Managing the coronavirus (COVID-19) for employers

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INTRODUCTION

The spread of the novel coronavirus (COVID-19) has been the dominating news topic of 2020 so far. Canadian health officials maintain that, at this point, the risk of contracting COVID-19 remains low in all parts of Canada. However, it is important for employers to be prepared to respond as COVID-19 continues to develop both in Canada and globally.

WHAT IS COVID-19?

COVID-19 is a form of coronavirus believed to have originated in Wuhan, China. Those who are infected may have little or no symptoms. The most common symptoms of COVID-19 are similar to a cold or flu and include fever, fatigue, cough and difficulty breathing. In severe cases, COVID-19 may cause pneumonia, kidney failure and death. According to guidance published by Health Canada and the World Health Organization as of the date hereof, symptoms may take up to 14 days to appear after exposure to COVID-19. Most people recover from COVID-19 without needing special medical treatment. The
likelihood that a person will become severely ill as a result of COVID-19 is higher in elderly people and people that have a weakened immune system.

WHAT YOU NEED TO KNOW AS AN EMPLOYER

REVIEW AND UPDATE POLICIES

It is important that employers review their sick leave, paid time off, and work from home policies to determine the leave employees are entitled to if they are infected with COVID-19 and current measures in place for employees to work from home if they have potentially been exposed to COVID-19. In light of COVID-19, employers may want to update these policies to increase the amount of paid sick leave an employee is allowed to take, allow employees to use their vacation time as paid sick leave, or increase on a temporary basis the amount of days employees may work from home. Employers should consider these measures if encouraging employees not to come into work and to stay at home if they exhibit any of the COVID-19 symptoms or have been potentially exposed to COVID-19. Policies that do not allow employees to take paid sick leave or work from home run the practical risk of dissuading employees from reporting any COVID-19 symptoms and discouraging employees from staying at home if they may have been infected with COVID-19. To reduce the potential risk of abuse of paid sick leave by employees who decide to self-quarantine but are unable to work remotely due to the nature of their job, employers may require documentary proof (e.g., copies of travel documents confirming a recent trip to a high-risk area) as a condition of receiving payment. Different approaches may be appropriate depending on the size and nature of the business.

TRAVEL RESTRICTIONS

Employers can restrict employees’ business-related travel. Currently, the threat of contracting COVID-19 is higher in multiple parts of the world than in Canada. If an employee becomes infected with COVID-19 during business-related travel they may be entitled to compensation under the their applicable workers’ compensation legislation. Global Affairs Canada currently advises against non-essential travel to some areas of China, Iran, Italy and South Korea and to exercise a high degree of caution in Japan.

Restricting employees’ leisure travel is more problematic. While an employer may have a legitimate business interest in limiting employees from travelling to areas that have a higher risk of being infected with COVID-19, an employer cannot generally prevent employees from travelling during their leisure time. A better approach for employers in managing employees that have or are planning to travel to areas that have a higher risk of contracting COVID-19 is:

1. Advise employees to review the Government of Canada’s travel health notices before doing any international travel;
2. Require employees to report if they have been, or will be travelling, to any high-risk areas;
3. Implement and advise employees of a policy that requires employees who have travelled to these areas to “self-quarantine” and work remotely or take a leave of absence for 14 days upon their return to Canada. Employees may then return to the workplace after 14 days if no COVID-19 symptoms emerge. Alternatively, employers may require employees to provide a clearance letter from a physician in order to return to the workplace. This alternative approach should be implemented, in particular, for employees that need to be at the workplace to do their work and cannot work from home; and
4. Continue to pay the employee (perhaps on the condition of the employee providing documentary
support) and provide benefits to employees during this time to limit any liability for constructive dismissal.

Whether for business or leisure-related travel, employers should review travel insurance policies to determine whether the policies have any limitations on coverage for travel to or through high-risk jurisdictions. Employers should communicate any of these limitations to employees and encourage employees to review the policies before embarking on any international travel.

DISCRIMINATION

An employer’s legal obligations under human rights legislation continue to apply in dealing with employees who have potentially been exposed to COVID-19. Although China remains the epicentre of the COVID-19 outbreak and multiple other countries have been identified as high-risk areas for transmission of the virus, it is important that measures to deal with COVID-19 do not discriminate on the basis of race, ancestry, or place of origin. For example, it is legal for an employer to require an employee who has recently travelled to China to work from home for 14 days upon returning to Canada. However, it is illegal for an employer to require anyone of Chinese origin (or who carries a Chinese passport) to work from home, regardless of whether they have recently travelled to China. It is important to note that human rights and occupational health and safety protections also extend to ensuring that employees are not harassed, bullied or mistreated in the course of their employment because of their race, ancestry, or place of origin. In some cases, employers may need to respond to insensitive and possibly discriminatory conduct directed at their workers by co-workers, suppliers, or members of the public.

