



COVID-19 UPDATE, May 28, 2020

Introduction:

This brief weekly bulletin is aimed at keeping employees and employers informed of COVID-19 related changes and concerns in the world of employment. To find more answers to common employment questions, you can:

- Visit the [Levitt LLP website COVID-19 page](#).
- Read [Howard Levitt's columns in the National Post](#).
- Listen to Howard Levitt and the other lawyers from Levitt LLP on [Newstalk 1010](#).
- For a summary of key employment issues, such as whether your employer has a right to place you on a temporary lay-off and your right to a safe workplace, [contact us to](#) request the COVID-19 Bulletins previously circulated by Levitt LLP.

Important: Every one's circumstances are different. The information provided in this bulletin and at the above resources is for general information purposes only and is not intended to be legal advice.

If you are interested in obtaining legal advice for your specific problem, you can contact us to book a **free consultation on COVID-19 related issues**. To set up a consultation, call us now at 416-594-3900 or complete [this form](#).

IN THIS BULLETIN:

1. Q & A with Levitt LLP Lawyer Robert Taylor
2. Employers' statutory duty to take reasonable steps to provide a safe workplace
3. Creating a plan and policies before reopening a workplace
4. Balancing the duty to provide a safe workplace with privacy concerns
5. The right of employees to refuse unsafe work

1. Q & A with Levitt LLP Lawyer Robert Taylor



Robert Taylor is a senior lawyer at Levitt LLP. His passion for the law stems from his Western Canadian roots and his desire to assist clients in achieving their corporate and personal objectives.

As a highly experienced litigator, Robert takes pride in applying practical and innovative solutions to challenging workplace employment law and labour law issues.

He has appeared in all levels of Court in Ontario, the Supreme Court of British Columbia, the New Brunswick Court of Queen's Bench, the Federal Court Trial Division, the Federal Court of Appeal, and the Supreme Court of Canada.

Robert welcomes the opportunity to work with you to help you find the optimal legal solution to your workplace issues.

Q & A

Q: People have a lot of questions about what they can and can't do during this COVID-19 pandemic. What is one of the biggest mistakes you see people making?

The biggest mistake by far that I see is people failing to consult a lawyer before making a decision that will significantly affect their rights. At the moment, we are offering 15-minute free consults for anyone with a Covid-19 related question. There is no reason not to know what your rights are, and how your decisions will affect them.

Q: What is the biggest point of confusion you see among people coming to you for advice?

The biggest source of confusion relates to what a lay-off means and what are employees' rights as a result.

Q: What is one tip you would give to employees in the current climate? / What is one tip you would give to employers in the current climate?

My advice to employees who have been paid off is to be patient. No one knows how long the lay-off will last. But it is prudent to see if there are other employment opportunities which may open when companies start recalling employees.

My advice to employers is to assess what their needs are and decide if they need to recall everyone. However, anyone not recalled will have a claim for wrongful dismissal.

Q: Courts and tribunals are currently closed. Are you still able to continue advocating for your clients?

Absolutely.

Q: What are you doing to ride out this crisis?

Playing golf with social distancing

2. Employers' duty to take reasonable steps to provide a safe workplace

Employers are required by provincial health and safety legislation to take the reasonable steps necessary in the circumstances to provide a safe workplace. The statutory language varies between jurisdictions, but the duty created is essentially the same.

In Ontario, S.25(2) of the *Occupational Health and Safety Act* states that an employer shall "take every precaution reasonable in the circumstances for the protection of a worker."

In British Columbia, S. 2.2 of the *Workers Compensation Act, Occupational Health and Safety Regulation* states "Despite the absence of a specific requirement, all work must be carried out without undue risk of injury or occupational disease to any person."

In Alberta, S.3.1(a) of the *Occupational Health and Safety Act* goes into more detail: "Every employer shall ensure, as far as it is reasonably practicable for the employer to do so: ...the health and safety and welfare of workers engaged in the work of that employer, those workers not engaged in the work of that employer but present at the work site at which that work is being carried out, and other persons at or in the vicinity of the work site who may be affected by hazards originating from the work site."

An employer's failure to carry out this duty could lead to substantial fines under health and safety legislation, Workplace Safety and Insurance Board claims, and liability if an employee or customer catches COVID-19 in the workplace

“Reasonable” precautions will depend on the circumstances, but in a world with COVID-19 it will almost certainly not be “business as usual”.

There are many government-prepared resources available online to assist business owners with reopening workplaces with regards to health and safety and other concerns.

3. Creating a plan and policies before reopening a workplace

Before reopening, employers should identify all the possible hazards in the workplaces (e.g., shared workspace, high traffic surfaces, public areas, etc.) and create a plan to keep employees and customers safe.

Physical preventative measures could include a schedule for disinfecting high-traffic surfaces, erecting barriers between employees and customers, creating separate workspaces, etc.

Administrative preventive measures could include implementing alternating work schedules so not everyone is in the office at the same time, permitting employees to work from home, communicating with vendors, suppliers, and landlords to ensure they have taken appropriate steps to protect you, your employees, and your customers, etc.

