

POST COVID-19 LOCKDOWN ISSUES

CONSIDERATIONS FOR A RETURNING WORKFORCE

As firms plan for their employees to return to the offices from working remotely, they face a number of operational, legal, and health and safety considerations. In order to facilitate a smoother transition back to the office for the employees and management, it is important to have a plan in place so issues can be dealt with as they arise, without causing further disruption while the firm is attempting to resume “normal” operations.

It is advisable for firms to develop a written plan containing policies and procedures that are as specific as possible in order to inform employees about what to expect, and to provide consistent operational guidance to all managers across business lines and geographic jurisdictions.

Firms should address the issues noted below in their written policies and procedures, in as much specificity as possible. This guidance is intended to assist firms in developing COVID-19 policies to manage the return of employees to office premises during this pandemic. Note that this IIAC paper represents suggestions of best practices and should not be construed as legal advice.

EMPLOYEE HEALTH AND SAFETY - PHYSICAL/ ADMINISTRATIVE CONSIDERATIONS

Employers are obligated to take reasonable efforts to keep employees and work sites safe, and protect employees from hazards in the workplace. The COVID-19 pandemic provides a new challenge, in that it must be considered in developing new administrative and physical procedures to manage the risks of contracting the virus.

It is important that employers continue to monitor public health guidelines and recommendations as more information becomes known about COVID-19 and how to alleviate the risk.

Current generally accepted hygiene measures should be implemented in the workforce, which include:

- Train everyone on possible COVID-19 transmission points in the workplace, what steps are being taken to protect them, and how they can protect themselves, including frequent hand washing or sanitizing, and not touching their face.
- Train everyone on how to keep their work surfaces, devices, screens and equipment clean.
- Have all employees and visitors wash their hands thoroughly with soap and water, or an alcohol-based hand sanitizer if soap and water are not available, before entering the workplace, after contact with others, or with surfaces others have touched. Be sure to include requirements for handwashing before breaks and at shift changes, etc. Be sure to keep an adequate supply of soap, paper towels, etc. Provide staff with hand sanitizer for their use when receiving deliveries, interacting with the public etc.
- Limit the number of people working in one space so that they can distance themselves from each other by:
 - Staggering shifts and break times.
 - Practicing physical distancing during breaks.
 - Not entering work areas where a 2-meter distance cannot be maintained.
 - Closing off areas to prevent large gatherings.

- Sanitize the workplace thoroughly and often, especially frequently touched surfaces and common areas, such as door handles, entryways, elevators, washrooms, and kitchens.
- Reposition workstations to increase physical distances. Install barriers and partitions.
- Reschedule unnecessary visits to the workplace by supply chain partners, vendors, delivery people or others who do not need to be there now.
- Screen employees regularly for health issues. If anyone develops symptoms of COVID-19, implement procedures for reporting the illness and keeping the employee away from others.

Each employer will have different characteristics which will inform their risk profile, and affect their return to work plans, including:

- the business model of the firm, including whether employees interact directly with clients or other third parties; whether they have employees that are in a vulnerable category;
- whether employees must be on-site at the same time, or if physical distancing can be accommodated by modifying shifts, using teams, alternating office presence etc.;
- the use of common areas;
- whether the location is standalone or shared with other entities (consider shared lobbies and elevator protocol);
- the degree of infection in their region; and
- the availability of Personal Protective Equipment and ability to ensure appropriate sanitization.

EMPLOYEE TESTING / HEALTH SCREENING

In order to protect employees from infection, employers may wish to implement various methods of screening employees for COVID-19 symptoms. Employers are able to screen employees' health, to the degree that it is "reasonable". Under normal circumstances health screening raises a number of privacy and human rights issues and is not generally advisable. Although the COVID-19 pandemic introduces an element of reasonableness due to the transmission risk, firms must still balance the transmission risk against the intrusiveness of the testing procedures in ascertaining the reasonableness of testing.

Firms may implement passive screening methods, such as implementing policies requiring employees to self-identify if they have symptoms consistent with COVID-19, have had contact with an individual diagnosed with COVID-19 or have travelled abroad within the quarantine period. These methods do not represent a material intrusion into an individual's privacy and are low risk to firms. A slightly more intrusive method of screening could involve the mandatory completion of questionnaires or interviews prior to entry.

