

COVID-19 – Best Practices Series: Alberta Workforce Recalls and Relaunch Planning

Recalling Workers from Layoffs

- Section 64 of the Employment Standards Code states that a recall notice must:
 - be in writing
 - be served on the employee, and
 - state that they must return to work within 7 days of being served
- You can serve in person, by mail, by leaving it at the employee’s home, or by email.
- If proper notice not given, employer has very limited means of enforcement
- If proper notice given, can be enforced through discipline or termination
 - Employee has no entitlement to statutory notice/pay if terminated for failure to return
- Caveats:
 - Collective agreements
 - Common law claims
 - Duty to accommodate
- Other Considerations
 - Recall may not be appropriate for all employees
 - Following up on notices
 - Providing information to quell safety concerns
 - Plan to accommodate illness, isolation/quarantine, and family obligations
 - Recruitment may prove necessary

Accommodations, Absenteeism & Workplace Refusals

Accommodations

- Employment Standards Code unpaid leaves
 - COVID-19:
 - If required to isolate/quarantine
 - If necessary to care for:
 - a family member under isolation/quarantine; or
 - a child due to school or daycare closure
 - Injury/Illness
 - Personal leave
- Human Rights Protections
 - Based on disability, family status, etc.
 - Family status includes childcare obligations
- Need to be practical
 - Limited documentation can be requested to verify COVID-19 leaves
 - Medical notes are not necessary
 - When family obligations are engaged, it requires a case-by-case assessment:
 - Are they caring for a possible COVID-19 carrier?
 - If not, have all reasonable child/elder care alternatives been explored?
 - Can solutions short of a leave of absence be offered?
 - modified shift schedules

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- working from home

Absenteeism

- Make contingency plans to address increase in absences with or without notice
- Be vigilant with screening and contact tracing to minimize domino effect
- Document absences
- Follow-up with employees
- Recruit if/as needed

Work Refusals

- Expect increase in workplace refusals from employees
- Employee rights under OHS Act:
 - To be informed of workplace hazards
 - To participate in safety matters and express concerns
 - To refuse dangerous work
 - To be free from discrimination for exercising rights
- Effective communication key to prevention and early resolution
- Dangerous Work is not well-defined
 - Right to refuse triggered by reasonable belief of dangerous condition or the work constitutes danger to health and safety

Work Refusal Rights and Obligations

Workers:

- May refuse work based on “reasonable” belief of danger
- Must promptly report refusal to supervisor or employer
- Must provide reasons for refusal – Must cooperate with supervisor and employer
- May maintain refusal until danger is remedied
- Entitled to participate in employer’s investigation
- Entitled to file complaint with OHS officer if not satisfied with employer response
- Entitled to maintain pay during work refusal process
- Entitled to protection against retaliation

Employers:

- Must promptly respond to work refusals (Immediately remedy or inspect)
- Must involve worker and safety rep in inspection
- May temporarily reassign worker
- Must not assign other worker(s) to the work until employer has:
 - Determined the work is not dangerous
 - Advised the (new) worker(s) of the refusal
- Must provide written report of remedial action taken and/or reasons work is not dangerous

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- Must not retaliate

Assessing the Merits of a Work Refusal

- S. 31(1), OHS Act: “... a worker may refuse to work or to do particular work at a work site if the worker believes on reasonable grounds that there is a dangerous condition at the work site or that the work constitutes a danger to the worker’s health and safety or to the health and safety of another worker or another person.”
- HOWEVER: “Danger” and “Dangerous” are not defined
 - Recent amendments made meaning less clear
 - Old definition required “imminent danger” – i.e. a danger that is “not normal” for the job, etc.
 - Alberta OHS appears to have retained old approach – they consider dangerous work to include:
 - Hazards that are not normal for the job
 - Normal hazards that are not properly controlled
 - Examples:
 - A danger that would normally stop work
 - Unexpected/unusual circumstances creating new hazards
 - A situation creating risk of immediate harm
- Premature Work refusals
 - A dangerous condition or task must be **actually observed** or experienced at work
 - Theoretical, **anticipated or potential risks do not amount to reasonable grounds** for a refusal

Internal Work Refusal Investigations

Steps:

1. Informal Consultation
 - Is there validity to the concern?
 - Can an amicable solution be worked out?
2. Formal Inspection
 - Involve worker & Safety Rep
3. Take remedial action, if necessary/prudent
4. Instruct employee to return to work or reassign employee
5. Provide written report to worker and safety rep
 - Address reasons for refusal, inspection, action taken (if any) and employer’s conclusion

Before assigning other employees to the work:

- Must first determine there is no danger
- Must give written notice to (new) worker of:
 - First worker’s refusal
 - Reasons for refusal
 - Employer’s reasons for conclusion that there is no danger

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- Right to refuse dangerous work

OHS Work Refusal Investigations

1. Informal Resolution – Have parties completed internal process? – Are they willing to revisit their positions?
2. Formal Investigation – Inspection – Gather documents and information – Assessment of whether Dangerous condition exists
3. Contact Report provided to parties – If no danger exists, employee is informed he or she may no longer refuse work – If danger exists, employer is ordered to take immediate remedial action

Work Refusal Appeal Process

Appeal to Director of Inspection

- 30-day limitation period to commence
- Does not automatically stay officer's decision
- Director may confirm, vary or revoke
- Director may also refer the matter to the Labour Relations Board

COVID-19 WCB Claims

The WCB's Criteria for COVID Claims:

- There must be a **work-related** COVID-19 illness
- The WCB will investigate reported cases for:
 - Level of risk;
 - Likely source of infection; and
 - Work-relatedness
- A COVID-19 illness is considered work-related if it is contracted as a direct result of the employee's duties and:
 - The nature of employment involves sufficient exposure to source of infection; AND
 - The nature of employment is the cause of the condition; OR
 - The nature of employment creates a greater risk of exposure for the worker.
- When there has been sufficient risk of exposure to source of infection
 - When work duties increase the worker's risk of exposure.
 - E.g. essential health care providers
 - E.g., when the virus is brought into the workplace and there are multiple infections causing an outbreak

Modifying Terms of Employment

Large, Fundamental Changes

Can trigger constructive dismissal claims if:

- Substantial change to fundamental term

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- Made unilaterally
- Without reasonable advance notice

Typical flashpoints:

- Salary/wage reductions
- Reductions in regular hours of work
- Significant changes to benefit plans
- Dramatic changes to duties/responsibilities
- Requires a contextual analysis

Small Changes

- Minor changes or changes to peripheral terms can be made unilaterally by employers without difficulty
- This provides some flexibility to adapt to the new reality when relaunching operations

Added flexibility through amendments to ESC

- Greater flexibility to change work schedules and hours of work averaging agreements - written notice now only required “as soon is practicable in the circumstances”
- Employers may apply for other variances

Strategies to avoid constructive dismissal

- Effective communication
- Seeking express agreement or acceptance
- Providing advance notice
- Relying on acquiescence
- Implementing incremental changes

Resources and Links:

- McLennan Ross LLP <https://mross.com/law/ViewPage.action?ran=1146950499>
- Alberta Construction Safety Association - <http://www.youracsa.ca/>
- COAA - <https://www.coaa.ab.ca/>
- University of Alberta – Faculty of Engineering - <https://www.ualberta.ca/engineering/index.html>

For more information or if you have any questions, please reach out to Sarah Lockwood, Director, Member Services, at slockwood@pcac.ca or 780-880-8833

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