

COVID Crisis Quiz



QUESTION

If employees contacts Covid-19 can employers fire an employee?

ANSWER

No.

Employers may not terminate an employee or otherwise discriminate against an employee due to physical disability (which may include COVID-19) under human rights legislation.

Human rights commissions have taken the position that COVID-19 is a physical disability.

The rapid spread and implications of the novel coronavirus (COVID-19) is world-wide. Employers are confronting difficult questions regarding how to handle safety and health rules, travel restrictions, privacy of employees' health information, compensation, and other employment issues.

WHY IS IT RIGHT

TRAVEL RESTRICTIONS

1. Should an employer restrict travel to all "affected areas" where there have been confirmed cases of COVID-19 infections, as reported by the World Health Organization (WHO)?

An employer should restrict business travel. Employers should continue to consult the Public Health Agency of Canada's (PHAC) website: Coronavirus disease (COVID-19): Travel advice for up-to-date travel notices concerning risk. An official global travel advisory is in effect. The PHAC recommends that all non-essential travel outside of Canada should be avoided until further notice.

2. What should an employer do if an employee shares that they plan to travel to an affected area?

All employees should be encouraged to work from home and practice social

distancing regardless of whether they have travelled to an affected area, pursuant to the recommendations of public health and government authorities.

An employer cannot prevent an employee from travelling to an affected area during their leisure time. The employer may advise the employee to review the travel health notices on the website of the PHAC before travelling to an affected area. Employers also may advise employees that if they travel to an affected area: they will be required to inform the employer of such travel before they return to work and that failure to do so may be cause for discipline; they may be prohibited from returning to the workplace until they have been quarantined for 14 days after their return; they may be required to work remotely during the quarantine period, if possible. In these instances, the employer should consult applicable employment standards legislation to determine entitlement to leave and pay, as well as the employee's sick leave policy, communicable disease policy, the employee's employment contract, and short-term disability coverage. Finally, the employer should avoid any action that could result in a claim of discrimination in employment on the basis of ethnicity, race, ancestry, or place of origin under Canada's human rights legislation. An employer may deny time off for an employee's personal travel, as long as such a denial is based on the destination, the business cost of a resulting quarantine, or other legitimate business-driven interest, not the ethnicity, race, ancestry, or place of origin of the employee.

An employer that has a reasonable belief an employee has travelled to a high-risk country or area and either has acquired COVID-19 or been exposed may ask that the employee not return to work for 14 days (per the PHAC recommendations) or may send the person home.

3. How should an employer handle employees who have family members who have traveled to affected areas?

Employers may request that employees advise them of any family members with whom they have close contact who have traveled to high-risk areas, in order to determine if the exposure has resulted in the employee posing a direct threat to the health and safety of others. The PHAC recommends that when an asymptomatic person has a high risk of exposure to the virus that causes COVID-19, (*i.e.*, through close contact with a symptomatic person or their body fluids), they should self-isolate in the home setting to avoid contact with others to prevent transmission of the virus.

4. Can we prevent employees from traveling to affected areas for personal reasons?

Employers cannot prevent employees from travelling to affected areas for personal reasons, but may deny time off if the denial is based on the destination, business cost of a resulting quarantine, or other legitimate business-driven reasons, not the ethnicity, race, ancestry, or place of origin of the employee. Employers can strongly discourage it, however, and should advise employees that such travel may result in quarantine or self-monitoring (including work from home, if applicable), possibly for a prolonged period. Employers should remain aware of their obligations under applicable employment standards legislation to allow employees to take leave to care for others who are ill, including persons in affected areas, as well as their obligations to avoid discrimination under applicable human rights legislation.

DISCRIMINATION LAW

5. What discrimination issues should employers address/be aware of?

Under Canada's human rights legislation, discrimination in employment on the basis of ethnicity, race, ancestry, or place of origin is prohibited. Employers are prohibited from discriminating against employees because of an association, perceived or otherwise, with an affected country or area. All workplace policies pertaining to COVID-19 should be applied uniformly to all employees and job applicants regardless of their ethnicity, race, ancestry, or place of origin.

