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The Employer's COVID-19 Return to the Workplace Playbook

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As the provincial governments in Canada proceed with cautiously reopening the doors to the economy, many employers are in the process of making plans for reopening their own doors and considering how to do so safely. Irrespective of government announcements, employers will need to make their own determinations as to whether, when and how they will reopen their physical workplaces, keeping in mind their duties to their employees and stakeholders. Having a rational and documented plan in place for reopening will be necessary to ensure a smooth transition back to work. This guide outlines the key considerations for employers in putting together such plans. A comprehensive chart of return to work resources for employers from the World Health Organization, Center for Disease Control, the Canadian Federal Government and each provincial government and provincial health authorities can be accessed via the link set out below.[1]

Employers Have a Duty to Provide a Safe and Healthy Workplace

Employers have a duty to protect the health and safety of their workers. Employers are required to implement preventative measures to ensure workers are not exposed to conditions which could be harmful to their health and safety while working. Failure to ensure a safe workplace can lead to liability under occupational health and safety ("OH&S") legislation, including fines and penalties, and, in serious cases, criminal prosecutions and/or civil liability for employers not covered under the applicable workers' compensation regime.

To meet their obligations to provide a safe workplace, it is imperative that employers update and implement (and in some cases post in the workplace) new health and safety policies and practices in their workplaces to address the risks associated with the COVID-19 pandemic. These policies and practices will, of course, vary from workplace to workplace, and province to province, but this guide highlights many of the common issues employers will need to address.

Deciding Whether and When to Reopen a Workplace

First, an employer must determine whether they can legally reopen their physical workplaces, based on current government orders and restrictions, and each province's plan for reopening the economy. Each province is loosening restrictions, and providing varying levels of guidance, which will continue to evolve. A summary of the steps taken towards reopening by each of the provinces in Canada can be found here.[2]

Any breach of government orders could expose an employer to fines, and potentially increased OH&S compliance risk.

Once employers have determined that they can legally reopen their physical workplaces, employers will need to consider whether their workplaces can be opened safely. This exercise consists of (i) assessing the workplace and determining whether the employer is able to satisfy its duty to provide a safe and healthy workplace by implementing controls to address the hazard of COVID-19, and (ii) implementing those controls.

Workplace controls to address the hazard of COVID-19 should align with the guidelines, mandates and orders in the employer's jurisdiction. This guide outlines the current guidance (as of the June 3, 2020) available from authorities across Canada regarding the practical steps employers should implement to reduce the risk of COVID-19 transmission in the workplace. We expect all levels of governments and public health authorities will provide additional guidance over time as to additional measures employers should take to protect workers.

Assessing the COVID-19 Hazard in the Workplace

The first step for ensuring a safe workplace is to conduct a hazard assessment for COVID-19 transmission in the workplace, as required to comply with provincial OH&S legislation. Employers should keep in mind that they may have a duty to consult joint health and safety committees, health and safety representatives and/or union, and seek input from employees (including joint committees and worker representatives) on where potential transmission may occur and how they think COVID-19 transmission can be controlled.

When identifying hazards and developing measures to control exposure, WorkSafeBC suggests employers conduct a walk-through of the workplace to identify specific conditions or tasks that may increase the risk of exposure of employees to COVID-19. Other workers compensation boards have issued similar guidance.

All decisions must be taken on a reasoned basis, taking into consideration governmental and public health guidance and the employer's duty of care to its employees, and in a manner consistent with the employer's workplace health and safety policies. Ensuring that all decisions related to workplace health and safety are properly documented and reasonable is also important. Employers may also have a duty to post their COVID-19 return to work safety plan and/or policies on their website or in the workplace, as is the case in British Columbia and most workplaces in Ontario.

Specific Considerations for Ensuring a Safe and Healthy Workplace

The safest way to keep employees from contracting or spreading COVID-19 is to eliminate or reduce physical contact between employees. This can obviously be accomplished by allowing employees to work from home or continue working from home, if possible. While we strongly suspect that effective work from home policies and procedures will be an invaluable tool for most workplaces going forward (as described in our *Quick Reference Guide for Employers*[3]), work from home arrangements are not possible for everyone, and may not be a long-term solution that can be supported by most employers (or employees for that matter). Employers' return to work plans should consider a staggered physical return to work, ongoing assessment of the employer's hierarchy of controls, and evolving reassessment of workplace hazards and policies.

As employers progress from allowing an increasing proportion of employees who are working from home to physically return to the workplace, employers should consider the following hierarchy of controls to address the identified hazards related to COVID-19 in the workplace:

- Engineering controls (*i.e.*, physical distancing and physical barriers).

