

COVID-19 RETURN TO WORK CONSIDERATIONS

May 13, 2020

As government orders are lifted, employers will enter uncharted waters. Sherrard Kuzz LLP has a deep understanding of the pandemic's impact on businesses and industries, and how to work through the related workplace issues. We are ready to assist clients throughout this process – to **develop and implement customized Return to Work (“RTW”) plans, train workplace leaders on how to manage the issues, and audit existing employment agreements and practices** to assess whether they should be amended to provide greater flexibility in the event of a future shut-down or slow-down.

To help you get started, we have developed these **Complimentary RTW Considerations**. Topics include:

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For assistance developing and implementing a RTW plan, training your management team, or for any RTW issue, contact your Sherrard Kuzz LLP lawyer or, if you are not yet a Sherrard Kuzz LLP client, contact us at info@sherrardkuzz.com.

HEALTH AND SAFETY MEASURES TO REDUCE RISK

Across Canada, every employer has a legal obligation to take every precaution reasonable in the circumstances to protect the health and safety of its employees. As such, even when business operations are permitted to resume, the health and safety of employees, customers and others, will remain the top priority. The steps that must, should or could be taken will vary by industry and workplace.

The chart below identifies some of the key steps that may be appropriate in your workplace:

<p>Hygiene</p>	<p>Post guidelines throughout the workplace and in multiple languages, if needed.</p> <p>Increase regular cleaning and disinfecting activities.</p> <p>Ensure high touch areas and equipment are frequently disinfected.</p> <p>Provide sanitizer at or near each work station and throughout common areas.</p>
<p>Entry Points</p>	<p>Temporarily suspend the requirement to physically ‘swipe in’ in favour of an alternative procedure.</p> <p>Stagger arrival times and/or shift start times to facilitate physical distancing upon entry and the start of work.</p> <p>Identify entry points for different work groups.</p> <p>If elevator access is required, set distancing protocols and/or consult with the building landlord to understand building-wide distancing protocols to be implemented.</p>
<p>Screening Protocols</p>	<p>In a high-contact workplace, require any employee or third party (contractor, visitor, customer, <i>etc.</i>) to complete a health screening questionnaire prior to entry.</p> <p>In a low-contact workplace, post a screening notice at entry points, advising employees and guests not to attend at the workplace if they meet established criteria (<i>e.g.</i>, family member with COVID-19, fever, cough, or other respiratory illness).</p> <p>Implement a temperature screening requirement prior to entry. Please note: temperature screening will not necessarily mitigate the risk of COVID-19 in the workplace. Body temperature fluctuates throughout the day such that an employee may have a fever but not present with an elevated temperature at the time of screening. Furthermore, research now suggests many individuals with COVID-19 never experience fever. As</p>

	<p>such, if temperature screening is implemented it should be done in addition to (and not in <i>lieu</i> of) a comprehensive health screening questionnaire to address symptoms other than fever. Your protocol should also address how temperature screening will take place, equipment to be used, and steps to be taken if an employee registers a temperature above an established threshold. When selecting temperature screening equipment consider the least intrusive means of reliable testing.</p> <p>Regardless of the type of screening implemented, privacy safeguards must be in place for the collection, use, retention and destruction of the information.</p>
<p>Physical Distancing- Changes to the Workplace</p>	<p>Install physical barriers (Plexiglas or similar) between employees and customers where physical distancing cannot be maintained.</p> <p>Reconfigure delivery models to minimize face-to-face interaction. For example, a designated “order” and “pick up” location with appropriate safeguards.</p> <p>Increase space between work stations to facilitate physical distancing.</p> <p>Use floor markings to encourage one-way traffic and physical distancing.</p> <p>Mark distances around work stations (<i>i.e.</i>, tape on the floor) as a visual cue to others who may need to enter.</p> <p>Install physical barriers between neighbouring workstations if they are located fewer than two meters apart.</p> <p>Set physical distancing parameters in any lunch or break room. Remove or block off certain chairs and tables.</p> <p>Establish guidelines for the use of washrooms, lockers and shower facilities.</p> <p>Reduce or eliminate the use of shared tools or equipment. If not possible, require an employee disinfect the tool or equipment before and after each use.</p> <p>Mark two metres around commonly used areas (<i>e.g.</i>, vending machine, microwave, etc.).</p> <p>Replace “made to order” with premade “grab and go” packaged options.</p>