6. What are the employer's obligations to prevent harassment of those suspected of being infected?

Under human rights legislation and occupational health and safety legislation in Canada, employers must provide a harassment-free workplace. Human rights legislation in Canada prohibits harassment on protected grounds. Occupational health and safety standards require employers to develop and implement anti-harassment policies and programs. Employers must be mindful that concerns over COVID-19 may result in workplace bullying and harassment. Accordingly, employers should remind employees of their anti-harassment/anti-bullying policies and that all employees are required to abide by these policies. In addition, employers should be vigilant about promptly responding to and investigating any complaints of harassment or bullying in the workplace.

DISABILITY LAW

7. Can employers take the temperature of employees who are coming to work?

In Canada, medical examinations or health-related tests are acceptable for a potential employee (*i.e.*, a job applicant who has accepted an employment offer conditional on an appropriate medical examination) only if the testing or examination is reasonably necessary to confirm the potential employees' ability to perform a *bona fide* occupational requirement of the role.

It is generally impermissible for Canadian employers to mandatorily require existing employees to undergo a health-related test such as taking temperatures at Canadian worksites. Such testing may be permissible, however, if COVID-19 becomes widespread in Canada or if Canada's public health agencies announce that the COVID-19 outbreak has reached pandemic proportions. In such circumstances, an employer may be justified in requiring mandatory temperature testing on the basis that the safety of the workplace and the safety of the public are priorities over the individual privacy rights of employees.

Of course, employers should not single out certain employees for mandatory temperature testing based solely on their nationality or racial or ethnic origin. Such testing should be implemented systematically, to prevent psychological harm to specific employees and to reduce the risk of claims for discrimination under applicable human rights legislation.

If mandatory employee temperature testing becomes justified in Canada, the dignity of employees should be ensured throughout the process. Results of employees' tests should be kept in the strictest of confidence; they should not be shared with other employees, except on a "need to know" basis. Employees

with whom the information has been shared because they “need to know” should be reminded that they are prohibited from disclosing it for unauthorized purposes. Medical records and notes related to COVID-19 should not be kept in an employee’s personnel file, but in a locked and separate confidential file.

Even without COVID-19 becoming widespread or reaching epidemic proportions, Canadian employers may be entitled to engage in an individualized assessment of whether they have reasonable cause to require mandatory temperature testing in a specific employee’s circumstances. For example, even when an employee fails to disclose it or even denies it, an employer may have reasonable cause to believe that the employee is infected with COVID-19, has been exposed to someone who is infected, recently returned from a high-risk country, or has been exposed to someone who has recently returned from a high-risk country. In such circumstances, the employer may have reasonable cause to require the employee to test their temperature on a mandatory basis.

An employer can consider requiring employees to self-check before reporting to work each day. On this page of its website under “Self-monitoring,” the PHAC recommends “self-monitoring when individuals are potentially exposed to the virus and includes monitoring for the occurrence of symptoms compatible with the COVID-19,” which include fever. Employers can then ask employees to remain at home if, after taking their temperature, they discover they have fever. This approach arguably would be consistent with the PHAC’s self-monitoring recommendation.

8. Are there any rules on what employers are allowed to do concerning subjecting employees to medical examinations or health-related tests that would apply to an emergency situation involving a communicable illness such as COVID-19?

There are no such “rules,” however, as noted above, medical examinations or health-related tests may be permissible now that COVID-19 has been declared a pandemic, and provinces have begun to declare provincial states of emergency.

WHY IS EVERYTHING ELSE WRONG

SAFETY AND HEALTH RULES

9. Are non-healthcare employees required to wear respirators or other personal protective equipment?

At this time, there is no general requirement in Canada for non-health care employees to wear respirators or other personal protective equipment. In fact, the PHAC has stated that for healthy individuals, the use of a mask is not recommended for preventing the spread of COVID-19. Furthermore, the PHAC warns that wearing a mask when not ill may give a person a false sense of security. The PHAC also warns that there is a potential risk of infection with improper mask use and disposal and that masks need to be changed frequently.

