



Labour & Employment Law A(H1N1) Update

CONTENTS

2 PANDEMIC STRATEGIES: A NATIONAL OVERVIEW

2 PART I – INTRODUCTION

2 PART II – H1N1 INFLUENZA PANDEMIC DATA

3 PART III – PREVENTION AND MAINTENANCE OF OPERATIONS GUIDELINES

3 3.1 Prevention and maintenance of operations guidelines

4 3.1.1 Basic Prevention – Hygiene Measures

4 3.1.2 Social Distancing Measures

4 3.1.3 Work Flexibility Measures

5 3.1.4 Communication and Education Measures

5 3.2 “Checklist” Recommendations

5 3.2.1 Plan for the impact of a pandemic on your business

6 3.2.2 Plan for the impact on your employees and customers

6 3.2.3 Establish policies to be implemented during a pandemic

7 3.2.4 Allocate resources to protect your employees and customers during a pandemic

7 3.2.5 Communicate and educate your employees

8 3.2.6 Coordinate with external organizations and help your community

10 PART IV – FREQUENTLY ASKED QUESTIONS AND ANSWERS

10 What are an employer’s health and safety obligations during a pandemic?

12 What are an employee’s health and safety rights in an influenza pandemic?

14 Is influenza a “disability” or a “handicap” under human rights legislation?

16 Can an employer require mandatory testing?

18 Can an employer require mandatory vaccination?

20 Can an employer require access to an employee’s personal health information?

22 Can an employer require a medical certificate?

24 Can an employer disclose the identity of an infected employee or patient/customer?

26 Do employers have to report H1N1 outbreaks in the workplace to public health officials?

28 What types of leaves can employees take during a pandemic?

30 Can sick employees be required to stay home?

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PANDEMIC STRATEGIES: A NATIONAL OVERVIEW

PART I – INTRODUCTION

Although globalization allows countries to benefit from increased economic opportunities, it also brings the risk of increased exposure to foreign health issues. The recent A(H1N1) (hereinafter “H1N1”) influenza pandemic has introduced a debate about how to control the spread of the virus. In particular, it is clear that employers must consider how the health risks associated with the H1N1 influenza may be minimized at the workplace.



The ongoing H1N1 pandemic, particularly the second wave now coming upon us, is expected to cause a significant number of people to fall ill. This will undoubtedly disrupt workplaces. As of October 25, 2009, the World Health Organization (“WHO”) reported over 441,000 laboratory-confirmed cases of H1N1 and at least 5,700 deaths due to it worldwide. The Americas are the hardest hit region, with over 174,000 cases. The WHO believes that the number of cases is much higher than the number of laboratory-confirmed ones.¹ It has been estimated that the pandemic could cost a minimum of 2% of the world’s Gross Domestic Product (roughly 60 billion USD).² Other estimates, based on the “attack rate” of the H1N1 virus, put potential losses to the United States economy alone at \$166 billion, assuming 35% of the population contracts the virus.³ Accordingly, businesses heavily reliant on human resources stand to be particularly hard hit by the spread of the virus.

Canada is the third most affected country in the world. Therefore, it is of utmost importance for Canadian employers to become knowledgeable about what can and ought to be done in order to stem the possible disruptions caused by H1N1, in order to ease the potential burden of the illness and be prepared to meet their legal obligations.

To aid employers, Heenan Blaikie’s national labour and employment practice has prepared this update to outline the various legal rights, obligations and responsibilities employers face during the current pandemic. Part II of this document provides key introductory data relating to the H1N1 pandemic. Part III offers guidelines for employers regarding the preparation of a plan designed to minimize the impact of a pandemic on the workplace and to ensure continued business operations. Finally, Part IV provides general answers to frequently asked questions about the legal implications of the H1N1 influenza in workplaces in British Columbia, Alberta, Ontario and Quebec and at the federal level.

PART II – H1N1 INFLUENZA PANDEMIC DATA

On June 11, 2009, the Director General of the WHO, Dr. Margaret Chan, announced that the H1N1 influenza outbreak had reached global pandemic levels. For the first time in forty years, the WHO upgraded its pandemic alert level to Phase 6 (the highest level), declaring the H1N1 influenza as the first pandemic influenza of the 21st Century. Only three such pandemics have occurred in the 20th Century.⁶ What makes this influenza pandemic particularly dangerous is the fact that it is caused by an entirely new flu virus to which we have no natural immunity. ►

Two indicators are generally used by health officials to determine the characteristics of an epidemic or a pandemic: the lethality rate and the attack rate. To date, the H1N1 flu strain has been more contagious than severe. The lethality rate of the H1N1 flu is relatively low. However its attack rate is extremely high. Consequently, experts agree that as much as 35% of the Canadian population may contract the H1N1 influenza, yet only 1% of those infected will die from contracting the virus.

In its current form, the H1N1 virus presents symptoms similar to those associated with the seasonal flu. These include fever, cough, sore throat, runny or stuffy nose, body aches, headache, chills and fatigue. A significant number of people who have been infected with this virus also have reported diarrhea and vomiting. As with the seasonal flu, severe illness or death has occurred in a small number of cases as a result of other underlying illnesses. The method of transmission of the H1N1 virus is also thought to be very similar to that of the seasonal flu. Like it, H1N1 is spread mainly from person to person through coughing or sneezing. People may also become infected by first touching something with the flu virus on it and then touching their eyes, mouth, or nose.

One concrete step towards preparedness is becoming aware of employers' obligations under occupational health and safety, employment standards and human rights laws.

PART III – PREVENTION AND MAINTENANCE OF OPERATIONS GUIDELINES

It is critical for businesses and employers to prepare for an influenza pandemic. In order to anticipate and respond to the impact of the new H1N1 strain, employers must put in place a prevention plan as well as a plan for the maintenance of operations. Employers should not rely only on the numerous governmental contingency plans⁷ without actively developing plans to help prevent the spread of the influenza in their workplaces, in order to ensure continued business operations.⁸ One concrete step towards preparedness is becoming aware of employers' obligations under occupational health and safety, employment standards and human rights laws.