- Administrative controls (*i.e.*, adjusting policies and procedures to reduce risk).

- The use of personal protective equipment ("PPE").

We consider these types of controls in detail below:

Physical Distancing Measures for Workplaces

Employers should implement engineering controls (*i.e.*, measures for addressing a workplace hazard by either removing the hazard or introducing a barrier between the hazard and the worker) and administrative controls (changes in workplace policies or procedures to reduce or minimize exposure to a hazard) to ensure physical distancing requirements are maintained. Employers should keep in mind that physical distancing considerations do not only apply to interactions between employees; such considerations may also apply to

interactions with customers, suppliers, patients, visitors and members of the public.

Employers could consider the following measures for reducing COVID-19-related risks in the workplace:

1. Limiting the number of employees and others in the workplace

Key Considerations

- Encouraging employees to continue working from home if they are able.

- Allowing only a minimum amount of staff to return to the physical workplace.

- Implementing staggered or rotating returns to the workplace to reduce the number of employees present at the workplace at any one time. For example, specifying which day(s) an employee or group of employees may come to the workplace.

- Controlling the number of customers and other third parties entering and exiting the workplace.

2. Encouraging physical distancing at work

Key Considerations

- Limiting entrance and exit points. Consider whether emergency evacuation plans need to be updated to address changes to access points.

- Rearranging workspaces and floor plans, including increasing separation between desks, workstations, and furniture or fixtures in common spaces such as lunchrooms, meeting rooms, waiting rooms, and washrooms. Examples include taping off every second urinal in a men's washroom and removing chairs in common spaces to ensure adequate physical distance.

- Controlling access to elevators and areas within the workplace, including updating key cards to limit access and limiting the number of people who may ride in an elevator at a time.

- Adjusting scheduling, such as start/end times and breaks to reduce the number of people using common spaces (such as break rooms, kitchens, and bathrooms) and elevators at the same time.

- Implementing signage to ensure distance is maintained, for example using taped arrows to indicate "one way" traffic in hallways, taping off waiting areas to prevent bottlenecks in small spaces such as washrooms, taping off areas around workstations, appliances, machines, photocopiers, etc. to indicate appropriate two-metre spacing.

- Discouraging or cancelling all non-essential activities, social events and in-person meetings.

- Staggering appointments and meetings with customers or other meeting attendees.

3. Limiting physical contact and minimizing interpersonal interactions

Key Considerations

- Installing physical barriers between workers or between workers and third parties. A common example of a physical barrier is the plexiglass partitions currently found in many grocery stores and pharmacies.

- Removing all communal items that cannot be easily cleaned, such as newspapers, magazines, and candy bowls.

- Reducing or eliminating the sharing of tools and equipment (such as keyboards, pens and other tools) between employees, or if sharing is required, providing solution for employees to disinfect tools and equipment between uses.

- Avoiding the provision or sharing of food, beverages, and food related items in the workplace, including coffee makers, cutlery, mugs, etc.

- Using technology to minimize interactions, such as using technology to share documents and going "cashless".

4. Worker and workplace hygiene

Key Considerations

- Promoting regular and thorough hand-washing and good hygiene by employees and other individuals present in the workplace. For example, by ensuring employees have access to soap and water or alcohol-based sanitizer, putting hand sanitizer dispensers in prominent places around the workplace, ensuring these dispensers are regularly refilled, and placing informational posters throughout the workplace.

- Developing procedures for regularly scheduled enhanced cleaning and disinfecting of the workplace, particularly high-contact items such as doors, handles, faucet handles, keyboards, and shared equipment. Various provincial governments have provided guidance on cleaning practices and workplace hygiene, that can be found in the list of Return to Work Resources for Employers located via the link referred to above.[4]

- Evaluation of workplace environments as to whether ventilation and filtration provided by

heating, ventilating, and air-conditioning systems can reduce the risk of transmission through the air.

5. *Preventing potentially sick employees from being at work*

Key Considerations

- Preventing symptomatic employees from attending the workplace by developing written policies and procedures employees must follow if they are sick or suspect they have come into contact with someone diagnosed with COVID-19.

- Requiring employees to complete a daily COVID-19 pre-screening, such as a COVID-19 self-assessment questionnaire prior to attending the workplace. Each province has published its own self-assessment tool that could be adapted by employers for this purpose.

- Requiring employees to take a temperature test before entering the workplace, if appropriate. Note that this type of precaution is not without risk and care should be taken to ensure that employees' rights are respected (as discussed in our *Quick Reference Guide*[5]). It is also important to keep in mind the limitations of temperature checks; employees can be contagious prior to having a fever, so this measure will only be partially effective and should only be used as part of a more comprehensive screening program.