The PHAC notes, however, that a person’s health care provider may recommend they wear a mask if they are experiencing symptoms of COVID-19 while they are seeking or waiting for care. In this instance, the PHAC advises that masks are an appropriate part of infection prevention and control measures because the mask acts as a barrier and helps stop the tiny droplets from spreading when a person coughs or sneezes.

The PHAC has issued guidance regarding the use of personal protective equipment, including masks and respirators, only for health care workers.

10. Can an employer with a public-facing business, prevent employees from wearing a surgical mask or respirator?

As noted above, the PHAC has issued guidance regarding the use of personal protective equipment, including masks and respirators, for health care workers only.

An employer may wish to bring to its employees' attention that, as noted above, at this time, there is no general requirement in Canada for non-health care employees to wear respirators or other personal protective equipment, such as a surgical mask; and that furthermore, the PHAC seems to discourage healthy individuals from wearing surgical masks, warning that wearing them when not ill may give a person a false sense of security, that there is a potential risk of infection with improper mask use and disposal, and that masks need to be changed frequently.

As the PHAC has not deemed the use of surgical masks and respirators necessary to protect health and safety at this time, employers have discretion as to whether to allow their employees to wear them. In making the decision, the employee may weigh employee concerns about transmission of the virus and their own interest in limiting fear and in not causing client or customer concern. In conducting this exercise, employers should be sensitive to the fact that some employees may have a strongly held belief that wearing a mask will prevent them from becoming ill.

11. What if an employee requests to wear some type of mask as an accommodation?

As noted above, at this time, there is no general requirement in Canada for non-health care employees to wear respirators or other personal protective equipment, such as a surgical mask. Furthermore, the PHAC seems to discourage healthy individuals from wearing surgical masks, warning that: wearing them when not ill may give a person a false sense of security; there is a potential risk of infection with improper mask use and disposal; and masks need to be changed frequently.

As the PHAC has not deemed the use of masks necessary to protect health and safety at this time, employers have discretion as to whether to allow their use as an accommodation. In making the decision, employers may weigh employee concerns about transmission of the virus and their own interest in limiting fear and in not causing client or customer concern. In conducting this analysis, employers should be particularly sensitive to the concerns of pregnant employees and employees who have medical conditions.

The PHAC notes that a person's health care provider may recommend the person wear a mask if they are experiencing symptoms of COVID-19 while they are seeking or waiting for care. If a person is in this position, the PHAC would require that they immediately leave the workplace and stay at home and self-isolate (unless directed to seek medical care). This negates the need for a mask as an accommodation.

12. For employers that have events for large gatherings scheduled, should they cancel them?

Several provinces, including Ontario, Alberta and British Columbia, have declared a state of emergency. In Ontario, this has included an order prohibiting public gatherings of 50 people or more. Quebec, Alberta and British Columbia recently recommended a ban on gatherings of 250 people or more. Restrictions on public gatherings are expected to increase.

The PHAC recommends conducting a risk assessment when determining the public health actions related to a mass gathering during the COVID-19 outbreak; decisions should be considered on a continuum from no changes needed, to enhanced communication to attendees, to risk mitigation strategies being employed without cancelling the event, to postponement or cancellation of the event. The PHAC recommends that public health authorities and event organizers work together to assess the situation, and it provides a table with risk considerations, their implications, and the weight to be assigned to each risk consideration. Employers should review this table before making any decisions.

13. What are an employer's obligations/liabilities when employees work from home?

When employees work from home, a number of issues are raised that employers must consider. Whether provincial occupational health and safety requirements extend to the workplace varies from province-to-province, and some workplaces may also be subject to certain industry-specific requirements.

Some common employer risks associated with employees working from home include:

- Having less control over confidential information, including trade secrets, and related concerns over privacy;
- The potential for liability for accidents that occur;
- Liability for excessive hours worked by employees, and properly reporting and recording overtime; and
- Maintaining employee accommodations and responding to new requests for accommodation (for example, where equipment provided as a workplace accommodation is not available at the home).

