



Responses to Select Questions from the “Establishing the New Normal: Return to Work Considerations in the COVID-19 Era” Webinar

(Prepared: April 30, 2020)

On Wednesday April 29, 2020, we hosted a webinar entitled “Establishing the New Normal: Return to Work Considerations in the COVID-19 Era”. We sincerely thank the webinar attendees for their participation and informed questions. Due to time constraints, we were not able to answer all of the questions that were raised during the webinar.

We have reproduced some of the recurring questions that were raised during and after the webinar, and we have provided written responses in this document. Please note that the following responses provide only an overview and do not constitute legal advice. The responses are not to be relied upon for any purposes outside the webinar. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained. In this latter regard, we would invite you to contact Dave McKechnie (dave.mckechnie@mcmillan.ca).

If you would like to view the webinar, a recording of the webinar, as well as a copy of the presentation slide deck, may be accessed here: [Establishing the New Normal: Return to Work Considerations in the COVID-19 Era](#)

Topics:

RETURN TO WORK CONSIDERATIONS

CONSIDERATIONS IN RECALLING EMPLOYEES TO WORK

MANAGING EMPLOYEE REFUSALS

ACCOMODATION

HEALTH & SAFETY CONSIDERATIONS

	QUESTION	RESPONSE
RETURN TO WORK CONSIDERATIONS		
1.	What is the best method/approach for recall - letter or phone call?	We would recommend a combination of a phone call and a letter, if practicable. The telephone call is a good way to ensure that the employee has received the recall notice, and also provides a personal touch. The letter can confirm information conveyed in the telephone call and serve as an official notification to the employee of his or her recall to work.
2.	What government guidelines is your business using to return to work?	Several jurisdictions have published guidelines and suggested related to return to work safety. For example, Ontario's latest guidelines can be found here: https://www.ontario.ca/page/resources-prevent-covid-19-workplace
3.	Can employers send a survey that asks questions regarding vulnerable situations that could prevent an employee from physically able to return to work?	Yes, the employer can. If it is trying to understand exposure or whether any personal characteristics of the employee present a barrier to returning to work, it can solicit that information provided it does so in a way that respects human rights and ensures that the information is kept secure and private.
CONSIDERATIONS IN RECALLING EMPLOYEES TO WORK		
4.	We are a manufacturer in Ontario. I have struggled to find the CORRECT information to bring people back safely. What is the best resource?	Although safety requirements will vary on a case-by-case basis, the Government of Ontario has published guidelines for workplace health and safety in the manufacturing sector: https://www.ontario.ca/page/manufacturing-health-and-safety-during-covid-19 Ontario's latest guidance provides a useful starting place for employers.
5.	Is an employer required to pay sick leave for employees who are refusing to return to work because of an underlying health condition - and they cannot be	If an employee cannot work and work from home is not a viable accommodation measure, then the employee's best option is likely a leave of absence. While some jurisdictions (i.e. employees regulated by the Canada Labour Code and employees in Quebec) will have access to a limited number

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	accommodated with a work from home arrangement. For example, a custodian.	<p>of paid leave days that can be used for personal health or family reasons, leaves established to respond to COVID-19, including that in Ontario, are unpaid.</p> <p>If an employee has access to paid sick days under his or her employment contract or collective agreement, the employee may be able to use those days, depending on whether permitted by contract wording or workplace policies.</p>
6.	<p>Clarification on legally binding documents in electronic age:</p> <p>Are digitally signed employment contracts and employee correspondence such as emails, as legally binding as hard copy signed documents? Is there still a need to keep hard copy files or can an organization keep all records electronically?</p>	<p>As a general rule, digitally signed contracts and emails are legally binding as long as all of the requirement elements for a binding contract are present – that is, offer, acceptance, and consideration.</p> <p>It is permissible for employers to maintain its personnel files and records electronically, however, the employer should ensure that they are complying with legislation within their jurisdiction governing the retention and storage of such information.</p>
7.	Is there any justification for an employee to refuse now (in April) to return to work physically in September, if they are immuno-compromised?	Since the COVID-19 situation is rapidly evolving, it would be premature for an employee to refuse now to return to work physically in September. An assessment of the situation will have to be performed much closer to the anticipated return to work date to determine whether an employee’s medical condition is a sufficient to refuse to return to work at that time.
8.	Recall is referring to if we have laid off employees vs bringing employees returning from working at home to their regular workplace?	<p>When referring to recall in this presentation we were specifically speaking about recall of employees who were temporarily laid-off from their employment as a result of Covid-19.</p> <p>If employees have been working at home during this period of time, the employer will want to provide notice, or recall them to the physical office. In these circumstances, the employer should consider applicable statutory standards relating to scheduling requirements and number of hours from work per week.</p>
9.	Should employers be concerned about insurance for teleworkers? And should	Generally, employee injuries arising “in the course of employment” are compensable under workplace safety and insurance schemes. This is likely to include work from home, though each incident would need to be evaluated