Below, we offer guidance to employers about appropriate precautions and work practices to minimize the risk of potential employee exposure, illness and the spread of the H1N1 influenza in the workplace.⁹

We first identify key measures employers should adopt in order to prepare for the potential effect of the current H1N1 influenza pandemic. We then offer a "guideline checklist", based principally on recommendations¹⁰ of the American Centers for Disease Control ("CDC"), intended to help businesses maintain operations in the face of an influenza pandemic. This document's guidelines may require revision as the course of the pandemic develops. Employers should thus periodically consult governments and public health authorities Web sites for updated information and guidance.¹¹

3.1 Prevention and maintenance of operations guidelines

Occupational health and safety legislation throughout Canada imposes duties on employers to take reasonable care to protect the health and safety of their employees. During an influenza pandemic, employers are legally required in all jurisdictions to adopt measures aimed at controlling or eliminating potential risks to the health and safety of employees. In order to prevent legal difficulties ►

and provide a safe workplace, the employer should adopt measures promoting hygiene, the use of personal protective equipment as reasonably required, social distancing, work flexibility and communication.

3.1.1 Basic Prevention – Hygiene Measures

At the most basic level, employee protection comes from standard hygiene practices (e.g. hand washing, respiratory hygiene and regular disinfection of work stations). Hand washing facilities should be easily available and worksites should be frequently cleaned. Ventilation systems should also be properly maintained. Moreover, employers should consider offering protective equipment, such as antibacterial products, and promoting vaccination.¹² Depending on the circumstances, it may also be appropriate for employers to permit or require workers to wear additional personal protective equipment – such as masks and gloves – to protect co-workers and themselves from contagion. The desire of workers to wear personal protective equipment, such as masks and gloves, when dealing with the public may require balancing against the employer's concern for maintaining business operations without their workers wearing masks and gloves before the public. In one matter that arose during the SARS crisis, ticket agents at Pearson

International Airport in Toronto stated that they were exercising their right to refuse to perform unsafe work when Air Canada would neither provide them with masks and gloves when dealing with the public nor permit the use of this equipment.¹³ Work refusal rights and health and safety measures are discussed below in the frequently asked questions section.

3.1.2 Social Distancing Measures

The implementation of a social distancing plan to reduce the frequency, proximity and length of human interactions should be considered where possible. For some, communication and information technology infrastructures can support employee telecommunications and remote customer access during a pandemic. Video and telephone conferencing should be facilitated and promoted. Where it is feasible, employees should be encouraged to work from home. Employers should also plan for the possibility of unscheduled leaves, encouraging employees who are sick to stay at home to care for themselves and others who are ill with the flu or for children sent home from school.

3.1.3 Work Flexibility Measures

Employers should consider the use of flexible worksites (e.g. telecommuting) and flexible work hours (e.g. stag-

Employers should clearly communicate the company's policies regarding employee access to health care, mental health and social services, including corporate and community resources. A policy on communicable illnesses, as well as a response plan, should be prepared.

gered shifts). They should also examine policies for leave and employee compensation. These policies should be reviewed with managers, supervisors, and employees so that all individuals are up-to-date on sick leave policies, availability of leave, and employee assistance services. As much as possible, leave policies should be flexible and non-punitive. Employers will need to be aware of leaves that may be available to employees under applicable employment standards legislation – e.g. family care leave and personal emergency leave. We discuss these leaves by jurisdiction in the frequently asked questions section below. ►

3.1.4 Communication and Education Measures

For preventative measures to be successful, it will be essential for employers to promote communication and education. Employers should clearly communicate the company's policies regarding employee access to health care, mental health and social services, including corporate and community resources. A policy on communicable illnesses, as well as a response plan, should be prepared. Additionally, employers should make sure their communication systems include a bulletin board, a voicemail system, a Web site and an email service, all aimed at communicating updates on the pandemic from governments and public health officials. Finally, employers should involve the company's Health and Safety Committee in all aspects of prevention and maintenance of operations planning.

3.2 "Checklist" Recommendations¹⁴

In order to comply with occupational health and safety, employment standards and human rights laws, employers should consider the following checklist,¹⁵ adapting it to the needs and realities of their businesses.

3.2.1 Plan for the impact of a pandemic on your business

- Identify a pandemic coordinator and/or team with defined roles and responsibilities for preparedness and response planning. The planning process should include employee input.



- Develop and plan for scenarios likely to result in an increase or decrease in demand for the business' product and/or services during a pandemic (e.g. effect of restrictions on mass gatherings, need for hygienic supplies).
 - Determine the potential impact of a pandemic on company business financials using multiple possible scenarios that affect different product lines and/or production sites.
 - Determine potential impact of a pandemic on business-related domestic and international travel (e.g. quarantines, border closures).
 - Find up-to-date, reliable pandemic information from community public health, emergency management, and other sources and make sustainable links.
 - Establish an emergency communications plan and revise it periodically. This plan should identify key contacts (with back-ups), chains of communications (including suppliers and customers), and processes for tracking and communicating business and employee status.
 - Implement an exercise or drill to test the plan and revise it periodically. ►
- Identify essential employees and other critical inputs (e.g. raw materials, suppliers, sub-contractor services, products and logistics) required to maintain business operations during a pandemic by location and function.
 - Train and prepare ancillary workforce (e.g. contractors, employees in other job titles and retirees).

Establish policies for employee compensation and sick-leave absences unique to a pandemic (e.g. non-punitive, liberal leaves), including policies on when a previously ill person is no longer considered infectious and can return to work after an illness.

3.2.2 Plan for the impact on your employees and customers

- Forecast and allow for employee absences during a pandemic due to factors such as employee or family member illness, community containment and quarantine measures, school and/or business closures, and public transportation closures.
- Implement guidelines to modify the frequency and type of face-to-face contact (e.g. hand-shaking, seating in meetings, office layout, shared workstations) among employees and between employees and customers (refer to Health Canada and WHO recommendations¹⁶).

- Encourage and facilitate annual influenza vaccination for employees, keeping in mind that most types of businesses cannot require their employees to be vaccinated. Employers usually cannot require employees to provide information about specific medical treatment.
- Evaluate employee access to and availability of mental and social services during a pandemic, including corporate, community and faith-based resources, and improve services as needed.
- Identify employees and key customers with special needs, and incorporate the needs of such persons into your preparedness plan.
- Establish policies for preventing influenza spread at the worksite (e.g. promoting respiratory hygiene and cough etiquette, and prompt exclusion of people with influenza symptoms).
- Establish policies for employees who have been exposed to pandemic influenza, and are suspected to be ill at the worksite (e.g. infection control response, immediate mandatory sick leave).
- Establish policies for restricting travel to affected areas (consider both domestic and international sites), evacuating employees in or near an affected area when an outbreak begins, and offering guidance for employees returning from affected areas (refer to Health Canada and the WHO travel recommendations¹⁷).

