FTR Now

Employer Bulletin: Influenza A(H1N1)

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You are all undoubtedly aware of the potential Influenza A(H1N1) (or “H1N1 virus”) pandemic that is currently underway.[1] While it is unknown at present just how serious or widespread this situation will become, employees are already expressing concerns, and it is important for employers to monitor the situation and to be prepared to respond as matters develop. Therefore, now is the time for you to consider what impact such a pandemic, should it transpire, would have on your workplaces and to understand your legal obligations as employers.

SICK LEAVE BENEFITS

Dealing first with contractual entitlements, employees unable to work because of illness caused by the H1N1 virus may be eligible to claim benefits under a sick leave policy. In this regard, they should be treated just like any other sick employee. Thus, the eligibility and procedural requirements of a sick leave policy would be applied as usual to the claims.

In the 2003 SARS crisis, questions arose as to the treatment of employees who had been quarantined, but who were themselves not ill – a situation that could occur again. It is possible that a broadly-worded sick leave policy may provide benefits for such a situation. However, if it does not, employers will need to carefully assess whether, for example, they would extend benefits on a gratuitous basis versus having employees apply for EI benefits (if they are made available).

EMPLOYMENT INSURANCE BENEFITS

In the absence of company paid sick benefits or where benefits are exhausted, employees may be entitled to *Employment Insurance Act* sickness benefits. Employees who face a reduction in “normal weekly earnings” of at least 40% because of illness, injury or quarantine are eligible for EI sickness benefits, provided that they have accumulated sufficient insurable hours. During the 2003 SARS crisis, the federal government implemented special loss of income relief for affected employees in various circumstances. At this time, it is not known whether the federal government would implement any special loss of income relief in response to an H1N1 virus pandemic.

EMPLOYMENT STANDARDS ACT, 2000 – LEAVES OF ABSENCE

The *ESA, 2000* now contains two specific leave provisions that could apply in a pandemic situation.

First, where companies regularly employ fifty (50) or more employees, those employees will have an entitlement to ten (10) unpaid “personal emergency leave” days. This leave may be used for the personal illness, injury or medical emergency of the employee or a specified family member.

Second, in the case of a pandemic, employees may be able to claim entitlement to the new “declared emergency” leave that was added to the *ESA, 2000* in 2006. This new leave gives employees the right to a leave of absence where an employee is unable to perform the duties of his or her own position because of a declared emergency.

The *ESA, 2000* sets out certain criteria which must be met in order to qualify for entitlement under a declared emergency. First, either the Lieutenant Governor in Council or the Premier must declare an emergency under the *Emergency Management and Civil Protection Act*. Additionally, employees must be unable to work because either:

- they are subject to an order under the *Emergency Management and Civil Protection Act*;
- they are subject to an order under the *Health Protection and Promotion Act*; or
- they are needed to provide care or assistance to a specified individual.

With respect to the first bullet point, the government may make orders under the *Emergency Management and Civil Protection Act* in order to: regulate or prohibit travel to, from or within any specified area; evacuate individuals and animals, or remove personal property from a specified area; and close any place, whether public or private, including any business, office, school, hospital or other establishment.

The second bullet point relates to the *Health Protection and Promotion Act* and refers to section 22 of the *Act*, which gives medical officers of health the power to order individuals to take or refrain from taking any action specified in an order. These orders can be quite broad and can include orders to be quarantined, to submit to an examination by a physician or to conduct oneself in such a manner so as not to expose another person to infection.

With respect to the third bullet point, the list of specified individuals includes the following:

- the employee's spouse;
- a parent, step-parent or foster-parent of the employee or the employee's spouse;
- a child, step-child or foster child of the employee or the employee's spouse;
- a grandparent, step-grandparent, grandchild or step-grandchild of the employee or the employee's spouse,
- the spouse of a child of the employee;
- the employee's brother or sister; or
- a relative of the employee who is dependent on the employee for care or assistance.

Declared emergency leave generally ends the day the declared emergency is terminated or disallowed, and the employee's right to the leave will usually end at the same time (subject to a few exceptions, including where an employee is exercising the right to declared emergency leave to care for a specified individual).

In the event that an emergency is declared by the government, employers would need to monitor the situation carefully, and would need to consult the *ESA, 2000* to determine the rights of its employees in the context of the actual declaration.

OCCUPATIONAL HEALTH AND SAFETY ACT – WORK REFUSALS

Under the *Occupational Health and Safety Act*, most employees have the right to refuse work if a condition of the workplace "is likely to endanger" their health or safety.[2] Employees encountering the H1N1 virus in the workplace (or who fear that they may encounter it) may seek to exercise their right to refuse work in this regard.

The *Act* outlines a specific work refusal procedure which must be followed. Employers cannot threaten to discipline an employee exercising a work refusal. When faced with a work refusal, the employer should immediately investigate, consider the right, and, failing resolution with the employee, notify a Ministry of Labour Inspector. Failure to comply with the *Act* may result in fines.

WSIB CLAIMS

The *Workplace Safety and Insurance Act, 1997* provides compensation for "personal injury or illness arising out of and in the course of employment" and provides compensation where "a worker suffers from and is impaired by an occupational disease that occurs due to the nature of one or more employments in which the worker was engaged". Workers infected in the course of employment may be entitled to services and benefits. Such claims were made by health care workers during the 2003 SARS crisis.

WORKFORCE ADJUSTMENTS AND STRATEGIC PLANNING

During the 2003 SARS crisis, a number of employers found that they had a downturn in business and were required to make workforce adjustments. Because of the current economic crisis, a number of employers are already engaging in such adjustment measures, and a further downturn in business will require a careful response that takes into account measures that have already occurred.

It is important that employers begin to plan now for the possibility of a pandemic occurring and for the resulting effects on your business. While you may not need to implement it, a good contingency plan will help to ensure that your business is well-prepared to face the challenges that may arise.

QUESTIONS AND ANSWERS

Many employers are already facing a number of questions from employees relating to the current H1N1 virus outbreak. In replying to these questions, it is important for employers to attempt to balance a responsible approach to legitimate employee concerns while taking care not to act unreasonably or based on misinformation or unreasonable fears. The task of employers is made more complex because, at the time of writing, there have been no specific directives or orders issued by health authorities that would dictate a required employer response.

Keeping these competing issues in mind, we have set out below some of the emerging questions and answers, along with some general guidelines. For specific advice, please directly contact one of the Firm’s lawyers.

Q. Can an employer require an employee who has recently visited Mexico to remain at home for a period of time upon his or her return?

A.