



# What's New in HR Law

## Coronavirus: Proactive Guidance for Employers

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### Bottom Line

With several recently confirmed cases in both British Columbia and Ontario, and numerous others currently under investigation, Wuhan Novel Coronavirus (Coronavirus) has arrived in Canada. While it is not yet known whether the virus will evolve to become a global pandemic, employers are nevertheless concerned about meeting their obligations to provide workers with a safe and healthy workplace.

In the context of a potential pandemic, it is critical for employers to be aware of their legal obligations and to develop a proactive plan to manage feelings of panic and fear – whether irrational or well-founded – which will inevitably ensue. Below we outline some of the potential issues relating to the Coronavirus and provide employers with practical guidance on how to respond to questions and concerns that may arise in the workplace

### Proactive Approach

Employers may consider getting out in front of the issue by openly communicating with workers before fear spreads unnecessarily. Workers can be made aware that preventing an outbreak within the workplace is a top priority for their employer and that steps are being taken to monitor and respond to developments as they occur. Workers can also be directed to available

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resources for informational or educational purposes, which may also serve to alleviate panic and anxiety. For instance, the Public Health Agency of Canada has assessed the public health risk associated with Coronavirus as “low” for Canada and for Canadian travelers (see [here](#)). To monitor the situation, the Government of Ontario has also created a dedicated website that is being regularly updated (see [here](#)).

Employers may also consider reminding workers of best practices to minimize the spread of infectious disease, including:

- staying home and out of the workplace when experiencing any flu-like symptoms (i.e. fever, cough, difficulty breathing, etc.);
- practicing hand hygiene and covering mouth (not with hand) when coughing/sneezing;
- avoiding touching the eyes, nose and mouth;
- avoiding contact with those who report or exhibit flu-like symptoms.

Employers may also benefit from reminding employees of their statutory or contractual rights to sick leave, family-related leaves of absence and any applicable short-term disability entitlements. Employees should be encouraged to take any necessary time away from work if they experience flu-like symptoms and to report any such symptoms to the health authorities – particularly if they have recently travelled to Wuhan, China, or other high-risk areas.

It should be made clear to workers that there will be no negative employment consequences resulting from the exercise of statutory or contractual rights, for reporting symptoms to the appropriate authorities, and/or for testing positive for Coronavirus.

## Statutory Leaves of Absence

Workers may be able to avail themselves of various unpaid leaves under applicable employment standards legislation where they, or a member of their family, contracts the Coronavirus. For instance, under Ontario’s *Employment Standards Act, 2000 (ESA)* applicable unpaid leaves may include:

- **Sick leave:** three unpaid days off per calendar year in the event of personal illness, injury or a medical emergency.
- **Family responsibility leave:** three unpaid days off per calendar year in the event of (i) an illness, injury or medical emergency involving certain classes of family members or (ii) another “urgent matter” that involves one of those family members.
- **Family medical leave:** up to 28 weeks in a 52-week period where the employee is providing support to certain classes of family members suffering from a serious medical condition, who are at significant risk of death within 26 weeks.
- **Family caregiver leave:** up to eight weeks to care for or support certain classes of family members suffering from a serious illness.
- **Critical illness leave:** up to 37 weeks to provide care or support to a critically ill minor child or 17 weeks to provide care or support to a critically ill adult family member.

The *ESA* also provides for “declared emergency leave” that may be applicable in the event the Coronavirus outbreak evolves into a global pandemic. In order for this provision to apply, an

emergency must first be declared under the *Emergency Management and Civil Protection Act (EMCPA)*. In addition, the worker seeking to take a declared emergency leave must:

- be subject to an order under the *EMCPA*
- be subject to an order under the *Health Protection and Promotion Act (HPPA)*, or
- be required to provide care or assistance to certain classes of family members.

Orders under the *EMCPA* and the *HPPA* may relate to a wide variety of conduct including travel restrictions, closures of public or private establishments, quarantines, and directions to submit to medical examination.

## **Financial Entitlements for Affected Workers**

Workers who are absent as a result of the Coronavirus have three potential sources of financial entitlement: contractual sick/disability policies, employment insurance, and claims under the *Workplace Safety and Insurance Act, 1997 (WSIA)*.

Entitlement to compensation under the terms of a short-term disability policy will depend on the wording of the policy. Generally, a worker who has suffered from Coronavirus will have the right to be treated in the same way as an employee who has suffered from any other applicable form of temporary illness. A disability policy may or may not extend to cover an individual who is not sick but is subject to quarantine (whether self-imposed or government-mandated). In the case of quarantine, even if not expressly addressed under benefit plan or policy documents, employers may nevertheless wish to remain flexible in the administration of benefits.

Under the *Employment Insurance Act*, workers who experience a reduction in normal weekly earnings of at least 40% because of “illness, injury or quarantine” are eligible for EI sickness benefits. In order to qualify, workers must have accumulated a certain amount of insurable hours in the qualifying period.

Workers who contract the Coronavirus in the course of their employment may be eligible for loss of earnings benefits under the *WSIA*, along with compensation for medical expenses and access to related services. However, as was the case during the past SARS outbreak, workers may have a difficult time proving they contracted the illness “in the course of their employment” – particularly if they have been exposed to a large number of people.

