KOSKIE MINSKY

JUSTICE MATTERS

MEMORANDUM

DATE: March 25, 2020

FROM: Koskie Minsky LLP Labour Department

SUBJECT: COVID-19: Employment-Related FAQ's for Trade Unions and Their Members[1]

This document is intended to provide general information during the COVID-19 pandemic and should not be construed as legal advice. The impact of the COVID-19 pandemic on unions and workers —both in terms of the public health crisis itself and the regulatory response to it—is changing rapidly and we will provide updated information as it becomes available.

For any questions arising from the information contained herein or relating to specific circumstances, please contact a lawyer in Koskie Minsky's labour department: https://bit.ly/3ba36u8.

FREQUENTLY ASKED QUESTIONS

I. THE CANADA EMERGENCY RESPONSE BENEFIT

A. What is it?

B. Who is eligible?

II. EMPLOYER RIGHTS AND ENTITLEMENTS

A. Can businesses shut down and/or cease operations because of COVID-19?

B. Can an employer refuse to let an employee work if they have been diagnosed with COVID-19, have been in close contact with someone diagnosed with COVID-19, or are returning from any international travel?

C. Do employers have a right to medical information from employees with symptoms of COVID-19 or to travel information from employees who have travelled outside of Canada?

III. RIGHTS OF EMPLOYEES WHO HAVE BEEN DIAGNOSED WITH COVID-19, HAVE SYMPTOMS OF COVID-19 OR ARE ENGAGING IN A PUBLIC HEALTH AUTHORITY DIRECTED SELF-ISOLATION AND/OR QUARANTINE

A. Are they entitled to hold themselves out from work?

[1] Occupational health and safety, human rights, and employment standards legislation and principles referred to in this memo apply to provincially-regulated employees in Ontario. For any information regarding federally-regulated employees, please contact us for further information.

I. THE CANADA EMERGENCY RESPONSE BENEFIT

A. What is it?

On March 24, 2020, the federal government introduced Bill C-13, which provides for the creation of a new Canada Emergency Response Benefit ("CERB"), which combines the "Emergency Care Benefit" and the "Emergency Support Benefit" that the government had previously announced.

The CERB, will provide a benefit of up to $2000 per month for up to 4 months (16 weeks) to workers who have lost their income as a result of the COVID-19 pandemic and

- Are 15 years old;
- Are a resident of Canada;
- Received a total income of at least $5,000 from employment, self-employment or EI benefits in the 12 months prior to making an application;
- Stopped working involuntarily because of COVID-19;

- Will not work for at least 14 consecutive days during the 4-week period for which they are applying; and
- Do not receive income from employment or self-employment, EI or any other income during the period for which they are applying.

The CERB will be paid every four weeks and be available from March 15, 2020 until October 3, 2020.

The portal allowing workers to apply for the CERB will available online in early April. Workers will receive their CERB payments within 10 days of applying.

Bill C-13 was introduced in the House of Commons on March 24, 2020 and is currently making its way through the legislative process. We expect that it will pass shortly.

A copy of Bill C-13 is available here: https://parl.ca/DocumentViewer/en/10711241

A copy of the March 25, 2020 news release regarding the CERB is available here: https://www.canada.ca/en/department-finance/news/2020/03/introduces-canada-emergency-response-benefit-to-help-workers-and-businesses.html

B. Who is eligible?

If they meet the above criteria, the following individuals will be eligible to receive the CERB:

- Employees who have been diagnosed with COVID-19 or have symptoms of COVID-19;
- Employees who are engaging in a public health authority directed self-isolation and/or quarantine
- Employees who must take care of a family member with COVID-19 or are affected by school and/or daycare closures because of COVID-19; and
- Employees who are healthy but out of work as a result of a layoff, slow-down, or shutdown related to COVID-19.

Contract workers, self-employed individuals, and those who are not otherwise eligible for EI benefits will also be eligible for the CERB.

All Canadians who have ceased working due to COVID-19, whether they are EI-eligible or not, will be able to receive the CERB (to ensure they have timely access to the income support they need because the EI system was not designed to process the unprecedented high volume of applications received). Further:

- Workers who already receiving EI regular and sickness benefits as of March 25, 2020 will continue to receive their EI benefits and should not apply for the CERB if and until their EI benefits end before October 3, 2020 and they are unable to return to work due to COVID-19.
- Workers who are still employed, but are not receiving income because of disruptions to their work situation (e.g. temporary layoff) due to COVID-19 also qualify for the CERB;
- Workers who have already applied for EI and whose application has not yet been processed are eligible for and should apply for the CERB; if they are still unemployed after the 16-week period covered by the CERB, they will be able to access EI regular and sickness benefits that time, without having to reapply.

