

Goodmans^{LLP} Update

So you're an essential workplace in Ontario: Considerations for maintaining a safe workspace amid COVID-19

Yesterday, Ontario's provincial government published a list of essential workplaces permitted to stay open amidst the provincial shut down of non-essential services. The list covers a broad number of businesses, including those involved in supply chains, retail and wholesaling, food services and accommodations, institutional, residential, commercial and industrial maintenance, telecommunications and IT infrastructure/service providers, transportation, manufacturing and production, agriculture and food production, construction, financial activities, resources, environmental services, utilities and community services, communications industries, research, health care and seniors care and social services, justice sector and business regulators and inspectors. [See here](#) for the complete list.

The list remains subject to change. To the extent businesses have questions regarding their designation, the province launched a toll-free line 1-888-444-3659 to support Ontario businesses.

Maintaining health and safety in the workplace

Essential workplaces need to make every effort to introduce effective infection control measures to ensure employees are not exposed to COVID-19 in the workplace. Where possible, employers should follow best practices as directed by the Ministry of Health and should promote social distancing and hand washing.

Below are some considerations for maintaining a healthy and safe workplace.

Temperature checks

A number of Canadian employers have introduced, or are considering introducing, mandatory temperature screenings for all employees entering the workplace.

In light of the unprecedented nature of COVID-19, it is arguable that workplace temperature checks are a valid precautionary measure and are reasonable in the circumstances to protect workers as required under occupational health and safety laws. However, employers should remain cognisant of their competing obligations under human rights and privacy laws, which ordinarily would prohibit them from conducting temperature checks.

While the Ontario privacy commission has yet to provide any guidance on medical screenings of this nature, the Ontario Human Rights Commission published guidance that medical assessments to verify or determine an employee's fitness to perform on their job duties may be permissible in these circumstances under the Ontario Human Rights Code. Accordingly, employers should ensure that if they are conducting temperature checks, they are doing so in a minimally invasive manner that respects employees' dignity and privacy.

Protective equipment

Under the *Occupational Health and Safety Act* (OHSA), employers are responsible for providing a safe working environment for employees.

Employers must provide personal protective equipment if employees have a heightened risk of becoming infected with COVID-19 at work because of the nature of the work they perform, such as employees in the

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healthcare or homecare industry who may come into direct contact with a person with COVID-19. Where employees do not have this type of heightened risk, employers will generally not be required to supply protective equipment.

Employers should continue to monitor the situation and follow any guidance issued by public health authorities for protective equipment in the workplace.

Cases and presumptive cases of COVID-19 in the workplace

Employees who test positive for COVID-19 should not be permitted in the workplace until they have followed the government and public health protocols for quarantine and self-isolation. As a precautionary measure, any employee who has had close contact with a person who has tested positive for COVID-19, should also be removed from the workplace for at least 14 days. This measure should be applied to (i) co-workers who have worked closely with an employee who has tested positive with the virus, (ii) employees who have come into close contact with a person who has tested positive with the virus, and (iii) may also extend to co-workers of an employee who has come into close contact with any other person who has tested positive with the virus.

Employees should also be actively encouraged to report any flu-like symptoms to management. Where these reports are received, employers should treat these as presumptive cases. More generally, any employee who is experiencing flu-like symptoms should not be permitted to enter the workplace and should be directed to self-isolate for a period of 14 days. Furthermore, any person who has come into contact with a person who has been in close contact with another person with a presumptive case, should also be directed to self-isolate for the earlier of 14 days or until the diagnosis of COVID-19 is ruled out by health authorities.

Employers must, however, remain mindful of their confidentiality and privacy obligations owed to any employee who tests positive for COVID-19. In certain circumstances, it may be necessary for the employer to disclose the identity of an employee who has contracted the virus to protect the safety of others who are likely to have been in close contact with the infected employee. However, to the extent possible, employers should make every effort to protect the identity of any infected employee.

Additionally, should an employer become aware of any employee who has tested positive, increased cleaning and disinfecting measures should be implemented, including within the area the affected employee works. While there is no obligation for an employer to report a confirmed case of COVID-19 to federal or provincial health authorities, employers may wish to contact public health authorities to obtain advice on implementing enhanced safety protocols. If the employee contracted COVID-19 in the workplace, depending on the circumstances of the case, the employer may be required to comply with its reporting obligations under the OHSA and worker's compensation legislation.

Job protected leave

As we summarized in our March 16, 2020 Update, *Proposed Amendment to Employment Standards Act, 2000 (Ontario): Job Protection to Workers Affected by COVID-19*, recent amendments to the *Employment Standards Act* include job-protected leave for employees unable to work as a result of COVID-19. The new job-protected leave includes unpaid leave for employees who cannot work because they are subject to a medical investigation or health order, are in self-isolation or quarantine, are subject to a travel restriction or are caring for a person affected by COVID-19. An employee taking a job-protected leave related to COVID-19 is not required to provide the employer with a medical note, but may have to provide evidence that is reasonable in the circumstances, at a time that is reasonable in the circumstances. Employees who elect to take a job-protected leave may not be laid off during that leave.

Refusal to work

Under the OHSA, most employees have the right to refuse work if a condition of the workplace "is likely to endanger" their health or safety. Accordingly, if an employee has a legitimate concern for their safety relating to a positive or presumptive case of COVID-19 in the workplace, potential exposure to COVID-19 from interactions in the workplace or travelling to the workplace or the employee's general vulnerability to COVID-19 (by reason of age or underlying medical condition), the employee may be able to rely on the right to refuse work under the OHSA.

Whether a work refusal related to COVID-19 is reasonable will depend on the individual circumstances. Employers should keep their employees apprised of all of the safety measures they are taking to maintain a safe and healthy workplace, which will not only benefit employees, but may also assist employers in responding to any work refusal in accordance with the OHSA.

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Employers are generally not permitted to dismiss, discipline, or intimidate employees for exercising a health and safety right, such as a work refusal, if done so properly and in good faith. Thus, any employer considering disciplinary measures against an employee for refusing to work should consult legal counsel before proceeding.

Looking Forward

In these unprecedented times, employers should endeavour to maintain and develop effective infection control measures, that are appropriate in the circumstances, to keep their workforce safe and healthy.

We will continue to update you as information becomes available. If you have any questions about COVID-19 measures in the workplace, please contact any member of our [Employment and Labour Group](#).