	<p>Discontinue the use of a common fridge, utensils and plates. Provide disposable cup, plates and utensils in personal packages and require employees to immediately dispose after use.</p> <p>Require employees to wash and store, or load into the dishwasher, all dishes, cups, glasses and flatware, etc.</p>
<p>Physical Distancing- Changes to Work Conditions</p>	<p>Stagger start time, break and lunch times.</p> <p>Group employees into “teams”, so that if an outbreak occurs within a team it may be more easily contained through isolation.</p> <p>Assign an employee to a single work station (even if shared – which is not the preference) to minimize the potential for cross-contamination.</p> <p>Eliminate non-essential and in-person meetings. Schedule “team huddles” on a telephone or “Zoom” call.</p> <p>For an essential in-person meeting, space (or close off) seating in waiting room, boardroom and other client areas.</p> <p>Unless there are health and safety reasons to avoid this, encourage employees to bring and eat lunch at their work station (if applicable) or outside.</p>
<p>Essential Travel</p>	<p>If travel is essential, require an employee work remotely for 14 days on return, particularly if the employee travelled to a region where there has been a known COVID-19 outbreak or risk.</p>
<p>Contact Logs</p>	<p>Request an employee maintain a daily contact log of the names of others in the workplace with whom employee came in close contact (fewer than 2 metres). This will assist in contract tracing in the event there is an outbreak of COVID-19 in the workplace.</p> <p>Maintain a visitors log and, where possible, the employees with whom the visitor was in contact.</p>
<p>HVAC</p>	<p>Ensure HVAC systems and air filters are functioning appropriately to reduce potential airborne exposure to illness. If HVAC is the responsibility of a third-party landlord, inquire of landlord what steps have been taken and what additional protection measures are available.</p>

PERSONAL PROTECTIVE EQUIPMENT (“PPE”)

In some workplace environments, such as health care, PPE is required by law or under the terms of a collective agreement. In other workplaces, where physical distancing cannot be consistently maintained, an employer may wish to use PPE as a means of reducing potential workplace transmission.

Consider any or all PPE as may be applicable to your workplace. Source the identified PPE as early as possible. In any event, prior to returning to work, **communicate to employees any PPE-related requirements and policies**. Employees may also require **training** on how to appropriately don, doff and dispose of PPE in biohazard bins provided by the employer.

Masks	If required, masks should be provided. Even if not required, employees should be permitted to wear a mask in the workplace if desired. The Government of Canada has discouraged the use of medical masks and respirators (N95 masks) for a non-healthcare setting, to preserve resources for healthcare providers. Be prepared to address a request for accommodation under human rights legislation arising out of the use of a mask (for example, for religious or disability-related reasons).
Gloves	If required, gloves should be provided. Even if not required, employees should be permitted to wear gloves in the workplace if desired. Be prepared to address a request for accommodation under human rights legislation arising out of the use of gloves (for example, disability-related reasons).
Respirators and Face Shields	May be mandated in health care environments.

WHAT TO DO WHEN AN EMPLOYEE HAS (OR MAY HAVE) COVID-19

If not already established, you should have a **Infectious Disease or COVID-19 Policy** which sets out the process, and reporting obligations, if an employee has a suspected or confirmed case of COVID-19.