If employers wish to require active testing, such as temperature screening, it is recommended that the least intrusive method be used, and that employers document why this method is reasonable under the business circumstances.

Firms can require visitors to the office to undergo screening and testing procedures prior to permitting entry, and can also require adherence to hygiene protocols when on site. It is helpful to advise visitors of these requirements in advance, if possible, or to have signage at the entry setting out the requirements.

For all screening/testing procedures, firms should develop and publish privacy policies, setting out the type of information to be collected, the reason for collection the method of collection, how the information will be used, stored, shared and how long it will be retained. (See the IIAC document [Balancing Employee Privacy and Safety During the COVID-19 Outbreak](#) for more details on privacy considerations of screening and testing).

Firms should also have clear policies on compensation in the event of a diagnosis of COVID-19, or in the event that employees are required to isolate due to exposure or foreign travel.

RECALLING EMPLOYEES

Employers will have different criteria and procedures for recalling employees to work in the office. In order to facilitate an orderly and predictable process, it is useful to develop objective criteria and procedures for determining which employees will be selected on what timeline, in order to avoid human rights complaints. Factors that may be considered could include business and staffing needs, and the importance of being in the office, whether that person is in a higher risk category, travel/transit considerations, whether the employees have children at home that are not attending school due to lockdown considerations, among other personal and organizationally specific matters.

It is advisable that written recall notices be provided to employees which include the following information:

- when and where to return to work
- who to report to at the office
- hours of work (usual or modified)
- any changes to compensation
- consequences of return (for example – changes in eligibility to government programs)
- who to contact if individual is unable to return
- if testing or screening will take place upon entry
- health and safety measures in place in the office

Employers may also want to consider revisiting their remote work policies to allow more flexibility on a longer term or permanent basis. As firms gain experience with these arrangements, a re-evaluation of the costs and benefits may reveal that adjustments to the traditional working environment can be made that would be beneficial to the organization as well as its employees.

EMPLOYEE REFUSALS TO RETURN OR REMAIN AT WORK

Until there is a vaccine for COVID-19, it is likely that certain employees may feel uncomfortable returning to an office environment after working remotely. Further, employees may be faced with additional challenges such as finding childcare in the event of delayed school and daycare openings, and this may give rise to rights to job protected leave under provincial regulation¹.

In order to alleviate fears of COVID-19 infection to the degree possible, employers should take all reasonable measures in compliance with public health requirements and follow best practices to ensure that the workplace remains as safe as possible, so that employees are less likely to be able to rely on an unsafe workplace justification for not returning.

However, if despite these measures being taken, employees refuse to return to work, employers should review the applicable workplace and labour regulation to determine what rights employees may have with respect to their right to refuse to retrain, their entitlement to unpaid leave, and firm's rights with respect to termination.

It may be useful to review the Q&A published by the Ontario Human Rights Commission for more detailed information about employers' rights and obligations under the Ontario Human Rights Code.²

¹ For instance, on March 19, 2020, Ontario passed Bill 186, *Employment Standards Amendment Act (Infectious Disease Emergencies)*, 2020, which allows for job-protected leave without pay to employees under medical investigation, supervision or treatment, or in isolation or quarantine, or who need to be away from work to care for children because of school or day care closures or to care for other relatives, or are affected by travel restrictions, due to COVID-19. The new measures are retroactive to January 25, 2020. British Columbia, Alberta and Saskatchewan have enacted similar legislation to date.

² http://www.ohrc.on.ca/en/news_centre/covid-19-and-ontario%E2%80%99s-human-rights-code-%E2%80%93-93-questions-and-answers-0

MENTAL HEALTH ISSUES

Aside from the physical effects of COVID-19, the pandemic and the associated stress related to the fear of infection of individuals and their family, social isolation as a result of physical distancing requirements, economic stress and uncertainty and other issues in this unprecedented time, is expected to give rise to an increase of mental health issues. Employers should anticipate these issues, and review their HR and benefits programs to assist their employees and ensure that where possible, they can access appropriate resources in a timely manner.

REVIEWING AND UPDATING HUMAN RESOURCES POLICIES

The COVID-19 pandemic has raised many new issues and required employers to create new ways of working, and adapt existing policies to the new environment. These new issues provide employers with the opportunity to review and update their HR policies to take into account new considerations in respect of health and safety, as well as how and where employees work.