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COVID-19
Return to Work Employer Toolkit

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We have developed this Return to Work Toolkit to help our Canadian clients with some of the employment law issues they may face as provinces and businesses begin to re-open during the COVID-19 pandemic. Please note that the information provided in this Toolkit does not constitute legal or professional advice or a legal opinion. Each employer will need to create its own plans for its employees, as well as for its business at large, having regard to the nature of its business. We hope this Toolkit will provide employers with some of the background information they need to create their own plans. If you have any questions, please reach out to one of the members of the Dentons Canada Employment and Labour Law group.

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Introduction

When we released the Dentons Canada COVID-19 Employer Toolkit on March 11, 2020, the impacts of the COVID-19 pandemic on Canadian workplaces were largely yet to be seen.

Our focus at the time was to provide employers with a practical framework to navigate the issues that would likely be of most relevance in the nascent stages of the pandemic, namely workplace health and safety, remote working and employees taking leaves of absence.

As provincial governments began to implement mandatory orders closing non-essential businesses, we released our follow-up publication titled, Employment Law Issues in Uncertain Times: Triaging workplace restructuring options in light of COVID-19. In that guide, we set out options for employers to prepare for the financial impacts of the pandemic, including options such as temporary layoffs, terminations and work-sharing arrangements.

Since releasing the above publications, hundreds of thousands of Canadian employees have been placed on temporary layoff, or have had their hours or salaries reduced, and most others are working from home. Employment legislation has been amended across the country, and there are a range of new provincial and federal benefits and assistance packages available to employees and employers.

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Employers will soon face new considerations as we enter various return to work stages, while awaiting an effective treatment or the release of a vaccine. On May 1, 2020, the Ontario government announced that some additional businesses in Ontario will be permitted to re-open on May 4, 2020, provided that proper health and safety guidelines are followed. This Dentons Canada COVID-19 Return to Work Employer Toolkit addresses many of the issues that employers will likely face in the coming year as lockdown restrictions fluctuate, easing and possibly restricting again, as necessary, to prevent the spread of the virus.

In this toolkit, we will discuss the following topics:

A. Temporary layoffs: Extensions, recalls, and other Issues

B. Flexible work arrangements

C. Managing workplace health and safety

D. Other considerations

Extending layoffs: Extensions, recalls and other issues

All provinces have periods during which employees may be temporarily laid off without triggering an automatic termination under applicable employment standards legislation. Before the applicable temporary layoff period has expired, the employer must recall the employee, failing which the employee's employment is deemed to have been terminated and all applicable termination entitlements are owing to the employee. The maximum temporary layoff periods under the *Employment Standards Act, 2000* (Ontario) (ESA) for Ontario provincially regulated employers, and under the *Canada Labour Code* (CLC) for Ontario federally regulated employers, are as follows:

	Maximum total length of temporary layoff

Ontario	• ***Not more than*** 13 weeks in a period of 20 consecutive weeks [emphasis added];
	or
	• ***Less than*** 35 weeks in a period of 52 consecutive weeks (inclusive of the above 13 weeks) [emphasis added], but only if:
	  • Throughout the layoff, the employer provides prescribed benefits to the employee (retirement plan, pension plan, group/employee insurance plan) or substantial payments;
	  • Throughout the layoff, the employee receives supplementary unemployment benefits (SUB plan benefits), or would be entitled to such benefits but were employed elsewhere during the layoff;
	  • A recall time was approved by the Director of Employment Standards; ***or***
	  • A recall time is agreed to between the employer and employee and the employee is recalled with that time;
	or
	• 35 weeks or longer if the recall time is agreed to in a collective agreement and the employee is recalled within that time.

Federal	• Three months; • Six months if the employee is notified of recall date within 6 months and is in fact recalled within 6 months; • 12 months if the employee maintain recall rights throughout pursuant to a collective agreement; or • No maximum period if prescribed benefits or payments continue throughout.

Ontario questions:

How do I recall an employee back to work?

If you choose to recall an employee from layoff, you will provide the employee with written notice that they are being recalled, along with the date they are expected to return to work. An employee on layoff does not experience a break in service: all time on layoff will be included in the employee's years of service, and in the employee's vacation entitlement year and stub period.

Note that an employee must earn 50 percent or more of their average wages per week to no longer be considered on temporary layoff.

In circumstances where an employer is recalling employees back to work for a period which is significantly less than full-time, it is possible that some such employees who earn a low income will still be eligible for the Canadian Emergency Response Benefit (CERB), or Employment Insurance (EI). In those cases, we recommended that employers advise employees in their recall notice that if they are in receipt of a government benefit, they will need to report to the government any income they are earning upon return from temporary layoff, so they are not receiving government benefits in excess of their entitlements.

More particularly, employees recalled by their employer may need to repay their CERB benefit if they no longer meet the eligibility requirements for the four-week period for which they received the benefit, which differ depending on whether the employer recalled the employee in the first four-week period for which the employee claimed the CERB or in a subsequent four-week period. If the recall occurs during the employee's first four-week period, the employee will need to repay the CERB if they received more than $1,000 from employment income for a period of two consecutive weeks in the four-week period. By contrast, if the recall occurs during a subsequent four-week period, the employee will need to repay the CERB if they earn more than $1,000 from employment income during the entire four-week period.

What happens if the employee refuses to return to work?

Employees who have been recalled to work from a temporary layoff are required to return within a reasonable time, failing which the employee may be deemed to have abandoned their job and will lose their right to statutory termination pay. However, the employee may still be entitled to statutory severance pay, if applicable. For an example of what might constitute a return to work "within a reasonable time", the Ontario Labour Relations Board has found that employees who failed to return to work between two weeks and one month were deemed to have abandoned their employment where they communicated no intention to return.