In all cases, you should require an employee to **not** attend at work if the employee:

- **Exhibits a fever, new or worsened cough, shortness of breath or difficulty breathing.** The employee should be directed to seek medical attention to confirm whether a test for COVID-19 is appropriate. The employee may return to work when cleared to do so by a medical practitioner.
- **Has a probable or confirmed case of COVID-19.** The employee should remain at home until cleared to return to work by a medical practitioner.
- **Has a household member (or someone else with whom the employee has had close contact) diagnosed with COVID-19.** The employee should be required to isolate for 14 days.
- **Was in close contact with an employee with COVID-19, within three days of onset of symptoms (or another time period as directed in consultation with a medical practitioner).** The employee should be required to isolate for 14 days.

Your policy should address what documentation an employer will require before an employee returns to work. In some cases, it may be sufficient to have an employee sign an attestation they are clear of symptoms. In other situations, such as when an employee has a confirmed case of COVID-19, you may require documentation from a medical practitioner to confirm the employee's fitness to return.

In Ontario, you also have an obligation to report a case of COVID-19 in the workplace to the Ministry of Labour (in addition to the joint health and safety committee or representative and trade union, if any) if the worker: i) advises they contracted COVID-19 as a result of exposure in the workplace; ii) or files a claim with WSIB to that effect. A similar reporting obligation may also exist under occupational health and safety or workplace safety insurance in other jurisdictions.

MANAGING THE RECALL PROCESS

Develop a Recall Plan

Prior to resuming or ramping up operations, it is necessary to create a recall plan. If your return to work includes a staggered process, determine your business and/or operational priorities and the associated skills required. Identify the employees with those skills, being careful your selection process does not trigger any of the prohibited grounds of discrimination.

When setting the plan, consider the following:

- **A collective agreement.** If one applies to your workforce, review the language as it likely addresses recall considerations, including for example, the relevance of skills and seniority.
- **Are there volunteers who wish to remain on lay-off if possible?** This may allow employees who wish to remain laid-off for a further period to do so, and reduce the potential for employee resistance to recall. However, this approach may only be appropriate if the employees at issue have a similar skill set, it is not important which of the employees returns to work and which remain on lay-off, and there are not other business or financial reasons to prefer one employee over another.
- **Are there objective factors to guide the recall decision?** For a non-unionized position, an employer can decide who to recall. Nevertheless, you should establish objective factors to guide your decision. This will minimize the potential an employee may later successfully claim a decision not to recall was discriminatory under human rights legislation (*e.g.*, an allegation an employee was not recalled due to his or her age, sex, race, etc.).

Objective factors could include, but are not limited to:

- Skill and ability in the context of your prioritized business needs
 - Adaptability/versatility
 - Seniority
 - Productivity
 - Potential termination cost if employee is not recalled
- **Avoid decisions based on discriminatory factors.** For example:
 - **Attendance record**, if there a risk an employee has a lower than average attendance record for reasons related to a disability.
 - **Potential susceptibility to COVID-19**, as this may be discriminatory under human rights legislation (*e.g.*, a bias against employees over 60 years of age).
 - **A known medical condition**, if it makes an employee more susceptible to a heightened adverse outcome if he/she were to contract COVID-19 (*e.g.*, diabetes, heart condition, *etc.*).

Determine Adjustments to Working Conditions

Every workplace is unique. As such, it is not possible to identify every adjustment that could take place in every workplace. Some of the more common and significant adjustments might include:

<p>Remote Work</p>	<p>The requirement to physically distance will not go away when business reopens. As such, remote work may still be appropriate.</p> <p>Implement a Remote Work Policy to address:</p> <ul style="list-style-type: none"> • Productivity expectations. • Confidentiality and security of the employer’s property and information. • How to track and record hours of work. • Reimbursement of expenses incurred by employee in work-from-home arrangement (<i>e.g.</i>, technology and office supplies, internet, etc.). • Technological requirements.
<p>Teams / Work-Sharing</p>	<p>Group employees into teams, so that if an outbreak occurs within a “team” it may be more easily contained through isolation of a smaller number of employees.</p>
<p>Change Hours of Work / Shift Change</p>	<p>To facilitate physical distancing and/or due to a reduction in work.</p>
<p>Reduce Hours and / or Compensation</p>	<p>For a unionized employee, a reduction in hours and/or compensation may be addressed by the collective agreement; as such, an amendment may need to be negotiated with the union.</p> <p>For a non-unionized employee, a reduction to compensation, particularly if done in conjunction with other changes to an employee’s position or responsibilities, may be considered a constructive dismissal. Consider options to reduce the likelihood of a successful constructive dismissal claim (<i>e.g.</i>, seek the employee’s agreement, limit the period of time for the reduction in compensation, etc.)</p> <p>An employee may still be considered to be on lay-off under employment standards legislation if returned to work on a significantly reduced schedule (<i>e.g.</i>, in Ontario, an employee is on lay-off for termination pay purposes if returned to a schedule where the employee makes less than 50% of his/her pre-lay-off weekly wage).</p>