3.2.3 Establish policies to be implemented during a pandemic

- Establish policies for employee compensation and sick-leave absences unique to a pandemic (e.g. non-punitive, liberal leaves), including policies on when a previously ill person is no longer considered infectious and can return to work after an illness.
- Establish policies for flexible work-sites (e.g. telecommunications) and flexible work hours (e.g. staggered shifts) where possible.
- Set up authorities, triggers, and procedures for activating and terminating the company's response plan, altering business operations (e.g. shutting down operations in infected areas), and transferring business knowledge to key employees. ▶

3.2.4 Allocate resources to protect your employees and customers during a pandemic

- Provide sufficient and accessible infection control supplies (e.g. hand-hygiene products, tissues and receptacle for their disposal) in all business locations.
- Enhance communications and information technology infrastructures as needed to support employee telecommunicating and remote customer access.
- Ensure availability of medical consultation and advice for emergency response.

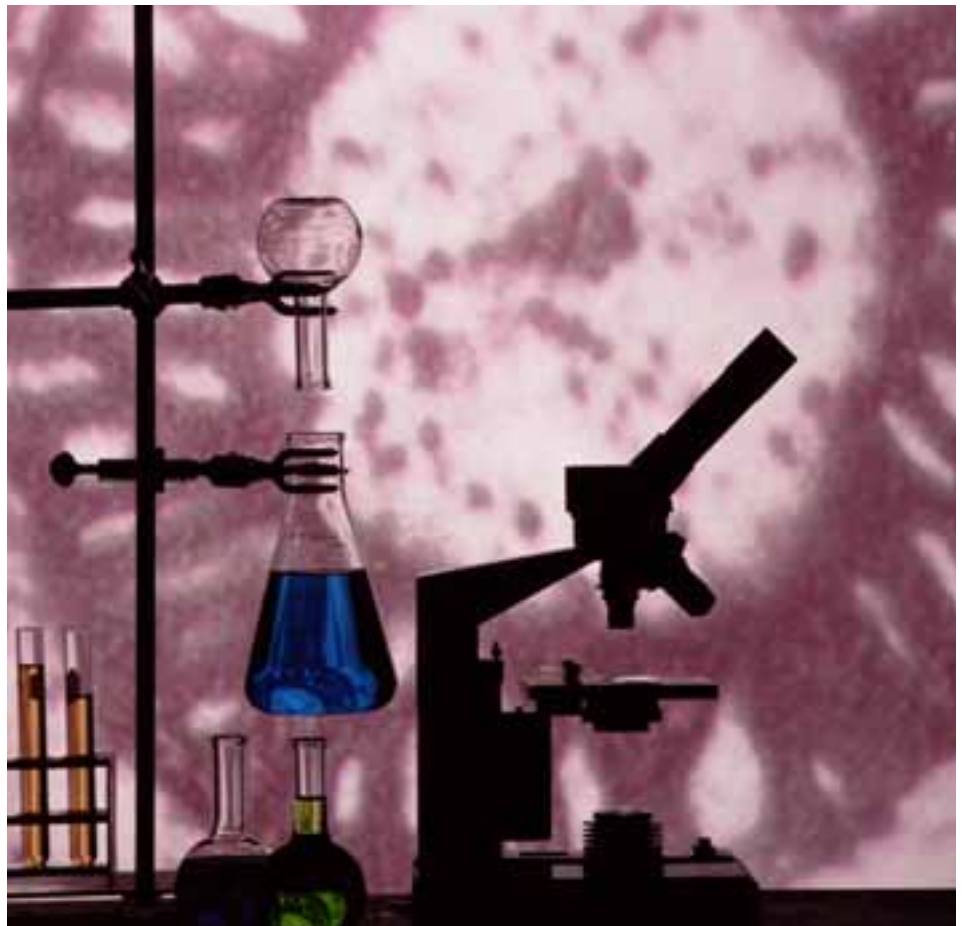
3.2.5 Communicate and educate your employees

- Develop and disseminate programs and materials covering pandemic fundamentals (e.g. signs and symptoms of influenza, modes of transmission), personal and family protection and response strategies (e.g. hand hygiene, coughing and sneezing etiquette, contingency plans).
- Anticipate employees' fears and anxieties, rumors and misinformation and plan communications accordingly.
- Ensure that communications are culturally and linguistically appropriate.

- Disseminate information to employees about your pandemic preparedness and response plan.
- Provide information for the at-home care of ill employees and family members.

suppliers and customers inside and outside the worksite in a consistent and timely way, including redundancies in the emergency contact system.

- Identify community sources for timely and accurate pandemic information



- Develop platforms (e.g. hotlines, Web sites) for communicating the status of the pandemic and the action plan to employees, vendors,

(domestic and international)¹⁸ and resources for obtaining counter-measures (e.g. vaccines and antivirals). ►

3.2.6 Coordinate with external organizations and help your community

- Collaborate with major healthcare facilities to share your pandemic plans and understand their capabilities and plans.
- Collaborate with federal, provincial and local public health agencies and/or emergency responders to participate in their planning processes, share your pandemic plans, and understand their capabilities and plans.
- Collaborate with federal, provincial and local public health agencies and/or emergency responders about the assets and/or services your business could contribute to the community.
- Share best practices with other businesses in your communities, chambers of commerce, and associations to improve community response efforts. ■

