

# **Pandemics and the Workplace**

## A Resource for Lawyers



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BARREAU CANADIEN

INFLUENCE. LEADERSHIP. PROTECTION.

# What could be different in your workplace during a pandemic?

Inter-pandemic period	Pandemic alert period	Pandemic period
<b>LEVEL OF ILLNESS DURING FLU SEASON</b>		
<ul style="list-style-type: none"> <li>• 5 – 8 %</li> </ul>	<ul style="list-style-type: none"> <li>• level of illness increasing: 8+ %</li> </ul>	<ul style="list-style-type: none"> <li>• 15 – 35 %</li> </ul>
<b>HEALTH &amp; SAFETY ISSUES</b>		
<ul style="list-style-type: none"> <li>• Understood within normal operational realities</li> </ul>	<ul style="list-style-type: none"> <li>• May be heightened concerns about working near a co-worker or serving a customer who appears to be ill.</li> <li>• May be need to provide protective equipment such as masks, gloves, sanitizers.</li> <li>• May be need to increase frequency of facility cleaning or cleaning methods, etc.</li> <li>• May be need to restrict work-related travel service delivery (e.g. over the phone rather than in person).</li> </ul>	<ul style="list-style-type: none"> <li>• Heightened fear of health risks and pressure to take all protective measures possible.</li> <li>• For work places with health and safety committees, illness levels may prevent meetings or require online meetings.</li> </ul>
<b>PUBLIC HEALTH INVOLVEMENT</b>		
<ul style="list-style-type: none"> <li>• General messaging regarding hand-washing, getting flu shots, etc.</li> </ul>	<ul style="list-style-type: none"> <li>• Warnings about spread of illness</li> <li>• Possible directives on what to do if ill, e.g. stay at home for 7 days.</li> <li>• Possible directives not to visit a doctor or clinic unless specific symptoms present.</li> </ul>	<ul style="list-style-type: none"> <li>• Imposition of quarantine</li> <li>• Directives concerning some segments of the population (e.g. pregnant women)</li> <li>• Directives concerning return to work protocols, etc.</li> </ul>
<b>REQUESTS FOR COMPASSIONATE CARE LEAVE</b>		
<ul style="list-style-type: none"> <li>• Rare</li> </ul>	<ul style="list-style-type: none"> <li>• More likely as family members may be ill and require care.</li> <li>• Directives concerning some segments of the population (e.g. pregnant women)</li> <li>• Directives concerning return to work protocols, etc.</li> </ul>	<ul style="list-style-type: none"> <li>• Expected to increase significantly with 1 in 3 people in the population ill and being told to stay home</li> <li>• May be a heavy impact on employees with school-aged children or elder care responsibilities</li> </ul>
<b>REQUESTS FOR ACCOMMODATION</b>		
<ul style="list-style-type: none"> <li>• Handled as part of routine management function</li> </ul>	<ul style="list-style-type: none"> <li>• Increased volume of requests in a short period of time.</li> <li>• Usual decision-makers may be ill.</li> </ul>	<ul style="list-style-type: none"> <li>• A flood of requests in a short period of time</li> <li>• Usual decision-makers may be ill</li> <li>• Situation may enable employer to refuse requests as “undue hardship” during the crisis</li> </ul>

# What could be different in your workplace during a pandemic?

Inter-pandemic period	Pandemic alert period	Pandemic period
<b>DECISION-MAKERS</b>		
<ul style="list-style-type: none"> <li>Routine decision-making process</li> </ul>	<ul style="list-style-type: none"> <li>Some decision-makers may be ill or not able to meet in person; next-in-line decision-makers have to step in</li> </ul>	<ul style="list-style-type: none"> <li>Many of the decision-makers are ill and unavailable; who may make decisions?</li> </ul>
<b>RECORD-KEEPING</b>		
<ul style="list-style-type: none"> <li>Routine record-keeping process</li> </ul>	<ul style="list-style-type: none"> <li>Some record-keeping staff may be ill.</li> <li>Decisions may need to be made by people who are not familiar with record-keeping systems and protocols</li> </ul>	<ul style="list-style-type: none"> <li>Many record-keeping staff may be ill</li> <li>Decisions may need to be made quickly (e.g. permission to work from home, permission to return to work without a doctor's note, shift change requests)</li> </ul>
<b>PRIVACY / CONFIDENTIALITY</b>		
<ul style="list-style-type: none"> <li>Routine</li> </ul>	<ul style="list-style-type: none"> <li>Possible need to breach confidentiality to let co-workers / customers know of a risk to their health</li> <li>Difficulty in maintaining privacy / confidentiality when there is a heightened sense of danger from a serious and contagious illness</li> <li>May need to obtain additional medical information from employees</li> </ul>	<ul style="list-style-type: none"> <li>Possible directives to report illness to public health authorities with no process in place on how to do this while maintaining privacy</li> <li>Possible loss of control of privacy / confidentiality with untrained staff handling notices of absence, accommodation requests, record-keeping, etc.</li> </ul>
<b>GRIEF</b>		
<ul style="list-style-type: none"> <li>Usual practices followed</li> </ul>	<ul style="list-style-type: none"> <li>Possible need to respond to an unexpected number of deaths among workers and their families</li> </ul>	<ul style="list-style-type: none"> <li>Fear of becoming ill and grief over colleagues who have died from the illness may lead to low morale</li> <li>Possible deterioration of employer / employee relations if management is perceived as not looking out for employees or acting appropriately given the crisis of a pandemic</li> </ul>

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# INTRODUCTION

## The reason for this resource

A new **contagious disease** giving rise to widespread illness and deaths – a pandemic – is **inevitable**. It has happened before and it will happen again. Planning for a pandemic is an important and necessary **risk management** strategy.

The CBA's Labour and Employment Law Section has assembled this resource material to help lawyers prepare their clients for a pandemic and advise them during a pandemic. It can also be used by lawyers to assess the effect a pandemic could have on their own workplace. This resource looks at how the law might come into play when a contagious disease begins to spread through a community, and then when a pandemic occurs. It covers such things as pandemic plans, vaccination requirements, work refusals, forced absences, compassionate care leave and doctor's notes.

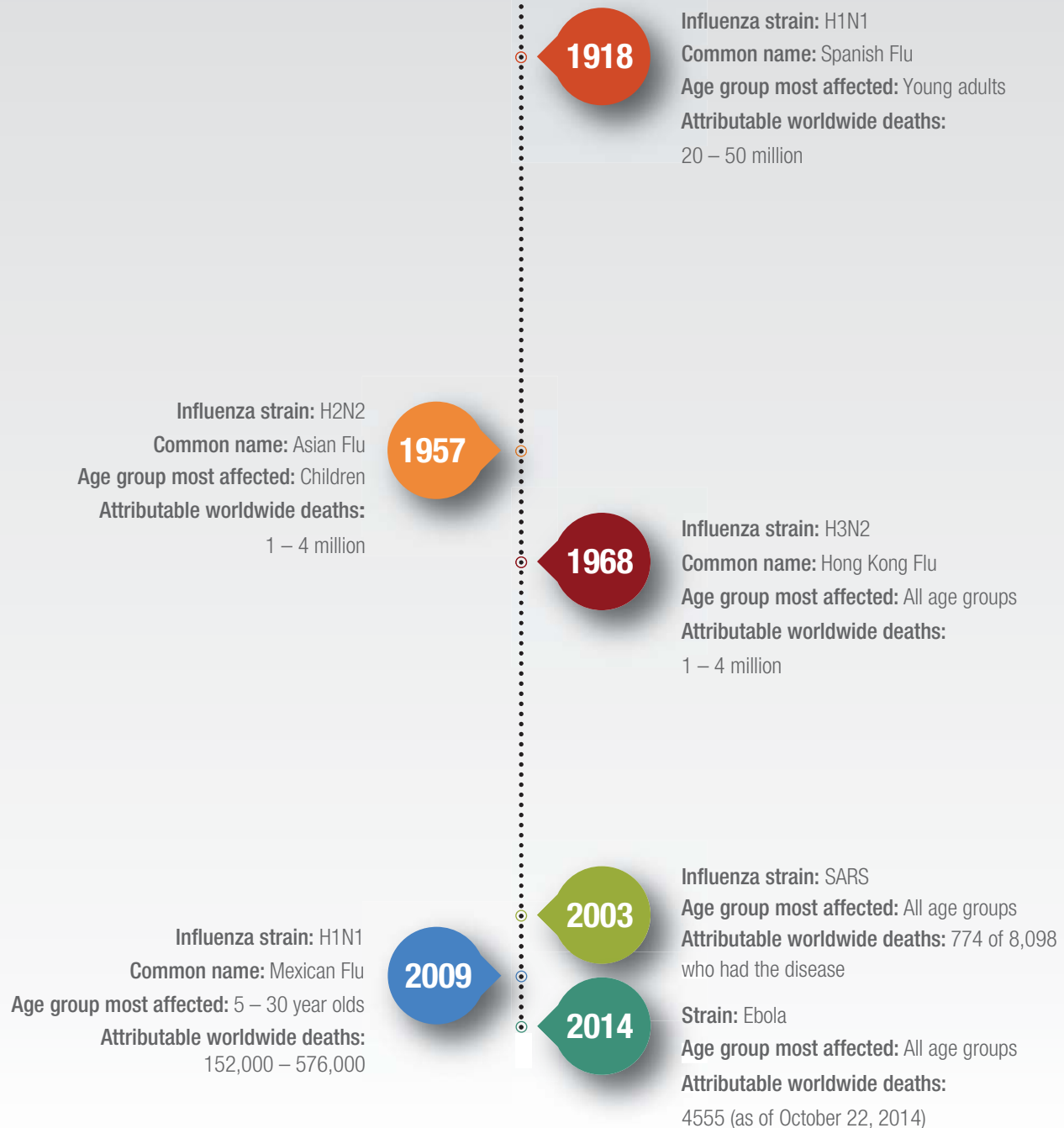
We reference Canadian legislation and cases that could have relevance in a pandemic situation, and include commentary that we hope will be of assistance. We cannot provide definitive answers as this field of law is relatively new and untested.

We are offering an overview of issues for you to consider. You will need to look at the specific legislation in the jurisdiction(s) that apply to your client and decide how best to protect your client's interests – whether your client is an employee, a union, a small business, a national enterprise, a not-for-profit organization or a government agency.

Good communications and strong workplace relationships will be critical when a major, widespread health crisis occurs. The best advice for now is to be aware of health risks, to have an active health and safety team, and to keep a pandemic plan up-to-date.

We would like to hear from you. Please write to **[cbalabourlaw@cba.org](mailto:cbalabourlaw@cba.org)** with any case references that we should add. We also welcome your thoughts on pandemic planning and the law. Thank you.

# Widespread illness inevitable



## SARS in Canada

Canadians have experienced many flu outbreaks, some more serious than others. When Severe Acute Respiratory Syndrome (SARS) hit Toronto in February 2003, it was a shocking example of how quickly a serious illness can spread and the upheaval it can cause.

Just under 400 people became ill with SARS which, at first, had a 38% mortality rate. Almost three-quarters of people with SARS got the disease in a health care setting with health care workers making up 40% of SARS cases. By the end of the outbreak later in 2003, almost one in ten people who caught the disease died from it.

During the SARS outbreak:

- the World Health Organization (WHO) advised people not to travel to Toronto unless it was absolutely essential
- the Ontario premier declared SARS a provincial emergency
- hospitals in the Greater Toronto Area called a “Code Orange” limiting visitors and creating isolation units for people with SARS
- health care workers at one hospital “were placed under a 10-day work quarantine, and instructed to avoid public places outside work, avoid close contact with friends and family, and to wear a mask whenever public contact was unavoidable.”
- Ontario passed the SARS Assistance and Recovery Strategy Act, 2003 to clarify the rights of employees who had to take leave due to their own or others’ illness, or because of quarantine requirements, during the SARS outbreak (SO 2003, c-1)<sup>1</sup>

## The 2009 Influenza A / H1N1 pandemic

In March 2009, a new influenza strain was first seen in Mexico when 60% of the population in La Gloria, Veracruz became sick with an unknown respiratory illness. The sudden widespread illness and some deaths raised the alarm and the WHO published a Disease Outbreak Notice on April 25, 2009. Two days later, the Public Health Agency of Canada issued a travel advisory regarding Mexico, and two days after that the WHO said that H1N1 was at Phase 5 (as it was then defined). In June, the WHO declared a Phase 6 pandemic. It was more than a year later before the WHO reported that the pandemic was over.

Although the Canadian government did not declare a state of emergency, it activated its pandemic planning system and ordered massive amounts (50 million+ doses) of anti-viral medication and vaccines against the H1N1 strain. Illness levels were moderate in Canada (about 10%); however, over 400 people died from the disease.

## The 2014 Ebola outbreak

Images of people lying ill in the streets or dying in makeshift hospitals sent shockwaves around the world during the summer and autumn 2014, as the Ebola virus spread through three West African nations. Health workers wore full protective clothing, including goggles, to minimize the risk of exposure to the virus which is fatal to around 50% of people who contract it. In Li-

beria and Sierra Leone, troops were called in to enforce a quarantine on the most affected communities. Travel advisories and perceived risks had a profound effect on workplaces and individuals. The outbreak reminded everyone of human vulnerability to certain diseases, and the panic, stigmatization, and civil disorder that a life-threatening virus can cause. More recently, the transmission of the disease to health care workers and the imposition of quarantine requirements in other countries has increased public anxiety.

## Just a matter of time

The Ebola and SARS outbreaks and the flu pandemics have demonstrated that the rapid spread of a new virus for which people do not have immunity can lead to a significant level of illness, workplace disruptions, and, sadly, unexpected deaths.

Canadian public health officials believe it is just a matter of time before the next pandemic is declared in Canada. They predict that a new flu virus could result in 15 to 35% of the population becoming ill, causing about 25% of the workforce to be away in the two-week peak illness period. The usual illness rate during flu season is 5 to 8%.

## Pandemic: defined

### Key point

The decision that a pandemic exists is made by the World Health Organization, and within Canada, by government officials. It is not a decision left to individuals or their employers.

### Legal context

The World Health Organization (WHO) is part of the United Nations system. It derives its authority from the shared commitment of the 194 United Nations member states to work together on global health matters.

The WHO has set out six phases in a pandemic influenza cycle.

