

# **An in-house guide to getting back in the workplace...or not?**

## **Dentons Canada LLP**

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# LATEST ON ONTARIO LOCKDOWNS

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# Return to the COVID-19 Response Framework

- February 8, 2020: Government of Ontario announced return to regional approach to lockdown measures
  - Province will gradually return each public health unit to the revised COVID-19 Response Framework
- Public health units that return to the COVID-19 response framework are no longer subject to Stay-at-Home order
- Public health units that remain outside of the COVID-19 response framework continue to be subject to individualized Stay-at-Home orders
  - Peel Public Health
  - Toronto Public Health
  - North York, York, and Richmond Hill District

# Revisions to the COVID-19 Response Framework

- Government of Ontario strengthened the COVID-19 Response Framework by introducing the following revisions:
  - Updated measures allowing in-store retail operations to resume at non-essential retail stores subject to implementing additional health and safety precautions
  - Enhanced mask and face covering requirements
- Government of Ontario also introduced an “emergency brake”
  - Allows the Chief Medical Officer of Health to take immediate action by advising moving region into Grey-Lockdown Zone
  - Purpose: To interrupt transmission where
    - Public health region experiences rapid acceleration in COVID-19 transmission; or
    - Public health region’s healthcare system risks becoming overwhelmed

# Overview - Current Restrictions in Effect

COVID-19 Response Framework Zone	Classification of Public Health Units (as of March 1, 2020)
“Stay-at-Home”	North Bay Parry Sound District; Peel; Toronto
“Grey-Lockdown”	Simcoe Muskoka District; Thunder Bay District
“Red-Control”	Durham Region; Halton Region; Hamilton; Lambton; Niagara Region; Region of Waterloo; Wellington-Dufferin-Guelph; Windsor-Essex County; York Region
“Orange-Restrict”	Brant County; Chatham-Kent; Eastern Ontario; Haliburton, Kawartha, Pine Ridge; Middlesex-London; Ottawa; Porcupine; Southwestern; Sudbury & District
“Yellow-Protect”	Algoma; Northwestern; Peterborough; Haldimand-Norfolk; Huron Perth District
“Green-Prevent”	Grey Bruce; Hastings and Prince Edward Counties; Kingston, Frontenac and Lennox & Addington; Leeds, Grenville and Lanark District; Renfrew County and District; Timiskaming

# Overview of Restrictions in Effect

- In public health units that have not returned to the COVID-19 Response Framework:
  - Stay-at-Home Order remains in effect
  - Businesses are required to ensure all employees work from home unless the nature of their work requires their presence on-site
  - Businesses not listed in Schedule 2 or 3 to Ontario Regulation 82/20 are required to remain closed
  - Businesses engaged in retail sales to the public are generally limited to operating through curbside pick up (where item is ordered in advance) or delivery during the hours of 7:00 am to 8:00 pm
  - Restaurants, bars and other food or drink establishments are only permitted to operate through take out, drive-through and delivery service

# Overview of Restrictions in Effect

- In public health units classified as in the Grey-Lockdown Zone:
  - Indoor events and social gatherings are prohibited
    - Outdoor gatherings of a maximum of 10 individuals are permitted
  - Employers are encouraged to permit employees to continue working remotely wherever possible
  - All businesses are required to implement enhanced restrictions
    - Including: screening employees, restricting capacity and masking
  - In-person retail and shopping is permitted subject to certain restrictions
    - Including: capacity limitations, masking requirements and screening protocols
  - Restaurants, bars and other food or drink establishments are only permitted to operate through take-out, drive-through or delivery service
  - Personal care services, gaming establishments, performing arts facilities and gaming establishments are required to remain closed

# Overview of Restrictions in Effect

- In public health units classified as in the Red-Control Zone:
  - Events and social gatherings are limited to a maximum of 5 individuals indoors and 25 individuals outdoors
  - Employees are encouraged to work remotely wherever possible
  - All businesses are required to implement enhanced restrictions
    - Including: screening employees, restricting capacity and masking requirements
  - In-person dining is permitted to resume for up to 10 individuals indoors subject to certain restrictions
  - In-person retail and shopping is permitted subject to certain restrictions
    - Including: capacity limitations, masking requirements and screening protocols
  - Sports and recreational fitness facilities may resume in-person operations subject to certain restrictions
  - Casinos, gaming establishments, certain personal care services and certain performing arts facilities are permitted to resume in-person operations subject to certain restrictions