We note that employers may have some employees who refuse to return to work out of concern for their health, due to caring for family members with COVID-19, or because their children are still at home and require care. Please see our Sections B (Flexible Work Arrangements) and D (Other Considerations) below, for strategies to deal with these issues.

Can I retroactively pay employees who I have recalled from layoff, and collect the Canadian Emergency Wage Subsidy?

If you have recalled employees and wish to pay them retroactively for the time they were on layoff, you may be able to claim the federal government's wage subsidy for those employees, as long as their retroactive pay and status meet the eligibility criteria for one or more of the following claim periods:

- March 15, 2020 to April 11, 2020;
- April 12, 2020 to May 9, 2020; and
- May 10, 2020 to June 6, 2020.

You must rehire and pay such employees before you include them in your calculation for the subsidy.

If an employee has received a Canada Emergency Response Benefit (CERB) payment from the CRA for a claim period, and that employee is retroactively hired and paid for during that same claim period, then that employee may no longer be eligible for the CERB, and they may have to return or repay the CERB amount.

Can I undertake another temporary layoff if lockdown restrictions are put back in place?

You may place your employees on another temporary layoff if you have not yet reached the 13-week (or less than 35 weeks, with benefits or payments) maximum layoff period, or if the "clock" has restarted on the maximum layoff periods (i.e., the applicable period of consecutive weeks has passed). For example, if you have laid off an employee for seven weeks without benefits or payments, and recalled the employee for two weeks, you can lay the employee off for up to another six weeks in the same 20-week period without triggering a termination. In addition, if you have temporarily laid off an employee in Ontario for up to 13 weeks without continuing benefits or payments, and then recalled the employee, you will need to wait another seven weeks before you put the employee back on layoff (so that the 20-consecutive-week period has expired) before placing the employee on another temporary layoff.

Because of the need to wait until the "clock" restarts on the maximum layoff period before conducting further layoffs, employers should be looking ahead at their long-term needs before maxing out their layoff times. This is particularly true since our governments may need to alternatively ease and restrict closures over time, which may necessitate further layoff and recall cycles. For example, if an employer places an Ontario employee on temporary layoff for a continuous period of 34 weeks with benefits, and then recalls the employee, it will be deemed to have automatically terminated the employee's employment if it lays off the employee for one additional week during the same 52-week period. Please refer below to Flexible Work Arrangements for options to consider instead of layoffs.

Can I extend the layoff instead of recalling an employee?

In general, once an employee has hit their maximum temporary layoff date, their employment is deemed terminated.

However, in Ontario, an employee with contractual recall rights in their employment agreement (which are most commonly found in collective agreements) and who has reached the end of their applicable temporary layoff period, can elect between: (i) having their employment deemed terminated and collecting their termination entitlements; or (ii) foregoing their termination entitlements and continuing to be on layoff while retaining their right to be recalled to work. If the employee elects to retain their recall rights, then their termination pay and any applicable severance pay are to be held in trust by the Director of Employment Standards, or by the employee's union, as applicable, and to be paid out to the employee if they eventually elect to be terminated.

Employers may also be able to extend layoffs by agreement with employees who do not have contractual recall rights. However, employers should not attempt to do so without first consulting their employment and labour legal counsel, as this approach is not expressly provided for under the ESA.

What if I am an Ontario or federal employer who did not continue prescribed benefits or payments, now wants to elect a longer layoff period?

If you are an Ontario employer that placed employees on a layoff under the assumption that the layoff would not exceed 13 weeks, you may not have continued benefits or the like, as required. Unfortunately, for employers, it is not possible to implement the benefits or payments as of the 13-week mark and, thereby, extend the layoff for up to 34 weeks. A similar principle applies to federally regulated employers under the CLC.

The question then, is whether it might be possible to provide benefits or payments retroactively for the prior period, or to set up a new agreement with an employee to extend their layoff. However, such options have not been widely tested and may require approval from labour regulators. Employers would

need to consider a range of issues before embarking on this strategy. For example, if an employer provides its employees with retroactive payments for the first period of their layoff, but the employee was collecting CERB or EI while on temporary layoff, they may not be able to accept retroactive payments without returning benefit payments.

If an employee is not recalled from layoff, what is their termination date? How are benefits and vacation pay affected?

If you do not recall an employee from temporary layoff and they are deemed terminated, the deemed date of termination is the first day of the layoff, and not the end of the layoff period. In the event of a deemed termination, statutory notice entitlements (including vacation pay) run from the first day of the layoff and must be paid out in full. Likewise, benefits continuance entitlements are also calculated from the first day of the layoff, but are provided to the employee from the end of the layoff period.

Note that if a large group of employees are not being recalled, mass termination entitlements may be triggered, resulting in longer statutory notice periods and various filing obligations. Each province has its own threshold for what qualifies as a mass termination, with different entitlements owing as a result.

10.31M
CERB applications received

$25.63B
dollar value of CERB Benefits paid

Source: Government of Canada, Current as of April 28, 2020, online: https://www.canada.ca/en/services/benefits/ei/claims-report.html

“Almost two-fifths (38.1%) of businesses reduced staff hours or shifts, while two-fifths (40.5%) of businesses reported that they laid off staff. Nearly one-fifth (18.3%) of all businesses laid off 80% or more of their workforce.”