THE RIGHT TO REFUSE WORK

Under occupational health and safety legislation, most employees have the right to refuse to work or to do particular work at a work site if the worker believes on reasonable grounds that there is a dangerous condition at the work site or that the work constitutes a danger to the worker’s health and safety. If COVID-19 spreads further in Canada, employees may seek to exercise this right if they reasonably believe they may encounter COVID-19 in the workplace. If an employee exercises this right, the employer should consult with their legal counsel regarding the potential application of work refusal procedures under the occupational health and safety legislation in their jurisdiction.

VISITORS

Taking extra precautions in allowing visitors to enter the workplace is important for employers in limiting exposure to COVID-19 in the workplace. Employers have the right to ask visitors to provide information in advance as to whether they have flu-like symptoms, have been in contact with anyone infected with COVID-19, or travelled to a high-risk area. If a visitor answers affirmatively to any of these questions, employers may consider requesting the visitor not come to the workplace until they have been asymptomatic for 14 days or can provide a clearance letter from a physician. Employers may also ask any visitor to provide their contact information in the event that COVID-19 develops in the workplace and the visitor may have been exposed to COVID-19.

PRIVACY CONSIDERATIONS

Employers may have to collect, use, and disclose personal information in order to prevent or manage the risk and/or reality of COVID-19’s rapid spread. In the event that an individual attends the workplace (a)
within 14 days of travelling to an area of high-risk for COVID-19 transmission; (b) within 14 days of developing symptoms for COVID-19; or (c) after testing positive for the COVID-19, employers are faced with the difficult task of balancing that individual’s right to privacy with the employer’s obligation to maintain a safe workplace.

Employees placed on leave or remote work duties remain entitled to privacy. Generally speaking, employers should not disclose the reasons for an employee’s leave or remote working arrangements, except to those employees who require that information to carry out their employment duties.

Where possible, employers should notify employees who have been subject to a credible transmission risk of COVID-19 in the workplace. What constitutes a credible transmission risk will vary, and should be determined in consultation with qualified medical personnel. If possible, qualified medical personnel should carry out appropriate individual notifications.

In carrying out such notifications, employers should make reasonable efforts not to disclose information that might (alone or together with publicly available information) identify the individual who may have caused the COVID-19 transmission risk. The objective, rather, is to provide potentially exposed employees with sufficient information to obtain medical advice and, if necessary, treatment. To that end, below are some guiding principles regarding notification:

**DO NOT PROVIDE INFORMATION REGARDING:**

- The name, date of birth, or other identifiers of the COVID-19 subject individual.

**DO PROVIDE INFORMATION REGARDING:**

- The fact that the individual was potentially exposed to COVID-19;
- If known:
  - date(s) of their potential exposure; and
  - the extent and circumstances of their potential exposure (i.e., incident indirect contact vs prolonged direct contact).

It may not always be possible to provide notice of a COVID-19 transmission risk without expressly or implicitly identifying the individual at the source of the risk. As an exception, Canadian privacy legislation permits the use and disclosure of personal information without knowledge or consent in an emergency that threatens the life, health or security of another individual. Determining whether an “emergency” exists should be made in consultation with a qualified medical professional, and also legal counsel. Depending on the jurisdiction, subsequent notice of such emergency disclosure may be required to the individual whose personal information was disclosed.

**STAY INFORMED AND COMMUNICATE**

It is vital that employers stay informed about the status of COVID-19 and keep employees informed as well as COVID-19 continues to develop in order to best manage the spread of COVID-19 in the workplace. Employers should also remind employees about policies in place regarding sick leave, paid time off, and working from home and communicate any new policies or measures taken to deal with COVID-19 to employees. Finally, there is a lot of misinformation about COVID-19 in the news and media. It is important that employers refer to and provide employees with accurate and reliable information. The following are links to government and public health organization websites that have reliable up-to-date
information about the status of the COVID-19 in Canada and globally:

- COVID-19 coronavirus info for Albertans
- Fraser Health: Coronavirus information for employees
- Government of Canada: Coronavirus disease (COVID-19): Being prepared
- Centers for Disease Control and Prevention: Coronavirus Disease 2019 (COVID-19)
- World Health Organization: Coronavirus disease (COVID-19) outbreak

If you have any questions related to employers’ rights and obligations in addressing COVID-19 and any other workplace issues arising from COVID-19, please contact any member of our Employment and Labour Group.
CONTACT US

For more information, please visit osler.com or contact the following individual(s):

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