In Phases 1 to 3 there is little sign of human illness and no community outbreaks. This is the time to plan and prepare.

Phase  
**1**

no animal influenza virus has infected humans

Phase  
**2**

an animal influenza virus has infected humans, a potential pandemic threat

Phase  
**3**

the virus has caused small clusters of disease in humans, limited transmission.

In Phases 4 to 6 there is human-to-human transmission of illness. This is the time to take mitigation measures.

Phase  
4

human-to-human infections occurring, community-level outbreaks of disease

Phase  
5

human-to-human infections occurring in at least two countries in one WHO region

Phase  
6

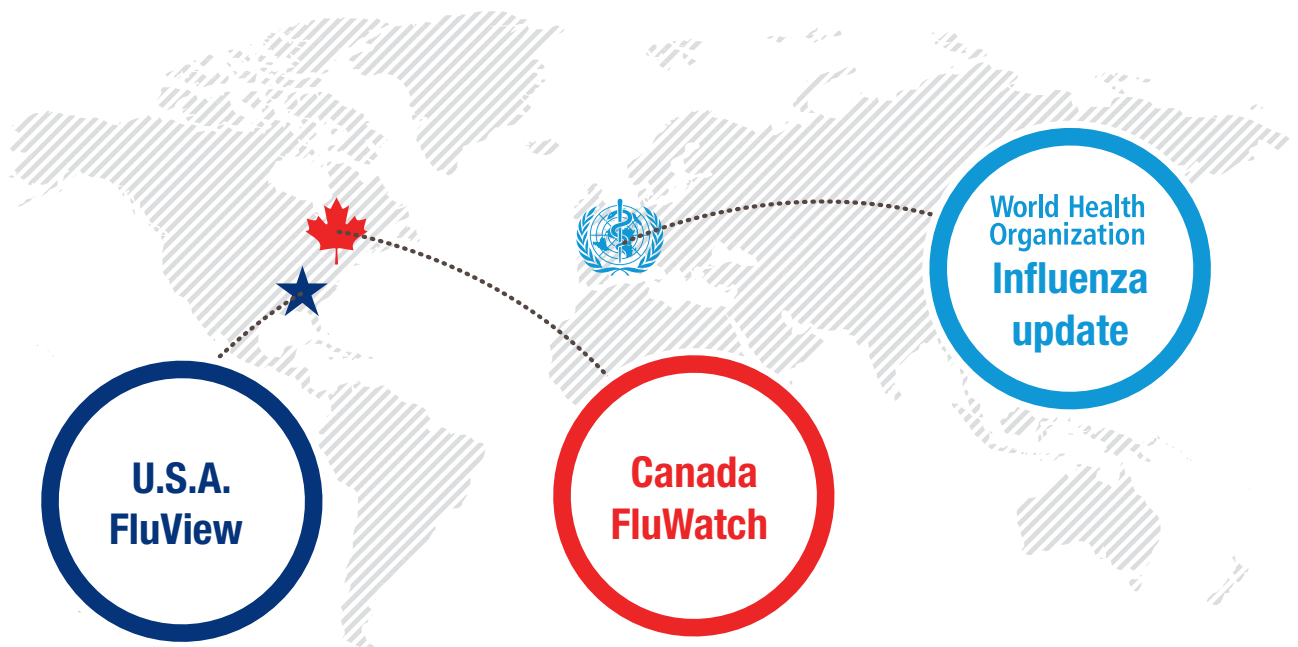
community-level outbreaks in at least two WHO regions.

When WHO declares a Phase 6 situation, a global pandemic is underway. However, this does not necessarily mean that Canada or any region of Canada is experiencing or will experience a high level of illness requiring any extraordinary measures.

In the post-pandemic period, levels of illness are decreasing and returning to the usual illness rate.

Additional waves of significant illness may lead the WHO to declare a pandemic again.<sup>2</sup>

## Tracking the spread of influenza



## Authority to respond to health emergencies within Canada

### Key point

Not all disease outbreaks are pandemics as defined by the WHO. For example, a region of Canada may experience a significant outbreak of illness which has a major impact on medical resources, transportation systems, schools and workplaces generally. Even though the disease is not a “pandemic” at a global level, local, provincial, territorial or federal public health authorities may put measures in place to protect public health and manage the outbreak.

### Legal context

#### Emergency measures legislation

Every jurisdiction in Canada has emergency measures legislation that provides the government with special powers in emergency situations. Emergencies are usually defined broadly and could include weather events, infrastructure failures and health crises.

For example:

*Emergency Services Act*, SNL 2008, c. E-9.1, s. 2(g)

“emergency” means a real or anticipated event or an unforeseen combination of circumstances which necessitates the immediate action or prompt co-ordination of action as declared or renewed by the Lieutenant-Governor in Council, the minister, a regional emergency management committee or a council;

*The Emergency Planning Act*, SS 1989, c. E-8.1, s. 2(b)

“emergency” means:

- i. a calamity caused by:
  - (A) accident;
  - (B) act of war or insurrection;
  - (C) terrorist activity as defined in the Criminal Code;
  - (D) forces of nature; or
- ii. a present or imminent situation or condition, including a threat of terrorist activity as defined in the Criminal Code, that requires prompt action to prevent or limit:
  - (A) the loss of life;
  - (B) harm or damage to the safety, health or welfare of people; or
  - (C) damage to property or the environment;

The emergency measures legislation usually authorizes the government to require emergency planning, to declare a state of emergency, and to take action. Emergency powers can be wide-sweeping, allowing a government to make orders that would ordinarily be considered beyond their authority. Actions include procuring supplies and recruiting people to do essential emergency tasks, evacuating livestock and people from an area, and controlling travel.

For example:

*Emergency Management Act*, SNS 1990, c. 8, s. 14

Upon a state of emergency being declared ... the Minister may ...

- (a) cause an emergency measures plan or any part thereof to be implemented;
- (b) acquire or utilize or cause the acquisition or utilization of personal property by confiscation or any means considered necessary;
- (c) authorize or require a qualified person to render aid of such type as that person may be qualified to provide;
- (d) control or prohibit travel to or from an area or on a road, street or highway;
- (e) provide for the maintenance and restoration of essential facilities, the distribution of essential supplies and the maintenance and co-ordination of emergency medical, social and other essential services;
- (f) cause or order the evacuation of persons and the removal of livestock and personal property threatened by an emergency and make arrangements for the adequate care and protection thereof;
- (g) authorize the entry by a person into any building or upon land without warrant;
- (h) cause or order the demolition or removal of any thing where the demolition or removal is necessary or advisable for the purpose of reaching the scene of an emergency, of attempting to forestall its occurrence or of combating its progress;
- (i) order the assistance of persons needed to carry out the provisions mentioned in this Section;
- (j) regulate the distribution and availability of essential goods, services and resources;
- (k) authorize and make emergency payments;
- (l) assess damage to any works, property or undertaking and the costs to repair, replace or restore the same;
- (m) assess damage to the environment and the costs and methods to eliminate or alleviate the damage.

## Public health legislation

Every jurisdiction in Canada has public health legislation which gives power to a Medical Officer of Health, Chief Public Health Officer or equivalent to take action to protect public health on a day-to-day basis (for example, stop smoking campaigns) and when there is a health emergency.

For example:

*Public Health and Safety Act*, RSY 2002, c. 176, s. 1

“health emergency” means urgent circumstances which, in the opinion of the chief medical officer of health, based upon reasonable grounds, jeopardize the lives or health of people in the Yukon, and includes a public health emergency;

*Public Health Act*, RSA 2000, c. P-37 s. 2(hh.1)

“public health emergency” means an occurrence or threat of

- (i) an illness,
- (ii) a health condition,

- (iii) an epidemic or pandemic disease,
- (iv) a novel or highly infectious agent or biological toxin, or
- (v) the presence of a chemical agent or radioactive material that poses a significant risk to the public health;

When there is an outbreak of disease in a community, public health legislation authorizes the designated official to take action to control its spread. These emergency powers may include:

- providing oral instead of written notices
- ordering a place to be closed
- prohibiting a person or people from going to certain places, for example, to school or work
- requiring people with the disease to stay home (quarantine)
- obliging people with the disease to report or be reported in to public health officials
- disclosing personal information in spite of legislated privacy requirements.

For example:

*The Public Health Act*, C.C.S.M. c. P210, s. 43

#### **Communicable disease order**

A medical officer may, by order, require a person to do or refrain from doing anything specified in the order, if the medical officer reasonably believes that

- (a) a communicable disease exists or may exist; and
- (b) an order is necessary to prevent, reduce or eliminate a threat presented by the disease.

#### **Content of order**

The order may require a person who is or might be infected with or has been or might have been exposed to the communicable disease to do one or more of the following:

- (a) submit to medical examination or medical testing, or both;
- (b) receive treatment, but only if the medical officer believes the person is infected, and only until the medical officer considers the person no longer presents a threat to public health;
- (c) be immunized or take other preventive measures;
- (d) conduct himself or herself in a manner that will not expose others to infection, or take other precautions;
- (e) present himself or herself for admission to a hospital or other facility and remain there once admitted, until the medical officer considers the person no longer presents a threat to public health;
- (f) isolate or quarantine himself or herself in a place specified by the medical officer and remain in isolation or quarantine until the medical officer considers the person no longer presents a threat to public health.

The law also sets penalties for offences under public health legislation.

For example:

In Ontario, the *Health Protection and Promotion Act*, RSO 1990, c. H.7, s. 101(1) and (2) sets fines for offences that range from up to \$5,000 per day for an individual to up to \$25,000 per day for a Health Board, municipality or corporation.

The rapid spread of a contagious disease may give rise to a variety of directives from public health officials and from emergency managers that may have a direct impact on the workplace. Failing to obey these directives may result in charges and fines.



# Inter-Pandemic Period

WHO Pandemic Phases



# INTER-PANDEMIC PERIOD

WHO Pandemic Phases 1 - 3

## Employer's duty to prepare for a pandemic

### Key point

An employer has a duty to provide a safe working environment for employees.

### Legal context

A new section was added to the *Criminal Code of Canada* after the 1992 Westray mining disaster in Nova Scotia and the subsequent recommendations from the Royal Commission of Inquiry.

*Criminal Code of Canada*, RSC 1985, c. C-46, s. 217.1

#### **Duty of persons directing work**

Every one who undertakes, or has the authority to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from the work or task.

To date, charges have been laid under this section when faulty equipment injured workers and in circumstances where there was a significant neglect of duty.<sup>3</sup>

As well, every jurisdiction in Canada has workplace health and safety legislation. This legislation typically sets out to:

- protect workers from workplace hazards
- give workers the right to know about hazards and to refuse dangerous work
- identify the duty of employers and employees to contribute to a safe working environment (sometimes referred to as an “internal responsibility system”) and to participate in a health and safety committee when a workplace has enough employees to meet the legislated threshold
- provide mechanisms for enforcement including penalties for failures to follow the law.

Workplace health and safety legislation usually includes a general duty on employers to take every precaution that is reasonable in the circumstances to ensure the health and safety of people at or near the workplace. There is no specific hazard mentioned and no specific action required. The clause is a “due diligence” or “umbrella provision”. This could be read to include having a pandemic plan or policy in place as governments generally promote pandemic planning as an important step in protecting employees, customers and service recipients from illness in the event of a local disease outbreak or pandemic.

Under applicable statutes or a collective agreement, an employer may have an obligation to consult with a health and safety committee or employee representatives when developing a plan for handling a disease outbreak. Pandemic planning is probably best accomplished as a collaborative management / employee process.

What should be covered in a pandemic plan is outlined later in this document.

## Cases

***Sault-St-Louis (Commission scolaire de) et Syndicat des enseignants du Sault St-Louis*** Commission d'appel en matière de lésions professionnelles, [1987] CALP 474.

The employer ran a school for children with mental disabilities. Tests found 9 of the 32 children were carriers of the Hepatitis B virus. The employer was required to provide employees with vaccinations to protect them from Hepatitis B. The potential cost of providing the vaccine did not remove the employer's obligation to protect employee health.

## Vaccination as a condition of employment

### Key point

Having a flu shot or taking an anti-viral medication may be a condition of employment when the employer's interest in providing a safe workplace and protecting the health of others outweighs the employee's right to privacy, dignity and bodily integrity. Depending on the applicable laws and the nature of the workplace, employees who have not been vaccinated may be sent home with or without pay during an illness outbreak or pandemic. Directives from public health officials may also come into play.

## Legal context

Being required to have a flu vaccination or to take anti-viral medicine in the work context could generally be construed as an intrusion into a person's right to privacy and bodily integrity. However, these personal rights will be balanced against an employer's duty to provide employees, clients and customers with a safe environment.

The requirements of occupational health and safety laws may, depending on the specific wording, require an employer to provide a safe working environment for both employees and everyone receiving services at that workplace. For example, the risks of the flu to health-compromised residents in a long-term care facility who need high levels of staff assistance may justify requiring staff to be vaccinated, or to stay away from work if they have not been vaccinated and there is a flu outbreak.

British Columbia and Québec hospitals were held to be able to require nurses to have flu vaccinations and to send them home without pay during a disease outbreak when they had not been vaccinated.

However, the Ontario Labour Arbitration Board found that the right to refuse a vaccination was a *Charter* right. The decision in ***St. Peter's Health Systems v. CUPE Local 778 (Flu Vaccination Grievance)***, [2002] O.L.A.A. No. 164; 106 L.A.C. (4th)

170, that “suspending employees (non-disciplinary) for refusing to undergo medical treatment is a violation of their common law s. 7 Charter rights”. “Reasonable limits” arguments based on section 1 of the Charter were not referenced in the decision. The Supreme Court of Canada considered the balancing of interests and proportionality when it examined a pulp and paper mill’s policy of requiring unionized employees doing “safety sensitive” work to be randomly tested for alcohol and drugs. The court found that an employee’s right to privacy prevailed given the absence of evidence that there was a safety problem at the workplace. Similar arguments of “proportionality” and “balancing of interests” could apply in a situation where an employer wanted employees to be vaccinated in order to work. The Court did note that in a unionized workplace union and management could include testing protocols in the collective agreement. ***Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper Ltd***, [2013] 2 S.C.R. 458.

