

**FREQUENTLY ASKED QUESTIONS REGARDING COVID-19  
IN THE WORKPLACE (VERSION 1.0)**

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# FREQUENTLY ASKED QUESTIONS REGARDING COVID-19 IN THE WORKPLACE

## Introduction

This collection and summary of answers to Frequently Asked Questions (“FAQs”) is intended to provide general information about the 2019 Novel Coronavirus disease (“**Coronavirus**”), also known as COVID-19 and its application to employers and the workplace. It covers a number of topics including how COVID-19 is transmitted, how workers may be protected from exposure and infection and a host of related workplace safety, workers’ compensation, labour and employment and related legal issues. This FAQ does not, however, constitute legal advice. Please seek and obtain legal advice from your lawyer regarding specific legal questions for your organization and your specific circumstances.

This FAQ summary is not intended to be exhaustive. Many of the sources of the answers provided is based on publicly available information and we encourage you to supplement your knowledge by visiting government and health authorities websites including but not limited to Health Canada of the Federal Government<sup>2</sup>, Public Health Ontario<sup>3</sup> and the widely respected Center for Disease Control and Prevention.<sup>4</sup>

The following information is provided based upon currently known and largely publicly available information. The progress and effects of this disease are constantly evolving as is the search for a vaccine. The foregoing information and answers to FAQ is subject to change based upon such evolving information.

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<sup>2</sup> <https://www.canada.ca/en/public-health/services/diseases/coronavirus-disease-COVID-19.html>

<sup>3</sup> <https://www.publichealthontario.ca/en/diseases-and-conditions/infectious-diseases/respiratory-diseases/novel-coronavirus>

<sup>4</sup> Centers for Disease Control and Prevention, “Centers for Disease Control and Prevention,” online: <<https://www.cdc.gov/>>.

**A. Background Information**

**1. What is Coronavirus?**

Novel Coronavirus also known as COVID-19 is a respiratory virus that originated in Wuhan, China. The virus is highly contagious and potentially fatal. It is suspected that it is transmitted through coughing and sneezing of infected individuals. At the present time, there is no vaccine or known cure. *“Coronaviruses are a large family of viruses that can cause illnesses ranging from the common cold to more serious respiratory infections like bronchitis, pneumonia or severe acute respiratory syndrome (SARS).”*<sup>5</sup>

**2. How does COVID-19 spread?**

Health authorities have not definitively confirmed how COVID-19 is transmitted, but suspect it is spread through person-to-person contact or contact with infected bodily fluids. There is also evidence that the virus has been spread by animal sources, including individuals with links to seafood or animal markets. Authorities do not believe you can get it from air, water, or food.

COVID-19es are spread mainly from person to person through close contact, for example, in a household, workplace, health care centre, or close proximity in public.

Some human COVID-19es, other than COVID-19 spread easily between people, while others do not. Risk of severe disease may be higher if an individual has a weakened immune system. This may be the case for: older people, people with chronic disease (for example, diabetes, cancer, heart, renal or chronic lung disease).

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<sup>5</sup> Government of Ontario, “The 2019 Novel Coronavirus (COVID-19)” (3 April 2020) online: <<https://www.ontario.ca/page/2019-novel-coronavirus#section-3>> [“Ontario COVID-19 Webpage”].

### 3. How do people react to COVID-19?

As of April 7, 2020, COVID-19 had a global mortality rate of approximately 5.6% of confirmed cases.<sup>6</sup> As of the same date, the mortality rate of confirmed cases Canada-wide was 1.9%.<sup>7</sup> As of April 5, 2020, the mortality rate of confirmed cases in Ontario was somewhat higher at 3.0%.<sup>8</sup>

The majority of those affected so far have survived the disease. However, data from the outbreak in China, and elsewhere, suggests that older adults, especially those with serious health issues, are at a greater risk of severe illness and death than younger persons.<sup>9</sup> Ontario tracks the known cases and health outcomes at its website on the topic.<sup>10</sup>

### 4. What are the Symptoms of COVID-19?

Symptoms range from mild – like the flu and other common respiratory infections – to severe. The most common symptoms include:

- fever
- cough
- difficulty breathing
- muscle aches
- fatigue
- headache

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<sup>6</sup> Johns Hopkins University, “Coronavirus COVID-19 Global Cases by the Center for Systems Science and Engineering (CSSE) at Johns Hopkins University (JHU)” (3 April 2020), online: <<https://gisanddata.maps.arcgis.com/apps/opsdashboard/index.html#/bda7594740fd40299423467b48e9ecf6>>

<sup>7</sup> *Ibid.*

<sup>8</sup> Ontario COVID-19 Webpage, *supra* note 5.

<sup>9</sup> Centers for Disease Control and Prevention, “Severe Outcomes Among Patients with Coronavirus Disease 2019 (COVID-19) — United States, February 12–March 16, 2020” (26 March 2020), online: <<http://www.cdc.gov/mmwr/volumes/69/wr/mm6912e2.htm>>.

<sup>10</sup> Ontario COVID-19 Webpage, *supra* note 5.

- sore throat
- runny nose

## 5. **How Infectious is COVID-19?**

Virus transmission may happen on a spectrum and public health authorities are not sure if the virus is highly contagious, or less so. For person-to-person transmission, health authorities suspect the virus is spread through coughing and sneezing, similar to how influenza and other respiratory pathogens are spread. Health authorities do not believe you can get it from air, water, or food.

There is some indication that the virus can be spread through touching a surface that someone sneezed or coughed on and then touching your face.

Recent guidance from the CDC, based upon a study conducted by Johns Hopkins University, indicates that the average time from infection to first symptoms, also known as the incubation period, is 5.1 days.<sup>11</sup> However, the incubation period may be as little as 2 days or as many as 14. During this period, an individual can be infected and spreading the disease although they may not be experiencing the signs and symptoms of the virus.