## **Human Rights Considerations**

In order to comply with the legal requirement under the *Occupational Health and Safety Act (OHSA)* to take every precaution reasonable in the circumstances to protect the safety of its workers, many employers may be inclined to require any employee who has just travelled from China or Asia to stay at home and away from the workplace. While the motivation for adopting such a policy may be well-intentioned, it carries a significant risk of violating human rights legislation, which prohibits discrimination on the basis of disability (perceived or real), race, colour, ethnic origin and/or place of origin.

In particular, given the fact that neither the federal nor provincial health authorities have imposed or even recommended quarantines, it may be seen as unreasonable for employers to

take it upon themselves to enact a policy that effectively forces employees to quarantine themselves. If the policy is found to be unreasonable and/or unnecessary, the fact that the policy would disproportionately impact certain individuals on prohibited grounds may lead a human rights adjudicator to the conclusion that such a policy is discriminatory.

In fact, in 2003 the Ontario Human Rights Commission took the position that “discriminatory action against any persons or communities because of an association with SARS, perceived or otherwise, is prohibited by the Ontario *Human Rights Code*.” In this context, the Commission reminded the public that barring someone from a place of employment because of their race or place of origin is unlawful and contrary to the *Code*. A similar approach is likely to be adopted with respect to the Coronavirus.

However, if it can be confirmed that an individual has travelled to Wuhan, China or another particularly high-risk area, it may be reasonable to request that the worker stay home in order to ensure the health and safety of the workplace. Still, the negative impact of this request should be minimized to the extent possible, including by maintaining the employee’s pay and benefits and allowing them to work from home, where operationally feasible. Where an employee is clearly exhibiting flu-like symptoms or has a confirmed case of Coronavirus, employers are within their rights to send the worker home, either with or without pay depending on applicable policies, plans, and past practices.

While the common flu is generally not considered a disability, confirmed cases of Coronavirus *may* be deemed to be a disability under applicable human rights legislation. In this case, a worker who contracts Coronavirus would be entitled to reasonable accommodation, which may include a leave of absence for the duration of their illness in excess of any leave entitlements they may have under applicable employment standards legislation.

## **Work Refusals**

Workers generally have the right to refuse work if they have a genuine belief that a condition of the workplace is “likely to endanger” their health or safety. Under the *OHSA*, a work refusal triggers an obligation to investigate the circumstances of the refusal and, if the issue cannot be resolved, the involvement of a Ministry of Labour inspector. Failure to comply with the *OHSA* provisions relating to work refusals may result in fines. Similar provisions exist under the *Canada Labour Code*, as well as in other provincial jurisdictions across Canada.

Importantly, there are a variety of employees that are exempted from the right to refuse work. These exempted employees include, among others, police officers, paramedics and many persons employed in the operation of hospitals and health care institutions.

During the 2003 SARS outbreak, many workers refused work under the work refusal provisions of the *Canada Labour Code* simply due to the fact that they would be exposed to individuals returning from countries where the illness was prevalent. In the cases where such work refusals were reviewed by an appeals officer, the workers were generally unsuccessful. Appeals officers consistently found that the risk of contracting SARS from such individuals did not meet the level of danger required to justify a work refusal.

Employers will likely want to pre-empt potential work refusals before they occur by employing the proactive approach mentioned above – with a focus on regular communication and information dissemination. Employers may also be able to address worker concerns around workplace safety by putting additional safety measures in place. For instance, employers may consider providing face masks and gloves to be worn by any worker who wishes, setting up hand sanitation stations throughout the workplace, and/or approving remote or home-work arrangements where feasible.

## **Additional Considerations**

Although the considerations outlined above are generally applicable to *all* workplaces, employers operating in the healthcare sector may face a unique set of issues if the Coronavirus continues to spread. With the 2003 SARS outbreak, almost half of those infected were healthcare workers who contracted the disease on the job. A 2007 report indicated that inadequacy of preparedness, infection control, and worker safety systems left healthcare workers unprotected. Several lawsuits were commenced as a result. Given the unique challenges facing employers in this sector, we recommend healthcare employers exercise particular caution and obtain individualized legal advice.

Unionized employers will also need to be particularly cognizant of the terms of their collective agreements and the involvement of any union(s). Ideally, any significant actions including requesting employees to refrain from attending at work (if appropriate) will be undertaken in consultation with union officials so as to minimize the possibility of additional workplace strife or the initiation of grievance proceedings.

Employers should also be cognizant that claims of constructive dismissal are possible if a worker perceives their employer to have made a fundamental change to their employment contract. Where workers are required to stay home or to commence a leave of absence due to contracting the Coronavirus, the employer should clarify that the leave is temporary, not disciplinary in nature, and that the worker will be placed in the same position at the same rate of pay upon their return. As discussed above, it is not advisable to require workers to stay home unless there is objective evidence that they pose a health and safety risk.

## **Check the Box**

The arrival of the Coronavirus in Canada has presented employers with a host of issues to consider. However, until the outbreak is classified as a significant risk to public health, employers are advised to exercise restraint, develop a plan, and adopt a proactive approach to reduce anxiety and maintain workplace health and safety.

We are continuing to monitor this situation closely, and will keep readers apprised of any new developments.

Thank you to Mark Van Ginkel for the preparation of this information bulletin. Mark can be reached at [mvanginkel@filion.on.ca](mailto:mvanginkel@filion.on.ca).

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