

## Coping with COVID-19

Employment is a significant part of the social and economic fabric of life in Saskatchewan. As such, an event such as the COVID-19 pandemic raises a number of questions regarding the rights and obligations of both employers and employees. For the most part, the law with respect to *The Saskatchewan Employment Act* and *The Saskatchewan Human Rights Code, 2018* (or the *Canadian Human Rights Act* for federally regulated employers) remains unchanged and so how an employer should manage illness, whether due to COVID-19 or otherwise, is the same as it was prior to the pandemic. However, the Government of Saskatchewan and the Government of Canada may mandate certain changes as the situation develops and the special circumstances that arise due to a pandemic creates some uncertainty with respect to employment rights and obligations. These mandates should be monitored closely to ensure compliance. As is always the case, each and every case will need to be assessed based on its own context. Therefore, this sheet is for information only and we strongly recommend consulting with your lawyer to obtain specific advice based on your circumstances.

The following is an information sheet for both employers and employees that may be helpful in response to the issues raised generally by the ongoing COVID-19 situation:

- 1. Obligations regarding infectious diseases**
- 2. Employees refuse to work in the workplace**
- 3. Employee layoffs - temporarily or permanently**
- 4. Employer requesting an employee self-quarantine**
- 5. Employment Insurance Benefits**
- 6. Changes to an employee's job duties or hours**
- 7. School closure impact**

### Introduction

We would encourage all employers to ensure that their employees are aware of any policies that are in place that could be of use during the pandemic such as any available sick leave, benefits, or EFAP programs in addition to vacation entitlement or statutory leaves of absence. If there are no policies in place for how the employer will deal with special circumstances, such as in response to COVID-19, we would encourage employers to develop such a policy and ensure that the employees are made aware of it. The circumstances surrounding COVID-19 are changing rapidly and employers should consult both government resources and, where appropriate, their legal counsel. This pandemic already has, and will continue to, have a profound impact on employers and employees alike.

## 1. Do employers have any obligations regarding infectious diseases?

Employers have a general duty under *The Saskatchewan Employment Act* (the “SEA”) to ensure the health, safety, and welfare of their workers. This includes the risk of infectious disease in the workplace. The obligations that fall under this duty will vary depending on the nature of the workplace. For example, what is expected of an employer in a workplace where the employees work in immediate proximity to one another and share tools or devices will be different than one where employees work at a distance from one another (and perhaps at a distance from even customers) and where there is no sharing of tools or devices.

An employer will be expected to take reasonable steps to protect their employees and workplace generally when it comes to infectious diseases. Therefore, if it is reasonable for employees to work remotely, particularly if such an ability is already present in the business structure, then the allowance by an employer for employees to work remotely may be considered a reasonable step to protect the health, safety, and welfare of their workers.

While the laws with respect to infectious diseases (and illness generally) remain the same, there have yet to be any decisions by the courts, or other decision-making bodies, as to whether or not the rights and obligations of employers and employees are affected in the circumstances of a pandemic. Employers should keep apprised of the Government of Saskatchewan’s provided information with respect to COVID-19. The Saskatchewan Government’s website is updated regularly and can be accessed online <https://www.saskatchewan.ca/government/health-care-administration-and-provider-resources/treatment-procedures-and-guidelines/emerging-public-health-issues/2019-novel-coronavirus>.<sup>1</sup> Using the Saskatchewan Government’s guidance may assist in how an employer manages their workplace.

Saskatchewan has also recently stated that some changes to the SEA will be enacted, to allow employees to access unpaid public health leave, and to remove the requirement of 13 weeks of employment before accessing sick leave (and dispensing with the need for a doctor’s note). These changes should be seen as beneficial for both employees and employers.

Some cities, such as Calgary and Red Deer in Alberta, have declared a state of emergency and have taken more significant measures to ensure the safety of their citizens. It is possible that cities in Saskatchewan will take the same route and so employers should closely monitor announcements by their respective government authorities on a local level in case they are required, or urged, to adjust their business.

