COPING WITH COVID-19 IN THE WORKPLACE

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INTRODUCTION

On March 11, 2020 the World Health Organization declared COVID-19 a global pandemic. Although it has been ravaging other parts of the world for some time, its presence has manifested most acutely in Canada and in Ontario over the past few weeks. This has presented significant new challenges for workers, from healthcare workers and first responders on the front lines of the crisis to service industry and other workers who face layoffs as their workplaces shut down. Below, we address some of the most common questions we have been receiving from our clients, which include unions and professional associations as well as non-unionized employees, regarding the myriad legal issues which are engaged by the pandemic.

This document is organized into seven parts:

- ⇒ Part I: factual chronology of key events in the spread of COVID-19 and our governments' response to it.
- ⇒ Part II: emergency powers exercised by the government of Ontario
- ⇒ Part III: occupational health and safety issues arising in workplaces that continue to Operate
- ⇒ Part IV: leaves and benefits available for those unable to work for reasons related to COVID-19
- ⇒ Part V: the availability of termination and severance benefits for those laid off from their jobs
- ⇒ Part VI: human rights issues arising out of the pandemic
- ⇒ Part VII: issues facing temporary foreign workers.

As you read, please be aware of the following considerations and qualifications.

First, this document is not, and cannot be, exhaustive. This is in part due to the range of questions that are being raised in the wide variety of workplaces and jobs in this province. It is also because the COVID-19 landscape is a rapidly evolving one. We cannot anticipate all of the developments or questions that have and will come up over the coming weeks and months. We will endeavour to update this memo regularly. As well, updated information about COVID-19 will be provided regularly on our website at www.goldblattpartners.com.

Second, this document was of necessity prepared quickly, for informational purposes. It should not be relied upon as legal advice. Legal advice should be provided on the basis of the application of specific current laws/orders and collective agreements/employment contracts to the particular factual circumstances you are facing.

If your questions are not covered below, or if you are seeking specific legal advice, please contact us directly for assistance tailored to your particular situation.

We would also like to acknowledge the work of other lawyers from other law firms and organizations who prepared publications that we consulted in preparing this piece, including David Doorey, Alec Farquhar, Income Security Advocacy Centre, Unifor, Molyneaux Law and Hicks Morley, recognizing that any shortcomings in the document are our own.

PART I: THE COVID-19 PANDEMIC

On March 11, 2020 the World Health Organization declared COVID-19 a global pandemic.

Although COVID-19 has been ravaging other parts of the world for some time, its presence has manifested most acutely in Canada over the past few weeks. To highlight just some recent developments in Canada and specifically in Ontario:

- On Wednesday, March 11, the federal government announced that the one-week waiting period for Employment Insurance (EI) sickness benefits would be waived for those workers who are in quarantine or who have been directed to self-isolate as a result of COVID-19.

- On Thursday, March 12, the Ontario government ordered all public schools to be closed until two weeks after March break. The closure has since been extended indefinitely. Similar school closures have occurred in other provinces.

- On Friday, March 13, the federal government listed all countries (other than Canada) as Level 3 risk and advised travellers returning to Canada to self-isolate for 14 days following their return from travel.

- On Monday, March 16, the federal government announced that entry to Canada would be denied to all but symptom-free Canadian citizens, permanent residents and their immediate family members (and at that time U.S. citizens).

- On Tuesday, March 17, a state of emergency was declared in Ontario. This authorized Cabinet to make certain orders for the purpose of protecting health, safety and welfare.

- Also on Tuesday, March 17, the Ontario government issued orders under emergency its powers prohibiting all organized public events of over 50 people and requiring the closure of all facilities providing indoor recreational programs, public libraries, private schools, licensed child care centres, bars and restaurants (except for takeout and delivery), theatres and concert venues.

- On Wednesday, March 18, Canada and the U.S. agreed to restrict non-essential travel across the border, thus barring U.S. citizens not engaged in certain activities deemed essential.

- Also on Wednesday, March 18, the federal government unveiled an $82 billion emergency response package to help Canadian businesses cope with the pandemic, which would include new emergency leave benefits to support workers who have to stay home as a result of the pandemic but don't qualify for paid sick leave or EI.

- On Thursday, March 19, the Ontario government introduced Bill 186, the *Employment Standards Amendment Act (Infectious Disease Emergencies)*, 2020, which has since been enacted. It provides job protections for certain employees affected by COVID-19.

- On Saturday, March 21, the Ontario government issued an order under its emergency powers making wide-ranging changes to how health service providers deal with their employees, overriding both employment legislation and collective agreements. Similar orders implementing nearly identical rules for long term care facilities and water and sewage systems were made on March 23.

- On Sunday March 22, 2020, the Ontario government announced that it will offer free emergency child care for certain essential workers. The next day, the government took measures to enable this through an order easing daycare restrictions that would otherwise apply.

- On Tuesday, March 24, the Ontario government issued an order under its emergency powers requiring the closure of all businesses deemed non-essential. As a result, many businesses have been effectively shuttered for the duration of the emergency, where they cannot operate on a remote basis.

- On Wednesday, March 25, royal assent was given to the federal *COVID-19 Emergency Response Act*, which among things, creates a new Canada Emergency Response Benefit (CERB) providing income for workers affected by COVID-19. Enhanced eligibility criteria for the CERB were announced on April 15, 2020.

- On Friday, March 27, the federal government announced further measures to discourage layoffs, including subsidizing employer payrolls by up to 75%, backing interest-free loans and waiving GST remittances.

- On Saturday, March 28, the Ontario government issued a further order under its emergency powers applicable to long-term care homes that would, among other things, remove training requirements for workers and allow homes to bring in volunteers.

- Also on Saturday, March 28, the Ontario government issued an emergency order to prohibited organized public events and social gatherings of more than five people.

- On Monday, March 30, the Ontario government issued an emergency order to close all outdoor recreational amenities such as sports fields and playgrounds

- Also on Monday, March 30, Ontario's Chief Medical Officer of Health recommended that all people over the age of 70 as well as those with compromised immune systems or underlying medical conditions self-isolate given the elevated risk of severe outcomes should they contract COVID-19.

- Effective Saturday April 4 at 11:59 pm, the list of types of essential businesses permitted to operate in Ontario was reduced from 74 to 44. Among the businesses ordered to close are construction projects (other than critical construction projects and residential construction projects that are near completion). Further additions to the list were made on April 9, April 16 and May 1 (effective May 4)

- On April 9, 2020, construction projects related to food production and processing was added to list of businesses permitted to operate in Ontario.

- On April 11, the federal government passed legislation expanding the Canada Emergency Wage Subsidy (CEWS) to cover 75% of an employee's wages to a maximum of $847 per week

- On April 22, 2020, the Federal Government announced a new package of benefits and programs to support students and recent graduates impacted by COVID-19, which was enacted into legislation on May 1, 2020

- On May 7, 2020, the Ontario government announced that retail businesses would be permitted to re-open (on a curbside basis) effective May 11, 2020.

- On May 14, 2020, the Ontario government announced that additional businesses and service would be permitted to open effective May 16, 2020, such as golf courses, marinas and private parks (to allow preparation for the season. It was also announced that all construction work, retail services not in shopping malls, and certain health and medical services would be permitted to resume effective May 19, 2020.

- On May 19, 2020, the Ontario government announced that it would keep schools closed for the remainder of the year

Throughout the pandemic, health officials have been advising self-isolation for anyone who has symptoms or a confirmed diagnosis of COVID-19 and those whose age or health conditions make them more vulnerable to COVID-19. Self-isolation for a period of 14 days (the duration of COVID-19's incubation period) is also advised for anyone exposed to risk, through either contact with an infected person or cross-border travel. Everyone else has been encouraged, and in some contexts required, to practice social distancing to reduce the spread of COVID-19. This involves staying home as much as possible, limiting physical contact with others, and leaving the house only for matters such as essential work, purchasing groceries and medication, and walks. Where in-person interaction is necessary, people are advised to stay at least two metres away from each other and not shake hands or embracing. Frequent hand washing and/or hand sanitizing is essential.

PART II: EMERGENCY POWERS

On Tuesday, March 17, 2020 a state of emergency was declared under Ontario's *Emergency Management and Civil Protection Act* (EMCPA). While an emergency under EMCPA may only last 14 days, it may be extended subject to procedures under the Act, and the COVID-19 emergency has in fact been extended past the time of this revision.

An emergency declaration authorizes Cabinet to make a range of emergency orders for the purpose of promoting the public good by protecting health, safety and welfare (subject to the *Charter of Rights and Freedoms*). Such orders prevail over any statute, regulation, rule, bylaw, or other legislative order or instrument, with the exception of the *Occupational Health and Safety Act*.

Cabinet has issued many orders of different types under its declaratory powers (38 as of the time of this revision) Two types of orders are of particular relevance for present purposes:

⇒ Orders impacting closures of workplaces

⇒ Orders impacting workplace operations and collective agreements

1. Orders impacting closures of workplaces

As set out in Part I, on March 24, 2020, all "non-essential" businesses were ordered closed. Initially permitting 74 types of listed businesses to continue to operate, subject to certain rules (e.g. social distancing and disinfecting), as of April 4, 2020, the list of essential businesses was reduced to 44, though was subsequently expanded on a number of occasions. The closure order has led to widespread layoffs and terminations.

However, there continued to be a number of businesses deemed essential and thus permitted to operate. These include supply chains and infrastructure, supermarkets, takeout & delivery restaurants, laundromats, gas stations, pharmacies, building maintenance and security, transportation, some types of manufacturing and construction, agriculture, utilities, laboratories, hospitals, long-term care facilities, shelters, social service agencies, the justice sector, regulatory authorities, capital markets, and banking. Some businesses, like dentists, are only permitted to provide urgent services. Others, like car dealerships, can operate by appointment only.

Thus, many businesses, services and sectors in Ontario have continued to be active and continue to employ workers. Further, on May 14, 2020, the order was amended to permit most retail businesses to re-open and construction to resume as of May 19, 2020, subject to social distancing.

2. Orders impacting workplace operations and collective agreements

Many of the emergency orders issued to date specifically impact workplace operations and collective agreements in workplaces deemed essential.

Such orders now apply to the following types of employers: Hospitals and health service providers, long-term care home operators, retirement home operators, service providers for persons with a

developmental disability; waste and water systems operators, boards of health, the Ministry of Transportation, violence against women and human trafficking service providers, district social service administration boards, community service providers, intervener services for persons who are deafblind, mental health and addiction agencies, and municipalities also may override certain collective agreement provisions and can suspend the ability of unions to file grievances.

These orders typically allow employers to take any reasonably necessary measures related to staffing to respond to, prevent and alleviate the COVID-19 outbreak, including deploying volunteers and contracting out, notwithstanding the terms of a collective agreement. One of them specifically allows hospitals to assist long-term care homes, including by redeploying staff from hospitals to long-term care facilities. Orders applicable to long-term care facilities prohibit employees from working at more than one health service-related workplace at a time (but also protects them from negative employment consequences should they be required to stop working in one or more locations as a result of the order) and also allows operators to dispense with certain legislative or regulatory requirements, such as staff screening and training requirements that would normally apply.

As a result, significant swaths of public service providers – including now many municipalities – are exempted to a certain extent from compliance with collective agreement terms.

