

Legal update

Pandemic: Top Five Q&A in Canada

March 2020

Employment and labour

Federal Employment and labour

First pandemic declared by the World Health Organization since H1N1. Bear markets. Unprecedented travel bans. Airline upheavals. School closures. Major league sports hiatus periods. Canada's Prime Minister and wife in quarantine. Changes to employment insurance. Six months before we will really know if our measures are working. Looking forward, between 30 to 70 percent of Canadians projected to be affected by the virus.

Needless to say, the COVID-19 situation in Canada is evolving rapidly. And employers across the country are having to prepare and respond quickly. To assist employers, we have prepared a list of commonly asked questions and answers, discussed below.

1. Can employers require employees to self-quarantine and thus not come to work?

→ *Short Answer:* Generally speaking, yes

- Employers are required to maintain a safe and healthy work environment.
- Employers should turn to the competent health authority for information on the virus' symptoms and "hot spots" across the globe most affected by the pandemic.
- If an employer has reasonable grounds to believe that a quarantine is required for employees (for instance, because an employee is exhibiting symptoms after traveling to a "hot spot"), then asking them to self-quarantine can be a reasonable preventative measure to avoid further spread of the virus and ensure health and safety in the workplace.
- Certainly, if an employee is under self-quarantine or mandated quarantine imposed by law or a qualified healthcare professional, then the employer should allow the employee to stay home or require that the employee not come to work.

2. Must an employer compensate an employee for time away from work due to the coronavirus, including if the employee is away due to quarantine?

→ *Short Answer:* Generally speaking, no, but...

- Paid alternative work arrangements should be seriously considered to allow employees to work from home while in quarantine, or to tend to a family member who is in quarantine.

- Employers should consider amending and relaxing their policies so that employees can avail themselves of vacation and sick days.
- Employees should be encouraged to consider any other leave entitlement under contract, legislation or a collective agreement.
- In some cases, employers should encourage employees to consult with their doctor and insurer to consider whether short-term disability leave might be a viable option.
- To that end, employers should also contact their benefit provider to understand if there are any circumstances that would render an employee ineligible for benefits under a plan, and act accordingly. For instance, if a provider will not be insuring employees who travel to certain areas of the world, the employer should clearly not be sending employees to any of those hot spots and inform employees of the risk of traveling to these areas.
- Employers should also encourage employees to inform themselves of what financial relief the federal government will be providing. For instance, the federal government has announced that employment insurance requirements will be relaxed to assist employees affected by the coronavirus. We expect that the government will come out with more details shortly on this issue

3. Must an employer pay an employee if the employee is required to stay at home to take care of an affected family member?

→ *Short Answer:* Generally speaking, no, but...

- For more information on what leave entitlements employees can avail themselves, please visit our first legal update related to the virus [here](#). Leave entitlements will vary depending on the jurisdiction and the facts at play.
- Certainly, employers may see a rise in leave requests, especially where schools are closing or continue be to closed, and employees feel that they are needed at home to take care of a child.
- Again, in these cases, employers should consider alternative work arrangements and strive to accommodate employees.
- If an employee is not able to work because they have to take care of a family member, the employee should, again, be encouraged to seek what relief the government is or will be offering to affected individuals.

4. What are the risks of not paying employees who cannot report to work for reasons related to the coronavirus?

→ *Short Answer:* There are some potentially useful considerations...

- It should be noted that a number of major employers in Canada and the United States are paying employees to work from home until the end of month, at least. Others, too, are deciding to continue wages while people self-quarantine following triggering events. Indeed, many employers are justifiably worried about “presenteeism” (opposite of absenteeism) right now.
- If, however, the employer chooses not to pay employees who are away from work due to virus-related reasons, that approach, while not necessarily unlawful, is not without risk.
- First, from a human resources perspective, this may impact retention and possibly affect recruitment.
- Second, there may be a risk that employees will feel constructively dismissed, generally if the uncompensated period will have a substantial impact on their annualized compensation. Such matters would have to be addressed on a case-by-case basis, with regard to the monetary loss that the employee will experience, and any other changes that could contribute to a constructive dismissal argument.

- Third, there may be human rights implications if an employee feels that he or she is not being paid because they are sick, perceived to be sick, or if they feel required to tend to family-related obligations. From a disability standpoint, it remains to be seen if human rights tribunals across Canada will treat COVID as a "disability", and therefore a protected ground. However, SARS was eventually regarded by the Ontario Human Rights Commission as a "disability", so COVID-19 may be subject to similar treatment. Therefore, as the situation continues to progress, employers should address any human rights concerns on a case-by-case basis, and consider relaxing their policies and practices to accommodate employees as best they can.
- Fourth, there may be further human rights concerns, in addition to disability, that should be considered, depending on the nature and facts of the situation.

5. What else should employers remain attentive to at this time?

→ *Short Answer:* With an increasingly lengthy list, there are a number of further considerations...

- **Privacy concerns:** Privacy looms large in the picture, and disclosure of exposure/illness will in many cases be required in order to safeguard health and contain the outbreak in the workforce. On a related note, if employers are tracking the absenteeism of employees, then the collected information should be kept safely and separately. Information should only be collected to the limited extent necessary to achieve COVID preventative or precautionary measures. In no case should any personal information be disclosed, except as required by law or with the employee's express consent. Access to this information should be limited to a small group of individuals in management and/or human resources, on a need-to-know basis. Employers seeking to gather information from employees (for instance, whether they are away due to quarantine), should do so after having communicated to them a clear policy or guidelines on the subject.
- **Imposing further preventive measures:** Preventive measures may vary depending on the circumstances. The more severe the situation, the more robust the preventive measures may be. Public health authorities should be consulted for guidance on any questions related to preventive measures in the workplace. Should an employer seek to impose preventive measures in the workplace that go beyond what is required by health authorities, it would be best to seek legal advice. Please also visit our latest legal update on the coronavirus [here](#).
- **Travel:** Given the current situation, employers can and should bar employees from business-related travels to areas that have been designated as hot spots by the authorities. In terms of employees' personal travels to affected areas outside of work, while employers may not be able to ban it, they may require employees to disclose this information and self-quarantine for health and safety reasons upon their return to Canada. In all cases, any restrictions or disclosure requirements mandated by employers should be clearly communicated to their employees.
- **Amending policies:** As noted throughout this update, a number of policies may have to be amended or relaxed to ensure health and safety in the workplace, and take into account employees' circumstances. Any new policies or changes to an employer's existing policies should be clearly communicated to employees as soon as possible.

Finally, we urge employers and employees to keep themselves informed of any new developments and information as it is made available. All should follow the guidance provided by public health authorities as this situation continues to advance. As we all prepare for what lies ahead, following all guidance provided by public health authorities, and treating each other with the utmost compassion and understanding, may indeed be our best line of defence.

For any questions on the virus, employers should contact our team of lawyers and we would be happy to assist. For employers operating in Quebec, please read the most recent legal update for that province [here](#).

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