Increase Compensation or Benefits	<p>Increase compensation or benefits (temporary or permanent) as an incentive to return, where necessary.</p> <p>For a unionized employee, any incentive will generally need to be agreed upon by the union prior to implementation.</p> <p>Incentive compensation may include:</p> <ul style="list-style-type: none">• Retention bonus• “Hero Pay” premium• Increased vacation entitlement or other benefit in late-2020 or beyond <p>Clearly set out in writing for how long the incentive will be in effect and any conditions for entitlement.</p>
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Notice of Recall

The applicable provincial employment standards legislation or collective agreement may require that an employer provide written notice of recall to a laid off employee. Regardless, written notice is a best practice for all employers, and should include the recall date, any adjustments to working conditions, and the health and safety measures (*e.g.*, health screening on entry) or PPE required on return.

MANAGING REQUESTS FOR ACCOMMODATION

Some employees may resist returning to work, either due to family obligations or a medical condition that may make the employee or a close family member more susceptible to an adverse outcome if they contract COVID-19. Common requests for accommodation might include the following:

- **Remote Work Arrangement or Leave of Absence to Provide Childcare During School and Daycare Closures.** In Ontario, an employee is entitled to an unpaid leave of absence under the new *Emergency Leave: Declared Emergencies and Infectious Disease Emergencies* (“Emergency Leave”) section of the Ontario *Employment Standards Act, 2000* (“ESA”) if the employee requires time off to provide care to a child at home due to a school or daycare closure. However, the ESA does not provide an entitlement to a remote work arrangement. Such a request would need to be addressed as a request for accommodation under human rights legislation (discussed below).
- **Remote Work Arrangement or Leave of Absence to Provide Childcare Once Schools and Daycares Reopen.** Even once schools and daycares open, an employee may request a leave of absence or remote work arrangement to provide care to a young child because employee does not feel comfortable sending the child due to COVID-19. This is a request for accommodation on the basis of family status.
- **Remote Work Arrangement or a Leave of Absence Due to Employee’s Underlying Health Condition.** An employee may assert they have an underlying health condition that makes them more susceptible to an adverse outcome if they contract COVID-19, and therefore wish to self-isolate. This is a request for accommodation on the basis of disability.
- **Remote Work Arrangement or a Leave of Absence Due to a Family Member’s Underlying Health Condition.** An employee may assert they have a spouse/partner/parent with an underlying health condition that makes them more susceptible to an adverse outcome if the spouse/partner contract COVID-19, and therefore wish to self-isolate. If the family member isolates as a result of a direction from public health and relies on the employee for care or support (for example, an elderly parent) the employee may be entitled to Emergency Leave under the ESA. Otherwise, this would be a request for accommodation on the basis of marital status or family status.

Responding to a Request for Accommodation

If an employee requests Emergency Leave under the ESA, the employer can request information reasonable in the circumstance to verify the need for the leave of absence, but cannot request a medical certificate. Documentation that may be requested includes confirmation of a school or daycare closure, or a direction or other notice from public health requiring an employee’s family member of the need to isolate. Note: the restriction on requesting a medical certificate to verify the need for Emergency Leave is unique to this form of leave under the ESA. Such documentation may be requested to verify any other leave, if reasonable in the circumstances (*e.g.*, sick leave, family responsibility leave, *etc.*)

This restriction also does not apply if an employee requests accommodation under human rights legislation. Each request for accommodation should be evaluated on its own merits to determine *whether* the employee is entitled to accommodation and, if so, *what* accommodation is appropriate in the circumstance.