6. *Implementing appropriate policies*

Key Considerations

- Developing policies and practices to:

  o Limit nonessential travel to other locations or worksites.

  o Ensure that all employees are trained on all COVID-19 related policies and procedures, including up-to-date education and training on COVID-19 risk factors and protective behaviours (for example, transmission points, equipment cleaning processes, cough etiquette and handwashing).

  o Retain the names and contact details of stakeholders attending the worksite to assist public health authorities to trace people who may have been exposed to COVID-19 at the worksite. Such action should only be taken after carefully considering and adequately addressing the privacy related concerns this may raise.

  o Ensure that policies are kept up to date and being followed, for example through regular

audits to ensure employees are maintaining appropriate physical distance.

  o Respond appropriately to employee concerns or refusals to work due to workplace health and safety concerns, including developing policies in advance in consultation with employers' joint workplace health and safety committees or other employee representatives and appropriately implementing additional policies and controls to address hazards identified by employees on an ongoing basis.

  o Check with vendors, suppliers and landlords on measures they have implemented to manage COVID-19 related risks.

7. *Evaluate policies and procedures regularly*

Key Considerations

- Review policies, practices and procedures regularly and assess whether they are achieving the desired outcome.

- Update policies and procedures regularly as the situation and available guidance changes.

Personal Protective Equipment (PPE) for Employees – Face Masks, Gloves and Eye Protection

Where hazards related to COVID-19 cannot be eliminated through administrative and engineering controls, employers may consider the use of PPE in the workplace. PPE, which controls the hazard at the employee level, includes measures such as face masks, gloves and eye protection. Provincial governments have advised that PPE should only be used when all other mitigation measures have been implemented (for example, refer to the following guidance from the Government of Alberta[6] and the Government of Ontario[7]).

Employees must also be trained on how to use PPE correctly, including fit, use, putting it on and taking it off, maintenance, cleaning, and disposal, as well as training on the limitations of PPE.

If PPE is necessary to control risks related to COVID-19, employers should consider what, if any, PPE the employer can provide. Regardless of the measures that are taken, it is important to ensure that safety measures are based on governmental and public health guidance.

Requiring the use of face masks, in particular, has been a common consideration for employers contemplating a return to the physical workplace. The current advice[8] from Canada's Chief Medical Officer is that individuals should wear a non-medical face mask when they are unable to maintain proper physical distance from others. A non-medical mask can reduce the chance of an individual's

respiratory droplets coming into contact with others or landing on surfaces. The use of a non-medical mask is primarily to protect an employee's co-workers, as opposed to protecting the individual wearing the mask.

If an employer wants to require or encourage its workers to wear a mask, they should supply those masks. Any provision of masks to employees should be accompanied by a policy on non-medical face masks and training for employees on how to properly use a non-medical mask, as well as their limitations (as described above).

The Government of Canada does not recommend N95 masks for the general public and medical masks such as the N95 are only recommended for healthcare workers and people who are taking care of someone in close settings such as acute care, primary care and long-term care facilities.

How to Handle Symptomatic Employees

Employers should develop an infection prevention and control plan that includes procedures for responding when an employee, customer, or other individual present in the workplace becomes ill with symptoms of COVID-19. Such a plan could include (i) procedures for isolating and transporting the individual home if they begin showing symptoms at the workplace, and (ii) steps to take if an employee or other individual tests positive for COVID-19 shortly after attending the workplace, including notifying other employees of potential exposure. Employers should also be aware that they may have an obligation to report COVID-19 transmission in the workplace to their provincial health authorities.

Employees who appear to have symptoms (*i.e.*, fever, cough, or shortness of breath) upon arrival at work or who become sick during the day should immediately be separated from other employees, customers, and visitors and sent home. If an individual does not have their own transportation, the employer should support them in arranging transportation home. Individuals should avoid taking public transit if at all possible. In fact, symptomatic or sick individuals are prohibited from taking public transit in certain provinces, including Alberta.

If the employee is able to be tested, the employee should not be allowed to return to the workplace until the employee tests negative for COVID-19 and has completed any self-isolation period mandated by public health authorities. If the employee is unable to be tested, the employee should not return to the workplace until the employee has completed any mandated self-isolation period and is free of symptoms.

Accommodating Employee Requests *Not* to Return

There are a variety of unique challenges employees are facing and there are a number of reasons a worker may be unwilling or unable to return to work. Employers should consider and develop policies for the following situations:

- **Higher-risk employees:** Certain individuals may be at greater risk of having more severe complications if they become infected with COVID-19. According to the Government of Canada, individuals at higher risk include older adults, people with weakened immune systems, and people with medical conditions, including heart disease, hypertension, lung disease, diabetes and cancer. Recommendations for higher-risk employees may include implementing:

  o A self-disclosure policy whereby employees can disclose that they are at a higher risk (without disclosing any personal details or sensitive medical information).

  o Mitigation measures if the employer is or becomes aware that an employee is at higher risk (for example, working from home).

