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INFORMATION BULLETIN

COVID-19: Unions' Questions Answered

On March 11, 2020, the World Health Organization declared the COVID-19 outbreak a *pandemic*. Government and public health officials are providing frequent updates, changing directives and making recommendations

We have received numerous inquiries from union clients related to the outbreak. In particular, unions have asked:

(1) What should the union do if the employer wants to send a member home?

(2) Is potential exposure to the virus a basis to refuse work?

The answers to these questions will depend on the facts of each particular case and the language in the relevant collective agreement. The following information is not legal advice. Unions should consult legal counsel for advice on their particular circumstances.

What should the union do if the employer wants to send a member home?

The general rule is to "work now, grieve later". Members risk discipline if they do not follow employer direction. The union should file a grievance if the employer's direction is unreasonable or in violation of the collective agreement.

This question has three dimensions:

(A) is the employer's direction fulfilling a statutory duty?

(B) is the employer's direction reasonable?

(C) if yes, is the member entitled to pay?

(A) Statutory Duties

The *Health Protection Act* (*HPA*) empowers public health officials to prevent, detect, and manage health threats. Orders made under the *HPA* may be binding.

At the time of writing, the Province of Nova Scotia requires anyone returning from international travel to self-isolate for 14 days upon return. This order applies to all travellers returning from abroad, regardless of what countries they visited or whether they are symptomatic.

A direction from an employer that a member must stay home to comply with an *HPA* directive must be followed.

Given the evolving nature of the outbreak, orders and recommendations will continue to change. Such orders and recommendations will shape the legal landscape in which unions operate.

(B) Reasonableness

Outside of orders made by public health authorities authorized by law, employer directions for members to stay home from work during the pandemic must be reasonable and must not be in violation of the collective agreement. Remember, this is an argument that would be pursued during the grievance procedure. In the meantime, the member must follow the direction to stay at home.

Whether a directive to stay home is reasonable is highly fact-specific. A directive to stay home will likely be reasonable if (1) the member to too sick to perform their job duties, or (2) the member poses a risk to the health of other employees or the public.

What is reasonable is fact-specific. On the spectrum of reasonableness, it is more likely to be reasonable for an employer to send a member home who has travelled, has had potential exposure to the virus, or displays symptoms of the virus.

The employer's decision to send a member home will be more reasonable where the employer mitigates the prejudice to the member by providing full pay.

Of course, an employer policy that requires members to leave work based on ethnic or national origin is unreasonable and discriminatory under the *Human Rights Act*.

(C) Entitlement to Pay

Some employers have committed to pay members who are forced to take leave to self-isolate. Some have not made this commitment.

Whether a member is entitled to pay while held out of service is highly fact-specific and dependent on collective agreement language. Follow the following line of questions:

1. Is the member entitled to paid sick leave (i.e., are they actually sick)?

   If **yes**, they should stay home and access sick pay.

2. If the member is not sick, does the collective agreement allow members to work from home?

   If the collective agreement allows members to work from home, the member in self-isolation should confirm with the employer that they will be working from home.

3. If the member is not sick and unable to work from home, are there any other paid leave provisions in the collective agreement that would apply, such as emergency leave, or quarantine leave?

   If **yes**, the member should remain home and access that paid leave.

4. If other leave provisions do not apply, does the collective agreement require the employer to give notice prior to layoff or changing scheduled shifts?

   If **yes**, file a grievance under the layoff notice or seniority provisions.

5. There may be cases where the employer directs a member to stay home and use banked sick leave, vacation, or lieu days, against the member's wishes. Members placed involuntarily on such leaves should speak to their union about how to proceed.

Is potential exposure to the virus a basis to refuse work?

The *Occupational Health and Safety Act* (*OHSA*) entitles employees to refuse work if they have **"reasonable grounds for believing that the act is likely to endanger the employee's health or safety or the health or safety of any other person."**

Whether the employee has reasonable grounds for believing work is likely to endanger their health or safety or the health or safety of any other person will depend on their particular circumstances, including but not limited to:

- whether there have been any suspected or confirmed cases of the virus at the workplace;
- whether anyone in the workplace has travelled internationally within the previous 14 days;
- the employee's age;
- whether the employee has any underlying health conditions that makes them more vulnerable;
- if the employee is pregnant or breastfeeding or lives with someone who is;
- if the employer has provided equipment or imposed policies to protect the employee; and
- whether the employee cares for someone who is particularly vulnerable due, for example, to age or underlying health conditions.

A general fear of contracting the virus within the workplace, *without further reasons*, is unreasonable. Nevertheless, the situation is dynamic and likely to change.

Additionally, the right to refuse **cannot** be exercised under certain circumstances, notably (1) where the refusal places the life, health or safety of another person in danger; or (2) where the danger is inherent to the employee's work.

The *OHSA* provides a procedure whereby employees can exercise their right to refuse work. The process can be summarized as follows:

(1) The employee must immediately notify their supervisor or employer the reason for their refusal.

(2) If the matter is not resolved to the employee's satisfaction, the employee must then report it to their Joint Occupational Health and Safety Committee or their worker health and safety representative.

(3) If the matter is not remedied to the employee's satisfaction, the employee must then report to the Occupational Heath and Safety Division of the Department of Labour and Advanced Education.

Members should be aware that employers have the right to reassign them to other work during the period of their work refusal. This right is subject to the applicable collective agreement. Additionally, members should be aware that they cannot continue their work refusal if the Joint Occupational Health and Safety Committee unanimously decides the member should return to work.

For further and more specific information on the right to refuse under the *OHSA*, we encourage unions to consult legal counsel.

If a member has concerns about workplace safety, even if the member does not feel the need to refuse to perform the work, they should bring those concerns to their union, management, or joint occupational health and safety committee.

Final Note

The COVID-19 pandemic is an ongoing and developing situation. New information and new issues will likely arise in the coming days and weeks.

The information provided in this Bulletin not legal advice. Unions should consult Pink Larkin for advice on their particular circumstances.