## Vaccination promotion and employer vaccination expectations

Public health officials promote annual flu shots to prevent a person from falling ill and to control the spread of the disease. “Get your flu shot” is the number one flu prevention strategy on Canada’s [FightFlu.ca](http://FightFlu.ca) web site.

Flu vaccine manufacturers try to predict the strain of the virus that will dominate in the upcoming flu season and develop the right vaccine to prevent people from catching the flu and the right anti-viral medicine to help people who have caught the flu to recover more quickly.

There is, however, an ongoing medical debate about the efficacy of mandatory flu vaccinations. While a 2012 Canadian Medical Association Journal editorial said that flu shots should be mandatory for all health care workers to protect patients<sup>4</sup>, researchers at the Infection Prevention and Control Unit at Toronto’s University Health Network found that the flu shot offers only 60% protection, a result they call “mediocre”.<sup>5</sup>

Although legislation to compel health sector workers to get flu shots has been discussed by Canadian governments, for example in Alberta, British Columbia and Ontario, no such legislation is in place in Canada today.

In addition to possible legislative requirements, an employer’s vaccination expectations and the consequences for failing to be vaccinated may be part of a collective agreement.

Québec is the only jurisdiction in Canada which has a “no fault” approach to compensation for people who have an adverse reaction to a vaccine covered by regulation. The list of diseases covered by the Act includes “influenza”.

*Public Health Act*, CQLR, c. S-2.2, s. 71, Division III

The Minister shall compensate, regardless of responsibility, any victim of bodily injury caused by a voluntary vaccination against a disease or infection identified in the regulation made by the Government under [section 137](#) or a vaccination imposed pursuant to [section 123](#).

In either case, the vaccination must have taken place in Québec.

Between the time the law was enacted in 1988 and the end of 2013, a committee has assessed 163 claims and awarded compensation in 35 of them.<sup>6</sup>

## Cases

### Workers in health care settings

Labour arbitrations have consistently found that hospitals and other similar health care environments may require employees to have a flu vaccination and are justified, when there is a flu outbreak, in sending home, or even firing, employees who have not complied.

#### ***Chinook Health Region v. United Nurses of Alberta, Local 120*** (2002), A.G.A.A. No. 88

The employer adopted a policy whereby staff at geriatric facilities had to have a flu shot or Amantadine (anti-viral) treatment. The Nurses' Association filed a grievance seeking cancellation of the policy. The Union alleged that the management policy imposed a mandatory medical treatment and constituted a violation of an employee's bodily integrity. The arbitrator upheld the policy on the grounds that the requirements were not truly mandatory and he "sought to take a more balanced approach in providing alternatives, admittedly with consequences, keeping in mind [the employer's] hugely legitimate concern for public safety".

#### ***Carewest and Alberta Union of Provincial Employees*** (2001), 104 L.A.C. (4th) 240 (Alberta Labour Arbitration)

This Alberta Grievance Arbitration decided that it is allowable to require vaccination as a condition for employment.

#### ***Health Employers Assn of B.C. v. B.C. Nurses' Union*** (2006), 155 L.A.C. (4th) 252 (British Columbia Labour Arbitration)

An arbitration over a collective agreement in British Columbia found that the employer's policy of requiring hospital workers to be vaccinated against the flu did not violate the employees' Charter rights.

#### ***Ontario Nurses' Association v. North Bay General Hospital***, [2008] O.L.A.A. No. 669 (Ontario Labour Arbitration)

The governing collective agreement required employees to be vaccinated if there was an outbreak of influenza in the hospital. There was an outbreak of influenza, but it did not meet the test for general vaccination set out in the hospital's Influenza Protocol. The Medical Officer of Health however had recommended that all staff be vaccinated. The hospital put staff who refused to be vaccinated on unpaid leave of absence. The arbitrator decided that the Medical Officer of Health's recommendation was sufficient to justify the hospital's directive, and that the nurses could be placed on unpaid leave.

#### ***Ontario Public Service Employees Union v. North Bay General Hospital*** [2006] O.L.A.A. No. 53 (Ontario Labour Arbitration)

The grievor was a phlebotomist at North Bay General Hospital. She was vaccinated as required, but she failed to follow the hospital's rules by not taking an antiviral medication in the two weeks following her vaccination. The Occupational Health Services Department, which was responsible for administering the inoculation policy and had access to staff medical records, told the employee's supervisor that she had failed to fill the antiviral prescription and her employment

was terminated. The arbitrator held that the termination was justified, but awarded damages because the evidence had been gained by breach of the employee's privacy.

***CUPE, Local 139 v. North Bay General Hospital (Kotsopoulos Grievance)***, [2003] O.L.A.A. No. 580 (Ontario Grievance Arbitration)

The *Ontario Ambulance Act* required paramedics to be vaccinated for influenza and further that an ambulance service could not employ unvaccinated paramedics (Note: the Act has been amended since this arbitration to allow ambulance attendants to refuse vaccinations). The grievor was a paramedic for North Bay General Hospital. He refused to get a flu shot and was subsequently suspended. The employee grieved the suspension on the ground that it breached the collective agreement by making a rule that was not fair and reasonable and that it had a duty to accommodate. The arbitrator held that the employer was precluded by statute from employing the grievor as a paramedic. He said "when valid legislation conflicts with a collective agreement, the legislation is paramount". The arbitrator also found that the hospital did not have a further duty to accommodate since there was no specific provision in the collective agreement to that effect.

In another case, a Québec court distinguished between the right to refuse a vaccination, which it held was protected by the *Charter*, and the employer's right to prevent an employee who had not been vaccinated from working. The employer was found to be justified in not paying the employee for time missed from work.

***Syndicat des professionnelles en soins infirmiers et cardio-respiratoires de Rimouski (FIQ) c. Morin***, June 8, 2009, 100-17-000847-089 (Soquij AZ-50562125); see also ***Micheline Bernier***, 2008-2519 (Tribunal d'arbitrage)

A nurse's aide (infirmière auxiliaire) refused to have a flu shot or take Tamiflu during a 2009 flu outbreak at a long-term care facility (CHSLD). She was not allowed to work for two days. Her grievance to recover the two days' lost pay was unsuccessful. The Superior Court said that because she had a right to refuse the shot and anti-viral medication her fundamental rights had not been abrogated. The loss of salary was an economic issue and not a breach of a fundamental right protected by human rights legislation or the *Charter*.

An unresolved issue is the right of employees, whose employers expect them to have flu shots, to receive workers compensation for lost work time when they become ill from the shot. Is the adverse reaction a work-related injury? The Québec Superior Court said "yes", the Québec workers compensation appeal board has said "no".

***Hôpital Maisonneuve-Rosemont c. Commission des lésions professionnelles***, 2013 QCCS 2280, (Superior Court)

A hospital nurse received a flu shot at the hospital as part of an immunization campaign that was promoted by health ministry policies. She had an adverse reaction within 15 minutes. The court found that her reaction was a work-related injury for which she was entitled to workers compensation for lost work time.

**Duval et Centre Gertrude Lafrance & Georges Phaneuf**, (2011) #414764-62A-1007, (Commission des lésions professionnelles)

A hospital employee had an adverse reaction to the H1N1 vaccine and claimed for the time lost from work in the Fall, 2009. The employee said that being vaccinated was required for her job and that she had a moral and professional responsibility to get the flu shot. The hospital handout to employees said the vaccination was “crucial” that year because there was a new strain of the virus. The tribunal found that the shot was not mandatory and that it was an employee’s choice to get a flu shot. As well, her reaction to the shot was not a workplace accident, was not a covered sickness, and was not a risk related to her work.

**Centre de santé et de services sociaux de la Montagne et Danis**, (2009) #355915-71-0808, (Commission des lésions professionnelles)

A nurse was given a flu shot at work and became ill less than an hour later. The tribunal found that even though getting a flu shot was promoted at the workplace, including through on-site vaccination opportunities and draws for \$50 gifts cards among those who had a flu shot, getting the shot was the employee’s decision. Her reaction to the shot was not a sudden and unexpected event and did not meet the test of a work-related accident leading to compensation for her month of lost work.



# **Pandemic Alert Period**

WHO Pandemic Phases



# PANDEMIC ALERT PERIOD

*WHO Pandemic Phases 4 & 5*

## Key point

Before Canadian authorities or the WHO finds that there is a pandemic in a community or region of Canada, the level of illness has to reach a certain point. Until a pandemic is identified, there is likely to be a “pandemic alert” period during which some people will become ill and unable to work, and workplace challenges may begin to emerge.

## Legal context

Generally, it is “business as usual” during the pandemic alert period:

- employers have a duty to protect employees from health and safety hazards
- employees have a right to refuse work when it is unsafe
- employers have a duty to accommodate employees with a disability in accordance with the applicable human rights legislation
- employers may ask an ill employee for an expected return-to-work date and for a doctor’s note for proof of illness when they have been away from work for several days, in accordance with the collective agreement, if there is one
- the reason for an employee’s absence is a private matter (even when the employee tells a manager that the sickness is the flu this should not be repeated to others)
- employees may have the right to compassionate care leave to attend to an ill family member, in accordance with the applicable collective agreement, employment standards or human rights legislation or provisions of the *Employment Insurance Act*, SC 1996, c. 23. Compassionate care leave is generally without pay, although employment insurance benefits are available when the criteria in the *Act* and regulations are met

## Work refusals

### Key point

Depending on the specific wording in the legislation, an employee’s right to refuse work may extend to situations in which a virus is spreading through the workplace even though a pandemic has not been declared. For example, in workplaces covered by the *Canada Labour Code*, pregnant and breastfeeding women have extra protections and may ask for an accommodation or leave to avoid a work situation that could be hazardous to them or their fetus or baby. Québec’s *Act respecting Occupational Health and Safety*, CQLR, c. S-2.1, has similar provisions.

## Legal context

Occupational health and safety laws give an employee the right to refuse or to stop work in certain circumstances.

The language used for a work refusal varies from jurisdiction to jurisdiction. Depending on the wording, a situation where an

employee is being asked to work in an environment where many people are ill with the flu may or may not be covered.

The law may refer to a work refusal relating to what an employee has been asked to do.

For example:

*The Saskatchewan Employment Act*, SS 2013, c. S-15.1, s. 3-31

A worker may refuse to perform any particular act or series of acts at a place of employment if the worker has reasonable grounds to believe that the act or series of acts is unusually dangerous to the worker's health or safety or the health or safety of any other person at the place of employment until:

- (a) sufficient steps have been taken to satisfy the worker otherwise; or
- (b) the occupational health committee has investigated the matter and advised the worker otherwise.

The law may refer to a work refusal relating to the danger of operating equipment.

For example:

*Workplace Health, Safety and Compensation Act*, RSNL 1990, c. W-11, s. 8

A worker shall not:

- (b) operate a tool, appliance or equipment that will create an imminent danger to his or her or another worker's health or safety or the health or safety of another person.

The law may refer to a work refusal relating to the physical condition of the workplace.

For example:

*Ontario Occupational Health and Safety Act*, RSO 1990, c. O.1, s. 43(3)

A worker may refuse to work or do particular work where he or she has reason to believe that:

- (b) the physical condition of the workplace or the part thereof in which he or she works or is to work is likely to endanger himself or herself; ...

The law may refer to a work refusal relating to both "health" and "physical well-being".

For example:

*An Act respecting Occupational Health and Safety*, CQLR, c. S-2.1, s. 12)

A worker has a right to refuse to perform particular work if he has reasonable grounds to believe that the performance of that work would expose him to danger to his health, safety or physical well-being, or would expose another person to a similar danger.

The law generally exempts situations where the danger is "inherent in the work" (Nova Scotia) or a normal condition of employment, such as working as a paramedic or in admissions in a hospital emergency department, provided standard safety measures are in place. The law may also exempt certain types of employment, such as firefighter or police officer.

The law usually requires the employee refusing to work to follow specific steps such as contacting the supervisor immediately, with the health and safety committee becoming involved when a committee exists. A ministry of labour inspector may be called in.

Employers are generally prohibited from taking disciplinary action or dismissing an employee who has raised a health and safety concern, unless the employer can prove that the employee wilfully abused the rights protected by the law. See, for example, *Canada Labour Code*, RSC 1985, c. L-2, s. 147.

### **Special provisions for pregnant and breastfeeding women**

Québec's *Act respecting Occupational Health and Safety* (CQLR, c. S-2.1, ss. 40 to 48) and the *Canada Labour Code* (RSC 1985, c. L-2, ss. 132 and 204) have special provisions allowing a pregnant and breastfeeding woman to refuse work that may pose a risk to her foetus or child.

*Act respecting Occupational Health and Safety*, CQLR, c. S-2.1 ss. 40, 41 and 46

A pregnant worker who furnishes to her employer a certificate attesting that her working conditions may be physically dangerous to her unborn child, or to herself by reason of her pregnancy, may request to be re-assigned to other duties involving no such danger that she is reasonably capable of performing ... (section 40)

If a requested re-assignment is not made immediately, the pregnant worker may stop working until she is re-assigned or until the date of delivery.

“Delivery” means the natural or the lawfully, medically induced end of a pregnancy by childbirth, whether or not the child is viable. (s. 41)

A worker who furnishes to her employer a certificate attesting that her working conditions involve risks for the child she is breast-feeding may request to be re-assigned to other duties involving no such risks that she is reasonably capable of performing. (s. 46)

*Canada Labour Code*, RSC 1985, c. L-2, s. 132

(1) In addition to the rights conferred by section 128 and subject to this section, an employee who is pregnant or nursing may cease to perform her job if she believes that, by reason of the pregnancy or nursing, continuing any of her current job functions may pose a risk to her health or to that of the foetus or child. On being informed of the cessation, the employer, with the consent of the employee, shall notify the work place committee or the health and safety representative.

(4) For the period during which the employee does not perform her job under subsection (1), the employer may, in consultation with the employee, reassign her to another job that would not pose a risk to her health or to that of the foetus or child.

(5) The employee, whether or not she has been reassigned to another job, is deemed to continue to hold the job that

she held at the time she ceased to perform her job functions and shall continue to receive the wages and benefits that are attached to that job for the period during which she does not perform the job.

These provisions would likely apply so that covered employees could request a different work assignment or a leave of absence to avoid coming into contact with the flu virus during an outbreak. In **Tremblay et Service Ambulancier Porlier Itée**, 2010 QCCLP 382, a breastfeeding paramedic was entitled to preventive leave while she was breastfeeding her child. The possibility of catching the H1N1 virus was one of the mentioned risks (see para 43). Similarly in **Godon et Ambulances Radisson**, 2011 QCCLP 2863, the tribunal agreed to preventive leave for a breastfeeding paramedic.

