

March 25, 2020

COVID-19 AND THE WORKPLACE

In response to the current COVID-19 Pandemic employees and employers in the Northwest Territories and Nunavut need to know their rights and obligations.

The following summary addresses general issues for workplaces related to COVID-19. This is general information only. Each workplace has its own unique circumstances. For specific issues please seek legal advice.

An Employer's Responsibility to Ensure a Safe Work Environment

Employers have a responsibility under occupational health and safety legislation in the Northwest Territories and Nunavut to maintain a safe and healthy work environment for their workers:

- Any worker who has been advised by a health official to self-isolate or be quarantined must be advised by their employer to do so.
- If the worker is not exhibiting symptoms of COVID-19 and they are considered essential workers the employer should have a plan in place that includes risk assessments and mitigation measures that allow for essential services to continue while minimizing the risk to the public.
- Anyone exhibiting symptoms of COVID-19 should be sent home immediately.
- An employee has the right to refuse to work in an unsafe work environment. Whether it is reasonable for an employee to refuse to work due to concerns about COVID-19 will depend on the nature of the workplace, the suspected safety risk, the individual needs of that employee and individual the circumstances.
- Public Health officials in the NWT have recommended that non-essential businesses such as tour operators, hair salons, bars should be closed but businesses considered essential services such as grocery stores, gas stations and convenience stores can stay open if they can maintain a two meter separation between individuals within the facility. So far, this is a recommendation not an order.

Due to the seriousness of the threat of COVID-19, employers will need to be flexible when accommodating the safety concerns of their employees. If the employee can work from home, it will likely be in the employer's best interest to provide this option.

Employee Leave and Compensation

If an employee has symptoms or is diagnosed with COVID-19 or they cannot work because they are required by health officials to self-isolate or be quarantined the employer is not required to pay the employee. However, the employee may be eligible for:

- sick leave benefits provided by the employer.
- banked overtime, paid vacation time or unpaid sick leave for this period.

If an employee cannot access the above benefits, they may be eligible for Employment Insurance (EI) benefits. Canada has announced enhanced eligibility for EI and new emergency benefits for employees even for workers who are otherwise not entitled to EI. More information on EI COVID-19 emergency benefits are available on the government's website at <https://www.canada.ca/en/services/benefits/ei/ei-sickness/apply.html>

Can an Employer Force an Employee to Self-Isolate?

Where an employee has no symptoms, is able to work and has not been ordered by a health official to self-isolate or be quarantined, the employer's fear, alone, is likely insufficient reason to ban them from work.

However, if the employer is aware that the employee has recently travelled outside of the territory it is reasonable for the employer to inquire about the travel and also require that the employee not attend work for 14 days. In the NWT the Chief Medical Officer has ordered that anyone who comes into the territory is required by law to self-isolate for 14 days. Subject to any legislative changes prohibiting it, the employer may also require medical clearance prior to the employee returning to the workplace.

Employers can ask that employees follow the directives of public health including the directive by with respect to self-isolation and filing self-isolation plans in the NWT.

Employers who wish to contribute to flattening the curve of the spread of this virus may wish to have their workers work from home, if possible. Employees working from home are entitled to receive their regular pay and benefits.

Can Employees be Temporarily Laid Off?

Many businesses find themselves in a situation where they no longer have a choice but to close their doors, either because they are ordered to by health authorities or because they have no customers. This may mean laying off employees. While an employment contract may include lay-off provisions it cannot negate statutory obligations.

- Employment Standards legislation in Northwest Territories and Nunavut employment allows employers to temporarily lay off their employees for a period not exceeding 45 days during a period of 60 consecutive days upon provision of written notice. It is possible to apply to the Employment Standards Officer for an extension to exceed the 45 days in special circumstances provided that the employee will be recalled.

- Notice must include the expected date on which the employer will require the employee to return to work. This can be done without triggering notice or severance obligations. This of course is subject to any lay-off provisions in the employment contract or collective agreement.
- Notice may also have to be provided to the Employment Standards Officer depending on the circumstances of the terminations, the number of employees being terminated and timeframe of the terminations.
- A federally regulated employer can temporarily lay off employees without triggering severance obligations as long as the employee is being laid-off for three (3) months or less. There are some exemptions and a number of other circumstances that may extend that period.

There is some case law in other jurisdictions that suggests that lay-offs can only be lawfully made if (a) there is an express condition in the employment contract that permits lay-offs (b) where lay-offs are anticipated in the industry (for example seasonal employees), or (c) if the employees voluntarily agree to the lay-off. If these conditions do not exist- there is a risk that an employee could claim that they have been constructively dismissed. It is not clear what a court would decide if an employee challenged a lay-off, given the impact that COVID-19 is having on the economy and the fact that this point of law has not been considered before in the NWT or Nunavut. We recommend seeking legal advice before laying off employees.

Subject to an employment agreement, policy or collective agreement that says otherwise, layoff periods are generally unpaid. However, employees may qualify for EI generally or for the COVID-19 emergency benefits. Employers should also consider whether or not they can continue to pay benefits.

Also, it's important to keep in mind that some of provinces have started to implement emergency legislation to protect employees who are forced to stay home instead of working because of COVID-19. It's unclear right now how far reaching those protections will be and whether the Northwest Territories or Nunavut will be implementing emergency legislation.

If a workforce adjustment or temporary layoff doesn't solve the operational problem or financial impact of COVID-19, employers may be forced to look at permanent workforce reductions. It is important that employers recognize that terminations in these circumstances will be considered "without cause" terminations and as such, the applicable statutory and common law requirements will apply. Employers should review their employment agreements in order to assess severance liability and seek legal advice.

Privacy and Human Rights Considerations

Within the context of the COVID-19 pandemic it seems reasonably necessary to collect some personal information about employees to ascertain the level of risk they pose to others in the workplace and to implement measures to satisfy occupational health and safety obligations. While an employer is limited by privacy laws, an employer might ask the following questions without violating an employee's right to privacy:

- Are you exhibiting any symptoms of illness?

- Have you had close personal contact with anyone exhibiting any of the symptoms?
- Have you travelled to an affected area?
- Have you been in close personal contact with anyone who has travelled to an affected area?

Employers should not target employees of a certain race, age, religious background or ethnicity in this respect. Differential treatment of employees due to a perception that they may have COVID-19 or been exposed to the virus, or differential treatment of employees due to their race or place of origin may be a violation of human rights legislation unless the employer can show that it had bona fide reasons for such differential treatment.

In short, an employer should not send an individual employee home or ask them not to work because of concerns over COVID-19 unless the concerns are reasonable and consistent with the most recent advice from medical and Public Health officials. Employers should give employees flexible options, such as working remotely, when feasible as an accommodation if they are not currently sick but need to self-isolate or stay home due to other reasons related to COVID-19.

Circumstances are changing and this article was last updated on March 25, 2020. If you have any questions, please contact Sandra MacKenzie, Lawson Lundell LLP, at smackenzie@lawsonlundell.com.