II. EMPLOYER RIGHTS AND ENTITLEMENTS

A. Can businesses shut down and/or cease operations because of COVID-19?

Federal and provincial governments as well as local public health authorities are continually providing direction on what businesses should or must shut down in an effort to reduce the prospects of community spread of the COVID-19 virus. Many businesses have also voluntarily chosen to cease operating. Generally speaking, businesses have a legal obligation and/or lawful right to cease operating.

B. Can an employer refuse to let an employee work if they have been diagnosed with COVID-19, have been in close contact with someone diagnosed with COVID-19, or are returning from any international travel?

An employer can send employees who have been diagnosed with COVID-19, have been in close contact with someone diagnosed with COVID-19, or are returning from any international travel home or ask them not to work if their concerns are reasonable and consistent with medical and public health directives. This is consistent with an employer's obligations to provide a safe workplace under the *Occupational Health and Safety Act* ("*OHSA*").

C. Do employers have a right to medical information from employees with symptoms of COVID-19 or to travel information from employees who have travelled outside of Canada?

Employers have an obligation to provide a safe workplace to all employees pursuant to the *OHSA*. They will generally have a right to request medical or travel information relating to COVID-19 in order to allow it to meet its obligations under the *OHSA* if concerns are reasonable and consistent with medical and public health directives. However, in accordance with general legal principles, medical and travel information should be kept in a file apart from an employee's employment file and the information should only be available to designated person(s) for the purpose of implementing and administering reasonable health and safety policies and/or accommodation plans (where applicable). This information should only be disclosed to others to the extent necessary for the implementation and/or administration of any policies or plans, for example a worker may need to be told about changes to their employment duties or a supervisor may need to be advised as to different instructions to relay to workers.

Employers may also notify employees who have been subject to a credible transmission risk of COVID-19 in the workplace. While employers should not disclose information that might identify the individual who may have caused the COVID-19 transmission risk, the employer may have a right to so in an emergency that threatens the life, health, or security of another individual. Whether an “emergency” exists depends on the facts of each case.

In all of the above circumstances, no more information than is necessary for the purpose of the implementation and/or administration of health and safety policies and/or accommodation plans should be disclosed to any individual within the workplace.

III. RIGHTS OF EMPLOYEES WHO HAVE BEEN DIAGNOSED WITH COVID-19, HAVE SYMPTOMS OF COVID-19 OR ARE ENGAGING IN A PUBLIC HEALTH AUTHORITY DIRECTED SELF-ISOLATION AND/OR QUARANTINE

A. Are they entitled to hold themselves out from work?

Yes. Employers must grant leave to an employee in these circumstances. Employers may not terminate an employee in the circumstances. Specifically, s. 53 of the *Employment Standards Act, 2000* ("*ESA*") provides an employee with the right to reinstatement upon the conclusion of a protected leave due to personal illness or similar circumstances. The *Human Rights Code* prohibits employers from terminating employees because of a disability or perceived disability. Further, employer absenteeism policies should not negatively affect employees in these circumstances.

Further, the Ontario government recently passed Bill 186, which brings significant amendments to the *ESA* by entitling employees to a leave of absence without pay if they cannot perform the duties of his or her position because of various reasons related to COVID-19. Although employers may require employees to provide reasonable evidence to prove their entitlement to the leave, employers cannot require that employees provide a doctor's note as evidence to support their claim.

B. Do they have a right to get paid?

Generally speaking, employers are not legally obligated to pay employees in these circumstances unless there is an operative workplace extended health benefit plan or collective agreement term that entitles the employee to pay.

Unions and employees should review applicable collective agreements and insurance policies to determine an employee's right to be paid while they are unable to work due to illness related to COVID-19 or are not ill but are in self-isolation and/or quarantine further to a public health directive. Often, only employees that are actually ill will be entitled to sick leave, short-term and/or long-term disability benefits under a collective agreement or insurance policy. However, some collective agreements provide for paid "personal emergency" leave, which employees who are unable to work due to a public health directive with an leave may be entitled to if they meet the criteria under the agreement.

