



FTR Now

Ensuring a Successful Return to Work in a COVID-19 World

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As governments start lifting orders and directives made under the *Emergency Management and Civil Protection Act* (or similar legislation in other jurisdictions), it is understandable that employers and employees alike are anxious to return to their 'pre-COVID-19 normal'. However, in order to ensure a successful return to work during the largest pandemic in modern history, it is crucial that employers turn their minds to the unique labour and employment issues created by COVID-19 and reopen with a solid return to work plan in place.

All employers who have had to close or curtail operations will face basic economic questions about the ongoing viability of their business and the impact that has on resuming operations and bringing employees back to work. Employees may, in turn, have concerns about returning to the workplace because of safety, childcare or other ongoing issues. What is clear is that COVID-19 has generated new workplace considerations for employers across a variety of areas such as human rights, health and safety, and privacy. In this review we provide a checklist of considerations, consistent with your legal obligations, to assist you in creating a successful return to work plan.

NOTE: *This review is not exhaustive – it focuses on COVID-19 issues and concerns that are likely to apply to most employers. While the review cites Ontario and federal legislation, similar legislation exists in all provincial jurisdictions in Canada, and in all cases, the applicable legislation should be consulted. If you have any concerns about your organization's particular return to work plan or have any questions about statutory requirements not addressed in this checklist, please contact your regular Hicks Morley lawyer.*

1. Health and Safety

Ontario employers have duties under the *Occupational Health and Safety Act* and its regulations to keep workers and work sites safe and free of hazards. (Federally regulated employers have similar obligations under Part II of the *Canada Labour Code* and its associated regulations.) The standards that employers must meet to provide a safe workplace continue to evolve, and have been augmented during the pandemic by a wide range of directives and guidelines issued by or on

behalf of the government and public health authorities. A critical first step in any return to work plan will be to ensure that your workplace can resume operations in a manner that meets your health and safety obligations.

- Do you have a protocol that employees must follow if they are sick or if they suspect they have come into contact with someone diagnosed with COVID-19?
- Have you reviewed all applicable guidance documents published by provincial and federal government authorities and various health and safety associations? What changes should you make to your workplace in light of these guidance documents?
- Have you conducted a risk assessment to determine whether all or some of your employees need personal protective equipment (PPE) when they return? Will they have access to adequate PPE? Are your PPE supply chains stable?
- If you have determined that PPE is unnecessary, will employees be allowed to supply their own PPE?
- Will you be implementing any screening measures for returning employees (e.g. temperature screening)?
- Are you able to ensure physical distancing? Have you considered any or all of the following:
 - limiting the number of employees recalled to work or permitting some employees to continue to work remotely
 - staggering start times, breaks and eating periods
 - restricting the number of people permitted in a given area at a particular time, including common areas such as lunch and locker rooms
 - limiting elevator and confined space usage.
- Do you have resources in place to allow employees to practice good personal hygiene (e.g. access to soap and water or alcohol-based sanitizer, washroom facilities, facial tissue)?
- Have you sanitized high-touch surfaces (professionally or otherwise)? Have you implemented a procedure to ensure the regular cleaning of these surfaces?
- Do you need to make any physical changes to your workplace to protect your workers (e.g. plastic shields)?
- Have you provided information to your joint health and safety committee or health and safety representative regarding workplace hazards, and the safety measures being put in place to address those hazards?
- Are you prepared to address any possible work refusals by employees returning to work in the ongoing pandemic environment?

2. Employment Standards

The *Employment Standards Act, 2000* (ESA) sets out the minimum standards for provincially regulated employees in Ontario, while Part III of the *Canada Labour Code* (CLC) establishes minimum standards for federally regulated employees. When returning employees to work, employers need to remain aware of their obligations under the statutes. Even after workplaces reopen, employees may remain entitled to job-protected leaves of absence for the foreseeable

future.

