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Communiqué

*for Health Industry Clients
on the Legal Retainer Program*

Managing Risk Around SARS – What Employers Should Know

It is a challenging time for many Ontario employers as they respond to the Severe Acute Respiratory Syndrome (“SARS”) outbreak. This is especially the case for health industry clients as they struggle to provide essential services and deal with outbreak management.

This Communiqué will provide basic information about the rights and obligations of employers and employees with respect to SARS. We also provide suggestions for employers who are not subject to Public Health directions on how to manage their risk in relation to SARS. As this situation continues to change, we encourage clients to monitor the situation as it evolves and have provided some useful links to government information sources.

Statutory Rights and Obligations Employment Standards

For employers who regularly employ 50 or more employees, the Emergency Leave provisions under the *Employment Standards Act, 2000* (ESA) are applicable if an employee has either been exposed to SARS or has been advised to take a self-imposed quarantine. The ESA provides for up to ten days unpaid leave each calendar year and is available in the case of personal illness, injury or medical emergency of the employee. These provisions also apply to employees who, for example, are caring for dependents who are ill or quarantined due to SARS. Under the legislation, employers are prohibited from penalizing an employee because he or she takes emergency leave. Please note that there is also an exception for regulated health professionals if such leave would constitute professional misconduct or a dereliction of their professional duties.

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If the employer regularly employs less than 50 employees, the Emergency Leave protection does not apply. There are also provisions under the *ESA* for employees who have been quarantined at their place of work. Employers whose premises have been quarantined, such as hospitals or schools, are required to pay their employees for work they perform. The regular hours of work and overtime provisions apply for work performed during the quarantine. The Ontario Ministry of Labour has indicated that employers are not required to pay overtime if the employee is under quarantine and cannot leave the facility, but is not actually working or on call.

Subject to any collective agreement or employment contract obligations, where an employer is unable to provide work for employees due to the SARS outbreak, the employer may layoff some or all of its employees. An employee may be laid off for a temporary period of time without triggering any obligation to pay termination or severance pay under the *ESA*. If the employee is laid off for a period longer than specified in the Act, his or her employment will be considered to have been terminated. The employer has the right to schedule vacation time owing to the employee during this period.

Occupational Health and Safety

Employers have a duty under the *Occupational Health and Safety Act* (OHSA) to ensure that the workplace is safe. An employee who feels that the circumstances at work are unsafe may discuss them with the employer or the Joint Health and Safety Committee if there is one. As health industry clients are aware, those involved in the operation of a hospital have limited rights to refuse work under the *OHSA*, however, other employers may face a situation where their employees refuse work if they are unable to resolve the issue. In such a case, the employee should initiate the work refusal process under the *OHSA*.

Workplace Safety and Insurance

The Workplace Safety and Insurance Board (WSIB) has issued an Announcement which provides that workers with symptoms of SARS who have been infected in the course of their employment may be entitled to WSIB benefits. As always, each case will be assessed on a case-by-case basis. The Announcement states that there will be no

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coverage for workers who are symptom-free, even if they are quarantined or sent home on a precautionary basis. Having said this, such workers may be entitled to benefits if they develop illness while in isolation that is compatible with their occupational exposure.

Human Rights

The Ontario Human Rights Commission (OHRC) has expressed concern about possible discrimination or harassment against Ontario's Asian-Canadian community since the SARS outbreak is believed to have originated in China. As well, the Human Rights Code prohibits discrimination on the basis of handicap. The OHRC has indicated that since diseases and medical conditions such as SARS fall within the definition of handicap, there are protections for persons who have or are perceived to have SARS.

Employers will have a duty to accommodate employees with SARS or who have been exposed to SARS. Suitable accommodation will vary depending on the circumstances but could include allowing the employee to take time off work or allowing the employee to work from home, if possible.