C. Do they have a right to receive EI benefits?

If they are not entitled to get paid under an applicable collective agreement or insurance policy, employees may be able to claim Employment Insurance sickness benefits provided they have the requisite insurable work hours. EI sickness benefits provide an employee with up to 55% of their gross earnings up to a maximum of $573 per week for up to a maximum of 15 weeks. The federal government has announced that it will be waiving the otherwise mandatory one-week waiting period for EI sickness benefits for those employees who have been diagnosed with COVID-19 and/or those who are engaging public health authority directed self-isolation and/or quarantine.

Under Bill C-13, which was introduced in the House of Commons on March 24, 2020 and is making its way through the legislative process, the federal government proposes to eliminate the need for a medical certificate in order to qualify for EI sickness benefits until September 30, 2020. We expect that Bill C-13 will pass soon.

Employees that have been diagnosed with COVID-19 or are engaging in a public health authority directed self-isolation and/or quarantine should file a claim for EI sickness benefits immediately. Any delay in filing a claim could give rise to a denial of EI sickness benefits.

For more information on EI sickness benefits, including eligibility requirements, please visit: https://www.canada.ca/en/services/benefits/ei/ei-sickness.html

The federal government has also set up a new dedicated toll-free phone number for employees in quarantine and seeking to waive the one-week EI sickness benefits waiting period:

Telephone: 1-833-381-2725 (toll-free)

D. Are they eligible for the Canada Emergency Response Benefit?

Yes, if they meet the criteria for eligibility. See Part "I", above.

IV. RIGHTS OF EMPLOYEES WHO ARE HEALTHY BUT OUT OF WORK AS A RESULT OF A LAYOFF, SLOW-DOWN, OR SHUTDOWN RELATED TO COVID-19

A. Do these employees have a right to get paid?

Generally speaking, employers are not legally obligated to pay employees in these circumstances unless there is a specific collective agreement term that entitles an employee to pay. Unions should review their operative collective agreements to determine whether there are any terms which may obligate an employer to pay employees some compensation in the event of a lay-off. Particular attention needs to be paid to providing regarding guaranteed hours of work, seniority rights, bumping rights, notice of layoff, termination pay and severance pay.

Provided employees have the requisite insurable work hours, employees may be able to claim Employment Insurance regular benefits once any collective agreement compensation, if any, has been exhausted. EI regular benefits provide an employee with up to 55% of their gross earnings up to a maximum of $573 per week. The length of any EI regular benefit entitlement varies from region to region depending on the unemployment levels in the region where the employee works. Currently, the federal government has not waived the mandatory one-week waiting period for EI regular benefits for those employees who have been laid-off as a result of a COVID-19 slow-down.

Employees that are otherwise healthy and have been laid-off for any reason, including a COVID-19 related workplace slow-down or shortage of work, should file a claim for EI regular benefits immediately. Any delay in filing a claim could give rise to a denial of EI regular benefits.

For more information on EI regular benefits, including eligibility requirements, please visit: https://www.canada.ca/en/services/benefits/ei/ei-regular-benefit.html

B. Are these employees entitled to termination pay and/or severance pay?

A temporary lay-off due to a shortage of work in connection with COVID-19 may eventually amount to a termination of the employment relationship. Generally speaking, a lay-off that lasts longer than 13 consecutive weeks may amount to a termination of the employment relationship.

Unions should review their operative collective agreements to determine whether there are any terms which may obligate an employer to pay employees termination pay and/or severance pay in the event of a temporary or permanent layoff. Generally speaking, employees may also have an entitlement to termination pay and/or possibly severance pay under the *ESA*, which provides that a lay-off of 13 consecutive weeks[2] will amount to a termination of the employment relationship.

An employee's eligibility to termination pay and/or severance pay as a result of a COVID-19-related shortage of work will require a review of a number of factors. For this reason, any such entitlement will have to be determined on a case-by-case basis. Unions should seek legal advice regarding the termination pay and/or severance pay entitlements their members may have in the event any COVID-19 related lay-offs continue for several weeks.

Please note that generally, construction workers are not entitled to termination and/or severance pay.

C. Are they eligible for the Canada Emergency Response Benefit?

Yes, if they meet the criteria for eligibility. See, Part "I", above,

V. RIGHTS OF EMPLOYEES WHO MUST TAKE CARE OF A FAMILY MEMBER WITH COVID-19 OR ARE AFFECTED BY SCHOOL AND/OR DAYCARE CLOSURES BECAUSE OF COVID-19

A. Can these employees stay home with pay?

Not necessarily.

