remuneration, availability of alternative employment, and the circumstances surrounding the hiring of the employee (*e.g.*, was the employee 'lured' from secure employment). When assessing the length of reasonable notice the employment standards notice period is included.

Unfortunately, there is no hard and fast formula to determine reasonable notice. The analysis often starts with a frequently referenced estimate of "one month per year of service" to an approximate maximum of 24 months, although there have been exceptional cases in which courts have exceeded this number. In reality, "one month per year of service" is a guidepost and each case requires individualized assessment.

Following termination from employment, an employee typically has an obligation to mitigate their losses during the period of reasonable notice by actively seeking comparable employment. As noted above, if an employee is recalled to employment following a layoff, and refuses to return, the employer may take the position the employee has failed to mitigate their losses, either in whole or in part, depending on the amounts at issue.

If an employer has a properly drafted and enforceable employment agreement with an employee, this will limit the amount of notice, or pay in *lieu*, to which an employee is entitled to as little as the ESA minimum entitlements. As such, it is **important** an employer reach out to experienced employment counsel to determine whether any of its employment agreements will limit potential liability should it be necessary to terminate an employee.

The layoff provisions of the ESA can be tricky and, and if not implemented correctly, can expose an employer to considerable liability. If you need assistance, contact Sherrard Kuzz LLP.

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[1] An employee is only entitled to severance pay where the employer has an annual payroll in Ontario of $2.5 million or more, or the employee is one of 50 or more employees terminated at an employer's establishment in a six-month period.

Employment Insurance ("EI")

With the introduction of the Canada Emergency Response Benefit ("CERB"), discussed in detail below, the Government of Canada indicates an EI benefit application filed on or after March 15, 2000 will be processed as an application for the CERB. An application for EI benefits filed prior to March 15, 2000, or an application filed for an individual who became eligible for EI benefits prior to March 15, 2020 will be processed as an EI application. As such, the information in this section applies only to an EI application that will continue to be processed through the EI scheme. Additional information on the interaction between EI and the CERB can be found here.

Q. Will an employee be eligible for Employment Insurance benefits if temporarily laid off due to economic reasons related to COVID-19?

An employee temporarily laid off for economic reasons may be eligible to apply for EI benefits. Benefits are paid at 55% of earnings, to a maximum of $573.00 per week (taxable income).

To qualify, an employee must meet the minimum number of "insurable hours" calculated over the previous 52-week period. The exact number of insurable hours required varies by region. Benefits are paid for a maximum period of time and this too varies by region. There is a one-week waiting period for regular EI benefits.

To facilitate an employee's access to EI benefits, an employer should complete a Record of Employment (ROE) within five days of the interruption in earnings. The "Reason for Issuing" the ROE (Block 16) should be marked as "A" (shortage of work). Under the "Expected Date of Recall" (Block 14) the employer should indicate the anticipated return to work date, or mark "unknown" if no anticipated return to work date has been indicated in the layoff notice. The ROE may be completed online (if an employer wishes to issue it in paper form, the employer must order paper copies from Service Canada).

If an employer wishes, it may "top up" the EI benefits through a Supplemental Unemployment Benefit Plan (SUB Plan). **Special rules apply to a SUB Plan, which must be registered with Service Canada.**

Q. Will an employee be eligible for Employment Insurance benefits if ill or quarantined by government due to suspected illness?

An employee will be entitled to EI sickness benefits if ill for any reason (including COVID-19) or quarantined by public health. In addition, the Federal Government has indicated an employee will be entitled to EI sickness benefits if the employee is required to self-isolate by an employer for reasons consistent with the directive of Public Health.

Sickness benefits are available for a 15-week period. The regular one-week waiting period to apply for these benefits has been waived. The amount of the benefit and the manner of calculation is the same as with regular benefits, as discussed above.

To facilitate an employee's access to EI benefits, an employer should promptly complete a Record of Employment (ROE). The "Reason for Issuing" the ROE (Block 16) should be marked as "D" (illness or injury").

Q. Can an employer "top up" Employment Insurance benefits if an employee is off due to illness or has been laid off due to shortage of work?

Yes. As noted above, an employer can implement a Supplemental Unemployment Benefit Plan (SUB Plan) to "top up" EI benefits if an employee is temporarily out of the workforce, to a maximum of 95% of the employee's normal weekly earnings. If the SUB Plan is implemented to "top up" regular benefits or sickness benefits, the SUB Plan must be registered with Service Canada.

