You Make The Call: Is This a Valid COVID-19 Screening & Quarantine Measure?



PANDEMIC QUARANTINE LAW, 101

OHS laws require employers to take reasonable or reasonably practicable health and safety measures to protect workers and others at the workplace against known hazards. Risk of COVID-19 infection is a known hazard. **Result:** Employers have a legal duty to implement reasonable measures to prevent people from contracting COVID-19 at the workplace.

QUESTION

What reasonable measures must employers take to prevent COVID-19 infection?

ANSWER

Taking reasonable measures means following government emergency orders and the COVID-19 infection guidelines of Health Canada and other public health agencies (which we'll refer to collectively as "the guidelines."). Part of it is ensuring regular handwashing, the use of appropriate PPE and worker education. But let's focus on the most important, and for employers, challenging COVID-19 infection control measure of all: social distancing.

Employers' Social Distancing Rights & Duties

The simplest way for an employer to comply with the social distancing mandate is to close down all sites and operate remotely with employees working from home. If your workplace is on the list of what government emergency orders describe as "non-essential business," you *must* close down. But what about the essential businesses that can and must remain open, businesses like hospitals, clinics, EMTs, pharmacies, grocery stores, utilities, infrastructure industries, construction sites and many others? For these businesses, remote work isn't reasonably practicable; they can't operate unless their workers come to work.

At the same time, these businesses also required to follow social distancing guidelines. First and foremost, that means keeping people who have or are reasonably suspected of having COVID-19 out of the workplace. In acting as gatekeepers, employers are being called on to adopt drastic measures like

mandatory quarantines and medical screening that would be totally impermissible in normal times. But even in a pandemic, privacy, discrimination and other legal limits apply.

HOW FAR CAN EMPLOYERS GO?

To answer that question, we've created 8 scenarios that, while hypothetical, are based on real-life situations employers across Canada are facing. Your assignment: Determine whether an employer's social distancing measure is legally justified.

1. Employer Sends Sick Worker Home

Scenario: An employer orders a worker to go home after he tests positive for COVID-19?

Is this a legitimate safety measure?

Answer: 100%, yes. This authority stems from the guidelines requirement that people who are infected with COVID-19 self-isolate for 14 days or until their symptoms completely disappear, whichever is longer. In addition to confirmed COVID-19 cases like the worker who tested positive, employers can send home or bar workplace entry to anybody who should be in self-isolation under the current guidelines (as described in the shaded box below):

People You Can & Must Keep Out of the Workplace

Under current OHS laws, government emergency orders and public health guidelines, the following workers, clients, visitors and other persons must be in self-isolation for at least 14 days and may not be allowed to enter or remain in the workplace:

- People who test positive for or are otherwise confirmed to have COVID-19
- People who've been in or had direct contact with people from "at-risk" countries within the past 14 days
- People who've been directly exposed, i.e., had frequent and close contact with somebody confirmed as having COVID-19, within the past 2 days
- People who have symptoms of COVID-19, including fever, cough, shortness of breath, difficulty breathing, sore throat or runny nose flu, e.g., cough, fever or respiratory issues, even if they're not confirmed as having COVID-19
- People who've been directly exposed to people in self-isolation due to COVID-19 symptoms, regardless of whether COVID-19 has been confirmed, within the past 2 days.

2. Employer Sends Exposed Co-Workers Home

Scenario: After sending the worker who tested positive, the employer also sends home all co-workers who had frequent and close contact with him in the past 2 days.

Is this a legitimate safety measure?

Answer: Yes. Close and frequent contact with a confirmed COVID-19 patient is one of the triggers for mandatory 14-day self-isolation under the guidelines.

Strategy: After learning that workers have COVID-19, require them to identify all of the workers with whom they've had close and direct contact in the past 2 days so you can also send them home.

3. Employer Tells Co-Workers that Worker Has COVID-19

Scenario: Same scenario as above, but instead of sending the co-workers home, the employer tells them that the worker has COVID-19 and suggests they get tested.