Employees who are caring for a family member with COVID-19 may have been exposed to COVID-19 and should not be attending at work given their exposure and current public heath directives from the provincial and federal governments. They may be entitled to unpaid leave under the *ESA* to allow them to care for a family member with COVID-19 or symptoms of COVID-19, including "emergency leave: declared emergencies and infectious disease emergencies" (recently expanded further to Bill 186), family medical leave (where a family member has a serious medical condition with a significant risk of death), family caregiver leave (to provide care or support to an individual with serious medical condition), and critical illness leave (to provide care or support to a critically ill minor child or adult). The *ESA* also requires that employers reinstate employees at the conclusion of a protected leave.

Employees who are caring for a family member with COVID-19 may have been exposed to COVID-19 and those who are affected by school and/or daycare closures because of COVID-19 have a right to be accommodated under the Ontario *Human Rights Code*, which prohibits differential treatment in employment on the basis of family status. Employers must to accommodate employees who have care-giving responsibilities up to the point of undue hardship, which can include circumstances where a family member is ill or in self-isolation or where their child's school or daycare is closed due to the COVID-19 pandemic. Employees are required to cooperate in the accommodation process, for example, by providing reasonable

[2] Different standards apply for employees who do not have a regular work week.

information as needed to assist with the development of an accommodation plan and accepting reasonable offers of accommodation, even if they are not perfect or their preferred form of accommodation. While the duty to accommodate is on the employer, Unions should be involved in the process of developing an accommodation plan. In the context of the COVID-19 pandemic, reasonable accommodation does not necessarily mean that the employee will be able to work from home. Potential accommodations may also include allowing the employee to work alternate hours or take leaves from work. What constitutes an appropriate accommodation will depend on the circumstances of each case.

B. Are they eligible for the Canada Emergency Response Benefit?

Yes, if they meet the criteria for eligibility. See Part "I", above.

VI. OCCUPATIONAL HEALTH AND SAFETY ISSUES RELATED TO COVID-19

A. Who can refuse to work?

Under Ontario's occupational health and safety legislation, workers have the right to refuse to perform unsafe work under certain situations. This is an exception to the general maxim "obey now, grieve later."

Generally speaking, employees can only engage in a work refusal where they have a reasonable basis to believe that attending work would put them in danger.

B. Who cannot refuse to work?

Certain categories of workers, including hospital workers, police officers and firefighters, are understood to accept certain risks in the course of their employment. (A complete list of those who are in this category can be found at *OHSA* ss. 43(2)). For these workers, there is a narrower set of circumstances that would justify a work refusal, especially where such a refusal would directly endanger the life, health, or safety of another person. In addition, these employees may not engage in a work refusal where the refusal would directly endanger the life, health, or safety of another person. (*OHSA* s. 43(1)(b)).

C. Can an employee engage in a work refusal related to COVID-19?

Generally speaking, the *OHSA* requires employers to take every precaution reasonable in the circumstances to protect the health and safety of its workers. If employees run the risk of becoming infected at work, an employer must provide safeguards appropriate to the circumstances, which could include, among other things, the provision of personal protective equipment ("PPE"), appropriately spaced workstations, or extra cleaning services, as deemed necessary.

Subsection 43(3) of the *OHSA* establishes that workers may engage in a work refusal where they have a "reasonable belief" that attending the workplace would endanger them. Hence, where an employee has a reasonable basis to believe that COVID-19 presents a dangerous workplace condition, he or she may be able to refuse to attend work or perform certain duties. The question of whether a work refusal is reasonable under the circumstances depends upon the facts and context of each situation. In general, the more serious the risk, the greater the chance that a work refusal will be justified. Factors such as whether there is a confirmed case of

COVID-19 in the workplace, whether the employee in question must work in close proximity to others, whether there is adequate sanitation and/or hand washing facilities and the specific vulnerability of the employee in question (principally age and health status), are likely to be relevant.

Where an employee decides to engage in a work refusal, he or she must clearly convey to the employer or a supervisor that the employee is refusing to work and the basis for the refusal. In the event of a work refusal, an employer must engage in an investigation into the concerns giving rise to the refusal and, if appropriate, implement measures to eliminate or reduce any identified workplace dangers. Any such investigation will be based upon the scientific understanding of COVID-19 at the time as well as any specific facts in the individual workplace. Employees are entitled to be free from reprisal when properly exercising a reasonably based work refusal.

