

COVID-19 UPDATE: Updates On COVID-19 From The BC Human Rights Commission And WorkSafeBC



Last week, WorkSafeBC and the BC Human Rights Commission both published guidance for employers in British Columbia on workplace health and safety and on discrimination, respectively, relating to the COVID-19 pandemic.

WorkSafeBC Guidance

On March 31, 2020, WorkSafeBC published a guide for employers on preventing exposure to COVID-19 in the workplace. WorkSafeBC recommends employers ask themselves two questions:

1. How are employers communicating to its employees about COVID-19 and exposure to COVID-19 in the workplace'
2. Is there a system in place where workers can inform managers of concerns about exposure and whether there are specific tasks that are of concern'

Further, WorkSafeBC recommended that employers focus on:

- Identifying exposure hazards and developing measures to control such hazards, including walk-throughs of the workplace to identify specific risks, consulting workers and developing and implementing controls;
- Controlling the number of people on site by considering staggering shifts, ensuring physical distancing, providing soap and water and/or hand sanitizers, having those who can work from home work from home, ensuring adequate cleaning between shifts and prioritizing critical work;
- Prohibiting workers who are sick, who live in the same household as someone with a confirmed case of COVID-19, or those returning from outside Canada from coming into work, in accordance with Public Health Orders; and
- Ensuring good communication of policies and hazards with managers, supervisors and workers.

These recommendations build upon WorkSafeBC's previously published guidelines on COVID-19, which can be found [here](#).

BC Human Rights Commission Guidance

On April 4, 2020, BC's new Human Rights Commission published two documents on COVID-19: a guidance statement from Kasari Govender, the newly-appointed BC Human Rights Commissioner (the "Statement"); and Frequently Asked Questions regarding COVID-19 (the "FAQ"). The Statement does not have legal effect, but provides guidance to employers, landlords, service providers and individuals to ensure that human rights are protected and balanced against the urgent health priorities caused by COVID-19.

The Statement recognizes the potentially disproportionate effects of COVID-19 on particularly vulnerable groups: immuno-compromised people, older people living alone or in institutions, Indigenous and racialized peoples, people with disabilities, women and gender diverse people and low-income communities. The Commissioner concludes that COVID-19 could result in discrimination based on the grounds of disability, race, colour, ancestry, place of origin, and family status.

With respect to disability, the Commissioner states:

In this time of rapidly changing circumstances, neither the Human Rights Tribunal nor the courts have had time to weigh in on whether COVID-19 amounts to a disability. However, in my view as BC's Human Rights Commissioner, it does. The seriousness of this illness ' and the potential stigma that attaches to it ' make it more akin to the legal protections that apply to HIV than to the common cold. Therefore, discrimination on the basis of someone having (or appearing to have) COVID-19, is prohibited under the Code except where the duty bearer can justify such treatment (for example, to prohibit or diminish the transmission of the virus).

(Emphasis in original.)

If COVID-19 or the effects of COVID-19 are protected under the BC *Human Rights Code* (the "Code"), then employers, housing providers and service providers need to accommodate the needs of the infected person to the point of undue hardship. The Commissioner recognizes that there are limits to undue hardship, including endangering the safety of others or inordinate expense. She recommends that any actions be supported by evidence and the recommendations of public officials.

The Statement and FAQ recommend the following for employers:

- Employers cannot make hiring, firing or discipline decisions on the basis of whether the person has or appears to have COVID-19, or comes from (or appears to come from) COVID-19 hot spots (for example, China and Italy).
- Employers must accommodate employees:
 - who have COVID-19, which includes taking precautions to stop the spread of the virus, by providing flexible remote working arrangement, delaying start times for new employees or providing sick leave;
 - who are particularly vulnerable (such as the elderly or immune-compromised people); and
 - who have increased child care obligations due to the pandemic where child care responsibilities cannot be covered by other means. This may also apply to employees who are required to care for sick family members at home.

- Employers cannot apply absenteeism policies that negatively affect employees who cannot work in connection with COVID-19.
- Employers who do have paid sick leave policies should apply them as needed, and, although not obligated to do so at law, employers should consider providing paid leave to employees who are sick or have family care obligations.
- Employers are not permitted to require sick notes from employees during this time.
- Employers, especially large businesses and public entities, if able, should consider providing job security to those employees who are unable to work due to workplace closures to avoid the disproportionate impact of COVID-19 on low income earners and the most economically marginalized.
- Employers are entitled to expect that employees will continue to provide work unless they have a legitimate reason why they cannot, including public health guidance to physically distance or self-isolate.
- Employers should not send an individual employee home or ask them not to work over concerns over COVID-19 unless the employer's concerns are reasonable and consistent with current advice from medical and Public Health officials. Employers also have obligations to keep employees safe under the *Workers Compensation Act* and the *Occupational Health and Safety Regulations*.

The FAQ also contains information for employees, including the following:

- Under the Code, an employer may not discipline or terminate an employee who has been diagnosed with COVID-19 (unless there is other reasonable cause). Similarly, an employer may not discipline or terminate an employee if:
 - they are unable to come to work because medical or health officials have quarantined them,
 - officials have advised them to self-isolate and stay home in connection with COVID-19, or
 - the employee is required to stay home and provide child care.

This is consistent with the new amendments to BC's *Employment Standards Act*, which creates a new unpaid, job-protected leave for employees who have COVID-19, are following public health orders, or are dealing with other circumstances related to COVID-19. The FAQ goes further, advising that employers cannot discipline or terminate employees who are *perceived* to have COVID-19 (because, for example, they are exhibiting certain symptoms), which treats COVID-19 as a disability or perceived disability, as the case may be.

- The Code allows for layoff due to lack of work and does not require employers to pay employees if they are not working or if there is no work for them to do because of the impacts of COVID-19. It is not discrimination under the Code if an employer needs to lay off employees because there is no work for them to do as a result of the impacts of COVID-19 (although the *Employment Standards Act* contains various obligations that apply to a temporary layoff).

Notably, the FAQ also addresses whether employers can require employees to undertake a medical test for COVID-19, such as a temperature test. The Commission's policy is that medical assessments or self-assessments to verify or determine an employee's fitness to perform job duties may be permissible in these circumstances. However, employers should only seek information from

medical testing that is reasonably necessary to the employee's fitness to perform on the job and or the employer's duty to protect the health and safety of workers on the job in accordance with occupational health and safety requirements.

As set out in the Statement, the Commission provides that as per its mandate, it is closely monitoring the human rights impacts of government decisions during this time and will be making recommendations and working with government actors.

Conclusion

The FAQ and Statement are among the first published guidance from the Commission and on COVID-19 as it relates to human rights.

While the Statement correctly identifies the intersection of COVID-19 with existing grounds protected under the Code, the characterization of COVID-19 as a disability does not consider the transient nature of the illness, which distinguishes it from other illnesses, such as HIV.

The Statement is closely modelled after the Ontario Human Rights Commission's statement on COVID-19, which also confirms its policy position is that COVID-19 falls under the ground of disability because the Ontario *Human Rights Code* covers medical conditions or perceived medical conditions that carry significant social stigma. This is consistent with the Ontario Human Rights Commission's position that the SARS outbreak in 2003 engaged the ground of disability under the Ontario Code.

The Commission's Statement does not have legal effect and it will ultimately be up to courts and the Human Rights Tribunal regarding how and whether human rights legislation and protections are engaged in connection with COVID-19. It remains to be seen how the Statement will influence discrimination claims relating to COVID-19.

By Conseiller De L'employeur and Lauren Soubolsky of McCarthy Tétrault LLP