

ON-DEMAND WEBINAR | COVID-19: MANAGING YOUR WORKFORCE THROUGH CRISIS

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Across all sectors, efforts to contain COVID-19 have significantly impacted the continuity of business in Canada - and forced employers to ask tough questions. To help our clients navigate this challenging time, Gowling WLG's Employment, Labour & Equalities Group invites you to watch our on-demand webinar, designed to give clarity on a range of complex employment law topics - including with respect to recently announced legislation.

Topics include:

- New COVID-19-related leaves and their implications on your workforce
- Temporary layoffs and their implications
- Forcing employees to take vacations
- Mandatory overtime and excess hour agreements
- Medical notes
- Work sharing
- Remote work arrangements

Transcript

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Neena Gupta: Good afternoon everyone, or good morning as the case may be. My name is Neena Gupta and I'm a partner at Gowling WLG. I'm joined by my partner Will Cascadden. Given the anticipated questions we're going to have I'm going to skip the formal introductions. In these difficult times we try to keep our morale up by talking about fun things. Will has three 2 legged children who are all grown up and three 4 legged doggie children who, well, some are very, very good and one is not so good. I personally have been spending a lot of my time with my 2 legged child, my 4 legged kitty cats and trying to keep sane in these very difficult times. Welcome to our first COVID-19 Employer Briefing: Managing your Workforce Through Crisis. We anticipate that there will be a lot of such briefings. I thought it would be helpful for everyone to understand what we're trying to accomplish on this call and what we're trying to do is kind of consolidate the questions that we have received and try to answer them on a fairly generic level. We will not be able to take very specific fact based questions but, if you have a more generic question please use the Q&A or chat function, and Will and I will do the best we can to get to as many of them as we can. You can see the agenda. These sort of represent a round-up of the questions that we have been receiving over the last week, including over the weekend, and we'll try to get them to at high level for everyone. This seminar is over subscribed and so we are re-running it at 2:00pm as well. If you know somebody who wishes that they had done this call, and was unable to get onto it, let us know and we'll send you the coordinates for the 2:00 call.

Couple of things. This is not intended to be legal advice and, as many of you know, law is difficult. On a high level basis we cannot cover all the ins and outs and relevant details. We strongly urge you to consult with your own lawyer on your own situation before making any decisions. The other thing that's unprecedented is that the situation is extremely fluid and changing on a daily basis. I had to make changes to these slides this morning because there's things that have changed. We need to know that. I'm called in Ontario. Will is called in Alberta, does a lot of BC work, and each Province has their own variation. Also, mindful of the fact that some industries are also governed by Federal laws, such as

inter-provincial trucking and pipelines. The joy of Federalism is that there are variations on themes that are unique to each jurisdiction. Finally, we will not really be covering the unionized work place, except to mention that unionized work places are governed by the collective agreement, and that is a work first place that any unionized employer needs to go when they're contemplating changes due to COVID-19.

Will Cascadden: Thank you Neena. I have three dogs. They're the only people that I'm aware of that are actually enjoying this time. They are getting a lot more attention than usual, and when things go back to normal I suspect they'll be disappointed, but that's the way it goes. I want to start chatting a little bit about temporary layoffs. We are getting a lot of questions about issues that really lead to a possible solution, temporary layoff of employees. What that means is they're not being terminated, permanently, but they are being essentially sent home without pay for a period of time. The concept is easy. The application and implementation is very difficult and this is one thing that really, really varies between Provinces. One of the things that I will mention is that there's an interplay of employment standards legislation and the common law. The common law, of course, is judge made law and it's that law that creates the obligation. For example, to give reasonable notice of dismissal beyond what the employment standards legislation sets out as the minimum notice, and in some cases the minimum notice, or pay in lieu of notice, and the statutory severance obligation. Insofar as employment standards legislation applies to the concept of temporary layoff the requirements, the availability of it, really varies between Provinces. Just as an example, Saskatchewan and Nova Scotia permit temporary layoff of no more than 6 days. British Columbia allows 13 weeks. Alberta allows up to 60 days, provided various criteria are met. For example, in British Columbia temporary layoff is only available if there's an agreement in place that permits that this is a statutory requirement. That means either you have an agreement, such as a collective agreement that specifically states that employees can be temporarily laid off, or the employee actually agrees to it. If you don't have that in place, or you're not in an industry where temporary layoff is generally permitted, you are going to find yourself in a situation where you cannot temporarily layoff in British Columbia. More specifics of the time for temporary layoff personnel on the next slide but I'm not there yet. I'll just tell you quickly. In Alberta, as another example, in Alberta you can temporarily layoff employees for up to 60 days, provided the notification information you provide is specifically in compliance with the employment standards requirements, and this includes setting out the statute, setting out a specific recall date and various other criteria. If you don't meet that notification criteria it's not about temporary layoff. Which means that you do not actually comply with the employment standards requirements for temporary layoff. That means that you are not temporarily laying them off. You're actually permanently dismissing them which will call

for employment standards, and probably common law, severance or pay in lieu of notice.

