



EMPLOYMENT, LABOUR & EQUALITIES LAW WEBINAR SERIES

RETURN TO OFFICE

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AGENDA

- **Re-opening your workplace – what employers need to know:**
 - Overview of employer obligations to return employees to a healthy and safe workplace
 - How to respond if employees refuse to return to work because of:
 - personal reasons (i.e. fear)
 - a claim that remote work is a term of employment
 - unsafe working conditions
 - human rights accommodation
- **Permanent Remote Work Arrangements**
 - What your Remote Work Policies or Agreements should cover
 - Things to consider if employees are working remotely in different jurisdictions
 - Special considerations for employees working remotely from Quebec

RETURNING WORKERS TO WORKPLACE SAFELY

- **Employers must follow:**
 - provincial instruction and guidance on workplace safety; and
 - Provincial/local public health and safety guidelines
- **In Ontario**
 - *Occupational Health and Safety Act* – health and safety rights and duties of everyone in the workplace
 - *Reopening Ontario (A flexible response to COVID-19) Act* – public health measures and restrictions

LIABILITY FOR BREACH OF OBLIGATIONS

Regulatory Liability

- Maximum penalties for a contravention of OHSA:
 - A fine of up to \$100,000 and/or up to 12 months imprisonment, for an individual
 - A fine of up to \$1,500,000 for a corporation.
- Maximum penalties for a breach of *Reopening Ontario (A flexible response to COVID-19) Act*
 - A fine of up to \$500,000 and a term of imprisonment of up to 12 months for an officer/director;
 - A fine of up to \$10,000,000, for a corporation

RETURNING WORKERS TO WORKPLACE SAFELY

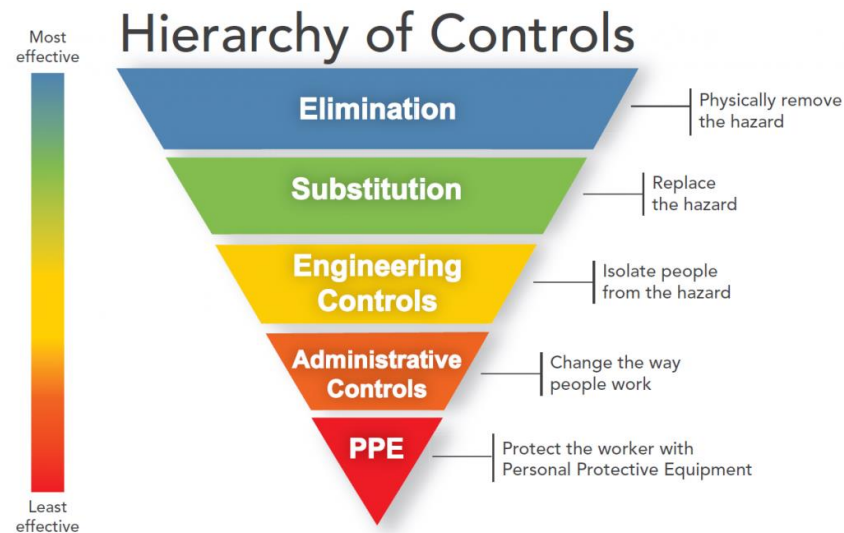
- **Ontario's *Occupational Health and Safety Act***
 - Employers must take every reasonable precaution in the circumstances to protect health and safety of workers
 - Includes duty to keep workers and workplaces safe and free from hazards posed by infectious diseases – COVID 19
 - Implementing control measures (i.e. screening, good ventilation, physical distancing, masking, cleaning/disinfecting protocols) to reduce the chance of workers being exposed to the COVID 19 virus

RETURNING WORKERS TO WORKPLACE SAFELY

- If employees are vaccinated, does this impact requirement to implement control measures?
- Current position - Ontario government:
 - Employers still need to maintain COVID 19 workplace control measures no matter how many workers are vaccinated.

WORKPLACE CONTROL MEASURES

- Choosing the right control measures for your workplace



WHAT'S HAPPENING IN STAGE 2?

- Applies as of June 30, 2021.
- Broadly stated: Further expanding outdoor activities and resuming limited indoor services with small numbers of people and with face coverings being worn.
- Mandated closure of specified businesses unless they can meet **all** requirements under the Regulation.
- The person responsible for a business shall ensure the business operates in accordance with **all applicable laws**, including the *Occupational Health and Safety Act*, as well as the advice of public health officials and the Chief Medical Officer of Health, including recommendations on physical distancing, cleaning/disinfecting and screening.

WHAT'S HAPPENING IN STAGE 2?

Requirements under the Regulation:

- Work from home is **still** the requirement
- COVID-19 safety plan
- Passive **and** active screening
- Masking, physical distancing
- Plexiglas barriers and/or physical distancing if mask is removed to consume food or drink
- PPE
- Capacity limits
- Cleaning requirements
- Contact tracing
- Limits on social events and gatherings

WHAT'S IN STORE FOR STAGE 3?

