COVID-19 and the modified workplace: Meeting and exceeding the law

Best practices and compliance for bringing workers back after the pandemic

BY RISHI BANDHU

WITH LITTLE promise of a vaccine in the immediate future, the novel coronavirus causing COVID-19 is here to stay. For the foreseeable future, commercial activity must focus on containment.

Clearly, the workplace needs to change and employers of all sizes must lead. This is not simply about moral or competitive leadership. Employers that fail to take reasonable measures to contain the coronavirus may face prosecution and liability.

Irrespective of jurisdiction, Canadian occupational health and safety (OHS) legislation creates overarching obligations to take every precaution, reasonable in the circumstances, for the protection of workers. The fact that the coronavirus spreads through human contact and is easily killed by household disinfectants are key determinants of the scope of what is reasonable in the circumstances.

Accordingly, the following precautions seem sensible:

- Structural changes, like modifying entrances and installing plexiglass barriers.
- Staggering start times.
- Communicating physical distancing guidelines.
- Regularly disinfecting machinery, tools and "high-touch" areas.
- Making personal protective equipment and hygiene products available.
- Eliminating tool sharing.
- Facilitating carpools to avoid public transit commuting.

Additional precautions will depend on the unique characteristics of the workplace. Successful implementation will depend on clear communication, training and enforcement.

Are these guidelines enough?

The core symptoms of the disease mimic the symptoms of the flu or the common cold. Worse, many carriers of the virus are asymptomatic and may be fuelling the spread. This underscores the need for rigour and discipline in implementing physical distancing, hygiene and sanitation practices within the workplace. On the other hand, given how insidiously the disease seems to spread, should we do more than just implement reasonable precautions?

Enhanced measures could include any one or combination of the following:

- Contactless temperature screening.
- Mandatory disclosure of self-assessments.
- Contact tracing.
- Mandatory testing.
- When feasible, mandatory vaccinations.

Privacy considerations

Enhanced screening, tracking and mandatory medical examinations raise important questions about constitutional rights, privacy interests and statutory human rights. Ostensibly, our government has the authority to pass legislation requiring these measures. However, in the absence of statutory authority, non-unionized employers looking to adopt these solutions must contend, potentially, with privacy legislation, common law privacy protections and human rights laws. Unionized employers face an additional significant layer of restriction. Arbitrators have long recognized workplace privacy, requiring employers to justify the need for policies that invade the privacy of their union member employees.

In terms of privacy legislation, some provinces have privacy legislation that applies to the employment relationship; other provinces, including Ontario, have none.

In recent years, our courts have recognized common law rights over privacy. In 2012, an Ontario judge in *Jones v. Tsige* recognized a cause of action for "intrusion upon seclusion." Damages may be awarded for the tort in the context of an invasion of privacy that is intentional, without justification and highly offensive.

Human rights legislation can also help employees to safeguard their privacy.

In 2000, the Ontario Court of Appeal in *Entrop v. Imperial Oil Limited* held that random drug testing of healthy persons under the guise of workplace safety was a violation of the Ontario Human Rights Code. The policy was prima facie discriminatory because it created the perception that employees who refused the test or tested positive were disabled. The policy may have been justified nonetheless if it discriminated minimally, but it did not because drug tests involving oral swabs are highly invasive and unable to reveal if someone was impaired at the time of the test.

Coronavirus testing may not suffer from the same problem. Although highly invasive, coronavirus tests are apparently able to identify the presence of a transmissible virus at the time of testing. Context is also important given that we are dealing with a pandemic.

The underlying principles grounding privacy rights are consent, justification, reasonableness and proportionality.

Employee consent is a complete defence to any claim over a breach of privacy. To achieve consent, employers must communicate clearly and frequently and have a strong relationship of trust with employees.

Absent consent, the legal barriers for employers (particularly non-unionized employers) do not appear particularly prohibitive. Whether the law relates to privacy legislation, the common law or human rights, employers must demonstrate reasonable justification and minimal impairment.

Pandemic may change standards

Given the unprecedented nature of this health crisis, justification for enhanced screening measures may be easily achieved. However, it will be important for employers not to overreach. Measures should be time limited and implemented professionally with discretion.

An employer who wishes to implement temperature screens and self-assessment questionnaires would be well advised to communicate the need for such measures and the steps the employer will take to safeguard the employee's health data. These steps could include utilizing a third-party health provider to administer the screening. Assurances that data will not be stored any longer than necessary and accessed only by limited individuals will also be important.

At the other extreme, mandatory testing and vaccinations (when feasible) represent more serious encroachments into an employee's sphere of privacy. Labour arbitrators and courts have consistently held that the imposition of mandatory medical treatments (including the flu vaccine), in the absence of consent or legislative authority, constitutes a battery. Based on Ontario Premier Doug Ford's recent announcement of his intention to test a large number of employees across a variety of industries, that legislative authority appears imminent in that province.

In the middle of the enhanced screening con-

tinuum is contact tracing, which involves determining if an individual has come within six feet of an infected person, followed by steps to ensure that the person is isolated to break the chain of transmission.

The concept isn't novel. It was used to resolve previous pandemics, like syphilis in the 1930s and Ebola in 2014 in West Africa. Individuals employed as "contact tracers" call infected persons to determine who they may have been in contact with.

Smartphones offer a unique opportunity to augment the process. Utilizing the Bluetooth technology built into smartphones, Apple and Google are developing further technology to allow users to determine if they have come into contact with an infected person.

An intriguing application of the contact tracing capabilities of smartphones and other technology is the workplace. PwC Canada, for example, is testing an application called "Check-In" that will permit its clients who purchase the application to monitor employee activity, including the details of whom they come into contact with. In the event of a positive diagnosis, the stored data would help facilitate isolation. The details on PwC's website appear to emphasize privacy protection.

If deployed in Canada, PwC's application ought not to attract employee privacy issues, provided informed consent has been obtained and considerable care has been taken to preserve the confidentiality of data. A more interesting and controversial issue will be the implications of maintaining the application as a permanent feature of the employment relationship. As we continue to grapple with the coronavirus, we may indeed witness an evolution of Canadian privacy law, particularly as it relates to the workplace.

For more information, see:

- *Jones v. Tsige*, 2012 ONCA 32 (Ont. C.A.).
- *Entrop v. Imperial Oil Limited*, 2000 CanLII 16800 (Ont. C.A.).

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