Orders made by the government are, of course, subject to the limits set out in the *Charter of Rights and Freedoms*. However, even if an order were found to infringe on *Charter* rights, including freedom of association, section 1 of the *Charter* allows governments to justify a limitation on *Charter* rights. In our view, the existence of the COVID-19 pandemic would very likely be considered by the courts to be a very significant factor in support of finding any *Charter* violation to be a justified and reasonable limit under s. 1. Thus, even if it were possible to obtain a court hearing in an expedited manner to challenge an emergency order for violating the *Charter*, a court could still uphold orders as reasonable limits, thus permitting them to stand.

PART III: OCCUPATIONAL HEALTH AND SAFETY

In this section, we address some of the occupational health and safety issues raised by the COVID-19 pandemic. This section applies to workplaces that the Ontario government has deemed essential and thus may continue to operate. This section is structured as follows:

- ⇒ general occupational health and safety principles
- ⇒ outline of basic precautions
- ⇒ sending at-risk employees home
- ⇒ accessing employees' personal information
- ⇒ enabling telework whenever possible
- ⇒ supporting safer commutes
- ⇒ providing adequate personal protective equipment (PPE)
- ⇒ employee right to refuse unsafe work
- ⇒ limitations on the right to refuse unsafe work for certain workers

General principles: occupational health and safety

Employers have a clear statutory duty to protect workers' health and safety.[1] The *Occupational Health and Safety Act* (OHSA), which governs provincially-regulated industries, requires employers to "take every precaution reasonable in the circumstances for the protection of a worker."[2] The *Canada Labour Code* (CLC) which governs federally-regulated industries, requires employers to "ensure that the health and safety at work of every person employed by the employer is protected."[3]

Beyond these general and overarching duties, each of these statutes contains several specific employer duties, many of which are relevant in the context of COVID-19. For example, the OHSA requires employers to provide employees with "information, instruction and supervision" to protect their health and safety,[4] and the CLC requires employers to ensure employees are "made aware of every known or foreseeable health or safety hazard in the area where the employee works."[5] An employer's duty to provide information to employees is relevant during this ongoing public health crisis given that employees need to know how the virus spreads and the best practices for minimizing transmission (i.e. handwashing practices, physical distancing, etc.).

It is important to note that the philosophy underlying occupational health and safety legislation is one of internal responsibility. That is, it is not just employers but everyone in the workplace, including employees, who are responsible for their own safety and the safety of their co-workers. This means that employees should stay home if they have symptoms or know/suspect that they have been exposed to COVID-19. It also means employees should engage in frequent hand washing and adopt social distancing both in their personal lives and in the workplace.

Basic precautions

The scope of an employer's duties depends on many factors, including the nature of the workplace, the type of work, and the specific hazards and risks that may be present. However, based on the pronouncements from public health agencies around the world about how contagious COVID-19 is and the manner in which it is spread, these are some of the basic precautions employers should be taking in order to fulfil their duties under the relevant legislation:

- cleaning and disinfecting commonly used surfaces

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[1] *Occupational Health and Safety Act*, RSO 1990 c. 0.1, s. 25(2)(h) ["*OHSA*"]. *Canada Labour Code*, RSC 1985, c L-2, s. 124 ["*CLC*"].

[2] *OHSA*, RSO 1990 c. 0.1, s. 25(2)(h).

[3] *CLC*, RSC 1985, c L-2, s. 124 ["*CLC*"].

[4] *OHSA*, ss. 25(2)(a)].

[5] *CLC*, ss. 125(1)(s).

- ensuring that workers have access to hand-washing stations
- reminding employees to wash their hands regularly, providing information about how to properly do so, and providing access to hand sanitizer
- encouraging physical distancing within the workplace as much as possible, which may require reorganizing the workplace to allow for greater space between employees while they are working
- directing employees not to come to work if they are showing even mild symptoms and directing any such employees to go home immediately in the event they attend the workplace
- arranging for employees to work from home some or all of the time
- shutting down operations in whole or in part to the extent that basic precautions are not possible.

Sending at-risk workers home

Occupational health and safety legislation require employers to take every reasonable precaution to prevent workplace harm. Workers who are infected with, showing symptoms of, or exposed to COVID-19 through travel or contact present an obvious risk of harm to others. Thus, employers may direct these at-risk employees to stay home. Indeed, the new amendments to the ESA expressly contemplate that an employer may direct an employee not to perform their job duties due to a concern that they might expose others in the workplace to COVID-19 (as set out below, these amendments protect the jobs of employees unable to work for this reason and certain other reasons related to the pandemic).

However, the employer's right to manage risk by limiting workplace access is not unlimited. Even in this extraordinary context, employers must nonetheless be reasonable in their approach to employees suspected of presenting a risk of COVID-19 transmission.

In particular, an employer's decision to send an employee home due to COVID-19 transmission should be based on actual, relevant information, including any applicable laws, directives and recommendations of public health authorities, and the employee's actual symptoms, contacts and/or travel history. It would be unreasonable and likely discriminatory for an employer to make such a decision solely on the basis of myths about COVID-19 that may be circulating on the internet or stereotypical assumptions formed on the basis of an employee's race, ethnicity or place of origin.

An employee who is sent home from work solely on the basis of such myths or assumptions may be able to challenge this decision under human rights legislation (for more on this, see part VI below). In unionized workplaces, this could also be grieved under the collective agreement as discrimination, and unreasonable exercise of management rights and/or unjust discipline or dismissal.

Accessing personal health information

In the unusual circumstances of this pandemic, the usual restrictions on disclosing confidential medical information may not apply, since the reason for the request is to prevent the spread of COVID-19 in the workplace. As a result, employees may be required disclose to employers information relevant to their risk of COVID-19 transmission, including any COVID-19 diagnosis, the fact that they are undergoing medical investigations for COVID-19, cross-border travel history or known contact with an infected individual. In some workplaces, employees may be required to submit to temperature checks.

It is important to acknowledge that this is the type of personal information that falls within the scope of an employee's right to privacy.[6] In ordinary circumstances, employers would likely have no business probing into an employee's specific diagnoses, travel history, or personal contacts. An employer would probably not be permitted, in ordinary circumstances, to take an employee's temperature.

However, the right to privacy is not unlimited, and the present circumstances are anything but ordinary. In the public health emergency in which we find ourselves, the right to privacy will likely be viewed as reasonably limited by the employee obligation to take responsibility for their own safety and that of their co-workers.

Still, there remain restrictions on the employer's right to access employee information, even in an emergency. An employer may not use the occasion of the COVID-19 pandemic to demand personal information unrelated to the COVID-19 pandemic. The employer may not, for example, inquire into an employee's general medical history, travel history, or relationships or conduct temperature checks for purposes other than screening for signs of COVID-19. Further, as is the case whenever personal information is collected, the employer must also take appropriate steps to ensure that the information is used and disclosed only for legitimate purposes and that it is appropriately safeguarded.

An employee who is subjected to a breach of privacy rights may have grounds for a complaint under applicable privacy legislation,[7] at common law,[8] or under a collective agreement as an unreasonable exercise of management rights or other grounds that may apply (depending on the language of the specific collective agreement). As is standard, employees should 'obey now, grieve later', even if the employer appears to be overreaching in its demands, unless an employee's

[6] The Supreme Court of Canada has established that employees have a reasonable expectation of privacy in the workplace: *R. v. Cole*, 2012 SCC 53; *Alberta (Information & Privacy Commissioner) v. UFCW*, 2013 SCC 62; *Communications, Energy and Paperworkers Union, Local 30 v. Irving Pulp and Paper Ltd.*, 2013 SCC 34

[7] In Ontario, there is no privacy legislation that applies directly to the employment relationship, but federally regulated employers are subject to the federal *Personal Information Protection and Electronics Documents Act* (S.C. 2000, c. 5)

[8] In *Jones v. Tsige*, 2012 ONCA 32, the Ontario Court recognized the right to bring a civil action for breach of privacy. However, cost considerations place civil litigation beyond the reach of most workers.

health and safety is compromised. Failure to comply with management directives could amount to insubordination and could provide grounds for discipline or discharge.

It may also be advisable for unions to make it clear to employers that temperature checks and other demands for employee personal information are being condoned only in the unique circumstances of the present emergency, for the duration of the emergency, and on a without precedent basis. Unions should also attempt to secure understandings from employers that sick leave will be available to any worker barred from the workplace due to their COVID-19 risk.

Enabling telework

In general, it is a basic element of an employment relationship that the employer has the "management right" to determine how and where an employee is to perform work, subject to any collective agreement limitations.[9] Occupational health and safety legislation may place limitations on that management right in the context of the COVID-19 crisis.

Governments around the world have implemented a range of measures to encourage and/or require social distancing in order to minimize the spread of COVID-19. For example, on March 28, 2020, Ontario issued an emergency order prohibiting organized social events or gatherings of more than five people.[10]

Employees are being encouraged by public health agencies to work from home if possible.[11] The corollary of this is that employers need to consider whether it is feasible for employees to work from home:

> Employers should explore whether they can establish policies and practices, such as flexible worksites (e.g., telecommuting, working from home) and flexible work hours (e.g., staggered shifts), to increase the physical distance among employees.[12]

[9] For example, some collective agreements restrict an employer's right to reassign work, or obligate an employer to consider permitting telework arrangements in certain circumstances.

[10] Government of Ontario, "Ontario Prohibits Gatherings of More Than Five People with Strict Exceptions", https://news.ontario.ca/opo/en/2020/03/ontario-prohibits-gatherings-of-five-people-or-more-with-strict-exceptions

[11] See for example: City of Toronto, "COVID-19: Practicing Social Distancing," <https://www.toronto.ca/home/covid-19/covid-19-health-advice/covid-19-practicing-social-distancing/> (retrieved March 18, 2020)

[12] Toronto Public Health, 2019 Novel Coronavirus (COVID-19)Guidance for Workplaces/ Businesses and Employers <https://www.toronto.ca/wp-content/uploads/2020/03/9538-Fact-Sheet-for-Workplaces-Non-Healthcare_final.pdf> (retrieved March 19, 2020).

The government of Canada has explicitly directed managers to consider telework in an effort to mitigate the impacts of COVID-19,[13] and the US Center for Disease Control has made similar recommendations.[14]

In light of these recommendations, employers should be giving strong consideration to telework arrangements. Employers should consider which employees are required to be in the workplace and which employees may reasonably complete some or all their work from home. Employers should also consider what technological enhancements may be necessary to facilitate telework arrangements. As discussed further in part VI below, employers may have additional human rights obligations to consider telework arrangements for those unable to attend work due to special health concerns or family obligations.

Supporting safer commutes

A worker's risk of contracting COVID-19 may be increased if they commute by way of public transit.[15] An employer may implement all the right protocols within the workplace to protect against the spread of COVID-19. But if their employees are travelling twice daily through public transit stations and aboard subways, trains, buses and streetcars in order to the workplace, these efforts may be ineffective.

The dangers posed by commuting presents another reason for which employers need to consider which employees can reasonably be permitted to work from home. But to the extent that telework arrangements are not possible, employers should, where possible, encourage employees to use personal vehicles by subsidizing the cost of gas, mileage and parking.