–Statistics Canada, Canadian Survey on Business Conditions: Impact of COVID-19 on businesses in Canada, March 2020, online: https://www150.statcan.gc.ca/n1/daily-quotidien/200429/dq200429a-eng.htm

Flexible work arrangements

A. Staggered return to work

In preparing for the return of employees to the workplace, employers will need to think about the most suitable employees to return to work, having regard to not only their skills and the available work, but also ensuring the workforce remains as close to financially whole as possible. There are practical considerations for paying employees, directly or indirectly, to return to work, including accessing the Canada Emergency Wage Subsidy (CEWS), implementing Work-Sharing Plans, having an employee work while an employee is in receipt of Employment Insurance or the CERB, and the interaction of the various government benefits and programs.

There may be employees who refuse to return to work out of concern for their health, or because their children are still at home and require care. Please see the Other considerations section below, for strategies to deal with those issues. For employees who legitimately cannot return to work, they may be able to apply for or continue to receive the CERB and, once the maximum period for receiving this benefit has been reached, apply for EI benefits.

B. Working While on Claim

The federal government's Working While on Claim program allows employees receiving EI benefits to work a certain amount and continue to receive EI benefits.

Applications for EI benefits made after March 15, 2020, are being redirected for relief under the CERB. The CERB has different thresholds for working while in receipt of a benefit. However, employees who applied for EI benefits before March 15, 2020, and who had their claim processed by the EI rules, may be eligible for Working While on Claim.

Working While on Claim allows an eligible employee to keep 50 cents of their EI benefits for every dollar earned, up to 90 percent of their previous weekly earnings. If the eligible employee earns more than 90 percent of their previous weekly earnings, then the EI benefits received are deducted dollar for dollar.

Employees who are in receipt of EI benefits, including regular benefits, sickness benefits and compassionate care benefits are eligible for the Working While on Claim program. Employees who work a full week, regardless of the amount earned, are not eligible to receive EI benefits and, therefore, they would not be eligible to participate in this program. Employees who are Working While on Claim also cannot receive the CERB for the same period. There is no application required for Working While on Claim. Employees simply have to declare their earnings online.

Therefore, having regard to who and when to bring back to work, it is important to keep scheduling in mind when it comes to employees who may be eligible for the Working While on Claim program. In other words, consideration must be given to the point at which employees move from Working While on Claim to being back at work. In some cases, employees may be better off coming back to work for full weeks at a time, while in other cases, they may be better off Working While on Claim.

C. Working while in receipt of the CERB

In response to the large number of employees affected by the COVID-19 outbreak, the federal government announced the CERB, under which eligible employees can receive a $2,000 payment every four weeks for a period of up to 16 weeks. The four-week periods are fixed and set on Service Canada's website. Employees currently looking to receive benefits as a result of a loss of employment are being directed to apply for the CERB instead of EI, and employees who applied for EI benefits after March 15, 2020, are automatically being redirected to the CERB. Employees who are redirected to the CERB will receive $500 per week, regardless of what they may have been eligible to receive through EI.

The CERB is available to employees who are not on layoff, provided that the eligibility requirements for the CERB are met. Employees are allowed to earn up to $1,000 per fixed four-week period and remain eligible for the CERB. Therefore, employees may work occasionally while receiving the CERB, so long as they do not earn more than $1,000 in the fixed four-week period for which they are in receipt of the CERB. At the time of publication and based on guidance available from the federal government, the $1,000 threshold for employees appears to be gross earnings.

As set out in the Temporary layoffs section above, if an employee earns more than $1,000 in the fixed four-week period in which they receive the CERB, the employee will not be considered eligible to receive

the CERB and, at a future date, the employee will be required to pay back the amount received for the time they were ineligible. Whether they have to pay back the CERB differs depending on the fixed four-week period. The employee will need to repay the CERB if they receive more than $1,000 for a period of two consecutive weeks in the first four-week period for which they applied. For subsequent four-week periods, the employee will need to repay the CERB if they earn more than $1,000 in the entire four-week period. Employees will need to report their CERB payments on next year's tax filings and as such, it appears that the reconciliation of the CERB and entitlement criteria will likely occur at that time.

Employees must re-apply for each fixed four-week period that they are seeking to receive the CERB. Therefore, if an employee is recalled to available work that would have them earning more than the $1,000 threshold for the subsequent fixed four-week period, this employee could choose not to re-apply for the CERB for that fixed period. If circumstances change and the employee is no longer making more than the $1,000 threshold, the employee could apply for another CERB payment at a fixed four-week period in the future.

Employers will need to consider the benefit for employees of returning to work if they are in receipt of the CERB, but may lose the greater benefit of the CERB if the available work pays less than the CERB. At the same time, employers will also need to balance the reality of any short-term temporary layoff periods that are nearing their end, so that deemed terminations do not occur.

D. Work-Sharing

Work-Sharing is an EI program that provides income support to employees eligible for EI benefits who work a temporarily reduced work week while their employer recovers. Work-Sharing is a three-party agreement involving the employer, employees and Service Canada that provides EI benefits to eligible employees who agree to reduce their normal working hours by at least 10 to 60 percent and share the available work.

The employer pays wages to employees for the hours they have worked, and the employer completes a Utilization Report so that Service Canada is aware of the work hours that employees have missed. Employees in Work-Sharing are then paid directly from Service Canada for the percentage of their EI benefit rate that corresponds with the percentage of the work hours they missed.

Work-Sharing agreements must be government approved and an application must be submitted to Service Canada. As a result of COVID-19, the application process has been streamlined as employers are no longer required to provide a detailed recovery plan. The Work-Sharing arrangement must have a minimum duration of six weeks and such arrangement can be extended up to 76 weeks, provided there is the agreement of the employees.