WORK REFUSAL UNDER OCCUPATIONAL HEALTH AND SAFETY LEGISLATION

Under the Ontario *Occupational Health and Safety Act* an employee has the right to refuse to perform work if they hold a *bona fide* belief a “physical condition” in the workplace constitutes a risk to their health or safety. Generally, this involves concern over equipment or machinery. However, it is possible “physical condition” may also include concern for the spread of a serious illness such as COVID-19.

Certain groups of employees are not entitled to refuse to perform work on health and safety-related grounds. This includes employees for whom danger is an inherent part of their work or where their withdrawal of services would directly endanger the life, health or safety of another person | (*e.g.*, police, firefighters, and hospital, long term care or group home employees, *etc.*).

The Process

If an employee engages in a work refusal, follow the following steps:

- **Protect the employee.** Place the refusing employee in an area where he or she is safe.
- **Investigate** the circumstances surrounding the refusal. The investigation must include a worker representative of the Joint Health and Safety Committee, as applicable. In the case of a COVID-19 related refusal, investigate the work circumstance the employee claims to be causing the risk.
- If there is an objective risk, **address the risk.**
- **Contact the Ministry of Labour:** If there is no objective risk, advise the employee of the outcome of the investigation and ask the employee to return to the work. If he/she refuses, contact the Ministry of Labour to perform its own investigation.
- **Discipline:** Should the Ministry of Labour confirm the absence of risk, the employee may be disciplined if he or she continues to refuse to return to work. When assessing the degree of discipline consider the employee’s prior job record and length of service.

EMPLOYEE RELUCTANCE TO RETURN TO WORK

If an employee expresses a reluctance to return to work, first discuss **why** the employee does not want to return. If related to a fear of COVID-19 in the workplace, the refusal should be addressed as a work refusal (see above).

If related to the employee's age (*e.g.* if over 60), medical condition, or family obligations, the employee may be entitled to a statutorily protected leave under employment standards legislation or an accommodation under human rights legislation (see *Managing Requests for Accommodation*).

If the employee's reluctance to return is not related to a specific concern about COVID-19 in the workplace, or a reason that would require accommodation, it may be related to:

- a general fear of leaving home due to COVID-19 (*i.e.*, in the public, during transit, *etc.*)
- a financial disincentive to return if the employee's income is relatively equal to, or less than, the monthly Canada Emergency Response Benefit.

In these circumstances, a continued failure to return to work may ultimately be treated as a resignation from employment. However, before ending the employment relationship, follow the following steps:

- **Advise employee of expectation to return.** Advise the employee of the expectation to return to work by the recall date and that, should they fail to return, the employee will be considered to have resigned employment and will have no further entitlement from employer.
- **Educate employee on steps to reduce risk.** Direct the employee to information on how COVID-19 is (and is not) spread (see *Government Resources* below). If safety concerns relate to public transportation, consider flexible hours to allow for a commute during lower-volume hours.
- **Advise employee of the impact of resignation on benefit entitlement.** If the employee refuses to return and is considered to have resigned employment, this may impact on continued entitlement to Government benefits, such as the Canada Emergency Response Benefit and Employment Insurance.
- **In a unionized context,** consider whether the collective agreement allows you to apply the **administrative termination provisions** (*i.e.*, if the employee fails to return to work for a prescribed period after notice of recall has been provided). Be alert to any provision in the collective agreement that entitles an employee to a leave of absence on request, subject to operational requirements.

“Deemed resignation” in this circumstance is not without risk. Courts have held that a resignation must be clear and unequivocal. If the employee indicates they do not wish to resign, but only wish to take some unpaid time off, it may be difficult to establish this as a resignation. In this case, it may be prudent to take an alternative position the failure to return to work when directed to do so constitutes cause for termination of employment.

