

## **COVID-19 and the Ontario *Human Rights Code***

As employers across Ontario take steps to adapt to the significant disruptions COVID-19 has caused to normal work-life, it is important that they do not forget about their obligations under the Ontario *Human Rights Code* (the “*Code*”). Under the *Code*, employers have a responsibility to ensure the workplace is safe, inclusive, and free from discrimination and harassment. In the wake of COVID-19, employers are faced with a number of unique challenges with respect to meeting these obligations.

On March 13, 2020, the Ontario Human Rights Commission (“**OHRC**”) released a [policy statement](#) on the COVID-19 pandemic. In this statement, the OHRC said that it considers COVID-19 to be a disability under the *Code*, and that employers have a duty to accommodate employees in relation to COVID-19. While OHRC policy statements are not law, they are important as they set standards for how employers and other stakeholders should act to ensure compliance with the *Code*. The OHRC has also released a [FAQs page](#) on COVID-19 and the *Code*, which offers further insight on the position the Human Rights Tribunal is likely to take on COVID-19 related human rights claims.

Employment issues stemming from COVID-19 interact with a number of *Code* grounds. Below, we have addressed a number of considerations employers should keep in mind as they navigate the interplay between COVID-19 and these *Code* grounds.

### **a) Family Status**

In its policy statement, the OHRC stated that employees with care-giving responsibilities should be accommodated to the point of undue hardship, which may include staying home. An employee’s care-giving responsibilities could include situations where another family member is ill or in self-isolation, where their child’s school or daycare is closed due to COVID-19, or where they have elder-care responsibilities.

Employers whose workplaces remain open will need to be cognizant of the various family-care obligations of their employees. Employees with child or elder-care responsibilities may be unable to attend the workplace. In such cases, employers will need to assess accommodation measures to determine if and how the employee may still continue to perform productive work at home. Where work from home arrangements are not feasible due to the nature of the work, the employee may need to take a leave of absence. These employees may be entitled to a Declared Emergency Leave.

For employers whose workplaces have moved to a work-from-home model, care-giving responsibilities of employees may pose different challenges. With school and daycare closures, parents across Ontario are now simultaneously fulfilling the role of care-giver, teacher and employee. It is no surprise that these employees may face interruptions throughout their workday

and may experience a drop in productivity and performance levels. Employers must keep these factors in their minds if confronting performance and productivity issues with employees.

### **b) Age**

The older population is particularly vulnerable to COVID-19. Employers have a duty to ensure the safety of their employees. This may mean accommodating work-from-home arrangements or leaves of absence for older employees even if the employer's workplace remains open.

Similar to the considerations above, employers must also keep these factors in mind if confronting performance and productivity issues with older employees who may be less familiar with online technologies and struggling to adapt to remote working arrangements.

### **c) Race/Place of Origin**

Reports of racism and discrimination towards the Asian-Canadian population have sparked since the COVID-19 outbreak. It is imperative that employers take proactive steps to protect these employees from discrimination and harassment at work.

The ramifications of failing to do so can be significant. Where an employee contravenes the *Code* in the course of employment, the employer may be held vicariously liable. Importantly, the employer can be held responsible even where it did not know of the discriminatory conduct, did not condone it, and even if it actively discouraged the conduct.

### **d) Disability**

As noted above, the OHRC has taken the position that it considers COVID-19 to be a disability under the *Code*. Employers must therefore accommodate employees who test positive for or become sick as a result of COVID-19. Employers should also ensure they are sensitive to employees with pre-existing medical conditions that make them particularly vulnerable to COVID-19, such as immuno-compromised employees.

In circumstances where employees may require disability-related accommodation as a result of COVID-19, the OHRC has stated that employers should be flexible and not overburden the health care system with requests for medical notes, which may increase the risk of exposure to COVID-19.

Employers should also be aware that employees with pre-existing conditions such as depression, anxiety disorders, and substance use problems may be triggered and struggling during these challenging times. Employers must remember that mental health disabilities and/or addictions are protected grounds under the *Code*. It is important for employers to consider that employees' productivity and performance may be suffering as a result of a disability that the employer may or may not know about.

It is also important to consider that many employees who may not suffer from a diagnosed mental disability for *Code*-related purposes may be suffering from significant stress and anxiety as a result of COVID-19. While the Tribunal has previously held that situational and temporary stress is not necessarily a disability for *Code*-related purposes, it is important that employers treat employees with patience and compassion in these unprecedented circumstances. These are

unforeseen and unprecedented circumstances, and it is normal for people to feel overwhelmed, stressed and anxious.

### **Practice considerations**

Limitation period and procedural time periods relevant to Ontario Human Rights Tribunal proceedings are currently suspended in accordance with the [Emergency Order](#) (O.Reg. 73/20) issued by the Government of Ontario on March 20, 2020. The suspension is retroactive to March 16, 2020.

This means that if a party is unable to meet the 1-year limitation for filing an application with the Tribunal during this time period, they will be able to do so at a later date.

The Tribunal is continuing to deliver services across Ontario. While some matters are being rescheduled to later dates, the Tribunal is continuing to have hearings, mediations and case conferences by teleconference or in writing.

This publication is intended only to provide general information. It should not be relied on as legal advice. For specific legal advice, please contact: [Leslie Dizgun](#), [Allyson Fischer](#), [Justin Anisman](#), [William McLennan](#), or [Alyssa Jagt](#).