

An Employer's Obligations During Flu Season



The weather is getting colder, the holidays are approaching and flu season is soon to be upon us. That means sick employees forced to miss work. Besides ensuring that productivity does not suffer, employers also need to be cognizant of their legal obligations towards their employees during flu season. Here are a few important points to keep in mind:

- **Obligation to Maintain a Safe Workplace** – Under the *Occupational Health and Safety Act* (“OHSA”), an employer has a general duty “to take every precaution reasonable in the circumstances for the protection of a worker” (s. 25(2)(h)). This duty not only applies to ensuring workplace machinery is safe, but also to communicable diseases like the flu. Employers should adopt reasonable policies/practices to prevent the spread of an illness like the flu (e.g. facilitating flu shots, providing hand washing dispensers, approving time-off and shift modifications where necessary).
- **Do not tolerate the sick (and present) worker** – Employers do not have to tolerate an employee who attends work with the flu. As part of the obligation to maintain a safe workplace, and as a “reasonable precaution” (see above), employers should consider sending the employee home and requiring a medical certificate before he/she may return to work. While employers are often rightly concerned about managing absenteeism and returning employees to work, there are times when employers need to encourage the opposite!!
- **Employees may refuse to work** – Most employees have the right under OHSA to refuse unsafe work. The unsafe work could relate to communicable diseases present in the workplace. In the event of a work refusal, the procedures set out in s. 43 of OHSA must be followed. These steps include the employee reporting the work refusal to management, an investigation by management (while the employee is kept in a safe location and paid) and, if no resolution, referring the work refusal to the Ministry of Labour (“MOL”) for inspection and resolution. Employees cannot be retaliated against for engaging in a work refusal in good faith (even where the alleged unsafe workplace is based on the employee’s subjective assessment).
- **Job Protected Leaves** – Under the *Employment Standards Act, 2000* (“ESA”) employees in workplaces with more than 50 employees are entitled to 10 personal emergency leave days (without pay). Having the flu can be grounds for taking this leave. Medical evidence can be required by the employer. In addition, it is important to remember that the *Human Rights Code* applies to “disabilities”

and requires employers to accommodate employees up to the point of undue hardship. Providing a leave of absence (generally without pay) to someone with the flu may be a required form of accommodation.

The MOL is very cognizant of an employer's obligations and an employee's rights during flu season. The MOL recently updated a [policy statement](#) titled, "Flu and Your Workplace". The policy statement stresses that, in relation to the flu, employees have the right to work in a "safe and healthy environment" and have the "right to know" about potential hazards in the workplace, the "right to participate" in identifying and resolving workplace health and safety concerns, and "the right to refuse" unsafe work. The statement advises workers to talk to their supervisor or Joint Health and Safety Committee if a co-worker has the flu or if the worker is concerned that the workplace is unsafe due to a "communicable disease". The statement also notes that an employee may be entitled to sick leave (under an employer plan) or personal emergency leave under the ESA.

Keeping the above points in mind will assist in ensuring employers comply with their legal obligations this flu season (including staying onside with the MOL). Perhaps more importantly, the above points will assist in keeping employees healthy and productive.

Article by Daniel Pugen

McCarthy Tétrault LLP