HOW TO PREPARE

The trajectory for COVID-19 is unknown. In addition to planning for today's pandemic reality, there is a very real possibility of resurgence. **Fill the gaps now to avoid facing them again in the future:**

- **Take stock of what has (and has not) worked for your business during the most recent closure and slow-downs.** Are there policies or resources that would have made the transition, and weathering the pandemic, less difficult? Is there training and/or tools managers, supervisors and human resources professionals need to more effectively and knowledgably lead the organization?

At the very least, consider policies (stand-alone or consolidated), practices, and training, for the following key items:

- Hygiene and Sanitation
 - Screening
 - Physical Distancing (changes to the workplace and to working conditions)
 - Travel and Contact Logs
 - PPE
 - Infectious Diseases (generally and regarding COVID-19)
 - Remote Work
 - Recall
 - Work Refusal
 - Requests for Accommodation
- **Review existing employment agreements.** Can and should they be amended to provide greater flexibility for future shut-downs or slow-downs ?
 - **Review vacation schedules.** Should they be adjusted to ensure sufficient coverage when business resumes or picks up, and employees use vacation during the year (rather than be paid out later, if this is an option to them).

For assistance developing and implementing a RTW plan, training your management team, or for any RTW issue, contact your Sherrard Kuzz LLP lawyer or, if you are not yet a Sherrard Kuzz LLP client, contact us at info@sherrardkuzz.com.

GOVERNMENT RESOURCES

Federal

[Government of Canada: Risk-informed decision-making guidelines for workplaces and businesses during the COVID-19 pandemic](#)

[Government of Canada: Preventing COVID-19 in the workplace: Employers, employees and essential service workers](#)

[Government of Canada: Cleaning and disinfecting public spaces during COVID-19](#)

Ontario

[Ontario Government: Sector-specific resources to prevent COVID-19 in the workplace](#)

[Public Health Ontario: Mask use for non-healthcare workers](#)

[Public Health Ontario: When and how to wear a mask](#)

[Public Health Ontario: Cleaning and disinfection for public settings](#)

British Columbia

[Worksafe BC: Preventing exposure to COVID-19 in the workplace: A guide for employers](#)

[Worksafe BC: What employers should do](#)

[Worksafe BC: COVID-19: Industry information](#)

Alberta

[Alberta Government: Guidance for Workplaces](#)

[Alberta Government: Workplace Guidance for Business Owners](#)

Saskatchewan

[Saskatchewan Government :COVID-19 Information for Businesses and Workers](#)

[Saskatchewan Government: COVID-19 Workplace Information](#)

Manitoba

[Manitoba Government: Key Responsibilities of Employees, Managers and Employers](#)

Quebec

[Gouvernement du Québec: Questions and answers pertaining to employers and workers during the COVID-19 pandemic](#)

[Institut national de santé publique du Québec: Occupational health interim recommendations by industry](#)

Nova Scotia

[Nova Scotia Government: COVID-19 occupational health and safety](#)

Prince Edward Island

[Government of PEI: COVID-19 Guidance for Businesses](#)

[Government of PEI: Employers - COVID-19 Frequently Asked Questions](#)

New Brunswick

[Government of New Brunswick: COVID-19 Guidance for Business](#)

[Worksafe NB: COVID-19 Health and safety measures for workplaces](#)

[Worksafe NB: COVID-19 Prevention Tool for Workplaces](#)

Newfoundland

[Government of Newfoundland and Labrador: COVID-19 Workplace Information](#)

[Government of Newfoundland and Labrador: COVID-19 Guidance on Personal Protective Equipment \(PPE\) for Employers](#)

[Government of Newfoundland and Labrador: Information Sheets for Businesses and Workplaces](#)

[Government of Newfoundland and Labrador: Risk-Informed Decision Making Guidance for Employers Operating During COVID-19](#)

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