

Pandemic planning for employers: responding to coronavirus

11 March 2020 | Contributed by [Fasken](#)

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Introduction

As of 2 March 2020, there are 88,948 confirmed cases of Coronavirus Disease 2019 (COVID-19) internationally, with more than 3,000 confirmed deaths.⁽¹⁾ Of the total confirmed cases, 80,174 were reported in China. Outside China, the highest numbers of confirmed cases have been reported in South Korea, Italy, Iran and Japan. The World Health Organisation assesses the global risk as very high.⁽²⁾ As of 2 March 2020, there have been 27 confirmed cases in Canada.⁽³⁾

The Canadian government has updated its travel health notices to warn against all non-essential travel to China, Iran, northern Italy and Daegu and Cheongdo County in South Korea. The notices also recommend a high degree of caution when travelling to Japan and the rest of South Korea.⁽⁴⁾ The situation is fluid. Government travel advisories should be regularly monitored by employers for the latest updates. Despite these travel health notices, the Public Health Agency of Canada currently assesses the public health risk of COVID-19 as low for Canada and Canadian travellers depending on their destinations.⁽⁵⁾

Risk to Canadian workplaces

As with most common illnesses, the workplace is susceptible to the spread of COVID-19 because of the proximity between workers and the frequency of contact with shared surfaces and objects. COVID-19 appears to spread in a similar way to the flu – namely, infected droplets may be deposited on surfaces and objects and another person may touch contaminated surfaces or objects and then touch their mouth, eyes or nose. People can also catch the virus by breathing in droplets of infected fluid if they are standing within one metre of another person.⁽⁶⁾

Employers must be prepared to deal with workplace issues arising from COVID-19 as global health officials almost uniformly agree that the disease will continue to spread. This article outlines the issues with which employers should be prepared to deal as part of a pandemic or communicable illness response plan. This general guidance will apply to most workplaces. Workplaces that are healthcare facilities treating the ill will require a more immediate and tailored response. Employers with unionised workforces will also need to be mindful of specific obligations in their collective agreements, including any obligation to develop a response in consultation with union representatives.

Employers must keep COVID-19 in context and not be swayed by sensational media reports without objective medical or public health information. Most people infected with COVID-19 experience mild, flu-like symptoms and then recover. The risk of serious illness is greater in vulnerable individuals, such as the elderly and those with weakened immune systems.

Establishing communicable illness policy

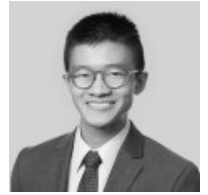
Employers should develop a written policy setting out clear guidelines on how they handle communicable illnesses such as COVID-19. A written policy that is communicated to the workforce and uniformly enforced will provide legitimacy to employers' actions and guidance given to employees and managers as well as ensure consistency. This can help to mitigate legal risks and

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assist in the defence of legal challenges.

Employers with unionised workplaces should be mindful of their collective agreement obligations (if any) to consult with unions. In the federal jurisdiction, employers should also be mindful of their statutory obligations to work with health and safety committees on the development of certain health and safety initiatives.

A communicable illness policy may include:

- a requirement for employees to notify their manager if they or someone with whom they reside plans to or has recently travelled to or from an area subject to a government travel health notice to avoid non-essential travel or avoid all travel;
- a requirement that employees who have or suspect that they have a communicable illness seek appropriate medical treatment and follow the recommendations of their medical professional, particularly as it relates to remaining home from work, self-isolation, quarantine or other measures designed to prevent the spread of illness;
- a requirement that employees remain out of the workplace for the period recommended by medical professionals and a related right of the employer to enforce that requirement for ill employees and those who have been exposed to a highly contagious communicable illness where that restriction is necessary to protect other employees;
- an overview of the paid and unpaid leave entitlement available to employees affected by a communicable illness;
- a confirmation that the employer may restrict business travel to areas subject to a government health travel notice to avoid non-essential travel or avoid all travel;
- a confirmation of the employer's commitment to take reasonable precautions and other specifically prescribed steps required by health and safety or other legislation to protect employees; and
- a confirmation that the employer's decision about employees affected by a communicable illness will be based on the most current available medical or public health information, including information about transmission risk and prognosis for recovery, among other things.

Some specific issues covered in a communicable illness policy are discussed in more detail below.

Employee leave of absence

Employers should reserve the right to restrict employees from attending work to prevent the spread of communicable illnesses. This may include requiring ill employees, or employees who have been exposed to certain highly contagious illnesses, to remain at home. These decisions should be made based on the most current available public health and medical information and not on speculation (no matter how well intentioned).

