

# EMPLOYER'S HUMAN RIGHTS OBLIGATIONS DURING THE COVID-19 PANDEMIC

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In the past few days, Canadians have been forced to adjust to the unprecedented social and economic changes of the COVID-19 pandemic. For employers, this has meant facing tough decisions about their business and their workforce. While these decisions are already difficult, employers must still consider their human rights obligations under Ontario's Human Rights Code (Code).

On March 13, 2020, the Ontario Human Rights Commission (Commission) published [a policy statement on the COVID-19 pandemic \(the "Policy"\)](#). While this does not constitute an official legal document, it may still provide an insight into how the Human Rights Tribunal of Ontario, and other human rights tribunals across Canada, may view future discrimination claims arising from the COVID-19 pandemic.

The Tribunal has held numerous times that common, transitory illnesses such as colds, influenza, bronchitis and lice are not considered disabilities under the Code. In light of this new policy, COVID-19 may be considered a disability as it is a medical condition or perceived medical condition that carries significant social stigma.

The following is a summary of the Policy's position with respect to COVID-19 and employment below:

- It is discriminatory under the Code to treat employees who have or are perceived to have contracted COVID-19, in a negative manner, for reasons unrelated to public health and safety. 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.
- Employers should not treat employees in a differential manner over COVID-concerns, unless these concerns are reasonable and consistent with the most recent advice of

medical and public health officials.

- Unless an employee can provide a legitimate reason why they cannot work, employers have a right to expect they will continue to perform their work. If an employee is required to self-isolate for legitimate reasons, the employer can explore alternative options to allow the employee to continue to work.
- Employers may not discipline or terminate individual employees who are unable to come to work because medical or health officials have quarantined or advised them to self-isolate and stay home because of COVID-19 concerns.
- Employers should accommodate employees who have care-giving responsibilities to the point of undue hardship. These accommodations might include working from home, reduced hours or leave without pay.
- Employers should take requests for accommodation in good faith and avoid requiring medical notes to justify employee absences where such notes are unnecessary.
- Finally, it is not discriminatory to lay off employees if there is no work for them to do because of the impacts of COVID-19.<sup>[1]</sup>

Employers should also actively remind employees that it is unacceptable to treat employees or members of the public differently, or assume they might be infected with COVID-19 on the basis of their race, place of origin, citizenship, ethnic origin or ancestry. Assuming that someone has the virus because they happen to have exhibited one of the symptoms of the virus and because of an assumption about where they are from based upon how they look would most likely be considered discrimination. If an employer were aware of this differential treatment and chose to do nothing about it, they could be exposed to liability since employers are in most cases vicariously liable for the actions of their employees. We strongly urge all employers to remind employees that this differential treatment is not permissible. Employers should likely go further and communicate that any employee who behaves in such a manner will be subject to corrective action and, possibly, discipline.

Please note that the Policy was published on March 13, 2020, and is subject to change as the COVID-19 pandemic continues to evolve. To learn more about handling COVID-19 in your workplace and discuss whether there may be human rights considerations in your particular situation, please contact a member of [Gowling WLG's Employment, Labour & Equalities Group](#).

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[1] Although not discriminatory, whether or not layoff is permitted will depend on the specific employment circumstances.

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