

Human Resource Issues in Preparing for a Pandemic

Here are some human resource issues that should be considered when preparing an Emergency Preparedness Plan:

Any policy denying an employee access to the workplace must be based on objective criteria and be consistently applied. Arbitrarily banning employees from the workplace or an arbitrary application of such a policy could result in claims of discrimination, or constructive dismissal if the employee is sent home without pay for an extended time without a legitimate reason. Where an employer has a reasonable belief that an employee is sick, an employer should be able to deny access to the workplace until the employer receives confirmation that the employee has been medically cleared to return to work. Examples of situations where an employer may have a reasonable basis for believing the employee is sick include situations where an employee is symptomatic, was quarantined or was caring for someone who has been quarantined.

What should an employer do if an employee refuses to work during a pandemic?

With the exception of some employees, such as health care workers and emergency services personnel, most employees in Canada have the right to refuse work they believe to be unsafe under applicable occupational health and safety legislation. While fear of contracting a contagious disease alone likely would not be sufficient to justify a work refusal, a pandemic policy should take into consideration the work refusal provisions of any applicable legislation and ensure that human resources, managers, and supervisors know what action to take if an employee raises a concern about exposure to a contagion in the workplace. Employees whose jobs require them to care for ill people also often have specific statutory schemes that dictate what is expected of them in such cases and which typically impose greater obligations to accept risk than might be expected of the average employee.

When should an employee be paid when absent from work during a pandemic?

Generally there is no legal obligation to pay employees who are absent due to illness, caring for ill relatives, taking approved leaves of absence or who are subject to quarantine orders. However, an employer who offers paid sick leave or short term disability benefits of some kind may be required to pay absent employees during a pandemic if they meet the eligibility criteria. A pandemic policy should address under what circumstances an employee who is absent will be paid. In order to encourage employees not to attend work when sick, it may be prudent to offer sick some kind of paid sick leave, even if it is only in the event of a declared emergency such as a pandemic. Other options to consider are permitting employees to use vacation or lieu days. In the case of employees who quarantined, but not sick, consider whether or not those employees can work from home during the quarantine period.

What information can an employer ask for from an employee to substantiate the employee's absence or fitness to return to work?

An employee's medical diagnosis is highly confidential and generally an employer has no right to request such information. However, an employer is entitled to know whether or not a person is fit to return to work, when the employee is expected to return to work, and whether or not any accommodation is required. An employer is also entitled to ask for an assurance that the employee is not a danger to others. This information should be provided by the employee's treating physician, once appropriate consent has been provided. A policy should also take into consideration when a medical clearance certificate will be required and who is to pay the cost of obtaining the certificate.

Can an employer replace an employee who is absent from work during a pandemic?

Any pandemic policy should take into consideration what arrangements can be made to ensure there is sufficient staff to maintain operations during a pandemic. However, an employer must be careful before deciding to permanently replace an absent employee. If the employee is absent due to illness, the employee may be protected pursuant to applicable human rights legislation. In jurisdictions such as Canada, where there is human rights legislation, an employer has a duty to accommodate a disabled employee to the point of undue hardship. This means that an employer may have to accommodate a lengthy period of absence and reinstate the employee either with or without accommodation once the person is medically cleared to return to work. Also, any policy must take into consideration any job protected leaves available to employees under the applicable statutory law. For example, in Ontario, under certain circumstances employees are entitled to an unpaid leave of absence during a declared emergency, in addition to personal and family emergencies, which will include the illness of the employee or close family members. As the laws vary from jurisdiction to jurisdiction, it is critical that you obtain legal advice in jurisdiction that you do business.