- 1 World Health Organization Web site: <http://www.who.int/csr/don/2009_11_20a/en/index.html>.
- 2 *Les Affaires*, April 30, 2009, Canada.
- 3 Martin Meltzer and others: *Modeling the economic impact of pandemic influenza in the United States*, April 30, 1999.
- 4 *Supra*, note 1.
- 5 Canada has gained valuable experience in pandemic planning and response having already dealt with Severe Acute Respiratory Syndrome (SARS) and the Highly Pathogenic Avian Influenza (HPAI). Although the H1N1 strain presents very different viral characteristics, these prior outbreaks have demonstrated how critical it is to prepare for the worst in a pandemic context.
- 6 Only three pandemic influenzas occurred in the 20th century: 1) the 1918 Spanish flu; 2) the Asian flu in 1957-58; and most recently 3) the Hong Kong flu in 1968-69.
- 7 John Murphy, Lancaster House Audio Conference: *Dealing with Pandemic Outbreaks: Implications for the Workplace*, May 9, 2009.
- 8 In 2006, only 9% of Canadian businesses had allocated a budget for pandemic preparedness. (*Avian Flu Pandemic Preparedness Survey Report*, Mercer Human Resources Consulting, Spring 2006, p. 8).
- 9 The information we offer applies to most workplaces. However, employers operating in health care and emergency response (e.g. law enforcement, firefighting, security) face increased obligations and should further enquire on prevention measures to be adopted.
- 10 *Business Pandemic Influenza Checklist*, CDC, December 6, 2005, Version 3.6.
- 11 Health Canada: <www.phac-aspc.gc.ca/alert-alerte/porcine_200904-fra.php>; WHO: <www.who.int/csr/disease/swineflu/faq/fr/index.html>; Centers for Disease Control: <www.cdc.gov/h1n1flu>; Agence de santé et des services sociaux: <www.santemontreal.qc.ca/fr/grippe/grippe.html>.
- 12 As discussed in Part IV of this document, it is important to note that generally employers will not be able to legally require employees to be vaccinated, as it would violate the individual's fundamental right to bodily integrity.
- 13 An appeals officer under the *Canada Labour Code* determined that there was ground to refuse to work: *Cole v. Air Canada*, [2006] CLCAOD No. 4. The appeals officer took into account the way in which the ticket agents were in contact with the public and the way in which SARS was known to be transmitted, based on information from the WHO.
- 14 With the exceptions of few adaptations for Canada, this checklist stems directly from CDC's recommendations: "*Business Pandemic Influenza Checklist*", CDC, December 6, 2005, Version 3.6.
- 15 With the exceptions of few adaptations for Canada, this checklist stems directly from CDC's recommendations: *Business Pandemic Influenza Checklist*, CDC, December 6, 2005, Version 3.6.
- 16 Health Canada: <www.phac-aspc.gc.ca/alert-alerte/porcine_200904-fra.php>; WHO: <www.who.int/csr/disease/swineflu/faq/fr/index.html>.
- 17 Health Canada: <www.phac-aspc.gc.ca/alert-alerte/porcine_200904-fra.php>; WHO: <www.who.int/csr/disease/swineflu/faq/en/index.html>.
- 18 E.g.: WHO: <www.who.int/csr/disease/swineflu/faq/fr/index.html>; Centers for Disease Control: <www.cdc.gov/h1n1flu>; Agence de santé et des services sociaux: <www.santemontreal.qc.ca/fr/grippe/grippe.html>.

PART IV – FREQUENTLY ASKED QUESTIONS AND ANSWERS

WHAT ARE AN EMPLOYER'S HEALTH AND SAFETY OBLIGATIONS DURING A PANDEMIC?

QUEBEC

Employers have a general duty to ensure the health and safety of workers.¹ This duty may require employers, among other things, to prevent sick employees from attending the workplace, to promote good hygiene and to provide and instruct employees in the proper use of personal protective equipment required. The practical measures required to discharge this duty are determined on the basis of published, recognized standards and employers should comply with any applicable guidelines released by governments and public health officials. Employers also have an obligation to provide information, instruction, and supervision to employees on workplace health and safety matters.² This may require employers to provide employees information about the H1N1 virus and how to reduce the risk of contracting it. Employers in certain sectors where exposure to illness will be prolonged, such as health care, may have additional health and safety responsibilities during a pandemic.

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- 1 Article 2087 of the *Civil Code of Quebec ; An Act respecting Occupational Health and Safety* [OHS-Que.], R.S.Q., c. S-2.1, s. 51.
 - 2 OHS-Que., s. 51.

ONTARIO

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- 1 *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1 [OHS- Ont.], s. 25(2)(h).
 - 2 OHS- Ont., s.25 (2)(a).

FEDERAL JURISDICTION

Employers have a general duty to ensure the health and safety of employees.¹ The practical measures required to discharge this duty are identified by reference to recognized, published standards. In the context of a pandemic, these standards will be those recommended by public health officials. For example, employers operating long-term care facilities or correctional institutions should comply with the H1N1 guidelines for closed facilities recently released by the federal Minister of Health and Canada's Chief Public Health Officer.² Employers also have an obligation to provide information, instruction, and supervision to employees on workplace health and safety matters.³ This may require employers to provide information about the risk of infection at work,

steps that can mitigate that risk, and about the advice of public health agencies.

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- 1 *Canada Labour Code*, R.S.C. 1985, c. L-2 [Code], s. 124.
 - 2 Public Health Agency of Canada, News Release "Canada Releases new H1N1 Outbreak Guidelines for Closed Facilities" (17 July 2009), online: <www.phac-aspc.gc.ca/media/nrrp/2009/2009_0717-eng.php>.
 - 3 *Code*, s. 125(q)

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¹ *Occupational Health and Safety Act*, R.S.A. 2000, c. O-2, s. 2; *Occupational Health and Safety Code*, 2009, s. 7; see: *Best Practices Guideline for Workplace Health and Safety during Pandemic Influenza*, <employment.alberta.ca>.

BRITISH COLUMBIA

Employers have a general duty to ensure the health and safety of workers.¹ This duty may require employers, among other things, to prevent sick employees from attending the workplace, promote good hygiene, and provide and instruct employees in the proper use of personal protective equipment required. The practical measures required to discharge this duty are determined on the basis of published, recognized standards and thus employers should comply with any applicable guidelines released by governments and public health officials. Employers also have an obligation to provide information, instruction, and supervision to employees. This may require employers to provide employees information about the H1N1 virus, and how to reduce the risk of contracting the virus. Employers in certain sectors, such as health care, where exposure to illness will be sustained, may have additional health and safety responsibilities during a pandemic.

WorkSafeBC has issued an Influenza Prevention bulletin that states that employers who are aware of an influenza outbreak should implement an “exposure control plan” in their workplace, which may involve: identifying any particular workers who are most at risk of exposure due to their job duties; assessing the degree of risk, and implementing measures to control the risk, including education, safe work practices, sanitation, and personal protection equipment (e.g. masks or gloves) if appropriate.² Health care workers whose job requires them to deal with persons who are ill will require the highest levels of protection.

¹ *Occupational Health and Safety Regulation* [OHS Reg.], B.C. Reg. 296/97, s. 2.2.

² <www.worksafebc.com>.

WHAT ARE AN EMPLOYEE'S HEALTH AND SAFETY RIGHTS IN AN INFLUENZA PANDEMIC?

