

Returning Employees to Work Post-COVID

As the spread of COVID-19 slows down, the Ontario government is gradually beginning to permit workplaces to re-open. With the COVID-19 crisis being far from over, employers are grappling with a new set of challenges as they begin re-introducing employees to the workplace. Below, we have highlighted key considerations for employers as they prepare to re-open.

Which employees should return to the workplace?

As a first step, employers should consider implementing a staged approach to bringing employees back to the workplace for the purpose of ensuring physical distancing. This will require an assessment of which positions are critical to operations, and which positions can reasonably work from home. Critical positions should be returned to the workplace first, and other positions should be slowly re-integrated as the circumstances permit.

Employers may also consider additional measures to facilitate physical distancing in the workplace, such as staggered work hours and/or rotating schedules so that only a small group of employees are in the workplace at a single time. Rotating schedules may be particularly useful for re-integrating employees who are currently working from home.

What should employers do before employees return to the workplace?

Employers have obligations to ensure a safe workplace under the *Occupational Health and Safety Act* (“**OHS**A”). In the time of the pandemic, this means taking proactive steps to prevent the introduction and spread of COVID-19 on the workplace. Employers should clearly communicate with employees regarding steps they are taking to protect employees from potential exposure to COVID-19. Every workplace will be unique regarding what those steps should be. Measures may include, but are by no means limited to, the following:

- requiring that all employees practice social distancing by staying two metres apart;
- requiring employees to clean their hands often using soap and water or alcohol-based sanitizer;

- requiring all employees to stay home if they are sick or experiencing symptoms;
- cleaning and disinfecting objects and surfaces frequently;
- encouraging employees to wear a mask or face covering if they are unable to practice social distancing on elevators or on transit;
- screening employees prior to return to work; and
- any additional measures recommended by the municipal and provincial public health agencies.

The Government of Ontario is also publishing [Workplace Safety Guidelines for specific industries](#) to help guide employers as they plan to re-open.

What if employees refuse to return to work due to COVID-19 fears?

Provided employers have taken steps to ensure that the workplace is safe, they can generally require employees to return to work. In most situations, an employee will not have a right to refuse a return to work based on general fears of contracting COVID-19. General fear of contracting COVID-19 at work is likely not a legitimate basis to refuse work under the *OHSA*, which is based on a danger stemming from a current condition the worker is exposed to.

If an employee refuses to return to work despite their employer having taken appropriate precautions to ensure a safe workplace, the employer may be able to impose disciplinary measures or take the position that the employee has resigned or abandoned their employment. The reasons and potential for these consequences should be clearly communicated to the employee before such steps are taken. Employers should also advise employees that in these circumstances, they may not be eligible for the CERB or EI given that their loss of employment would be considered voluntary.

Employers, however, should be sure to consider each employees' individual circumstances. What may not be a reasonable fear of contraction for one employee may be reasonable for another. For example, consider elderly employees or those who are immuno-compromised. In these situations, among other things, an employer's duty to accommodate under the Ontario *Human Rights Code* ("**Code**") may be engaged. Our previous article on accommodations can be found [here](#).

What if employees refuse (or are unable) to return to work because of childcare or other responsibilities?

An employer's duty to accommodate may also be engaged where employees refuse to return to work because of childcare or other family-related responsibilities. Schools and other childcare services throughout Ontario currently remain closed despite the gradual re-opening of the broader economy. Many employees with children will therefore not be able to return to work as quickly or as fully as others.

These employees may require accommodations. If employees cannot be accommodated in the workplace or through a work-from-home arrangement, they may need to be accommodated with a leave of absence. Where these or other accommodations cause undue hardship, these employees may also be entitled to the Declared Emergency Leave under the *Employment Standards Act*.

It will be important for employers to carefully consider all requests for accommodation. For employers who do not yet have an accommodation process, employees should be directed to a single person or team to discuss accommodation requests related to COVID-19.

Can employers screen employees for COVID-19 before they return to work?

As noted above, employers have an obligation to provide a safe workplace under the *OHSA*. In the context of a pandemic, it may be reasonable to screen employees for COVID-19 as a way of ensuring that safety. Indeed, the government is requiring certain workplaces, for example many in the healthcare sector, to do so.

What degree and method of screening is reasonable will depend on both on the stage of the pandemic and the workplace in question. Depending on the circumstances, a number of screening methods may be justified as necessary, including temperature screening, self-assessments, and testing for COVID-19.

Given the pandemic, it is likely reasonable that most employers can require employees to self-assess and self-report symptoms of the virus. Toronto Public Health has released a [screening questionnaire](#) with a list of questions workers can ask themselves to determine if they might be at risk of carrying COVID-19. The Government of Ontario has also released a self-assessment resource, which can be accessed [here](#). Where an employee is at risk of spreading the virus, an employer would likely be justified in restricting their access to the workplace.

Any policies put into place should be applied reasonably, to all employees, to avoid any risk of discrimination or other human rights issues arising.

What if an employee has banked vacation time?

Many employees have been forced out of the office and want to return as soon as possible. In some cases, employees may even refuse to take vacation as a result of their desire to return to work. Failing to take vacation time may result in accrual of liability by employers or result in large numbers of employees taking vacation at the same time, disrupting business further.

To address these issues, employers should encourage employees to take vacation now so that they are well rested for their return to work. Further, for employers who have “use it or lose it” vacation policies, employees should be reminded of this such that they are not put in a position where they lose the opportunity to use their full entitlements at the end of the year.

What if an employee has been working from home and asks to keep doing so even though the workplace is re-opening?

Employers can require their employees to return to work unless the employee requires accommodation and/or can effectively work from home pursuant to [current Ontario public health guidelines](#).

However, especially where it was not made clear that these arrangements were temporary at the start of the pandemic, employers should be careful when scaling back their work-from-home policies when the time comes to do so. Employees should be given ample warning that this condition of their employment will be reverting back to how things were pre-pandemic. Many employees may have come to think of working from home as a reasonable aspect of their employment, especially where productivity and performance has been unaffected.

That being said, many employees have enjoyed working from home and the ability to do so may be a common expectation post-pandemic. As a result, if working from home is a feasible business option, the pandemic presents an excellent opportunity for employers to boost morale and introduce a highly-desired benefit through introducing a comprehensive work-from-home policy.

Employers looking to end, edit, or introduce a work-from-home policy should seek legal advice on best practices when doing so. Any change to these policies should consider, among other things:

- Clear employee agreement to conditions of work set out in any policy;

- Maintenance of safe conditions and safety habits at the home office—employer obligations under the *OHSA* and the *Workplace Safety and Insurance Act* can extend and apply to employees working from home;
- Productivity and performance, by clearly stating policies on, for example:
 - Continuing requirements to complete of work assignments;
 - Maintaining availability during normal business hours;
 - Ensuring all work time is recorded;
- Compliance with data privacy, security, and confidentiality policies, including client policies on data security and usage;
- Expense reimbursement policies, including travel, office supplies, and IT equipment or infrastructure; and
- IT policies and support procedures.

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