## Cases

While the applicable occupational health and safety law applies to work situations in a jurisdiction, collective agreements may also have work refusal provisions that apply in specific work environments.

As a general rule, unionized employees are expected to “work now and grieve later”.

**United Steelworkers and Lake Ontario Steel Co. Ltd.** (1968), 19 L.A.C. 103

This is the seminal Canadian arbitration case for the ‘work now grieve later’ rule. The employee was a millman. He refused to work during his lunch, effectively shutting the operation down. It was decided that the employee was guilty of insubordination, that he should not have stopped working, despite the fact that the collective agreement provided for a paid 20 minute lunch break.

**Steel Co. and USWA Local 1005** sets out the test to determine if a work refusal is justified.

**Steel Co. and USWA Local 1005** (1973), 4 L.A.C. (2d) 315 (Ontario Labour Arbitration)

The grievor was employed as a labourer in the brick mason’s labour department. He refused to work because he was concerned about falling brick and debris. The following test was applied to determine whether the alleged danger justified the work refusal:

1. Did the grievor honestly believe that his or her health or well-being was endangered?
2. Did the grievor communicate this belief to his or her supervisor in a reasonable and adequate manner?
3. Was the belief reasonable in the circumstances?
4. Was the danger sufficiently serious to justify the particular action that the grievor took?

In this case the work refusal was justified and the grievance was upheld.

The determination of whether or not a work refusal was reasonable in the circumstances and the risk was sufficient to justify a work refusal is a question of fact left to the adjudicator.

**H.M. Trimble & Sons (1993) Ltd. and I.U.O.E., Local 115** (1994), 42 L.A.C. (4th) 313 (Canada Labour Arbitration)

The employees received seven-day suspensions for refusing to drive into the U.S. during a truckers strike because they believed they were at risk due to potential violence. Their grievances were upheld because of the health and safety

exception in the Canada Labour Code. The test was whether their fears were reasonable in the circumstances, and it was found that they were.

***Hogue-Burzynski v. Via Rail***, [2006] C.L.C.A.O.D. No. 5 (Occupational Health and Safety Tribunal Canada)

On the Winnipeg-Vancouver train run, 28 of 211 passengers had become violently ill. Two cars from that run had been cleaned in Vancouver and sent east. One person was ill on the trip east and one bathroom was found to have been improperly cleaned. Four Via Rail employees scheduled to board the train in Winnipeg refused to work because they asserted that conditions on the train would cause them to come into contact with a Norwalk-like virus. The Appeals Officer found that the danger was not sufficient under Part II of the *Canada Labour Code* to justify their refusal to work.

See also ***Douglas Martin and Public Service Alliance of Canada and the Attorney General of Canada***, 2003 FC 1158, and ***Verville v. Canada (Correctional Services)***, 2004 FC 767 where the courts considered the meaning of “danger” in assessing health and safety risks in a workplace.

Although there may be a justified reason to refuse to work because of personal danger, the employee may be required to use sick leave instead of being on leave with pay.

***Re School District No. 33 (Chilliwack) and BC Teachers' Federation***, 147 L.A.C. (4th) 251 2006 CLB 13024, 84 C.L.A.S. 336, [2006] B.C.C.A.A.A. No. 20

When elementary school children were diagnosed with Fifth Disease, some pregnant teachers absented themselves from work. Fifth Disease is a contagious minor childhood disease which can cause severe problems for pregnant women who lack immunity. The teachers argued that they should be allowed to refuse work without losing pay or depleting their sick leave. The employer argued that they should use their allowable sick leave. The arbitrator held that the presence of Fifth Disease does not amount to an undue hazard and the requirement to use sick leave benefits was not discriminatory.

Finally, occupational health and safety legislation may provide a statutory defence to insubordination when a worker refuses to work in a dangerous situation as happened in:

***Lennox Industries (Canada) Ltd and USWA Local 7235***, [1999] O.L.A.A. No 158 (Ontario Labour Arbitration)

It is enough when an employee has a subjective belief that he is in danger, protecting the employee from reprisals for raising the concern. The arbitrator adopted the four part test in *Steel Co and USWA Local 1005* (1973), 4 L.A.C. (2d) 315.

## Forced absences

### Key point

An employer may require an employee to work in an isolated area, leave work or stay away from work when the employee is showing symptoms of a communicable disease.

### Legal context

Given that occupational health and safety legislation generally requires an employer to provide employees with a safe workplace, an employer may reasonably ask a person who is apparently ill with a communicable disease to either work in an isolated area or to leave the workplace to prevent the possible spread of disease to other employees.

Employment standards legislation may also address the ability of an employer to require an employee to leave the workplace.

For example:

*Employment Standards Act*, SNB 1982, c. E-7.2, s. 31

Notwithstanding section 30, an employer may lay off an employee without notice ...

(b) for any reason, for a period of up to six days.

### Cases

An employee who was asked to leave work when she tested positive for tuberculosis was not entitled to special leave with pay even though it turned out that she did not have tuberculosis.

***Tremblay and Treasury Board (Agriculture Canada)***, [1988] C.P.S.S.R.B. No. 271 (QL) (Canada Public Service Staff Relations Board)

The grievor tested positive for tuberculosis and employer withdrew her from work until she could produce a medical certificate of health. It was subsequently determined that the employee did not have the disease and was fit to work. The grievor claimed special leave with pay. The collective agreement stipulated that the employer might grant special pay, at its discretion, when circumstances not directly attributable to the employee cause an absence. The Board held that the employee was not entitled to paid leave because the employer was right to require a medical certificate of health and had reasonable grounds to believe that to do otherwise would put the public's health at risk.

In another case, retirement home management told an employee to stay away from work as the employee also worked at another health facility where there had been a disease outbreak. She was not entitled to claim sick leave according to the language of the disability plan:

***Rouge Valley Health System v. Ontario Nurses' Assn. (Jossul Grievance)***, [2007] O.L.A.A. No. 680 (QL), 92 C.L.A.S. 8 (Ontario Labour Arbitration)

The grievor worked full time at Rouge Valley and part time at a retirement home. An outbreak of Febrile Respiratory

Illness at the retirement home caused the Chief Medical Officer to issue a directive that staff could not work at any other health facilities for four days from their last contact. The grievor claimed three days of sick pay for the days she was prevented from working at Rouge Valley. The Panel held that leaving work pursuant to the CMO directive does not entitle an employee to claim 'sick leave' under the language of the 1980 Hospital of Ontario Disability Income Plan (HOODIP)

However, in other situations, provisions in a collective agreement or in the applicable disability insurance plan might have enabled the employee to be paid during this forced time off work.

## Employee medical information

### Key point

Generally, employees have a right to privacy regarding their specific medical information. Employers may ask about the general nature of the illness or disability, for a doctor's note to confirm the medical reason for an absence, and for information that is relevant to the return to work and any necessary accommodation. The right to privacy is balanced with the employer's right to manage the workplace.

### Legal context

Human rights and privacy legislation may come into play when an employee is ill. These laws could limit the type of information an employer may collect from an employee and may create an obligation not to disclose personal information that has been collected. A collective agreement may also cover these issues.

For example:

The Alberta Human Rights Commission has issued an interpretive bulletin, *Obtaining and responding to medical information in the workplace*, and a Sample Medical Absence Form for doctors to complete. It says:

"When completing this form, disclose only information necessary to meet the purpose of the form. Typically, it is not necessary to provide a diagnosis or treatment information."

Another factor in the context of infectious diseases is the employer's duty to provide all employees with a safe workplace under occupational health and safety legislation. This may enable the employer to ask for additional information from an employee when the employer has reasonable grounds to believe that the employee is or has been ill with a disease that may still be at the contagious stage and could infect other employees or people in the workplace. As well, public health agencies may require that certain illnesses, such as gastroenteritis in an institution, Hepatitis A, and West Nile virus, be reported to them promptly, usually by the treating physician. See, for example, the Public Health Agency of Canada's list of diseases under national surveillance.

### Cases

An employer may ask for a medical examination to establish the fitness of an employee to perform work but not to test the accuracy of medical reports about why they were absent from work or to establish the employee's HIV status.

***Monarch Fine Foods Co. Ltd. and Milk and Bread Drivers, Dairy Employees, Caterers & Allied Employees, Local 647 (1978)***, 20 L.A.C. (2d) 419 (Ontario Labour Arbitration)

While on vacation in India, the grievor notified his employer that he would be unable to return to work on the expected date due to an injury that would not allow him to travel for some weeks. He returned to work six weeks after the scheduled date with medical certificates from India and Toronto. The employer requested that the employee undergo a medical examination at a specified clinic to test the truth of the employee's claims. The employee refused and received a two-week suspension without pay or benefits. The board stated "[w]e are satisfied that the company does not derive authority to require the grievor to submit to the medical examination in question from any provision in the collective agreement. We are equally satisfied that it had no implied right to do so where the medical examination is not for the purpose of reasonably establishing the fitness of an employee to perform the work assigned to him". Accordingly, there was no insubordination in refusing the order.

***Centre d'accueil Ste. Domitille et Union des employés de service, local 298***, April 21, 1989 (Tribunal d'arbitrage)

The grievor taught at a group home for teenage girls and was off work after contracting malaria. During this time she appeared on a TV program about HIV-positive people. Although she was disguised to be anonymous, her employer recognized her and asked her to see a doctor chosen by the employer before returning to work. The doctor found her fit to return to work and did not mention her HIV-positive status in the medical report. When the employer asked her to have another medical, she refused and was fired. The tribunal found that the employer had no right under the collective agreement or the law to ask for a medical examination for the purpose of establishing her HIV status.

An employee's right to privacy was found to have been compromised when the employer's choice of medical doctor for a return to work examination worked in the same clinic as the employee's own doctor, had treated her on a few occasions, and made use of this knowledge in the health assessment.

***Syndicat des employés de l'Hôpital juif de réadaptation (CSD) et Hôpital juif de réadaptation (X)***, DTE 2005T-879, June 20, 2005 (Tribunal d'arbitrage)

The employee worked part time in the technical support services of a rehabilitation hospital. She was HIV positive and had been off work for several months. Her doctor reported that she was well and able to return to work. For a second opinion, the employer chose a doctor who worked in the same clinic as the employee's regular doctor and had treated her on a few occasions. The employee objected to the choice of doctor but thought she had no choice as the medical exam was required before she could return to work. The tribunal found she had not consented to the release of her confidential information. It also found that she had been discriminated against under the Québec human rights law because she was HIV positive. There was no bona fide reason ("exigence professionnelle justifiée") to keep her from working. The possibility of her becoming ill again was not immediate or predictable.

## Work-related illness

### Key point

It may be difficult to prove that the flu and any injury or impairment resulting from it is a work-related injury giving rise to workers compensation benefits.

### Legal context

Workers compensation legislation provides financial and other benefits to workers who have been injured on the job when their employer is registered with the program.

Compensation is generally for an “injury” or “impairment” “arising out of” and “in the course of” employment. The worker must have been on the job when the injury happened and doing something that was part of the job. It may be difficult to prove that an infectious disease was caught at work, as opposed to on public transit or from family and friends. However, when an infectious disease begins to spread in a workplace, as happened at a few Toronto hospitals during the SARS outbreak in 2003, there may be more evidence linking an employee’s illness to the workplace.

### Cases

***Workers’ Compensation Review Reference #R0092037***, December 18, 2008 (British Columbia)

The worker was a nurse employed by a hospital. She contracted metapneumo virus at a time when there was an outbreak of an unspecified respiratory illness at her workplace. She claimed workers compensation for occupational exposure to a respiratory illness. It was denied by the WorkSafeBC Board. At this application for review, the Reviewing Officer stated that, to be compensated for injuries from contracting a contagious disease at work, the worker must show either:

- the nature of the employment created for the worker a risk of contracting a kind of disease to which the public at large is not normally exposed; or
- the nature of the employment created for the worker a risk of contracting the disease significantly greater than the ordinary exposure risk of the public at large.

The decision was referred back to the board with these directions.

***Lamontagne et Centre de santé et de services sociaux de la Vieille Capitale***, 2009 QCCLP 158 (Commission des lésions professionnelles)

There was a gastrointestinal illness outbreak on the 2nd and 3rd floors of a health care facility. A cleaner who worked on the 4th and 11th floors became ill and claimed it was a work-related illness that entitled him to workers compensation. The tribunal found that the disease had spread despite precautions taken by the employer to contain it, and the employee became ill in the execution of his duties. This was unforeseen and unexpected and was therefore covered by workers compensation.

**Decision No. 2579/07** [Names of Parties not Published] [2007], OWSIATD No. 3012 (QL), 2007 ONWSIAT 3046 (Ontario Workplace Safety and Insurance Appeals Tribunal)

The claimant was a paramedic diagnosed with viral meningitis. He claimed benefits for a contagious disease resulting from workplace exposure, even though the ambulance call reports for the time preceding the employee's illness did not indicate any specific contagious disease. The claim was denied by the Appeals Resolution Officer and that decision was appealed. The claim was denied because the worker could not show any "persuasive specific evidence which would cause us to conclude that his illness in March 2001 was probably work-related". The board said that the standard of proof is the balance of probabilities, and it is not sufficient that the job poses a general level of risk of contracting an infectious disease.

**Reda v. The Toronto Hospital** [2004], OWSIATD No. 2062 (QL), 2004 ONWSIAT 2119; **Reda v. The Toronto Hospital** [2005], OWSIATD No. 858 (QL), 2005 ONWSIAT 849 (Ontario Workplace Safety and Insurance Appeals Tribunal)

The claimant was employed by the hospital as a medical records clerk. She contracted bronchiectasis and asserted that her medical injury was caused by workplace exposure. In this right to sue application, she and her husband claimed that they were entitled to sue her schedule 1 employer for negligence for allegedly failing to take steps to prevent workplace exposure. It was held that the plaintiffs had no proper claim in tort. In a request for reconsideration in 2005, it was held that a civil suit in contract for wrongful dismissal could be brought.

On the other hand, workers compensation was awarded to a personal care worker who got salmonella poisoning from food served at her workplace cafeteria and to the widow of a firefighter who died of meningitis four days after contact with a person with open sores.