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	teleworking employees be concerned with their home insurance?	on its own. Whether or not a private policy covers work conducted from an employee's home will depend on the scope of the coverage under that policy and the nature of the injury for which a claim is made. There is likely a difference between property-related losses incurred at an employee's home and whether or not an employee has coverage under their own policy for losses caused by the performance of employment duties (the latter requiring an assessment of vicarious liability to determine whose policy might be applicable).
10.	What happens with employees who are mat leave and are expected to return within a few weeks to work but the clinic that they worked at is closed due to COVID?	<p>Broadly-speaking, employees on statutory leave are entitled to return to their pre-leave position or a comparable position if the pre-leave position is no longer available. However, employers are still permitted to make business decisions that may affect the position of an employee on leave, so long as the decision is not made with any discriminatory purpose.</p> <p>Nevertheless, you should be aware of other legal obligations to the employee, including the obligation to provide pay in lieu of notice and (if applicable) severance pay if employment is being terminated and, depending on one's province, notice prior to temporary layoff.</p>
11.	If we determine that some of our employees will not be recalled to work after the temporary layoff period, does the layoff period count towards the notice obligations for termination?	<p>Unfortunately no. If the employer chooses not to recall an employee to work, the temporary layoff turns into a termination and notice/pay in lieu of notice and severance are payable in accordance with statute and common law.</p> <p>In Ontario and Newfoundland, the employment standards legislation exempts an employer from paying the statutory pay relating to termination if an employee is recalled to work and does not come back "within a reasonable period of time". This exemption only applies when it is the employee who fails to return to work, rather than the employer not recalling the employee to work.</p>
12.	For jurisdictions without a required notice period for recall, what would be a reasonable period of time to ask employees to report to work?	<p>The appropriate amount of notice for recall will vary depending on the circumstances.</p> <p>As a general rule, you will want to ensure that you provide the employees with enough notice to organize their affairs so that they can return to the workplace. This will avoid claims by employees that it was impossible to return to</p>

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		work as a result of insufficient notice. We would recommend providing at least 5 business days' notice of a recall to work.
MANAGING EMPLOYEE REFUSALS		
13.	What are your thoughts on the applicability of frustration of contract and/or the statutory equivalents (s.65(1)(d) of the BC Employment Standards Act) if an employer is unable to recall at the end of the temporary layoff period due to continued business restrictions? The payment of common law pay in lieu of notice for employees who do not have any work is unrealistic for many employers at this time who have been more or less shut down.	<p>It remains to be seen whether or not courts or tribunals will apply the principle of frustration of contract to permit employer's to be relieved of their duty to provide statutory and/or common law notice as a result of terminations due to Covid-19. Certainly the government in British Columbia has indicated that there is a possibility that this may be an avenue available to employers to avoid statutory severance.</p> <p>The key to a successful frustration of contract argument is that the contract must be impossible to perform, rather than more onerous or difficult. The determination of whether a contract of employment has become impossible to perform will have to be determined on a case by case basis while taking into consideration whether the employer was subject to a mandatory shut-down, how long the mandatory shut-down lasts, and whether there is any reasonable prospect that the employees can return to work at some point in the future.</p>
14.	In QC the Government is frequently using the age of 60: strong recommendation to stay home. Could we prevent an employee say 65 from coming back to work in the office even though they want to based on this recommendation (even though age is a ground for discrimination)?	Since an employee who is over age 60 would be more susceptible to get sick from COVID-19, they may have a legitimate basis upon which to refuse to report to work. However, while you can recommend that employees stay home if they are over 60 years old as per the Quebec's government's recommendation, you cannot prohibit them from coming to work.
15.	How to approach situations where employees who rely on public transportation to commute to work and do not have transportation alternatives (i.e.: driving is not a job requirement)?	Unless the employee is particularly vulnerable (i.e. of advanced age, is immunocompromised or suffers from an underlying health condition), the fear of using public transit is not a legitimate excuse for a refusal to return to work. If an employee indicates a refusal to return to work because they do not want to use public transit to travel to work due to fears related to COVID-19, the employer should encourage the employee to practice careful risk mitigation strategies while on public transit such as, for example:

