

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**.

If you have additional questions, please either contact your Sherrard Kuzz LLP lawyer, or our firm at info@sherrardkuzz.com with the re line: COVID-19. We'll respond promptly.

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

Yes. Although human rights case law has generally held an employer is not entitled to ask for an employee's *diagnosis* (only the *prognosis* as it impacts the workplace) 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 may 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 advise if he or she has been in close contact with someone diagnosed with COVID-19 or travelled recently to an affected area?

Yes. An employee can be required to disclose if he or she has been in close contact with someone diagnosed with COVID-19. Similarly, an employee can be required to disclose travel to an area where there has been a COVID-19 outbreak. The Government of Canada currently considers the following countries to be 'affected areas': China (Mainland), Hong Kong, Iran, Italy, Japan, Singapore, South Korea. This list will likely change as COVID-19 continues to spread.

Q. What protected leave is available to an employee with COVID-19?

If an employee or a member of his or her family contracts COVID-19, there are a number of unpaid leave entitlements under employment standards legislation. Leave entitlements vary between jurisdictions. For example, in Ontario, the *Employment Standards Act, 2000* (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
- **Declared Emergency Leave** – if an employee cannot perform his or her duties as a result of an emergency declared under the *Emergency Management and Civil Protection Act* or other similar legislation

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

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

It is not certain 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). That said, 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.

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 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). However, the employee may be able to access short-term disability benefits, if available, or Employment Insurance.

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

An employee may be eligible for sickness benefits if he or she is ill due to COVID-19 or has been quarantined by public health officials.

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**. If a worker is entitled to benefits, he or she 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 to most chronic mental stress claims.

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 likely 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 confirm the absence of risk, the refusing employee may be disciplined if he or she continues to refuse to return to work.

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

No. 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.

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

As noted earlier, 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.*). As a result, no two workplace policies will be exactly the same.

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

Self-Quarantine

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

Working from Home

- Is this possible in this workplace 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, what is the impact on the employee's status in the workplace?

Return to Work

- When and how?
- Medical certification (will the employer pay for the certificate)?

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?
- Travel to "affected areas"

Visitors to the Workplace

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

Internal Reporting and No Reprisal

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

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, contact your Sherrard Kuzz LLP lawyer or a member of the Sherrard Kuzz team.

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