**Rodriguez et Maison Mère des soeurs des saints noms de Jésus Marie**, DTE 89T-521 (April 10, 1989) (Commission d'appel en matière de lésions professionnelles)

A personal care worker providing assistance to nuns living at the Motherhouse missed a month's work after getting salmonella poisoning from meat she ate at the Motherhouse cafeteria. She had only a short lunch break and if she did not bring her own food she had no option but to eat there. Over 30 nuns were also ill with the same salmonella strain. Her claim for workers compensation was originally denied and then successful on appeal, the tribunal finding that her illness was work related.

**Workers' Compensation Claim No. 21327880** (November 19, 2002) (Ontario Workplace Safety and Insurance Board)

A firefighter died of contagious meningitis within four days of being exposed to a person with open sores and bodily fluid secretions. Although there was no confirmation that the person had meningitis, the firefighter's exposure to the person was "medically compatible" with it and "no other significant exposure could be identified". The spouse's claim was allowed.

## Discrimination and the duty to accommodate

### Key point

Human rights legislation protects workers from discrimination on many grounds, including gender, disability and, in most jurisdictions, family status. When a workplace policy or rule has a negative effect on an employee and the policy or rule is linked to a prohibited ground of discrimination, the employer has a duty to accommodate the employee up to the point of undue hardship. What constitutes an undue hardship for an employer varies by jurisdiction and circumstances.

Under some employment standards legislation, employees may be able to take leave, with or without pay, to take care of an ill family member or to be at home with children whose day care or school has been temporarily closed due to an illness outbreak. Compassionate care leave may also be covered in a collective agreement, by employment standards legislation and under Canada's *Employment Insurance Act*.

### Legal context

The federal *Employment Insurance Act*, SC 1996, c. 23, provides compassionate care benefits to eligible employees who need to take time off work to care for an ill family member who is expected to live less than six months. The Act provides for six weeks of employment insurance benefits over a 26-week period. The definition of “family member” is broad and covers parents and children of the claimant and of the claimant's spouse or common-law partner as well as uncles and aunts and close friends who consider the claimant a family member. Family members may also share the benefits. [Click here for more information](#) about the Act's compassionate care benefits.

“Family status” is a prohibited ground of discrimination in human rights legislation in most Canadian jurisdictions.

For example:

*Human Rights Act*, RSPEI 1988, c. H-12, s. 1(d)

(d) “discrimination” means discrimination in relation to age, colour, creed, disability, ethnic or national origin, **family status**, gender expression, gender identity, marital status, political belief, race, religion, sex, sexual orientation, or source of income of any individual or class of individuals; [emphasis added]

Tribunals and courts have found that “family status” includes childcare and (in some jurisdictions) eldercare obligations, and that this ground of discrimination has equal footing with other protected grounds. An employer has a duty to accommodate an employee when these care obligations are substantial obligations that go beyond personal choice. Whether a request arises out of a personal choice or an obligation is a factual determination that requires consideration of the employee's individual situation.

An employer's policy may be discriminatory when it forces an employee to choose between employment and care obligations, and the employer has not accommodated the employee to the point of undue hardship. See, for example, ***Canadian National Railway v. Seeley***, 2014 FCA 111, on an employee's childcare obligations and an out-of-province work assignment. The court held that when the complainant could show that a policy, in this case an unwritten policy, had an adverse effect on her because

of her child care responsibilities she had provided *prima facie* evidence of discrimination based on family status. Furthermore, the court held that the threshold for showing a *prima facie* case of discrimination based on family status is the same as for any other ground of discrimination. “There should be no hierarchies of human rights.” (para 81).

Mainville, JA wrote: ... in order to make out a *prima facie* case where workplace discrimination on the prohibited ground of family status resulting from childcare obligations is alleged, the individual advancing the claim must show:

- (i) that a child is under his or her care and supervision;
- (ii) that the childcare obligation at issue engages the individual's legal responsibility for that child, as opposed to a personal choice;
- (iii) that he or she has made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible; and
- (iv) that the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation. (para 93)

The duty to accommodate requires a substantive process and a collaborative effort. When there is *prima facie* evidence that the employer's policy or conduct discriminates, whether intentionally or not, against the employee whose personal situation is protected by human rights legislation, the parties need to discuss what arrangements could be made to address the discriminatory impact on the employee.

The employee is expected to look at all options and the employer is expected to be flexible. Unless there is a *bona fide* occupational requirement, i.e. accommodating the employee would cause the employer undue hardship (for example unreasonably high cost) or give rise to health and safety concerns, the employer has a duty to accommodate. See, for example, ***Devaney v. ZRV Holdings Limited***, 2012 HRTO 1590, where the tribunal found that an employer failed to accommodate an architect's eldercare responsibilities and discriminated against him when he was fired for frequent absences from the office during regular business hours. The quality of his work was not in dispute. The failure to discuss possible accommodations was held against the employer.

In the context of widespread illness, employers may need to be ready to make accommodation arrangements for a number of employees who have child or eldercare obligations, and to consider how to manage multiple requests within a tight timeframe. It is possible that having to respond to a high volume of urgent requests might be found to cause undue hardship to the employer.

Given that jurisprudence relating to family status and child and eldercare is relatively recent, collective agreements may not yet reflect it. It is therefore important to note the Supreme Court of Canada decision in ***Parry Sound (District) Social Services Administration Board v. OPSEU, local 324***, 2003 SCC 42. It clarifies that collective agreements are not to be interpreted in isolation and will be applied in a manner consistent with relevant legislation, such as employment standards laws and human rights codes.

## Cases

### ***Canada (Attorney General) v. Johnstone***, 2014 FCA 110 (Federal Court of Appeal)

The employee was a border services officer who worked rotating shifts. She applied to work full time on fixed day shifts to accommodate her childcare schedule. She was refused on the basis that the employer only offered fixed day shifts to part time employees. Part time employees were not entitled to the same benefits as full time employees. The Canadian Human Rights Tribunal found that the employer had discriminated against the employee on the basis of family status and had not accommodated the employee. The employer applied to the court to contest whether the term “family status” in the *Canadian Human Rights Act* includes parental childcare obligations. The court and then the court of appeal found that it did.

### ***Communications, Energy, and Paperworkers Union, Local 70 7 v. SMS Equipment Inc.***, 2013 CanLII 71716 (Alberta Labour Arbitration)

The grievor was a single mother of two children employed as a welder. Her employer required her to work rotating day and night shifts which she was unable to do because of her child care responsibilities. She complained that the policy discriminated against her because of her family status contrary to the *Alberta Human Rights Act*. The arbitrator agreed that the term “family status” does include childcare responsibilities and held that the grievor had proved a *prima facie* case of discrimination and that the employer had not established that the policy was a *bona fide* occupational requirement. The employer was directed to accommodate the grievor.

### ***Hicks v. Human Resources and Skills Development Canada***, 2013 CHRT 20 (Canadian Human Rights Tribunal)

The applicant worked for the federal public service and was relocated from Sydney, Nova Scotia to Ottawa. He applied for financial assistance under a Treasury Board Relocation Directive for a temporary housing allowance to allow his wife to remain in Sydney to care for his mother-in-law who was in a retirement home. It was refused on the ground that the mother-in-law was not a dependent. He claimed discrimination based on his family status. The Canadian Human Rights Tribunal found that the employer had discriminated against the applicant by not taking his family situation into account when they denied his claim. It ordered reimbursement for his claim under the Relocation Directive, as well as compensation for pain and suffering and compensation for the employer engaging in a discriminatory practice willfully or recklessly.

### ***Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)***, 2008 SCC 43, [2008] 2 S.C.R. 561

Over a seven year period the employee was absent from work for 960 days due to numerous physical and psychiatric conditions (including tendinitis, epicondylitis, bursitis, hyperthyroidism, hypertension and depression). She was ultimately dismissed because of absenteeism and claimed the dismissal was unjustified because her condition could have been accommodated by the employer. The court recognized that an employer has a duty to accommodate an employee by arranging the workplace in such a way that enables an employee to do their job, but held that duty ends “where the employee is no longer able to fulfill the basic obligations associated with the employment relationship for the foreseeable future.”

***Health Sciences Assoc. of B.C. v. Campbell River and North Island Transition Society***, 2004 BCCA 260

The employee was a part time worker at a transition house. Her regular hours of 8:30 am to 3:00 pm allowed her to provide after school care for her 13 year old son who had severe behavioural and psychiatric difficulties. The employer changed her regular hours to noon to 6:00 pm in order to provide care to additional youths. She tried to work the new shift but ended up taking disability leave because of stress. She claimed the employer had discriminated against her based on her family status. The Court of Appeal considered the meaning and scope of the term 'family status' and said "a *prima facie* case of discrimination is made out when a change in a term or condition of employment imposed by an employer results in a serious interference with a substantial parental or other family duty or obligation of the employee". The court found that caring for her son was a substantial parental obligation for the employee, so a *prima facie* case of discrimination had been proved. It sent the case back to the arbitrator to resolve the matter of accommodation.

**Resources**

[Duty to Accommodate, Ontario Human Rights Commission, e-learning](#)

[A Guide to Balancing Work and Caregiving Obligations, Collaborative approaches for a supportive and well-performing workplace, Canadian Human Rights Commission](#)

[Accommodation Works! A user-friendly guide to working together on health issues in the workplace, Canadian Human Rights Commission](#)

**Accumulation of seniority and service time while on disability**

An employee who takes leave, for example, because of a fear of exposure to a contagious disease, where a prohibited ground of discrimination under human rights legislation is not at issue, may not acquire seniority rights during that leave. It depends on the applicable employment standards legislation, or the wording of the collective agreement, if there is one. However, the Ontario Court of Appeal held that an employee on unpaid leave due to a disability continues to acquire seniority rights.

***Ontario Nurses' Association v. Orillia Soldiers Memorial Hospital*** (1999), 42 O.R. (3d) 692 (ON CA)

The Ontario Court of Appeal held that a collective agreement which provided that nurses on unpaid leave of absence due to disability did not accumulate seniority did not comply with the *Human Rights Code*. Those provisions in the agreement were struck.



# Pandemic Period

WHO Pandemic Phases



# PANDEMIC PERIOD

*WHO Pandemic Phase 6*

Once a pandemic has been declared by government authorities, there are likely to be government announcements (advisory) and orders (mandatory) made under public health and emergency measures legislation that will have an impact on the workplace.

For example, during the 2009 H1N1 pandemic, public health officials told people who were ill to stay home in quarantine, rather than visit their doctors and risk spreading the disease. Return to work dates were based on the number of symptom-free days rather than a doctor's note. "Safe pregnancy" directives suggested that pregnant teachers and health care workers who were likely to be in contact with people who had H1N1 ask for another workplace assignment.

When a life-threatening illness is spreading quickly through a community, region or the country, balancing employee rights with business interests may shift as what is reasonable during a "business as usual" period may no longer apply.

## Work refusals

During the 2003 SARS crisis, customs officers, ticket agents and flight attendants working out of Pearson International Airport claimed that their workplace put their health at risk. Their claims were denied. So was the claim of government workers working away from the airport.

***Chapman v. Canada (Customs and Revenue Agency)***, [2003] C.L.C.A.O.D. No. 17 (QL) (Occupational Health and Safety Tribunal Canada)

The claimant was a customs officer at Pearson International Airport when the SARS epidemic broke out. He refused to work because he claimed that it would expose him to a danger in the meaning of Part II of the *Canada Labour Code*. The Appeals Officer denied that there was a dangerous situation under Part II because there was no evidence that the potential hazard (in this case a SARS infected passenger) would be likely to arrive at Customs during the shift in which the claimant refused to work.

***Cole v. Air Canada***, [2006] C.L.C.A.O.D. No. 4 (QL) (Occupational Health and Safety Tribunal Canada)

In March 2003 two Air Canada ticket agents refused to work because they believed they were at risk of contracting SARS from passengers. They invoked s. 128(1) of the *Canada Labour Code*. The Appeals Officer held that it was "not reasonable to expect that SARS could cause injury or illness to either employee," so they were not justified in their refusal to work. The Appeals Officer found, though, that Air Canada was in breach of its obligations under the Code because it did not consult with its workplace health and safety committees about SARS.

***Crawford v. Air Canada***, [2004] C.L.C.A.O.D. No. 10 (QL) (Occupational Health and Safety Tribunal Canada)

The applicant was a flight attendant who refused to work during the SARS crisis following the WHO advisory to avoid Toronto. Her claim was denied by the Health and Safety Officer on the ground that a danger did not exist for her. She

appealed the decision, but subsequently withdrew the appeal.

***Caverly and Canada (Human Resources Development)*** [2005], C.L.C.A.O.D. No. 10 (QL) (Appeals Officer under Canada Labour Code)

Two investigation and control officers refused to work at the Toronto East HRDC Centre during the SARS crisis because they were afraid of contact with Asian clients who might come directly from Pearson International Airport and who may have been exposed to SARS. The Appeals Officer held that their refusal to work was not justified because there was “neither an existing nor a potential hazard of contracting SARS” in the circumstances.

In 2009, pregnant and breastfeeding women in Québec whose jobs put them in direct contact with people who may be carriers of the H1N1 virus were entitled, under Québec's occupational health and safety law, to accommodation with a reassignment or a preventive withdrawal from work.

The Québec Director of Public Health sent out several notices in August and September 2009, including one recommending that pregnant school teachers be reassigned during the outbreak. Pregnant teachers were held to be entitled to a preventive withdrawal from their teaching jobs with full pay when no reassignment was possible.

- ***Blackett et Commission scolaire Lester B. Pearson***, 2010 QCCLP 5186, 19 weeks pregnant in September
- ***Strunc et Commission scolaire Lester B. Pearson***, 2010 QCCLP 5184, 12 weeks pregnant at the end of September
- ***Varinsky et Commission scolaire Lester B. Pearson***, 2010 QCCLP 5183, 24 weeks pregnant in September
- ***Pinsonneault et Commission scolaire Lester B. Pearson***, 2010 QCCLP 5180, 21 weeks pregnant in September
- ***Edgar et Commission scolaire Riverside***, 2010 QCCLP 5181, 31 weeks pregnant in September
- ***Laroche et Centre hospitalier Anna Laberge***, #398204-62C-0912 (2011) (Commission des lésions professionnelles)

A hospital emergency department clerk who was 19 weeks pregnant should have been reassigned during an H1N1 outbreak. In spite of her doctor's certificate and the government's safe pregnancy recommendations during the outbreak (“Pour une maternité sans danger”) her employer refused her request. She did not work during the H1N1 outbreak, returning to work when separate clinics were set up for people with flu symptoms. The tribunal found that her job had put her in direct contact both with people who had the flu and with objects they had touched and put her health at risk. She was entitled to be paid for the missed weeks of work.