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		<p>wearing a mask; wearing gloves; and maintaining social distance from other commuters. Furthermore, since public transit is often crowded during the rush hour, the employer may consider allowing their employees to alter their arrival and departure times to avoid rush hour congestion on public transit. In the event of a vulnerable employee, the employer may want to consider other measures if possible, such as remote-work.</p>
16.	<p>Does work refusal due to fear apply if the employee has no other choice than to use public transportation and the fear relates to the commute. And who / how would we determine if the fear is justified?</p>	<p>Unless the employee is particularly vulnerable (i.e. of advanced age, is immunocompromised or suffers from an underlying health condition), the fear of using public transit is not a legitimate excuse for a refusal to return to work. If an employee indicates a refusal to return to work because they do not want to use public transit to travel to work due to fears related to COVID-19, the employer should encourage the employee to practice careful risk mitigation strategies while on public transit such as, for example: wearing a mask; wearing gloves; and maintaining social distance from other commuters. Furthermore, since public transit is often crowded during the rush hour, the employer may consider allowing their employees to alter their arrival and departure times to avoid rush hour congestion on public transit. In the event of a vulnerable employee, the employer may want to consider other measures if possible, such as remote-work.</p>
17.	<p>How would you recommend handling the following situations:</p> <ul style="list-style-type: none"> -Employees who refuse to work because they feel unsafe (but don't have any specific medical concerns). -Employees who refuse to work because they (or a relative they live with) have a high risk health concern. -Employees who refuse to work because of childcare needs. 	<p><i>- Employees who refuse to work because they feel unsafe (but don't have any specific medical concerns).</i></p> <p>An employee cannot refuse to come to work simply because they feel unsafe unless they have a legitimate reason to believe that there is a dangerous condition in the workplace, or that their duties present a danger to their health and safety. Whether the work refusal is justified will really depend on the particular facts (i.e. if they had a medical issue or were particularly vulnerable) and the measures taken by the employer to protect health and safety of its employees and to eliminate the potential dangers in the workplace.</p>

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		<p>- <i>Employees who refuse to work because they (or a relative they live with) have a high risk health concern.</i></p> <p>As mentioned above, an employee cannot refuse to come to work simply because they feel unsafe unless they have a legitimate reason to believe that there is a dangerous condition in the workplace, or that their duties present a danger to their health and safety. An employee’s health issues or those of someone they live with may be sufficient justification to refuse to work.</p> <p>- <i>Employees who refuse to work because of childcare needs.</i></p> <p>The requirement to accommodate employees who have childcare needs will depend on whether an employee is able to benefit from a statutory leave of absence (i.e. some jurisdictions have statutory leaves of absence permitting employees to take a leave of absence due to childcare needs in the context of the current COVID pandemic) and also on whether the employee has no choice but to require accommodation since schools and daycares are closed.</p>
18.	If an employee refuses to work for no real reason, do they jeopardize their right/ability to receive EI or CERB?	<p>Individuals on EI are required to make reasonable and ongoing job search efforts. While the CERB does not have an identical requirement, affected individuals must be without income of more than \$1,000 because of COVID-19. As such, it is possible that refusing work (without additional considerations, i.e. the need to care for children) could disqualify an employee from the CERB.</p>
19.	What happens if an employee refuses to return to work because they have to take public transit to travel to work?	<p>Unless the employee is particularly vulnerable (i.e. of advanced age, is immunocompromised or suffers from an underlying health condition), the fear of using public transit is not a legitimate excuse for a refusal to return to work. If an employee indicates a refusal to return to work because they do not want to use public transit to travel to work due to fears related to COVID-19, the employer should encourage the employee to practice careful risk mitigation strategies while on public transit such as, for example: wearing a mask; wearing gloves; and maintaining social distance from other commuters. Furthermore, since public transit is often crowded during the rush hour, the employer may consider allowing their employees to alter</p>

