



What's New in HR Law

Workplace Mental Health in the Age of COVID-19

May 27, 2020

Bottom Line

As businesses across Canada prepare to reopen, mental health is an important consideration for employers. When creating reopening plans, employers should maintain open lines of communication with employees to reduce the fear of returning to work, and contemplate whether they have accommodation obligations for employees with mental health disabilities that may have been triggered or exacerbated by the ongoing COVID-19 pandemic.

Stress and Worry about COVID-19

A recent [research poll](#) conducted by Nanos for the Mental Health Commission of Canada surveyed over 1,000 individuals and found that approximately 84% of participants reported feeling some amount of stress related to COVID-19, with 13% reporting they felt stress all the time, and 33% reporting they felt stress regularly because of the pandemic.

As workplaces prepare to reopen, it is important to take this new mental health landscape into consideration and maintain an open dialogue with employees to facilitate a smooth and effective transition back to work.

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

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Workplace Health and Safety

Due to concerns about the COVID-19 pandemic generally, workplaces that are reopening may see an increase in COVID-19-related work refusals. While health and safety requirements and the response to work refusals will vary depending on the workplace and the jurisdiction in which the employer operates, clear and regular communication with employees about the measures employers are taking to keep them safe is an important tool that employers should use to help manage employee concern and mitigate potential work refusals.

In Ontario, for instance, employers have an obligation under the Ontario *Occupational Health and Safety Act* (the “OHS”) to provide a safe work environment and to take every precaution reasonable in the circumstances for the protection of workers. For workplaces that are reopening this likely includes, but may not be limited to, following public health advice and any government-issued sector-specific guidelines regarding COVID-19.

Employers should also evaluate the physical workplace and workplace practices to determine what changes are necessary, if any, to facilitate:

- physical distancing; and
- appropriate hygiene practices (e.g. providing access to alcohol-based hand sanitizers where soap and running water may not be consistently available);

Some governments, including the Government of Ontario, have recommended that employers and workers consider wearing face coverings while attending at the workplace as an additional measure that may help reduce the transmission of COVID-19; however, medical masks such as surgical masks and N95 respirators should be reserved for healthcare workers and first responders.

Under occupational health and safety legislation, employees have a right to refuse unsafe work. Whether such a refusal is reasonable in the context of COVID-19 will depend on the circumstances and the individual workplace. Accordingly, before reopening, employers should undertake an investigation to determine whether there are any COVID-19-related workplace hazards and how those hazards will be addressed.

Provided the employer has undertaken an investigation and is complying with public health directives and guidelines, an employee likely cannot refuse to attend at the workplace based only on an employee’s fear or concern that they will contract COVID-19. However, where the employee expresses concern regarding the safety of the workplace, the employer should respond to the employee’s concerns in accordance with their obligations under applicable occupational health and safety legislation.

It is also important to remember that employees cannot be disciplined, dismissed, suspended, or threatened with discipline, dismissal or suspension for engaging in a work refusal in good faith, whether or not such a work refusal is eventually determined to be “valid”. Such an action would run afoul of the anti-reprisal protections built into occupational health and safety statutes

across Canada. If in breach of these statutory protections, an employer could be subject to fines or other penalties.

Support for Employees

Experiencing fear, stress and concern during this pandemic is a normal response and this stress may be heightened for employees returning to work. To ease the stress of these employees and to mitigate the impact of work refusals, employers should provide information to all employees regarding the actions they have taken and/or will take to minimize the risk of transmission of COVID-19 in the workplace.

Employers may also highlight mental health resources that are available to employees, whether general or specific to COVID-19, including:

- Employee Assistance Plans, if available; and
- Mental health resources available through the provincial and/or federal government.

Employees should also be encouraged to seek information regarding COVID-19 from credible sources, including the World Health Organization and provincial and federal public health authorities.

Duty to Accommodate

Under human rights legislation, employers have a duty to accommodate workers with disabilities. Stress and anxiety are not, in and of themselves, disabilities; however, they may be symptomatic of one.

While some stress regarding the ongoing pandemic is normal and may not trigger the employer's duty to accommodate, these obligations may be triggered for employees who have experienced mental health disabilities, including anxiety or depressive disorders, that have been brought on and/or exacerbated by the COVID-19 pandemic. Where appropriate, employers should make inquiries to determine whether there are barriers to an employee's return to work and whether accommodation is necessary.

Each request for accommodation should be evaluated on a case-by-case basis. The duty to accommodate includes both a procedural and substantive element. If an employee requests accommodation due to mental health concerns related to or brought on by COVID-19, but the employer fails to adequately consider the request, the employer could be found in breach of the procedural aspect of the duty to accommodate. This would be the case even if the outcome would have been the same in any event. Human rights cases in which this has been the adjudicated outcome highlight the need for employers to meaningfully consider accommodation requests, and engage workers in the accommodation process. Dismissing an accommodation request out of hand can have costly consequences.

Future Updates

Filion Wakely Thorup Angeletti LLP continues to closely monitor the developments surrounding the COVID-19 pandemic and will provide additional updates as new information becomes available.

Need more information?

For more information regarding reopening and workplace management during the COVID-19 pandemic, contact [Madeline Davis](#) at 416-408-5528, or your regular lawyer at the firm.



management labour and employment law



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