***Tremblay et Serv. Ambul. Portier Itée***, 2010 QCCLP 382

An ambulance attendant was entitled to a preventive withdrawal from work due to the various hazards to which her job exposed her and her breastfeeding child, including the risks of getting the H1N1 virus.

## H1N1: a work-related injury

***Del Papa et Groupe Voyages Visions 2000 inc.***, #398618-71-0912 (2010) (Commission des lésions professionnelles)

The employee worked as a conference organizer and had spent five days at a hotel, without leaving, managing a conference with 40 attendees. The day after the conference ended she felt ill and the day after that she had flu-like symptoms. One of the conference attendees with whom the employee had had personal contact (a 15-minute conversation) had tested positive for H1N1. The tribunal found that the employee had contacted H1N1 through her work and she had a work-related injury.

## Absence from work

Pandemics also change how employers may respond to a work absence. In one case the employer was held to have inappropriately dismissed an employee for absenteeism during the SARS pandemic. In another, a father should have received special leave with pay when he stayed home to care for his child whom he believed had H1N1.

***St. Joseph's General Hospital v. Ontario Nurses' Assn. (Schryer Grievance)***, [2006] O.L.A.A. No. 99 (QL), 84 C.L.A.S. 214 (Ontario Labour Arbitration)

The grievor was a nurse at St. Joseph's Hospital. The employer discharged her for alleged innocent absenteeism. The employee had been warned that her absences did not meet the hospital's attendance standard. The arbitrator held that the attendance standard was not reasonable once the Ministry SARS Directives regarding mandatory work absences came into effect. The employee's absences should properly be counted as sick days and her termination was without just cause.

***Canada Post Corp. v. Canadian Union of Postal Workers (Tucker Grievance)***, [2010] C.L.A.D. No. 17 (QL) (Canada Labour Arbitration)

The grievor was a letter carrier who missed work to care for his daughter who was suspected of having H1N1 virus. He sought special leave with pay, but was denied because the employer said his daughter's suspected illness did not prevent him from reporting for duty. The grievance was sustained and special leave allowed despite the fact that the daughter did not actually have H1N1 virus. The arbitrator considered relevant government health directives to avoid contact in suspected H1N1 cases and the high level of public concern over the rapid spread of illness.

Some unionized employees who were told to stay away from work for seven days if they had flu-like symptoms during the 2009 H1N1 outbreak were entitled to salary with benefits and did not have to use their sick leave.

***Syndicat de l'Enseignement de la Région de la Mitis et La Commission scolaire des Monts-et-Marées*** DTE 2012T-208 (January 20, 2012) (Tribunal d'arbitrage)

The tribunal found that public health directives, which were communicated to employees by their employer, told people to stay home for seven days when they had flu-like symptoms during the H1N1 outbreak. The collective agreement for employees of the school board covered quarantine situations. The tribunal held that a school did not have to be closed for the quarantine sections to apply. An employee was in quarantine when at home during the seven days. Employees

were entitled to salary and benefits, and not required to take sick leave under the terms of the collective agreement.

## Doctors' notes

During a pandemic, different rules may apply for a return to work. In one case, the lack of a doctor's note for a work absence was acceptable as people who were ill had been asked not to go to their doctor's office. In another, the employer required a doctor's note because the employee wanted to return to work before the symptom-free period set by public health officials had passed.

***Syndicat des cols bleus regroupés de Montréal section locale 301 et Ville de Montréal, (Frédéric Ledoux)*** DTE 2010T-592

A blue collar worker was laid off and told that a recall would be several weeks away. He was called back to work much sooner but did not return the phone calls because he was in bed for a week with H1N1. The Health and Social Services Department had asked ill people to stay home and not go to their doctor's office. The employer fired him for not having a medical certificate and not returning the recall-to-work calls. The tribunal held that the employer should have checked into why the employee had not returned the calls and should not have fired him. He was given his job back with a clean file (no work refusal).

***Casino de Lac-Leamy et Syndicat des croupiers du Casino du Lac-Leamy (Gilliaume Ouellet)*** DTE 2010T-280 (Tribunal d'arbitrage)

An employee could not finish his shift because he was running a fever. Two days later he was better. He asked to return to work but his employer said he would have to wait seven days, unless he had a note from his doctor saying he was able to return to work earlier. The workplace was following government recommendations to ask people with flu-like symptoms to stay home for seven days, during the contagious period, and not require a doctor's note in those situations. The employee and his union claimed the employer should pay for the time away from work, and it should not come out of sick leave. According to the collective agreement, unused sick leave could be cashed in at the end of the year. The tribunal found that the employer was following the government's recommendations and doing what it could to prevent the spread of the flu. Asking for a doctor's note for an early return was reasonable in the circumstances.

## Employer's duty to provide protective equipment

***Hastings and Prince Edward Counties Health Unit***, [2009] OOHSA No. 183 (QL) (Ontario Occupational Health and Safety Adjudication)

The employer sought a suspension of orders made by a Ministry of Labour health and safety inspector. The orders related to health care workers administering H1N1 vaccines and required provision of respirators and eye protection. The Board considered the criteria in ***RJ Dungey & Sons Ltd v. Ontario (Labour)***, 1999 CanLII 19955 (ON LRB), where Ministry Health and Safety Orders would not be rescinded unless three factors were considered:

- “(i) whether the suspension of the order would endanger worker safety,
- (ii) the degree of prejudice to the employer, and
- (iii) whether there is a strong *prima facie* case for a successful appeal of the order”

The Board held that because the workers would be nominally safer with the equipment, and the prejudice to the employer was minimal, the Orders would not be suspended.

## Employer's interest in knowing about other employment

Generally, privacy rules may restrict an employer's right to ask about other jobs an employee might have. However, concerns about bringing disease from one health facility to another during a pandemic allowed an employer to add the following clause to a collective agreement with health care employees:

***Sunnybrook Health Sciences Centre v. Service Employees International Union, Local 1 Canada***, 2011 CanLII 37464

An Ontario arbitration included the following term regarding pandemic planning in the collective agreement:

"16. *Pandemic Planning*

NEW

19.03 Pandemic Planning

In the event there are reasonable indications of the emergence of a pandemic any employee working at more than one health care facility will, upon the request of the hospital, provide information of such employment to the hospital. No consequence will flow from such disclosure, other than as strictly necessary to prevent the spread of infection."

## Right to compensation – health care workers and SARS

The Ontario Court of Appeal denied a claim for damages by nurses who contracted SARS and their families for damages, finding the Ontario government had no private law duty to them.

***Abarquez v. Ontario***, 2009 95 O.R. (3d) 414; 310 D.L.R. (4th) 726; 75 C.C.E.L. (3d) 159; 189 C.R.R. (2d) 131; 252 O.A.C. 268 (ON CA)

Nurses who contracted SARS and their families sued Ontario for damages in negligence and for a *Charter* breach. The Ontario Court of Appeal denied the negligence claim because Ontario was not a "supervisor" of the nurses under the *Occupational Health and Safety Act* and owed no private law duty to them, despite Ontario's detailed and mandatory directives to front-line workers during the SARS crisis. The *Charter* claim failed because there was no denial of the principles of fundamental justice.

***Sunnybrook and Women's College Health Sciences Centre***, [2004] O.L.R.D. No 4234 (QL)

This case concerned unilateral compensation and reimbursement by the employer hospitals to nurses involved in the SARS crisis. It was found that the hospitals had violated the *Ontario Labour Relations Act*. The respondent hospitals were ordered to cease from dealing directly with the nurses, to deal directly with the Ontario Nurses' Association, and not to negotiate or extend extra compensation to members directly.

## Missed court date, accommodation assignment due to H1N1

Being in bed with H1N1 excused a man from missing his court date.

**Projet Cube, s.e.c.c. c. Khawam**, 2010 QCQC 1513

Khawam sought to overturn a judgment against him, ordering him to pay \$6,600 for architect's plans. He had H1N1 when the case went to court and could not attend. The court accepted that he was not able to go to court because of his illness but, after considering the evidence, came to the same conclusion and ordered him to pay \$6,600 and court costs of \$155.

An employee on leave for a work-related injury missed the first week of an accommodation assignment because she was caring for her child at home sick with H1N1. The arbitrator held it was correct to pay her during that week. **CPE Abinodjio-Miguam et Lacroix**, 2011 QCCLP 567.

## Privacy considerations

### Key point

During a pandemic, public health directives aimed at minimizing health risks and protecting the population generally may result in a reduction of personal privacy rights. It will be important for a business or organization to keep a record of directives to explain any release of personal information, and to keep everyone informed about the change of approach due to the pandemic emergency.

### Legal context

All jurisdictions have privacy legislation that applies to access to information and privacy protection in government and the public sector. For the private sector, a patchwork of privacy legislation is in place across Canada, covering employee personal information in some jurisdictions but not others.

The federal *Personal Information Protection and Electronic Documents Act* (PIPEDA), SC 2000, c. 5 sets out privacy standards for federal works, undertakings or businesses, such as banks, railways, airlines, inter-provincial trucking, and telecommunications. It also applies to private enterprises across Canada engaged in commercial activities, except in provinces that have adopted substantially similar privacy legislation, at this time Québec, British Columbia and Alberta.

Ontario, New Brunswick and Newfoundland and Labrador have adopted substantially similar privacy legislation for personal health information held by health information custodians under health sector privacy laws in those provinces. Saskatchewan, Manitoba and Nova Scotia have privacy legislation for personal health information that has not been deemed substantially similar to PIPEDA.

PIPEDA also applies to personal data that flows across provincial or national borders, in the course of commercial transactions involving organizations subject to PIPEDA or to substantially similar legislation.

Even when there is no specific applicable legislation there may be a “reasonable expectation of privacy” that should be respected to avoid litigation.

It is necessary to consider which law or laws may apply to a particular employer – in some situations an enterprise may need to comply with more than one privacy law – and to review definitions in the legislation carefully.

For example:

*PIPEDA*, SC 2000, c 5, s. 2(i)

“organization” includes an association, a partnership, a person and a trade union

*Personal Information Protection Act* (PIPA), SA 2003, c P-6.5, s. 1(j)

«organization» includes:

- (i) a corporation,
- (ii) an unincorporated association,
- (iii) a trade union as defined in the Labour Relations Code,
- (iv) a partnership as defined in the Partnership Act, and
- (v) an individual acting in a commercial capacity,

but does not include an individual acting in a personal or domestic capacity

As part of pandemic planning, an employer might be interested in knowing how many employees could be expected to have child or eldercare responsibilities; who might be particularly at risk because of an existing pre-condition, such as asthma; who has already had a flu shot; who might be equipped to work at home; and even who is pregnant or breast-feeding in jurisdictions where specific rules allow these women to withdraw from at risk work (see the *Canada Labour Code*, RSC 1985, c. L-2, and Québec's *Act respecting Occupational health and Safety*, CQLR, c. S-2.1) . However, collecting this type of information from employees could run afoul of some privacy laws.

In the publication *Privacy in the Time of a Pandemic: Guidance for Organizations*, the Privacy Commissioners of Canada, Alberta and BC recommend using the “least privacy-intrusive way, and collect[ing] the minimum amount of personal information. For example, instead of asking employees if they have children or elderly parents, an employer might distribute a survey asking employees if they may need to make alternative work arrangements to care for children or elderly parents in the event of a pandemic emergency.” Instead of asking employees if they have had a flu shot, the Commissioner suggests circulating information about times and places where the shot is available.

Once a pandemic is declared, the Privacy Commissioners note that “the powers to collect, use and disclose personal information to protect the public health may be very broad . . . orders issued under public health legislation could require the collection, use and disclosure of certain personal information relating to employees and customers. Private sector privacy legislation would not impede the work of public health officials in this regard.”

While under normal circumstances an employer would not be able to ask an employee for specific information about a diagnosis and the exact nature of an illness, during a pandemic this might be acceptable information to request and might even need to be reported to public health officials.

Public health concerns could trump privacy considerations once there is a risk of a significant level of illness from a highly contagious disease in a community, and specific orders or directives from public health authorities.

In a pandemic environment with the heightened sense of fear and risk, employers may need to remind employees that health information is a personal and private matter to prevent inappropriate breaches of confidentiality.

## Resources

[Canadian Privacy Laws map, CPA Canada \(formerly Canadian Institute of Chartered Accountants\)](#)

[Questions and Answers regarding the application of PIPEDA, Alberta and British Columbia's \*Personal Information Protection Acts\*, Office of the Privacy Commission of Canada](#)

[Privacy in the Time of a Pandemic: Guidance for Organizations](#)

[Privacy in the Time of a Pandemic: Fact Sheet for Employees](#)



# **Workplace Pandemic Plans**



# WORKPLACE PANDEMIC PLANS

## Key point

Being prepared may enable an enterprise to keep operating in the case of widespread illness and is likely to support positive employer/employee relationships during and after a pandemic. It is a good risk management strategy to have an up-to-date pandemic plan. Once a plan is in place, it should be checked annually to make sure that names and contact information are accurate. Some employers may wish to practice parts of their plan to ensure it works as desired.

## Legal context

While it is prudent for every employer to have a pandemic plan, emergency measures and public health legislation may require plans for workplaces in the health care, public transportation, and related sectors. For example, long-term care facilities, hospitals, seniors' residences, group homes and other residential facilities may be expected to have pandemic plans.

For example:

To promote pandemic planning, the Public Health Agency of Canada and Public Safety and Emergency Preparedness Canada have developed the [Canadian Pandemic Influenza Plan for the Health Sector](#), in consultation with provincial and territorial governments.

In addition, the federal, provincial and territorial governments have agreed to [An Emergency Management Framework for Canada](#) "to enable and inspire all emergency management partners in Canada to work in better collaboration to keep Canadians safe". The Framework takes an "all-hazards" approach, and recognizes that most emergencies are locally or regionally based, and that all levels of government need to cooperate "to save lives, preserve the environment and protect property and the economy."