Employer occupational health and safety obligations for employees working at home will differ from province to province. In a recent decision, the Supreme Court of Canada clarified that a federally-regulated employer's inspection obligations under the *Canada Labour Code's* health and safety obligations were limited to areas they have control over. Similarly in Ontario, the *Occupational Health and Safety Act* provides an exception to its application for work performed by the owner or occupant in or about a private residence (though some obligations may continue to apply, for example, employers would still be required to respond to allegations of workplace harassment online).

Conversely, in British Columbia, the *Occupational Health and Safety Regulation* does not cease to apply when employees work from home. It also imposes further obligations on employers where employees work alone or in isolation. To "work alone or in isolation" means the work is performed in circumstances where assistance would not be readily available to the worker in the case of an emergency, or in the case the worker is injured or in ill health. To be clear, this would not apply to every situation where employees are asked to work from home, even if they would technically be alone in the home. Each situation would need to be assessed on a case-by-case basis. Where the criteria are met, employers are required to identify and eliminate or reduce hazards

where the employee is assigned to work alone, though it is not clear how this would work where a hazard is a communicable disease that could inhibit an inspection. Employers in British Columbia are also required to establish check-in procedures for employees working alone or in isolation.

Some liability and workplace related issues may be resolved or eased by providing employees with a written policy outlining, for example:

- Requirements related to technologies that should/should not be used;
- Guidelines for maintaining confidential information;
- Whether the employer will bear/or not bear the costs of repairing technology/equipment at home;
- The costs that the employer will/will not bear (g., mobile phone, internet access, electricity, etc.)
- Whether employees are prohibited from meeting with third parties, including clients, customers or patients, in their homes; and
- Reminding employees about their health and safety obligations, and reporting any job-related injuries.

Employers are encouraged to continue to engage in health and safety best practices to the extent possible when employees work from home.

IMMIGRATION

14. Has your country's government issued travel advisories? (If so, please summarize the guidance and provide a link to the government's website (if applicable)).

The PHAC has issued a *global* Level 3 Travel Health Notice in relation to COVID-19. All non-essential travel outside of Canada should be avoided.

15. An employee who recently traveled to an affected area (in another country) is having difficulty re-entering your country:

(a) How can an employer help the employee get back into your country?

The employer can refer the employee to the Canadian consular services abroad, which may be able to assist the employee. Alternatively, the employer can help the employee arrange travel to another country that is not affected; after 14 days of self-isolation there with no symptoms of COVID-19, the employee will then be able to return to Canada. The PHAC would ask that the employee monitor their health for fever, cough and difficulty breathing for 14 days after they arrive in Canada. If the employee has these symptoms, they will be required to inform the public health authority in the province or territory they are in. The public health authority will provide advice on what the employee should do.

(b) In the case of a foreign employee, will the government's travel advisories affect an employer's ability to get the foreign employee back into the country? (Discuss if there are visa-related issues)

Yes. The federal government has closed Canadian borders to everyone who is not a Canadian citizen or permanent resident, with exceptions for airline crews, diplomats, and immediate family members of Canadians. The US-Canada border has been closed to all non-essential travel.

UNEMPLOYMENT & OCCUPATIONAL RISK LIABILITY

16. Do employer-instituted quarantines or temporary shutdowns or mass lay-offs entitle workers to unemployment benefits or severance?

In Canada, *Employment Insurance* (EI) sickness benefits are available to eligible employees for medical reasons. Medical reasons include quarantine. In addition, EI benefits are available to eligible employees during a temporary lay-off or a mass lay-off.

17. What are an employer's workers compensation obligations if an employee traveled to an affected area for work and contracted COVID-19?

In Canada, employees who are infected with the coronavirus due to the nature of, or in the course of, their employment (e.g., while travelling to an affected area for business) may be entitled to workers' compensation benefits. It is up to the employee to follow the procedure for applying for these benefits.

WORKS COUNCIL/INDUSTRIAL UNIONS

18. In the event of a government-declared quarantine or state of emergency, does your country's law override contractual provisions and allow for actions that might contradict a collective bargaining agreement (CBA)?

