

BALANCING EMPLOYEE PRIVACY AND SAFETY DURING THE COVID-19 OUTBREAK

The COVID-19 pandemic, and its impact on employee and client safety present a number of challenges in respect of the collection, use and retention of personal information of employees.

As employees return to office settings after working from home, firms will be faced with the challenges of ensuring employee safety while protecting their personal information.

Under normal circumstances, the ability of employers to require employees to undergo health testing, disclose health information, and have that information shared is extremely limited and would generally give rise to a breach of privacy regulation.

However, during the course of the COVID-19 pandemic, employers may be able to avail themselves of certain provisions of privacy regulation to keep their employees and members of the public that interact with their organization safe and informed. During a public health crisis, privacy laws still apply, however, they are not a barrier to appropriate information sharing.

The Office of the Privacy Commissioner of Canada (OPC) has issued [guidance](#) to help organizations subject to federal privacy laws understand their privacy-related obligations during the COVID-19 outbreak.

This guidance is useful for firms to develop COVID-19 policies to guide their collection, use, sharing and retention of employee health information during this pandemic. Note that this IIAC paper represents suggestions of best practices and should not be construed as legal advice.

The Personal Information Protection and Electronic Documents Act (“PIPEDA”) allows organizations to collect, use or disclose information only for purposes that a reasonable person would consider appropriate in the circumstances. Organizations are required to obtain the meaningful consent of the individual for the collection, use, or disclosure of their personal information. Consent is only valid if it is reasonable to expect that the individual understands the nature, purpose and consequences of the collection, use or disclosure of the personal information to which they are consenting.

In order to ensure the way in which firms manage employee’s health information does not violate privacy laws, it is recommended that firms develop COVID-19 policies that include information about the use of health testing, how the results will be communicated, what information employees are expected to report, the implications of reports, when individual’s names will be shared, who will have access to the information and how long such information will be retained. These policies should be shared with employees so that they can provide informed consent (where necessary) for the collection and appropriate sharing of information to ensure the workplace remains a safe place for staff, clients and any other individuals present in the space.

QUESTIONS TO ADDRESS WHEN IMPLEMENTING COVID-19 PRIVACY POLICIES

1. IS THE COLLECTION, USE OR DISCLOSURE OF THE PERSONAL INFORMATION FOR A REASONABLE PURPOSE?

Organizations are typically required to take reasonable steps to protect the health and safety of their employees, and clients. Given the public health concern with the COVID-19 outbreak, identification,

collection, use and disclosure of information regarding employees, clients and others attending the workplace, who are, may be carrying, or who may have been exposed to others who are carrying, COVID-19, may be deemed reasonable. Where necessary to fulfill their health and safety obligations in the context of a pandemic, employers may be justified in asking employees to disclose symptoms consistent with COVID-19, whether they have tested positive for the COVID-19 virus, or been exposed to certain risk factors such as recent travel or proximity with others who have tested positive for the COVID-19 virus.

Information obtained from individuals may be used to take steps to protect the health and safety of the individual and others in the workplace, including: requiring the individual to self-isolate; advising the organization's other employees, clients and other guests that COVID-19 has been identified in the particular workplace; advising those individuals who are reasonably expected to have come into contact with the identified individuals of their possible exposure and requiring them to self-isolate; and advising the applicable public health authority where required.

Note that employees placed on leave or remote work duties remain entitled to privacy. Generally speaking, employers should not disclose the reasons for an employee's leave or remote working arrangements, except to those employees who require that information to carry out their employment duties.

2. IS THE PERSONAL INFORMATION TO BE COLLECTED, USED OR DISCLOSED LIMITED TO THAT NECESSARY TO MEET THE PURPOSE?

The personal information collected, used and disclosed by the organization about the identified individuals should be limited only to the personal information needed to meet the purpose for which it was collected.

For instance, firms may want to require employees to disclose symptoms of COVID-19. An employer can require employees to report any flu-like symptoms, including a fever, cough, and/or shortness of breath, or other symptoms that may be indicative of COVID-19; however, a requirement or request to disclose further personal information unrelated to COVID-19 exposure would be unreasonable.

Some employers across Canada have started to implement temperature screening prior to allowing an employee access to the office or a workplace. If an organization believes this is an appropriate means to maintain workplace safety, they should consider the following:

- Temperature checks should be conducted using the least intrusive methods available (e.g. non-contact infrared thermometers vs. contact thermometers).
- Qualified individuals should administer the test and ensure it is conducted in a safe manner, such that there is no enhanced risk of employees being infected by each other or the test administrator.
- The organization should provide advance written notice to workers of the temperature check requirement, including the means by which the check will be conducted and that the purpose (i.e. to promote a safe workplace and help reduce the spread of COVID-19).
- Medical advice may need to be obtained with respect to what body temperatures are of concern.
- Records of individuals who test within ordinary temperature ranges (as determined by a medical expert) should not be retained by the employer.
- Individuals who test at or above a level that concerns a medical expert should not be allowed access to the workplace, but rather be discretely asked to leave the facility and to seek medical advice.