## 6. **Has COVID-19 been declared a Worldwide Pandemic?**

Yes. On March 11, 2020, the World Health Organization (“**WHO**”) an Agency of the United Nations, released a “breaking” tweet quoting Doctor Tedros Adhanom Ghebreyesus, Director-General: “*We have therefore made the assessment that COVID-19 can be characterized as a pandemic.*”

According to the CDC definition, a “pandemic” refers to (1) a virus that can cause illness or death with (2) sustained person-to-person transmission of that virus and (3) evidence of spread throughout the world. As the WHO has the reach to demarcate the global

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<sup>11</sup> Stephen A Lauer, et. al., “The Incubation Period of Coronavirus Disease 2019 (COVID-19) From Publicly Reported Confirmed Cases: Estimation and Application” (10 March 2020), online: [Annals of Internal Medicine: <https://annals.org/aim/fullarticle/2762808/incubation-period-coronavirus-disease-2019-COVID-19-from-publicly-reported>](https://annals.org/aim/fullarticle/2762808/incubation-period-coronavirus-disease-2019-COVID-19-from-publicly-reported).

spread of the disease, individual countries look to the WHO to confirm a pandemic. The WHO cautioned that “*describing the situation as a pandemic does not change WHO’s assessment of the threat posed by this COVID-19. It doesn’t change what WHO is doing, and it doesn’t change what countries should do.*” Accordingly, the WHO has not made additional recommendations based on the “pandemic” declaration.

**7. How long can COVID-19 live outside of the human body?**

It may vary. For similar viruses, most exist for a few hours depending on the hardness of the surface it exists on, as well as ambient air conditions. The harder the surface, the longer the virus can survive.

During recent testing, *under ideal laboratory conditions* which cannot be reproduced in the real-world, the virus was able to survive over 24 hours on plastic and metal, less than 24 hours on cardboard, and less than 4 hours on copper. However, CDC indicated that a more realistic real-world time frame is minutes to an hour on soft surfaces and hours to a day on hard surfaces.

**8. How can Employers protect workers and the public?**

Since there is currently no vaccine to prevent infection, the best way to protect yourself is to avoid being exposed to this virus. The Canadian public health authorities and CDC recommend the following additional steps:

- Wash your hands often with soap and water for at least 20 seconds. Use an alcohol-based hand sanitizer that contains at least 60% alcohol if soap and water are not available.
- Avoid touching your eyes, nose, and mouth with unwashed hands.
- Avoid close contact with people who are sick.
- Stay home when you are sick.
- Cover your cough or sneeze with a tissue, then throw the tissue in the trash.



- Clean and disinfect frequently touched objects and surfaces.

## 9. What happens if you suspect that you have COVID-19?

If you exhibit symptoms of COVID-19 or have had close contact with someone exhibiting COVID-19 symptoms, DO NOT report to work. Remain in your home and call, message, or email your healthcare professional. Additionally, if you or someone you have had close contact with exhibit symptoms of COVID-19 following recent travel from areas heavily affected by COVID-19, you must mention your recent travel when you contact your healthcare professional. There is a growing list of affected areas within Canada, as well as a long list of affected countries that is rapidly changing.<sup>12</sup>

Should employers consider providing Protective Information to their workers about COVID-19?

Yes. Information is available at no cost on the:

- Ontario Ministry of Health website<sup>13</sup>
- Public Health Agency of Canada (“PHAC”) website<sup>14</sup>
- CDC website<sup>15</sup>
- WHO website<sup>16</sup>

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<sup>12</sup> Government of Canada, “Coronavirus disease (COVID-19): Outbreak update” (2 April 2020), online: <<https://www.canada.ca/en/public-health/services/diseases/2019-novel-coronavirus-infection.html?topic=tilelink>> [“**Canada COVID-19 Outbreak Update**”]. See also: Centres for Disease Control and Prevention, “Global Map” (2 April 2020), online: <<https://www.cdc.gov/coronavirus/2019-ncov/locations-confirmed-cases.html>> [“**CDC Global Map**”].

<sup>13</sup> Ontario COVID-19 Webpage, *supra* note 5.

<sup>14</sup> Government of Canada, “Coronavirus disease (COVID-19)” (3 April 2020) online: <<https://www.canada.ca/en/public-health/services/diseases/coronavirus-disease-COVID-19.html>>.

<sup>15</sup> Centres for Disease Control and Prevention, “Coronavirus (COVID-19),” online: <<https://www.cdc.gov/coronavirus/index.html>>.

<sup>16</sup> World Health Organization, “Coronavirus disease (COVID-19) Pandemic,” online: <<https://www.who.int/emergencies/diseases/novel-coronavirus-2019>>.

## 10. What Businesses and Workplaces are considered essential services?

In Ontario, businesses classified as essential can remain open during the Emergency Order. On April 3, 2020, Ontario updated the list of essential businesses that can remain open.<sup>17</sup>

The list of essential workplaces include:

- Supply chains, including businesses that supply other essential businesses or essential services in and outside of Ontario.
- Food, including businesses that primarily sell food, beverages and consumer products necessary to maintain households and businesses.
- Services, which include: pharmacies; gas stations and other fuel suppliers; laundromats and drycleaners; certain security services; vehicle and equipment repair and essential maintenance and vehicle and equipment rental services; courier, postal, shipping, moving and delivery services; funeral and related services; staffing services including providing temporary help; urgent veterinary services and other select businesses that provide for the health and welfare of animals; home child care services of up to six children as permitted under the *Child Care and Early Years Act, 2014*, and child care centres for essential workers authorized to operate in accordance with *Ontario Regulation 51/20*; hotels and restricted forms of accommodation; and cheque cashing services.
- Services to the public that are restricted to alternative methods of sale, such as curbside pick-up or delivery, except in exceptional circumstances.
- Certain businesses that provide financial services.
- Telecommunications and IT infrastructure/service providers.

