

STOP THE SPREAD: WHAT EMPLOYERS NEED TO KNOW ABOUT CORONAVIRUS IN THE WORKPLACE

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The recent outbreak of the Novel Coronavirus (2019-nCoV or “Coronavirus”) in China is becoming a global health concern as it spreads, with Canada confirming its first cases in the last few days (two in Toronto and one in British Columbia, confirmed January 28, 2020). This health concern has sparked fears over human-to-human transmission, particularly in the workplace, as employers and employees recall the 2003 SARS outbreak. The following is a reminder of the ongoing rights and responsibilities of employers and employees under various employment-related statutes as they pertain to this issue.

Employers can find additional information on the Coronavirus outbreak, including signs and symptoms on the [Health Canada website](#).

What are my obligations as an Employer?

(a) Safety of the Workplace and the Right to Refuse Unsafe Work

Employers and employees are both responsible for ensuring the safety of their workplace.

In addition to reminding employees to wash hands frequently, we recommend the following:

- If an employee has symptoms of Coronavirus or has been in direct contact with someone who has symptoms of Coronavirus they should be denied access to work, sent home for isolation and advised to see a doctor; and,
- If an employee has recently returned from a trip to Wuhan, China during (or just prior to) the outbreak, consider whether the employee ought to be sent home for isolation; and

Employees^[1] who believe that a condition in the workplace is likely to endanger their health or safety can refuse to work under applicable occupational health or safety legislation.

Employers who receive a Coronavirus-related refusal to work must comply with their obligations under applicable occupational health and safety legislation. This means that the employer must investigate the situation immediately and attempt to work out a satisfactory resolution with the employee. If that is not

possible, the employer must notify a Ministry of Labour inspector or officer, as required by provincial legislation.[2] As a reminder, an employer cannot threaten to discipline an employee who refuses to work on this basis.

(b) Discrimination and Harassment

Employers are under an obligation to keep the workplace free from discrimination and harassment. Provincial human rights legislation prohibits discrimination or harassment in employment on the basis of certain protected grounds, including (depending on the province) ancestry, disability, race, ethnicity and place of origin. In 2003, during the SARS outbreak, the Ontario Human Rights Commission confirmed that the ground of disability, which includes “any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness”, covered diseases such as SARS. Because the Coronavirus outbreak is so new, we have yet to see any case law or publications from various human rights tribunals contemplating Coronavirus as a disability, but we expect that it will be treated the same as SARS, given the serious global health concerns. Therefore, differential treatment towards people with Coronavirus (or perceived to have Coronavirus) for reasons outside health and safety is prohibited under applicable human rights legislation.

The origins of Coronavirus are believed to be in Wuhan, China, with the virus spreading quickly throughout mainland China and into Hong Kong, Japan, Thailand and Vietnam. As a result, many people may assume that a person from the Asian-Canadian community either has Coronavirus or associates with others affected by Coronavirus.[3] Employers should note that barring someone from a place of employment because of race, ethnicity, or place of origin (perceived or otherwise) is contrary to human rights legislation. Therefore, we remind employers not to make assumptions based on stereotypes.

(c) Privacy Issues

Employees have a right to expect that their personal information, including health status, is kept confidential and is not disclosed throughout the workplace. On the other hand, employers are under legal obligations to ensure that the workplace is safe. The question of whether to reveal the names of employees who have symptoms of Coronavirus or who have been isolated or quarantined is a difficult one to answer, and will involve a balancing of two competing interests.

We encourage employers to proceed with caution and to seek legal advice in appropriate cases. Where in doubt, please contact a member of McMillan’s Privacy Law Group.

(d) Employment Standards

[Sick, Family Responsibility and Other Leaves](#)

Employees may have access to unpaid statutory leaves of absence that address the need to be absent in connection with an illness, such as Coronavirus.

For example, Ontario employees who have accumulated at least two (2) weeks of service with an employer and are unable to attend work for Coronavirus-related reasons (including quarantine) are entitled to take sick leave under the Employment Standards Act, 2000^[4] (the “Ontario ESA”) for up to three (3) days. Additionally, employees may qualify for up to three (3) days of family responsibility leave to care for an ill family member.

In British Columbia, employees may be eligible to take sick leave if this is provided for in an employment contract. Under British Columbia’s Employment Standards Act,^[5] employees may also be entitled to up to five (5) days of family responsibility leave to care for an ill family member.

Similarly, in Quebec, employees may be eligible for sick leave under the Act Respecting Labour Standards,^[6] which provides 26 weeks of unpaid leave (of which the first two (2) days per year are paid if the employee has three (3) months of service) over a period of 12 months if the employee suffers a sickness or an accident. Employees may also be eligible for family medical leave of up to 16 weeks over a 12-month period to allow the employee to provide care or support to a family member because of a serious illness or a serious accident.

In Alberta, the *Employment Standards Code*^[7] provides that an employee who has been employed for 90 days is entitled to 16 weeks of unpaid leave due to illness, injury or quarantine, and may also be entitled to personal and family responsibility leave which provides five (5) days of unpaid leave due to health or to care for a family member.

Finally, if the Coronavirus outbreak rises to public health emergency levels in Ontario, the Lieutenant Governor in Council or the Premier could declare an emergency under the Emergency Management and Civil Protection Act^[8] (the “EMCPA”), in which case employees who are unable to work because they are subject to an order under the EMCPA or the Health Protection and Promotion Act,^[9] or who are providing care or assistance to a specified individual may qualify for declared emergency leave. Similar legislative powers exist in other provinces.^[10]

During the SARS outbreak, Ontario passed the *SARS Assistance and Recovery Strategy Act, 2003*,^[11] which provided employees an unpaid leave, in addition to existing Ontario ESA leaves, for medical investigation, treatment or quarantine of themselves or a family member. McMillan’s Employment and Labour Relations Group will provide updates if any similar legislation is passed to address the Coronavirus outbreak.