For more information on how to set up and register a SUB Plan in your workplace, please contact Sherrard Kuzz LLP.

Canada Emergency Response Benefit ("CERB")

Q. What is the Canada Emergency Response Benefit and who is eligible?

The CERB is an income-relief benefit that replaces the Emergency Care Benefit and Emergency Support Benefit introduced by the Federal Government in early March 2020.

A worker can apply for the CERB for any four-week period beginning March 15, 2020 and ending October 3, 2020. A worker will be entitled to receive the CERB for a maximum of 16 weeks. The CERB entitlement is $500 per week paid out in a four-week block (or another amount as fixed by Regulation).

In order to be eligible, a worker must:

- be at least 15 years of age and a resident of Canada
- have had a total income of at least $5,000 in 2019 or in the 12-months preceding the worker's application, from employment, self-employment, maternity or parental EI benefits, or other maternity or parental-related allowances, money or other benefits paid under a provincial plan
- have ceased working for reasons related to COVID-19 or be eligible for Employment Insurance regular or sickness benefits or have exhausted their Employment Insurance regular benefits between December 29, 2019 and October 3, 2020.

There is now some ability for a worker to receive the CERB even if they have some income. For the initial claim, a worker must not have earned more than $1,000 in income within 14 or more consecutive days within the four-week benefit period of the claim. When submitting a subsequent claim, a worker cannot expect to earn more than $1,000 in income for the entire four-week benefit period of the new claim.

A worker is not be eligible for the CERB if they have quit employment voluntarily.

The CERB is designed, in part, to alleviate the current strain on the EI system. In some circumstances, the CERB may be a superior entitlement, depending on the worker's annual income. In addition, the CERB is available to a worker who might otherwise be ineligible for EI entitlement, such as a self-employed worker or a worker who takes a leave of absence for COVID-19 related reasons to care for children at home due to a school closure.

If a worker has already applied for EI and is in receipt of EI regular or sickness benefits, the worker is not eligible for the CERB. However, the worker may apply for the CERB once the EI benefit entitlement ceases, if this occurs prior to October 3, 2020.

Any income loss due to COVID-19 related reasons after March 15, 2020 is to be compensated through the CERB. As such, if a worker is eligible and has applied for EI regular or sickness benefits on or after March 15, 2020, the worker will receive the CERB. If the claim was filed with EI prior to March 15, 2020, or if the worker was eligible for EI benefits prior to March 15, 2020 but did not apply until after this date, the worker will receive EI benefits.

Additional information on the CERB and access to the online portal to apply for CERB benefits can be found here and here.

Workplace Safety and Insurance

Q. If an employee contracts COVID-19 at work is the employee entitled to WSIB benefits?

Typically, an infectious disease claim is adjudicated through the WSIB's Occupational Disease and Survivor's Benefits Program, a specialized team at the Workplace Safety and Insurance Board that deals with infectious diseases, such as SARS and H1N1. To obtain WSIB benefits a worker must be diagnosed with COVID-19 **as a result of a work-related exposure**.

The WSIB has issued an adjudicative reference (found here) for how decision-makers should evaluate the work-related nature of a COVID-19 claim. Under this reference, a decision-maker will consider whether:

- the nature of the worker's employment created a risk of contracting the disease to which the public at large is not normally exposed; and
- the WSIB is satisfied the worker's COVID-19 condition has been confirmed.

If established, this will generally be considered persuasive evidence the worker's employment made a significant contribution to the worker's illness. However, all claims will be adjudicated on a case-by-case basis even if they do not fit within the above noted test.

A worker may be eligible for wage loss benefits which includes any period in quarantine pre-diagnosis, healthcare benefits, and permanent impairment benefits as a consequence of the disease. In the case of a fatality the worker's survivors would receive benefits from the WSIB.

If a worker stayed away from work due to stress or anxiety resulting from the risk of contracting COVID-19, a claim for benefits may be made under the Chronic Mental Stress policy. The worker would have to provide a DSM diagnosis of an anxiety or stress disorder and prove, on the balance of probabilities, the work related stressor, fear of COVID-19 and/or quarantine, arose out of and in the course of the worker's employment and was the **predominant cause** of the diagnosed mental stress injury. Practically speaking the "predominant cause" test is a significant hurdle for most chronic mental stress claims.