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<sup>17</sup> Ontario Government, “List of essential workplaces” (April 3, 2020), online: <<https://www.ontario.ca/page/list-essential-workplaces>>.

- Maintenance services which are necessary to manage the safety, security, sanitation, and essential operation of properties and buildings.
- Transportation services, including 1) businesses and facilities that provide transportation services and 2) businesses that provide and support online retail.
- Manufacturing, including businesses that extract, manufacture, process and distribute goods, products, equipment and materials.
- Agriculture and food production businesses.
- Construction for critical construction projects, including industrial projects, such as refineries and petrochemical plants, as well as infrastructure projects, such as new hospitals, roads, and bridges. New residential projects will stop, but residential construction that is near completion can continue.
- Resources and energy businesses.
- Community services that deliver or support the delivery of services.
- Research, including businesses and organizations that maintain research facilities, including medical research.
- Health care and social services.

Business-owners with questions concerning their essential business status can call the Stop the Spread hotline at 1-888-444-3659.

**B. Business & Workplace Protections & Restrictions**

**11. Should employers consider quarantining workers, or having workers remain off work, who have recently returned from areas affected by COVID-19?**

Yes, employers should consider telling any worker returning from areas heavily affected by COVID-19 that they should remain away from work for fourteen days after their return. This is required by the Ministry of Health.<sup>18</sup> Since this list of affected countries is likely to change, please refer to the PHAC and CDC websites.<sup>19</sup> You may also consider telling workers to self-monitor for any symptoms of COVID-19. If any symptoms occur, the worker should consider self-quarantine and be evaluated by a healthcare provider. Further, even if not symptomatic, workers may also want to consult a healthcare provider to confirm that the worker is not infectious before returning to work. For union-represented workers, applicable collective bargaining agreements should be consulted regarding employment terms relevant to such actions.

**12. Should employers consider quarantining workers who have travelled to countries near areas heavily affected by COVID-19, or who may have travelled with individuals from areas heavily affected by COVID-19 on a plane or other carrier?**

Yes. Anyone who returns to Canada after international travel is required by the Government of Canada to self-isolate for 14 days whether or not they have symptoms of COVID-19. Those who do not comply may be subject to severe penalties.<sup>20</sup>

**13. Can employers restrict workers from traveling to areas heavily affected by COVID-19 as determined by the CDC?**

Yes. Employers may consider restricting worker travel to the areas affected by the disease for business purposes.

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<sup>18</sup> Ontario COVID-19 Webpage, *supra* note 5.

<sup>19</sup> Canada COVID-19 Outbreak Update, *supra* note 12. See also: CDC Global Map, *supra* note 12.

<sup>20</sup> Government of Canada, “New Order Makes Self-Isolation Mandatory for Individuals Entering Canada” (25 March 2020), online: <<https://www.canada.ca/en/public-health/news/2020/03/new-order-makes-self-isolation-mandatory-for-individuals-entering-canada.html>>.

Employers cannot tell workers that they cannot travel to areas heavily affected by COVID-19 for personal purposes. Employers should remain aware of their obligations under the law to allow workers leave to travel to affected areas to care for others who are ill, as well as their obligations to avoid national origin discrimination.

Employers may also consider requesting that workers inform the employer if they are traveling for personal reasons so the employer is aware of workers who are going to areas and are potentially exposed to the disease. Workers should also be informed that there may not be adequate medical services available if they travel to areas heavily affected by COVID-19 and become ill.

**14. Can employers request medical information from employees related to COVID-19?**

Employers are allowed to request medical information from their employees for the purposes of attendance management, determining fitness to work, providing disability accommodation, administering benefits or administering the return-to-work process under workers' compensation legislation.

Even during a pandemic, there are significant privacy concerns which can arise when an employer requests medical information from an employee:

- to validate the employee's justification for absences from work;
- regarding the employee's medical condition or that of their family members;
- regarding their fitness to return to work; or
- about travel arrangements and plans.

If an employer does collect personal or medical information from employees, the employer should obtain the employee's consent to collect, use and disclose such information. The employer should also (1) explain to the employee why the information is being collected, (2) refrain from disclosing information beyond the direct purposes for which the information was collected or as required by law, and (3) thoroughly document the disclosure of personal or medical information.

In Ontario, an employer cannot require an employee to provide a medical note to substantiate any leave under the newly implemented infectious disease emergency leave.<sup>21</sup>

**15. Can a healthy worker in a direct patient-care position (e.g. nurse) who is not in a high risk group refuse to treat COVID-19 patients out of fear of exposure?**

It is not likely that a healthy worker in a direct patient-care position who is not in a high risk group refuse to treat COVID-19 patients out of fear of exposure.

The legal right for Canadian workers to refuse to do particular work where they has reason to believe that they may be endangered by (1) any equipment or thing the worker is to use or operate; or (2) the physical condition of the workplace.<sup>22</sup>

However, emergency workers do not generally have the right to refus to do unsafe work. For example, in Ontario a person employed in the operation of a hospital, long-term care home, residential group home, an ambulance service, first aid clinic or station, and various other specified health-sector facilities cannot refuse work under the conditions in the previous paragraph when:

- the danger is inherent in the worker’s work or is a normal condition of the worker’s employment; or
- the worker’s refusal to work would directly endanger the life, health or safety of another person.<sup>23</sup>

Another basis for establishing a work refusal exists under Canadian human rights law. A worker may refuse to perform work or assigned tasks due to exposure to COVID-19 and articulate unique risk factors due to a disability. This may include significant mental health-related disabilities, such as acute anxiety. This action would require the employer

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<sup>21</sup> Government of Ontario: Office of the Premier, “Employment Standards Amendment Act (Infectious Disease Emergencies), 2020” (19 March 2020), online: <<https://news.ontario.ca/opo/en/2020/03/employment-standards-amendment-act-infectious-disease-emergencies-2020.html>>.