The information should be relevant to the COVID-19 threat only, and the specific identity of relevant individuals should only be disclosed when necessary. The disclosure of the identity of the affected individual would be required in respect of the HR team managing COVID-19 policies, however, the organization should be careful to manage that information closely outside of that group. For instance, it may be appropriate to disclose the name of the affected individual to the individual's supervisor, in order to advise them of their

absence from the workplace due to self-isolation. In addition, it may be appropriate to advise individuals who are reasonably expected to have come into contact with the identified individuals of their possible exposure to COVID-19 to assist them in determining whether they have had contact and may need to self-isolate.

Depending on the size of the organization, advising the organization's employees, clients and other guests that COVID-19 has been identified in the particular workplace, along with the time and general location of that individual without identifying the specific individual affected may be appropriate. In carrying out such notifications, employers should make reasonable efforts not to disclose information that might (alone or together with publicly available information) identify the specific individual(s) who may have caused the COVID-19 transmission risk. Depending on the circumstances, it may not always be possible to provide notice of a COVID-19 transmission risk without expressly or implicitly identifying the individual at the source of the risk.

3. IS THE COLLECTION, USE OR DISCLOSURE OF THE PERSONAL INFORMATION AUTHORIZED BY LAW WITHOUT THE NEED TO OBTAIN CONSENT FROM OR PROVIDE NOTICE TO THE INDIVIDUALS IN QUESTION?

Canadian private sector, privacy legislation generally permits an organization to collect, use and disclose personal information about an individual without consent in certain situations. However, the legislation is not uniform across Canada as to how it is applied. In order to be safe, where possible, organizations should provide notice and where possible, obtain consent to collect, use or disclose an individual's personal information.

In order to provide notice, and obtain consent, organizations should advise its employees, clients and other guests that it has adopted a COVID-19 response policy, which sets out how it will manage the collection, use and disclosure of personal information when COVID-19 is identified in the workplace. Consent can be express, deemed, or implied. In order to obtain meaningful consent¹, individuals should be provided information (via the COVID-19 policy or otherwise) regarding what personal information is being collected; the purpose for which personal information is collected, used or disclosed; and the potential risk of harm and other consequences from the collection, use or disclosure.

4. HOW DOES THE ORGANIZATION MANAGE THIS INFORMATION INTERNALLY?

Firms must comply with the accountability principle, by documenting the disclosures of personal information (including the rationale for the disclosures) made in connection with the pandemic, and ensuring that written policies and procedures appropriately address the types of collection, use, disclosure and storage of personal information in the COVID-19 context.

5. CAN I ASK CLIENTS AND OTHER VISITORS ABOUT THEIR COVID-19 HEALTH STATUS?

In order to limit exposure to COVID-19 in the workplace, employers may utilize extra precautions in allowing clients and other visitors to enter the workplace.

Organizations have the right to ask visitors to provide information in advance as to whether they have flu-like symptoms, have been in contact with anyone infected with COVID-19, or travelled to a high-risk area. If a client or visitor answers any of these questions positively, a firm may consider requesting the client or

¹ Jointly issued [guidance](#) from the Office of the Privacy Commissioner of Canada and the Offices of the Information and Privacy Commissioner of Alberta and British Columbia identified several principles underlying meaningful consent.

visitor not come into the workplace until they have been asymptomatic for 14 days or can provide a clearance letter from a physician.

6. SHOULD I ADVISE CLIENTS IF SOMEONE IN THE OFFICE HAS TESTED POSITIVE FOR COVID-19?

Firms have taken different approaches to this question, depending on the size of the firm and the potential exposure of the client. Where clients have attended the firm and have likely come into contact with an individual who has tested positive for COVID-19, the best practice is to directly advise all clients known to have or likely have had contact. Depending on the size and the physical layout of the firm, and the likelihood of contact with clients, firms may elect to advise known visitors of possible contact. Where tracing of visitors is not possible, signage within the firm indicating that an individual has tested positive for COVID-19, and the days on which that person was potentially contagious and in the office may be advisable. Unless necessary, the name of the person testing positive should not be disclosed to clients or visitors.

7. IF ONE OF OUR EMPLOYEE'S HAS COVID-19, DOES THE EMPLOYER HAVE TO REPORT IT TO THE PROVINCIAL OR FEDERAL GOVERNMENT?

Currently, there is no obligation to report a confirmed case of COVID-19 to federal or provincial health authorities. The medical professional who received the diagnosis has the obligation to report the positive test result to provincial health authorities.

However, if an employee in the workplace is diagnosed, employers may want to voluntarily contact public health authorities to receive advice and assist in identifying contacts the infected employee had in the workplace.

Additionally, if the employee becomes ill or dies from COVID-19, and it is determined that infection occurred at the workplace or in the course of employment, there may be an obligation, under health and safety and workers' compensation legislation, to notify the regulator.

This document is intended to assist members in developing policies and processes to address privacy concerns in the context of the COVID-19 pandemic. It should not be considered to be legal advice. As the pandemic continues, we expect further operational and regulatory guidance to be published. We will continue to update this document based on issues and guidance as it arises. If you have specific legal questions, please consult your counsel.