If we go onto the next slide you'll see that the length of time for temporary layoff really varies from Province to Province, however, they identified the 60 days for Alberta, the 13 weeks for British Columbia, the 6 days for Saskatchewan and other Provinces, and Quebec has 6 months. That is not the place to start when you're considering this. That's probably the place to finish. The first thing you should figure out is whether you're allowed to do it all and, if so, how you can best effect it. The one thing I will say is that in almost every Province, even though the statute, the employment standards legislation, permits temporary layoff under the statute, there is a reasonably high likelihood that a court looking at it would say, "Even though the employment standards code or act, or whatever the legislation is, says you can temporarily layoff if you comply with the legislation," the courts might still say, "Well, it's constructive dismissal." What that means is an employee who is constructively dismissed can create him or herself as having been actually wrongfully dismissed and make a claim for severance.

This slide sets out some specific, more specific, issues that you should be aware of when you're dealing with temporary layoffs. There are a number of other things you need to be aware of that are set out in this slide. The main one is you need to be very careful about the notice provisions and the timing of these things, which we'll talk about in a little more detail, the number of people that are being affected by this.

Neena: Thank you Will. One of the things that I worry about is, is two things we need to deal with when in crisis mode. When you're in crisis mode it's sometimes hard to think a little bit ahead as in where indicated the permitted layoff varies from 6 days in Saskatchewan to possibly 6 months in Quebec. That we have this issue of constructive dismissal in the common law Provinces. What that means is, as Will pointed out, you may start seeing clients from plaintiff's lawyers or your employee saying, "I want my package right now." What that may entail is a pretty tough response saying, "We are in unprecedented times. We're treating this as a layoff. We will call you back. We'll deal with the legalities later and whether or not its constructive dismissal. Let's talk at a later point in time." I've been told that somebody can't hear me so just give me one second. If somebody could tell me if they can hear me better that would be very helpful.

Will: Can I just say one thing, Neena?

Neena: Yes, go ahead.

Will: Just on the constructive dismissal piece, as Neena pointed out, the appropriate response to someone who claims to be constructively dismissed is basically, "We're

dealing with this as a temporary layoff, we're going to recall you, we'll deal with it later." Our general advice to most employers, depending on the jurisdiction is, yes, you have this risk of constructive dismissal but your alternative is simply permanent termination. Permanent termination definitely gives rise to an obligation to give pay in lieu of notice or severance. Even though there's a pretty good chance it would be a constructive dismissal, you're still in a better position going through that process and dealing with the fall out of it after things settle down, then effectively terminating people immediately.

Neena: I agree, Will. One of the things that we need to worry about is also what is the maximum time period permitted for temporary layoffs. There have been no changes to the ESA's or the employment standards codes or the normes du travail in Quebec with respect to periods of time permitted for what is a temporary layoff. If you exceed the temporary period established in your Province, or under the Canada Labour Code if that is what you're governed by, it then triggers statutory rights. Those statutory rights can be notice, or pay in lieu of notice in your jurisdiction, and in certain jurisdictions it triggers statutory severance. And of course, as we've pointed out before, there are common law requirements that may be triggered depending on the implied, or written, terms of your employment arrangement with your employee. One of the things to keep an eye on is the time clock. If you are going to lay off people make sure you diarize when the temporary layoff becomes permanent and start thinking about what are you going to do then.

Will: Sorry. Just on that. In some jurisdictions, Alberta for example, although the Alberta temporary layoff period is 60 days the legislation does permit the parties, which is the employer and the employee, to agree to an extension of the temporary layoff period. So there may be alternatives as you approach the end of that period to find ways to extend it or deal with it another fashion. And again, your situation will dictate what your options are but it's something that you need to be thinking about before you get to the end. I'm telling people to start looking at it about 15 days ahead of time so we have time to come up with a strategy and approach. Thanks Neena.