To qualify for Work-Sharing, the employees must be "core staff", which means they are a year-round, permanent, full-time or part-time employee needed to carry out the day-to-day functions of the business, eligible to receive EI benefits. In addition, the employee must agree to a reduced schedule of work and to share the available work for a specified time period. The program has been expanded in response to COVID-19 in order to include employees considered essential to the recovery and viability of the business, such as senior management and marketing agents responsible for recovery, or technical employees engaged in product development.

Core staff who were temporarily laid off prior to the employer applying to enter into a Work-Sharing agreement can be included in the Work-Sharing unit, which is a term for the group of employees who agree to a work reduction and equal sharing of work. Any employees laid off in between the submission of an application to enter into a Work-Sharing agreement and

the date the Work-Sharing agreement commences, are also eligible to participate in Work-Sharing. Eligible employees can be added to an existing Work-Sharing agreement by way of an amendment, and they need to be added to weekly Utilization Reports.

Employees who are receiving EI benefits and who are called back to work can stop receiving EI benefits through the regular EI channel in order to participate in Work-Sharing. Instead, they will receive EI benefits through the Work-Sharing program. Even though applications for EI regular benefits are currently being redirected and processed through the CERB, applications for EI benefits received through a Work-Sharing agreement continue to be processed according to the standard EI rules. EI benefits under a Work-Sharing agreement are, therefore, calculated based on the existing EI threshold (55 percent of an employee's weekly earnings up to a maximum of $573 a week), rather than the $500 a week entitlement under the CERB. Employees applying for EI benefits under a Work-Sharing agreement are advised to apply through Service Canada as opposed to the Canada Revenue Agency.

For employees who are participating in a Work-Sharing program, the EI benefits received by employees through the Work-Sharing program will reduce the benefit that the employer is entitled to receive for each employee under the CEWS.

E. Supplementary Unemployment Benefit Plan

Employers may top up employees' EI benefits through a registered Supplemental Unemployment Benefit (SUB) plan during a period of unemployment due to illness, injury, quarantine, temporary stoppage of work or training. Payments under a registered SUB plan are not insurable earnings and will not reduce the amount of EI benefits received. Employers are required to have a SUB plan registered with Service Canada, unless the top-up for EI benefits is for pregnancy, parental, family medical or critical illness leave. If the SUB plan is not registered, the payments will reduce the amount of EI benefits received by the employee.

The weekly payment under a SUB plan, when added to the weekly EI benefit rate, cannot exceed 95 percent of the employee's normal weekly earnings.

SUB payments can be made to employees in the Working While on Claim program. As discussed above in the "Working While on Claim" section, employees in this program are allowed to retain up to 50 percent of their earnings and, once they have earned 90 percent of the average weekly earnings amount used to calculate the EI benefit rate, earnings are deducted dollar for dollar. However, employees in receipt of EI benefits must report all earnings, including those earned Working While on Claim, and a consideration by the employer of all earnings will impact the amount received through the SUB plan.

SUB payments may not form part of a Work-Sharing agreement.

At present, the federal government has not allowed employer contributions to a SUB plan to top up the amount that employees receive through the CERB.

F. Canada Emergency Wage Subsidy

An option for employers that would like to minimize the risk of having a temporary layoff turn into a deemed termination, is to access the Canada Emergency Wage Subsidy (CEWS). The CEWS is designed to enable eligible employers to rehire or recall employees who had been temporarily laid off due to COVID-19. Employers were able to begin applying for the CEWS with the Canada Revenue Agency starting on April 27, 2020. Employers must file applications for the CEWS before October 2020.

The CEWS provides a subsidy of 75 percent of eligible remuneration to employers in respect of eligible employees—up to a maximum of $847 per week—for up to 12 weeks. An employee is eligible for the CEWS if they are employed in Canada by an eligible entity, and the employee has not been without remuneration for 14 or more consecutive days from an eligible employer in a claim period. Eligible employee status is determined for each claim period and, as a result, an employee may be eligible in future claim periods should circumstances change. CEWS applications for a claim period can be made only after the end of the claim period.

Employees who have been temporarily laid off can have CEWS paid retroactively, as far back as March 15, 2020. However, employers should be aware that if an employee was in receipt of the CERB during the period in which the retroactive CEWS payment