	QUESTION	RESPONSE
		their arrival and departure times to avoid rush hour congestion on public transit. In the event of a vulnerable employee, the employer may want to consider other measures if possible, such as remote-work.
20.	I have an elderly / immunocompromised employee who is refusing to return to work. What do I do?	Employers should be aware that elderly or immunocompromised employees might be able to establish that COVID-19 poses a real threat to their workplace health and safety, and, therefore be able to validly refuse to work. For this reason, employers should proactively consult and accommodate employees who identify as vulnerable. Accommodations could include ongoing work-from-home arrangements, or altered work hours that allow an employee to avoid using public transit at peak hours.
ACCOMODATION		
21.	Is there a requirement for employers to provide food and beverage if we close say a common area (kitchen) because we can't guarantee physical distancing	The short answer is that there is no requirement. An employee can still bring a lunch and beverages that don't require refrigeration, so there is no obligation on the employer to come up with alternatives.
22.	What kind of testing am I legally allowed to require of my employees? What about giving COVID-19 tests to employees when they become available, to clear them to being able to return to work in the office? Is this something that you expect won't cause issues? What would happen with examples: if an employee refused to take the test; if tested positive and we require to stay home until test positive?	Permitted testing varies across workplaces and jurisdictions. Employers should seek specific guidance to confirm that they are implementing appropriate testing for their workforce, and to ensure that any personal information or personal health information obtained in the course of testing is adequately managed.
23.	Would we consider mandatory temperature checks at the entry of the establishment as being legal or justified in the present circumstances?	While it is generally impermissible for Canadian employers to mandatorily require employees to undergo a health-related test such as taking temperatures at Canadian worksites. Given the nature of the pandemic, mandatory temperature checks could be considered reasonably necessary to manage the employment relationship and

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		<p>several employers are using a method of temperature checks rather than relying on employee self-reporting.</p> <p>That being said, for federally-regulated employers or employers in provinces that have privacy legislation in place, the employer must ensure that the privacy legislation is being followed with respect to the collection, use, disclosure and storage of the information. A carefully developed policy that is consistent with human rights legislation and privacy legislation is necessary.</p>
24.	<p>Re temperature checks: Assuming a case could be made for the bona fide nature of these checks, how might privacy obligations affect employers' ability to do this?</p>	<p>Privacy obligations will vary across jurisdictions, based largely on what privacy legislation is in place. Broadly, employers should take reasonable steps to protect employee privacy, including keeping testing information in a secure location, limiting access to such information, and conducting any testing in a private location. If possible, it may also be beneficial to engage the services of a nurse or other qualified health professional to take the temperature, and such person could then only communicate the results of the employer (i.e. the names of the persons who have an elevated temperature).</p>
25.	<p>If an employee wants to work in the office (once the employer is able to receive employees again) and are able to do so, but they are being forced to work at home, is this considered constructive dismissal?</p>	<p>A constructive dismissal occurs where an employer has unilaterally changed one or more fundamental terms of employment – written or not – such that it is deemed to have repudiated the employment contract. The employee can then either accept the revised term or sue for wrongful dismissal.</p> <p>Requiring employees to work from home, without any additional adverse impact (i.e. on an employee's ability to perform his or her job) and where tied to safety concerns, seems unlikely to amount to constructive dismissal, especially since employers do have latitude to make non-fundamental changes to employment terms. Moreover, courts and tribunals may be more flexible in assessing (good faith) measures taken by employers in response to COVID-19, though that much is not yet clear.</p>
26.	<p>If employees are in the high risk group (but not age wise) is it ok for them to request accommodation to work from home? Do they have that right or can the employer</p>	<p>Employees can request accommodation if they believe have that need. The employer's duty is then to assess that accommodation request and determine whether the employee's needs can be met without undue hardship,</p>