# Overview of Restrictions in Effect

- In public health units classified as in the Orange-Restrict Zone:
  - Events and social gatherings in private homes, backyards or parks are permitted for up to 10 individuals indoors and up to 25 individuals outdoors
  - All businesses are required to implement enhanced restrictions
    - Including screening employees, restricting capacity and masking requirements
  - In-person dining is permitted for up to 50 individuals indoors subject to certain restrictions
  - Sports and recreational fitness facilities may resume in-person operations subject to certain restrictions
  - In-person retail and shopping is permitted subject to certain restrictions including masking requirements and screening protocols
  - Cinemas, casinos, gaming establishments, performing arts facilities and certain personal care services are permitted to resume in-person operations subject to restrictions

# Overview of Restrictions in Effect

- In public health units classified as in either the Yellow-Protect or Green-Prevent Zones:
  - Events and social gatherings in private homes, backyards or parks are permitted for up to 10 individuals indoors and up to 25 individuals outdoors
  - Businesses remain required to implement enhanced restrictions
  - In-person retail and shopping remains subject to certain restrictions including masking requirements and screening protocols
  - Restrictions are loosened in the following industries:
    - Restaurant, bars and other food or drink establishments
    - Sports and recreational fitness facilities
    - Personal care services
    - Cinemas, casinos, gaming establishments

# Key Takeaways

- Familiarize and follow all guidance, recommendations and advice of the Chief Medical Officer of Health
- Familiarize and comply with the guidance, recommendations and advice of local public health units
- Remain flexible – anticipate unexpected changes regarding zone classification within the COVID-19 Response Framework
  - Emergency brake allows the Chief Medical Officer of Health to immediately advise a region is moving into the Grey-Lockdown zone

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Larysa Workewych, Associate, Dentons Canada LLP

# MANAGING YOUR REMOTE WORK OBLIGATIONS

# Remote Work Obligations – What you need to know

- An employer's legal obligations continue to apply to employees working remotely
- Key considerations:
  - 1) Health and Safety Obligations
  - 2) Employment Standards Obligations
  - 3) Managing and protecting confidential information in the remote work environment
- What if my employee is now working remotely in a different province/country?
- What if my employee refuses to return to their regular place of work?

# Remote Work Obligations – Health and Safety Obligations

- Obligations under the *Occupational Health and Safety Act* continue to apply in remote work environment
  - Take every precaution reasonable in the circumstances to protect workers
- Accommodation issues
  - Is an ergonomics assessment required?
- Maintaining a safe work environment
  - Domestic violence issues?
- Keep stress issues top of mind

# Remote Work Obligations – Health and Safety Obligations

- Best Practices:
  - Consider requiring employees to conduct an assessment of their workplace
  - Ensure employees are provided with the appropriate equipment to perform their duties and responsibilities safely
  - Check in with employees periodically to confirm that their workplace continues to be safe

# Remote Work Obligations – Employment Standards Considerations

- Provincial employment standards legislation continues to apply in remote work environment
- Possible issues that may arise:
  - Hours of work and breaks
  - Overtime
  - Vacation and statutory holidays



# Remote Work Obligations – Employment Standards Considerations

- Best practices:
  - Clear policy
  - Monitor employee activity outside of regular hours of work; implement a system that accurately monitors' hours of work and overtime
  - Speak with managers and supervisors regarding continuing obligations
  - Limit work, including email communication, that occurs outside of regular hours of work (i.e. late evening and/or early morning)

# Remote Work Obligations – Protecting Confidential Information

- Remind employees about their obligations regarding confidential information
  - Consider training sessions or updating confidentiality policy to take into account remote work environment
- Ensure work equipment is utilized for work purposes
- Unique concerns regarding protection of confidential information:
  - Use of and/or disposal of hard copies of documentation
  - Use of personal devices for work purposes

# Remote Work Obligations – Out-of-Province/Country Employees

- Employment standards legislation of the employee's "home" province may continue to apply
- In Ontario, *Employment Standards Act, 2000* applies:
  - Where the employee's work is performed in Ontario
  - Where the employee's work is performed outside of Ontario if the work performed outside of Ontario is a continuation of the work performed in Ontario
  - Where is employee primarily performing their work?
- Jurisdictional implications
- Enforceability of employment agreements
- Corporation, tax and immigration implications

# Remote Work Obligations – Out-of-Province/Country Employees

- Best practices:
  - Talk to your employee to determine the where, when, why and how long
  - Determine potential risks and legal issues that arise from employee's intended move
  - Clearly communicate expectations regarding remote work to employees
    - Temporary or permanent?
    - Employees expected to return to workplace at employer's discretion
  - Retain the ability to recall employees in the workplace

# Remote Work Obligations – Employee Refuses to Return to Regular Place of Work

- Employers can generally dictate how work is performed and can generally require employees to return to work
- Answer depends on context: what is the reason for the refusal?
  - Childcare or other responsibilities?
  - Fear of COVID-19?
  - Preference for remote working?