- Do you have a protocol for determining whether any of your employees are entitled to Declared Emergency Leave or Infectious Disease Emergency Leave (ESA), COVID-19 Leave (CLC) or other applicable statutory leave?
- If you will be implementing staggered hours of work to ensure physical distancing, do your new work schedules fit within the hours of work limits and other scheduling restrictions in the ESA and CLC or your collective agreement? Do you need to secure hours of work agreements with your employees or trade unions?
- If employees continue to work full-time from home, or will be working part of the time at home and part of the time at the workplace, how will you record hours of work for overtime and other purposes?
- Did you schedule employees to take vacation prior to the start of their layoff or leave? Do you have a plan in place to permit employees to use their accrued vacation after they return to work?
- Will you be recalling all of your employees back to work?
- For employees not recalled to work, will they remain on a temporary layoff? Have you determined how much time remains before the temporary layoff exceeds what is permitted under the ESA, the CLC or your collective agreement?
- Will you need to terminate the employment of some of your employees? If so, you will need to determine their entitlements under the applicable statutes (e.g. termination pay, severance pay, accrued vacation pay) and at common law. Will you need to reinstate benefits for the duration of the statutory notice period?

3. Human Rights

The COVID-19 pandemic has resulted in a range of human rights concerns. There is the fact of the virus itself and the significant health impacts it has on individuals who contract it. While the Human Rights Tribunal of Ontario has not considered the issue, the Ontario Human Rights Commission has adopted a policy that COVID-19 engages the *Human Rights Code's* protections for disabilities. Furthermore, the impacts of COVID-19 may engage other *Code*-protected grounds, such as family status, age, race or place of origin.

- Have you implemented workplace harassment, discrimination, and accommodation policies? Do they need to be updated?
- Have you established a procedure for reviewing and resolving harassment and discrimination complaints? Is the procedure compatible with your business operating remotely or do revisions need to be made?
- Have you considered whether changes to business delivery or remote operating models have a disproportionate impact on particular employees (or customers) based on a protected ground? Do you have a process in place to address individual employee or customer accommodation needs?

- Do your managers require refresher training on key human rights issues that are being impacted by COVID-19?
- With the re-opening of your operations, will any of your employees require (or continue to need) accommodation due to disability, family status or other grounds? Do you have a process in place to respond in good faith to the accommodation requests?

4. Pension and Benefits

COVID-19 forced many businesses to temporarily lay off their employees. The layoff and pending recall of employees has a range of implications for employment benefits and pensions, as well as the various federal wage replacement initiatives that have been put in place.

- Do you need to re-enroll your employees in their benefits plans? Have you contacted your provider to determine the process? Is there a waiting period before they are eligible for coverage again? Have you communicated the process, especially any waiting period, to employees?
- How did the layoff impact employees' pension entitlements? Are employees permitted to buy back any pensionable service? Have you prepared any required communications?
- Will you be recalling employees back to full-time or part-time work? Will the recall disentitle them to the Canada Emergency Response Benefit (CERB)?
- Will you be claiming the Canada Emergency Wage Subsidy (CEWS)? What impact will this have on your employees' CERB entitlement?
- If employees will be paid less than their regular pay, how will their pension, life insurance and disability entitlements be affected? Will a pension plan amendment be needed to permit full accrual? Do you have a communication plan?

5. Workplace Safety and Insurance

Employees who contract COVID-19 while at work may be eligible for WSIB benefits. The WSIB will consider the nature of the employee's employment and whether their employment risk of contracting COVID-19 was greater than the risk for the public at large. Employers are expected to make reasonable efforts to meet the regular timelines of initial accident reporting. Workers' initial accident reporting obligations, and appeal timelines to both the WSIB and WSIAT, have been suspended.

- Are there any injuries or illnesses that you need to report?
- Have you reported any material changes affecting your obligations under the *Workplace Safety and Insurance Act, 1997*?
- Have you notified the WSIB or the WSIAT of any objections to any WSIB decisions?
- Have you turned your mind to accommodating employees who were injured at work and are now ready to return to the workplace?
- If you had deferred WSIB payments, have you secured the necessary funds to make your

payment by August 31, 2020?

6. Privacy and Data Security

The pandemic has given rise to a range of privacy and data security concerns, ranging from the collection of sensitive health and other personal information of employees to establishing appropriate security protocols to enable employees to work remotely. As workplaces reopen, employers may find that some of their security measures and protocols will need to be reviewed and enhanced. Employers subject to privacy legislation will need to consider any statutory obligations as well.