Neena: The other thing, I have to tell you, I've been practicing for over 30 years and there is no doubt that this is the most overwhelming crisis, from a employment law perspective, that I have experienced. What I would say is almost every Province has a mass termination provision. What that mass termination provision is designed to do is if you are letting go of a certain number of employees, as low as 10 in Saskatchewan, Quebec and Nova Scotia, 25% of the workforce in New Brunswick, or in Ontario, for example, 50 employees, it may well be that you have an obligation to advise the government of that change. You may have an obligation to "post" that. Given that so many businesses are actually physically shut down it is really interesting as to how you post but perhaps it's an

intranet posting requirement. But having said that, it's important that you comply with the mass termination requirements as there's case law in some Provinces which say that the time clock on the notice you're paying doesn't actually start until the director of employment standards, or the director of labour standards, or the government is actually advised. So keep an eye. You guys are all professionals. Check it on the internet. Keep on an eye on the mass termination thresholds in your Province. Perhaps you could comment on that, Will, because I know Alberta has been doubly hit in the last few months and has experienced already a lot of mass terminations.

Will: Right, with the unprecedented drop in oil prices, coupled with the current pandemic situation, Alberta has suffered a uniquely unfortunate situation. In Alberta the mass termination notices, this is just an example, is actually quite similar to BC. If you're termination 50 or more employees from a single location, within a 4 week period, you're obligation to give advance notice to the Minister is triggered. That notice depends on how many people are being dismissed and ranges from 4 to 8 weeks up to 12, again depending on how many you're dealing with. There are ways to avoid the notification obligation. For example, if you are laying employees off or terminating employees in various locations, depending on what jurisdiction you're in, the number of employees may not be enough in each location to trigger the obligation. But again, it's something to be aware of, deal with proactively. In your case if you think you are going to be letting go basically more than 10, depending on the jurisdiction, but if it looks like you're going to let go more than 10 you should at least raise the issue so that you know whether you are required or not.

Neena: Thank you, Will. We've been getting a lot of questions with respect about, I thought I'd take a couple. One is in many cases employers have been told they must shut down. That's restaurants, you may think this is trivial but I apparently get a haircut for the next 2 weeks. So that's not quite as big an issue for you but for me it's a big issue.

Will: Yeah. I was going to say that's one of those things that affects some people differently.

Neena: So, the issue that's been raised, is do we think that the risk of constructive dismissal is lower in those industries which have been effectively been forced to shut down because of government orders in order to comply with various public health or provincial requirements? Will?

Will: I'm sorry.

Neena: Did you drift off?

Will: No. Because I got a question about the quality of the audio and I thought it was fine. Say that again, please, Neena.

Neena: The question that's been posed by a number of attendees is a good one, which is many businesses are actually closed down because they have to. That's the hairdressers, the restaurants, the schools, the recreational centers, and do we think there's a lesser risk of constructive dismissal argument when an employer is effectively obeying an order or requirement of the Province or public health authorities?

Will: The answer is yes. There is a lower risk. If you're ordered to shut down or you're effectively have no alternative but to shut down. For example, if you operate a business in a shopping mall and the shopping mall is required to shut down you obviously have to shut your business. That may create what in legal terms is called force majeure or an act of God. What it really means is a situation that arises through no one's fault that causes the contract, and of course employment relationship is contractual, it causes the contract to be unable to be performed by either party. It's no one's fault and so the liability that arises from that particular termination is more evenly spread between the parties and, in that case, it would be very difficult to say that it was constructive dismissal because constructive dismissal is, of course, a unilateral change to a fundamental term of employment imposed by the employer, and not accepted by the employee. In a situation where the business is forced to shut down it's not a unilateral change.

Neena: Alright. So we are hopeful, I'm particularly hopeful, that the courts will have a realistic approach to the issue of constructive dismissal. I was a bit disappointed, quite frankly, in our court system in the '08 - '09 financial crisis because I didn't see the sensitivity and, in the case law under ... but I think COVID-19 is so overwhelming and crosses all industries, I'm really hopeful the courts will be realistic about what force majeure and the overwhelming circumstances.

Will: Sorry. I was just going to add to that. The other piece is, even if it's a permanent termination, either by effective statute or because it's a claim of constructive dismissal, if when the situation settles down a bit you offer the employee a return to work, at the very least your mitigating your risk and you are also making the point that the reason for the termination of employment was a sense of this force majeure situation. That should help to put you in a better light with the court if you actually face constructive dismissal claim in that situation. I'm with Neena. I hope that the courts are a little more reasonable about it. I've heard that some lawyers interviewed on various media saying, "It doesn't matter. It doesn't matter what's causing it. The law says X, employees have all these rights, employers don't. Too bad." I'm hoping that that's not going to be enforced in the same

way as Neena pointed out. It was enforced in '89.