In Canada, provisions in a private contract or a collective agreement that are contrary to public policy will not be enforceable.

PRIVACY

19. According to your government's health department, what are the steps that employees should follow to notify the authorities that they suspect or are confirmed to have a COVID-19 infection?

The PHAC requires such employees to notify their health care provider or the public health authority in the province or territory they are in, as soon as possible.

If the employee feels sick during travel to Canada or upon arrival, PHAC requires them to inform the flight attendant, cruise staff or a Canadian border services officer.

20. Can an employer require employees to self-report if having a COVID-19 infection?

Under occupational health and safety legislation, Canadian employers are required to ensure the safety of their workplaces. In light of this duty and given the highly contagious nature of COVID-19, an employer can require employees to self-report when they have been diagnosed with COVID-19.

21. If one of our employees is quarantined, what information can we share with our employees? Who can we share it with?

If an employee is quarantined, other employees may be advised that "an employee" has been quarantined, however the identity of the quarantined employee should not be disclosed except on a "need to know" basis. Employees with whom the employee's identity has been shared because they "need to know" should be

reminded that they are prohibited from disclosing the information for unauthorized purposes. If the coronavirus outbreak is declared a public emergency, the privacy rights of individuals may be outweighed by the importance of the public's safety. In these circumstances, it may become necessary to identify employees who are quarantined.

22. What privacy concerns do we need to be aware of when we are asking for the health information of our employees in order to evaluate whether they need to be quarantined?

When asking for employees' health information, employers should explain to them why it is necessary and reasonable for them to do so. Employers should restrict their information requests to information that would enable them to protect the health and safety of the workplace, and their requests should be made discreetly. If an employer determines that an employee has been diagnosed with COVID-19, other employees may be advised that "an employee" has been diagnosed, however, the identity of the employee should not be disclosed except on a "need to know" basis. Employees with whom the employee's identity has been shared because they "need to know" should be reminded that they are prohibited from disclosing the information for unauthorized purposes.

LAY – OFFS / PPE / WORK / REFUSAL

Can an employer layoff a large number of employees at the same time?

As outlined in our article concerning temporary layoffs, only a few provinces address mass layoffs in their employment standards legislation (see for example, Saskatchewan and Nova Scotia). However, where the layoff is caused by an unpredictable event or circumstances, the notice provisions related to a mass layoff may not apply. Quebec, as well, has special rules in the case of "collective dismissals," which includes layoffs for a period of 6 months or more, of 10 or more employees from the same establishment, over the course of 2 consecutive months.

While other provinces may not consider mass layoffs specifically, provincial and federal employment standards laws do outline specific requirements for mass terminations. These would generally apply where mass layoffs turn into deemed terminations, however, the specific requirements vary across the country.

As this is a fluid and rapidly changing situation, please keep in mind that different or additional facts may warrant re-assessment of policies and practices so they can serve the best interest of employees, employers and the community at large. Accordingly, employers should consult with their employment counsel to keep updated on any new legislation or related legal development.

What happens to our employees if we are ordered to close our business by the government?

If the employer is ordered to close by health or other authorities, employers may be able layoff employees without liability under provincial employment standards legislation or the common law. Each case will be dependent on its own facts.

If we layoff our employees, are they still covered under our benefit plans?

This will depend on the language of the benefit plan document.

Employers must review their policies with their benefit plan provider and advise employees of any limitations or restrictions in coverage.

Can an employer close its business for safety reasons due to the COVID-19 outbreak?

An employer must ensure a safe working environment. Depending on the situation, it may be necessary to close a business location for occupational health and safety reasons.

An employer's obligation for providing notice or pay in lieu of notice to employees in the event of a workplace closure will be governed by the specific facts of each case.

If an employer keeps an employee without COVID-19 symptoms out of work, is there a requirement to compensate the employee?

This will depend on the circumstances, including if the employee has travelled, the nature of the specific workplace, alternatives available (i.e. working from home) and any potential contract or collective agreement requirements.

