Return to Work: Managing Employee Reluctance and Refusals

Date: October 01, 2020

Original Newsletter(s) this article was published in: Employment Update: October 2020

The COVID-19 pandemic has been a time of great uncertainty for both employers and employees. Change has been the only constant. When we previously published an article on February 25, 2020 about an employee's right to refuse work due to concerns about the coronavirus, there was only one (1) confirmed positive case in Ontario and nine (9) cases under investigation.

Unfortunately, 700 positive coronavirus cases were reported in Ontario on September 28, 2020, the highest daily count of new infections since the pandemic began in March.

Despite legitimate concern about a "second wave", many employers have entered a new normal in which some of their employees have returned to work after a temporary shutdown, albeit under strict health and safety precautions. The Ontario government recently enacted new mandatory screening requirements for the workplace, which are explained in more detail in our recent article.

While some employees have embraced a work recall, many employers are encountering questions and concerns from employees that are reticent to return to work.

Workplace Safety

Under the *Occupational Health and Safety Act* ("OHSA") employers have a general duty to take every precaution reasonable in the circumstances for the protection of a worker. This general duty applies to threats from a global pandemic. Under section 43 of the OHSA, a worker who may otherwise be subject to discipline for insubordination is entitled to refuse work in certain circumstances where he or she "has reason to believe" that performing the work would endanger himself, herself or another worker.

In order to lawfully refuse work, the employee must report the refusal to his or her supervisor, who is required to investigate the hazard in the presence of the worker or a health and safety representative, if applicable. Following the supervisor's investigation, if the worker "has

reasonable grounds" to believe there is still a danger, he or she may continue to refuse work and an inspector from the Ministry of Labour may be notified.

The OHSA permits an employer and employee to agree to safety precautions that address an employee's concerns. Therefore, if an employee is reticent to return to the workplace due to health and safety issues, employers are well advised to openly and candidly discuss the protections implemented to keep workers safe and mitigate the risk of contracting the coronavirus.

Preference to Work from Home

Many employers have implemented significant safety precautions yet still encounter resistance from employees who are reticent to return to the workplace.

To be clear, work is not optional. Assuming a workplace is reasonably safe, an employee's generalized anxiety or preference to work from home does not justify the refusal to return to work.

The reluctance of some employees to return to work may be attributed in part to the Canadian Emergency Response Benefit ("CERB"). However, the program will expire on October 3, 2020, after which the Canada Recovery Benefit ("CRB") is expected to provide income support to workers so long as such workers are available and looking for work. According to *Bill C-2, An Act relating to economic recovery in response to COVID-19*, which has not yet been enacted, a worker is not eligible for CRB if he or she "failed to return to their employment when it was reasonable to do so if their employer had made a request."

Childcare and Family Status

If an employee raises concerns about returning to work for reasons associated with child care, the employer should make appropriate inquiries to understand the employee's issue. This may include a discussion about a flexible schedule and/or the opportunity to work from home, in certain circumstances, and if it is practical to do so.

The Ontario *Human Rights Code* (the "*Code*") prohibits discrimination on the basis of family status, which is intended to protect the parent-child relationship. Case law is clear that it is an employee's child care needs that are protected under the *Code*, as opposed to their *preferences*. Therefore, an employer is not necessarily obligated to provide the type of accommodation requested by an employee so long as the accommodation offered adequately addresses the family status issue.

However, employers must recognize that employee morale and the appearance of unfairness is not a legitimate reason to deny an accommodation request. Employers may cite operational concerns in denying accommodation requests, however, these concerns cannot be theoretical. Rather, employers must rely on concrete evidence to support a denial of accommodation. Given that many employees have been working from home for months without incident, claiming that such an arrangement is untenable may prove difficult without a clear explanation as to why.

Even under normal circumstances, the accommodation of family status is challenging. As a result of the COVID-19 pandemic however, accommodation is even more difficult for several reasons:

- While many school districts are returning to in-classroom learning, in the event of an outbreak at a given school or daycare, employees may suddenly be responsible for providing childcare due to a quarantine order;
- Due to legitimate fears about COVID-19, a child with a light cold might be directed to stay at home unless he or she can produce a negative COVID-19 test result;
- Some schools and school districts that are returning to in-classroom learning are still relying upon hybrid models in which students are learning remotely for portions of the day or week; and
- Alternative childcare options, such as grandparents picking up children from school, have been limited by health and safety concerns.

If ongoing childcare concerns make a sustained return to work impossible, an employee is entitled to take an unpaid Infectious Disease Emergency Leave ("IDE Leave") for reasons related to COVID-19, such as the need to care of a designated family member because of a matter related to COVID19. This includes but is not limited to school closures. Currently, there is no specified time limit for how long an employee initiated IDE Leave can last, provided that COVID-19 remains a designated infectious disease. For more information about IDE Leaves under the *Employment Standards Act, 2000*, please see our recent article on the subject.

Medical Concerns

The Human Rights Code also protects discrimination on the basis of disability, which is broadly defined and could include an otherwise manageable illness that is impacted by a hazard in the workplace. For example, asthma in many work settings would not pose a significant barrier to safe and productive work. However, due to the COVID-19 pandemic individuals with severe respiratory issues may be concerned about their acute vulnerability to contracting the virus.

Employers are required to accommodate disability to the point of undue hardship. The threshold of *undue* hardship means that an employer is required to withstand a reasonable level of hardship in an effort to accommodate employees.

When an employee seeks accommodation, an employer is entitled to sufficient information to respond to that request. However, generally speaking employers are not entitled to an employee's medical records or diagnoses.

In summary, returning employees to work presents very difficult questions for employers. In response to employees who are reluctant to accept a return to work, patience, flexibility, and open communication are encouraged. As outlined above, health and safety concerns as well as accommodation requests are highly fact specific and employers should engage counsel before concluding that an employee's refusal to return to work is an impassable obstacle.

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