Employers should also develop clear policies to address situations that are likely to occur so that they can respond to those situations in a reasonable, consistent, and fair manner. Examples include:

- A policy delineating the circumstances in which employees who feel sick will not be allowed to enter the workplace, and how they will be able to continue working in the interim.
- A policy setting out how symptomatic employees in the workplace will be treated. For starters, they should immediately be sent home and kept away from other employees, clients, etc. They should be tested as soon as possible and not be allowed to return until they have tested negative and/or completed any mandatory self-isolation.
- Policies regarding the use and provision of Personal Protective Equipment (PPE). Will it be required, when and where, and is the employer ready to provide it to employees?
- Policies that limit unnecessary business travel and interactions with customers and clients in the workspace.

4. Balancing the duty to provide a safe workplace with privacy concerns

Although the safety of a workplace must be the priority for employers, the privacy rights of employees cannot be ignored.

Employers are responsible for how they handle the personal information in their possession, including medical information about employees.

The fact that an employee has COVID-19 is technically personal information: typically, an employer should not broadcast an employee's diagnosis to the workplace.

However, in these circumstances it will be almost certainly necessary to disclose the fact that someone in the workplace has tested positive for the virus. Otherwise, it may be impossible to ensure that every who has come into contact with that employee can be tested.

If an employer wishes to monitor the health of employees (asking for symptoms, taking temperatures every time they enter the workplace, etc.), they should do so in a way that is minimally intrusive, safe, and conducted by qualified individuals. The process should also be explained in advance to employees, so they understand what is happening and what steps have been taken to protect their data.

The employer should only request that information deemed necessary to determine whether the employee may have the virus and it should not collect any more information than that. Once collected and assessed, the medical information should not be saved or published.

In conclusion, an employer's priority is the safety of employees and negligence could invite a lawsuit from anyone who contracted the virus in the workplace. However, employers should still be conscious of their obligations to safeguard the personal information in their possession. For starters, they should minimize the extent to which they collect, store, and share employees' medical information

The best way for employers to handle this incertitude is to keep themselves informed of all their obligations, follow the latest news and updates from their local governments and health authorities, and seek professional advice as necessary.

5. The right of employees to refuse unsafe work

Employees have a right under provincial health and safety legislation to refuse unsafe work. In this case, if an employee believes that the condition of the workplace places him or her, or another employee, in danger because of COVID-19 they have a protected right to refuse that work.

Much like the employer's duty to provide a safe workplace, the right to refuse unsafe work is expressed differently across provinces but the basic right is the same.

In Ontario, S. 43(3)(b) of the *Occupational Health and Safety Act* states "A worker may refuse to work or do particular work where he or she has reason to believe that ... the physical condition of the workplace or the part thereof in which he or she works or is to work is likely to endanger himself or herself."

In British Columbia, S. 3.12(1) of the *Occupational Health and Safety Regulation* states: “A person must not carry out or cause to be carried out any work process or operate or cause to be operated any tool, appliance or equipment if that person has reasonable cause to believe that to do so would create an undue hazard to the health and safety of any person.”

In Alberta, S. 31(1) of the *Occupational Health and Safety Act* states “... a worker may refuse to work or to do particular work at a work site if the worker believes on reasonable grounds that there is a dangerous condition at the work site or that the work constitutes a danger to the worker’s health and safety or to the health and safety of another worker or another person.”

The procedure to be followed once a worker has refused unsafe work is similar between provinces:

- The employee must report the hazard to the supervisor or employer.
- The employer or supervisor promptly investigates and takes the necessary corrective action if necessary.
- If the employee still believes their workplace is unsafe, the employee can make a complaint to the appropriate health and safety authorities in their jurisdiction and request an inspector.
- The inspector carries out an investigation of the workplace. Health and safety inspectors have the authority to enforce the legislation in a several ways, including conducting inspections, issuing orders, writing violation tickets and issuing administrative penalties

If the inspector finds that the workplace is safe, then the employee can be required to return to work. A failure to do so could potentially be cause for discipline or dismissal.

While the unsafe workplace is under investigation or while waiting for an inspector, the employee cannot be forced to do the complained-of task. However, they can be asked to do a different task.

An employer can only ask a different employee to complete the "dangerous" task if they explain to that second employee the reasons for the first employee's refusal in the presence of a third party, usually either:

- member of the joint health and safety committee who represents workers; or
- a health and safety representative, or
- a worker who because of his or her knowledge, experience and training is selected by the trade union that represents the worker or, if there is not trade union, by the workers to represent them.

Finally, an employer may not reprise against an employee who has exercised their right to refuse unsafe work. Examples of reprisals can include reprimanding the employee for refusing the work, discipline, or discharge.

Co-authored by Levitt LLP Articling Students Michael VanderMeer and Sarah Helmer.

DISCLAIMER:

Remember, this bulletin provides only general information and is not a substitute for legal advice. If you have a legal problem, you should seek out legal advice before making any decisions. The fact that you have received this bulletin from Levitt LLP or have communicated with members of Levitt LLP does not create a lawyer-client relationship.

If you want legal advice, you can set up a consultation with Levitt LLP by calling us at 416-594-3900 or by completing [this form](#).