- Current guidance is that the province will remain at each step for **at least 21 days** to evaluate any impacts on key public health and health system indicators.
- Currently planned for Stage 3: Expanding access to indoor settings, with restrictions, including where there are larger numbers of people and where face coverings cannot always be worn.
- Work from home requirements?
- Material changes in safety measures?

WORKPLACE SAFETY PLAN

- **Workplace Safety Plan**
 - Ontario Government has posted a template Workplace Safety Plan on its website: <https://www.ontario.ca/page/develop-your-covid-19-workplace-safety-plan>

WORKPLACE SAFETY PLAN

- **Six key questions to be addressed in your Workplace Safety Plan:**
 - How will you ensure all workers know how and are able to keep themselves safe from exposure to COVID-19?
 - How will you screen for COVID-19?
 - How will you control the risk of transmission in your workplace?
 - What will you do if there is a potential case, or suspected exposure to, COVID-19 at your workplace?
 - How will you manage any new risks caused by changes to the way you operate your business?
 - How will you make sure your plan is working?

HOW WILL YOU ENSURE ALL WORKERS KNOW HOW AND ARE ABLE TO KEEP THEMSELVES SAFE FROM EXPOSURE TO COVID-19?

- **CLEAR communication is KEY**
 - **Inform, train and educate** employees on what they need to do to protect against transmitting COVID 19
 - Stay informed and up to date on public health and workplace safety guidance for COVID-19.
 - Share new information and guidance as soon as possible

HOW WILL YOU SCREEN FOR COVID-19?

- **Set out guidelines for COVID -19 screening**
 - Require employees to complete COVID-19 Screening Questionnaire before attending at work
 - Consider what type of COVID-19 screening you need for third parties attending your workspace (clients, suppliers, couriers)
 - Active v. Passive screening
 - Outline protocol if someone does not pass screening

HOW WILL YOU CONTROL THE RISK OF TRANSMISSION IN YOUR WORKPLACE?

- **Assess your workplace to determine what control measures are needed to reduce risk of transmission of COVID-19**
 - Physical distancing and separation
 - Masks, face coverings and eye protection
 - Enhanced Cleaning & Disinfecting
 - Maintain heating, conditioning and air ventilation
 - Encourage Hygiene and Respiratory Etiquette

SUSPECTED EXPOSURE TO COVID-19 AT YOUR WORKPLACE?

- **Develop and plan/protocol to deal with suspected exposure to COVID 19**
 - Step 1: Exclude symptomatic person from the workplace
 - Step 2: Contact public health for direction
 - Step 3: Guidelines for self-isolation and return to work
 - Step 4: Inform any employee who may have been exposed; Contact tracing
 - Step 5: Report to Ministry of Labour, Training and Skills Development, Health & Safety Representation or JHSC (as applicable) and the WSIB (if applicable)

HOW WILL YOU MANAGE ANY NEW RISKS CAUSED BY CHANGES TO THE WAY YOU OPERATE YOUR BUSINESS?

- **What has changed and does this change give rise to any new risks in your workplace?**
 - Any change in procedures that will bring new risks or challenges?
 - Are there other plans and protocols that may also need to be adapted for COVID-19?

HOW WILL YOU MAKE SURE YOUR PLAN IS WORKING?

- Form a COVID-19 Response Team to meet regularly and take charge of COVID-related issues.
- Involve your health and safety representatives or JHSC (as applicable) in evaluating how well the plan is working.
- Regularly monitor active confirmed cases or potential cases of COVID-19 to identify any trends that need to be addressed.
- Consider surveying employees to gather their feedback and ideas.
- Review and update Safety Plan regularly to ensure it is up to date and accounts for current health and safety guidance and complies with any new requirements.

EMPLOYEES THAT REFUSE TO RETURN BASED ON FEAR

Fear based on the commute / elevators

- Public Transit / Uber
- Offices / Landlords

Fear in office – generally

- Return to Work Safety Plan

Concern / Fear of the unvaccinated specifically

EMPLOYEES THAT REFUSE TO RETURN BASED ON FEAR

Nova Scotia ***Human Rights Act***, Chapter 214 of the Revised Statutes, 1989

Prohibition of discrimination

5 (1) No person shall in respect of:

(d) employment;

discriminate against an individual or class of individuals on account of

(p) an irrational fear of contracting an illness or disease;

EMPLOYEES THAT REFUSE TO RETURN BASED ON FEAR

Can employers insist on knowing if someone is vaccinated?

- Privacy considerations
- Should employers ask if anyone needs accommodation?

Do employees have a right to be advised / Do employers have an obligation to advise:

- Who is not vaccinated?
- Who has tested positive for COVID-19?

WORKING FROM HOME AS A TERM OF EMPLOYMENT

- When was the employee hired?
- If more recently, check their employment agreement.
- Review your remote working policies.
- Check in with management and specifically, the employee's direct supervisor.
- Consider what has been done for other employees.

REFUSE TO RETURN TO WORK BASED ON ALLEGATION THAT WORKPLACE IS NOT SAFE

Occupational Health and Safety Act (OHSA) / Canada Labour Code

Employers shall take every reasonable precaution to protect employees (workers)

Employees (workers) have the right to refuse unsafe work.