## 2. Are employees allowed to refuse to work if they are worried about COVID-19 in the workplace?

Section 3-31 of the SEA states that a worker may refuse to work, or refuse to perform certain tasks, if the worker has “reasonable grounds to believe that the act or series of acts is unusually dangerous

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<sup>1</sup> See: <https://www.saskatchewan.ca/government/health-care-administration-and-provider-resources/treatment-procedures-and-guidelines/emerging-public-health-issues/2019-novel-coronavirus> (citation as of March 16<sup>th</sup>, 2020).

to the worker’s health or safety or the health or safety of any other person at the place of employment.” This includes situations in which the worker is worried she/he, or someone at their workplace, has COVID-19.

Employers are encouraged to take any refusal to work due to concerns over COVID-19 seriously. As with any refusal to perform dangerous work, an employer will be required to investigate the reported dangerous work, including any required parties, and if the conditions are found to be dangerous then remedial action will need to be taken. During the investigation and remediation, an employee can be reassigned to other work but must continue to receive the same wages and benefits they would have received but for the refusal. Employees are entitled to involve an Occupational Health Officer in such an investigation. Under the SEA, if an employer makes a decision that negatively affects an employee on account of that employee asserting their occupational health and safety rights, whether for refusing dangerous work or for a complaint made with respect to health risks in the work environment, then the employer could face a discriminatory action complaint followed by a subsequent investigation by an Occupational Health Officer. The Occupational Health Officer has the power to award retroactive wages and to reinstate the employee to their employment (if dismissed) and to remove the discipline from that employee’s record if that officer deems the action by the employer to be discriminatory.

### 3. Can I temporarily or permanently layoff my employees?

One of the main questions that we receive as counsel to employers is whether a business can temporarily layoff employees, while managing the issues. We deal with the question of forcing employees to stay home below, but this deals with the case where an employer wants to shut down all or part of the business on a temporary basis.

If you are looking to layoff employees in Saskatchewan on a temporary basis, then you will need to provide notice, or pay-in-lieu of notice, to the employees under the *Saskatchewan Employment Act*. You will want to have an estimated or forecasted return date for employees, in order to demonstrate the difference between a temporary and a permanent layoff.

If you are looking at a layoff of more than six months, for 10 or more employees, then there are also obligations to notify the Minister of Labour. Employees who are laid off (temporarily or permanently), will be eligible for employment insurance, as discussed below.

If you are looking at a permanent layoff, or termination of employment, then you will have to look at your employment agreement, or collective agreement (in unionized workplaces) to determine whether you have a specific amount of notice, or pay-in-lieu, owed to employees. If nothing is specified, then you are likely looking at a common law termination, which would entitle employees to common law notice, often called severance. Severance is subjective – different in each situation, so please contact a legal professional to assist you in dealing with severance situations.

If you are simply looking to have your employees stay home, with some ability to work from home, or continued pay, please see below.

#### 4. Can an employer force an employee to stay home if the employer has concerns over the employee's exposure to COVID-19?

From a practical perspective, we recommend that you do an organizational analysis, and determine which of your employees could perform some or all of their work from home, especially given the school closures in Saskatchewan. If an employee is able to perform some or all of their work from home, then working from home is the best option, to prevent the spread of COVID-19, and to flatten the curve. While we recognize that some jobs will require physical presence (health care, grocery, pharmacy, transport and delivery, etc.), we recommend that people be permitted to work from home, where their job permits. There is a global recognition that there will be some reduced productivity for a time in the workplace, but the health and safety of workers takes priority over production in times like this. If your employees are able to work from home, we recommend maintaining their full pay, to avoid an economic crash that could potentially accompany the current COVID-19 concerns. We can also provide you with the following legal guidance.

An employer is entitled, under their obligations to protect the workplace, to require employees to stay home if that employee's illness could cause harm to other employees or to the work environment. If the employer requires the employee to stay home, then the employer will likely be required to pay that employee's wages. However, if an employee chooses to stay home on their own accord, then an employer may not be required to pay that employee for their absence. Under the SEA, an employer is not required to pay an employee while they are absent from work. However, given the nature of the current situation and the special circumstances it has created, employers may want to provide some form of financial relief to their employees during an absence regardless of the lack of a statutory requirement. There are several benefits to providing such relief including ensuring that employees are not attending work while infected with the COVID-19 virus because they cannot afford, or do not desire, to take unpaid leave. Additional options could include allowing an employee to use accrued vacation time or to take a short-term paid leave of absence.

