EMPLOYMENT LAW

MANAGING WORKPLACE RISK DURING COVID-19 PANDEMIC

These are unprecedented times, so it is important for employers to plan deliberately and proceed with caution, say **Priya Sarin** and **Matthew Badrov** of **Sherrard Kuzz**, in looking at the enhanced liability around safety and the legal risks associated with layoffs

IN a matter of weeks, the employment landscape for employers across the country has changed dramatically. Many have been forced to institute temporary layoffs and work-from-home arrangements as Canadians are encouraged to self-isolate and, in many jurisdictions, non-essential businesses have been required to close.

In these unprecedented times, employers are grappling with a variety of issues. This article addresses two key issues: enhanced employer liability that may arise out of the spread of COVID-19 in the workplace; and the legal risks associated with laying off employees and best practices to minimize those risks.

Employer liability concerns

Health and safety: Across Canada, an employer has an obligation under provincial occupational health and safety or workplace safety and insurance legislation to report an occupational illness to the respective Ministry of Labour (MOL) or other applicable government body. Generally, this reporting obligation only arises if exposure to the illness occurred in the workplace. In the case of COVID-19, the source of the transmission may be difficult to determine, particularly in light of community spread. As such, it is not always clear whether notice to the MOL of a confirmed case of COVID-19 is required.

Because of this lack of clarity (or despite it), the Ontario MOL has taken the position that any confirmed case of COVID-19 in the workplace must be reported to the Ontario MOL (in addition to the joint health and safety committee or representative, and trade union, if any).

The concern with this reporting requirement is that, if an employer reports a COVID-19 case to the Ontario MOL, the presumption may be that the employer concedes the exposure to COVID-19 occurred at work. In that case, the employer may later have difficulty establishing that the exposure did not occur in the workplace, in response to a workplace safety and insurance claim or other legal proceeding.

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To reconcile these two positions and protect the employer's interests, in Ontario at least, an employer should provide notice to the MOL but clearly state that disclosure is being made in accordance with the MOL's directive; not because it is the employer's position that the employee contracted COVID-19 in the workplace (unless there is clear evidence).

Workplace safety and insurance: In the normal course, if an employee is diagnosed with an infectious disease as a result of workplace exposure, the employee may be entitled to benefits through the respective workers' compensation scheme. This may result in increased claim costs for an employer.

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In the case of COVID-19, the source of the transmission may be difficult to determine. The question employers have asked is: "Will this lack of precision make it more difficult for an employee to demonstrate they are eligible to receive benefits?"

Thus far, the answer appears to be no. To the contrary, workplace safety and insurance adjudicators appear to have relaxed the standard, so that now an employee need only demonstrate that the employee's working environment put them at increased risk of contracting the disease as compared to members of the general public. If established, this will generally be considered persuasive evidence that the employee's employment made a significant contribution to the illness.

For example, in Alberta, the Workers' Compensation Board has indicated a "claim is likely to be accepted if an employee contracts the illness and is performing work the province deems to be an 'essential service' that puts them in regular contact with the general public. A worker will also likely be covered in the event of a widespread outbreak at their place of work."

Similarly, in Ontario, the Workplace Safety and Insurance Board (WSIB) has indicated that it will assess whether the nature of the employee's employment created a risk of contracting the disease to which the public at large is not normally exposed. While a COVID-19-related claim may be compensable, the WSIB indicates the costs associated with such a claim will not be allocated at the employer or class level and instead will be allocated on a schedule-wise basis. This means there may be an increased potential for COVID-19-related cost increases even where an employer has not had a claim filed in its workplace. It remains to be seen whether other provincial workers' compensation bodies will take a similar approach.

Legal risks associated with layoffs

The risk of constructive dismissal: Employment standards legislation across Canada recognizes an employer's right to temporarily lay off an employee for a prescribed period of time, following which the layoff is deemed to be a termination of employment.

Despite the statutory entitlement, courts have held that unless an employment contract or other agreement includes an express or implied right to lay off an employee, an employer has no right to do so. If there is no express or

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CANADIAN GENERAL-TOWER LTD. V. U.S.W.,
Local 862, 2008 ONCA 404 (Ont. C.A.). Employer planned permanent layoffs, but it recalled workers after 49 weeks. Layoff became temporary and workers were entitled to temporary layoff benefits.

BRISEBOIS, RE, 2016 CARSWELLBC 3295 (B.C. EMP. STDS. TRIB.)
Doctor's note said worker was unfit to work for four weeks. Employer said worker didn't meet minimum standards of job, but no frustration because no evidence condition was permanent.

implied right, a layoff may, in certain circumstances, amount to a unilateral, fundamental breach of the employment contract (whether or not the contract is in writing).

In that case, the employee is deemed to have been constructively dismissed and entitled to common law reasonable notice of termination (or pay in lieu of notice). Common law reasonable notice requirements are generally considerably higher than requirements under employment standards legislation.

That's the bad news. The good news is that a constructive dismissal arises only if there has been a unilateral change by the employer to the terms and conditions of employment. If an employee agrees to the change in the terms of employment (the temporary layoff), no constructive dismissal arises. Similarly, if the change is not imposed by the employer but is the result of a government directive (shutting down operations), an employee may not be able to successfully assert the layoff constitutes a constructive dismissal.

Even if the layoff might be a constructive dismissal, the employee has an obligation to mitigate their potential losses. For example, if a laid-off employee is recalled to work and declines (and the employer-employee relationship is not so damaged that it would be reasonable for the employee to return), a court may find the employee failed to mitigate their losses (in whole or in part) by failing to return to work. This will reduce the value of the claim against the employer.

Practical considerations: Employers are in an unenviable position. While this pandemic rages among us, business decisions must be made in real time, with imperfect information and under enormous stress. However, those same decisions will later be scrutinized by adjudicators with the benefit of time, clarity and context.

To minimize the risk that a decision made today to lay off an employee will result in a claim for constructive dismissal, consider the following best practices:

- If possible, before laying off an employee, obtain the employee's consent to do so. This is not always straightforward, so it's advisable to consult with experienced employment counsel on how best to proceed.
- Maintain contact with laid-off employees, and provide them with updates, including when the business may resume operations. Even if you do not know when operations might resume, contact with laid-off employees will mean that they are less likely to listen to rumours and speculation and more likely to feel connected to the workplace and be ready to return.
- If possible, consider whether the business can recall employees earlier than anticipated by taking advantage of various government initiatives such as the Canada Emergency Wage Subsidy. The federal government has indicated that the subsidy is available to any business, regardless of size, including a non-profit or charitable institution, but will not apply to a public body and is intended to encourage an employer to maintain employees on payroll even if there is a reduction in work.

Frustration of contract: Even if an employer takes all appropriate steps, it may still be faced with a constructive or wrongful dismissal claim from a laid-off employee. If the layoff resulted from COVID-19-related reasons, including a government-mandated closure, an employer may be able to defend itself by relying on the doctrine of frustration of contract. Frustration of contract arises when an unforeseen event, outside of the control of either party, renders the contract impossible to perform. In that case, the employee is not entitled to any damages under common law or employment standards legislation.

Bottom line

These are unprecedented times and the ground seems to shift with every passing day. For these reasons, it is important to stay abreast of the issues, plan deliberately and proceed with caution. If your organization must report a confirmed case of COVID-19 in the workplace, understand what you are reporting and what you are not reporting. And if you have to lay off employees, or have already done so, keep in touch with those employees, and leverage the experience of a skilled employment lawyer to help minimize risk. CHRR

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