## Elements to cover in a pandemic plan

Imagine that one out of four employees are ill with a contagious disease and not able to work and another one out of four employees are at home caring for an ill relative or a child whose day care or school has been shut down. Imagine that public health officials have asked people to stay home if ill and not to visit their family doctors. Imagine that public health officials have shut down the public transit system to limit transmission of the disease.

Now imagine how a business or service could prepare for these possibilities in order to protect employee health and safety, maintain an operational workforce, minimize business losses or service shortfalls, promote positive working relationships, and avoid charges for failing to follow public health and other emergency directives. A pandemic plan is a step in the right direction.

Main elements in a workplace pandemic plan:

### Communications planning

To staff

- Whom should employees call when they cannot come to work? Who is monitoring the list to make sure the contact people are not home sick as well?
- How is the business or service going to remain operational? Could employees work from home? Will the workplace provide secure internet connections, additional phones, etc.?
- Which positions are identified for accommodations? (e.g. pregnant or breast-feeding women could be reassigned if regular work requires contact with the public)
- How can the employer get in touch with the employee (privacy considerations)?
- How will supervisors respond to a work refusal because of the risks from contact with ill people?
- When may the employer tell an employee suspected of being ill or carrying the virus to go home and to stay there for a specified period of time?
- When may an employee who has been ill return to work?
- What proof of illness will be required to access sick leave benefits?
- How will employees be compensated? (sick leave, leave without pay, etc.)
- How will absent employees find out what is going on, when they may return to work, etc.?
- Who is authorized to make decisions on behalf of the employer?

To clients or customers

- What protective measures can be put in place? (hand sanitizers, masks, increased cleaning procedures, limited face-to-face meetings, working from home, etc.)
- How is the risk of transmitting disease being reduced?
- What is being done to continue to provide service?
- How will they find out what the business or service is doing during the pandemic?
- Who is responsible for maintaining up-to-date communications with clients or customers?

### Risk management

- What strategies can be put in place to reduce the spread of disease in the workplace? (e.g. to promote good hygiene, increase cleaning procedures, reduce travel, cutback on meetings, offer on-site flu shot clinic, promote employee best hygiene practices at home)
- What is the process for identifying and managing employees who come to work ill or become ill at work? (e.g. screening, disinfecting work station, privacy considerations, morale)
- What are the critical operational areas and how can these areas be kept running with reduced staff?
- What functions can be done off-site? (Consider confidentiality and privacy issues, logistics – laptops, IT support, etc.)

- How could employees be accommodated? (e.g. adjusted work hours, other work location, other tasks, graduated return to work for those who were very ill)
- What role does the health and safety committee, if one is appropriate or required by law, have in pandemic planning and during a pandemic?
- How will work absences, accommodation arrangements, alternate work arrangements, etc. be documented?
- How will costs of the pandemic be documented in case there is access to a disaster assistance program?

### **Recovery**

- What re-entry plans are in place for employees returning to work?
- Will there be access to grief counselling (given the possibility of deaths, staff on long-term disability)?

### **Resources**

For links to provincial pandemic plans, see the [Public Health Agency of Canada Pandemic Plans in Canada](#)

### **Sample plans**

[Peel Long Term Care Pandemic Influenza Plan](#)

[Innovation Place Pandemic Preparedness Plan \(Saskatchewan, 2009\)](#)

### **Other resources**

[Business Continuity Plan, Infectious Diseases, Canadian Centre for Occupational Health and Safety](#)

[Guide to Developing a Workplace Health Plan for an Influenza Pandemic \(Ontario, 2006\)](#)

[Business Pandemic Influenza Planning Checklist \(United States, 2005\)](#)

[Pandemic Influenza Business Checklist \(Alberta, 2009\)](#)

# LIST OF STATUTES BY JURISDICTION

## Canada

Canada Labour Code .....	RSC 1985, c. L-2
Canada Occupational Health and Safety Regulations.....	SOR/86-304
Canadian Charter of Rights and Freedoms .....	Part 1 of the <i>Constitutional Act, 1982</i> , being schedule B to the Canada Act 1982 (UK), 1982, c. 11
Canadian Human Rights Act.....	RSC 1985, c. H-6
Criminal Code of Canada .....	RSC, 1985, c. C-46, S. 217.1
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*Pandemic – Government, Employee Relationship*

In a pandemic, the Government is not an employer who owes a duty of care to employees, despite Government Directives which mandate employee actions

**Blackett et Commission scolaire Lester B. Pearson**, 2010 QCCLP 5186

*Pandemic – Work Refusal – Vulnerable Employees entitled to Accommodation*

Employee who was 19 weeks pregnant was entitled to accommodation during 2009 H1N1 outbreak.

**Canada (Attorney General) v. Johnstone**, 2014 FCA 110 (Federal Court of Appeal)

*Employer's Prohibition Against Family Status Discrimination and Duty to Accommodate*

The term “family status” in the Canadian Human Rights Act includes parental childcare obligations and thus, an employee was discriminated against when her employer did not accommodate her childcare schedule.

**Canada Post Corp. v. Canadian Union of Postal Workers**, [2010] C.L.A.D. No. 17 (QL) (Canada Labour Arbitration)

*Pandemic – Absenteeism to Care for Family Members*

Employee was entitled to special leave with pay to care for daughter who was suspected of having H1N1 virus.

**Canadian National Railway v. Seeley**, 2014 FCA 111

*Childcare obligations – Re-location policy – Duty to accommodate*

Relocation assignment policy had adverse effect on employee with childcare obligations. She had a right to accommodation due to family status.

**Carewest and Alberta Union of Provincial Employees** (2001), 104 L.A.C. (4th) 240 (Alberta Labour Arbitration)

*Management Right to Require Vaccination*

Arbitration upheld employer's right to require vaccination as a condition for employment.

**Casino de Lac-Leamy et Syndicat des croupiers du Casino du Lac-Leamy (Gilliaume Ouellet)**, DTE 2010T-280

(Tribunal d'arbitrage)

*Pandemic – Doctors' Notes*

Employer was justified in asking an employee to provide a doctor's note when the employee wanted to return to work before the symptom-free period set by public health officials had passed.

**Caverly and Canada (Human Resources Development),** [2005] C.L.C.A.O.D. No. 10 (QL) (Occupational Health and Safety Tribunal Canada)

*Pandemic – Work Refusal – Health and Safety Exception*

During the SARS pandemic, work refusal by two investigation and control officers at the Toronto East HRDC Centre was not justified because there was “neither an existing nor a potential hazard of contracting SARS” in the circumstances.

**Centre d’accueil Ste. Domitille et Union des employés de service, local 298,** April 21, 1989 (Tribunal d’arbitrage)

*Medical Examinations – Employees’ Right to Privacy*

Employee (disguised) was on TV show about HIV; employer recognized her and asked her to have a medical examination. Doctor found her fit to work without mentioning her HIV status. Employer asked for another medical examination. She refused and was fired. Employer had no right to ask for a medical to establish her HIV status.

**Centre de santé et de services sociaux de la Montagne et Danis,** (2009) #355915-71-0808 (Commission des lésions professionnelles)

*Flu shot – adverse reaction – no workers compensation*

Although getting a flu shot was promoted at the work place, including through prize draws, a nurse’s adverse reaction to the shot and subsequent lost time from work was not eligible for workers compensation.

**Chapman and Canada (Customs and Revenue Agency),** [2003] C.L.C.A.O.D. No. 17 (QL) (Occupational Health and Safety Tribunal Canada)

*Pandemic – Work Refusal – Health and Safety Exception*

During the SARS pandemic, a Customs Officer’s work refusal was not justified by the health and safety exception in the Canada Labour Code because there was no evidence he would be exposed to a hazard.

**Chinook Health Region v. United Nurses of Alberta, Local 120** (2002), A.G.A.A. No. 88

*Management Right to Require Vaccination*

Labour arbitration upholds hospital policy that requires staff at geriatric facility to have flu shot or Amantadine treatment.

**Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper Ltd,** [2013] 2 S.C.R. 458

*Random drug & alcohol testing – Privacy -- Proportionality*

Random drug and alcohol testing is an invasion of employee privacy when there is no evidence of a safety problem.

**Communications, Energy and Paperworkers Union of Canada, Local 707 v. SMS Equipment Inc.,** 2013 CanLII 71716 (Alberta Labour Arbitration)

*Childcare obligations – Shift work – Family status*

Childcare obligations fall within the human rights code definition of “family status”. Employer did not show that shift work was a bona fide occupation requirement and had a duty to accommodate a single mother with young children.

**Cole v. Air Canada**, [2006] C.L.C.A.O.D. No. 4 (QL) (Occupational Health and Safety Tribunal Canada)

*Pandemic – Work Refusal – Health and Safety Exception*

During the SARS pandemic, two ticket agents' work refusal was not justified by the health and safety exception in the Canada Labour Code because it was not reasonable to conclude that either employee would catch SARS doing their work.

**CPE Abinodjio-Miguam et Lacroix**, 2011 QCCLP 567

*Accommodation assignment missed – H1N1*

An employee who missed the first week of an accommodation assignment to care for her sick child with H1N1 was entitled to pay.

**Crawford and Air Canada**, [2004] C.L.C.A.O.D. No. 10 (QL) (Occupational Health and Safety Tribunal Canada)

*Pandemic – Work Refusal – Health and Safety Exception*

During the SARS pandemic, a flight attendant's work refusal was not justified by the health and safety exception in the Canada Labour Code because she was found not to be in danger of catching SARS.

**CUPE, Local 139 v. North Bay General Hospital**, [2003] O.L.A.A. No. 580

*Management Right to Require Vaccination – Duty to Accommodate Unvaccinated Employee*

Legislation which required paramedic to be vaccinated as a condition of employment overrode collective agreement. Employer did not have duty to accommodate employee.

**Decision No. 2579/07 [Names of Parties not Published]**, [2007] O.W.S.I.A.T.D. No. 3012 (QL), 2007 ONWSIAT 3046 (Ontario Workplace Safety and Insurance Appeals Tribunal)

*Right to Compensation for Workplace Exposure to Illness*

A paramedic was unable to claim for workplace exposure to a contagious disease because he was unable to show any persuasive specific evidence that his illness was work-related.

**Del Papa et Groupe Voyages Visions 2000 inc.**, # 398618-71-0912 (2010), (Commissions des lésions professionnelles)

*Pandemic - Right to Compensation for Workplace Exposure to Illness*

Conference organizer exposed to H1N1 during week-long conference was found to have suffered a work-related injury.

**Devaney v. ZRV Holdings Limited**, 2012 HRTO 1590

*Eldercare responsibilities – Employer duty to accommodate*

Architect fired for frequent absences from office to take care of ill mother. Quality of work not in dispute. Employer had duty to accommodate.

**Douglas Martin and Public Service Alliance of Canada**, 2003 FC 1158

*Workplace danger – Reason to carry firearm*

Risk to unarmed Canada Parks rangers assessed.

**Duval et Centre Gertrude Lafrance & Georges Phaneuf**, (2011) #414764-62A-1007, (Commission des lésions professionnelles)

*Management Right to Require Vaccination – Employee's right to Compensation*

An adverse reaction to the H1N1 vaccine does not entitle employee to workplace compensation if the flu shot is not mandatory.

**Edgar et Commission scolaire Riverside**, 2010 QCCLP 5181

*Pandemic – Work Refusal – Vulnerable Employees entitled to Accommodation*

Employee who was 31 weeks pregnant was entitled to accommodation during 2009 H1N1 outbreak.

**Godon et Ambulances Radisson**, 2011 QCCLP 2863

*Preventive leave – Breast-feeding Paramedic*

During a flu outbreak, a breast-feeding paramedic had a right to accommodation.

**H.M. Trimble & Sons (1993) Ltd. and I.U.O.E., Local 115**, (1994), 42 L.A.C. (4<sup>th</sup>) 313 (Canada Labour Arbitration)

*Work Refusal – Health and Safety Exception*

Work refusal was justified under health and safety exception in Canada Labour Code where truckers' fear of violence was a reasonable one.

**Hastings and Prince Edward Counties Health Unit**, [2009] O.O.H.S.A.D. No. 183 (QL) (Ontario Occupational Health and Safety Adjudication)

*Pandemic – Employer's Duty to Protect Employees from Exposure*

When an employer sought to suspend orders made by a Ministry Health and Safety Inspector requiring protective equipment for health care workers administering H1N1 vaccines, Board held the orders could not be rescinded without considering:

- Whether suspension would endanger worker safety
- Prejudice to employer
- Whether there is a strong *prima facie* case for successful appeal.

**Health Employers Assn. of B.C. v. B.C. Nurses' Union**, (2006), 155 L.A.C. (4<sup>th</sup>) 252 (British Columbia Labour Arbitration)

*Management Right to Require Vaccination*

Employer's policy of requiring hospital workers to be vaccinated against the flu does not violate employees' Charter rights.

**Health Sciences Assoc. of B.C. v. Campbell River and North Island Transition Society**, 2004 BCCA 260

*Childcare obligations – Shift change – Family status*

Employer's required shift change which affected employee's ability to care for special needs child was a failure to accommodate as required by human rights code.

**Hicks v. Human Resources and Skills Development Canada**, 2013 CHRT 20 (Canadian Human Rights Tribunal)

*Employer's Prohibition Against Disability-based Discrimination and Duty to Accommodate – Family Status as a Disability*

The term “family status” in the Canadian Human Rights Act includes elder care obligations and thus, an employee was discriminated against when his employer did not accommodate family obligations.

**Hogue-Burzynski v. Via Rail**, [2006] C.L.C.A.O.D. No. 5 (QL) (Occupational Health and Safety Tribunal Canada)

*Work Refusal – Health and Safety Exception*

Work refusal was not justified under the Health and Safety exception in the Canada Labour Code where an employee was unable to show sufficient danger of catching a Norwalk-like virus in the course of his work.

**Hôpital Maisonneuve-Rosemont c. Commission des lésions professionnelles**, 2013 QCCS 2280, (Superior Court)

*Flu shot – adverse reaction – workers' compensation*

Public health promoted flu shots for hospital workers. Nurse had adverse reaction to shot 15 minutes after receiving it. Lost days from work were eligible for workers' compensation.

**Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)**, 2008 SCC 43, [2008] 2 S.C.R. 561

*Employer's Prohibition Against Disability-based Discrimination and Duty to Accommodate – Limits*

An employer does not have a duty to accommodate an employee who is no longer able to fulfill the basic obligations of his employment.

**Lamontagne et Centre de santé et de service sociaux de la Vieille Capitale**, 2009 QCCLP 158 (Commission des lésions professionnelles)

*Illness outbreak – Right to workers' compensation*

A cleaner became ill after cleaning floors 4 and 11 when illness outbreak was confined to floors 2 and 3. Workers compensation provided.

**Laroche et Centre hospitalier Anna Laberge**, # 398204-62C-0912 (2011) (Commission des lésions professionnelles)

*Pandemic – Work Refusal – Vulnerable Employees entitled to Accommodation*

Employee who was 19 weeks pregnant was entitled to accommodation during H1N1 outbreak.

**Lennox Industries (Canada) Ltd. and U.S.W.A. Local 7235**, [1999] O.L.A.A. No 158 (QL) (Ontario Labour Arbitration)

*Work Refusal – Health and Safety Exception*

Work refusal was not insubordination as it was justified under Occupational Health and Safety legislation. Employee genuinely believes he is in danger.

**Monarch Fine Foods Co. Ltd. and Milk and Bread Drivers, Dairy Employees, Caterers & Allied Employees, Local 647**

(1978), 20 L.A.C. (2d) 419 (Ontario Labour Arbitration)

*Medical Examinations – Employees' Right to Privacy*

The employer was not allowed to require the employee to undergo a medical examination for the purpose of testing the accuracy of the employee's claims where it was not for the purpose of establishing the employee's fitness to work, and where there was no provision allowing for it in the collective agreement.

**Ontario Nurses' Association v. Orillia Soldiers Memorial Hospital**

(1999), 42 O.R. (3d) 692 (ON CA)

*Employer's Prohibition Against Disability-based Discrimination and Duty to Accommodate – Accumulated Seniority as a Protected Right*

Court held that a collective agreement which provided that nurses on unpaid leave of absence due to a disability did not accumulate seniority did not comply with the Human Rights Code.

**Ontario Nurses' Association v. North Bay General Hospital**, [2008] O.L.A.A. No. 669 (QL) (Ontario Labour Arbitration)*Employee's responsibilities during a pandemic - Management right to Require Vaccination Once Illness Breaks Out*

Hospital staff who refused to be vaccinated contrary to recommendation of Medical Officer of Health can be placed on unpaid leave.

**Ontario Public Service Employee's Union v. North Bay General Hospital**, [2006] O.L.A.A. No. 53 (QL) (Ontario Labour Arbitration)*Management Right to Require Vaccination*

An employee can be terminated if she is not inoculated, as the hospital rules required.

**Parry Sound (District) Social Services Administration Board v. OPSEU, local 324**, 2003 SCC 42*Collective agreement – Employment laws – Human Rights laws*

Collective agreements must be interpreted in the context of current employment and human rights laws, not in isolation.

**Pinsonneault et Commission scolaire Lester B. Pearson**, 2010 QCCLP 5180*Pandemic – Work Refusal – Vulnerable Employees entitled to Accommodation*

Employee who was 21 weeks pregnant was entitled to accommodation during 2009 H1N1 outbreak.

**Projet Cube, s.e.c.c. c. Khawam**, 2010 QCQC 1513*Pandemic – Missed Court Appearance Excused*

Court accepted that defendant missed his court appearance because he was in bed with H1N1.

**Reda v. The Toronto Hospital**, [2004] O.W.S.I.A.T.D. No. 2062 (QL), 2004 ONWSIAT 2119; **Reda v. The Toronto Hospital** [2005] O.W.S.I.A.T.D. No. 858, 2005 ONWSIAT 849 (Ontario Workplace Safety and Insurance Appeals Tribunal)

*Right to Compensation for Workplace Exposure to Illness*

An employee has no claim in tort against her employer for illness caused by workplace exposure.

**Re North Bay General Hospital and CUPE, Local 139 (Kotsopoulos Grievance)**, [2003] O.L.A.A. No. 580

*Management Right to Require Vaccination – Employer's Duty to Accommodate Unvaccinated Employee*

Legislation which required paramedic to be vaccinated as a condition of employment overrode collective agreement, and employer did not have a duty to accommodate unvaccinated employee.

**Re School District No. 33 (Chilliwack) and BC Teachers' Federation, 147 L.A.C. (4th) 251**, 2006 CLB 13024, 84 C.L.A.S. 336, [2006] B.C.C.A.A.A. No. 20

*Work Refusal – Employee Required to Take Sick Leave*

Pregnant women in a school board where there was an outbreak of Fifth Disease were entitled to refuse to work, but they were required to use their allowable sick leave.

**RJ Dungey & Sons Ltd v. Ontario (Labour)**, 1999 CanLII 19955 (ON LRB)

*Employer's Duty to Protect Employees – Ministry Orders*

Sets out test for rescinding a Ministry of Labour's health and safety inspector's orders.

**Rodriquez et Maison Mère des soeurs des saints noms de Jésus Marie**, DTE 89T-521 (April 10, 1989) (Commission d'appel en matière de lésions professionnelles)

*Employee ill – workplace lunchroom*

A personal care worker only had 30 minutes for lunch and ate in the workplace cafeteria. She became ill with salmonella poisoning as did the residents who ate there. Her illness was work-related.

**Rouge Valley Health System v. Ontario Nurses' Assn. (Jossul Grievance)**, [2007] O.L.A.A. No. 680 (QL), 92 C.L.A.S. 8 (Ontario Labour Arbitration)

*Forced Absences – Communicable Disease - Entitlement to Benefits*

Following a Chief Medical Officer directive, a retirement home employee was prevented from working at one of her jobs because there were many people sick with a virus at her other job. She was not entitled to sick leave under 1980 Hospital of Ontario Disability Income Plan (HOODIP).

**Sault-St-Louis (Commission scolaire de) et Syndicat des enseignants du Sault St-Louis**, [1987] CALP 474

*Employer's Duty to Prepare for Pandemic*

Employer in a school with high incidence of Hep B virus required to provide employees with the option to be vaccinated.

**St. Joseph's General Hospital v. Ontario Nurses' Assn. (Schryer Grievance)**, [2006] O.L.A.A. No. 99 (QL), 84 C.L.A.S. 214 (Ontario Labour Arbitration)

*Pandemic – Absenteeism*

Arbitrator held that the attendance standard to which the employee was being held was not reasonable once the Ministry SARS Directives regarding mandatory work absences came into effect.

**St. Peter's Health Systems and Canadian Union of Public Employees, Local 778**, (2002), 106 L.A.C. (4<sup>th</sup>) 170 (Ontario Labour Arbitration)

*Management right to Require Vaccination Once Illness Breaks Out*

To require vaccination is to mandate medical treatment, and in the absence of statutory authority or express provision in the collective agreement, this is a violation of an employee's common law s.7 Charter rights.

**Steel Co and USWA Local 1005**, (1973), 4 L.A.C. (2d) 315 (Ontario Labour Arbitration)

*Work Refusal – Health and Safety Exception*

Sets out four part test to determine if a work refusal is justified by employee's fear to his health and safety.

**Strunc et Commission scolaire Lester B. Pearson**, 2010 QCCLP 5184

*Pandemic – Work Refusal – Vulnerable Employees entitled to Accommodation*

Employee who was 12 weeks pregnant was entitled to accommodation during 2009 H1N1 outbreak.

**Sunnybrook and Women's College Health Sciences Centre**, [2004] O.L.R.D. No 4234 (QL) (Ontario Labour Relations Board)

*Pandemic – Compensation for Health Care Workers during SARS outbreak*

Employer was ordered to deal with the Ontario Nurses' Association and not to negotiate or extend extra compensation directly to members who had worked during the SARS crisis.

**Sunnybrook Health Sciences Centre v. Service Employees International Union, Local 1 Canada**, 2011 CanLII 37464 (Ontario Labour Arbitration)

*Pandemic – Privacy - Employee's Duty to Advise Employer of other Employment*

Arbitrated Collective Agreement included a term which requires health care employees to advise employer if they are working at more than one health care facility if there are indications of a pandemic.

**Syndicat de l'Enseignement de la Région de la Mitis et La Commission scolaire des Monts-et-Marées**, DTE 2012T-208 (January 20, 2012) (Tribunal d'arbitrage)

*Quarantine – Pay Entitlement*

During an H1N1 outbreak, public health directives required employees to stay home for seven days when they had symptoms. Collective agreement spoke to quarantine situations. School did not have to be closed for the quarantine provisions to apply. Employees entitled to salary and benefits. Did not have to use sick leave.

**Syndicat des cols bleus regroupés de Montréal section locale 301 et Montréal (Ville de), (Frédéric Ledoux), DTE**

2010T-592 (Tribunal d'arbitrage)

*Pandemic – Doctors' Notes*

The lack of a doctor's note regarding a work absence was acceptable because people who were ill had been asked to stay in their homes and not go to their doctors' offices.

**Syndicat des employés de l'Hôpital de réadaptation (CSD) et Hôpital juif de réadaptation (X), DTE 2005T-879, June 20, 2005 (Tribunal d'arbitrage)**

*Medical Examinations – Employees' Right to Privacy*

HIV-positive employee's doctor found her able to return to work. Employer asked for a second opinion which was given by a doctor at her family doctor's clinic. This was a breach of confidentiality and she could not be fired because there was a possibility she would be ill again.

**Syndicat des professionnelles en soins infirmiers et cardio-respiratoires de Rimouski (FIQ) c. Morin;**

June 8, 2009, 100-17-000847-089 (Soquij AZ-50562125); **Micheline Bernier**, 2008-2519 (Tribunal d'arbitrage)

*Duty to be Vaccinated When Illness Breaks Out; When can an Employer require an Employee to Stay Away from Work?*

An employee can be required to stay home without pay if she refuses to be vaccinated when illness breaks out.

**Tremblay and Treasury Board (Agriculture Canada), [1988] C.P.S.S.R. B. No. 271 (QL) (Canada Public Service Staff Relations Board) )**

*Forced Absences – Communicable Diseases*

When an employee was suspected of having a communicable disease, the employer was entitled to withdraw employee from work, without pay, and require a medical certificate of work before she could return.

**Tremblay et Serv. Ambul. Portier Itée, 2010 QCCLP 382**

*Pandemic – Work Refusal – Vulnerable Employees entitled to Accommodation*

Employee who was breast-feeding her child was entitled to accommodation during H1N1 outbreak.

**United Steelworkers and Lake Ontario Steel Co. Ltd, (1968), 19 L.A.C. 103 (Ontario Labour Arbitration)**

*Work Refusal*

Sets the general rule that unionized workers are expected to "work now grieve later".

**Varinsky et Commission scolaire Lester B. Pearson, 2010 QCCLP 5183**

*Pandemic – Work Refusal – Vulnerable Employees entitled to Accommodation*

Employee who was 24 weeks pregnant was entitled to accommodation during 2009 H1N1 outbreak.

**Verville v. Canada (Correctional Services), 2004 FC 767**

*Workplace danger – Reason to carry handcuffs in correctional setting*

Risk to correctional workers who were not allowed to carry handcuffs with them was assessed.

**Workers Compensation Review Reference #R0092037 (British Columbia),** December 18, 2008*Right to Compensation for Workplace Exposure to Illness*

Sets a two part test for employee to be compensated for contracting contagious disease in the workplace:

- Risk must be one to which the public is not normally exposed
- Nature of employment must itself increase the risk

**Workers' Compensation Claim No. 21327880,** (Ontario Workplace Safety and Insurance Board) (Nov 19, 2002)*Right to Compensation for Workplace Exposure to Illness*

An employee was awarded compensation where his illness was medically compatible with workplace exposure, and no other significant exposure could be identified.

# RESOURCES

Privacy in the Time of a Pandemic: Guidance for Organizations

World Health Organization influenza update

FluWatch (Canada)

Public Health Network – contact information for Medical Officers or Health

Health Canada, Pandemic preparedness

Guide to Developing a Workplace Health Plan for an Influenza Pandemic (Ontario, 2006)

Business Pandemic Influenza Planning Checklist (United States, 2005)

Individuals and Families Preparedness Checklist (Alberta, 2009)

Controlling Exposure: Protecting Workers from Infectious Diseases, WorkSafe BC,

Duty to Accommodate, Ontario Human Rights Commission, e-learning

A Guide to Balancing Work and Caregiving Obligations, Collaborative approaches for a supportive and well-performing workplace, Canadian Human Rights Commission

Accommodation Works! A user-friendly guide to working together on health issues in the workplace, Canadian Human Rights Commission

# ENDNOTES

<sup>1</sup> SARS in Canada: Anatomy of an Outbreak <http://www.phac-aspc.gc.ca/publicat/sars-sras/naylor/2-eng.php> accessed 23 October 2014.

<sup>2</sup> Current WHO phase of pandemic alert for Pandemic (H1N1) 2009, <http://www.who.int/csr/disease/swineflu/phase/en/> accessed on 23 October 2014.

<sup>3</sup> Bill C-45 – Overview, Canadian Centre for Occupational Health and Safety, <http://www.ccohs.ca/oshanswers/legisl/billc45.html> accessed on 23 October 2014.

<sup>4</sup> *Mandatory flu vaccine for health care workers to protect patients*, CMAJ, 29 October 2012, [http://www.cmaj.ca/site/misc/pr/29oct12\\_pr.xhtml](http://www.cmaj.ca/site/misc/pr/29oct12_pr.xhtml) accessed on 23 October 2014.

<sup>5</sup> *We need a better flu vaccine before considering mandatory vaccination of health care workers*, CMAJ, 25 March 2013, [http://www.cmaj.ca/site/misc/pr/25mar13\\_pr.xhtml](http://www.cmaj.ca/site/misc/pr/25mar13_pr.xhtml) accessed on 23 October 2014.

<sup>6</sup> Québec's compensation for victims of vaccination program, [http://www.msss.gouv.qc.ca/sujets/santepub/vaccination/index.php?indemnisation\\_en](http://www.msss.gouv.qc.ca/sujets/santepub/vaccination/index.php?indemnisation_en) accessed on 23 October 2014.