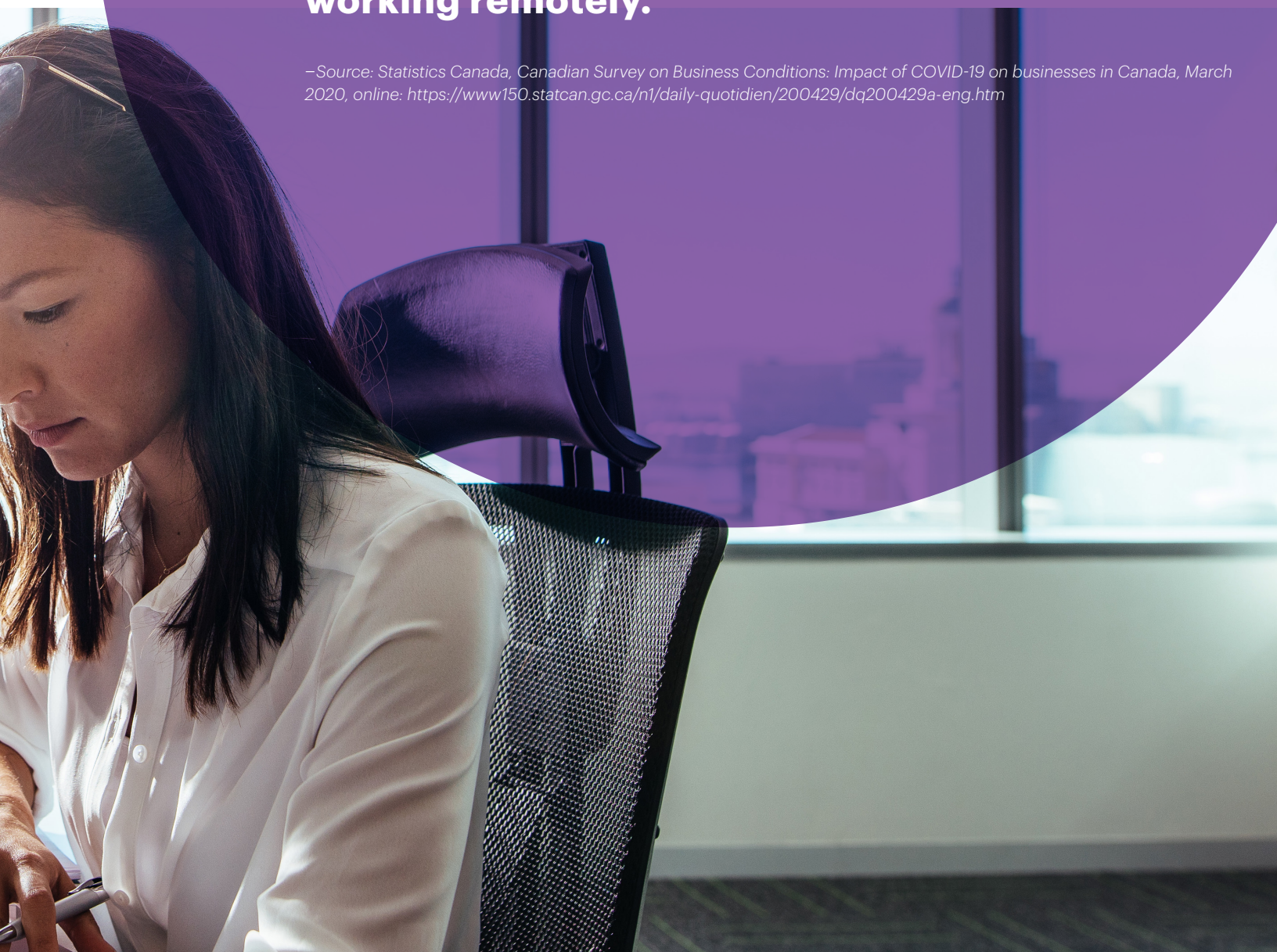
is being provided, and the employee is no longer entitled to the CERB as a result of that retroactive payment, the employee will be required to pay back the CERB received for that retroactive period. Employers should also note that they must recall and pay these employees before they can be included in the employer's calculation for the CEWS.

An employee who has received the CERB can still qualify for the CEWS, provided the employee has not been without remuneration from an eligible employer for 14 or more consecutive days in the period claimed. The onus is on the employer to ensure that ineligible employees for CEWS are not included for any claim period. All of that being said, as of April 27, 2020, the federal government announced that employees cannot receive both the CEWS and the CERB at the same time, and employees will have to pay back one of the benefits.

Employers that do not qualify for the CEWS may qualify for the previously announced temporary wage subsidy of 10 percent of remuneration paid from March 18 to June 20, up to a maximum subsidy of $1,375 per employee and $25,000 per employer. For employers that are eligible for both the CEWS and the 10 percent temporary wage subsidy, receipt of the latter will reduce the amount available to be claimed under the CEWS in that same period.

“Nearly half (47.9%) of businesses reported 10% or more of their workforce was teleworking or working remotely on March 31, 2020. This was over twice the level reported as of February 1, 2020, when 20.4% of businesses reported 10% or more of their workforce was teleworking or working remotely.”

–Source: Statistics Canada, Canadian Survey on Business Conditions: Impact of COVID-19 on businesses in Canada, March 2020, online: https://www150.statcan.gc.ca/n1/daily-quotidien/200429/dq200429a-eng.htm



Workplace health & safety

The majority of workplace safety requirements specifically relating to COVID-19 are derived from guidelines and recommendations from public health bodies in various Canadian provinces. As such, they may not themselves have legal force, but may be seen as "reasonable precautions" that are, therefore, given legal force under the general duty clauses of occupational health and safety laws across Canada. Those "general duty clauses" require employers to take "reasonable precautions", and the government safety inspectors who enforce occupational health and safety legislation will likely take the position that public health recommendations are "reasonable precautions" that may, therefore, be enforced by government safety inspectors as legal obligations under occupational health and safety legislation.

When developing policies, procedures, and training and communication materials, workplaces should use current correct messaging from a trusted source. It is best to follow federal, provincial and local government public health and workplace guidance. Any training and communications should be reinforced to employees by the use of signage (preferably infographics) placed in strategic locations in the workplace, wherever possible.

A. Temperature or other screening

Active screening

As a primary step, employers should instruct employees not to report to work if they are ill and they should not be allowed in the workplace if they are known to be ill. Current public health guidelines indicate that employers should screen all individuals prior to entering the workplace (including employees, contractors, visitors, etc.). The screening questions should be based on current health guidance (in other words, the known symptoms at the time), and other screening (such as, to the best of their knowledge, they have not been in contact with someone with a confirmed or probable case of COVID-19), and updated as necessary. It remains to be seen whether public health officials, or provincial ministries of labour, will recommend that employers continue active screening of employees even after the government permits non-essential workplaces to reopen. In any event, employers that serve vulnerable populations (for example, hospitals and long-term care homes) should strongly consider maintaining employee screening until the threat of COVID-19 has subsided.

Employers should also plan for rapid isolation or removal of a symptomatic employee, and identify an area where employees or others can be isolated if they become ill at the workplace.