- Is the personal information you collected during the COVID-19 pandemic stored, physically or electronically, in a manner that safeguards the confidentiality of the employee's personal information? Do you need to upgrade your IT capabilities and systems?
- Do you have a policy with respect to how long you will be retaining employee personal information collected during COVID-19?
- If you will be implementing screening measures, do they limit the amount of personal information collected to only that which is necessary to ensure a safe workplace? Will the screening take place in an area where others are not able to overhear or learn of the results?
- If an employee tests positive for COVID-19 after they return to work, do you have a policy in place which addresses how you will balance the employee's privacy rights with your health and safety obligations to other employees?
- How will you protect your organization from privacy and data security issues that may arise as a result of employees continuing to work remotely? Have you:
 - reviewed and updated your security and incident response plan?
 - implemented sufficient security measures (e.g. a VPN or multi-factor authentication)?
 - provided employees with training to detect and avoid cyber risks (e.g. phishing emails)?

7. The Unionized Workplace

Unionized employers must comply with the negotiated terms of their collective agreement. Seniority, notice and recall provisions will all inform your return to work protocol.

- Have you reviewed your seniority and recall provisions of your collective agreements? Are there any past practices that the union might expect you to apply?
- What obligations do you have with regard to employees who had bumped into other positions during COVID-19?
- If there are any provisions in the collective agreement that may be difficult to apply, have you considered negotiating a return to work protocol with the union?

- Are there any other specific provisions in your collective agreement that may impact your return to work plans – e.g. scheduling restrictions or privacy protections?

8. Litigation and Other Contractual Considerations

Some employers changed the terms and conditions of their employees' employment agreements in order to deal with significant loss of revenue or, in some cases, to assist employees with their financial shortfalls. As employees return to work and workplaces begin to reopen, employees will anticipate a return to their pre-pandemic wages and other entitlements. However, employers may not have the financial ability to meet these expectations for some time to come. In all cases where wage reductions or other actions directly impacting employee entitlements are being considered, employers should seek legal advice to discuss any risks involved.

- If you reduced your employees' wages or hours during the pandemic, have you assessed when you will return their hours or wages to pre-COVID-19 levels? How and when will you communicate this to your employees?
- Do you need to continue to pay reduced wages (or, for employers who have been closed throughout the pandemic, implement wage reductions when you reopen)? How will you implement these changes? Have you considered all alternatives?
- Is there an agreement to pay employees a retention bonus upon their return to work or at some future date? When will that be paid out and how much will it be?
- Some employers provided a loan to employees during the COVID-19 pandemic. How will employees repay the money? If you decide to deduct wages, have employees signed a written authorization as required by the ESA or CLC?
- Did some employees bring work equipment home during the COVID-19 pandemic? If so, how will you ensure that the equipment is returned?

9. A New Normal?

Businesses and employees alike will be facing a "new normal" when workplaces reopen. Returning to work will be a challenging time for many employees. They may feel stress about their health and safety. If daycares and schools remain closed, they may be juggling childcare obligations with work obligations or have entitlements to statutory leaves. The government has also warned that there may be additional waves of COVID-19 outbreaks which may necessitate the re-imposition of restrictions. Employers need to keep all this in mind as they restart their operations.

- Do you have mental health support services that employees can access? If not, will you be adding these services to your company's benefits package?
- Do you need to reconsider some of your existing social practices at work to ensure physical distancing? Will this require a change in your firm's work culture?
- Will you be reorganizing your workplace as a result of the pandemic? Will employees work from home on a partial or full-time basis?

- Do you need to revise any existing policies or develop new policies to facilitate the future closing (either in whole or in part) of your business? Did any problems arise during this closure which you want to address in preparation for another closure?
- Do any of your policies need to be revised, either temporarily or permanently, to address issues which may arise as employees return to work under new circumstances?
- Do you need to revise your employment agreements for new hires to expressly permit temporary layoffs in the future?

For More Information

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