Neena: 2008, 2009 but that's okay. I was around in '89 as well.

Will: Sorry. I notice you said you've been practicing for 30 years and you're the only person I know who started practicing law at 7 years of age.

Neena: Thank you, dearest, I do love you. Okay. In a totally respectful, consistent with Gowling, respect in the workplace kind of way. Flattery is nice in these difficult times. One of the things that I wanted to just highlight and we've actually gotten some questions on it. So if I can get you to move to the next slide, Shannon, that would be great. One of the things that has caused all employment lawyers to have to stay up late and catch up is the fact that the Provinces, and I believe the Feds, will introduce, every Province has announced they're going to do something. The question is when are they going to do it and is it in force? In Ontario there are new job-protected leaves that are in force and they were retroactive. So in other words in that the idea was we've known that COVID-19 has been an issue in the offering. We want to make sure that people have job-protected leaves even though the legislation may not have caught up. Job-protected leaves have been generally given to people who have been required to self-isolate. I have friends who are just coming back from India. They're going to be forced to stay home for 2 weeks. But there's a diagnosis of COVID-19, a presumptive COVID-19, or like many of your employees, they have to care for a child because there's no daycares open, or very few, and schools open. Or they have somebody in their family who is sick. Those people who you may have laid off already, effectively have a right to convert their layoff to a job protective leave. There's some advantages to doing that, from an EI perspective, because they are entitled to get employment insurance from day 1, as opposed to having that 1 week delay period. And although we don't know the full ins or outs of how the Federal government is going to administer this, I know Quebec has its own leaves, but independent contractors who typically cannot share in the EI system will be entitled to emergency care and emergency support leave and we anticipate seeing more details of that tomorrow, when Parliament is back in session. Essentially, what I'm trying to alert everyone to is the fact that if you have, like I do and I was going to actually bring it to the seminar, I've got this 3 inch volume of the Employment Standards Act, it's out of date and you need to go on the web, in your Province or Federally, to check what those job protected leads are. I've gotten a couple of questions, Will, about converting leads. And typically it's not as difficult as people think. It requires an amended record of employment and to indicate the reason for amendment is that you are changing the category of leave. I don't know if there's anything else you want to add, Will, on the job protected leaves that we're seeing across the country.

Will: Just two things. Again, the Premier of Alberta announced a week ago last Friday, that the self-isolation there was going to be a paid job protected leave and, of course, the Provincial government didn't actually explain what that meant, nor put out the appropriate legislation. So, what happened to a number of my clients was their employees thought they were going to get 14 days of extra paid vacation. In Alberta, and we'll talk more about doctor's notes in a moment, in Alberta the Premier also stated that this leave would not require a doctor's note. So a number of employees basically said, "Hey, I'm going to go on a 14 day self-isolation leave. Please let me go." Of course, they did because it's a job protective leave and a doctor's note is not required. You're required as an employer to essentially take the word of your employee. Then last week we discovered, as most of us anticipated, the paid aspect of it was not that the employers are required to continue to pay you while you are on leave, it was simply that you could apply for employment insurance illness benefits and the 1 week waiting period would be waived. When this discovered a number of these people who thought it was a 14 day paid vacation said, "Oh, I feel better now. I'm coming back." The thing was he would have to let them come back and the answer was, no, because they identified themselves as requiring a self-isolation leave they have to complete it. That leads to, perhaps we could go to the next slide, the doctor's note requirement. The fact that doctor's notes are generally required by most employers for most illness leaves does not sit well with the medical profession. Doctors, for the most part, hate giving medical notes and frankly, there's a lot of doctors who will give a note for anything upon request without actually even assessing it. As I said before, Alberta specifically does not require doctor's notes from employees who are self-isolating. I think in other jurisdictions there's a similar mandatory waiver of that. Practically speaking it's very, very difficult for people to get medical notes, anyway. They would have to go to their doctor. In Alberta most doctor's offices are shut down and people are having to deal with their doctors adversely. So, the point of all that is I don't think it's reasonable to require medical notes for people going on self-isolation leave or actual sick leave, either because they have tested positive for COVID-19 or indeed they're just ill. One thing that I will say is employers are going to be, they're already dealing with people who have been on leave, required to come back. What we're telling employers that they should do is, again, not require a medical note before they come back but have the employees go through an assessment, which we generally suggest is a questionnaire, where the employer asks the employee questions like, "Why did you self-isolate? Are you suffering from any symptoms? Did you suffer any symptoms? Has anything occurred that suggests you need to continue self-isolation, etcetera, etcetera." Basically having the employee verify that he or she is in a position to return to work. They've self-isolated. They aren't sick. They can come back to work. One thing we're putting on that questionnaire is a thing

that says, "If you lie on this form you are subject to discipline." In other words we don't want people lying saying, "Hey, I'm healthy, I'm ready to come back.", when they are not because that creates a huge, huge issue, as you can imagine. We are helping employers put together these types of questionnaires and I strongly recommend that you have a process for when people are ready to come back.