<sup>22</sup> *Occupational Health and Safety Act*, RSO 1990, c O 1, s 43(3).

<sup>23</sup> *Ibid.*, ss 43(1)-(2).

to engage in the interactive process with the worker and determine whether they should consider reasonable accommodations, including not interacting with COVID-19 positive patients, unless that is an essential function of the job.

Healthcare-sector employers should follow the guidelines for health professionals posted on the Government of Canada website, including those related to proper personal protective equipment.<sup>24</sup>

## **16. What has happened in the past when Employees Refused to Work during a Pandemic?**

Not surprisingly, the right to refuse unsafe work has arisen in the context of other infectious diseases and in sectors other than healthcare. In one case, two airline ticket agents refused to work during the SARS outbreak, and requested an accommodation to wear gloves and face masks.<sup>25</sup>

An investigation by the employer, and the subsequent health and safety investigation under the federal Canada Labour Code ("CLC"), determined that no "danger" existed to justify the work refusal. Their conclusion was based on guidance by public health authorities, including the WHO and Health Canada. This finding was upheld on review by the federal labour relations board.

In another case, two officers working at a government services centre near an airport refused to work unless their employer provided them with masks and gloves.<sup>26</sup> The officers were required to interact with clients who were directly arriving from countries where SARS was prevalent. Although the employer permitted them to wear masks and gloves during these interactions, the work refusal arose because the employer insisted they procure this equipment themselves.

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<sup>24</sup> Government of Canada, "Coronavirus Disease (COVID-19): For Health Professionals" (3 April 2020), online: <<https://www.canada.ca/en/public-health/services/diseases/2019-novel-coronavirus-infection/health-professionals.html>>.

<sup>25</sup> *Cole v Air Canada*, [2006] CLCAOD No 4 (CLRB).

<sup>26</sup> *Caverly v Canada (Human Resources Department)*, [2005] CLCAOD No 10 (CLC Appeal Office).

The findings of the CLC investigator, which were upheld on appeal, were that the employer appropriately relied on Health Canada guidance that the positions were at low risk because of their limited contact with the public. Moreover, the use of protective equipment at issue was not necessary given this low risk, and clients arriving from the airport were being subject to SARS-related controls. Accordingly, the threshold for "danger" under the CLC was not met.

Although the decisions in these cases are based on their particular legislation and particular facts, they offer some general guidance for employers on their obligations in the context of a pandemic.

**17. Can Employers take Worker Body Temperatures to screen when they arrive for work and send them home if they have a fever?**

Whether body temperature screening fully complies with Canadian human rights and privacy law has not yet been fully reviewed or determined. There is no reported case in Canada that directly addresses this issue, despite the relatively recent SARS and H1N1 pandemics. However, it is clear that human rights and privacy legislation and collective agreements across Canada may limit an employer's ability to require medical examinations or health testing.

Unless the examination or testing is reasonably required to assess the employee's ability to work, mandatory temperature checks of employees, in normal circumstances, would not be permitted. This prohibition would arguably be based on the breach of provincial health legislation on the basis of discrimination against a perceived disability.<sup>27</sup> However, even if mandatory temperature screening of all employees would likely be considered *prima facie* unlawful, it may be permissible if it amounted to a bona fide occupational requirement and workplace safety laws.

Occupational health and safety ("OHS") legislation and the *Criminal Code*<sup>28</sup> both require employers to take reasonable steps to provide a safe and healthy workplace for all

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<sup>27</sup> For example, see *Human Rights Code*, RSO 1990, c H 19, s 5.

<sup>28</sup> *Criminal Code*, RSC, 1985, c C-46.



workers. OHS law is also considered important public welfare legislation that, in many cases, has a superseding provision. For instance, Ontario's OHS statute states that "despite anything in any general or specific Act, provisions of this Act and the regulations prevail".<sup>29</sup>

Case law has also indicated that when there are competing values of dignity and privacy rights found in human rights legislation, and those of the life, health, and safety of both workers and members of the public, found in the OHS legislation, the latter will ultimately prevail over the former.<sup>30</sup> Furthermore, employers must take "every precaution reasonable in the circumstances for the protection of a worker".<sup>31</sup>

The Westray Bill amendments to the *Criminal Code* established additional legal duties for workplace health and safety. The *Criminal Code* now imposes serious penalties for OHS violations that result in any bodily harm or death. Criminal liability has been expanded to include organizations, including corporations, their representatives, and those who direct the work of others. While the *Criminal Code* does not provide additional requirements, hazard control measures, or system criteria for an OHS management system, it does require all affected parties to take "reasonable steps" to prevent bodily harm.<sup>32</sup>

Therefore, there is a strong legal argument that taking an employee's body temperature during the COVID-19 pandemic is a reasonable step or precaution, since it assists the employer in meeting their obligations under OHS and criminal law. According to the Supreme Court, a rule or policy is "reasonable" if it balances the employer's interest in enforcing the rule against the legitimate interests of the affected employees who are

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<sup>29</sup> *Occupational Health and Safety Act*, RSO, c o 1, s 2(2).

<sup>30</sup> *Amalgamated Transit Union, Local 113 v Toronto Transit Commission*, 2017 ONSC 2078.

<sup>31</sup> *Occupational Health and Safety Act*, RSO, c o 1, s 25(2)(h); see also *Ontario (Ministry of Labour) v Quinton Steel (Wellington) Ltd*, 2017 ONCA 1006: s. 25(2)(h) establishes a standard, rather than a rule, for requirements of which are tailored to suit particular circumstances. Employers must take every reasonable precaution in the circumstances in order to protect workers. Reasonableness is a well-known legal concept that is interpreted and applied in a wide variety of legal contexts.