A noted above, to justify a work refusal, employees must have a *reasonable* belief that attending work or performing certain duties would put them in danger. It is not necessary that, following an investigation, an actual hazard is found, as long as the employee's belief was reasonable at the time. However, if an employee is found to have engaged in a work refusal that was not based on a reasonable apprehension of danger, the employee could be subjected to lost wages and/or discipline up to and including termination.

It is important to remember that not every health and safety violation justifies a refusal to work, and there are less drastic measures that employees can take, which are discussed below.

D. Does inadequate personal protective equipment (PPE) or procedures justify a work refusal?

In theory, yes. Whether a lack of PPE or other precautions (such as workplace spacing, extra cleaning measures, etc.) could justify a work refusal depends on several factors, including the nature of the hazard, the degree of connection of the requested equipment or procedures to the hazard, the actual risks entailed by the employee's employment, and the nature of the PPE requested. This circumstances in which first responders, hospital employees, and employees enumerated in subsections 43(1) and 43(2) of the *OHSA*, are more restricted and may not include inadequate PPE. In addition, workers whose jobs do not require them to be in close proximity to individuals infected by COVID-19 may not be entitled to PPE, including a face mask.

E. Where an employee engages in a work refusal, can the employer withhold pay during the investigation?

When an employee engages in a work refusal, they must report the circumstances of the refusal to their employer, who must immediately undertake an internal investigation (*OHSA*, ss. 43(4)). During the internal investigation, the employer must pay the employee.

During the course of the investigation, workers who are the subject of the investigation have certain obligations, including remaining in a safe place that is as near as reasonably possible to his or her work station and being available to the employer or supervisor for the purposes of the investigation (*OHSA*, ss. 43(5)).

If, after conducting its internal investigation, the employer does not find that a work refusal was justified, and the employee continues to reasonably believe that attending work would endanger himself or herself, the employee can continue to engage in a work refusal and still get paid

(*OHSA*, ss. 43(6)). At this point, either the employee or the employer (or someone on their behalf) must contact the Ministry of Labour ("MOL"), which will then conduct an investigation. MOL inspectors are not always required to physically attend the workplace during the course of an investigation. During the pendency of the MOL investigation, the worker in question must remain, during normal working hours, in a safe place that is as near as reasonably possible to his or her work station and available to the inspector for the purposes of the investigation, unless the employer assigns some other reasonable alternative work during normal working hours or gives other directions to the worker where an assignment of reasonable alternative work is not practicable (*OHSA*, ss. 43(10), 43(10.1)). Note as well that during the pendency of the investigation, the employer may ask another employee to perform the work in question, provided that the employer advises the employee in the presence of a worker representative on the JHSC, a health and safety representative or a union steward that the job or duties in question are the subject of a work refusal (*OHSA*, ss. 43(11)). Of course this employee retains the same rights as the first employee to engage in a work refusal.

If, after conducting its investigation, the MOL determines that it is safe for employees to return to work, the employee must do so. Employees who refuse to attend work at this stage could lose pay or be disciplined for insubordination and/or a failure to report to work, up to and including termination.

A decision of an MOL inspector can be appealed to the OLRB, but employees are required to attend work during the appeal process (*OHSA*, s. 61).

F. If no work refusal is possible or advisable, what alternatives are there?

Unions and employees should keep in mind that the MOL must conduct an investigation where an employee reports health and safety violations at the workplace and the MOL may issue orders to protect employees from hazardous situations.

Workplace parties may also use the internal responsibility system to try to resolve health and safety issues within the workplace. For instance, Unions and workers can raise concerns with worker or employee health and safety representatives and/or a Joint Health and Safety Committee.

G. Can a collective work refusal constitute an unlawful strike?

Yes! The *Labour Relations Act, 1995*, mandates that employees may not strike while a collective agreement is in force. It is clear that where union members collectively decide to engage in a work refusal, they may be found to have engaged in an illegal strike. This can be the case even where the collective refusal stems from genuine health and safety concerns. Union officials should be very careful not to encourage their members not to engage in collective work refusals. However, the right to refuse unsafe work is an individual right and the fact that multiple employees might engage in a work refusal based on their individual decisions would not amount to an illegal strike.