A worker exposed at work to the COVID-19 virus, but who does not develop symptoms, may choose to voluntarily report COVID-19 exposure through the WSIB's Program for Exposure Incident Reporting (PEIR) program.

While a COVID-19 related claim may be compensable, the WSIB indicates the costs associated with such a claim will not be allocated at the employer or class level, and instead will be allocated on a Schedule-wide basis.

Work-Sharing

Q. What is "Work-Sharing"?

"Work-Sharing" is a Government of Canada program that allows an employer to continue to employ its 'core' employees during a period when they might otherwise be laid off on a temporary basis due to shortage of work beyond the employer's control. Under a Work-Sharing arrangement, an employee is eligible to receive EI benefits on a *pro-rata* basis for the time the employee is not otherwise able to work due to the reduction in hours.

In the normal course, a Work-Sharing arrangement may last for up to 26 weeks (with an additional 12 weeks, on request). However, in light of the COVID-19 pandemic, the Federal Government will permit a Work-Sharing arrangement to extend up to **76 weeks**.

The Work-Sharing program allows an employee to make more money than if the employee was completely laid off and on EI regular benefits. It also permits an employer to continue to run its operations on a partial basis during a slow economic period. To implement a Work-Sharing arrangement, the employer must obtain approval from Service Canada and agreement of employees in the workplace.

A Work-Sharing agreement must include a reduction in the employees' regular work schedule between 10% (one-half day) and 60% (three days) over the life of the agreement.

For more information or assistance establishing a Work-Sharing arrangement in your workplace, please contact Sherrard Kuzz LLP.

Closure of Non-Essential Businesses

Q. The Ontario Government ordered the closure of all non-essential business in Ontario. How can an employer determine if this applies to its business?

To contain the spread of COVID-19 the Ontario Government ordered the mandatory closure of all non-essential businesses effective as of Tuesday, March 24th at 11:59 p.m. **On April 3, 2020 the Ontario Government expanded the list of non-essential businesses required to close as of Saturday, April 4th at 11:59 p.m.** This closure is in effect until April 23, 2020 with the possibility of extending the order as the situation evolves.

Businesses permitted to remain open can be found here. This list of businesses is broken-out into categories followed by further descriptions. It is important to read the descriptions carefully because many contain important qualifiers. In some cases, the descriptions are clear. However, with others, there may be some confusion whether a business is or is not essential for the purposes of this government directive.

If you are unsure whether your business is essential, the Ontario Government has set up a hotline to field inquiries (1-888-444-3659). An employer can also contact Sherrard Kuzz LLP.

Support for Business

Q. Has the Ontario Government implemented programs to assist employers?

The Ontario Government has introduced three programs to assist employers navigate the COVID-19 pandemic:

Increase in Employer Health Tax Exemption- A private-sector employer with total annual Ontario payroll of less than $5 million is eligible for an Employer Health Tax exemption on up to $490,000 of payroll. For 2020, this exemption will increase to $1,000,000.

WSIB Relief- The Workplace Safety and Insurance Board will allow an employer to defer WSIB payments for a period of six months. All employers are automatically eligible for the financial relief package. Schedule 1 employers with premiums owed to the WSIB will be allowed to defer reporting and payments until August 31, 2020. The deferral will also apply to Schedule 2 businesses that pay WSIB for the cost related to their workplace injury and illness claims. No interest will be accrued on outstanding premium payments and no penalties will be charged during this six-month deferral period. More information on this program may be found here.

Tax Deferral- From April 1, 2020 to August 31, 2020, the Province of Ontario will not apply any penalty or interest on late-filed returns or incomplete or late tax payments for select provincially administered taxes, such as the Employer Health Tax, Tobacco Tax and Gas Tax. This is intended to complement the tax deferral holiday provided by the Federal Government.

For information on financial programs in other provinces, please contact Sherrard Kuzz LLP.

Q. Has the Federal Government introduced programs to assist employers?

The Federal Government has introduced three programs to assist employers navigate the COVID-19 pandemic:

Canada Emergency Wage Subsidy- On April 11, 2020 the Federal Government passed legislation to amend the *Income Tax Act* and introduce an emergency wage subsidy in response to the COVID-19 pandemic. The wage subsidy is available to any business, regardless of size, including a non-profit or charitable institution, but will not apply to a public body. According to the Government, the wage subsidy is meant to encourage an employer to maintain employees on payroll even if there is a reduction in work.