Temperature screening

In an employment context, medical examinations or health-related tests like temperature testing are generally acceptable *only if* the testing or examination is reasonably necessary to confirm a potential employee's ability to perform a *bona fide* occupational requirement of the role. It is generally not permissible to require that all employees undergo a health-related test, such as temperature screening, as that would constitute an unnecessarily invasive action. It would be more acceptable to test individuals on a case-by-case basis, where an employer has reasonable cause to require a particular employee to have his/her temperature checked (i.e., a reasonable belief that a particular employee requires quarantine).

However, in the exceptional circumstances of COVID-19, it is likely that an employer's obligations, under applicable occupational health and safety legislation, to take all reasonable precautions for the protection of the health and safety of its employees, may justify temperature screening in these circumstances – particularly where the employer operates a long-term care home or serves another vulnerable population.

The Ontario Human Rights Commission (OHRC) has issued a policy position on temperature screening by employers in the circumstances of COVID-19: using temperature screening to verify or determine an employee's fitness to perform on the job duties **may be permissible** under the Human Rights Code (Ontario) in the circumstances of COVID-19. However, the OHRC has also stated that information on medical tests may have an adverse impact on employees with other disabilities.

As a result, employers that conduct temperature screening during COVID-19 should conduct such screening in conjunction with other active screening measures as set out above. An employee's temperature may be elevated for a reason related to a different, non-communicable medical disability that does not pose an unreasonable risk to health and safety at the workplace.

Once the COVID-19 crisis is over and business operations have resumed, it will likely be difficult to justify the invasive action of temperature screening for employees in most workplaces, again with the exception of long-term care homes and other workplaces that serve vulnerable populations.

Note that there may also be privacy law issues that have to be taken into account when undertaking various types of screening, although they will need to be balanced against health and safety considerations. For further information on COVID-19-related privacy issues, please contact a member of the Dentons Privacy and Cybersecurity group.

B. Physical distancing measures

Public health guidance has suggested that physical distancing is an effective measure for preventing exposure and the spread of the virus. Employees should be required to maintain separation of at least two metres (six feet) to the extent possible in the workplace. Methods of physical distancing that can be employed in most areas within most workplaces include the following:

- Installing barriers (e.g., clear plexiglass for employees who interact with the public, placing dividers on tables to remind employees to maintain a physical barrier between each other);
- Marking certain tables or chairs "off-limits" by tape, or removing them altogether;
- Using visual cues at six-foot intervals (e.g., floor markings, signs);
- Adjusting schedules to facilitate distancing of employees (including increasing the flexibility around shift start times and break times in order to decrease the number of employees in entrances or break areas at one time);
- Considering methods to increase physical distance in areas where employees commonly congregate (including punch clocks, copy rooms, where PPE is checked out, etc.) and to ensure contactless interactions between employees as much as possible;
- Finding alternate ways to hold essential meetings of large groups (e.g., online training sessions, video and teleconferencing, adjusting the physical layout of meeting rooms);
- Assigning an individual to monitor social distancing efforts in communal spaces (e.g., break rooms, cafeterias, locker rooms), or closing those rooms altogether;
- Implementing tools and technologies to minimize contact with the public (e.g., having customers scan and pack their own purchases when possible);
- Establishing one-way traffic, where possible, to prevent people from encountering each other; and
- Informing suppliers, subcontractors, partners and delivery persons of the measures implemented by the company to control the risks associated with COVID-19, and stressing the importance of complying with these measures.

C. Hand hygiene and sanitation

Public health guidance indicates hand hygiene and sanitation (infection prevention and control) are important tools to avoid being exposed to the virus and slowing its spread. Cleaning and disinfection of surfaces and objects that are frequently touched, especially in common areas, several times per day is an important component to control the spread of COVID-19. Ensure workers have access to toilets, water and soap. Encourage frequent handwashing with soap and water for at least 20 seconds, and provide hand sanitizer with at least 60 percent alcohol if soap and water are not available.

D. Personal Protective Equipment in the workplace

Current public health guidance indicates that if employees are at risk of coming in contact with contaminated material or those who have been exposed to COVID-19, Personal Protective Equipment (PPE) can be helpful in reducing the spread of the virus. Otherwise, PPE should currently be reserved for those working in healthcare and on the front lines, until the PPE supply chain is more robust. If employees must wear PPE because they may come in contact with contaminated material or individuals, the PPE must be donned and doffed correctly. Misuse of gloves and other PPE increases risk of infection. After use, PPE

should be: (i) properly disposed of in a designated disposal unit; or (ii) properly disinfected and then stored in a clean location. PPE worn in the workplace should not be taken home.

E. Training

Employers' obligations under occupational health and safety legislation to ensure that all workers receive appropriate safety training, extends to training related to COVID-19 prevention. Employers must ensure that employees are properly trained on physical distancing, hand hygiene, PPE and all other safety measures related to COVID-19.

F. Government reporting

The Ontario *Occupational Health and Safety Act* requires that employers report to the Ministry of Labour, Training and Skills Development, their joint health and safety committee and trade union(s) (if any), within four days where any employee contracts an "occupational illness" at work. COVID-19 is an occupational illness under the OHSA. Similarly, employers are required to file a "Form 7" with the WSIB where an employee contracts COVID-19 at work. It will not always be clear, however, whether the person contracted COVID-19 at work or elsewhere. Where there is some evidence that the person contracted COVID-19 at work, but it is not clear, the safe approach is for the employer to report to the Ministry of Labour, Training and Skills Development, and to the WSIB.