While each situation will have to be assessed individually, there will be circumstances where holding an employee out of service, without pay, may be deemed reasonable. There is also the potential for reputational damage should it become publicized that employers are forcing employees to remain away from the workplace without pay.

Employers may also wish to consider whether the absence of compensation will reduce the efficacy of preventative measures in the workplace. If they will not be compensated, employees may not self-assess as critically as required or may not report issues or concerns.

What if an employee has COVID-19 and cannot work?

Where an employee contracts COVID-19 and is unable to work, an employer must grant any applicable legislative leave to the employee, in addition to meeting any sick leave obligations outlined in employment agreements or collective agreements.

If the employee contracted COVID-19 in the workplace, there may be additional reporting obligations under workers' compensation and occupational health and safety legislation.

Do employers have to buy personal protective equipment for employees?

Employers have a duty to provide a safe working environment relative to the expected duties of the employee and the risks in the workplace. If employees run the risk of becoming infected at work because of the work they perform, the employer must provide personal protective equipment. As of March 12, 2020, public health authorities are not generally recommending personal protective equipment (e.g. masks, gloves) or any other physical protective devices.

The preventative measures being advised are hand, respiratory, and environmental hygiene and social distancing. These recommendations suggest that these

measures are generally reasonable for most workplaces.

However, if you have an employee who is vulnerable (over age 65, compromised immune system, or underlying medical condition) the obligations to this employee could be different. Precisely what steps may be reasonable to protect the vulnerable worker are likely to be determined on a case-by-case basis and involve advice from public health and/or medical officials. Employers may not know if a vulnerable employee is in the workplace. As part of workplace communications about COVID-19, employers should prompt workers with individual risk concerns to raise them with the employer.

Can we prevent an employee from wearing masks at work?

Generally, yes, unless the use of personal protective equipment, such as masks, is a condition of employment or otherwise required for the employee to safely perform their duties.

Since the outbreak of the pandemic, the opinion of public health authorities on the use of masks has been evolving. Presently, the Public Health Agency of Canada (PHAC) says that wearing a non-medical mask (such as a homemade cloth mask) in the community is not proven to protect the person wearing it, but it is an “additional measure” you can take to protect others around you.

The US Centres for Disease Control (CDC) has issued a recommendation for the general public to wear “cloth face coverings” (not surgical masks or N95 masks) in “public settings where other social distancing measures are difficult to maintain (e.g. grocery stores and pharmacies”).

Work Refusal

What if employees refuse to work because they are afraid of contracting COVID-19 in the workplace?

Employers have a positive obligation to take reasonable care in the circumstances to protect the health and safety of employees under occupational health and safety legislation. Where an employee has reason to believe that there is a dangerous condition in the workplace, or that their duties present a danger to their health and safety (which is not an inherent or normal condition of their work), the employee may be able to refuse to attend work or perform certain duties.

In the context of the COVID-19 pandemic, employers can expect to see work refusals from employees based on:

- a confirmed or presumptive case of COVID-19 in the workplace;
- a confirmed case of COVID-19 in an employee’s immediate family or other close contact;
- the risk of potential exposure to COVID-19 from contractors, customers or clients depending on the nature of the workplace or the people it serves;
- concerns from employees who are particularly vulnerable (over age 65, compromised immune system, underlying medical condition) not wishing to report to work; or
- employees with a generalized fear of contracting COVID-19 by travelling to or attending work.

Whether or not a work refusal based on the above or other grounds is reasonable will depend on individual circumstances. In the event of a work refusal, the employer must respond in accordance with occupational health and safety legislation, which response will include an investigation into the concerns and, if appropriate, adopting measures to eliminate or reduce the workplace danger. This investigation will, in large part, be based upon the current scientific understanding of COVID-19 and the specific facts in the individual workplace. No reprisal for properly exercising a health and safety right may occur.

Employers should also understand that, where the regulator is required to resolve the work refusal, the way the regulator does so could be different than might ordinarily occur. The determination of the regulator might be made without meeting with the workplace parties in person or there may be other steps or measures implemented by the regulator, for the protection of its staff, that are unusual.