For the period of March 15, 2020 to June 6, 2020, an eligible employer will be entitled to a subsidy that is the greater of:

- 75% of the amount of the remuneration paid to an eligible employee, to a maximum of $847 per week; and

- The amount of remuneration paid to an eligible employee, up to a maximum benefit of $847 per week or 75% of the employee's pre-crisis weekly remuneration, whichever is less.

An employer is to make best efforts to "top up" an employee's salary or wages to the pre-pandemic rate.

To qualify for the subsidy, an eligible employer must attest it has experienced at least a 15% drop in qualifying revenue in March 2020, and at least a drop of 30% in qualifying revenue for April or May 2020, when compared to the same month in 2019, or when compared to its average revenue in January and February of 2020. An employer that qualifies for a specific period automatically qualifies for the next period.

Additional information on the Canada Emergency Wage Subsidy can be found here.

Temporary Wage Subsidy- The Temporary Wage Subsidy for Employers program is a three-month measure to allow an eligible employer to reduce the amount of its payroll deductions required to be remitted to the CRA. It is in effect from March 18, 2020 to June 20, 2020. The subsidy is equal to 10% of the remuneration an employer pays between March 18, 2020, and June 20, 2020, to a maximum of $1,375 per employee and $25,000 per employer. If an employer is eligible for the Temporary Wage Subsidy and the Canada Emergency Wage Subsidy for any period, the benefit from the Temporary Wage Subsidy for remuneration paid in that specific period will generally reduce the amount available to be claimed under the Canada Emergency Wage Subsidy for that period.

Additional information on the Temporary Wage Subsidy can be found here.

Income Tax Deferral- The Canada Revenue Agency will allow a taxpayer (business or individual) to defer, until after August 31, 2020, the payment of income tax that becomes owing on or after March 18, 2020 and before September 2020. This relief will apply to tax balances due, as well as instalments, under Part I of the *Income Tax Act*. No interest or penalties will accumulate on these

amounts during this period. In addition, the deadline for filing of individual tax returns has been deferred to June 1, 2020.

GST/HST Remittance Deferral- The Canada Revenue Agency will allow a business or self-employed individual to defer GST/HST remittances to June 30, 2020. This will apply to monthly remittances for the February, March and April reporting periods, quarterly remittances for the January 1, 2020 to March 31, 2020 reporting period and annual remittances otherwise due in March, April or May 2020.

Business Credit Availability Program- The Business Credit Availability Program will allow the Business Development Bank of Canada and Export Development Canada to provide more than $40 billion of direct lending and additional support, largely targeted to small and medium-sized businesses.

Additional information on Government of Canada programs to support businesses during the COVID-19 pandemic can be found here.

COVID-19 Workplace Policy

Q. What should an employer include in a COVID-19 (infectious diseases) policy?

As noted earlier, no two workplace policies are exactly the same, so there is no standard policy. At the very least, an employer should consider the following topics:

Communication

- How will the employer communicate with employees or other contractors?
- Does the employer have the information and technology required for efficient communication (*e.g.*, mass text)?

Reporting

- When must an employee report exposure or suspected exposure to COVID-19?
- To whom must the employee report and how: HR, Public Health, *etc.*

Self-Isolation/Isolation

- When, for how long, and to whom to report?

Work from Home

- Is this possible given nature of the work, technology, legal considerations, *etc.*?
- If not, what if anything can be put into place to facilitate this? Can this be done proactively?
- What are the expectations of an employee working from home?
- If an employee cannot work from home, will this impact the employee's workplace status?

Return to Work

- When and how?

- Medical evidence (will the employer pay)?

Business Travel

- Reporting: when and to whom?
- Will there be no obligation to travel for business?
- What is "non-essential" travel?

Personal Travel

- Reporting: when and to whom?

Visitors to the Workplace

- Visitors' log
- Pre-screening questions and steps
- Privacy considerations

Internal Reporting and No Reprisal

- Encourage internal reporting and reinforce that there will be no-reprisal for doing so.