As mentioned above, an employer is obliged to "take every precaution reasonable in the circumstances for the protection of a worker."[16] While during "normal times" an employer's duties generally begin and end at the workplace's doorway, the COVID-19 crisis has created a new set of circumstances necessitating different analysis than would be typical. It can be argued that in these extraordinary times, a purposive approach to health and safety legislation requires that the employer's obligation extend beyond the walls of the workplace.[17]

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[13] See for example: Government of Canada, "Information for Government of Canada employees: Coronavirus disease (COVID-19)" https://www.canada.ca/en/government/publicservice/covid-19.html#toc2

[14] Center for Disease Control, "Interim Guidance for Businesses and Employers," https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html (retrieved March 19, 2020).

[15] Meaghan Collie, "Coronavirus can spread on public transit. Here's what commuters need to know," *Global News*, <https://globalnews.ca/news/6649109/coronavirus-public-transit/> (retrieved March 23, 2020).

[16] *OHSA*, s. 25(h).

[17] A similar argument can be made for an expansive interpretation of section 124 of the *CLC*: "Every employer shall ensure that the health and safety at work of every person employed by the employer is protected."

Providing adequate personal protective equipment (PPE)

There are obviously higher levels of risk of COVID-19 transmission in certain workplaces, hospitals and long-term care homes most prominent among them. It is worth remembering that nearly half of the people who contracted SARS were health care workers who got it on the job.[18] As of April 8, 2020, 622 Ontario health care workers had contracted the disease, approximately 10% of the province's total. One health care worker, an environmental services employee, had died, and dozens of health care workers had been hospitalized with COVID-19.[19]

Workers in other "essential" workplaces where large numbers of people congregate, including in grocery stores, transit agencies and pharmacies, are also at increased levels of risk. The increased likelihood of transmission among certain groups of workers gives rise to additional employer obligations including provision of personal protective equipment ("PPE"). The appropriate level of PPE will depend on the specific work being performed and the associated risk of exposure, but may include the following:

- Gloves
- Isolation gowns
- Eye protection
- N95 respirator masks (which must be properly fit-tested and seal-checked)
- Surgical masks

In addition to ensuring that workers have access to the appropriate PPE, healthcare employers are also required to train their workers on how to properly use PPE.[20]

N95 respirators significantly reduce the risk of inhaling airborne particles. Research about the manner in which COVID-19 is transmitted is ongoing. As a result, there has been some debate about the circumstances in which N95 respirator masks are necessary. However, there is growing evidence that COVID-19 is transmitted by air.[21] For example, a letter by several experts published

[18]The Honourable Justice Archie Campbell, *The SARS Commission: Executive Summary*, "Spring of Fear," Vol 1 (December 2006) at p 22.

[19] Karen Howlett, "Ontario health care worker dies of COVID-19, first known provincial front-line fatality," *The Globe and Mail* (April 8, 2020) < https://www.theglobeandmail.com/canada/article-ontario-health-care-worker-dies-of-covid-19/>

[20] "Health Care and Residential Facilities," O. Reg. 67/93, s. 10.

[21] See for example: Yonghong Xiao, Mili Estee Torok, Comment: "Taking the right measures to control COVID-19," *The Lancet* (March 5, 2020) https://www.thelancet.com/action/showPdf?pii=S1473-3099%2820%2930152-3 (retrieved March 26, 2020); De Chang, Huiwen Xu, Andre Rebaza, Lokesh Sharma, Charles S Dela Cruz,

in the *New England Journal of Medicine* summarizing the findings of a recent study indicated that aerosol transmission of COVID-19 "is plausible, since the virus can remain viable and infectious in aerosols for hours."[22]

Thus, healthcare unions have advocated for the provision of N95 masks to all healthcare workers who are screening and/or coming into proximity with known or suspected COVID-19 patients.[23] This position is consistent with the precautionary principle, the paramount importance of which was emphasized by the Honourable Justice Archie Campbell in the SARS Commission report:

> The importance of the precautionary principle that reasonable efforts to reduce risk need not await scientific proof was demonstrated over and over during SARS…
>
> One example was the debate during SARS over whether SARS was transmitted by large droplets or through airborne particles. The point is not who was right and who was wrong in this debate. When it comes to worker safety in hospitals, we should not be driven by the scientific dogma of yesterday or even the scientific dogma of today. We should be driven by the precautionary principle that reasonable steps to reduce risk should not await scientific certainty.[24]

The precautionary principle was codified in section 77.7(2) of the *Health Protection and Promotion Act* (HPPA), which requires Ontario's Chief Medical Officer of Health (CMOH) to consider the precautionary principle where in the opinion of the CMOH there exists or may exist an outbreak of an infectious or communicable disease and the proposed directive relates to worker health and safety in the use of any protective clothing, equipment or device.

At the same time, the government of Ontario has given increasingly dire warnings about what could be an imminent shortage of N95 respirators.[25] Some employers are attempting to conserve

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Correspondence: "Protecting health-care workers from subclinical coronavirus infection," *The Lancet* (February 13, 2020) https://www.thelancet.com/journals/lanres/article/PIIS2213-2600(20)30066-7/fulltext (retrieved March 26, 2020).

[22] Neeltje van Doremalen et all, "Aerosol and Surface Stability of SARS-CoV-2 as Compared with SARS-CoV-1," (March 17, 2020) https://www.nejm.org/doi/10.1056/NEJMc2004973 (retrieved March 25, 2020).

[23] See for example: Ontario Council of Hospital Unions, "Ontario government is not doing enough to protect them or the people they care for, say 70 per cent of hospital staff polled," https://ochu.on.ca/2020/03/22 (retrieved March 26, 2020); Canadian Union of Public Employees, "COVID-19 Fact sheet," https://cupe.ca/coronavirus(retrieved March 26, 2020); Ontario Nurses' Association, "We need access to proper PPE" https://www.ona.org/ppe/ (retrieved March 26, 2020).

[24] The Honourable Justice Archie Campbell, *The SARS Commission: Executive Summary*, "Spring of Fear," Vol 1 (December 2006) at p 29

[25] Laura Stone, "Ontario says 500,000 masks destined for province to be released by U.S." *The Globe and Mail* (April 6, 2020) < https://www.theglob eandmail.com/canada/article-ontario-says-500000-masks-destined-for-province-to-be-released-by-us/>.

their PPE supply by requiring workers to wear masks for extended periods of time.[26] The Ministry of Health asked hospitals to store used PPE while it investigates the possibility of sanitization and reuse.[27] On April 4, 2020, Public Health Ontario published a synopsis of published and unpublished reports related to the reuse of PPE, acknowledging the problems associated with the reuse of N95 respirators:

> They are disposable, designed for single use and the outer surface may be contaminated after use, potentially acting as a vehicle of transmission. Reprocessing may decontaminate the surface of the respirator but may compromise the filtering efficiency and fit of the respirator. As a result, once reprocessed, N95 respirators lose their National Institute for Occupational Safety and Health (NIOSH) certification.[28]

On March 30, 2020, the Chief Medical Officer of Health issued a new directive, Directive #5 under section 77.7 of HPPA requiring public hospitals to implement new precautions and procedures respecting PPE while at the same time addressing issues of supply. The Directive was revoked and substituted with an expanded directive on April 10, 2020 applicable to both public hospitals and long-term care facilities.[29] The expanded directive includes the following (summarized and paraphrased):

- For interactions with suspected, presumed or confirmed COVID-19 patients: at a minimum, health care workers and other employees must use contact and droplet precautions, including gloves, face shields or goggles, gowns and surgical/procedure masks

- Where health care workers or other employees are within two metres of suspected, presumed or confirmed COVID-19 patients: workers shall have access to appropriate PPE which will include N-95 respirators (fit tested NIOSH-approved),

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[26]Jennifer Biemann, "COVID-19: Nurses refusing work amid pandemic-fuelled mask shortage at London hospitals, union says," *London Free Press* (March 30, 2020) < https://lfpress.com/news/local-news/covid-19-mask-shortage-leads-to-work-refusals-by-nurses-at-londons-hospitals>.

[27] Colin D'Mello, "Ontario hospitals being asked to not throw out used face masks," *CTV News* (April 7, 2020) <https://toronto.ctvnews.ca/ontario-hospitals-being-asked-to-not-throw-out-used-face-masks-1.4886359>.

[28] Public Health Ontario, " COVID-19 – What We Know So Far About… Reuse of Personal Protective Equipment," (April 4, 2020) < https://www.publichealthontario.ca/-/media/documents/ncov/covid-wwksf/what-we-know-reuse-of-personal-protective-equipment.pdf?la=fr>.

[29]Directive #5 for Hospitals within the meaning of the *Public Hospitals Act* and Long-Term Care Homes within the meaning of the *Long-Term Care Homes Act, 2007* http://www.health.gov.on.ca/en/pro/programs/publichealth/coronavirus/docs/directives/public_hospitals_act.pdf

surgical/procedure masks, gloves, face shields with side protection or goggles, and appropriate isolation gowns

- Where aerosol generating medical procedures (AGMP) [30] are being performed, are frequent or probable, are frequent or probable, or with any intubated patients: N95 respirators must be used by all health care workers in the room

- In long-term care homes only, all staff and essential visitors must wear surgical/procedure masks at all times for the duration of full shifts or visits

Directive #5 contemplates health care worker involvement with respect to these precautions and procedures. Specifically, the worker must perform a point-of-care risk assessment (PCRA) before every patient or resident interaction in the hospital or long-term care home. If the worker determines based on that PRCA and their professional and clinical judgment that health and safety measures may be required in the delivery of care to the patient or resident, then the hospital or long-term care home must provide the worker with the appropriate health and safety control measures, including an N95 respirator. The hospital or long-term care home will not unreasonably deny access to appropriate PPE.

Hospitals and long-term care homes must provide all workers with information on safe utilization of all PPE and employees must be appropriately trained to safely don and doff all PPE.

The Directive also addresses issues related to the supply of PPE, requiring that:

- Hospitals, long-term care homes, health care workers and other employees engage in conservation and stewardship of PPE

- Hospitals and long-term care homes assess the available supply of PPE on an ongoing basis and explore all available avenues to obtain and maintain a sufficient supply

- In the event that utilization rates indicate a shortage will occur, government and employers will be responsible for developing contingency plans, in consultation with affected labour unions, to ensure the safety of health care workers and other employees.

On April 22, 2020, in *Ontario Nurses Association v. Eatonville/Henley Place,* 2020 ONSC 2467, the Ontario Nurses Association (ONA) was successful in obtaining an injunction against four long-term care facilities in relation to their failure to provide them with PPE in accordance with

[30] AGMPs are defined in the directive to include but not limited to: intubation and related procedures (e.g. manual ventilation, open endotracheal suctioning), cardio pulmonary resuscitation, bronchoscopy, sputum induction, non-invasive ventilation (i.e. BIPAP, open nebulized therapy/aerosolized medication administration, high flow heated oxygen therapy devices (e.g. ARVO, optiflow) and autopsy

Directives #3 and 5. The facilities had cited problems with supply and economics. The Court ordered the facilities to adhere to Directive #5, which it described as follows:

> "Directive #5, the latest word on the subject from the CMOH, leaves the choice of protective great, with specific mention of N95 respiratory masks, to the health care provider at the point of care. While all personnel working in this field are admonished to be reasonable and to take account of long term and short term needs in making their assessments, it is the health and safety question faced by the nurses and other health professionals on the spot that is given priority in the CMOH's Directive."

