



## MEMBER BULLETIN

March 5, 2020

# Employer OH&S Responsibilities Around Coronavirus

1. **The duty of an employer to send an obviously sick employee with flu-like symptoms home to ensure a safe workplace**

**McMillan LLP:** Employers (and workers) are responsible for ensuring the safety of their workplace. A worker who has symptoms of the coronavirus, or who has had *direct contact* with someone else who has symptoms of Coronavirus, “should be denied access to work, sent home for isolation and advised to see a doctor.” McMillan is also advising employers to *consider* whether a worker who has recently returned from a trip to Wuhan (McMillan’s article was written in January) during the outbreak “ought to be sent home for isolation.” Employers are advised to “exercise good judgement” in encouraging workers who are experiencing symptoms to stay at home, instead of taking the risk of contaminating the workplace. In all cases, human rights legislation needs to be top-of-mind (and all of the articles I sent to you discuss this).

**Daniel Lublin:** The responsibility of the workplace parties to ensure a safe and healthy workplace includes preventing the spread of a contagious illness. He says an employer “is required to protect the remainder of its work force” if a worker is showing symptoms of the coronavirus and has either travelled to an affected area or been in *direct contact* with someone who has symptoms of the coronavirus. He says that under such circumstances, these workers “should not be permitted to return to work until and unless they have a clearance letter from a physician and pose no risk of infecting the workplace.” He says the same goes for individuals who visit the workplace, i.e., clients, contractors, etc., and that employers need to take “reasonable precautions” to ensure that visitors who pose a danger are denied access to the workplace.

**Hicks Morley:** They did not speak to your question of what to do if a worker shows up for work with flu-like symptoms. But sort of contrary to what McMillan said, Hicks Morley says an employer would need to keep human rights considerations in mind if it *required* a worker to stay away from the workplace because the worker had recently visited a high risk area. It points out that while the HRTO does not generally view a cold or the regular flu as a disability that falls under the OHRC, the coronavirus may be considered a disability in the case of a pandemic, and would therefore require accommodation.



**First Reference Talks:** This author talks about the duty employers have “to take all reasonable precautions to prevent injuries or accidents in the workplace” under the general duty clause included in Canadian occupational health and safety legislation. She says employers should, among other things, have a workplace policy that applies to workers, contractors and visitors alike which says people who have flu symptoms “are not allowed access to the workplace.” But she later says “Employers *should* reinforce sick leave policies and *encourage* employees to stay home if they are feeling ill, *to the extent feasible*,” (emphasis added), which is a much weaker statement. She does say that an employer may “demand” that employees get a medical letter to justify a leave or as a clearance to return to work “in certain circumstances,” but she follows that up with advice to “be mindful of exposure to human rights and privacy liabilities.” When earlier discussing the associated human rights issues (as the other articles do as well), the author says, “Employers should balance the duty of care owed to their entire staff against the rights and obligations of individual employees,” and also that “Employers must ensure that screening procedures, requests to stay away from the workplace and other practices do not run afoul of applicable laws.”

**Fillion Wakely Thorup Angeletti LLP:** This lawyer states that, “Where an employee is clearly exhibiting flu-like symptoms or has a confirmed case of Coronavirus, employers are within their rights to send the worker home, either with or without pay depending on applicable policies, plans, and past practices.” He goes on to say that if the coronavirus is considered to be a disability under the OHRC, a worker who is confirmed to have it would be entitled to reasonable accommodation. Near the end he says it’s “not advisable to require workers to stay home unless there is objective evidence that they pose a health and safety risk.”

## 2. **Whether other employees can refuse to work in the presence of a sick co-worker**

**McMillan LLP:** With the exception in Ontario of first responders, correctional officers and healthcare workers, the OHSA provides workers with the right to refuse to work if they believe there is a condition in the workplace that is “likely to endanger” their health or safety. If a worker refuses to work for a Coronavirus-related reason, the employer needs to comply with its obligations under the OHSA by immediately investigating the situation and trying to resolve the situation with the worker and, if that fails, by contacting a MLTSD inspector. Employers are not allowed to threaten to discipline a worker who refuses to work because of Coronavirus-related health and safety concerns.

**Daniel Lublin:** The OHSA allows workers to refuse work that is “*likely to endanger*” their health or put them at risk. He says workers can refuse to perform their duties if a coronavirus outbreak in Canada exposes them to people or situations where infection is *likely*. Again, the employer will need to investigate and attempt to resolve the situation and if unsuccessful, will need to contact a MLTSD inspector. Until the situation is



resolved, the worker should be allowed to continue to refuse the work that he/she believes is unsafe, without fear of reprisal.

**Hicks Morley:** The OHS Act provides most workers (see above) with the right to refuse work if a condition of the workplace “is likely to endanger” the worker’s health or safety. The article says that workers who “encounter” the coronavirus in their workplace, or who are *scared* they may encounter it, may exercise their right to refuse work on that basis. If that happens, the employer needs to follow the procedure set out in the OHS Act for work refusals, with failure to do so resulting in fines. They say, “In responding to these issues, 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 and unreasonable fears.”

**First Reference Talks:** Again, “likely to endanger” is key, and workers who encounter the coronavirus in the workplace, or fear they might, may choose to exercise their right to refuse work. This can include the right to refuse travelling to a high-risk place for business purposes. Following the regular process to resolve the issue under the OHS Act applies.

**Fillion Wakely Thorup Angeletti LLP:** This lawyer says that most workers have the right to refuse work if they *genuinely believe* that a condition of the workplace is “likely to endanger” his/her health or safety, which could happen with the coronavirus. He says employers will want to try to prevent potential work refusals by implementing various proactive measures in the workplace (as all authors advocate). Employers in the healthcare sector and unionized employers, in particular, are encouraged to obtain legal advice in cases involving the coronavirus.

If you have any questions or concerns with this Act, please contact Patrick McManus (905-629-7766 ext. 222 or [patrick.mcmanus@oswca.org](mailto:patrick.mcmanus@oswca.org)).