Is this a legitimate safety measure?

Answer: No. Not sending the co-workers home after learning they were directly exposed to a worker with COVID-19 violates the guidelines. In addition, the fact that the worker has COVID-19 is protected health information that the employer may not disclose except for a legitimate employment purpose and only to the extent necessary to accomplish that purpose. Protecting the co-workers' health is a legitimate employment purpose and letting them know that a worker has COVID-19 is arguably essential to accomplish that purpose. But suppose the employer were also to reveal that the worker with COVID-19 has diabetes. While the intent may be to let co-workers know that their colleague may be in big medical trouble, disclosing the worker's diabetes is revealing more personal information than necessary to accomplish the purpose of protecting the co-workers and thus runs afoul of the exception.

4. Employer Requires Workers to Disclose Illness

Scenario: An employer adopts a temporary policy requiring all workers to disclose not only the fact that they're ill but also what illness they have.

Is this a legitimate safety measure?

Answer: Yes. In normal times, you can't ask workers to provide personal information about their health and illnesses; but in a pandemic, when privacy and safety conflict, the latter prevails, providing, of course, that the privacy intrusion furthers a legitimate safety measure. And to the extent it enables an employer to enforce quarantine and social distancing rules, mandatory self-disclosure of illnesses would likely be considered justified for as long as the pandemic lasts.

5. Employer Fires Worker Because He Has COVID-19

Scenario: After learning that the worker has tested positive for COVID-19, the employer terminates his employment.

Is this a legitimate safety measure?

Answer: No. Being sick with COVID-19 or any other illness isn't legal grounds for termination but rather a form of disability discrimination banned by human rights laws. The same thing is true if you merely suspect the worker has COVID-19.

6. Employer Fires Sick Worker for Refusing to Stay Away

Scenario: A worker who's sent home and told to self-isolate for 14 days after testing positive for COVID-19 defies the order and shows up for work the next

day. The worker gets a warning, but the violations continue until the worker is fired.

Is this a legitimate safety measure?

Answer: Yes. Deliberately failing to follow orders to quarantine and stay away from work, like any other health and safety violation or act of insubordination, is misconduct subject to discipline up to and including termination, provided that the quarantine order is legitimate and the employer follows the normal rules and procedures of its progressive discipline policy.

7. Employer Takes Workers' Temperature before Letting Them Enter Workplace

Scenario: An employer hires a nursing firm to take the temperature of all workers before starting their shift; workers with body temperature above 98.6^{0}F/37^{0}C are sent home.

Is this a legitimate safety measure?

Answer: Yes. Normally, this kind of medical screening raises bright red flags under privacy and human rights/disability discrimination laws. But during the pandemic, it seems to have become common practice through much of the country, in large part because workers are willing to submit to it because they want the comfort of knowing that the people they'll be working with don't have a fever. While Canadian regulators haven't yet directly addressed the practice, the US Equal Employment Opportunity Commission (EEOC) (the US equivalent of provincial human rights agencies) has given it a green light given the unique circumstances of the pandemic. Caveat: As a screening method, temperature-taking has its limitations because a person with normal body temperature may still have COVID-19.

8. Employer Makes New Job Applicants Pass Medical Screening

Scenario: Under a new policy, all new job applicants who receive offers of employment must undergo and pass medical screening showing they're free of COVID-19 symptoms.

Is this a legitimate safety measure?

Answer: Yes. Again, a potentially privacy-invasive and disability discriminatory policy is most likely permissible during the COVID-19 pandemic, provided that all applicants who get a conditional offer that particular job or job classification have to undergo the same screening. In other words, your options are to screen everybody within the classification or nobody within the classification.

When Can Workers Return to Work?

Go to HRI for a Cheat Sheet explaining when it's safe for workers in COVID-19 quarantine or self-isolation to return to work, based on the most recent guidelines.