



What's New in HR Law

Ontario Arbitrator Clarifies Sick Pay Entitlements for Long-Term Care Employees

June 4, 2020

A recent arbitration [award](#) by Arbitrator Stout (the “Award”) provides guidance on when long-term care homes are (and are not) required to pay employees for COVID-19-related absences. The decision underscores the importance of carefully considering both the collective agreement and the reasons an employee is in self-isolation when determining whether an employee is entitled to sick pay.

Factual Background

The Ontario Nurses Association (the “Union”) has Collective Agreements with a number of long-term care homes (“Homes”) that contain an identical provision regarding employee entitlement to sick pay. The Collective Agreements provide that certain classes of employee (i.e., full-time seniority employees) would receive sick pay if they are absent from work due to “legitimate personal illness or injury...” The Collective Agreements do not state that these entitlements are available to part-time or casual workers.

This update is for general discussion purposes and does not constitute legal advice or an opinion.

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Following the onset of the COVID-19 pandemic, Ontario's Chief Medical Officer of Health issued a number of Directives to long-term care homes (and other employers in the health care sector) mandating that long-term care homes implement certain precautions to combat the spread of COVID-19. One of the Directives requires that employees of long-term care homes who either have COVID-19, or satisfy one of several other criteria (i.e., as a consequence of travel, exposure, public health direction, instruction from the employer to remain off work, while waiting for test results, etc.) are required to self-isolate and not report to work for a period of fourteen days.

The Union alleged that the sick pay provision under the Collective Agreements required the Homes to provide sick pay to both (i) nurses who received a positive COVID-19 diagnosis and/or were symptomatic, and (ii) nurses who were asymptomatic but were required by the Homes to self-isolate as a precautionary measure in accordance with the Chief Medical Officer of Health's Directives. The Union further alleged that part-time and casual nurses were also entitled to sick pay.

Entitlement to Sick Pay

Arbitrator Stout held that it "is well accepted that employees are not entitled to be paid if they do not attend work. Any payment for an absence must be found in legislation or the collective agreement [...]." Because the Federal and Provincial Governments had not implemented a requirement that employees be paid for time off work due to COVID-19, "the right to compensation must be found within the four corners of the Collective Agreements."

Observing that the Collective Agreements stated that sick pay would be paid to "full-time employees", but said nothing about other classes of employee, the Arbitrator rejected the Union's argument that part-time and casual employees were entitled to sick pay as well.

The Arbitrator held that the Collective Agreement language stating that sick pay would be awarded in cases of "legitimate personal illness or injury" draws a distinction between different types of COVID-19-related absences. In particular, the Arbitrator held that based on this language:

- Employees *would* be entitled to compensation if they (i) received a positive diagnosis of COVID-19, or (ii) were (or became) symptomatic for COVID-19;
- Employees *would not* be entitled to compensation where the Directives require them to self-isolate as a precaution, but they do not test positive or become symptomatic. This is because they are not sick and, therefore, the reason their absence is the Directive and not an "illness or injury", which would have otherwise entitled certain employees to paid sick leave under the terms of the Collective Agreements; and
- Where an employee is entitled to compensation, they will be entitled to compensation for the entire duration of their mandatory isolation period, even after symptoms have subsided.

The Directives

As part of the Award the Arbitrator also commented on the application of the Chief Medical Officer's various Directives. The Arbitrator held that:

- It is reasonable for long-term care homes to rely on the Directives when making decisions with respect to their workforce, including the requirement that certain healthcare workers self-isolate and not report to work as a precautionary measure;
- It was a reasonable exercise of the Homes' management rights to prevent those employees who may pose a risk from attending at the workplace in accordance with the Directives. Such a rule was reasonable and designed to meet the legitimate purpose and crucial objective of protecting residents, employees and stopping the spread of what can only be described as a deadly infectious disease; and
- *Bona fide* decisions made by a long-term care home to comply with the Directives will generally not be considered disciplinary action, even where it has a negative impact on one or more employees. The Arbitrator found that, "it is fair and reasonable, in the context of a global pandemic, to require employees not to attend work if they pose a risk of infecting fragile residents or other employees".

Check the Box

This Award provides helpful guidance regarding the Directives and how to assess past and future decisions made regarding employees who were absent from work for reasons related to COVID-19. Absent express language in a collective agreement or workplace policy, at this time employees may not be entitled to compensation for time off work even where they are diagnosed with COVID-19. Before determining whether to compensate a particular employee for time spent in self-isolation, employers should carefully consider their collective agreement, applicable sick leave policies, and the circumstances of the particular employee when determining whether the employee is entitled to compensation while self-isolating.

Future Updates

Our firm continues to closely monitor the developments surrounding the COVID-19 outbreak and the unique issues impacting employers in the broader healthcare sector. We will continue to provide further information as it becomes available.

Need more information?

For more information regarding workplace management during the COVID-19 outbreak, contact [James Jennings](#) at 416-408-5503, or your regular lawyer at the firm.



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