In the result, the facilities were ordered to provide nurses with access to fitted N95 facial respirators and other PPE when assessed by a nurse at point of care to be appropriate and required.

Directive #5 applies to public hospitals and long-term care homes. However, retirement homes are expressly required to take all reasonable steps to follow the required precautions and procedures outlined in Directive #5.[31] A similar directive, Directive #4, applies to ambulance services and paramedics.[32] Other contexts where PPE may be an issue, such as home care facilities or other types of first response, are lacking an express directive. However, in our view, employers in all of these contexts ought to err on the side of caution, heeding the recommendations of Justice Archie Campbell that the precautionary principle guide all worker health and safety decisions including the provision of appropriate PPE. While regrettable shortages of PPE may require the rationing of such resources to those most at risk, every effort should be made to ensure that all workers are provided with necessary PPE and when considering measures to conserve and reuse PPE.

Refusing unsafe work

Most employees have a statutorily-protected right to refuse unsafe or dangerous work.[33] We say "most" because certain types of employees, including emergency responders and many health care workers, have limited rights to refuse unsafe work. The limits on the rights of these specific groups of employees are explored below.

The right to refuse unsafe work is an exception to the general rule that employees must obey their employer's directives or risk exposing themselves to discipline. In a unionized workplace, this is an exception to the general rule of "work now, grieve later." Under both the OHSA and the CLC, employers are prohibited from disciplining or otherwise penalizing employees for exercising their statutorily protected rights, including the right to refuse unsafe work.[34] Work refusal and reprisal

[31] O. Reg. 68/20

[32] http://www.health.gov.on.ca/en/pro/programs/publichealth/coronavirus/docs/directives/ambulance_services_paramedics.pdf

[33] *OHSA*, s. 43(3); *CLC*, s. 128(1).

[34] *OHSA*, s. 50; *CLC*, s. 246.1.

issues also may arise in the context of grievances challenging discipline imposed as a result of a worker's decision to refuse unsafe work.

Under both OHSA and the CLC, a worker has the right to refuse to work that is likely to endanger themselves or in some cases other workers.[35] As a result, an employee may have a right under either statute to refuse work when they have reason to believe that their health or safety could be endangered as a result of increased risk of COVID-19 transmission in the workplace, even in workplaces deemed essential under emergency orders issues to date.

Here are a few hypothetical scenarios that could engage the right to refuse unsafe work in the context of the COVID-19 pandemic:

- the employer fails to direct a co-worker who tested positive for COVID-19 to immediately leave the workplace
- the employer fails to take reasonable steps to disinfect an area where a person known or suspected to have contracted COVID-19 was previously working
- An employee is directed to provide service to a customer with visible symptoms of COVID-19 and they have not been provided with the appropriate personal protective equipment
- The employer has failed to take basic precautions such as providing sinks for handwashing or requiring physical distancing
- A worker is directed by their physician to stay home because of health conditions rendering them more vulnerable to COVID-19

A number of examples of COVID-19-related work refusals have been covered in the news. Details are scant, particularly with respect to the basis upon the Ministry of Labour inspectors reached the conclusions they did or the extent to which the Ministry of Labour was involved at all. That said, given the dearth of relevant case law, the scenarios are worth considering.

- On March 12, 2020,166 Chrysler workers carried out a work refusal after another worker was placed in self-isolation because of potential secondary contact with COVID-19. According to the news report, the MOL inspected and concluded that the work refusal was not warranted.[36]

[35] *OHSA*, s. 43(3); *CLC*, s. 128

[36] *CBC News*, "Production back up at Windsor Assembly after employees refuse work amid COVID-19 concerns" (March 13, 2020) < https://www.cbc.ca/news/canada/windsor/wap-employees-line-stoppage-coronavirus-concerns-1.5496855> (retrieved March 26, 2020).

- Also on March 12, 2020, approximately one dozen TTC employees engaged in a work refusal related to the employer's alleged failure to clean streetcars. The news report does not indicate whether the TTC had to take any steps to address the workers' concerns before they returned to work, although the union representing the workers asserted that the work refusal resulted in the TTC adopting new guidelines regarding personal protective equipment.[37]

- On March 30, 2020, it was reported that nurses in London had refused to work over concerns about access to adequate personal protective equipment.[38] In particular, the nurses were concerned about the hospitals' protocol for extended use of surgical masks, and the lack of access to N95 respirators for workers conducting COVID-19 screening. The outcome of the Ministry of Labour's inspection, if any, was not clear from the report.

- On March 31, 2020, Ottawa corrections officers refused to work over a concern about lack of screening for people entering the jail.[39] At the time of the report, the Ministry of the Attorney General said it was working with the Ministry of Labour to address the situation.

- On April 10, 2020, it was reported that corrections officers at various institutions had refused to work when they were denied access to masks and gloves.[40] The report did not provide any information about whether the Ministry of Labour had been contacted or the status of its investigation, if any.

It is difficult to draw much guidance from these examples, particularly since they both arose as the COVID-19 outbreak was just beginning to escalate in Ontarigiven that the media reports do not contain any detail about whether or how the more recent refusals were dealt with by the Ministry.

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[37] Ben Spurr, "TTC workers stage brief work stoppage over virus fears" (March 13 2020) *The Star* < https://www.thestar.com/news/gta/2020/03/12 (retrieved March 26, 2020).

[38] Jennifer Bieman, "COVID-19: Nurses refusing work amid pandemic-fuelled mask shortage at London hospitals, union says," *London Free Press* (March 30, 2020) < https://lfpress.com/news/local-news/covid-19-mask-shortage-leads-to-work-refusals-by-nurses-at-londons-hospitals>.

[39] Gary Dimmock, "Ottawa jail guards refuse work over lack of COVID-19 screening," *Ottawa Citzen* (April 1, 2020) < https://ottawacitizen.com/news/local-news/ottawa-jail-guards-refuse-work-over-lack-of-covid-19-screening/>.

[40] Liam Casey, "Ontario jail guards refusing to work without protective gear in COVID-19 crisis," (April 10, 2020) < https://toronto.citynews.ca/2020/04/10/ontario-jail-guards-battle-with-province-over-use-of-protective-gear-in-covid-19-crisis/>.

For reference, on March 12, 2020, there were a total of 59 confirmed cases in the province. In contrast, on March 29 (at the time of this writing), there were 211 cases in a single day, bringing the province's total to 1355. Our view is that as the public health crisis escalates, there will inevitably be a greater number of circumstances in which work refusals will be exercised.

There are two stages of the work refusal process under the OHSA. The process is similar under the CLC.[41]

At the first stage, an employee may exercise their right to refuse unsafe work if they have a "reason to believe" that their health or safety will be endangered. At this stage, the test is subjective.[42] This means that so long as an employee has a sincerely-held belief that the work is unsafe, they are protected against discipline for refusing to perform it. A first-stage work refusal triggers an employer obligation investigate. [43]

The second stage only arises if, after the employer's investigation, the worker has "reasonable grounds to believe" that the work is still unsafe. In this case, the Ministry of Labour (MOL) is notified and completes its own inspection to determine whether work in question is likely to endanger. If the MOL inspector finds the work to be unsafe, they may issue orders to the employer to address the underlying concerns. An employee or union can appeal the decision of the MOL inspector to the Ontario Labour Relations Board.

At the second stage, the test is objective. The question is whether "the average employee at the workplace, having regard to his general training and experience, would, exercising normal and honest judgement, have reason to believe that the circumstances presented an unacceptable degree of hazard to himself or to another employee."[44]

Even though the test is objective at the second stage of the work refusal process, the worker's particular circumstances ought to be considered. The meaning of "reasonable grounds to believe" must account for the heightened risk posed to workers in particular demographics, including older workers and those with compromised immune systems.

Employees must be aware that unless a formal work refusal is made, a worker who refuses their employer's direction to attend or perform work risks discipline or discharge for insubordination or abandonment. This has presented a 'catch 22' for workers employed in the sectors deemed essential by Ontario's emergency orders, who may have legitimate concerns about unsafe work, yet they are at risk of jeopardizing their employment if they simply fail to attend work. To ensure

[41] Under the *CLC*, the process is similar although there is an additional stage. After a worker refuses, the employer undertakes its investigation (see sections 128(6)) and if the problem is not resolved at that stage, the work place health and safety committee is notified and undertakes its own investigation (s. 128(10)). If an employee's concerns are still unresolved, the Ministry undertakes its own investigation (s. 129(1)).

[42] *Sidbec Dosco Inc.; Re Grant Elgaard*, [1988] OLRB Rep. December 1334.

[43] *OHSA*, s. 43(4), (5) and (11)

[44] *Inco Metals Company*, [1980] OLRB Rep. July 981 at para 59.

job protection, workers should address their health and safety concerns through the following channels:

- making a formal work refusal, as outlined above
- avail themselves of any available leaves of absence, as outlined below in part IV
- if the worker has particular vulnerabilities to COVID-19 due to age and/or pre-existing health conditions, seek accommodation under the human rights code, as outlined below in part VI

Unsafe working conditions has been a notorious problem in the construction industry. Earlier on in the pandemic, it was reported that many construction employers were not taking adequate precautions with respect to handwashing, social distancing, tool sharing or sending sick workers home.[45] The health and safety problems on construction sites were acknowledged by the Ontario government, which announced increased measures to limit the spread of COVID-19 on construction sites.[46] On April 3, 2020, the government, acting under its emergency powers, further reduced the list of essential businesses to exclude most construction projects.[47] As a result of this, construction projects were ordered closed, except those deemed critical. Critical construction projects included certain industrial projects such as refineries and petrochemical plans, infrastructure projects such as new hospitals, roads and bridges, and construction related to food production and processing. As well, residential projects that are near completion were allowed to continue. On May 14, 2020, the government announced that all construction could resume effective May 19, 2020. Thus, the health and safety 'catch 22' has continued and will continue to apply to construction workers as well as any worker performing essential work.

Limitations on right to refuse unsafe work for certain classes of worker

As mentioned above, certain classes of workers have restricted rights to refuse unsafe work. Under the OHSA, several groups of workers, including police and corrections officers, have restricted rights to refuse unsafe work. [48] For the purposes of this memo, the key categories of workers

[45] "Construction Labour Groups Raise Concerns Over Job Site Safety", https://www.ctvnews.ca/health/coronavirus/construction-labour-groups-raise-concerns-over-job-site-safety-1.4866244

[46] "Ontario Stepping up Measures to Limit the Spread of COVID-19 on Construction Sites", https://news.ontario.ca/mol/en/2020/03/ontario-stepping-up-measures-to-limit-the-spread-of-covid-19-on-construction-sites.html

[47]`List of essential worplaces`, https://www.ontario.ca/page/list-essential-workplaces

[48] The *CLC* does not feature the same carve-out for specific classes of workers but the *OHSA* restrictions placed on certain classes of workers apply to all workers under the *CLC*. Under the *CLC*, no worker, regardless of their particular workplace, can exercise a work refusal if (a) the refusal puts the life, health or safety of another person directly in danger; or (b) the danger referred to in subsection (1) is a normal condition of employment (s. 128(2)).

subject to this restriction are health care workers in hospitals and long-term care homes,[49] firefighters,[50] and those in employed in the operation of ambulance services.[51]

Hospital and long-term care home workers, firefighters and paramedics have no statutorily-protected right to refuse either when the unsafe condition is "inherent in the worker's work or is a normal condition of the worker's employment,"[52] *or* "when the worker's refusal to work would directly endanger the life, health or safety of another person."[53] This means that there are two separate hurdles that a worker in one of these categories must clear in order to exercise their statutorily protected right to refuse. They only have a right to refuse if:

1. the work in question is not "inherent" in their work or a "normal condition" of their employment; AND

2. the work refusal would not directly endanger another person's health or safety.