<sup>32</sup> *Criminal Code*, R.S.C., 1985, c.C-46, s. 217.1.; see also *Workplace Health & Safety Crimes*, (4<sup>th</sup> Edition) Norm Keith, Lexis Nexus

expected to comply.<sup>33</sup> Arguably a body temperature screening policy will achieve this balance, particularly if it minimally intrudes on the employees' privacy and human rights.

The important topic of OHS legal and best practice issues relating to COVID-19 will be more thoroughly reviewed in the next section of this FAQ.

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<sup>33</sup> Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd., 2013 SCC 34 [*Irving Pulp*].

## C. Occupational Health and Safety (OHS) Legislation Requirements

### 18. Have Canadian OHS Regulators provided guidance on how to handle COVID-19?

Yes. For example, Ontario employers must still comply with occupational health and safety obligations pursuant to the *Occupational Health and Safety Act*<sup>34</sup> (“**OHSA**”) and other industry-related regulations. Employers have obligations to protect workers from hazards in the workplace as set out in the OHSA and its regulations and the directives coming from the Chief Medical Officer of Health. Employees also have the right to refuse unsafe work.

The Ministry of Labour, Training and Skills Development (“**MOL**”) will continue to investigate all complaints related to workplace health and safety, including proactive inspections as needed. Employers are required to report occupation illnesses, including COVID-19, or claims filed with the appropriate workers’ compensation regulators. In Ontario, the Workplace Safety and Insurance Board policy (“**WSIB**”) with respect to COVID-19 exposure at work to:

- the Ministry (in writing) within four days;
- the joint health and safety representative or workplace joint health and safety committee; and
- the trade union, if they exist.<sup>35</sup>

Failure of the employer to comply with the OHSA and its regulations may result in an inspection, compliance order or even a stop-work order by the MOL. The government has implemented additional measures to protect frontline workers in essential businesses by adding more than 60 special consultants and officers and doubling the number of

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<sup>34</sup> R.S.O. 1990, c. O.1

<sup>35</sup> Ontario Government, “Job Protection for Workers during the COVID-19 Situation,” (March 16, 2020), online: <<https://news.ontario.ca/opo/en/2020/03/job-protection-for-workers-during-the-COVID-19-situation.html>>. See also: Ontario Government, “Employment Standards Amendment Act (Infectious Disease Emergencies), 2020,” (March 19, 2020), online: <<https://news.ontario.ca/opo/en/2020/03/employment-standards-amendment-act-infectious-disease-emergencies-2020.html>>.

phone agents at its Health and Safety Call Centre to make it easier for workers to report safety concerns. Workers can phone 1-877-202-0008 to speak with an agent.<sup>36</sup>

**19. What is the Role of the Chief Prevention Officer during the COVID-10 Pandemic**

Many Canadian provinces have established a statutory established position regarding workplace safety for the respective provinces. In Ontario, for example the Chief Prevention Officer has issued specific guidance for construction site health and safety, which may also generally apply to other workplaces.<sup>37</sup> The guidance provides on-site best practices for workers and requires employers to report all known positive test results for COVID-19, as noted above.

**20. What OHS Best Practices should Employers consider for the Protection of Workers during the COVID-19 Pandemic?**

Employers should ensure that policies are in place to implement hygiene and infection control practices, including:

- Promotion of good personal hygiene by frequent and thorough hand washing, including effective hand washing techniques, and use of a hand sanitizer.
- Providing workers, clients, customers and visitors with a place to wash their hands with soap and water.
- Providing alcohol-based hand rubs containing at least 60% alcohol, if soap and water to wash hands is not available.
- Encouraging workers to stay home if they have symptoms or are sick.

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<sup>36</sup> Ontario Government, “Ontario Extends Business Closures to Stop the Spread of COVID-19,” (April 3, 2020), online: <<https://news.ontario.ca/opo/en/2020/04/ontario-extends-business-closures-to-stop-the-spread-of-COVID-19.html>>.

<sup>37</sup> Ontario Government, “Construction site health and safety during COVID-19,” (March 29, 2020), online: <<https://www.ontario.ca/page/construction-site-health-and-safety-during-COVID-19?ga=2.168439017.918020383.1585506891-1895858205.1585506891>>.

- Encouraging respiratory etiquette, including effective covering of coughs and sneezes.
- Discourage workers from using other workers' phones, desks, offices, or other work tools and equipment, when possible.
- Maintain regular housekeeping practices, including routine cleaning and disinfecting of surfaces, equipment, and other elements of the work environment. When choosing cleaning chemicals, employers should consult information on Environmental Protection Agency (EPA)-approved disinfectant labels with claims against emerging viral pathogens.

**21. What guidance have the Public Health Authorities provided to Employers for the Protection of Workers in Canada and Ontario**

The Ministry of Health (“MOH”) has also provided occupational health and safety guidance specifically for healthcare workers. In addition to the notice requirements above, the MOH states that any instances of occupationally-acquired infection must be reported to the WSIB within 72 hours of receiving notification of the illness.<sup>38</sup>

**22. Will a worker who contracts COVID-19 at work be entitled to Workers' Compensation benefits?**

Workers who contract COVID-19 may be entitled to workers' compensation benefits, if it is determined that it arose out of and in the course of their employment. The worker's compensation boards across Canada appear to have taken a consistent approach with respect to this, indicating that, should claims be submitted by employers on behalf of their workers, or directly by workers for COVID-19, each claim will be adjudicated based on its own facts and circumstances.