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	deny that request without getting into legal issues later?	whether by permitting what measure the employee has sought or providing an alternative solution. Employers should not deny an accommodation request without properly assessing the request and documenting their decision-making process. Denying an accommodation request, while permitted if accommodation would amount to undue hardship, could result in a legal claim.
27.	For those you CAN work from home, and want to avoid fear of returning, is it best to allow them to continue to work from home?	Although you are not legally obligated to accommodate an employee who is scared to return to work (without a justifiable health and safety reason for the concern), if the employee can work from home and their current work from home arrangement has been working effectively, you may decide to allow them to continue to work from home, particularly since it is not a bad idea to have less people physically present at work. The decision to accommodate any particular employee will likely depend on how disruptive remote work may be to your organization and how many people are requesting similar accommodations.
28.	If the employer makes working from home mandatory, what, if any, are the obligations around costs (desks, internet etc.) and around health and safety in a home office situation?	<p>The easier question to answer is the health and safety question, as an employer’s health and safety obligation extends to mandatory work-from-home (“WFH”) arrangements. We recommend that a policy be developed that sets out the expectations for a safe WFH arrangement, which can include advice and guidance on ergonomics, trip hazards, etc. These policies should also go further to cover off protection of confidential information, accountability and tracking hours worked, property use and technology. You can also ask employees to submit pictures of their home office setup to ensure that it appears safe and schedule check-ins. One difficult issue for Ontario employers that has to be considered is the obligation under the OHSA regarding domestic violence and people living in abusive situations. Such a policy should cover off reporting such incidents and how the employer will deal with the issue. Similarly, it should be clear how a workplace injury will be reported.</p> <p>In terms of costs, the tools that the employer requires the employee to use should be paid by the employer, such as a laptop, software, internet connection, etc. In accommodation cases, other devices might be required,</p>

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		such as a standing desk or ergonomic chair. The employer will want to review its expense policy to see what is addressed and consider whether any changes need to be made.
29.	If the employee has been able to do their job remotely effectively, is the grounds to force them back to the office?	Although you can require employees to come back to the office (once allowed to open), if the employee can work from home and their current work from home arrangement has been working effectively, you may decide to allow them to continue to work from home, particularly since it is not a bad idea to have less people physically present at work. The decision to accommodate any particular employee will likely depend on how disruptive remote work may be to your organization and how many people are requesting similar accommodations.
30.	If an employee is working perfectly well from home and the employer wants him/her to report to the workplace; would that constitute an act of constructive dismissal generating a claim for damages where the employee has ANY fear of catching the disease or bringing it home? And, wouldn't damages for notice be significantly more these days where it is practically impossible to find alternate work for at least the next several months?	In terms of the constructive dismissal question, if the employee normally reported to an office location and only during the pandemic was working from home, requiring the employee to work at the office would not be a constructive dismissal as the arrangement was implemented in response to the crisis. If the employee had the flexibility prior to the pandemic to work from home at their leisure, requiring reporting to work at an office on a regular basis could be considered a constructive dismissal. With respect to damages, that remains to be seen. There are cases going both ways – that a court should take into account the economic conditions and how difficult it would be to find another position in setting a longer notice period, and conversely, how an employer who is struggling to survive due to economic conditions should not have to provide a longer notice period. One other alternative is whether any notice is required if the company is shut down due to governmental order, and therefore frustration applies both under the statute and the common law.
31.	Does COVID-19 affect my duty to accommodate other employees, such as those still on disability leave?	The basics of your duty to accommodate have not changed. However, if you have employees scheduled to return from disability leave in the near future, you may want to check in and remind them that your workplace is open, as well as that you are implementing measures to protect employees at work. As you might have done in any

