

Labour, Employment & Employee Benefits

Client Alert

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Employer Alert on “Swine Flu”

The confirmation that the contagion, “Swine Flu”, is present in Canada, raises potential issues about the rights and responsibilities of both employers and employees.

This situation is highly dynamic and the comments contained below may change as a result to changes in circumstances and new information from public health authorities. However, based on past experiences with similar public health issues, most notably SARS, it is prudent for employers to consider the issues and take reasonable steps now. The following will assist employers in doing so.

In addition, there are very specific risks and issues for employers operating in the healthcare industry that are not addressed in detail in this alert. For information specific to the healthcare industry please contact us and we can provide more precise advice and assistance.

Employer Duties

Ontario Occupational Health and Safety Act (“OHSA”)

Statutory Duty to Provide a Safe Workplace

Employers are under a duty to ensure the safety of employees. Generally speaking, this duty requires employers to take reasonable steps to ensure that employees are safe, and that the workplace is reasonably safe. As such, employers may wish to increase the safeguards in place at the workplace to reduce the risk that an employee may contract the virus at work. Employers should take all those steps that a reasonable person would in the circumstances. As such, it is advisable that employers put in place the protections suggested by the Ministry of Health and/or World Health Organization (“WHO”) and/or Center for Disease Control. Such steps would include, for example:

- Ensuring that ventilation systems in the workplace are clean and in good condition;
- Providing employees with antiseptic cleanser;
- Ensuring that the workplace is kept clean and free of germs to the extent reasonably possible;
- Reminding employees of the need to wash their hands regularly, and to cover their mouth when sneezing or coughing;
- Taking reasonable measures to ensure that employees at work are not symptomatic and therefore likely to infect others and the work-product.
- Remind employees that are experiencing flu-like symptoms to stay away from the workplace and immediately see a doctor.

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Under the *OHSA*, employers are required to ensure that the workplace is safe and free of hazards. As such, employers have an obligation to protect employees from contagion. The *OHSA* imposes a high standard on employers to ensure the safety of employees. Employers must use an objective measure and take every precaution reasonably possible in the circumstances to protect employees. To this end it is relevant and appropriate for employers to consider the precautions recommended by physicians, scientists and other knowledgeable persons when making decisions regarding employee rights.

Employers who operate in industries in which employees perform job duties which could impinge on the health and safety of the public, where there is a high degree of travel required (and to places where the employee could contract Swine Flu), or where invasive procedures are an unavoidable part of the employees work will be required to be even more diligent in their attempt to secure the workplace. Such industries may include: the food services, retail, processing or preparation; the healthcare industry, schools, and retail and service industry generally. In such industries employees may be at an increased risk of contracting Swine Flu, or may put others at an increased risk of contracting Swine Flu, and as such, employers operating in these industries should take special measures to safeguard employees and the public.

An employer may be required to suspend an employee who creates or created unsafe working conditions. Thus, employees who choose not to remain at home in isolation or quarantine if ordered to do so, should be prohibited from entering the workplace.

Employers should be cautious, however, to ensure that they are not succumbing to generalized fears of contagion. While it is important to ensure that the workplace is a safe environment and that employees are protected from legitimate risks, it is also important not to be swept up in unreasonable and unfounded generalized fears of contagion. Fears that are not based upon genuine risk may result in unfair or discriminatory treatment toward employees of certain ethnic backgrounds. Such treatment is of course prohibited by the *Ontario Human Rights Code*.

Duty to Direct Workers

Under the *OHSA*, employers are under a duty to provide information, instruction and supervision to employees in order to protect employees from workplace hazards or dangers. This duty requires employers to ensure employees are acquainted with workplace hazards and how to protect themselves and other employees. This duty extends not only to employees, but also to any workers at the employer's place of business.

In addition to educating employees about Swine Flu generally, employers should also take time to educate employees as to how they can, if necessary, protect themselves from any risks associated with working in a particular place of work.

Ontario Human Rights Code

Employer responsibilities extend to both infected and non-infected employees. Employers have a responsibility to ensure that employee fears of contagion do not result in discrimination or harassment. In addition, employers have an obligation to accommodate employees who are suffering from a disability. Given the broad interpretation of disability under the *Code*, employees suffering from health issues relating to Swine Flu will likely be covered by the *Code*. The Ontario Human Rights Commission defines disability very broadly to include the subjective belief that someone is disabled. A disability may be the result of a physical

limitation, an ailment, a perceived limitation or a combination of all these factors. The focus is on the effects of the distinction, preference or exclusion experienced by the person and not on proof of physical limitations or the presence of an ailment. As such, an employer will be required to protect employee from harassment or discrimination on the basis of a perceived disability. In addition, an employer may be required to accommodate an employee who genuinely believes that s/he is disabled, despite the fact that the employee may not in fact be suffering from a disability.