Employment Insurance

Human Resources Development Canada (HRDC) has made several amendments to the *Employment Insurance Regulations* to respond to SARS-related claims submitted on or after March 30, 2003. Where a period of quarantine has been imposed or recommended by a public health official or the individual has been asked by an employer, medical doctor, nurse or another person in authority to quarantine him or herself, the normal two-week waiting period for sickness benefits has been removed. Further, the requirement to produce a medical certificate issued by a physician has been removed in SARS-related quarantine cases.

Other Considerations

Employers have an obligation to encourage employees to voluntarily quarantine themselves where there is a valid reason to do so. In order to encourage compliance, employers may also consider the following options where an employee is quarantined due to SARS related symptoms or exposure: allowing the employee to use available sick days;

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short term disability benefits where available; use of vacation time; days off in lieu of overtime or a leave of absence without pay. It may also be possible to provide employees with the technology to work from home during the quarantine.

Risk Management Strategies

In our view, all employers should take proactive steps to ensure the protection of their workplace. The following actions may be subject to a policy or directive from the employer and should be clearly communicated throughout the workplace:

- The employer should provide information about SARS to employees and outline the symptoms and criteria to watch for, and the actions that the employee and employer are required to take.
- The employer should designate an individual or create a team to monitor SARS in the workplace and to coordinate efforts.
- Employees should be encouraged to voluntarily quarantine themselves if they are exhibiting symptoms or have been in direct contact with someone who is symptomatic. The employee will be asked to notify the contact person or team.
- If the employer is aware that an employee is exhibiting symptoms or has been in contact with someone who is symptomatic and that individual has not quarantined him or herself voluntarily, this person should be denied access to the workplace.
- Employers should consider advising employees that employees who break quarantine or attend work when they know that they have been exposed to SARS may be subject to discipline, up to and including termination. Further, breaking quarantine may be a violation of the *OHS*A and could result in criminal proceedings
- Employees should be encouraged to wash their hands frequently. Signs should be posted in appropriate areas in this regard.
- Employers can consider use of hand sanitation supplies.

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- Employers can initiate employer travel policies with respect to travel to high risk areas.
- Employers can initiate directives limiting non-essential internal and external contact. Use of technology in place of person to person contact may be encouraged.
- Contingency plans should be developed to limit possible work interruptions for those who perform essential duties in the workplace.

The above information may be subject to terms contained in collective agreements or employment contracts.

Employers should ensure that they monitor regular updates from Ministry and government sites. This Communiqué is a synthesis of information currently available. For more detailed information, please refer to the following web sites:

Ontario Ministry of Labour:

<http://www.gov.on.ca/LAB/english/hs/sars/>

Human Resources Development Canada

<http://www.hrdc-drhc.gc.ca/common/news/>

Workplace Safety and Insurance Act, 1997

<http://www.wsib.on.ca/wsib/wsibsite.nsf/public/policysars>

Occupational Health and Safety Act

<http://www.gov.on.ca/LAB/english/hs/ohsaguide/>

Ontario Human Rights Commission

<http://www.ohrc.on.ca>

Toronto Public Health Department:

<http://www.city.toronto.on.ca/health/sars>

Health Canada:

<http://www.hc-sc.gc.ca/english/protection/warnings/sars/>

The World Health Organization:

<http://www.who.int/csr/sars/en>

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Note: This communiqué is provided as an information service to our clients and is a summary of current legal issues of concern to Health Industry Clients. Communiqués are not meant as legal opinions and readers are cautioned not to act on information provided in this communiqué without seeking specific legal advice with respect to their unique circumstances. Your comments and suggestions are most welcome and should be directed to Kathryn Frelick, Supervising Counsel, Legal Retainer Program.

Contact Information

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Please note that the Health Industry Group will be providing post-SARS recovery advice.

About the Author:

Kathryn Frelick is a lawyer practicing in our Health Industry Practice Group and is responsible for the Legal Retainer Program. Kathryn focuses on advocacy, regulatory and health policy issues.

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