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<sup>38</sup> Ontario Ministry of Health, “COVID-19 Guidance: Occupational Health and Safety and Infection Prevention & Control” (March 20, 2020), online: [http://www.health.gov.on.ca/en/pro/programs/publichealth/coronavirus/docs/2019\\_occupational\\_health\\_safety\\_guidance.pdf](http://www.health.gov.on.ca/en/pro/programs/publichealth/coronavirus/docs/2019_occupational_health_safety_guidance.pdf).

The workers' compensation boards have confirmed that benefits only exist for conditions that arise out of and in the course of employment, including COVID-19. Should a worker be off work as a preventative measure, such as self-quarantining, entitlement under the workers' compensation regime would not be in order.

Employers should ensure that they follow the provincial reporting requirements for their respective workers' compensation boards. Should workers advise their employer that they have contracted COVID-19, and they think it was contracted due to exposure at work, it is the employer's responsibility to report the claim, whether they agree that the condition is work-related or not.<sup>39</sup>

#### **D. Employment Law Issues**

##### **23. Can an Employer require a Worker to Report if they has been diagnosed with COVID -19?**

Yes. Although human rights case law has generally held an employer is not entitled to ask for a worker's diagnosis (only the prognosis as it impacts the workplace), in the present circumstances it is reasonable to require proactive disclosure due to the risk of transmission.

An employer should ensure any medical information provided about a worker is kept in a separate and secure location and not broadly disclosed to others. It may be necessary to advise other workers that 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.

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<sup>39</sup> WorkSafeBC: <https://www.worksafebc.com/en/about-us/news-events/announcements/2020/March/COVID-19-and-the-workplace>  
Workplace Safety and Insurance Board: <https://www.wsib.ca/en/novel-coronavirus-COVID-19-update>  
Alberta Workers' Compensation Board - Employer Fact Sheet: [https://wcb.ab.ca/assets/pdfs/employers/EFS\\_COVID-19.pdf](https://wcb.ab.ca/assets/pdfs/employers/EFS_COVID-19.pdf)  
Workers' Compensation Board of Nova Scotia: <https://www.wcb.ns.ca/About-Us/News-Room/News/COVID-19-Novel-Coronavirus.aspx>

Unfortunately, there is no simple 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. a worker may travel to clients to service them, or travel routinely as a component of the job).

**24. Can an employer require a worker advise if he or she has been in close contact with someone diagnosed with COVID-19 or travelled outside of Canada?**

Yes. A worker can be required to disclose if he or she has been in close contact with someone diagnosed with COVID-19. Similarly, a worker can be required to disclose travel outside of Canada or on a cruise ship within the past 14 days. This includes indirect travel, such as a plane “stopping-over” in an area, because new passengers and service individuals from that area may come into contact with existing passengers and crew.

Attendance at large gatherings is also discouraged and should be monitored. At this time, Ontario has declared a public emergency and prohibited all organized public events of over five people. This order does not apply to:

- private households with five people or more,
- operating child care centres supporting frontline health care workers and first responders, provided the number of persons at each centre does not exceed 50 people; and
- funerals up to 10 people.

As of March 30, 2020, this order will extend to April 13, 2020.<sup>40</sup>

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<sup>40</sup> Ontario Government, “Ontario Extends Emergency Declaration to Stop the Spread of COVID-19” (March 30, 2020), online: <<https://news.ontario.ca/opo/en/2020/03/ontario-extends-emergency-declaration-to-stop-the-spread-of-COVID-19.html>>.

**25. What type of leaves of absences are employees entitled to take in light of COVID-19?**

The Ontario *Employment Standards Act* (“*ESA*”) sets out the following statutorily protected leaves that employees can take in relation to COVID-19:

- **Family Medical Leave** – up to 28 weeks to provide care or support to family members if a qualified health practitioner issues a certificate stating that the individual has a serious medical condition with a significant risk of death occurring within a period of 26 weeks or a shorter period.<sup>41</sup>
- **Family Caregiver Leave** – up to eight weeks to care for or support a family member suffering from a serious illness.<sup>42</sup>
- **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 if the employee has been employed by his or her employer for at least six consecutive months.<sup>43</sup>
- **Sick Leave** – up to three days in each calendar year due to worker illness, injury or medical emergency if the employee has been employed by his or her employer for at least two consecutive weeks.<sup>44</sup>
- **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 if the employee has been employed by his or her employer for at least two consecutive weeks.<sup>45</sup>
- **Emergency leave for declared emergencies and infectious disease emergencies** - unpaid leave is permitted for a worker who cannot perform his or

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<sup>41</sup> *Employment Standards Act, 2000*, SO 2000, c 41, s 49.1 [“*ESA*”].

<sup>42</sup> *Ibid.*, s 49.3.

<sup>43</sup> *Ibid.*, s 49.4.

<sup>44</sup> *Ibid.*, s 50.

<sup>45</sup> *Ibid.*, s 50.0.1.



her duties as a result of a declared emergency (i.e. emergency under the *Emergency Management and Civil Protection Act* or other similar legislation) or an infectious disease emergency.<sup>46</sup> This new leave was enacted as a result of amendments to the *ESA* made on March 19, 2020.

COVID-19 is considered an infectious disease for purposes of this leave.<sup>47</sup> The measures are retroactive to January 25, 2020, the date that the first presumptive COVID-19 case was confirmed in Ontario.<sup>48</sup> As of March 30, 2020, the Declaration of Emergency is in force until at least April 13, 2020.<sup>49</sup>

Specifically, employees may take job-protected leave who are:

- under medical investigation, supervision or treatment for COVID-19;
- acting in accordance with an order under the *Health Protection and Promotion Act*;
- in isolation or quarantine;
- acting in accordance with public health information or direction;
- need to provide care to a person for a reason related to COVID-19 such as a school or day-care closure; and
- are directed by the employer not to work.<sup>50</sup>

The *ESA* amendments also restrict an employer from requesting a medical note to substantiate the need for this leave. Entitlement to the emergency leave continues until termination of the emergency, or as long as the circumstances listed above apply and the disease continues to be a designated infectious disease.