Employees who are ill with a communicable illness and unable to work should have access to paid sick leave benefits generally available to other employees. If no paid sick leave entitlements are provided by the employer, sick time may be unpaid by the employer. Employees should be reminded of the possible availability of employment insurance sickness benefits or other government benefits.

Employees who have been exposed, but who are not ill, should be allowed to work remotely where possible given the nature of their duties and the available technology infrastructure. Where remote work is not possible, employers should obtain specific advice about whether leave should be paid or unpaid to mitigate possible liability.

Employers should be mindful of employee privacy issues when communicating leave of absence decisions to other employees in the workplace. Information should be limited to confirming that an employee is out of the workplace and their expected return to work date. No other information should be provided without express employee consent. It may be appropriate in some cases to seek that consent and develop a message that the employee is comfortable sharing with co-workers and that is carefully vetted by the employer to ensure compliance with their legal obligations.

Travel considerations

Employers should caution employees against personal travel to any country or region subject to a Level 3 or 4 government travel health notice. Level 3 warns Canadians to avoid non-essential travel and Level 4 warns Canadians to avoid all travel. Employers should also consider suspending business travel to such areas and requiring employees to leverage technology rather than face-to-face interactions to continue business. Under such travel restrictions, employees should be expected to provide advance notification if they intend to travel to any of those countries or regions.

Personal travel warnings or business travel suspensions should be based on public health information and government travel health notices and updated as necessary to ensure that they are current. In rapidly evolving and fluid situations, such as the COVID-19 outbreak, this may require daily monitoring and updating. Based on current public health information about COVID-19, personal travel warnings and business travel suspensions to China, Iran, northern Italy and Daegu and Cheongdo County in South Korea may be appropriate. Travel to Japan and the rest of South Korea should be carefully considered as the situations there are rapidly evolving.

If business travel to an area subject to a travel health notice is unavoidable, employees should be made aware of the potential risks and best practices for their health and safety while travelling. Some employees may wish to decline such required travel based on the perceived risk. Employers should seek legal advice in relation to any work refusal or when considering whether to restrict an employee from business travel because they may be at higher risk of illness.

In addition, employers should keep track of employees who are travelling abroad for business and may wish to circulate health screening questionnaires for employees returning from travel. If an employee returns from a country with a high number of confirmed cases, but they are not themselves experiencing symptoms, the employer may consider exercising their policy to place the employee on leave.

Medical clearance

It is not likely reasonable to require confirmation that an employee tested negative for COVID-19 before returning them to the workplace whether from illness, leave or travel. Testing for COVID-19 is limited and currently restricted to cases meeting certain criteria. It is not widely accessible by family physicians or employees seeking to return to work.

In general, it is advisable to self-isolate for the 14-day incubation period, as recognised by Public Health Agency of Canada,⁽⁷⁾ after suspected exposure to COVID-19. If an employee is not experiencing symptoms after 14 days' self-isolation, it may be reasonable, depending on the circumstances, to return them to the workplace without a medical certificate. If an employee has been experiencing symptoms, they should remain out of the workplace for the period advised by their treating physician or other healthcare professional.

Business continuity

In addition to a communicable illness policy, employers should develop a plan and procedures in case their community becomes seriously affected by COVID-19. The plan should include measures to keep the business running even if employees cannot come into the workplace. This would include identifying key employee groups and individuals that are necessary to keep the business operating every day. Employers can then consider whether some of these key functions can be done by employees at another location or by a team in another geographic location.

Businesses should ensure that their IT systems are functioning to enable seamless working from home. This may require scheduling additional IT support staff to assist with employees experiencing any difficulty with remote access systems.

By engaging in contingency planning and preparing the workplace for the impact of an outbreak, employers can at least mitigate the consequences of a worst-case scenario.

For further information on this topic please contact [Shane D Todd](#) or [Justin P'ng](#) at Fasken by telephone (+1 416 366 8381) or email (stodd@fasken.com or jpgng@fasken.com). The Fasken website can be accessed at www.fasken.com.

Endnotes

(1) World Health Organisation, "[Coronavirus disease 2019 \(COVID-19\) Situation Report - 42](#)" (2 March 2020).

(2) *Id.*

(3) Public Health Agency Canada, "[Coronavirus disease \(COVID-19\): Outbreak update](#)" (2 March 2020).

(4) Government of Canada, "[Travel Advice and Advisories](#)" (2 March 2020).

(5) Public Health Agency Canada, "[Coronavirus disease \(COVID-19\): Outbreak update](#)".

(6) World Health Organisation, "[Getting your workplace ready for COVID-19](#)" (27 February 2020).

(7) Public Health Agency of Canada, "[Coronavirus disease \(COVID-19\): Frequently asked questions \(FAQ\)](#)" (29 February 2020).

Jessica Nolan, articling student, assisted in the preparation of this article.

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