Discrimination

The Ontario *Human Rights Code* prohibits discrimination based upon place of origin, race, ancestry, or disability. As such, employers must be diligent in ensuring that their policies and procedures respecting Swine Flu do not contravene the *Code*. It may be legitimate for an employer to refuse to allow an employee to return to work after a trip to a known Swine Flu hotspot, following a period of quarantine, or following time off from work to care for a relative who was in isolation or quarantined. To ensure that these measures are not seen to be discriminatory, employers should take measures to justify their decision. This means that an employer may wish to require that employees who return to work from a visit to a known Swine Flu hotspot, or following quarantine, provide a medical certificate stating that they are fit and healthy, and able to return to work. It is only after an employee refuses to provide a medical certificate in the face of a reasonable employer request or where a medical certificate suggests that an employee is not healthy enough to return to work that an employer may be able to refuse to allow such employees back into the workplace.

Reasonable Accommodation

Employers should be careful to ensure that they take appropriate steps to accommodate employees who are disabled as a result of Swine Flu. This may require employers to provide disabled employees with alternate work, allow employees to work from home, or to provide such employees with time off from work without penalty. The requirement to accommodate disabled employees is to the point of undue hardship.

Harassment

Employers also have an obligation under the Ontario *Human Rights Code* to ensure that the workplace is free of harassment. Employers should take appropriate steps to investigate allegations of harassment and to eradicate such behaviour. It is important that employers do not harass employees who maybe suffering from Swine Flu, have a close relative or relation that may be suffering from Swine Flu, or who have returned home from an area which is known to be a Swine Flu hotspot (presently Mexico and Southern U.S.). This means that while it is important for employers to take appropriate measures to ensure that the workplace remains a safe place to work, it must not engage in harassment. Employers should not be investigating employees while they are not at work, calling employees, threatening employees, or engaging in conduct that may cause insult or humiliation to certain groups of employees.

Health Protection and Promotion Act

The Ontario *Health Protection and Promotion Act* (“*HPPA*”) provides the Ontario Minister of Health with broad powers to deal with hazards presented by communicable and virulent diseases. Under the *HPPA*, certain individuals are required to report communicable diseases to the Medical Officer of Health. As such, physicians, nurses, chiropractors, pharmacists, optometrists, dentists, practitioners, school principals, laboratory operators, hospital administrators and superintendents of stipulated institutions are required by law to report Swine Flu to the Medical Officer of Health. Failure to report such knowledge is an offence that is punishable by fine of up to \$5,000 per day or part of a day in which the offence continues. Directors, officers, employees or agents of a corporation responsible for the conduct of that part of the business guilty of an offence are subject to a fine of up to \$25,000 for each day or part of a day that the offence continues.

Although the *HPPA* does not require employers to report the knowledge or belief that an employee has Swine Flu, where an employer operates in an industry in which the public may be put at risk as a result of the failure to report the information and to take appropriate measures to protect the public the employer may find themselves in breach of other regulatory requirement or standard (depending upon the nature of the industry). As well, an employer who provides medical services on-site to employees or refers employees to a company physician are required to ensure that company medical personnel are in compliance with the *HPPA*.

Additionally, the *HPPA* provides broad powers on the Medical Officer of Health, and as such, it may be that an order will be issued requiring employers to comply with certain requirements. No such orders have been issued to date.

Certain employers will have additional obligations due to the particular industry in which they operate.

Food Services. Manufacturing or Processing

Employers who operate in the food services industry are subject to a higher degree of regulation. The federal *Food and Drugs Act* and other regulations impose high standards for hygiene and safety on such employers and employees. For example, a regulation made pursuant to the federal *Meat Inspection Act*, at s.57 prohibits a person with a known communicable disease, from working in any area where the person may contaminate meat products, or a surface with which meat comes into contact with meat. As such, employers should be diligent in this industry to ensure that employees who are exhibiting symptoms or who may have come into contact with Swine Flu to obtain medical certification that they are able to perform the essential duties of their job without putting others at risk. However, regular, randomized disease testing may not be defensible. Where an employee has reason to believe that he is ill, or where the employee’s supervisor also reasonably has such belief, it is incumbent on the company to ensure that the employee is not suffering from a communicable disease if his work will require regular contact with meat in a manner as to constitute an infection risk.

In addition the *HPPA* contains specific provisions that impose a higher duty on employers operating in the food services industry. For example, the *HPPA* requires every person who operates a food premise to provide the Medical Officer of Health with information requested regarding the manufacturing, processing, preparation, storage, handling,

display, transportation, sale or offering for sale of any food on or in the food premise. Persons are also prohibited from offering for sale any food that is unfit for human consumption due to disease, adulteration, impurity or other cause.