Allison Buchanan, Associate, Dentons Canada LLP

# **WILL THERE BE A COVID-19 BUMP IN NOTICE CASES ?**

# Can you dismiss an employee during the pandemic?

## Factors to consider:

- Age
- Length of service
- Character of employment
- Availability of comparable work in the marketplace
- Human Rights and Job Protected Leaves of Absence

# Will COVID-19 be a factor to be considered?

## Not yet...

- *George v Laurentian Bank Securities Inc*, 2020 ONSC 5415
  - 58 year old Vice President Equity Trading, employed for 5 months and awarded 2 months reasonable notice.
- *Rothenberg v Rogers Media Inc.*, 2020 ONSC 5853
  - 73 year old broadcaster, employed for almost 20 years and awarded 21 months of reasonable notice despite court acknowledging he could be entitled to as much as 23 months.



# Will COVID-19 be a factor to be considered?

## ...But it will be

- *Hunsley v. Canadian Energy Services LP*, 2020 CarswellAlta 2624
  - “The amount of reasonable notice must be determined based on circumstances at the time of dismissal, not subsequent events or length of actual unemployment.”
- *Yee v. Hudson’s Bay Company*, 2021 ONSC 287
  - “it seems clear terminations which occurred before the COVID pandemic and its effect on the employment opportunities should not attract the same consideration as termination after the beginning of the COVID pandemic and its negative effect on finding comparable employment.”

# Is the economic hardship of the Employer a factor?

- The Ontario Court of Appeal says “no” in *Michela v St. Thomas of Villanova Catholic School*, 2015 ONCA 801.
  - “It is important to emphasize, then, that an employer’s poor economic circumstances do not justify a reduction of the notice period to which an employee is otherwise entitled...”
- However, other jurisdictions have indicated it remains a relevant factor.
  - *Freeman v PetroFrontier Corporation*, 2017 ABQB 340: “the state of the economy may in any given case militate either for or against an extended notice period. In some cases, it may indeed be unrealistic (and unfair) to burden an employer with the same notice period in a depressed economy as it would be in a time of prosperity.”

Andy Pushalik, Partner, Dentons Canada LLP

# THE COVID-19 VACCINE AND THE WORKPLACE

**“75% of Canadians aged 12 and older, or approximately 22.3 million people, indicated that they would be somewhat or very likely to get a COVID-19 vaccine.”**

**- Majority of Canadians intend to get the COVID-19 vaccine, September 2020,  
Statistics Canada**

# Can an employer require an employee to get the COVID-19 vaccine?

- Currently no legislation in Canada requiring individuals to obtain the COVID-19 vaccine
  - There is already some legislation where employees are required to be vaccinated against communicable diseases
- Employers in certain industries where employees are working with vulnerable populations will have a good case to support a mandatory vaccination policy:
  - Health Care
  - Long-term care homes
- Other situations where employers could argue that a mandatory vaccination policy is necessary:
  - Employees working in close quarters (e.g. food processing; factories);
  - Employees who are customer-facing (e.g. transportation; some retail).

# What do employers need to consider when drafting a mandatory vaccination policy?

- Privacy
- Human Rights
  - Disability
  - Religion
  - Duty to Accommodate

# Lessons from the flu shot case law

- Cases arise from union setting – Mandatory Vaccination Policies are within an employer's management rights
- Mandatory Vaccination Policies require a balancing of interests – Safety vs. Employee Privacy; Human Rights; Exemptions will be necessary
- Employee Non-Compliance could result in discipline up to and including dismissal

# Can an employer ask an employee for proof that they have been vaccinated?

- May be permissible depending on the employer's circumstances and conditional on the employer complying with privacy law principles:
  - Limited purpose
  - Collecting the least information possible
  - Limited disclosure
  - Security of information
  - Destruction of information



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# THE VIEW FROM THE LEGAL FRONTLINES

# Q&A

# THANK YOU

[https://app.getresponse.com/survey.html?u=hSVRV&survey\\_id=1400003](https://app.getresponse.com/survey.html?u=hSVRV&survey_id=1400003)

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