There is very little, if any, case law interpreting these provisions in the context of health care or first response; nearly all of the jurisprudence arises out of corrections.

A "Guidance Note" created by the Ontario Health Care Health and Safety Committee under the OHSA regulations provides the following example to illustrate the meaning of "inherent in the worker's work or is a normal condition of the worker's employment:"

> An experienced medical lab technologist could not, in the course of his or her regular work, refuse to handle a blood sample from a patient with an infectious disease. But the technologist could refuse to conduct the test for a highly infectious virus where the appropriate controls such as protective clothing, training, and engineering controls are not made available. Potential exposure to infectious agents might be inherent in the workplace for a medical lab technologist, but working without the proper health and safety controls, measures and procedures is not "inherent" or a normal condition of that worker's employment.[54]

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[49] OHSA, ss. 43(2)(d)(i). Not all health care workers have a restricted right to refuse. For example, home care workers have the same right to refuse as most Ontario workers do.

[50] *OHSA*, ss. 43(2)(b).

[51] *OHSA*, ss. 43(2)(d)(iii).

[52] *OHSA*, ss. 43(1)(a).

[53] *OHSA*, ss. 43(1)(b).

[54] Ontario Health Care Health and Safety Committee Under Section 21 of the Occupational Health and Safety Act, "Guidance Note for Workplace Parties #7 Right to Refuse Unsafe Work" (September 2014), < https://terraform-2018042317445374680000001.s3.amazonaws.com/attachments/cjiisgn60001mfxj7goyfsqa1-approved-right-to-refuse-gn-health-care-section-21-september-1820141.pdf>

Exposure to infectious diseases like COVID-19 may be "inherent" in many health care workers' work, but only when the appropriate controls, such as provision of personal protective equipment, are in place. According the Ontario Nurses Association, a nurse refused unsafe work during the SARS crisis when her employer assigned her to care for a SARS patient even though she had not been fit tested with the appropriate N95 respirator. According to ONA, the MOL upheld her work refusal (there does not appear to be an OLRB decision arising out of this situation). [55]

Of course, the meaning of "inherent" and "normal condition" will vary depending on the specific health care context and will certainly vary as between the various categories of workers subject to these limitations. What may be a normal condition of employment for health care workers may not be so for firefighters, and while the working conditions of firefighters and paramedics share some things in common, there are important differences.

As set out above, even if the work in question is not "inherent" or a "normal condition," a worker in one of the restricted categories must also be satisfied that refusing the work would not endanger another person's health or safety. We have been unable to find any jurisprudence dealing with this subsection of the OHSA. This is not surprising given the well-known commitment on the part of health care workers and first responders to prioritizing patient safety.

Whereas older case law suggested that employees in these categories were protected against discipline at least until the MOL had conducted its inspection, the OLRB has more recently held that workers with restricted rights exercise those rights at their own risk.[56]

Hospital and long-term care home workers, firefighters and paramedics need to be aware of the risk of discipline associated with refusing work in a way that is not protected by the OHSA. An employee in one of those groups may face discipline if they refuse work which is "inherent" in their work, a "normal condition" of their employment, or which would directly endanger another person's health or safety.

Yet on April 4, 2020, the Crown Agency Ontario Health made recommendations to health care organizations about how to respond to work refusals. Ontario Health articulated "common principles" to guide health organizations as they decide how to respond to work refusals including the following:

> No employee shall suffer any form of reprisal for refusing work he or she believes to be unsafe.[57]

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[55] Ontario Nurses' Association, "My Right to Refuse Unsafe work: A Guide for ONA Members," October 2019 < https://www.ona.org/wp-content/uploads/ona_guide_myrighttorefuseunsafework.pdf> (retrieved March 22, 2020).

[56] *Dowling v. Hamilton-Wentworth Detention Centre*, [2012] O.L.R.D. No. 4714 at para. 66.

[57] Ontario Health, "COVID-19 HR Recommendations: Work Refusals Related to COVID-19," (April 4, 2020) < https://www.oha.com/Bulletins/OH_COVID-19_HR_Recommendations_Work%20Refusals_Apr042020_final.pdf>.

While Ontario Health's recommendations do not supersede the legislation or the Board's case law interpreting it, this is nonetheless an encouraging development.

PART IV: LEAVES AND BENEFITS

In this section, we outline some of the leaves and benefits available to workers unable to work due to the health, social and economic impacts of COVID-19. This section is structured as follows:

⇒ Protected leaves

⇒ Benefits

Protected leaves

Both the Ontario and federal governments have recently created job-protected leave to address needs arising during the COVID-19 crisis. Workers affected by COVID-19 may also be able to avail themselves of other forms of statutory and negotiated protected leave.

A job-protected leave means that an employer cannot terminate or otherwise penalize an employee because of the leave (however, an employer may be able to lay off an employee during a leave for *bona fide* reasons unrelated to leave, e.g. the company goes out of business for economic reasons).[58] During a leave, employees continue to participate in benefits plans including pension plans, life insurance plans, accidental death plans, extended health plans and dental plans.[59] For unionized employees, seniority typically continues to accrue and dues continue to be paid.

Designated infectious disease leave (Ontario)

As previously mentioned, on March 19, 2020, the Ontario government introduced Bill 186, the *Employment Standards Amendment Act (Infectious Disease Emergencies), 2020*, which provides for an **unpaid** designated infectious disease leave for most workers who are unable to work for reasons related to COVID-19.

The circumstances that trigger entitlement to designated infectious disease leave are as follows:

1. The employee is under medical investigation, supervision or treatment for COVID-19.[60]

2. The employee is acting in accordance with an order under the *Health Protection and Promotion Act.*[61] (these sections permit a Medical Officer of Health and the Ontario Court

[58] *ESA*, s. 53

[59] *ESA*, s. 51

[60] *ESA*, s. 50.1(1.1)(b)(I).

[61] *ESA*, s. 50.1(1.1)(b)(ii).

of Justice to order a person to do or refrain from doing certain things in order to prevent, reduce or eliminate the risk of the spread of a communicable disease).

3. The employee is in isolation, quarantine or is subject to a control measure including self-isolation.[62] The direction or recommendation to isolate or quarantine can come from a broad number of sources including: public health officials, any qualified medical practitioner (e.g. doctors, nurses), Telehealth Ontario, or a municipality, the Government of Ontario or the Government of Canada.[63]

4. The employee is directed by their employer not to perform their job duties due to a concern that they might expose others in the workplace to COVID-19.[64]

5. The employee needs to provide care to a person for a reason related to COVID-19 such as a school or day-care closure.[65] The "person" the employee is caring for is broadly defined as anyone the employee considers "like a family member".[66]

6. The employee is directly affected by travel restrictions related to COVID-19 and, under the circumstances, cannot reasonably be expected to travel back to Ontario.[67]

There is no maximum number of days for a designated infectious disease leave. It may last as long as COVID-19 continues to be designated an infectious disease and one or more of the six circumstances listed above continues to apply to the employee.[68]

A designated infectious disease leave may be taken retroactive to January 25, 2020.[69] This means that anyone who was not performing their job after January 25, 2020 due to one of the six reasons listed above, is deemed to have taken an infectious disease leave and may have remedies for any adverse employment consequences imposed on them as a result of having taken such a leave.

Employers are expressly prohibited from requiring a medical note for an employee taking a designated infectious disease leave. While the employer may ask for other forms of proof that the

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[62] *ESA*, s. 50.1(1.1)(b)(iii).

[63] *ESA*, s. 50.1(1) *s.v.* "qualified medical practioner".

[64] *ESA*, s. 50.1(1.1)(b)(iv).

[65] *ESA*, s. 50.1(1.1)(b)(v)

[66] *ESA*, s. 50.1(8)12.

[67] *ESA*, s. 50.1(1.1)(b)(vi).

[68] *ESA*, s. 50.1(5.1)

[69] *ESA*, s. 50.1(5.1); O. Reg. 66/20, Infectious Disease Emergency Leave

worker is taking the leave for one of the six reasons triggering entitlement to such a leave, this request may only be made "at a time that is reasonable in the circumstances."[70]

Designated infectious disease leave is only available to workers covered by the ESA. The ESA only applies to "employees", which is defined to exclude independent contractors and volunteers. This excludes truly self-employed individuals as well as many workers in the "gig" economy who may be deemed by their employer to be self-employed.

In addition, several types of work are expressly excluded from the ESA, including:[71]

- Co-op placements though secondary schools, universities or colleges
- Participants in community participation projects under the Ontario Works Act
- Inmates in correctional institutions, penitentiaries or youth custody facilities
- Political, religious, judicial or adjudicative tribunal members
- Elected officials, including trade union officials
- Corporate directors
- Police officers (however, leave may be extended to police officers by regulation)
- Junior Hockey players receiving a scholarship[72]

There are also workers with legitimate, COVID-19 related reasons for being absent from work whose circumstances may not map onto any of the six reasons that trigger entitlement to a designated infectious leave. This could include employees who choose not to work due to fear of COVID-19 exposure, but have not received direction or recommendation from public health officials to self-isolate. As set out below in Part VI, these workers may nonetheless be able to claim job protection (as well as other accommodations) on human rights grounds.

COVID-19 leave (Federal)

The newly enacted *COVID-19 Emergency Response Act* amends the *Canada Labour Code* (CLC) to create a new COVID-19 leave entitlement for federally regulated workers. The leave is available for workers unable to work for reasons related to COVID-19,[73] which could include being sick with COVID-19, being quarantined due to COVID-19 symptoms or exposure, being

[70] *ESA*, s. 50.1(4.1).

[71] *ESA*, s. 3(5)

[72] O. Reg. 477/18

[73] *CLC*, s. 239.01(1).

unable to work because of school/daycare closures or looking after a sick family member. There is currently a 16-week cap on the duration of leave, but Regulations may be made to change the maximum duration of this leave.[74]

In addition to this COVID-19 leave, the CLC already provides for five days of personal leave per calendar year for all employees. For employees with three or more months of service, the first three of these personal leave days are paid. The CLC also provides for up to 17 weeks of unpaid medical leave.

Other protected leaves

Job protected leaves other than the COVID-19 specific leaves discussed above. Workers may elect to, and in some cases are be required to, avail themselves of such other leaves where the other leave provides a greater benefit, where the worker is excluded from employment standards legislation, or where the worker's circumstances do not trigger entitlement to the leave.