The Canadian Food Inspection Agency has prepared a Food Safety Enhancement Program Manual to provide guidance to management and employees of the food industry outlining standards of personal hygiene and cleanliness that are required of all employees handling food products. The Manual provides that such employees are required to:

- Wash their hands with soap and warm water upon entering the food handling area; paper towels should be used to turn off water taps; employees should also wash their hands after using the toilet, coughing or sneezing or blowing their nose;
- Clean clothing, uniforms and aprons should be used by all food handlers; uniforms or aprons should not be worn outside the food processing area; hair should be restrained at all times;
- Food handlers should avoid touching their nose, mouth, hair and skin during food handling;
- Personal effects and street clothing should not be kept in food handling areas; these items should be stored so as to prevent contamination;
- Access of personnel and visitors should be controlled in food processing areas;
- Protective clothing, hair coverings, gloves and footwear applicable to the operation, worn and maintained in a sanitary manner;
- Employees to remove any items that may fall into food;
- Jewellery is not to be worn or carried into food handling areas;
- Tobacco products, gum and food not permitted in food handling areas;
- Report to management any communicable disease.

Transportation/Travel Industry

Employers who operate in the public transportation industry, be it the airline, busing, transit or the like, who have close contact with large numbers of travellers will be required to meet higher standards for health and safety, both to its employees as well as regulators. Such employers may not be able to continue operations that cross borders without providing appropriate assurance to customs or immigration officials that employees are not infected. Where an employer is required to provide verification regarding the health of employees, it is reasonable and appropriate for such employers to require medical certification of employees, to ensure that they are fit for work. It is a management/employer right to maintain efficient and productive operations, and thus all reasonable and legal steps can be taken to this end. However, it is important that employers do not single out certain groups of employees based on a prohibited ground, without *bona fide* justification.

For employers to ensure continued operation in the travel industry, they will need to put in place measures to protect its employees from the contagion, as well as reassure employees that the measures are adequate to protect them. These steps will assist employees to remain disease free and feel safe to come to work.

Given the nature of Swine Flu and the fact that it is a communicable disease believed to be spread through aerosolized droplets and body secretions, employees who work in close quarters with one another and/or the general public, like in the airline or bus industry, should be closely monitored to ensure that they do not infect others or become infected. As such, employers who operate in such an industry should be particularly vigilant to ensure that infected or potentially infected employees are screened or monitored for symptoms.

Rights of Employees

Ontario Occupational Health and Safety Act

Under the *OHS Act* employees can refuse to work if they believe that the workplace is unsafe. The *OHS Act* sets out a very specific procedure that must be followed in a work refusal. Most Provinces and Federally regulated employers have similar rights for employees.

In Ontario all workers have the right to refuse to work, although for some this right is circumscribed. Police officers, firefighters, workers employed at correctional institutions, healthcare workers employed at hospitals, nursing homes, psychiatric facilities, rehabilitation facilities, residential group homes for persons with physical or mental disabilities, ambulance services, first aid clinics, licensed laboratories, or in laundry, food service, power plant or technical services used by one of the above cannot refuse to work if the danger in question is a normal part of the job, or if the refusal would endanger the life, health or safety of another person.

A worker can refuse to work if s/he believes that the physical condition of the workplace or station is likely to endanger him/her or the physical condition of the workplace contravenes the *OHS Act* and is likely to endanger him/her or another worker. At this stage of the work refusal it is not necessary that an employee be correct in his/her assessment of the condition of the workplace or the apparent danger. Nor is it necessary that the employee's belief be entirely objective or objectively reasonable. It is important that there is some element of validity to the employee's fear, but at the first stage of the work refusal the threshold is much lower than is required after a Ministry inspector has come out to the workplace and determined that the workplace is safe. As such, employers should be aware that although the risk of contracting Swine Flu is actually quite minimal in most workplaces, employees may still be entitled to refuse to work if they genuinely believe that they are at risk. The constant media attention to the issue and the appearance of people wearing masks will heighten hysteria.

Where an employee refuses to work the worker is required to immediately report it to the supervisor in charge and explain the reasons for the refusal. The supervisor or the employee must investigate in the presence of a committee member representing employees, a health and safety representative or another worker, who due to his/her knowledge, experience and training has been chosen by the workers. The refusing worker is required to remain in a safe place near the workstation until the investigation is completed.

However, once an inspector has come out and determined that the employee is not in danger, the employee must meet a more objective standard of belief to continue to the work refusal. At this point the belief of an employee will be subjected to the reasonableness test. It must therefore be objectively reasonable for the employee to continue to refuse to work once an inspector has determined that the workplace is safe.