QUEBEC

Employees have the right to refuse unsafe work that continues during a pandemic.¹ Employees in certain occupations (e.g., police, firefighters) have a restricted right to refuse work where the unsafe work is part of normal working conditions or if a refusal would endanger the life, health or safety of another person.² Health care work involves a relatively high degree of danger to the worker's health. In the case of these employees, it is normal to be exposed to persons who are infected by the H1N1. Because of the wording of section 13 of the *OHSA-Que.*,³ these employees cannot exercise a right to refuse unsafe work during a H1N1 pandemic.⁴

The right to refuse unsafe work involves a two-stage process. At the first stage, the employee is justified in refusing work if he or she has reasonable grounds to believe that the work is unsafe. After having been informed of the employee's refusal to perform certain work, the employer must notify the employee's representative. The employer and the representative assess the situation and identify the necessary corrective measures, if any.⁵ If the employee continues to refuse work despite being assured that no danger exists, an inspector from the Commission de la santé et de la sécurité du travail can be asked to investigate.⁶ The inspector determines whether or not a danger exists that would justify the worker's refusal to work and issues an immediate decision. Given the current moderate severity of H1N1, it is unlikely that an employee will be justified in refusing work. However, immuno-compromised, pregnant, or other susceptible workers may be justified in some cases.

An employer may not dismiss, discipline, or impose any penalty on an employee for refusing unsafe work.⁷ An employer will be justified in imposing discipline only where it is clear that the employee's belief in the unsafe nature of the work is completely baseless, where the refusal is motivated by an ulterior motive or concern entirely unrelated to safety, or where the employee persists in refusing work after the inspector's ruling that no danger exists. Discipline should only be imposed after careful investigation.

1 *OHSA-Que.*, s. 12.

2 *Id.*, s. 13.

3 *Supra*, note 1.

4 *Treatment of cases in the event of an influenza pandemic* (our translation), Québec, Commission de la santé et de la sécurité du travail, p. 4.

5 *OHSA-Que.*, s. 16.

6 *Id.*, s. 18.

7 *Id.*, s. 30.

ONTARIO

Employees have the right to refuse unsafe work that continues during a pandemic.¹ Employees in certain occupations (e.g., police, firefighters) have a restricted right to refuse work where the unsafe work is part of normal working conditions or if a refusal would endanger the life, health or safety of another person.²

Apart from the situation of restricted refusal rights, exercise of the right to refuse unsafe work involves a two-stage process. At the first stage, an employee is justified in refusing work if he or she honestly and subjectively believes that the work is unsafe. As discussed above, the H1N1 pandemic currently has a low fatality rate; however, because of the subjective nature of the test in a first-stage refusal, employees may be justified in refusing work. If an employee continues to refuse work, an inspector from the Ministry of Labour is notified and he or she investigates.³ At this stage, an employee is justified in refusing work if he or she has reasonable grounds to believe the work is unsafe.⁴ The objective nature of the test is modified for "susceptible workers" with demonstrable medical or physical conditions.⁵ Given the current moderate severity of H1N1, it is unlikely that an employee will be justified in refusing work at the second stage. However, immuno-compromised, pregnant, or other susceptible workers may be justified in some cases.

Employers may not dismiss, discipline, or intimidate employees for refusing unsafe work.⁶ An employer will be justified in imposing discipline only where it is clear that the employee's belief in the unsafe nature of the work is completely baseless, where the refusal is motivated by an ulterior motive or concern entirely unrelated to safety, or where the work refusal process has concluded and an employee continues to refuse work despite a determination that the work is safe. Discipline should only be imposed after careful investigation.

1 *OHSA – Ont.*, s. 43(3).

2 *Id.*, ss. 43(1)(a)-(b) and 43(2).

3 *Id.*, s. 43(6).

4 *Id.*, s. 43(6).

5 Ontario, Ministry of Labour, *Operations Division Policy and Procedure Manual: Events—Work Refusals—Guidance Notes: Susceptible Workers*, 22 August 2005.

6 *OHSA – Ont.*, s. 50(1).

WHAT ARE AN EMPLOYEE'S HEALTH AND SAFETY RIGHTS IN AN INFLUENZA PANDEMIC?

ALBERTA

Employees have a general right to refuse unsafe work, if they are not properly trained to do the work and/or do not have access to proper supervision and instruction in how to eliminate or reduce hazards.¹

In order to be justified in refusing unsafe work, an employee must hold an honest and reasonable belief that the work is unsafe. The current H1N1 pandemic has a low fatality rate; however, in some workplaces where many employees are affected by the virus, or if the employee is in a vulnerable category, an employee may be found to have an "honest belief" to initially refuse work, and require the employer to investigate further and to implement measures to eliminate or reduce the safety risk. However, once the matter has been reported and the employer has investigated it and responded to the employee, the employee will only be justified in continuing to refuse to work if he or she has reasonable grounds to believe the work is unsafe despite the additional protective measures introduced. Given the current moderate severity of H1N1, it is unlikely that most employees in most workplaces will be found to have a reasonable basis for refusing to work on the grounds of safety. However, immuno-compromised, pregnant, or other susceptible workers may be justified in some cases.

1 *Occupational Health and Safety Regulation*, Alta. Reg. 62/2003, s. 1 and 13.

BRITISH COLUMBIA

Employees have the right to refuse unsafe work during a pandemic.¹ Employees in certain occupations (e.g., police, firefighters) have a restricted right to refuse unsafe work when the unsafe work is part of normal working conditions or if a refusal would endanger the life, health or safety of another person.²

In order to be justified in refusing unsafe work, an employee must hold an honest and reasonable belief that the work is unsafe. The current H1N1 pandemic has a low fatality rate; however, in some workplaces where many employees are ill, or if the employee is in a vulnerable category, an employee may have an honest belief that work is unsafe and require the employer to investigate. This may require the involvement of a WorkSafeBC investigator, if the employee does not accept the outcome of the employer's initial investigation. However, once the matter has been reported and the employer has investigated it and responded to the employee, the employee will only be justified in continuing to refuse to work if he or she has reasonable grounds to believe the work is unsafe. Given the current moderate severity of H1N1, it is unlikely that most employees in most workplaces will be found to have a reasonable basis for refusing to work on the grounds of safety. However, immuno-compromised, pregnant, or other susceptible workers may be justified in some cases.