Neena: Thank you, Will, and just one comment on doctor's notes and doctor's visits. There was a world before COVID-19. It's hard to remember that but there are employees who are away due to other conditions and other concerns or they may be being accommodated because of some underlying non-COVID-19 health issues. Just a general warning it's going to be very difficult to get any kind of health care reports from actual practitioners in the foreseeable future. My own doctor has gone to virtual visits only, unless there's specific arrangements made, and they've already made it clear that they're not going to deal with administrative stuff, of which doctor's notes and reports are considered to be, high on the list of things they don't want to do. So just a warning or a, what do you want to call it? A heads up. In general I think what we are finding is doctors have always hated doing notes. Sending people into health care facilities to get notes is just not going to be socially acceptable anymore. And we may be seeing some of the beginnings of a change that will have a trickle down effect even after the COVID-19 crisis is over. Which I'm really hoping is soon. One of the things that we get asked about a lot is that formal written confirmation. We also put in information, or recommend that you put information, current information based on the Public Health of Canada's website regarding when people should be allowed to come home. Sort of emphasize the message that there is a health care issue here, please don't come back too soon. It's not just your own health but it's also the health of anybody that you've been in close contact with that impacts upon your ability to come back. One of the reasons that I'm doing this from home is I have seasonal allergies and they have started. I have started coughing. But I have no way of knowing whether that's just my regular "I'm allergic to everything cough" or if that is a COVID-19 cough so I'm self-isolating and will be for the next 14 days. That just gives you an example of how people should be careful. We're getting a lot of questions, Will, Shannon, about work sharing and supplementary unemployment insurance benefits. Wondering if you want to go to the next slide?

Work sharing has been in the Federal government's EI legislation for a very long time. The part that you see on this slide is actually taken right from the website that I've quoted. Essentially, employees have to agree to work share. There must be a reduced schedule of work and effectively you identify a group of employees who will share the work and therefore, not be laid off and thereby not be terminated. It's intended effectively to be a

way of sharing the pay. You'll see it's a voluntary program. You can't force employees into it and it's a "temporary" reduced work week while the employer recovers, and goes back to normal, or close to normal levels.

Essentially, one of things that they announced last week is that the duration of work shares can actually now go up to 76 weeks. Also, for some employers, the mandatory work week waiting period has been waived. The problem is it's ambiguous on the website. When you read it one way it sounds like the mandatory waiting period has been waived for all employers and if you read it another way, it's only for employers who already have a work sharing approval and they want to extend it. We are trying to essentially do two things. One is to obtain clarification but more importantly, to lobby the Federal government to waive the mandatory waiting period, and also to waive the 30 day administrative delay. Typically, if you apply today for work sharing, you have to wait 30 days to get approval and I can tell you most of my employer clients can't wait 30 days for approval. They're just going to send everybody on a temporary layoff. If you want to do something useful I would say lobby your Federal representative to update the work sharing program so there isn't a 30 day delay in approvals. That there is a deemed approval or approval from day one. Work sharing might be very useful for companies who have actually done work sharing before because it kind of allows a seamless way of extending or renewing it. I'm not confident that it is good for the vast majority of our clients who have not used work sharing before. Will, do you have any insight from Alberta because you guys kind of hit the rough one sooner than we did on the use of work sharing.

Will: Well, two things. One is we have clients who are simply, I was going to say posing work share, but perhaps a better way to say it is, reached agreements with employees to work share without specifically engaging the employment insurance process. Again, that may be treading in the waters of constructive dismissal again, but practically speaking most of their employees understand and are agreeing to it. Even though it's not the Federal work sharing EI program that they're using they are able to work something out. This is some of our smaller employers who were able to speak one on one with their employees. The second thing is that if you have a unionized work force, the union needs to be involved in the process as well. Until the other side says an agreement among 3 parties, you can't replace employees with union when that applies. Then I guess the last thing I would say is, if you are in a jurisdiction where you have a longer temporary work layoff process, in Alberta 60 days, BC 13 weeks, whatever, that is something that you can think about in advance of your expected recall date. Perhaps make your application 30 days or more in advance so that when people are able to come back you can maybe jump into a work share program. Again, that will depend on the circumstances of your work

place, the workforce, but it is one thing when we talk about being proactive with the temporary layoff to think about well ahead of the game.