G. Government of Ontario guidelines to prevent COVID-19 in the workplace

On April 30, 2020, the Government of Ontario released safety guidelines on the prevention of COVID-19 in the workplace in the following sectors: manufacturing, food manufacturing and processing, restaurant and food service, and agriculture. These resources provide direction to workplaces on, among other things, best practices, physical distancing, workplace sanitation, workforce tracking, reporting requirements, and sharing information.

The government has indicated that it will release resources for additional industries in the future. It is expected that the government will update these safety guidelines in accordance with public health information. As such, it is recommended that employers check the Government of Ontario website on a regular basis in order to ensure they are following the most current guidelines. Note that any applicable Government of Ontario guidelines, as updated from time to time, must also be followed by all Ontario businesses that we be permitted to re-open on May 4, 2020.

Other considerations

Employees who refuse to return to work

Employers should consider the possibility that even after essential workplace rules are relaxed and employees may be able to return to their workplaces, some employees may not want to or may even refuse to do so. Employer responses to same will depend upon the facts of each case, as well as government orders. In particular, it is assumed that at least for some period of time after essential workplace rules are relaxed, employers may be required to continue with remote work wherever possible. That said, there are three primary types of work refusal issues that are most likely to occur:

- *Employees who believe that they were effective working remotely and that they should be permitted to continue working remotely.*
  Generally speaking, unless there is a disability issue that requires accommodation, the employer can insist that the employee return to the workplace, provided it meets occupational health and safety requirements. Ultimately, it is a business decision for employers to determine whether employees will be permitted to work remotely, be it on a full-time, part-time or occasional basis. That said, ongoing government restrictions may also help to guide this issue, as even when governments choose to relax certain workplace restrictions, there may still be a need for reduced staff for periods of time, in order to maintain social distancing within workplaces.

- *Employees who have younger children at home and do not have childcare options due to school and daycare closures.*
  For so long as schools and daycares remain closed, and an employee has no other options to care for their children, "family status" protection under human rights legislation may give the employee the right to stay at home and care for their children. In addition, on March 19, 2020, the Ontario government passed the *Employment Standards Amendment Act (Infectious Disease Emergencies)*, 2020 (ESA Amendment Act). The ESA Amendment Act provides job-protected leave to employees who, among other things, need to provide care to a person for a reason related to COVID-19, including caring for children due to school and daycare closures. For so long as this protected leave is in place, employees cannot be terminated due to an inability to work because of childcare closures.

- *Employees who are scared to return to work, have underlying health issues and/or otherwise cannot return to the workplace.*
  Having regard to the above, if an employee has underlying health issues, the employer may need to accommodate them. In such a situation, the employer generally needs to work with the employee and their medical professional(s) in order to understand whether there is a disability, whether accommodation for same is required, and the nature of any such accommodation. If there is no disability but the employee still has an underlying health issue that creates greater risk of COVID-19 complications, then the situation needs to be examined by the employer from an occupational health and safety perspective. In such cases, even where there is no disability, it may be that the only way for the employer to keep the employee safe, is to permit the employee to work from home.

  There may be cases where an employee has valid reasons to continue to refrain from attending work in the workplace but where there is no remote work available for the employee. In such a case, if the employee is under disability, then the employer needs to examine whether or not it would be a matter of undue hardship for the employer to find a way to accommodate the employee.

  There may also be situations where the employee does not want to attend work in the workplace because a member of their household has underlying medical conditions. Pursuant to the ESA Amendment Act, as referenced above, employees in this situation also have job protections if they are unable to return to work. Any employee wishing to take advantage of the unpaid leave under the ESA Amendment Act may need to be able to provide evidence in support of the need for the leave, although medical notes cannot be requested.

  If there is no disability or grounds for a leave under the ESA Amendment Act, and/or if the employee does not want to attend the workplace for non-medical reasons, then the employee's employment can be terminated or the employee can be placed on temporary layoff if they refuse to return to work. The question of whether such a refusal might trigger a termination due to frustration of contract is something that should be examined with the benefit of legal advice.

Vacation

Employers should begin to consider how to best manage vacation through the balance of 2020, to best balance operational considerations with financial considerations.

For employees who have not yet taken most of their vacation this year, questions will inevitably arise in relation to such things as: (i) banking vacation for another year when travel may be more likely; (ii) obtaining a payout of vacation to help supplement tough times.

- *Banking vacation time and pay*
  For some employers, the banking of vacation time and pay may be fine, as the company may want to put off the payment of that liability for as long as possible. That is permitted with statutory vacation under the ESA, as long as it is taken within 10 months of the year in which it was earned. Vacation entitlements in excess of statutory minimums may be banked for as long as the employer permits.