While waiting for the inspector to investigate and make a determination an employer can ask another employee to do the work that was refused. The second worker must, however be advised of the work refusal and the reasons given and be provided with the same opportunity to refuse work.

Although the *OHSA* does not deal with whether an employer is required to pay an employee who has refused to work, the Ontario Labour Relations Board has decided that a refusing worker is considered to be at work during the first stage of the work refusal and is therefore entitled to be paid at his/her appropriate rate of pay.

Employers must be sure not to discipline or appear to discipline a worker for enforcing a right under the *OHSA*. Employers are prohibited from penalizing, dismissing, disciplining, suspending or threatening employees for enforcing *OHSA* rights. However, if the worker refuses to work in bad faith, or continues to refuse to work after the Ministry of Labour inspector finds that the work is not likely to endanger the worker, then an employer may take appropriate action to deal with the employee.

Privacy

Employers in Canada must be mindful of their obligations under both employment and health information privacy legislation either at the Federal or Provincial level. Balancing the need to ensure a workplace free of infectious disease against the ongoing rights of employees to keep the state of their medical conditions private can be challenging. Consent for the employer to collect medical information continues to be necessary and the withholding of that consent may not, in all situations, provide employers with the right to remove a non-compliant employee, particularly where there is no reasonable brief of possible infection. This standard will vary depending on the nature of the industry. Once obtained, that medical information is also subject to all of the privacy-related obligations, such as security, limited access, retention and destruction rules.

Employee Benefits

In general, there is no requirement that employers pay employees who are not at work because they are ill. However, many employers provide employees with sick leave or short-term disability benefits. Where such benefits are available to employees, it is recommended that employers allow employees who have either been ordered to quarantine themselves, or have voluntarily quarantined themselves to access such benefits. In addition, where an employer does not provide paid time off work for sickness employers may wish to encourage employees to take vacation time or lieu time off to deal with sickness due to Swine Flu. An employer may choose to schedule vacation time owing to an employee during a period of quarantine depending on the terms and conditions of employment.

Workplace Safety and Insurance Act

The *Workplace Safety and Insurance Act* (“*WSIA*”) provides compensation to eligible employees for “personal injury or illness arising out of the course of employment.” The *WSIA* also provides coverage for employees who are suffering from and impaired by an occupational disease.

This means that only those employees who contract Swine Flu in the course of employment are eligible for WSI benefits. The *WSIA* does not provide coverage for symptom-free employees, even if they are quarantined or sent home on a precautionary basis.

Employment Standards Act, 2000

Under the *Employment Standards Act, 2000* (“ESA”), employees are eligible for up to 10 days of unpaid emergency leave. For this provision of the ESA to apply, the employer must regularly employ over 50 people in Ontario. Emergency leave is unpaid job protected leave in cases of personal illness, injury or medical emergency of the employee, or illness, injury, medical emergency or death of certain relatives. Thus employees who are at home or in hospital due to Swine Flu, to either care for themselves or for a child, parent or other close relative (as defined in the ESA) are entitled to up to 10 days of unpaid time off from work. While off on emergency leave, employees’ benefits must be continued.

The Ontario ESA also provides unpaid Family Leave up to eight weeks for employees to provide care and support to a spouse, parent, step parent, foster parent, child, step child and foster child. However, such leaves are limited to circumstances where the individual has a serious medical condition with a significant risk of death within 26 weeks and must be supported by a certificate from a medical practitioner.

Employers whose workplaces become quarantined are required to pay employees for work performed. They may not, however, be required to pay employees overtime if the employees are under quarantine and cannot leave the workplace, but is not actually working or on call. If any work is performed during the quarantine of the workplace, then the regular hours of work and overtime requirement apply, and employees should be paid at the appropriate rate.

Employers who have lost staff due to employee quarantine can require other staff to work overtime in exceptional circumstances without employee consent, but only to the extent necessary to avoid a serious interruption or interference with the ordinary working of the employer’s operations.

An employer can also require an employee to work more than eight hours per day, or the regular work day (if it is longer) and more than 48 hours in a week where there is an emergency, something unforeseen occurs that could interrupt the continued delivery of essential public services, or that could interrupt the continuous processes or seasonal operations or urgent repair work to the employer’s plant or equipment if necessary.

Conclusion

This general alert may not cover all the potential issues or questions that employers are dealing with. However, the regulatory requirements and measures an employer puts in place will vary depending on the industry, employers circumstances and Federal or Provincial jurisdiction in which they operate. If you have a specific question that is not adequately addressed in this alert, we would be pleased to assist.

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