(e) Workplace Safety and Insurance

Workers’ compensation benefits may also be available to employees who are infected by the Coronavirus, if the infections stems from the nature of their employment.

For example, in Ontario, the Workplace Safety and Insurance Act, 1997^[12] provides compensation for employees who suffer “personal injury or illness arising out of and in the course of employment” and where “a worker suffers from and is impaired by an occupational disease that occurs due to the nature of one or more employments in which the worker was engaged”. Similar legislation exists in other provinces.^[13]

The Workplace Safety and Insurance Board (the “WSIB”) has not yet made any statements regarding an employee’s entitlement to benefits and services if they are infected by the Coronavirus. However, similar claims were made by workers during the 2003 outbreak of SARS.

At the time, the WSIB stated that employees who were infected with SARS in the course of their employment could be entitled to the usual benefits and services available, on a case-by-case basis. However, the WSIB refused to cover quarantined employees that did not develop symptoms of SARS, even if the quarantine arose in the course of employment.

In the wake of the 2003 SARS outbreak and considering the pace at which the Coronavirus is spreading, the WSIB may follow a similar path. McMillan’s Employment and Labour Relations Group will provide updates if any similar statements are posted by the WSIB to address the Coronavirus outbreak.

Dealing With Employees Absent From Work Because of Coronavirus

In order to protect your workplace from the spread of Coronavirus, employees should not feel that they will be penalized for failing to come to work. We encourage employers to carefully consider the implications of failing to provide employees with pay during a period of isolation or quarantine. An unpaid leave may cause employees to attend work, which could result in a potential contamination of your workforce. The following options may be considered:

- Offer employees to take time off under sick leave or short-term disability. Coronavirus should fall within the parameters of an employer’s sick leave or short-term disability policies. However, employees who are quarantined without Coronavirus-related symptoms may not necessarily be eligible for benefits, depending upon the wording of the specific plan. We encourage employers to contact their insurers to determine whether their policies cover quarantine or whether their insurer will accept these claims on an “extra-contractual” basis; or,
- Allow employees to use vacation days, or lieu days.

Changes to the *Employment Insurance Act*^[14] Regulations

During the 2003 SARS outbreak, Human Resources Development Canada (now Employment and Social Development Canada, “ESDC”) announced amendments to the Regulations to facilitate access to EI sickness benefits for employees affected by SARS.

The amendments were as follows:

- The regular two-week waiting period for benefits was removed; and,
- The requirement to produce a medical certificate was removed. However, if the claimant was ill from the start, or became sick before the end of the quarantine period, a medical certificate was required - in such cases, the claimant would have been receiving medical care and should have been able to obtain a medical certificate.

The amended Regulations applied to any SARS-related claims for EI sickness benefits where a period of quarantine had been:

- imposed by a public health official; or,
- recommended by a public health official and where the employee was asked by the employer, a doctor, nurse, or another person in authority to quarantine themselves.

It is too soon to tell if the Canadian Government will follow past practice and provide similar relief to employees in the event of a Coronavirus epidemic. McMillan's Employment and Labour Relations Group will provide updates if any similar amendments are announced by ESDC to address the Coronavirus outbreak.

Practical Considerations for Employers

Employers should ensure that policies on various sick and caregiver leaves are readily available to employees, and that employees understand they will not be penalized for absenteeism related to controlling the spread of Coronavirus. If in doubt about the applicability of a leave, employers should exercise good judgment in encouraging symptomatic employees to stay home, rather than risk contamination of the workplace.

Posting additional handwashing signs and providing hand sanitizer, in addition to circulating email reminders about cold and flu season etiquette are recommended. In addition, employers should have a contingency plan in place where key employees are absent due to illness.

Finally, employers must take care to act reasonably, being mindful of human rights considerations. To learn more, please contact any of the members of McMillan's Employment and Labour Relations Group for information or assistance.

[1] With certain exemptions – in Ontario, police officers, firefighters, correctional officers and hospital workers may not exercise this right.[ps2id id='1' target='']

[2] Note that employers located in British Columbia must report unresolved investigations to WorkSafe BC.[ps2id id='2' target='']

[3] For example, see

<https://www.thestar.com/news/gta/2020/01/28/coronavirus-fears-are-sparking-an-outbreak-of-xenophobia-and-hoaxes-gta-chinese-communities-warn.html> (accessed January 29, 2020)[ps2id id='3' target='']

[4] SO 2000, c 41.[ps2id id='4' target='']

[5] RSBC 1996, c 113.[ps2id id='5' target='']

[6] CQLR, c N-1.1.[ps2id id='6' target='']

[7] RSA 2000, c E-9.[ps2id id='7' target='']

[8] RSO 1990, c E.9.[ps2id id='8' target='']

[9] RSO 1990, c H.7.[ps2id id='9' target='']

[10] See for example the Alberta Emergency Management Act, RSA 2000, C E-6.8.[ps2id id='10' target='']

[11] SO 2003, c 1 – Bill 1.[ps2id id='11' target='']

[12] SO 1997, c 16, Sched. A.[ps2id id='12' target='']

[13] See for example Workers' Compensation Act, RSA 2000 c W-15 (Alberta); Workers Compensation Act, RSBC 1996, c 492 (British Columbia); and Act respecting industrial accident and occupational diseases, CQLR c A-3 (Quebec).[ps2id id='13' target='']

[14] SC 1996, c 23.[ps2id id='14' target='']

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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