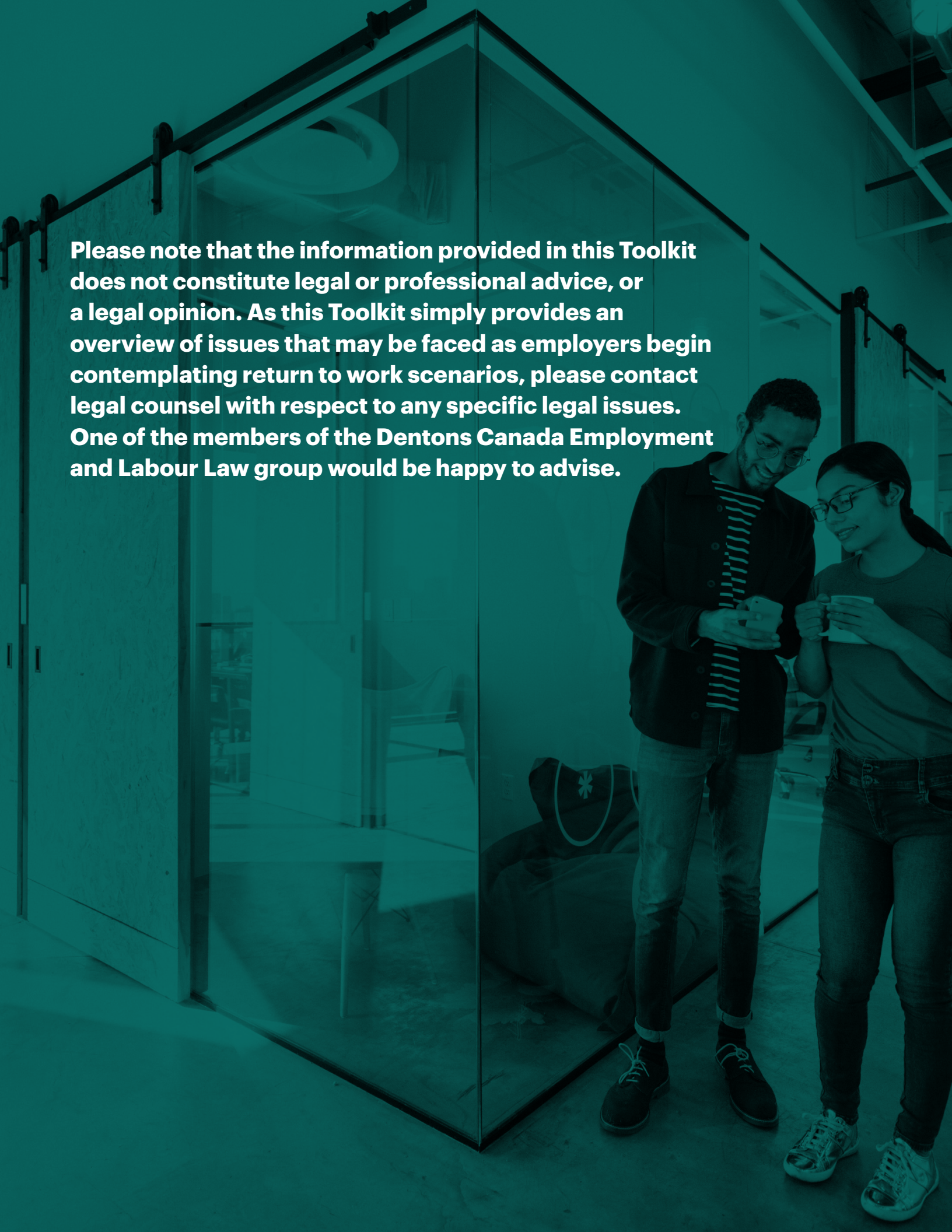
  That said, some employers might not want to permit the banking of vacation time and pay. To that end, it is important for employers to remember that vacation pay falls under the definition of wages in most provinces, and that unpaid wages claims can be brought against corporate officers and directors if companies are not able to pay them out. Therefore, a banking of vacation pay that results in a carry-forward of statutory vacation into another year can have the effect of possibly increasing liability to officers and directors.

  Above all, it is important to remember that under the ESA, the timing of vacation rests with the employer rather than the employee. If it is in the employer's best interests to dictate when employees will take vacation in 2020, it will have the ability to do so and force employees out on vacation at a time of the employer's choosing.

- *Payout of vacation time*
  In cases where an employee wishes to receive a payout of vacation pay but it is not convenient for the employer, the request may be refused under the ESA. As stated above, this is due to the fact that the ESA states that the employer shall determine when an employee shall take vacation. The only caveat is that the vacation time must be provided and the corresponding vacation pay provided within 10 months of the year in which it was earned. It is also important to keep in mind that vacation pay should generally not be paid out without the provision of corresponding vacation time. Even if vacation pay is paid out at an employee's request for financial reasons, the employer cannot forego providing the corresponding vacation time.

Mental health issues in the workplace

Throughout the COVID-19 pandemic and as employees begin to return to the workplace, employers should keep in mind the fact that the stresses of the pandemic may exacerbate or cause mental health issues. People have experienced numerous stressors as a result of COVID-19, including but not limited to personal and family health issues, anxiety, childcare, elder care, financial problems and so on. In addition, it can reasonably be expected that some employees, having managed to keep depression at bay for a period of time, may be unable to do so as things relax and they begin to realize what they have been through. All of that said, not all anxiety and stress manifests as a disability. Employers should be aware of the possibility of new mental health issues where perhaps before there were none, and for employers to work through the standard processes when there are concerns about same. Those processes include reminding employees of available supports like EAP providers, working with medical providers to understand whether or not there is a disability and, when there is, to explore potential accommodations. For further information, the National Standard of Canada for Psychological Health and Safety in the Workplace (the Standard) is a good resource, and offers a free online toolkit designed to support organizations working to implement the Standard.



Please note that the information provided in this Toolkit does not constitute legal or professional advice, or a legal opinion. As this Toolkit simply provides an overview of issues that may be faced as employers begin contemplating return to work scenarios, please contact legal counsel with respect to any specific legal issues. One of the members of the Dentons Canada Employment and Labour Law group would be happy to advise.

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Dentons, which has offices in 182 locations in 74 countries, has been at the forefront of the global legal response to COVID-19 since the beginning of 2020. For further information on COVID-19 legal matters around the world, our Dentons COVID-19 (Coronavirus) Hub can be found here: **https://www.dentons.com/en/issues-and-opportunities/covid-19-coronavirus-hub**. Our employment and labour lawyers around the world are ready to assist with your global concerns.

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