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Construction Industry

Q. Is a construction business an "essential business" allowed to remain open?

As of Sunday, April 5th, 2020, the operating status for parts of the construction industry changed, as sectors of the construction industry previously permitted to operate were deemed non-essential. At present, essential construction services and supporting industries that continue to operate include:

- Projects and services required to ensure safe and reliable operations of, or to provide new capacity in, critical infrastructure including transit, transportation, energy, and justice sectors.
- Maintenance of petrochemical plants, industrial construction and modifications of existing industrial sectors for the production of PPE.
- Critical infrastructure repair and maintenance including roads, dams, bridges, etc.
- Projects associated with the health care sector, including new facilities, expansions, renovations, etc.
- Residential projects started prior to April 4th, 2020, including family homes, condominiums, mixed-use buildings, and renovations to residential properties.
- Projects due to be completed before October 4th, 2020 that provide additional capacity in the production, processing, manufacturing or distribution of food, beverages or agricultural products.
- Businesses that supply other essential businesses or essential services.

Q. What obligations do parties have re: sanitary conditions on a jobsite?

In addition to the general duties and obligations that owners, constructors, employers, supervisors and workers have under occupational health and safety legislation, constructors and supervisors are also responsible for maintaining a sanitary jobsite.

For example, under *Ontario Reg 213/91 - Construction Projects*, a constructor is responsible for ensuring a sufficient number of toilets, urinals and hand washing facilities on each jobsite, and that each meets certain standards and is regularly serviced (pumped), cleaned and sanitized.
A constructors is also responsible for ensuring a reasonable supply of potable drinking water is available on the site.

Q. Must workers remain at least six feet apart while on a jobsite?

There is no government directive requiring workers to remain at least six feet apart. However, employers should make best efforts to abide by the recommendations of public health and government officials regarding social distancing and hygiene. To this end, employers may considering the following:

- staggering start times
- staggering breaks
- staggering lunches
- restricting the number of people on-site and where they are assigned to work
- controlling site movement (by limiting the potential for workers to gather, including personnel
- in material hoists and site trailers)
- limiting the number of people who use elevators and hoists at one time
- holding meetings in an outside or large space to enable physical distancing
- limiting unnecessary on-site contact between workers, and between workers and outside service
- providers, and encourage physical distancing in these areas (for example, by removing coffee trucks from the site)

Employers should also remind workers to follow other precautions to limit the risk of transmitting COVID-19 including not attending work if the worker has flu-like symptoms, regularly washing hands, wearing gloves and other PPE, and coughing into a handkerchief, sleeve or tissue.

Information from Ontario's Chief Prevention Officer regarding construction site health and safety during COVID-19 can be found here.

Healthcare Industry

Q. What changes have been made to help health care employers respond to COVID-19?

The Ontario Government has issued orders under the *Emergency Management and Civil Protection Act* to provide greater flexibility to hospitals, long-term care homes and certain psychiatric facilities ("health care providers") as well as boards of health retirement homes in respect of work deployment and staffing. These orders are currently in effect until **April 23, 2020** or as they may be extended.

The orders authorize a health service provider, retirement home or board of health to take any reasonably necessary measure, as it relates to work deployment and staffing, to respond to, prevent and alleviate the outbreak of COVID-19, despite any collective agreement, policy, statute, or agreement that might otherwise limit its right to do so. This can include, but is not limited to:

- Redeploying staff within different locations in (or between) facilities of the health service provider or board of health (not applicable to a retirement home)
- Redeploying staff to work in COVID-19 assessment centres (not applicable to a long-term care home, retirement home or board of health)
- Changing the assignment of work, including assigning non-bargaining unit employees or contractors to perform bargaining unit work
- Changing the scheduling of work or shift assignments
- Deferring or cancelling vacations, absences or other leaves, regardless of whether such vacations, absences or leaves are established by statute, regulation, agreement or otherwise
- Employing extra part-time or temporary staff or contractors, including for the purpose of performing bargaining unit work
- Using volunteers to perform work, including to perform bargaining work
- Providing appropriate training or education as needed to staff and volunteers to achieve the purposes of a redeployment plan.
- Suspension, for the duration of the emergency, the requirement to conduct screening measures required by statute, such as a police record check, if other screening measures to ensure the care and safety of residents are conducted before staff is hired or volunteers accepted (not applicable to a health care provider or board of health).

The orders specifically note that a health care provider, retirement home or board of health may implement a redeployment plan without complying with any applicable collective agreement provisions, including those that might relate to layoff, service, seniority or bumping rights. In addition, the orders provide a health care provider, retirement home or board of health the ability to suspend, for the duration of the order, any grievance process with respect to any matter referred to in the order.

Social Service Industry

Q: What changes have been made to help social service employers respond to COVID-19?