Despite the above, the rules of any workplace policy, employment contract, collective agreement, or other binding agreement will apply. Therefore, employers should review all binding agreements or policies and consult legal advice to ensure they are making an informed decision based on their particular circumstances.

As noted earlier, employers will be required to follow any government mandates. If the government mandate involves recommendations rather than explicit instruction, then the employer should consider such recommendations in light of the circumstances of their business as it may affect what is considered reasonable in the circumstances. For example, it may be reasonable to require workers who have travelled internationally recently to stay at home, particularly during the recommended self-isolation periods. Generally, the more exposure an employee may have had to COVID-19 the more reasonable it will be to prevent their return to the workplace for the associated medically recommended periods. As of March 17, 2020, the Government of Saskatchewan has stated that anyone returning from another country (including the United States) needs to self isolate for a period of 14 days upon return.

It is also worth noting that an employer is not entitled to prevent an employee from travelling to another country on their vacation. What an employee chooses to do with their vacation time is their decision alone. If an employee chooses to travel to a place to which a government mandated quarantine applies, when that employee was aware of the related quarantine, then the employer may not be required to pay that employee's wages during the quarantine period. Such situations, and their related determinations, will be highly contextual and so employers should exercise caution in how they choose to approach it.

While an employer is unlikely to be able to prohibit employees from travelling outside of the country on vacation, it is defensible that the employer could require that the employee disclose the location of their international trip so that appropriate steps can be taken to protect the health and well-being of their workers. Employers should not speculate on the risks of certain travel destinations. Rather, they should rely on official sources such as the travel advisories provided by the provincial and federal governments. Both the Government of Saskatchewan and the Government of Canada have strongly recommended that individuals who have returned from outside of Canada should self-isolate for a period of 14 days. Therefore, employers may consider requiring employees who return from outside of Canada to remain at home for 14 days before returning to work.

The Government of Saskatchewan has also implemented a number of requirements for their employees in response to COVID-19. While there is no strict requirement for any private businesses to do the same, the Chief Medical Health Officer for Saskatchewan has strongly recommended that all employers and individuals adopt the same measures to limit the spread of COVID-19. These measures, taken from the Saskatchewan Government website, are as follows:

Additionally, the Government of Saskatchewan as an employer is imposing a number of policies regarding government employee travel, as well as self-monitoring and self-isolation procedures:

- Effective immediately, international travel (including the U.S.) for government employees on government business has been prohibited.
- Any out-of-province travel for government employees on government business within Canada will be restricted and is subject to approval by the Deputy Minister to the Premier.
- Any government employees who are currently travelling internationally (including to the U.S.), or plan to travel internationally for personal reasons will be required to self-isolate for 14 days after returning to Canada as a precaution. If they have or develop acute respiratory or flu-like symptoms, they should contact Healthline 811.
- All government employees who are experiencing symptoms of an acute respiratory or flu-like illness will be required to stay at home.

While these measures are being implemented as a policy for Government of Saskatchewan ministries, crowns, and agencies, the Chief Medical Health Officer strongly recommends that all employers and individuals across the province adopt these measures to limit the spread of

COVID-19 in Saskatchewan, protect residents from exposure to the virus and reduce the impact of COVID-19 on the health system <https://www.saskatchewan.ca/government/news-and-media/2020/march/13/further-measures-for-covid-19>.<sup>2</sup>

Generally, if the government is recommending certain measures or if they, as an employer, are instituting certain measures, then other employers may be entitled to do the same.

Employer's are also entitled to require proof of an employee's fitness for duty. Typically, that proof comes in the form of medical documentation. Such proof can be merited where an employee requests accommodation or if the employer has legitimate reason to be concerned about the employee's ability to perform their duties (such as on account of an illness). Employers should use their discretion when requiring medical documentation given the strain that this pandemic has already put on our medical system.

## 5. Will employment insurance benefits be provided due to the pandemic?

The federal program for employment insurance benefits can be used as a method of reducing the negative impact associated with absences from work due to the COVID-19 virus. Given the rapid evolution of the Canadian Government's approach to the pandemic, the most recent information regarding the employment insurance program should be consulted at the relevant time. Changes could occur at any time without notice.

