



Deloitte Legal Alert

Returning to work in a post COVID-19 world – guidance for employers

May 19, 2020

After almost two months of economic shutdown, and the loss of three million Canadian jobs in March and April alone, a number of Canadian provinces have announced plans to gradually reopen their economies. However, despite cautious optimism that infection rates are beginning to slow, COVID-19 continues to pose a very real threat to workers in workplaces of all kinds across the country.

Contacts:

Charif El-Khoury

Partner, Employment and Labour
Tel: 514-393-5581

Jessica Kearsey

Partner, Employment and Labour
Tel: 416-775-2302

A number of employers must now prepare for a return to work while ensuring the health and safety of their employees in a post-COVID-19 world. We provide some tips below as guidance to employers in managing operational, human resources and legal risks.

1) The basics

The occupational health and safety regimes in a number of provinces establish three fundamental obligations:

- (i) Employers must provide information, instruction, training and supervision to employees to protect their health and safety, and take every precaution reasonable in the circumstances for the protection of their employees.
- (ii) Employees also have obligations when it comes to ensuring occupational health and safety. For example, they must familiarize themselves with and obey applicable occupational health and safety rules and policies, as well as take necessary measures to ensure their health, safety or physical well-being as well as others.
- (iii) Employees have a right to refuse to work when doing so would expose them or another person to danger to their health, safety or physical well-being. There are various processes established under provincial regimes for the exercise of this right of refusal, as well as a number of exceptions and restrictions. In the context of the COVID-19 pandemic, it is our view that workers may not just invoke the generalized risk of infection as a basis for exercising their right to refuse to work, and must invoke reasons that relate to inadequate health and safety measures in the workplace itself.

2) Specific COVID-19-related guidance

Various governmental agencies and health and safety boards issued guidance and rules for employers to follow in ensuring the health and safety of employees in the workplace in the current situation. While some mandatory rules were issued, much of this guidance is non-mandatory and must be adapted by employers to the specific circumstances of their workplace. Suggested or mandatory measures include the following:

- (i) Establish active and passive symptom screening systems and develop preventive measures on the exclusion of symptomatic workers from the workplace (e.g., identification of symptomatic workers with a questionnaire or a self-evaluation before they enter the workplace);
- (ii) Encourage physical distancing (e.g., installation of physical barriers between workstations, wear of personal protective equipment (PPE), reorganization of work methods, etc.);
- (iii) Provide employees with PPE where necessary (in particular, where physical distancing measures are not possible) and ensure that employees do not share PPE or tools required to perform work;
- (iv) Ensure that employees travel to and from worksites in separate vehicles;
- (v) Increase sanitation of high-touch surfaces such as employee clocks, microphones, equipment controls and cash registers;

Olivier Fournier

Partner, National Leader,
Deloitte Legal Canada LLP
Tel: 514-393-8362

Quebec

Philippe Ross

Tel: 514-393-9704

Ontario

Alexis Lemajic

Tel: 416-874-3436

Related links:

[Deloitte Legal Canada LLP](#)

- (vi) Develop a system to report COVID-19 cases or outbreaks to coworkers and health authorities;
- (vii) Manage customer and traffic flow using signage, barriers or markings on the ground;
- (viii) Minimize handling of cash;
- (ix) Inform suppliers, subcontractors, partners and customers of the occupational health and safety measures implemented in relation to COVID-19 and solicit their cooperation as applicable to ensure compliance with these measures;
- (x) Identify and address any specific risks related to contamination in the work environment and if applicable, update any policies and prevention program accordingly; and
- (xi) Maintain hygienic conditions for the use of tools, equipment and frequently touched surfaces.

3) Mental health

Health officials and a number of organizations have predicted a wave of mental health challenges as Canadians grapple with sustained isolation and adapt to a very different social and working world. In this context:

- (i) Employers must implement measures to address work-related psychosocial risks in relation to working in the current circumstances of COVID-19. In particular, we recommend that employers ensure that their psychological harassment policies address cyberharassment in the context of teleworking.
- (ii) Employers should also ensure that employees are informed of any resources at their disposal in relation to mental health, such as an Employee Assistance Program, mental health benefits, etc.
- (iii) Employers may also review their benefit programs and consider improving certain benefits, in particular employee assistance and counselling coverage. Some employers are even considering having counsellors and trained mental health therapists available in the physical workplace during reintegration to provide consultation, support and advice to supervisors and employees who may be struggling.
- (iv) Employers must also remain mindful of their duty of accommodation under applicable human rights legislation. An employer has a duty to accommodate an employee with needs protected under applicable human rights legislation (e.g., disability) up to the point of undue hardship.