Employers may not dismiss, discipline, or intimidate employees for refusing unsafe work.³ An employer may be justified in imposing discipline only where it is clear that the employee's belief in the unsafe nature of the work is baseless or clearly unreasonable, where the refusal is motivated by an ulterior motive or concern entirely unrelated to safety, or the employee continues to refuse work despite a determination that the work is safe. Discipline should only be imposed after careful investigation.

1 *OHS Reg.*, s. 3.12(1).
 2 *Id.*, s. 3.12 (4) and (5).
 3 *Id.*, s. 3.13.

FEDERAL JURISDICTION

Employees have the right to refuse work that constitutes a danger to their health and safety.¹ Employees may not refuse work if the refusal would endanger the life, health or safety of another person or if the danger is a normal condition of employment.²

The right to refuse unsafe work is a two-stage process. At the first stage, an employee is justified in refusing work if he or she has reasonable cause to believe that the work constitutes a danger. If an employee continues to refuse work despite the employer's determination that it is safe, a federal labour officer is required to investigate.³ Given the objective nature of the test and the well-documented current low lethality rate of the H1N1 virus, an employee in the federal jurisdiction is unlikely to be justified in refusing work because of fears about H1N1. However, immuno-compromised workers, pregnant or other susceptible workers may have reasonable cause to refuse work, in some cases.

Employers may not dismiss, suspend, lay off, or demote employees or impose financial penalties on them for refusing dangerous work.⁴ However, employers have an explicit right under the *Canada Labour Code* to discipline employees who have wilfully abused this right.⁵ Discipline should only be imposed after a careful investigation.

1 *Canada Labour Code*, R.S.C. 1985, c. L-2, s. 128.
 2 *Id.*, s. 128(2).
 3 *Id.*, s. 129.
 4 *Id.*, s. 147.
 5 *Id.*, s. 147.1.

IS INFLUENZA A “DISABILITY” OR A “HANDICAP” UNDER HUMAN RIGHTS LEGISLATION?

QUEBEC

There is no definitive ruling in Quebec jurisprudence on whether influenza is a disability. Guidance can be found in Supreme Court of Canada cases that have found that a “handicap” may be the result of an ailment, a social construct, a perceived limitation or the combined effect of all these circumstances.¹ Moreover, despite its temporary nature, a biomedical condition can nonetheless constitute a “handicap”.² In other provinces, more recent jurisprudence concerning influenza focuses on the degree of impairment.³

Under this analysis, influenza could be a disability if an employee were totally, even though temporarily, incapacitated by it. The current moderate severity of H1N1 makes it unlikely that it will be considered a disability; however, illness resulting from a more severe strain could be considered a disability. As a comparison, during the 2003 Severe Acute Respiratory Syndrome (SARS) outbreak, the Ontario Human Rights Commission issued a statement that it considered SARS to be a disability under the *Human Rights Code*. If such a strain emerges, employers will be required to accommodate employees disabled by the strain to the point of undue hardship. The most obvious form of accommodation for employees with H1N1 is letting them use any sick leave to which they may be entitled and letting them make use of any short- or long-term disability coverage applying to them to cover an absence from work. Other forms of accommodation could include allowing employees to telecommute, or allowing them to return to work gradually during their recovery.

- 1 *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, [2000] 1 S.C.R. 665, par. 80-82.
- 2 *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703.
- 3 See for example: *Mississauga (City) Transit Department v. A.T.U. Loc. 1572* (Tanner), [2005] 141 L.A.C. (4th) 84 (Ontario) (Springate) and *Re Canadian Waste Services Inc. and C.L.A.C. (McGee)* (2000), 91 L.A.C. (4th) 320 (Lynk) (Ontario).

ONTARIO

The majority of jurisprudence has held that influenza is not a disability. These decisions have focused on the temporary nature of influenza and the rationale that human rights legislation is directed towards assisting individuals who suffer permanent or semi-permanent disabilities.¹ However, more recent arbitral jurisprudence focuses on the degree of impairment.² Under this analysis, influenza could be a disability if an employee is totally, even though temporarily, incapacitated by influenza. The current moderate severity of H1N1 makes it unlikely that it will be considered a disability; however, illness resulting from a more severe strain could be considered a disability. During the 2003 Severe Acute Respiratory Syndrome (SARS) outbreak, the Ontario Human Rights Commission issued a statement that it considered SARS to be a disability under the *Human Rights Code*. If such a strain emerges, employers will be required to accommodate employees disabled by the hypothetical strain to the point of undue hardship. The most obvious form of accommodation for employees with H1N1 is letting them use any sick leave to which they may be entitled and letting them make use of any short- or long-term disability coverage applying to them to cover an absence from work. Other forms of accommodation could include allowing employees to telecommute or to work flexible hours.

- 1 See for example: *Ouimette v. Lilly Cups Limited*, (1990), 12 C.H.R.R. D/19 (Ont. Bd. Inq.) and *St. Joseph's General Hospital, Elliott Lake v. Ontario Nurses' Association*, 2006 CanLII 7155 (Luborsky) (Ontario).
- 2 See for example: *Mississauga (City) Transit Department v. A.T.U. Loc. 1572* (Tanner), [2005] 141 L.A.C. (4th) 84 (Ontario) (Springate) and *Re Canadian Waste Services Inc. and C.L.A.C. (McGee)* (2000), 91 L.A.C. (4th) 320 (Lynk) (Ontario).

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ALBERTA

The majority of jurisprudence has held that influenza is not a disability. These decisions have focused on the temporary nature of influenza and the policy rationale that human rights legislation is directed towards assisting individuals who suffer permanent or semi-permanent disabilities.¹ The current moderate severity of H1N1 makes it rather unlikely that it will be considered a disability; however, illness resulting from a more severe strain could be considered a disability. As a comparison, during the 2003 Severe Acute Respiratory Syndrome (SARS) outbreak, the Ontario Human Rights Commission issued a statement that it considered SARS to be a disability under the *Human Rights Code*. Sound human resources policies should allow employees time to recover from H1N1 and to return to work when they are fit to do so. Accommodations could include allowing employees to telecommute, or allowing employees to gradually return to work during their recovery. Generally, employees with H1N1 should be treated in the same manner as employees in the workplace who have had other strains of the flu in the past that have been treated.

1 See for example: *Chiang v. British Columbia (Ministry of Small Business and Revenue)*, 2007 BCHRT 148; *Wutke v. Mageria Holdings Ltd.*, 2007 BCHRT 340; *Salvation Army Grace Hospital and United Nurses of Alberta, Local 47*, (1995) 47 L.A.C. (4th) 114.