- **Employees with childcare issues or caring for a sick relative:** In some provinces, employees are eligible for job protected leaves if they are required to provide care to a person for a reason related to COVID-19 (*i.e.*, school closure or sickness). If an employee requests to take a certain unpaid statutory leave of absence and meets the qualifying requirements of that statutory leave, the employer must grant it and may be precluded from terminating the employee's employment for the duration in the leave. For employees making such requests, employers may consider:

  o Permitting the employee to work from home, if possible.

  o Whether the employee is eligible for paid leave in accordance with the employer's existing contracts, policies and practices.

For more details regarding statutory leaves and options for employers, please see our *Quick Reference Guide for Employers*.[9]

- **Employees concerned about workplace safety:** Subject to applicable OH&S legislation, workers have a statutory right to refuse work if the worker believes on reasonable grounds that the work constitutes a danger to the worker's health and safety. OH&S legislation varies by jurisdiction, but requirements related to work refusals generally include the following steps:

  o the employee must report the hazard to the employer;

o the employer must take any necessary corrective action in a timely manner to address the reported hazard;

o if an employee believes their workplace is still unsafe, the employee may make a complaint to the OH&S authorities in their jurisdiction; and

o OH&S officers have authority to enforce OH&S legislation in a number of ways, including conducting inspections, issuing orders, writing violation tickets and issuing administrative penalties.

Employers should consult legal counsel where an employee has exercised their right to refuse to work to inform themselves of the applicable procedure in their jurisdiction.

Employers should ensure that their accommodation policies and practices address these issues fairly and in accordance with their legal obligations pursuant to applicable human rights legislation. As we noted in our *Quick Reference Guide for Employers*,[10] human rights commissions across Canada have published policy statements and general principles regarding COVID-19 and an employer's human rights obligations. Human rights commissions within Canada have provided very clear guidance that employers should be sensitive to a variety of factors affecting an employee's ability to attend the workplace such as caregiving responsibilities or pre-existing health problems (for example, if the employee has a compromised immune system). See, for example, Alberta's guidance here.[11]

Looking Ahead: Adjustments to Policies and Contracts as a Result of COVID-19

In conjunction with addressing workplace safety issues as described above, it will be important to consider what workplace policies and practices need to be updated, supplemented or replaced as a result of the COVID-19 pandemic. In addition to adapting workplace health and safety polices to the "new normal" as described above, employers should consider if any of their policies need to be updated. For example:

- **Travel:** Earlier in the year, we saw many employers scrambling to amend their travel policies to provide for travel restrictions and quarantine periods. These types of policies will continue to be important in the coming months, especially as countries start reopening their borders and business and personal travel resume.

- **Time off:** Most employers' sick policies do not sufficiently address considerations related to COVID-19. For example, time off during quar-

antine periods should be expressly addressed. Time off policies should be clear on whether leaves of absence will be paid or unpaid. Various provinces have introduced amendments to job protected leaves as a result of COVID-19 and employers' policies will have to be adjusted to comply with these amendments.

- **Work from home:** As described above, working from home is likely to be a tool that employers use to maintain workplace safety going forward. Work from home policies should address mandatory and optional work from home arrangements (as applicable) and considerations related to security, privacy, and acceptable use of company equipment.

Employment contracts should also be reviewed to ensure they appropriately address various issues which the COVID-19 pandemic has brought to the forefront, such as temporary layoffs. Employers may also want to consider whether their employment contracts have effective termination clauses, as well as provisions regarding changes to duties, compensation, and work location.

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[1] <https://www.osler.com/en/resources/regulations/2020/the-employer-s-covid-19-return-to-the-workplace-playbook> [Resources].

[2] <https://www.cbc.ca/amp/1.5601572>.

[3] *Ibid.*

[4] Resources, *supra* note 1.

[5] Guide, *supra* note 2.

[6] <https://www.alberta.ca/assets/documents/covid-19-workplace-guidance-for-business-owners.pdf>.

[7] <https://www.wsps.ca/WSPS/media/Site/Resources/Downloads/covid-19-office-health-and-safety-guidance.pdf?ext=.pdf>.

[8] <https://www.cbc.ca/news/politics/masks-covid-19-pandemic-public-health-1.5576895>.

[9] Guide, *supra* note 2.

[10] *Ibid.*

[11] <https://www.albertahumanrights.ab.ca/employment/Pages/covid19.aspx>.