Employment standards legislation provide for various other forms of (unpaid) protected leave that may apply to workers affected by COVID-19. For example, Ontario's ESA provides for sick leave, family responsibility leave, family medical leave, family caregiver leave and critical illness leave. More information about these leaves can be found on the Ministry of Labour's website.[75]

Collective agreements may also provide for leaves for various forms of personal emergencies that could parallel or exceed the leaves available under employment standards legislation. Some of these leaves may be paid. The most typical form of paid leave is sick leave (discussed in greater detail below). These kinds of leave may be available to non-unionized employees as well.

Human Rights legislation may also require employers to accommodate employees by affording them job protection similar to a protected leave (see part VI below).

Benefits during leaves/unemployment due to COVID-19

As noted, both the federal and provincial COVID-19 specific leaves are unpaid. If workers are to be paid for a COVID-19 related leave of absence, the payment must come from other sources, such as the newly introduced Canada Emergency Response Benefit, EI benefits (sickness, regular or compassionate care), WSIB benefits, or sick leave and personal days that may be available under workplace policies or collective agreements. These entitlements are discussed below.

[74] *CLC*, ss. 239.01(1), (13)(b).

[75] https://www.ontario.ca/document/your-guide-employment-standards-act-0

Canada Emergency Response Benefit

The new *Emergency Response Act* enacts the *Canada Emergency Response Benefit Act* [*CERBA*],[76] which provides for direct payments to workers economically affected by COVID-19. The government has indicated that the CERB will be available in early April.

The amount of the weekly income support payment has been fixed by regulation[77] at $2,000 per month,[78] payable biweekly. A worker may apply for income support payments for any 4-week period (up to a maximum of 16 total weeks total)[79] that falls between March 15 and October 3, 2020.[80]

CERB is not EI, and it applies to a broader category of workers than EI. EI benefits are often beyond the reach of gig economy workers (who may be deemed "self-employed" and thus ineligible) as well as precariously employed workers (because they cannot meet the hours required to qualify). In contrast, to be eligible for CERB, an applicant must be a "worker", which is defined to be a person who is at least 15 years old, is resident in Canada, and who made at least $5000 (or as varied by regulation) in 2019 or in the 12-month period preceding their application. That income must have derived from employment, self-employment, or statutory pregnancy or parental benefits.[81]

CERB is potentially available to virtually any worker affected by the COVID-19 economy who did not voluntarily quit their job. [82] This includes:

- workers who have stopped working for reasons related to COVID-19 over the four-week period for which benefits are claimed;[83]

[76] *Canada Emergency Response Benefit Act,* SC 2020, c. 5, s. 8 [*CERBA*].

[77] *CERBA*, s. 7(1).

[78] SOR/2020-62 April 1, 2020

[79] *CERBA*, s. 8(1).

[80] *CERBA*, s. 5(1).

[81] *CERBA*, s. 2, *s.v.* "worker".

[82] *CERBA*, s. 6(2).

[83] *CERBA*, s. 6(1)(a)

- workers who have exhausted their EI regular benefits between December 29, 2019 and October 3, 2020 and are unable to find a job or return to work because of COVID-19;[84]

- workers who are eligible for EI regular or sickness benefits.

Workers who fall into those categories are entitled to support payments provided that the worker has not earned more than $1000 of employment or self-employment income for 14 or more consecutive days within the four-week benefit period of the claim.[85] It thus appears that CERB may available to workers who are continuing to work, but whose income is reduced to an amount that does not exceed the $1,000 threshold.

Workers who qualify for CERB may also alternatively qualify for EI benefits, as outlined in the section below. It appears that workers who are potentially available for both CERB and one or more types of EI may elect which benefit to apply for (however, the government has advised that those who are already receiving EI benefits will continue to receive those benefits and should not apply to the CERB, and that pending EI applications will be automatically processed through the CERB system). The relative advantages of CERB versus EI will depend on each worker's circumstances, including their eligibility and pre-interruption income. A CERB and EI Comparison table after the EI section compares CERB with the three types of EI benefit that may be available to workers affected by COVID-19.

EI benefits

EI benefits provide temporary income support to individuals who lose wages. They replace up to 55% of a worker's income to a maximum of $573 per week. In some workplaces, a Supplemental Unemployment Benefit (SUB) plan can be used to increase their employees' weekly earnings while on EI.

To qualify for EI, a worker must be engaged in insurable employment for a minimum number of hours. This necessarily excludes self-employed individuals, who are not considered to be engaged in insurable employment (except for those who previously opted in to the special unemployment scheme under the EI Act). As noted, gig economy workers may be deemed to be self-employed and thus not eligible for EI. As well, the hours threshold makes EI out of reach for most precariously employed workers.

Three types of EI benefits are most likely to apply in circumstances of COVID-19 related wage loss: regular benefits, sick benefits and caregiving benefits.

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[84] SOR/2020-89 April 16, 2020

[85] SOR/2020-90 April 16, 2020. However, in order to requalify for CERB after already receiving it for an initial four-week period, the worker may not have earned more than $1,000 for the entire four-week benefit period of the claim.

Regular benefits apply to workers who lose their wages due to job loss or temporary layoff. This would cover situations where workers are terminated or laid off for reasons related to the COVID-19 crisis, e.g. the business closes, reduces or reorganizes due to a government order and/or the economic effects of the crisis or have been laid off prior to the crisis and remain unable to find work. More detailed information about eligibility for EI regular benefits is set out in CERB and EI comparison table below and on the government's website: https://www.canada.ca/en/services/benefits/ei/ei-regular-benefit/eligibility.html

Sickness benefits apply to workers who lose their wages for medical reasons. There is little doubt that this would cover workers with suspected or diagnosed COVID-19. A regulation makes it clear that these benefits are available to workers who attest that: [86]

> (a) a period of quarantine was imposed on the claimant under the laws of Canada or a province;
>
> (b) a period of quarantine was imposed on the claimant by a public health official for the health and safety of the public at large
>
> (c) a period of quarantine was recommended by such an official for the health and safety of the public at large and that the claimant was asked by their employer, a medical doctor, a nurse or a person in authority to place themselves under quarantine.

In order to make the sickness benefit more accessible for COVID-19 related claims (i.e. claims arising out of the three circumstances outlined above, the federal government has waived the one-week waiting period that would ordinarily apply, as well as the requirement to produce a medical certificate.[87]

More detailed information about eligibility for EI sickness benefits is set out in the CERB and EI comparison table below and on the government's website: https://www.canada.ca/en/services/benefits/ei/ei-sickness.html

Caregiving benefits apply to workers providing care to a family member that is gravely ill, injured or in need of end-of-life care. That illness could be COVID-19, provided that the family member is at least critically ill with COVID-19. It is not available simply because the family member is ill with COVID-19, even they require care and support.

More detailed information about eligibility for EI caregiving benefits is set out in the CERB and EI comparison table below and on the government's website: https://www.canada.ca/en/services/benefits/ei/caregiving.html

CERB and EI comparison table

[86] SOR/96-332 s. 40.1(1)(a)-(c)

[87] EI Reg s. 40.1(2)(a)-(b)

The differences between CERB and each of the three types of EI benefits discussed above are illustrated in the table below:

	EI regular	**EI sickness**	**EI caregiving**	**CERB**
Circumstances covered	Job loss/ layoff (involuntary)	Sickness and quarantine	Care for family member who is critically ill or at end of life	Job loss/layoff (involuntary) Sickness/quarantine Care for family member who is ill Care for children home because of school/daycare closures EI benefits exhausted and unable to find job/return to work because of COVID-19
Amount of benefit ($)	55% of pre-loss income to a maximum of $573/week	55% of pre-loss income to a maximum of $573/week	55% of pre-loss income to a maximum of $573/week	$2000 per month
Maximum number of weeks available	14-45 (varies by region)	15	15-26 depending on the type of caregiver benefit	Four-weeks per claim to a maximum of 16 weeks
Insurable employment requirement (over past 52 weeks)	420-700 hours of insurable employment (regionally dependent)	600 hours of insurable employment	600 hours of insurable employment	$5,000 from employment, self-employment or pregnancy/parental leave benefits
Interruption in earnings	Without work or pay for at least 7 consecutive days	40% decrease for at least one week	40% decrease for at least one week	Without work or earned less than $1,000 within four-week benefit period
Waiting period	1 week	None (waived for COVID-19-related claims)	1 week	None
Medical note	n/a	None (waived for due to COVID-19)	None (waived due to COVID-19)	None

WSIB benefits

For workers covered by workers' compensation, a WSIB claim may be available where it is more likely than not that a workplace exposure made a significant contribution to the worker's development of the illness.

Workers can make claims with the Workplace Safety and Insurance Board (WSIB) for occupational diseases, which can include communicable/ infectious illnesses such as COVID-19. Claims for such illnesses are currently dealt with on a case-by-case basis (they are not dealt with under the Schedules to the Act, nor are they dealt with in any WSIB Policy).

The WSIB has recently released an Adjudicative Approach Document with respect to COVID-19.[88] This document confirms that adjudication of COVID-19 claims will take place on a case-by-case basis. The WSIB will consider two factors in adjudicating claims: 1) whether the nature of the worker's employment created a risk of contracting the disease to which the public at large is not normally exposed, and 2) whether the WSIB is satisfied that the worker's COVID-19 condition has been confirmed. Where these factors are satisfied, this will ordinarily be sufficient to show that the workplace made a significant contribution to the worker's illness.

The WSIB will consider all of the facts when considering the opportunity for transmission in the workplace, including whether a contact source to COVID-19 within the workplace been identified, the nature/location of employment and risk of exposure to infected persons/substances.

Significantly, the WSIB is not currently requiring a confirmed diagnosis of COVID-19. This is important in light of the fact that many sick individuals have not been able to access testing. The WSIB will consider whether the incubation period (time from exposure to onset of illness) is compatible with workplace exposure, and if a medical diagnosis has not been confirmed, whether the worker's symptoms are compatible with COVID-19. Ideally, this should be supported by an assessment by a registered health professional with a record of the assessment.

The WSIB also confirmed that it does not provide coverage for workers who are symptom-free and quarantined or sent home on a precautionary basis. However, should a symptom-free worker develop symptoms or illness while in quarantine, they may be eligible for WSIB benefits.

Injured worker advocates are seeking an improved approach under which claims for health care workers, first responders and all other workers who come into contact with the public who develop COVID-19 would be subject to an irrebuttable presumption under Schedule 4 of the *WSIA*.[89]

Sick leave plans

[88] https://www.wsib.ca/sites/default/files/2020-03/adjudicativeapproachnovelcoronavirus.pdf

[89] https://injuredworkersonline.org/covid-19-oniwg-calls-for-wsib-support/

Many workplaces, especially unionized workplaces, have employee sick leave plans. Sick leave plans will provide coverage where the worker is unable to work due to diagnosed or suspected COVID-19. Virtually all of them will provide coverage in cases where the worker is ordered into quarantine by a public health official.

It is less certain whether coverage is available in cases where a worker is not sick or specifically ordered into quarantine, but heeds the advice of public officials to self-isolate following cross-border travel or because their age and/or pre-existing health conditions makes them especially vulnerable to COVID-19.

In those cases, while the scope of coverage may vary depending on the particular language of the plan, unions should assert that the plan covers all absences due to COVID-19 related self-isolation.

