



# What's New in HR Law

## Ontario Passes Bill 128 – *Supporting Ontario's Recovery and Municipal Elections Act, 2020*

November 24, 2020

### Bottom Line

On November 20, 2020, the Government of Ontario passed Bill 218, *Supporting Ontario's Recovery and Municipal Elections Act, 2020* (the "Act"). The Act will provide civil liability protection for businesses, workers, and volunteers that make a "good faith" or "honest" effort to follow public health guidelines and laws relating to COVID-19.

According to the Government of Ontario, the Act seeks to protect and ensure that Ontarians who are contributing to the recovery of the province, and who make good faith efforts to follow public health guidelines, are not discouraged from making a difference as a result of potential concerns linked to liability arising from the COVID-19 pandemic.

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

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## Scope of the Protections

The *Act* bars actions that arise against any person as a direct or indirect result of an individual being, or potentially being, infected with or exposed to COVID-19 on or after March 17, 2020, as a direct or indirect result of an act or omission of the person if, at the relevant time, the person acted or made a good faith effort to act in accordance with: (i) applicable public health guidance relating to COVID-19; and (ii) federal, provincial, or municipal laws relating to COVID-19.

The *Act* defines a “good faith effort” as an honest effort, whether or not that effort is reasonable.

With respect to “public health guidance” the *Act’s* definition encompasses advice, directives, or instructions given or made in respect of public health regardless of the form or manner of the communication. Public health guidance includes communications received from the Chief Medical Officer of Health; a person appointed as a medical officer under the *Health Protection and Promotion Act* or an employee of the board of health; a public health officer of the Government of Canada; a public health official of the Government of Ontario; government ministries and municipalities; and public health agencies or regulatory bodies having jurisdiction over the person.

As a result of the evolving circumstances surrounding the COVID-19 pandemic, health guidelines have changed throughout the pandemic with some guidelines seemingly contradicting one another. The *Act* addresses this issue by extending protections regardless of any conflict or inconsistency in the public health guidelines or laws applicable to the person. Consequently, employers should make efforts to document measures they have implemented in order to observe public health guidelines as these records could later prove useful if claims are made against the business or the employer.

## Broad Application

The protections have been drafted broadly and a “person” has been defined to include any individual, corporation or other entity, including the Government of Ontario. The broad language ensures the protection of a wide range of operations and organizations, including:

- Healthcare workers and institutions;
- Frontline workers who serve the public everywhere from grocery stores to restaurants and retail stores;
- Businesses and their employees;
- Charities, non-profit organizations; and
- Coaches, volunteers and minor sports associations.

Significantly, the *Act* extends the protections to persons who are vicariously liable for the acts or omissions of other persons where the applicable protections would negate the liability of the other person in relation to any act or omission. This will be particularly helpful for employers who are responsible for the actions of their employees that are performed in the ordinary course of employment.

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## Retroactive Application

The *Act* provides retroactive relief to March 17, 2020, the date when the Government of Ontario first implemented emergency measures in response to COVID-19. As such, all actions that arose before the *Act* came into being, and on or after March 17, 2020, will be deemed to have been dismissed, without costs, from the day the *Act* came into force.

## Exceptions

The *Act* does not apply to claims based on gross negligence or where businesses operated when they were required to be closed. The *Act* does not specifically define gross negligence. However, the concept of gross negligence has previously been defined by the Supreme Court of Canada to encompass conduct where, if there is no conscious wrongdoing, there is a **marked** departure from the standard of care by which a responsible and competent person would govern themselves. Ultimately, the determination will be a fact-specific enquiry that will be decided on a case by case basis.

In addition, and with particular relevance for employers, the protections will not apply to claims brought by an employee involving exposure or infection that occurred during the course of employment. The *Workplace Safety and Insurance Act, 1997* (“*WSIA*”), continues to govern issues related to occupational injuries, including infectious illnesses. To the extent there is any conflict between the *Act* and the *WSIA*, the latter will prevail.

## Check the Box

The *Act* provides protection that shields employers from potential liability from either the operation of their own business, and/or the actions of their employees, directors, and other company representatives, during the COVID-19 pandemic. While the safeguards provided by the *Act* are a welcome stress relief, employers should keep in mind that the statutory protection from liability is contingent on their adherence with public health guidelines and applicable laws.

As such, employers are well-advised to keep abreast of current guidance from public health officials, as well as to implement, maintain and enforce appropriate workplace policies and protocols that ensure and document compliance.

## Need more information?

For more information about workplace management amidst the COVID-19 pandemic, please contact [Tawanda Masimbe](#) at 416.408.3221 or your regular lawyer at the firm.



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