Neena: It's sort of like if you're looking at what's coming down the pipeline a week in advance it's hard to think 30 days or 45 days in advance so that's an excellent point. Just had a question and just that forms for work sharing are available online and essentially, what it means is that somebody, I'm going to give a hypothetical, goes down to a 3 day work week they would be eligible for EI for the 2 days remaining. The fact that they're earning 60% of their regular income would not be used to claw back or reduce EI benefits. That's the primary benefit of work sharing, is that it helps share the pay a little bit. We don't have a slide on supplementary unemployment benefits. A number of my employers are saying, "Look, we'd like to help our employees. Can we top up EI?" Well, the problem with topping up EI is that it is considered to be a payment from an employer to an employee. Typically that would be a wage and that wage would be used to determine if there are any earnings or interruptions in earnings. What I would recommend that you do is if you're thinking of doing this, is recognize there will be a delay, 2 to 4 week delay. 2 weeks was normal for delay in pre-COVID times. It might even be longer. Consider registering, if you think you're going to do this, now for supplementary unemployment benefit plan and then consider, during the waiting period, whether you want to get into a loan agreement where you lend people monies and then convert that loan to SUB top up when the approval comes in. It's the only way I can think of, quite frankly, to avoid the jeopardy of trying to help your employees out but then finding your disempowering them or reducing their EI benefits. I think that when we do this re-run we'll through in a slide for supplementary unemployment benefits questions as well because we have gotten a few.

Will: The slides will be posted on the website. People will be able to access that including the links to the various EI sections that deal with this. Just a couple of things about that. One of them is there's never been so many applications for EI as there has been in the last 2 weeks. I suspect everything is delayed in that process. I guess be prepared for that and be patient, particularly from the employers side. I'm glad that you made that point about not topping people up on EI because I'm aware of people who've tried to do that, and you said, they basically cause people to become ineligible when their intention was to actually do the opposite.

Neena: Right. It's hard to believe, Will, if I could just get the next slide. When we talked about shortages of work and layoffs and job sharing, but actually I have a number of clients who in this situation are finding that they're short of workers. This started off partially because so many workers have had to stay home and do the self-isolation or

taking care of their children. The issue is can I force people to work more? Is that a form of constructive dismissal? Is that a regulatory offence because under the employment standards legislation of all of the Provinces there are limits on how many hours people can work in a day and/or a week and the question is, what do you think we should do? I can give my standard answer which is I think in some cases you could argue that this is an emergency situation. Particularly if you have a business that isn't a supply chain. I have people who manufacture and distribute cleaning supplies, Kleenexes, generic paper things like paper towels, so they are working really hard because there is an unprecedented demand for it. I can think you can argue that this is an emergency situation. Every Province, every jurisdiction has a slightly different definition. This is definitely where you want to talk to your lawyer about whether or not you can actually deal with this. I suspect for many of my clients they're going to be in a situation for a while so now you might want to get an excess hours agreement by, in writing, get it approved if in your jurisdiction you need to get it approved. Will keeps reminding us of about the unionized situation. If they're unionized you have to bring your union reps in and deal with that with your union reps. Are you seeing anything like that in Alberta?

Will: Yes. I agree with what you said, Neena. The problem we face is the concept of an emergency situation for requiring employees to work extra time is really designed to deal with a sudden incident. For example, pipeline burst. Will we need all hands on that to deal with it right now. Let's everybody come to work and we're going to stay at work for 16 hours until it's fixed, or at least under control. The concept of an emergency situation isn't really, in my read of most of the legislation, assigned to deal with an ongoing emergency like we have now. People need to be cautious about that. What I can tell you is there are a number of employers in Calgary who are desperately trying to hire people. Grocery stores and other stores are trying to hire people to work in the evenings, or at night, to restock shelves. There's a huge demand for delivery drivers, etcetera. So, I'm telling my clients who actually have this situation, assuming that the work is such that they can hire people right away, to actually do some hiring. Do it on a temporary basis for a fixed term or maybe for a specific project. Just as another way to deal with it, because if you're going to try to rely on the emergency provisions in the employment standards code, you want to show that you did your due diligence which really means you did everything you could to avoid making people work more than, for example 12 consecutive hours, which is the limit in Alberta. The second thing is, and this is more identifying the issue as opposed to giving an answer, is we have a number of clients who have what they consider to be essential services and they can't have employees self-isolating because they have to keep operating power plants, water treatment plants, refineries, various types of production plants and so, the issue they're facing is what do we do? We've got clients who are

talking about everything from essentially sequestering their workers saying, "You go to work and then we take you in a bus to the hotel and you have no access to anything outside until this is over because we can't have people getting sick. We can't have the infection in the work place because we'll have to shut down our power plant and we have to keep supplying power." Again, I'm just identifying that as something to think about and this is going to tie into Provincial and Federal emergency measures legislation and that sort of thing. But if you are in a situation where you are concerned that if you are required to stop operating it's going to have a significant detrimental affect on, I'll say the functioning of society, you better start thinking about that stuff.