Emergency Student Canada Benefit

On April 22, 2020, the Federal Government announced a new package of benefits and programs to support students and recent graduates impacted by COVID-19, which includes the new Canada Emergency Student Benefit (CESB).

The benefit will be available for students who are unable to find full-time summer employment or who are unable to work due to COVID-19, and who are not eligible for Employment Insurance (EI) or the Canada Emergency Response Benefit (CERB).

A student who is eligible for the CESB will receive $1250 per month. Students with dependents and permanent disabilities are eligible for an additional $750 per month.

To be eligible for the program, an applicant must be a permanent resident or Canadian citizen who falls into one of the following categories:

- high school students who graduated in 2020, have applied for enrollment in a post-secondary program that is scheduled to begin before February 1, 2020 and who plan to enroll in the program if their application is accepted;
- current post-secondary students who were enrolled in a degree, diploma, or certificate program at any time, between December 1, 2019 and August 2020; and
- recent post-secondary graduates who graduated no earlier than December 2019.

Students receiving CESB cannot receive any income from employment or self-employment, from benefits like EI, CERB, or provincial benefits for student parents while receiving CESB. However, the Minister of Finance has power under the Act to make regulations that could allow students to earn some income while receiving CESB. No regulations have yet been made.

It is expected that students will be able to apply for the CESB beginning in mid-May, 2020. The program will be run through the Canada Revenue Agency. Students can apply for the benefit for any four-week period between the time the benefit becomes available and September 30, 2020. Students applying for the CESB on the basis that they cannot find work must attest to the fact that

they are actively looking for employment. The government will stop accepting applications as of September 30, 2020.

Programs to support employment during periods of downturn

As alternatives to layoffs, employers may avail themselves of certain federal benefits that permit them to continue to pay employee wages despite the downturn. These include EI Work-Sharing and the Canada Emergency Wage Subsidy (CEWS).

EI Work Sharing

Where there is a temporary decrease in business activity, an employer may be able to apply to the EI Work-Sharing program. The program provides federal income support to employees eligible for EI who work a temporary reduced work week while the business recovers. Affected employees must all agree to an equal reduction of wages and to share available work over a specified period of time. There are a number of rules and restrictions on the program, including that each participating employee must be eligible for EI. In response to COVID-19, the federal government extended the maximum possible duration of an agreement from 38 weeks to 76 weeks.

Canada Emergency Wage Subsidy (CEWS)

On Saturday, April 11 the Government of Canada passed legislation creating the expanded Canada Emergency Wage Subsidy (CEWS).

The CEWS is intended to prevent layoff and to encourage the re-hiring of laid off employees. For eligible employers who can demonstrate a decrease in business revenue of at least 30% as a result of COVID-19, CEWS provides 75% of an employee's remuneration up to $847 per week per employee, for a period of up to 12 weeks (March 15 to June 6). Employers are expected to re-hire laid off employees, retain existing employees, and even hire new employees using the subsidy.

Most private sector employers in Canada are eligible to apply for CEWS. This includes large or small companies, non-profit organizations, registered charities and trade unions. However, CEWS is not available to public sector employers such as municipalities, school boards, hospitals and universities and colleges.

CEWS was backdated to March 15. This means that employers can hire back workers who were laid off due to COVID-19 and have 75% of their wages covered retroactively (i.e., pay them back pay from date of recall to March 15 and apply for subsidy). In this scenario, the employee would likely have to repay any CERB benefits received while laid off.

Employers are still responsible for paying all wages and benefits.

PART V: TERMINATION AND SEVERANCE PAY

The COVID-19 pandemic has resulted and will continue to result in layoffs and termination. In addition to EI benefits that provide income support during periods of layoff, employees who are terminated from their employment have rights to notice of termination, termination pay and

severance pay under written employment contracts (or employer personnel policies), or under oral or implied employment contracts at common law.

Generally, employment standards legislation establishes a minimum floor of entitlements. Collective agreements and individual contracts of employment may provide greater or different rights or benefits (if they provide lesser benefits, they are unenforceable). Below, we provide an overview of these entitlements. This section is structured as follows:

⇒ Termination and severance pay under employment standards legislation

⇒ Greater rights or benefits

- Under collective agreements
- Under written employment contracts (or employer personnel policies)
- Under oral or implied individual contracts of employment at common law

Termination and severance pay under employment standards legislation

Employment standards legislation (Ontario ESA and federal CLC) sets out minimum standards for notice of termination, termination pay (pay in lieu of notice), and severance pay, subject to exemptions and exclusions set out in the legislation and regulations.[90]

Under the ESA:

- termination pay is available to employees who have been employed for three months or more in an amount equal to one week of pay per year of service up to a maximum of 8 weeks.[91] In cases of mass terminations (50 employees or more within a 4-week period), employees may be entitled to 8-16 weeks' pay in lieu of notice, depending on the number of employees who are terminated.[92]

- Where applicable, severance pay is available in an amount equal to one week of severance pay per year of service up to a maximum of 26 weeks.[93] Severance pay is applicable in the following circumstances:

[90] *ESA*, s. 3(5) and O. Reg. 477/18 (see Part III – Leaves and Benefits). In addition, the termination and severance provisions of the Act do not apply to construction employees: O. Reg. 288/01, s. 2(1)9 and 9(1)7.

[91] *ESA*, s. 57.

[92] *ESA*, s. 58; O. Reg. 288/01, s. 3(1).

[93] *ESA*, s. 65.

- employee has worked for an employer for 5 years or more (whether it is continuous employment or not), and
- employer has a payroll of $2.5 million or more or where the employee is one of 50 or more employees who have been severed in a 6 month period due to a permanent discontinuance of all or part of the employer's business.[94]

Under the CLC:

- termination pay is available where an employee has completed 3 months of consecutive employment with the employer in an amount of two weeks' pay, regardless of the length of service.[95]

- severance pay is available to an employee who has completed 12 consecutive months of employment with the employer[96] in an amount of five days wages at the employee's regular rate of pay + two days wages at the employee's regular rate of pay for each year of employment completed with the employer.[97]

Under the ESA and the CLC, termination and severance entitlements do not arise for so long as the layoff is "temporary".[98] A temporary layoff under the ESA generally cannot exceed 13 weeks in a 20 week period;[99] under the CLC, it cannot exceed three months[100] (in both cases, this is subject to certain exceptions).[101] It is only once a layoff is permanent that a layoff becomes a termination and the employee's entitlements to termination and severance pay are triggered.

Both the ESA and the CLC provide for a number of other exceptions to the requirement for notice and/or severance.[102] Of note, under the ESA, if an employer can prove that the contract of employment has become "impossible to perform" or "frustrated by a fortuitous event", then it will be relieved of its termination pay obligations. An employer may also be relieved of its severance

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[94] *ESA*, s. 64; 65(2).

[95] *CLC*, s. 230.

[96] *CLC*, s. 235(1).

[97] *CLC*, s. 235(1).

[98] *ESA*, s. 56(1)(c); *CLC*, s. 230(3)

[99] *ESA*, s. 56(2)

[100] CLC Regs, s. 30

[101] Under the *ESA*, the temporary layoff period may be extended where the employee continues to receive substantial payments from the employer or benefits during the layoff period (s. 56(2)(b)) or where a unionized worker retains recall rights (s. 56(2)(c)). Under the CLC, the temporary layoff period may be extended up to six months if the employee retains recall rights (CLC Regs, s. 30(1)).

[102] O. Reg. 288/01, ss. 2(1) and 9(1)

pay obligations provided that its business is not permanently discontinued; however, severance obligations likely remain where the employer's business is permanently discontinued.

Some commentators have suggested that this frustration exception would apply in the case of businesses forced to close for reasons related to COVID-19, on the basis that the pandemic is a "fortuitous and unforeseen event." However, the frustration exception is an exception to employment standards protections, and the Supreme Court of Canada has emphasized that such exceptions must be construed narrowly.[103] It is arguable that unless a business has shut down entirely and permanently, the contract of employment has not become "impossible to perform." Further given that in Ontario the SARS epidemic occurred fairly recently and in light of the increasing frequency of worldwide pandemics it is difficult to say that these events are entirely unforeseen.

Greater rights or benefits

As noted, employment standards establish a minimum floor of entitlements. Employers may not contract for lesser standards, but contracts, including collective agreements and individual contracts, may provide for greater rights or benefits.[104] Where greater benefits are available under a contract, then the terms of the contract apply and the employment standard does not.

The question of whether employment standards legislation or a collective agreement provide a greater right or benefit is not always a simple analysis. One must look at the entirety of the terms of the contract that "directly relate to the subject matter" of the employment standard and compare them to the employment standard. It is important to compare "apples with apples". In addition, one must consider that benefits under a collective agreement might be better than the employment standard for one member of the bargaining unit but not for another, depending on their circumstances.[105]

As set out below, both collective agreements and individual contracts of employment may provide a greater right or benefit with respect to termination and severance entitlements.

Collective Agreements

Collective agreements may provide for greater rights or benefits than employment standards legislation. Some collective agreements provide for layoff packages that far exceed the amounts of termination and severance pay available under employment standards legislation. These may be part of a negotiated layoff regime that defines what constitutes a layoff, the order in which employees can be laid off, bumping rights, retirement options and/or recall rights.

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[103] *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC)

[104] *ESA*, s. 5(2); CLC, s. 168(1).

[105] *Corporation of the Town of Oakville v Oakville Professional Fire Fighters Association, Local 1582*, 2018 CanLII 88290 (ON LA)

The duration of a "temporary layoff" may also be different under a collective agreement. For provincially regulated unionized workers in Ontario, the ESA extends the potential duration of a temporary layoff where the employer recalls the employee within the time set out in the collective agreement.[106] In those circumstances, the temporary layoff period could be as long as the recall period, which under some collective agreements can be upwards of two years. In that case, the right to termination pay is not triggered unless and until the recall period has elapsed. However, under the ESA, employment is severed earlier than that, at 35 weeks.[107] Thus, after 35 weeks, employees may elect to either:

- retain the right to be recalled but give up their right to receive their severance pay at that time (in which case the union and the employer can reach an agreement to hold the monies in trust for the duration of the recall period);[108] or
- give up their right to be recalled and receive termination and severance at the same time.[109]

For federally regulated workers, the CLC extends the potential duration of a temporary layoff to 12 months as long as the employee maintains recall rights under the collective agreement.[110]

Written contracts of employment (or employer personnel policies)

The termination pay entitlements of non-unionized employees will depend on what is written in their employment contract or employer personnel policy. There are three possibilities:

- The employment contract specifies that the employee's entitlements are limited to the statutory minimums. In this case, the employee is entitled to the employment standards benefits.
- The employment contract or employer personnel policy expressly provides for more notice of termination than the statutory minimum. In this case, the employee is entitled to the greater notice provided in the employment contract or employer personnel policy.

[106] *ESA*, s. 56(2)(c)

[107] ESA, s. 63(1)(c)

[108] *ESA*, s. 67(7)

[109] *ESA*, s. 67

[110] *CLC* Regs, s. 30(1)(f)

- The employment contract or employer personnel policy is silent on the matter of notice. In this case, the employee is entitled to reasonable notice of termination as determined by the common law.