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<sup>46</sup> *Ibid.*, s 50.1.

<sup>47</sup> O Reg 66/20, s 1.

<sup>48</sup> O Reg 66/20, s 2.

<sup>49</sup> Ontario Government, "Ontario Extends Emergency Declaration to Stop the Spread of COVID-19," *supra* note 38.

<sup>50</sup> Ontario Government, "Job Protection for Workers during the COVID-19 Situation" (March 16, 2020), online: <<https://news.ontario.ca/opo/en/2020/03/job-protection-for-workers-during-the-COVID-19-situation.html>>.

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

Perhaps. The Ontario Human Rights Commission’s policy position is that the ground of “disability” under the Ontario *Human Rights Code* is engaged in relation to COVID-19 because disability covers medical conditions or perceived medical conditions that carry significant social stigma.<sup>51</sup>

However, general jurisprudence in the area has indicated that the common cold, influenza and many other viral health conditions that are temporal, have not been accepted as a “disability.”

If determined to fit within the disability category of a prohibited ground of discrimination, other implications apply. Employers have a duty to accommodate employees in relation to COVID-19, unless it would amount to undue hardship based on cost, or health and safety.<sup>52</sup>

As such, an employer may wish to treat any confirmed case of COVID-19 as a disability and accommodate the worker even if the worker has exhausted his or her applicable leaves of absence under the Ontario *ESA*. Accommodation would include providing the worker with an extended unpaid leave if medically required.

Employers should also accommodate an employee who has care-giving responsibilities in relation to family members who are ill or in self-isolation, or where their child’s school is closed due to COVID-19, to the point of undue hardship. These care-giving responsibilities relate to the Code ground of family status.<sup>53</sup>

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<sup>51</sup> Ontario Human Rights Commission, “OHRC Policy Statement on the COVID-19 Pandemic,” (March 13, 2020), online: <[http://www.ohrc.on.ca/en/news\\_centre/ohrc-policy-statement-COVID-19-pandemic](http://www.ohrc.on.ca/en/news_centre/ohrc-policy-statement-COVID-19-pandemic)>. See also: Ontario Human Rights Commission, “COVID-19 and Ontario’s Human Rights Code – Question and Answers,” (March 18, 2020), online: <[http://www.ohrc.on.ca/en/news\\_centre/COVID-19-and-ontario%E2%80%99s-human-rights-code-%E2%80%93-questions-and-answers-0](http://www.ohrc.on.ca/en/news_centre/COVID-19-and-ontario%E2%80%99s-human-rights-code-%E2%80%93-questions-and-answers-0)>.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*

**27. What needs to be included in a layoff notice?**

There are no specific notice requirements in Ontario. In fact, the *ESA* does not expressly require that written notice of layoff be provided. However, as a best practice, an employer should clearly provide written notice of layoff. It should state when the layoff will start, who the worker should be in contact with during the layoff, and, if there is an expected date of recall, include the date (or an anticipated date).

**28. Does the layoff notice need to include a definite return to work date?**

An employer is not required to have a return to work date for a temporary layoff in Ontario. However, the layoff will turn into a termination once the period of layoff is no longer considered to be a “temporary layoff.” In this case the worker is deemed to have been terminated on the first day of the layoff, and will be entitled to pay in lieu of notice depending on how long he or she has worked with the employer.

**29. Will a worker be eligible for Employment Insurance benefits if temporarily laid off due to economic reasons?**

A worker temporarily laid off for economic reasons may be eligible to apply for Employment Insurance (“**EI**”) benefits. Benefits are paid at 55% of earnings, to a maximum of \$573.00 per week (taxable income).

To qualify, a worker must meet the minimum number of “insurable hours” calculated over the previous 52 week period. The exact number of insurable hours required varies by region. Benefits are paid for a maximum period of time and this too varies by region.<sup>54</sup>

At present, there is a one-week waiting period for regular EI benefits. This may be waived by the Government during the current COVID-19 pandemic, but this has not yet occurred.

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<sup>54</sup> Government of Canada, “EI Regular Benefits: How Much You Could Receive,” (March 19, 2020), online: <https://www.canada.ca/en/services/benefits/ei/ei-regular-benefit/benefit-amount.html>.

To facilitate a worker's access to regular EI benefits, an employer should complete a Record of Employment ("ROE") within five days from the interruption in earnings. The "Reason for Issuing" the ROE (Block 16) should be marked as "A" (shortage of work). Under the "Expected Date of Recall" (Block 14) the employer should indicate the anticipated return to work date, or mark "unknown" if no anticipated return to work date has been indicated in the layoff notice. The ROE may be completed online (if an employer wishes to issue it in paper form, the employer must order paper copies from Service Canada).

If an employer wishes to, it may "top up" the EI benefits provided to a worker during a temporary layoff through a Supplemental Unemployment Benefit Plan ("SUB Plan"). Special rules apply to a SUB Plan, which must be registered with EI.

**30. Will a worker be eligible for Employment Insurance benefits if ill or quarantined by government due to suspected illness?**

A worker will be entitled to EI sickness benefits if ill for any reason (including COVID-19) or quarantined by public health. In addition, the Federal Government has indicated a worker will be entitled to EI sickness benefits if the worker is required to self-isolate by an employer.

EI sickness benefits can provide workers with up to 15 weeks of financial assistance if they cannot work for medical reasons. Workers could receive 55% of their earnings up to a maximum of \$573 a week.<sup>55</sup>

The Federal Government has waived the one-week waiting period for EI sickness benefits for new claimants who are quarantined so they can be paid for the first week of their claim.<sup>56</sup> Further, individuals who claim EI sickness benefits due to quarantine will not have to provide a medical certificate. Those who cannot complete their claim for EI

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<sup>55</sup> Government of Canada, "EI Sickness Benefits: What these benefits offer," (March 20, 2020), online: <<https://www.canada.ca/en/services/benefits/ei/ei-sickness.html>>.