4) Other terms and conditions of employment

- (i) COVID-19-related policies

In addition to basic workplace safety obligations, employers may also wish to consider reviewing their existing sick leave programs and also implementing new policies or guidelines, such as pandemic planning or infectious disease policies.

(ii) Statutory leaves

Employers should update their policies to account for the number of new leaves that were provided in employment standards legislation in a number of Canadian provinces.

Employers should ensure that managers and human resource departments are aware of the employer's procedures and of statutory obligations in relation to paid and unpaid leave, including new statutory developments in this regard.

5) A second wave of confinement

Depending on how the situation evolves, it is possible that new waves of confinement orders will be imposed on Canadians and our economy to address spikes in infections.

Employers must ensure that they are not caught off-guard by any additional confinement measures and plan appropriately for this possibility. In particular, employers may want to ensure that they have appropriate policies and processes in case of prolonged periods of remote work.

Moreover, employers may establish contingency plans for temporary lay-offs or reductions in force in case of additional confinement periods. In this context, employers should consider whether specific Employment Insurance programs (e.g., Work-Sharing programs, Supplemental Unemployment Benefit programs) are useful to them in managing temporary lay-offs or reduction of workforce costs. These programs allow employers to supplement employment insurance benefits of employees through various ways (through employer benefits, or through some limited work hours). These programs will become more relevant as the temporary COVID-19 benefits expire (such as the Canada Emergency Response Benefit).

6) Constant communication

Moreover, as part of the gradual return to work, employers should maintain continuous communication with employees in order to inform them of the measures they are taking to ensure occupational health and safety and to advise them of the importance of complying with all such measures. Various government bodies and watchdog organizations published useful tools in this regard. For example, Quebec's labour standards, pay equity and occupational health and safety commission (CNESST), published a poster outlining preventive measures (i.e., physical distancing, recommended hygiene, and employers' obligations to arrange work accordingly, to provide access to soap and water, and to regularly clean surfaces) which could be posted in a conspicuous place in the workplace.

Beyond ensuring legal compliance, implementing appropriate health and safety measures and communicating them to employees will be essential to reassure and motivate employees. Employers will not be fully able, in the current circumstances, to verify the validity of sick leave claims and as such, from an operational perspective, must make it a priority to engage employees and address their concerns.

Based on the experiences of our colleagues in other jurisdictions, we know that employers should anticipate a possible increase in the rate of unsafe work refusals, workers' compensation claims, and accommodation requests once employees begin the gradual return to the workplace and adjust to "the new normal." Managers and supervisors are critical in allowing employers to stay informed and responsive in this regard.

Deloitte Legal Canada LLP's Employment and Labour group provides guidance and support in all employment and labour law matters and can assist employers in ensuring that their policies are up to date and their managers trained to effectively manage the return to work.

Deloitte Legal Canada LLP
Bay Adelaide Centre, East Tower
8 Adelaide Street West, Suite 200
Toronto ON M5H 0A9
Canada

This publication is produced by Deloitte Legal Canada LLP as an information service to clients and friends of the firm, and is not intended to substitute for competent professional advice. No action should be initiated without consulting your professional advisors. Your use of this document is at your own risk.

Deloitte Legal Canada LLP is an independent national law firm with offices across Canada and is affiliated with Deloitte LLP, a Canadian limited liability partnership that is a member firm of Deloitte Touche Tohmatsu Limited ("DTTL"), a United Kingdom private company limited by guarantee. Deloitte Legal Canada LLP, Deloitte LLP, DTTL and each member firm of DTTL are legally separate and independent entities.

Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee ("DTTL"), its network of member firms, and their related entities. DTTL and each of its member firms are legally separate and independent entities. Please see www.deloitte.com/about to learn more about our global network of member firms.

Please note that Deloitte is prepared to provide accessible formats and communication supports upon request.

© Deloitte Legal Canada LLP.