BRITISH COLUMBIA

The majority of jurisprudence has held that influenza is not a disability. These decisions have focused on the temporary nature of influenza and the policy rationale that human rights legislation is directed towards assisting individuals who suffer permanent or semi-permanent disabilities.¹ The current moderate severity of H1N1 makes it rather unlikely that it will be considered a disability; however, illness resulting from a more severe strain could be considered a disability. As a comparison, during the 2003 Severe Acute Respiratory Syndrome (SARS) outbreak, the Ontario Human Rights Commission issued a statement that it considered SARS to be a disability under the *Human Rights Code*. Sound human resources policies should provide employees time to recover from H1N1 and to return to work when they are fit to do so. Accommodations could include allowing employees to telecommute, or allowing employees to gradually return to work during their recovery. Generally, employees with H1N1 should be treated in the same manner as employees in the workplace who have had other strains of the flu in the past that have been treated.

1 See for example: *Chiang v. British Columbia (Ministry of Small Business and Revenue)*, 2007 BCHRT 148; *Wutke v. Mageria Holdings Ltd.*, 2007 BCHRT 340.

FEDERAL JURISDICTION

The Canadian Human Rights Tribunal has not considered whether influenza is a disability. The majority of jurisprudence from other jurisdictions has held that influenza is not a disability. These decisions have focused on the temporary nature of influenza and the rationale that human rights legislation is directed towards assisting individuals who suffer permanent or semi-permanent disabilities.¹ However, more recent arbitral jurisprudence focuses on the degree of impairment.² Under this analysis, influenza could be a disability if an employee is totally, although temporarily, incapacitated by influenza. The current moderate severity of H1N1 makes it unlikely that it will be considered a disability; a more severe strain could be considered a disability. If such a strain emerges, employers will be required to accommodate employees disabled by the hypothetical strain to the point of undue hardship. The most obvious form of accommodation for employers with H1N1 is letting them use any sick leave to which they may be entitled and letting them make use of any

applicable short- or long-term disability coverage applying to them to cover absences from work. Other forms of accommodation could include allowing employees to telecommute or to work flexible hours.

1 See for example: *Ouimette v. Lilly Cups Limited*, (1990), 12 C.H.R.R. D/19 (Ont. Bd. Inq.) and *St Joseph's General Hospital, Elliott Lake v. Ontario Nurses' Association*, 2006 CanLII 7155 (Luborsky) (Ontario).
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CAN AN EMPLOYER REQUIRE MANDATORY TESTING?

QUEBEC

The general rule in Quebec is that employers may not test employees against their will, as doing so would infringe their rights to privacy and bodily integrity.¹ In exceptional circumstances where an employer has serious reason to consider that an employee's health poses a threat to him or herself or to others, a test could be required.² The fact that many persons infected with H1N1 may be asymptomatic raises additional issues about selecting employees for testing. Given the complexity of the legal issue and the high risk of a grievance or other complaint, attempting to impose mandatory testing is never preferable to a strongly worded and consistently enforced policy on communicable illnesses that requires employees experiencing symptoms of illness to stay away from the workplace.

1 Articles 1, 3, 10, 11, 13, *Civil Code of Quebec*; Quebec *Charter of human rights and freedoms*, R.S.Q. c. C-12, s. 1, 5, 46.

2 Linda Bernier, Lukasz Granosik and Jean-François Pedneault, *Les droits de la personne et les relations du travail*, looseleaf (Cowansville: Yvon-Blais), at p. 16-137.

ONTARIO

Mandatory testing will only rarely be permissible and then only in the clearest cases of reasonable suspicion of infection and a pressing interest in the identification and management of disease. The fact that many persons infected with H1N1 may be asymptomatic raises additional issues about selecting employees for testing. Given the complexity of the legal issue and the high risk of a grievance or other complaint, attempting to impose a practice of mandatory testing is never preferable to a strongly worded and consistently enforced policy on communicable illnesses that requires employees experiencing symptoms of illness to stay away from the workplace.

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ALBERTA

Mandatory testing will only rarely be permissible and then only in the clearest cases of reasonable suspicion of infection and a pressing interest in the identification and management of disease. The fact that many persons infected with H1N1 may be asymptomatic raises additional issues about selecting employees for testing. Given the complexity of the legal issue and the high risk of a grievance or other complaint, attempting to impose a practice of mandatory testing is never preferable to a strongly worded and consistently enforced policy on communicable illnesses that requires employees experiencing symptoms of illness to stay away from the workplace.

BRITISH COLUMBIA

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CAN AN EMPLOYER REQUIRE MANDATORY VACCINATION?

QUEBEC

As a general rule, employers may not force their employees to be vaccinated, as this would be considered an infringement of both their bodily integrity and their privacy rights.¹ However, it is the employer's duty to implement all reasonable measures to ensure the health and safety of the workplace as a whole. Mandatory vaccination programs for a limited range of employees in critical occupations may thus be permissible. The most likely example would be healthcare workers.² It should be noted that mandatory vaccination provisions in collective agreements covering such workers have been upheld in Ontario.³ Conversely, the employer's duty to ensure the health and safety of its employees may, in some circumstances, require it to provide vaccination for employees who request it, without them bearing the cost.⁴ The better course for employers may be to increase voluntary vaccination by educating employees about its benefits and arranging voluntary vaccination sites at the workplace or, if this is not possible, arranging for employees to have sufficient time off to attend vaccination clinics.

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- 1 Articles 1, 3, 10, 11, 13 of the *Civil Code of Quebec*
 - 2 Rhéaume Perreault and Simon-Pierre Paquette, "Le vaccin en milieu de travail n'est pas un jeu de maux" (November/December) 11:5 *Effectif*, <www.orhri.org/impression/default.aspx?f=55205>.
 - 3 *Re North Bay General Hospital and O.N.A.*, [2008] 18 O.L.A.C. (4th) 52 (Chauvin) (Ontario) where there was also an order from the Medical Officer of Health under the *Health Protection and Promotion Act*, 2004, S.O. 2004, c. 3, Sched. A, s. 29.
 - 4 *Commission scolaire du Sault St-Louis et Syndicat des enseignants du Sault St-Louis*, [1987] CALP 474.