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		event, you could also advise the employee that are free to speak about accommodation needs in advance of his or her return to work.
32.	What human rights laws are applicable to decisions made to return to work, particularly, disability, perceived disability, testing, reasonable accommodations, and any applicable human rights laws?	Applicable human rights law will depend on one's jurisdiction. For example, in Ontario, the <i>Human Rights Code</i> is applicable, whereas federally regulated employers and employees will be governed by the <i>Canada Human Rights Act</i> .
33.	<p>Can an employer withdraw a job offer if an applicant test positive with COVID-19 without considering reasonable accommodations?</p> <p>Is a positive result or a recovery from COVID-19 a disability or even a perceived disability?</p> <p>Did I understand correctly that employers can do testing, but only based on a scientific rationale?</p>	Employers should be very cautious when withdrawing job offers because of a medical condition or perceived medical condition. The duty to accommodate extends to the hiring process and a positive COVID-19 test could amount to a medical disability under applicable human rights law.
HEALTH & SAFETY CONSIDERATIONS		
34.	<p>COVID-19 represents a serious challenge for businesses. We know so little about the disease and public health recommendations have been changing weekly. Furthermore, the supply of personal protective equipment ("PPE") is very limited and is not or may not be available to address the demand in the marketplace.</p> <p>In an ideal world, we would have clear best practices and PPE for everyone. What are your views on the recommended sources for best practices for safety in the workplace to avoid the transmission of COVID for Canada? Does an employer's obligation to supply PPE in Ontario vary with different work environments? For example in Ontario, would the obligation to supply PPE differ in a non-food factory and</p>	<p>An employer's obligation to provide PPE will most likely be governed by the applicable jurisdiction's occupational health and safety legislation. That legislation's application will most likely vary depending on an employer's (or safety committee's) assessment of workplace risks and will, therefore, vary between industries or types of workplaces.</p> <p>Canadian jurisdictions are beginning to provide guidance on workplace safety in response to COVID-19. For example, Ontario's guidance is here:</p> <p>https://www.ontario.ca/page/resources-prevent-covid-19-workplace#manufacturing</p>

	QUESTION	RESPONSE
	a typical law office environment especially with anticipated PPE shortages?	
35.	Are there any recommendations/ considerations where employees are part of a multi-tenant office building and how to protect employees in that circumstance where other businesses in the building may not have the same standards?	<p>The first place to start is with the property manager to understand what restrictions and processes they are going to have in place. For example, if it is a high-rise multi-tenant office building, the property manager is going to have to think through: (a) how do people enter the building without crowding or how are they cleaning high-touch entrances, (b) where will people queue to get into the elevator, and (c) how many people will be allowed on the elevator. The property manager may also have mandates for people wearing masks in their buildings or common areas to protect others, the number of people who can be in the food court, traffic flow, etc.</p> <p>An employer can only control its own space, but that doesn't necessarily help it convince its employees that it is safe to come to work. Communicating the arrangements in the building to your employees will help make them feel safe.</p>
36.	What sort of cleaning protocols are required in the workplace?	<p>It will depend on the jurisdiction, but we expect that governments will rely on broader health and safety legislation rather than passing specific cleaning protocols. It will therefore be necessary to look to the "guidelines" or "recommendations" put forward by the ministries to determine what would be the best practice.</p> <p>For example, in Ontario, the Ministry has published the following guidelines for manufacturing employers:</p> <ul style="list-style-type: none"> • Provide ways to properly clean hands, by providing access to soap and water or alcohol-based hand sanitizer. • Have all employees and visitors wash their hands thoroughly with soap and water before entering the workplace and after contact with surfaces others have touched. • Include handwashing before breaks and at shift changes. • Provide a safe place for workers to dispose of used sanitizing wipes and personal protective equipment.

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		<ul style="list-style-type: none"> • Clean washroom facilities. • Sanitize commonly touched surfaces or areas such as entrances, counters, washrooms and kitchens. • Sanitize shared equipment (where sharing of equipment cannot be avoided). • Enforce rigorous use of site sanitation protocols such as use of foot wear cleaning (for example, boot buddies/boot sanitizing trays). • Consider a captive boot/personal protective equipment program to limit this equipment’s use outside of the production/processing environment. • Post hygiene instructions in English or French and the majority workplace language so everyone can understand how to do their part. • Introduce more fresh air by increasing the ventilation system’s air intake or opening doors and windows. Avoid central recirculation where possible.
37.	<p>If an employer does not require staff to wear PPE, can an employee insist on wearing a mask?</p>	<p>Unless there is a bona fide occupational health and safety reason why the employer is refusing, there is no benefit to an employer in prohibiting an employee from wearing a mask. It may be that the type of mask can be managed (e.g. an employee cannot wear a mask with profanity on it), but given the current pandemic there is likely only downside to prohibiting the use of masks</p>
38.	<p>For employees who frequently travel for their job and attend large meetings with customers, when is it reasonable to force them to travel? Is it reasonable to expect an employee to travel and attend large meetings as soon as travel bans are lifted and commercial air lines decide to fly?</p> <p>Or is it reasonable for the employee to take the position that for as long as they are able to attend video-conference meetings, they should not be forced to travel or attend in-person meetings?</p>	<p>The response to this question will depend on the government orders and recommendations issued both in Canada and in the country/location of the employee’s destination at the time of the employee’s required business travel. Even once travel bans are partially lifted, it is quite possible that avoiding non-essential travel will still be recommended. As a result, and considering that an employer has a duty to ensure the health and safety of its employees, it will be important to determine whether physical attendance at the business meeting cannot be avoided or whether the meeting can be held via video-conference.</p>

