

## Labour and Employment Issues in Preparing for a Pandemic

### Labour & Employment Group

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Government agencies have been warning employers to “prepare for a pandemic.” However, few employers have considered the implications of a pandemic outbreak in their workplaces and fewer have implemented any concrete plans to deal with such an outbreak. It is important for employers to keep basic employment law requirements in mind when making their pandemic plans. Below is an outline of issues to consider:

### A. Sick Leave

Employees who become ill with H1N1 or any other pandemic illness are entitled to use any sick leave benefits which are available to them pursuant to employment policies, collective agreements or individual contracts of employment. In addition, employers may allow employees to use accumulated vacation time or other accumulated time off to cover any additional time needed to recover. While the government is encouraging employers to be generous in providing time off with pay for employees who become infected with H1N1, there is no obligation to provide additional time off with pay beyond the sick leave entitlements employees normally have. However, allowing additional paid time off may help prevent the spread of the illness and be less costly in the long run. Prior to allowing any additional time off with pay, it should be made clear that this is a one-time, non-precedent accommodation given the special nature of the situation.

On the other side of the coin, there may be employees who are exhibiting flu-like symptoms who insist on reporting for work. Under the *Occupational Health and Safety Act*, an employer has an obligation to provide a safe workplace and an employer is entitled to insist that an ill employee remain at home until s/he is fit to return to work. Again, these employees could use any earned sick leave, vacation time or other accumulated time off to avoid loss of income. The employer is also entitled to require a proper medical certificate attesting to the employee’s fitness to return to work.

The Nova Scotia *Labour Standards Code* also allows employees to take three *unpaid* days per year for “sickness of a child, parent or family member or for medical, dental or other similar appointments during working hours.” Therefore, employers may also have to allow some time off for employees to care for sick family members.

### B. Human Rights and Privacy Issues

While ensuring other employees are safe, employers must also ensure they are not violating the *Human Rights Act* and are protecting ill employees’ privacy rights.

Under the *Act*, employers cannot discriminate based on an “an irrational fear of contracting an illness or disease” [s. 5(1)(p)]. Therefore, employers must ensure they have a reasonable basis for

requiring employees to remain at home. There may also be a duty to accommodate employees who are ill by allowing those employees to work from home, work flexible hours, etc.

Employees who have contracted H1N1 or other illnesses have legitimate concerns about the confidentiality of their medical information and whether it will be shared with co-workers. However, an employer will have to balance concerns over an individual employee's privacy against its obligation to provide a safe workplace and address co-workers' concerns over their own health. The nature of the illness and the likelihood of transmission should be considered in determining whether privacy rights or the safety of the employees will prevail.

### C. The Right to Refuse Unsafe Work

If there is an outbreak of H1N1 (or other communicable disease) in your workplace or if the illness becomes more serious and widespread, employees may refuse to report for work due to their fear of contracting the illness.

Under section 43(1) of the *Occupational Health and Safety Act*, S.N.S. 1996, c. 7, an employee can refuse to "do any act at the employee's place of employment where the employee has reasonable grounds for believing that the act is likely to endanger the employee's health or safety or the health or safety of any other person ..." Section 43(1) has both a subjective and an objective element, *i.e.*, the employee's subjective fear of contracting H1N1 must have a reasonable basis. An employee's irrational fear of contracting an illness is not sufficient.

Based on the result of similar claims made during the SARS outbreak, it is unlikely that an employee would be successful in a work refusal under this section based on exposure or potential exposure to H1N1. It is important however that the employer follow the requirements of a work refusal under the *Act*. The employee must indicate that s/he is exercising the right to refuse unsafe work and, if the matter cannot be resolved to the employee's satisfaction internally (either through the employer or the OH&S Committee), an Inspector from the Department of Labour is contacted, who determines whether the refusal is reasonable.

Where an employee has exercised his/her right to refuse dangerous work under the *OH&S Act*, s/he can be reassigned to other duties but, if this is not possible, the employer must pay the employee the same salary and benefits as would otherwise have been paid until the matter is resolved. There is also protection against dismissal or discriminatory action, including reduction in wages and other benefits, where an employee has refused dangerous work in accordance with the *Act*.

Although it is unlikely that a work refusal under the would be successful, it is important that you educate your employees on how to prevent the spread of viruses and ensure you are fulfilling your obligation to provide a safe workplace. This includes ensuring employees who have flu-like symptoms do not come to work, promoting good hygiene practices such as hand-washing and ensuring the workplace is kept clean (paying particular attention to taps, door handles, washrooms, etc.).

Employees should also be encouraged to raise

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any concerns and make suggestions through the appropriate channels in your organization (including the occupational health and safety committee).

#### **D. Operational Requirements**

If a large number of employees become ill, it may be necessary to require the remaining employees to work extra hours or shifts. Any internal policies on payment for overtime hours should be followed in addition to meeting the requirements under the *Labour Standards Code* (1.5X the employee's regular hourly rate after 48 hours worked in a week).

There is no maximum number of hours per day or per week an employee can be required to work under Nova Scotia Labour Standards legislation, but an employee must be given at least 24 consecutive hours off in every seven-day period and at least a 30 minute meal break for every five hours of work. However, there are exceptions under the *Code* for circumstances beyond human control and unpreventable circumstances.

In the event employees are working long hours, the employer should consider taking steps to make employees as comfortable as possible by supplying meals, rest areas, etc.

If the number of ill employees becomes too great, the employer may have to consider ceasing operations or operating at a reduced level with essential operations only. The employer should consider in advance at what point this will occur and make plans to provide appropriate notice to

employees.

With respect to business continuity in the face of wide-spread illness, the employer should consider how this will affect its operations. For example:

- Will the employer be able to obtain sufficient goods from suppliers and get its products to customers?
- Will demand for the company's product increase or decrease, and can the company meet existing obligations?
- Are there other sources of labour that could be used in the event of a shortage of employees (retired workers, contract workers, etc.)?
- How will you communicate with employees to provide information regarding operations, the need for extra shifts, etc.?
- Do you have the resources in place to allow for alternate work arrangements such as working from home, teleconferencing etc.?
- Will any travel restrictions that may be imposed affect your operations and can they be addressed through other methods such as teleconferencing?
- Is there a back up plan for key people in your organization in the event they become ill?

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A number of government agencies and employer organizations have prepared information for employers on preparing business continuation plans. These are a good starting point to begin thinking about these issues.

### **E. Summary and Steps to be Taken**

In terms of preparing for a pandemic, employers should have a Communicable Disease Policy which addresses the following points:

- the requirements to stay home from work if ill;
- the requirement to report for work if healthy and to work additional hours, if necessary;
- sick leave and other benefits available;
- how information will be communicated to employees;
- workplace requirements to prevent the spread of illness;
- the employer's ability to restrict travel to certain areas, if necessary;
- allowing employees to work from home; and
- the requirement to provide medical certificates and other medical information.

Having this information gathered in a single policy will allow employees to know in advance what benefits are available and what is expected of them in the event there is an outbreak of illness in the workplace. This policy would be applicable to any communicable disease and address more than the H1N1 virus.

Employers should also have an internal business continuity plan which will address the issues necessary to ensure they can continue their operations in the event of widespread illness.

The above newsletter is an outline of basic considerations and current entitlements employers should consider when preparing business continuation plans to cover pandemic situations. The Labour and Employment Group at Ritch Durnford can help you create policies and procedures that reflect your unique business situation. We will continue to keep you updated on any significant developments in this area.