For the time being, individuals may call Service Canada through a specific phone line set up for EI claims related to the virus: **1-833-381-2725**. The previous one (1) week waiting time has also been waived not only for those that are sick but also for those who are in their 14-day isolation period. This program will be particularly helpful for those that do not have access to sick leave benefits or who have already used their allotted amounts for sick leave.

The Prime Minister alluded to additional announcements with respect to financial measures in response to COVID-19. We expect that these measures will be with respect to employers and employees that will be, or are, affected by the developing situation. Employers and employees alike are encouraged to monitor government announcements as they are released.

## 6. Can an employer make changes to an employee's job duties or hours in response to COVID-19?

Temporary changes to an employee's job duties or work hours may be permissible provided that the reasons for such changes are sufficiently reasonable and connected to actual concerns or impacts of COVID-19. While these temporary changes may be permissible, employers should be mindful of such changes crossing over into the territory of long term or significant changes. If the changes are in too great a number or of too great significance, and particularly if those changes persist for a long period of time,

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<sup>2</sup> See: <https://www.saskatchewan.ca/government/news-and-media/2020/march/13/further-measures-for-covid-19> (citation as of March 16<sup>th</sup>, 2020).

an employer may face a constructive dismissal claim. Decision-making bodies are typically sensitive to constructive dismissals that are cloaked in some other guise (such as changes to an employee's contract of employment instituted with a purported rationale as a response to illness).

If temporary changes to an employee's job duties or work hours are required, the employer should ensure that such changes are backed by valid business reasons. Any changes made that impact an employee could be scrutinized as discrimination under Occupational Health and Safety Legislation or under Human Rights laws and so employer's should not base their decisions to make changes on impermissible grounds such as due to disability, sex, gender, sexual orientation, family status, marital status (or any other prohibited ground). If an employer requires that an employee work from home, that employee must be provided with the appropriate tools and resources to perform their job successfully.

Any business structure changes that could affect employees, such as reorganization or layoff, should only be made with proper notice to employees and should be backed by legitimate business reasons. It is not appropriate to make such changes under the guise of a response to COVID-19. Employers should be aware of the potential for backlash on social media, in the news, or otherwise should an employee be negatively affected by the employer due to that employee self-isolating (whether due to illness or precaution). Further, an employer may face a discrimination claim under human rights law if an employee is treated to a lower standard than any other employee diagnosed with an illness.

## 7. How will employers and employees be impacted by the recent school closures?

Many employees will be substantially impacted by the Saskatchewan Government's decision to close down schools (from Pre-K to Grade 12). The school shutdown will be implemented in a progressive fashion beginning on March 16<sup>th</sup>, 2020 and with the final day of school falling on March 19<sup>th</sup>, 2020. The government has announced that there will be no impacts on absences or grades. Parents who are able are encouraged to keep their children home starting immediately, but those that will need to arrange for additional childcare will have until the 19<sup>th</sup> so make such arrangements.

Due the school closures, many employees may require some form of accommodation in order to care for their children. Both the *Saskatchewan Human Rights Code, 2018* and the *Canadian Human Rights Act* protect employees from discrimination on the grounds of "family status". Therefore, an employer may be required to accommodate employees who are affected. Each employee's particular circumstances will be relevant to whether or not accommodation is required and to what degree. We recommend that employers implement a dynamic and flexible approach to dealing with the associated hardships employees may face with respect to the closure of schools. In appropriate circumstances, employers should allow employees with children to work from home whenever possible, adjust work schedules or allow for more flexible work hours, allow for reduced work hours, allow a short-term leave of absence or the use of vacation time (or banked overtime as appropriate). It may also be appropriate for the employer to reduce their expectations with respect to what an employee can accomplish when caring for their children.

Each employer and employee will have different circumstances to consider and what works for one employer, or employee, may not work for another. Therefore, employers and employees should be

flexible and creative in the solutions they develop. The greater the flexibility an employer is able to show, the greater the likelihood they will be found to have met their obligations with respect to accommodation. The requirement, however, is that an employer needs to accommodate an employee to the point of “undue hardship”. The circumstances of an employer will be an integral part to what constitutes “undue hardship”. Such hardship may also change as the situation develops, particularly considering that some forms of short-term accommodation may be feasible now but may not be feasible in the long term. A continued, dynamic, and flexible approach with open communication between the parties is the best way to proceed. Such an approach will assist in respecting the rights and obligations of each party.