Employment Standards Act

- Employers are required to provide eligible employees with up to three days of **paid** infectious disease emergency leave for reasons related to COVID-19.
- Infectious disease emergency leave remains available to employees covered by the ESA after the end of the COVID-19 period on September 25, 2021.

ACCOMMODATION OF CODE GROUNDS

- Employees may seek return to work exemptions based on grounds that may trigger protections under the *Human Rights Code*.
- Most common *Code* protected grounds include disability/illness, marital status and family status (e.g. employee lives with a vulnerable person, child care obligations).
- Recent events may also trigger the need for accommodation requests on the basis of race, ancestry, place of origin and ethnic origin.
- The onus is still generally on the employee to request accommodation. However, if there are circumstances that suggest the employee may require these accommodations, the employer should still make inquiries.
- Different scenarios arise depending on whether the employee is able to work from home.

FLEXIBLE & REMOTE WORKING ARRANGEMENTS

Remote Work Policy or Remote Work Agreement

Set out clear terms that apply to the remote working arrangement to avoid confusion and manage expectations

- Work Schedule
- Term and Termination
- Communication
- Supply of Equipment
- Health and Safety/Inspections
- Accidents/Injury/Insurance
- Security
- Reimbursement of Costs
- Remote Work Location

FLEXIBLE & REMOTE WORK ARRANGEMENTS

Implications employees working in a different Province or Territory in Canada

- Employment Standards
- Human Rights / Pay Equity
- Health and Safety
- Privacy Legislation
- Income Tax obligations with respect to Québec

FLEXIBLE & REMOTE WORK ARRANGEMENTS

Implications of employees working remotely outside of Canada

- Tax implications for:
 1. The Employer - if a permanent establishment is created
 2. The Employee
- Immigration issues requiring a work permit
- Employment Standards / Human Rights / Pay Equity / Health and Safety / Privacy

REMOTE WORKING VS « DOING BUSINESS »

- Having an employee working remotely from their residence in Québec will not automatically trigger the application of all Québec employment-related laws.
- Key consideration: Does the employer have an establishment in Québec?
- The notion of establishment in Québec will vary depending on the applicable law.

REMOTE WORKING VS « DOING BUSINESS »

- General principle: Having an establishment in Québec means « doing business » in the province of Québec.
- Not limited to physical premises.
- An employer who has no residence, domicile, head office or office in Québec but who comes to Québec to fulfill a contract or render a service of a continuous nature through an employee, will be considered to have an enterprise in Québec.

REMOTE WORKING VS « DOING BUSINESS »

- Having an establishment in Québec → carrying on an enterprise in Québec.
- Performing, on a continuous basis, and with a certain degree of permanence, services or work through one or more employees (ARLS).
- Having an establishment requires facilities and equipment grouped in a location for the production or distribution of goods or services (AROHS & ARIAOD).

ACT RESPECTING LABOUR STANDARDS

- Applies to an employee who performs work both in Québec and outside Québec for an employer whose residence, domicile, undertaking, head office or office is in Québec.
- Recent case law confirmed that ARLS will also apply to an employee who is remotely working from Québec, as their residence may be considered as the employer's establishment in Québec.

INDUSTRIAL ACCIDENTS AND OCCUPATIONAL DISEASES

- The *Act Respecting Industrial Accidents and Occupational Diseases* applies only to workers to whom an industrial accident happens in Québec or who contracts an occupational disease in Québec and whose employer has an “establishment” in Québec.
- The notion of establishment requires facilities and equipment grouped in a location for the production or distribution of goods or services.
- Result: Potential exemption from the obligation to register with the CNESST.

OCCUPATIONAL HEALTH AND SAFETY

- The *Act Respecting Occupational Health and Safety* (AROSH) provides for a number of obligations for employers with regard to their employees.
- The AROSH does not provide specific rules regarding its application to an employer located outside Québec, as long as the work is performed in Québec, the AROSH will apply to the employer (and the employee).
- As in Ontario, the employer will need to ensure the safety of the employee's workplace and may set out certain conditions to that effect in a specific policy or agreement.

CHARTER OF THE RIGHTS AND FREEDOMS

- No particular territorial application.
- The Charter applies to all individuals located in Québec and all employers must abide by its provisions.
- Potential impacts :
 1. Right to privacy;
 2. No discrimination based on penal or criminal offense (if not related to employment).
- Potential claim for employees.

PRIVACY

- It should be noted that Québec, Alberta and British Columbia have their own provincial privacy laws.
- As such, the collection, use, communication and disclosure of any personal information on Québec-based employees will be governed by the *Act Respecting the Protection of Personal Information in the Private Sector*.
- Major impacts of upcoming Bill 64 in Québec (fines for non-compliance with the Act, security breach reporting, etc.).

CHARTER OF THE FRENCH LANGUAGE

- Similarly to the *Charter of the Rights and Freedoms*, the *Charter of the French Language* will likely apply to Québec-based employees.
- Potential impacts for employers based outside Québec (under the current version of the Charter).
- Upcoming impacts for employers based outside Québec pursuant to Bill 96.

QUESTIONS?