The Ontario Government has issued orders under the *Emergency Management and Civil Protection Act* to provide greater flexibility to various social service agencies in respect of work deployment and staffing. The orders relate to any:

- Social service agency funded by the Ministry of Children, Community and Social Services providing violence against women residential services and crisis line services. This order is currently in effect until **April 28, 2020** or as it may be extended.
- District social services administration board in respect of work deployment measures needed to prevent, reduce or mitigate the impact of COVID-19 on its provision of critical services (such as the operation of homeless shelters and child care programs and services). This order is currently in effect until **April 30, 2020** or as it may be extended.
- Social service agency that receives funding through the Ministry of Community and Social Services to provide services and supports to adults with developmental disabilities. This order is currently in effect until **April 23, 2020** or as it may be extended.

(collectively, the "service agency")

The orders authorize a service agency to take any reasonably necessary measure, as it relates to work deployment and staffing, to respond to, prevent and alleviate the outbreak of COVID-19, despite any collective agreement, policy, statute, or agreement that might otherwise limit its right to do so. This can include, but is not limited to:

- Redeploying staff within different locations in (or between) premises or workplaces where a service agency provides services and supports
- Changing the assignment of work, including assigning non-bargaining unit employees or contractors to perform bargaining unit work
- Changing the scheduling of work or shift assignments
- Deferring or cancelling vacations, absences or other leaves, regardless of whether such vacations, absences or leaves are established by statute, regulation, agreement or otherwise
- Employing extra part-time or temporary staff or contractors, including for the purpose of performing bargaining unit work
- Using volunteers to perform work, including to perform bargaining work
- Providing appropriate training or education as needed to staff and volunteers to achieve the purposes of a redeployment plan.

The orders specifically note that a service agency may implement a redeployment plan without complying with any applicable collective agreement provisions, including those that might relate to layoff, service, seniority or bumping rights. In addition, the orders provide a service agency the ability to suspend, for the duration of the order, any grievance process with respect to any matter referred to in the order.

The Ontario Government has also issued an order under the *Emergency Management and Civil Protection Act* to authorize a local health integration network (LHIN) to request any contracted service provider with which it works in the provision of homemaking, personal support or professional services to provide health care and related social services in a setting identified by the LHIN. Where such a request is made, the contracted service provider is authorized to accept the request and deploy its employees, despite any statute or regulation that may provide otherwise. However, the contracted service provider is not **required** to do so. Similarly, an employee of the contracted service provider is not required to agree to provide the requested services. The order is currently in effect until **April 30, 2020** or as it may be extended.

Municipal Sector

Q: What changes have been made to help municipalities respond to COVID-19?

The Ontario Government has issued an order under the *Emergency Management and Civil Protection Act* to provide greater flexibility to a municipality to take steps to prevent, reduce or mitigate the impact of COVID-19 on the provision of certain prescribed critical services. The order is currently in effect until **April 30, 2020** or as it may be extended.

The order authorizes a municipality to take any reasonably necessary measure, as it relates to work deployment and staffing, to respond to, prevent and alleviate the outbreak of COVID-19, despite any

collective agreement, policy, statute, or agreement that might otherwise limit its right to do so. This can include, but is not limited to:

- Redeploying staff within different locations in the municipality
- Changing the assignment of work, including assigning non-bargaining unit employees or contractors to perform bargaining unit work
- Changing the scheduling of work or shift assignments
- Deferring or cancelling vacations, absences or other leaves, regardless of whether such vacations, absences or leaves are established by statute, regulation, agreement or otherwise
- Employing extra part-time or temporary staff or contractors, including for the purpose of performing bargaining unit work
- Using volunteers to perform work, including to perform bargaining work
- Providing appropriate training or education as needed to staff and volunteers to achieve the purposes of a redeployment plan.

The order specifically notes that a municipality may implement a redeployment plan without complying with any applicable collective agreement provisions, including those that might relate to layoff, service, seniority or bumping rights. In addition, the order provides a municipality the ability to suspend, for the duration of the order, any grievance process with respect to any matter referred to in the order.

Bottom line: There are many issues at play in this serious and evolving situation. If you have any questions about how COVID-19 may impact your workplace or would like assistance, contact your Sherrard Kuzz LLP lawyer or, if you are not yet a Sherrard Kuzz LLP client, our firm at info@sherrardkuzz.com with the re: line COVID-19. We'll respond promptly.

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