Oral Contracts of Employment

Below, we address an employee's common law entitlements, which as set out above apply where the employee is not covered by a collective agreement, does not have a written contract of employment or is not bound by an applicable employer personnel policy that addresses their entitlement to notice or severance pay. Specifically, we will discuss (1) the common law notice period; and (2) the matter of temporary layoffs.

(1) The common law notice period

An employee is entitled to a reasonable period of notice at common law when their employment is terminated without cause.

When calculating reasonable notice periods at common law, the courts consider a non-exhaustive list of factors which include the following: [111]

- the character of the employment,
- the length of service of the employee,
- the age of the employee and
- the availability of similar employment, having regard to the experience, training and qualifications of the employee.

As a result of COVID-19 and the economic recession that will likely follow, for most employees, the availability of similar employment will be narrowed. Arguably, this should increase the notice period. While there is conflicting caselaw about whether an economic recession may increase the notice period, it appears to be settled in Ontario that the recession may not diminish the notice period.[112]

(2) Temporary Layoffs

In the case of temporary layoffs or other significant changes in the terms and conditions of employment (for employees who aren't covered by a collective agreement or whose individual written contract of employment or employer personnel policy doesn't address changes such as

[111] *Bardal v. The Globe & Mail Ltd.,* 1960 CanLII 294 (ON SC)

[112] *Lim v. Delrina (Canada) Corp.,* 1995 CanLII 7271 at para. 25

temporary layoffs), courts have generally afforded those employees certain rights that aren't available to other employees.

For example, in the case of a temporary layoff, an employee governed by the common law probably has a different option than simply waiting a period of time before being able to claim termination or severance pay. Generally, an employer can only rely on the temporary layoff provisions in the ESA if the contract of employment expressly permits temporary layoffs[113] or the employee and employer agree in writing to a temporary layoff or if the employer has had a custom or practice of invoking temporary layoffs at certain times. Where the written or oral contract or the employer's custom or past practice does not permit temporary layoffs, the common law has generally held that a temporary layoff is a serious or significant breach of a fundamental term of the employee's contract, or a "constructive dismissal." This gives the employee the option of treating the employer as having terminated the contract and entitling the employee to make a claim for common law notice and/or statutory notice and severance.[114]

Thus, if an employee is laid off temporarily by an employer as a result of COVID-19, but the contract or the employer's personnel policy or custom or practice does not allow temporary layoffs, the employee will be able to argue that this was in fact a termination and claim notice and severance.

A similar situation can occur if the employer imposes significant changes in an employee's hours of work or salary during the COVID-19 crisis. If significant enough, those changes could also amount to a constructive dismissal.

There are many considerations to take into account before an employee decides to claim that they have been constructively dismissed, and the employee has options other than leaving the employment and making such a claim. The employee should definitely seek legal advice as soon as possible after getting notice of a temporary layoff, reduction in hours, reduction in wages, or any other significant change in their terms of employment. Leaving your employment and making a claim for constructive dismissal can be a risky decision to take, because if the claim is denied by the courts, then leaving the employment is treated as a resignation and no termination entitlements are owing at common law or under the applicable statute. Depending on what termination entitlements are owing and what other employment alternatives are available to the employee, it may be preferable for an employee to simply give the employer notice that they are not accepting the change in the terms of their employment but that they will continue to work for the employer under those changed terms - and bide their time until their personal situation changes. Or if the only change is a temporary layoff and there is a realistic chance of returning to work, the employee may simply decide to do nothing until the end of the period of the temporary layoff. A decision of this nature is obviously a very important decision with very important consequences

[113] See e.g. *Bevilacqua v Gracious Living Corporation*, 2016 ONSC 4127 at para 18.

[114] The issue of temporary layoffs and constructive dismissal is further discussed in Devan Marr, "Constructive Dismissal in the time of COVID-19" Canadian Law of Work Forum (March 17 2020): http://lawofwork.ca/?p=11986.

and should not be made without seeking legal advice, and very carefully laying out your situation to the lawyer.

PART VI: *HUMAN RIGHTS ISSUES*

Human rights codes prohibit discrimination on the basis of certain protected characteristics, (e.g. disability, race, place of origin, family status). Employers may not treat employees adversely on the basis of protected characteristics, unless they can justify the adverse treatment as a bona fide occupational requirement (BFOR). The duty to accommodate is part of the BFOR process. Employers cannot justify discrimination as a BFOR unless all reasonable attempts have been made to accommodate the employee to the point of undue hardship. The undue hardship analysis involves consideration of health, safety and cost.

The response of employers to COVID-19 has the potential to affect workers on the basis of protected characteristics, thus engaging human rights codes (which are also implied terms of collective agreements). In particular, requirements and rules adopted or applied in response to COVID-19 could impact the following protected categories of workers:

- Those with COVID-19, or are perceived as having COVID-19 because of their symptoms or exposure to risk. These employees would likely be regarded as falling within the protected ground of "disability". The Ontario Human Rights Commission has taken the policy position "that the *Code* ground of disability is engaged in relation to COVID-19 as it covers medical conditions or perceived medical conditions that carry significant social stigma."[115] While the Commission's position is not binding on any adjudicator, it is likely to be regarded as highly persuasive.

- Those who may be suspected of having COVID-19 because of the protected grounds of race or place of origin.

- Those whose age and/or pre-existing health conditions render them especially vulnerable to COVID-19. Age is a protected ground, and those pre-existing health conditions would likely be considered disabilities.

- Those who live with people whose age and/or pre-existing health conditions render them especially vulnerable to COVID-19. Human rights codes prohibit discrimination on the basis of association with a person with a protected characteristic.

[115] Ontario Human Rights Commission policy statement on the COVID-19 pandemic, http://www.ohrc.on.ca/en/news_centre/ohrc-policy-statement-covid-19-pandemic

- Parents or caregivers affected by school and daycare closures. To the extent that these employees must stay home to look after their children, they would likely be covered by the protected ground of family status.

As discussed above in Part II (occupational health and safety), the COVID-19 pandemic is a public health emergency that has heightened the obligation employers to ensure worker health and safety. It is therefore likely that measures adopted by employers to reduce the spread of COVID-19 in the workplace will be upheld as a BFOR, and accommodations that ask the employer to tolerate increased risk will be viewed as creating undue hardship. Thus, for example, employers will almost certainly be justified in denying access to the workplace to employees at risk of transmitting COVID-19, even though this could be construed as imposing a disadvantage on a protected group. These employees present a clear risk to the health and safety of other workers.

However, not all risk management measures can be justified as a BFOR. An employer's assessment of risk must be grounded in science, not stereotype. A decision to bar an employee from the workplace solely on the basis of stereotypical assumptions about the employee's race or place of origin would not be a BFOR.

Further, employers will generally not be able to justify terminating or otherwise penalizing an employee solely on the basis that they are unable to work for reasons related to COVID-19. As set out above in Part III (protected leaves and benefits), employment standards legislation and most collective agreements also provide this protection for most employees. However, for employees excluded by employment standards legislation, not covered by collective agreements, or whose circumstances fail to trigger entitlement to a job-protected leave, human rights legislation may afford equivalent protection. However, from a practical perspective, it may be difficult to obtain a timely remedy from a human rights tribunal. The Ontario Human Rights Tribunal was already experiencing significant backlogs prior to the COVID-19 crisis, and the crisis can only make the existing systemic delays worse.

Employees may also be entitled to accommodations consistent with workplace safety. Some accommodations that may be appropriate in the context of the COVID-19 pandemic include:

- Modifying schedules or work areas to reduce the risk of infection for vulnerable employees or employees who live with vulnerable people

- Allowing employees to work from home and providing necessary technological and other supports to enable this

- For employees working from home while also caring for children: modifying schedules, reducing hours or extending deadlines

- For employees who are accommodated with reduced hours, allowing them to use other available benefits to top up their pay

The availability of these accommodations is of course subject to undue hardship considerations, which will necessarily vary depending on the nature of the workforce and the job being

accommodated. What constitutes undue hardship in one workplace may be feasible and required in another.

PART VII: TEMPORARY FOREIGN WORKERS

Tens of thousands of migrant workers in Canada work in industries that are being impacted by the COVID-19 pandemic, including agriculture, live-in caregiving, and food service.

When the federal government announced restrictions to air and land travel to Canada, there was initial uncertainty about whether migrant workers under the Temporary Foreign Worker Program and related programs would be permitted to enter Canada. On March 20, 2020, the federal government issued a statement clarifying that "[e]xemptions to the air travel restrictions will apply to foreign nationals who have already committed to working, studying or making Canada their home, and travel by these individuals will be considered essential travel for land border restrictions."[116] The statement said exemptions would include:

- seasonal agricultural workers, fish/seafood workers, caregivers and all other temporary foreign workers
- international students who held a valid study permit, or had been approved for a study permit, when the travel restrictions took effect on March 18, 2020
- permanent resident applicants who had been approved for permanent residence before the travel restrictions were announced on March 16, 2020, but who had not yet travelled to Canada.117

Migrant workers have access to many of the same statutory protections as Canadian workers, but face significant barriers in practice.[118] Closed work permits that are tied to a single employer make migrant workers dependent on their employer for status and employment, and thus reluctant to make complaints. If a migrant worker wishes to leave their employer and find a new job, the new employer must obtain authorization to hire a temporary foreign worker through a Labour Market Impact Assessment.

There are also arbitrary exclusions from statutory protections that will adversely impact migrant workers in the weeks and months ahead. For instance, Ontario's *Employment Standards Act* excludes agricultural workers from basic protections such as minimum wage and overtime pay.[119] As Canadians rely on continued food production during the pandemic, it is unacceptable that

[116] https://www.canada.ca/en/immigration-refugees-citizenship/news/2020/03/canada-provides-update-on-exemptions-to-travel-restrictions-to-protect-canadians-and-support-the-economy.html

[117] *Ibid.*

[118] See e.g. Canadian Council for Refugees, *Evaluating Migrant Worker Rights in Canada* (May 2018), online: https://ccrweb.ca/sites/ccrweb.ca/files/reportcards_complete_en.pdf.

[119] Exemptions, Special Rules and Establishment of Minimum Wage, O Reg 285/01, s. 2(2).

migrant farmworkers producing much-needed food lack the same workplace protections enjoyed by others. In addition, the *Occupational Health and Safety Act* excludes live-in caregivers, many of whom will face unique dangers of COVID-19 in their work.[120] These arbitrary exclusions are layered on top of other barriers faced by migrant workers seeking to enforce their rights.

Subject to certain exclusions, migrant workers generally benefit from the protections afforded by Employment Insurance, WSIB, the *Human Rights Code*, *Employment Standards Act* and *Occupational Health and Safety Act*, as described elsewhere in this memo, as well as the *Employment Protection of Foreign Nationals Act* in Ontario.

Groups dedicated to supporting migrant worker rights include the Workers' Action Centre (416-531-0778 or 1-855-531-0778 or www.workersactioncentre.org) and Justicia for Migrant Workers (Spanish: 1-866-521-8535 or English: 1-877-230-6311 or www.justicia4migrantworkers.org).

[120] *OHSA* s. 3(1): "This Act does not apply to work performed by the owner or occupant or a servant of the owner or occupant to, in or about a private residence…"