Neena: Yes, and we live in crazy times and I'm fully anticipating more direction from the various ministries of labour on various types of issues that we've raised in this conference call. That's one of the reasons why the employment and labour law group has been working overtime and a lot of excess hours because it has been hard to digest all of the directives and changes that have happened over the last week. I expect more.

Will: Sorry. Yeah, the other one that people need to really think about is inter-provincial travel. Currently, I believe, the Northwest Territories for sure, I believe Nova Scotia have actually imposed restricted access to those Provinces from other Provinces. That may occur before too long in those places, for example, Lloyd Westminster in Alberta is on the border between Saskatchewan and Alberta. There are people that commute back and forth to work. People need to just be aware that that may be coming down and think about how we're going to deal with that. Then I do get questions from clients who say, "What do I do?". Sometimes the answer is, "I don't know.". Because, this is as you say, totally unprecedented, never happened before, hopefully never happens again.

Neena: Yes, and as you know as lawyers, we don't like saying, "We don't know.", but in this case we have no choice because things are changing and, quite frankly, I've phoned government offices and they've told me, "We don't know the answer to your question.". They promise to get back to you.

Will: Well, right. The one little other last heads up I give is Parliament is being recalled tomorrow. They say it's just to pass legislation to free more money but I think that there's a pretty good chance they're going to actually pass the Emergency Measures Act and that's going to create the power to impose additional restrictions on really short notice. Again, people need to be prepared for that.

Neena: A couple of people have asked questions. If we could just stick to them. They've anticipated our next slide. If I could get to the next slide, please. One of the questions that we've been asked a lot on Q&A, can we just force salaried people to take their vacation?

The idea being that salaried people may have 2 to 4 weeks of vacation eligibility, if they took it now their income wouldn't go down, and it helps the employer out a little bit because it reduces payroll costs and typically vacation monies are already budgeted for. They're kept in trust. They're essentially not spending additional money. And the answer, there's a couple of things to think about when they're forcing employees to take vacation time, or if they even ask to take vacation time, is that typically it will postpone employees EI eligibility. Right? That slide is wrong. We're going to have to change that for the 2:00. So eligibility for EI because it's essentially treated as week for earning. Many of you have heard, oh yes, Justin Trudeau said there would be waiting period for EI but that's only for people who are in self-isolation, or are taking care of somebody like a child, due to the COVID-19 crisis. As far as I can that 1 week delay on EI still applies for regular layoff. In the past, forcing people to take a vacation when your practice is for them to get to pick their time, or they've already picked their time and you're now asking them to take it earlier, has been treated as a breach of contract. I mean, I'm going to be very practical. What are the damages for that? The damages are arguably that the person didn't get the paid vacation later on but they got it pre-paid. I don't know. What's your view on forced vacation?

Will: Well, some employment standards legislation, for example Alberta's, actually allows the employer to require employees to take vacation with advance notice. Under the statute. Again, there's the issue of whether that's a constructive dismissal. But I think if you couple the fact that we're in this unique situation, with the fact that legislation permits employers to aptly impose vacation with advance notice, it's probably not a bad option for employers to consider. Particularly as you say there's really no loss. The other thing that I would say is that because it doesn't impact EI eligibility, some of our clients who are doing temporary layoffs are actually paying out employees vacation, or at least saying they'll pay your earned but unused vacation on the date of your temporary layoff, if you wish, simply to help them get over that waiting period and then deal with the fact that their income will be reduced. Again, it's hard to simply unilaterally pay it, although again, what's the employees loss if you do? There are options you can work with but again, you really need to look at your situation, what Province you're in, what is your agreement with your employees, what is your past practice, that kind of thing. There are things that you can do there. It is certainly something to look at, particularly as an employer, you have accumulated liability for earned but unused vacation, anyway. If you can at least use it to help your employees and help your financial situation then it is something that's worth looking at.