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39.	If employees have the right to refuse masks - how do we defend ourselves from the employees that refuse to work in close proximity with employees not wearing masks? Seems like a catch 22.	The employee does not have a right to refuse a mask if the employer has mandated the use of masks. If, however, an employee has a bona fide reason for not wearing a mask (breathing difficulties, etc.) then it is an accommodation issue and the question is whether the employee can be accommodated. This may mean moving the employee to another work location where the failure to have a mask on would not be an issue, working from home, etc.
40.	Given concerns around privacy etc., how can an employer learn if employees (or someone they take care of or live with) are vulnerable and should not return to the workplace so that an employer can take steps to protect health/safety of the employee?	A survey of employees is fine provided that the employer has followed privacy legislation to ensure that the collection, use, storage and disclosure of the information is compliant. If you had a dedicated team assigned to address this issue and ensure that the questionnaire is not collecting information that is not reasonably necessary to manage the health and safety of the workplace, there would not be an issue with collecting the information.
41.	Can I require employees to wear face masks or other PPE at work, when these types of protective items are not normally required for our workplace?	As jurisdictional and industrial requirements vary significantly, employers should seek specific legal advice before mandating otherwise optional PPE. Generally, where PPE is not an occupational requirement – during the COVID-19 pandemic or otherwise – employers may be able to require employees to wear PPE while at work. Note, however, that the employer would be responsible for providing and paying for all PPE they require employees to wear. The PPE must also meet applicable standards and be in good working order. Employers should also select all PPE in consultation with the workplace Occupational Health and Safety committee or worker representative.
42.	What type of testing is currently deemed most reliable in terms of assessing a given employee’s likelihood of having COVID-19 and perceived threat to the workplace?	The COVID-19 pandemic is still in a relatively early stage. As such, it is difficult to identify a workplace-appropriate test that is most effective at detecting either the antigen or antibody. One option is thermal testing. While provincial Privacy Commissioners have not yet provided any guidance with respect to thermal testing by employers in the face of a global pandemic, the risk of implementing this type of testing in a workplace is minimal so long as employees

	QUESTION	RESPONSE
		<p>consent, the information collected is limited as much as possible to fulfil the purpose of testing, and test records are not collected, stored, used or disclosed for any purpose outside of the screening context. However, employers should be aware that not all COVID-19 patients exhibit high temperatures – or any symptoms at all – and as such, thermal testing may not be particularly effective. This is especially true for outdoor workplaces such as constructive sites.</p> <p>Another option is a daily questionnaire. For example, employees could be required to answer a set of questions about recent symptoms and contacts on arrival at the worksite. Answers to these types of questionnaires must be confidential and employers must take steps to ensure their confidentiality.</p>
43.	Can I allow the workplace kitchen to remain open, so long as employees do not gather there?	<p>While it may not necessarily be a breach of occupational health and safety regulations to allow a workplace kitchen to remain open as employees return to work, kitchens are particularly high touch-point areas. For this reason, employers should reconsider the ongoing use of communal workplace kitchens and kitchen appliances.</p> <p>If you choose to keep your workplace kitchen open, ensure that employees can maintain physical distance of at least 2 meters while in the kitchen. This may mean allowing only one employee into the kitchen at a time. You should also prohibit sharing of food and dishes, place hand sanitizer and other hand-washing equipment in a convenient kitchen location, and increase kitchen cleaning to every 2-4 hours.</p>