<sup>56</sup> Government of Canada, "Coronavirus disease (COVID-19) – Employment and Social Development Canada," (April 1, 2020), online: <<https://www.canada.ca/en/employment-social-development/corporate/notices/coronavirus.html>>.

sickness benefits due to quarantine can apply later and have their EI claim backdated to cover the period of delay.

**31. What other forms of support are available for workers affected by COVID-19, and how do they affect employee entitlements to EI?**

The Federal Government has introduced the Canada Emergency Response Benefit (“CERB”), which provides \$500 a week for up to 16 weeks to individuals who have stopped working because of COVID-19. The Federal Government started to accept applications on April 6, 2020.<sup>57</sup> Individuals are eligible if:

- They are 15 years old and over and reside in Canada;
- had an income of at least \$5,000 in 2019 or the 12 months before the CERB application;
- stopped working for reasons related to COVID-19; and
- have not received income for at least 14 consecutive days within the four-week period for which the CERB is claimed.

CERB applies regardless of whether individuals are eligible for EI. The benefit is available from March 15, 2020 to October 3, 2020. If individuals apply for EI regular or sickness benefits on March 15, 2020 or later, their claims will be processed through CERB.

The Federal Government also announced the Canada Emergency Wage Subsidy, which will provide a 75% wage subsidy for employers impacted by COVID-19. Employers who have experienced revenue loss of at least 30% due to COVID-19 are eligible for the

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<sup>57</sup> Government of Canada, “Canada Emergency Response Benefit,” (April 1, 2020), online: <<https://www.canada.ca/en/services/benefits/ei/ceib-application.html>>. See also: Government of Canada, “Government introduces Canada Emergency Response Benefit to help workers and businesses,” (March 25, 2020), online: <<https://www.canada.ca/en/department-finance/news/2020/03/introduces-canada-emergency-response-benefit-to-help-workers-and-businesses.html>>.

subsidy. The subsidy will be retroactive to March 15, 2020.<sup>58</sup> Employers are encouraged to top-up the remaining 25% of remuneration to their workers. The Federal Government has warned that there will be serious consequences for businesses who attempt to take advantage of this subsidy.

Interested CERB applicants can apply via the official CERB portal at: <https://www.canada.ca/en/services/benefits/ei/cerb-application.html>.

On April 6, 2020, the Ontario government also announced financial support to parents given the closure of schools and child care centres in the province. The Support for Families initiative will provide one-time payments to parents of \$200 per child up to 12 years of age, and \$250 per child with special needs up to 21 years of age.<sup>59</sup> Families can apply by submitting an application on this webpage: <https://www.ontario.ca/page/get-support-families>.

### **32. What are an Employer's Liabilities on termination of employment?**

If an employer terminates a worker, there are two potential sources of liability: employment standards legislation and the common law.

#### **Employment Standards**

Under the Ontario *ESA*, a worker is entitled to notice based on years of service, to a maximum entitlement of eight weeks of notice or pay. In addition, a worker with five or more years of service may be entitled to severance pay approximately equivalent to one week's pay per year of service to a maximum of 26 weeks.<sup>60</sup> An employee is only entitled to severance pay where the employer has an annual payroll in Ontario of \$2.5 million or more, or the employee is one of 50 or more employees terminated at an employer's establishment in a six-month period.

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<sup>58</sup> Government of Canada, "The Canada Emergency Wage Subsidy" (April 1, 2020), online: <https://www.canada.ca/en/department-finance/news/2020/04/the-canada-emergency-wage-subsidy.html>.

<sup>59</sup> Ontario Government, "Ontario Government Supports Families in Response to COVID-19" (April 6, 2020), online: <https://news.ontario.ca/opo/en/2020/04/ontario-government-supports-families-in-response-to-COVID-19.html>.

<sup>60</sup> *ESA*, *supra* note 39, ss 63-64.

There are additional termination entitlements on a “mass termination” which generally involves a termination of 50 or more workers within a period of four weeks.<sup>61</sup> If an employer is considering a mass termination, it is critical to first consult with an experienced employment lawyer because the requirements are different and the potential liability is considerable.

### **Common Law**

In addition to employment standards entitlements, an employer may be required to pay a terminated worker common law reasonable notice. This is a term of art used by Canadian courts intended to be a rough estimate of how long a worker will take to find comparable, alternate employment. The length of reasonable notice owed to a worker varies depending upon a range of factors including type of work, degree of expertise or training, length of service, worker age, remuneration, availability of alternative employment, and the circumstances surrounding the hiring of the worker (e.g. whether the worker was ‘lured’ from secure employment). When assessing the length of reasonable notice, the employment standards notice period is included.

Unfortunately, there is no hard and fast formula to determine reasonable notice. The analysis often starts with a frequently referenced estimate of “one month per year of service” to an approximate maximum of 24 months, although there have been exceptional cases in which courts have exceeded this number. In reality, “one month per year of service” is a guidepost and each case requires individualized assessment.

Following termination from employment, a worker typically has an obligation to mitigate their losses during the period of reasonable notice by actively seeking comparable employment. As noted above, if a worker is recalled to employment following a layoff, and refuses to return, the employer may take the position that the worker has failed to mitigate their losses, either in whole or in part, depending on the amounts at issue.

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<sup>61</sup> *ESA, supra* note 39, s 56.

If an employer has a properly drafted an enforceable employment agreement with a worker, this will limit the amount of notice or pay to which a worker is entitled as long as it does not fall under the *ESA* threshold.

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