Neena: One of the things, if we could go to the next slide, is I'm working from home. I

have commandeered the dining room table to the great disgust of my cats who like sitting underneath the dining room table, and I've kicked them out as well, so I thought I would just go through some pointers. Remote working and I've actually given you some really good resources but, Will, is remote working something that you seen is happening a lot in Alberta?

Will: Yes. It's happening almost universally for people that are working in offices. They are working remotely. Our firm, for example, was very proactive. Retained a bunch of IT in anticipation of this and so our office is essentially able to work remotely and is doing very well. The concerns, of course, are set out in the slide. Health and safety concerns, are employees working in a safe location. There are different requirements in terms of ensuring safety for people working in their own house but it is still something that an employer needs to be aware of. And, this is really important and something I think some of our client's aren't thinking about is, ensuring that you maintain confidentiality of your confidential proprietary information. Make sure people are not, for example, using their own home computer that doesn't have proper virus protection to do your sense of work place work. Things like that. Those are all things you need to be aware of. Some of our clients have really excellent information technology departments that are helping them with that. Other ones really don't and so we've got some clients who basically people are emailing files and documents from their work email to their home email, using their home computer that has outdated security software on it and dealing with really sensitive information. The company has no answer to that because they just don't have the IT set up that the other ones do. Those are the two issues that I think you need to look at for the remote work. I think it's almost a requirement in most places nowadays, if it's possible for people to work remotely, you have to let them and make them work remotely. And, also, in some sense deals with the increased childcare requirements that are coming out, that have developed as a result of closure of schools, daycares, after school care programs, swim lessons, etcetera. Because people who are working remotely can still assist with the childcare aspect of that's come as a result of this crisis.

Neena: Right. One thing I would point out is work from home is hard to do especially when you have very young children because they really need a lot of attention. I think you need to have individualized discussions regarding what is realistic, how many hours a day can somebody really work where they're really doing productive work, are they really able to do 7 hours or 8 hours of productive work, or do they need to split that day with their spouse or another person. There are people who are saying I can't work. I know that you've given me the technology to work but I really need to take care of my kids. In that case that's why we have the job protected leave that is available to these people and,

presumably, the accelerated EI; no waiting period for that week. You need to have a realistic discussion. Even in our own firm we've had some discussions about whether or not a laptop is enough. I can tell you, personally, I can't work 12 hours a day on a little keyboard and a tiny monitor. As I said, I was 7 when I started law, but my eyes are getting tired and I can't do a 12 hour day on a laptop screen. Those are some of the things that there may be some additional expenses but employers are going to have to think about, or once we get over this week, we may have to think about can we ship additional equipment to employees. But for those employees who can work from home, it's actually not just productive work, it's also quite frankly a way of breaching the social isolation you feel. I have to tell you, personally, I was really shocked to find out how much I felt deprived when I wasn't allowed to go into the office and interact with my colleagues. Not sure everybody agrees with me but certainly for me that was an important thing to learn about how much we rely on our co-workers for social interaction.

Will: Yeah, and then we don't even really need to do our second webinar today but it's so nice to be able to actually speak to people but we're going to do it anyway. I'm kidding of course. We are tremendously subscribed for this and we really appreciate people's interest and we certainly understand the nervousness that this situation is creating. So please do reach out to us. We are all working in this firm. I know that all of our labour employment colleagues are going full steam all the time. That means they are totally accessible by phone, by email, and any other way that you can reach out. I encourage you to do that. I encourage to reach out to your friends, relatives, neighbours, electronically, just to do that. Some friends of mine and I had a little ZooChat party the other night. Actually, you don't realize you go through that how much people are missing social interaction. As employers, I think if you can do something to encourage that amongst your employees it really will help with the mental state morale aspect of this weird time.

Neena: Thank you, Will. I will not share the private pictures of my partners in pyjama party. Then on that note, if we could get to the last final slide, please. So, these are contact information so if you have questions, even though we're not called to all of the Provinces, we'll try to get you to a lawyer who can handle your questions, if you have specific questions for your work place. I want to thank everybody for their attention. I want to apologize to those people that we couldn't deal with their questions but we literally ran out of time. I hope you found this helpful. One final note, if you want to get our written COVID-19 briefings I encourage you to go to www.gowlingwlg.com. It is bit cumbersome but you will actually have a button to subscribe to our updates and I encourage you to do so. As one of my managing partners says, "Stay well, keep calm and together we've got

this.". Thank you very much and I hope you join us for future briefings as well. Over to you Shannon.

Shannon: Thank you everyone for joining. There is another presentation at 2:00pm. If there's anyone that you would like to be invited to that presentation you can just email me at shannon.wadsworth@gowlingwlg.com. Thank you everyone.

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