ONTARIO

Non-consensual medical treatment is a violation of an individual's personal integrity and may constitute an assault. The Ontario Court of Appeal has affirmed the right of competent adults to be free of unwanted medical treatment.¹ Ontario arbitrators, however, have upheld the mandatory vaccination policies of healthcare employers where a provision of the collective agreement provides for mandatory vaccinations and there is an order from the Medical Officer of Health under the *Health Protection and Promotion Act*.² The better course for most employers will be to encourage voluntary vaccination by educating employees about its benefits and arranging voluntary vaccination sites at the workplace, or if this is not possible, arranging for employees to have sufficient time off to attend vaccination clinics.

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- 1 *Flemming v. Reid (Litigation Guardian)*, (1991) 82 D.L.R. (4th) 298, (Ont. C.A.) at 10.
 - 2 See *Re North Bay General Hospital and O.N.A.* (08-04), [2008] 180 L.A.C. (4th) 52 (Chauvin) (Ontario).

FEDERAL JURISDICTION

The issue of mandatory vaccination has not been considered by the Federal Court or federal arbitrators. It is well established in other jurisdictions that non-consensual medical treatment is a violation of an individual's personal integrity and may constitute an assault. Military judges have reached similar conclusions when considering the mandatory vaccination of persons serving as members of the regular, special or reserve Canadian Armed Forces.¹ Arbitrators from other jurisdictions have though upheld mandatory vaccination policies in an outbreak where there is a collective agreement requiring vaccination and there is an order from public health officials.² The better course for most employers will be to

increase voluntary vaccination by educating employees about its benefits and arranging voluntary vaccination sites at the workplace, or if this is not possible, arranging for employees to have sufficient time off to attend vaccination clinics.

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- 1 *R. v. Kipling*, 2002 CMAC 1.
 - 2 See *Re North Bay General Hospital and O.N.A.* (08-04), [2008] 180 L.A.C. (4th) 52 (Chauvin) (Ontario).

CAN AN EMPLOYER REQUIRE MANDATORY VACCINATION?

ALBERTA

Non-consensual medical treatment is a violation of an individual's personal integrity and may constitute an assault. Alberta arbitrators, however, have upheld the mandatory vaccination policies of healthcare employees where there is an order from the Provincial Medical Health Officer.¹ It is unlikely that non-healthcare employers would be successful in requiring employees to be vaccinated for H1N1. The better course for employers may be to increase voluntary vaccination by educating employees about its benefits and arranging voluntary vaccination sites at the workplace, or if this is not possible, arranging for employees to have sufficient time off to go to vaccination clinics.

¹ See *Chinook Health Region v. United Nurses of Alberta, Local 120*, [2002] A.G.A.A. No. 88.

BRITISH COLUMBIA

Non-consensual medical treatment is a violation of an individual's personal integrity and may constitute an assault. British Columbia arbitrators, however, have upheld the mandatory vaccination policies of healthcare employees where there is an order from the Provincial Medical Health Officer.¹ It is unlikely that non-healthcare employers would be successful in requiring employees to be vaccinated for H1N1. The better course for employers may be to increase voluntary vaccination by educating employees about its benefits and arranging voluntary vaccination sites at the workplace, or if this is not possible, arranging for employees to have sufficient time off to go to vaccination clinics.

¹ See *Health Employers Assn. of British Columbia v. British Columbia Nurses Union*, (2006) 155 L.A.C. (4th) 252.

CAN AN EMPLOYER REQUIRE ACCESS TO AN EMPLOYEE'S PERSONAL HEALTH INFORMATION?

QUEBEC

Many pieces of legislation, including *An Act respecting the protection of personal information in the private sector*¹, *An Act respecting Access to documents held by public bodies and the Protection of personal information*², *An Act respecting Occupational Health and Safety*,³ and *An Act respecting the Ministère de la Santé et des Services sociaux*⁴ limit access to personal health information without the consent of the individual. In most cases, access to personal health information is not required for an employer to ensure the safe and continuous operation of its workplace during a pandemic. Indeed, most of an employer's goals in seeking access to health information may be satisfied on the basis of a medical opinion that does not include specific health information. Employers may seek access to personal health information to discharge their duty to ensure the health and safety of employees, to fulfill an employee's request for accommodation, or to determine whether an employee is fit to return to work. These purposes may be satisfied on the basis of a medical opinion stating that the employee is not contagious, disabled, or unfit to return to work, as the case may be.

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- 1 R.S.Q., c. P 39.1, s. 2, 5 and 9.
 - 2 R.S.Q., c. A-2.1, s. 64.
 - 3 OHSA – Que., s. 123 and 129.
 - 4 R.S.Q., c. M-19.2, s. 19.

ONTARIO

Many pieces of legislation, including the *Personal Health Information Protection Act*, 2004¹ and the *Occupational Health and Safety Act*², limit access to personal health information without the consent of the individual. In most cases, access to personal health information is not required for an employer to ensure the safe and continuous operation of its workplace during a pandemic. Indeed, most of an employer's aims in seeking access to health information may be satisfied on the basis of a medical opinion that does not include specific health information. Employers may seek access to personal health information to discharge their duty to ensure the health and safety of employees, to fulfill an employee's request for accommodation, or to determine whether an employee is fit to return to work. These aims may be satisfied on the basis of a medical opinion stating that the employee is not contagious, disabled, or unfit to return to work, as the case may be.

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- 1 *Personal Health Information and Protection Act*, 2004, S.O. 2004, c.3, Sched. A., s. 29.
 - 2 OHSA – Ont., s. 63(2).

FEDERAL JURISDICTION

Many pieces of legislation, including the *Personal Information Protection and Electronic Documents Act* (PIPEDA),¹ limit access to personal health information without the consent of the individual. In most cases, access to personal health information is not required for an employer to ensure the safe and continuous operation of the workplace during a pandemic. Indeed, most of an employer's aims in seeking access to health information may be satisfied on the basis of a medical opinion that does not include specific health information. Employers may seek access to personal health information to discharge their duty to ensure the health and safety of employees, to fulfill an employee's request for

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- 1 *Personal Information and Protection of Electronic Documents Act*, S.C. 2000, c. 5.

CAN AN EMPLOYER REQUIRE ACCESS TO AN EMPLOYEE'S PERSONAL HEALTH INFORMATION?

ALBERTA

The *Personal Information Protection Act*¹ limits the access of employers to personal health information without the consent of the individual, except where the information is reasonably necessary for the maintenance of the employment relationship. In most cases, access to personal health information is not required for an employer to ensure the safe and continuous operation of the workplace during a pandemic. Employers may seek access to personal health information to discharge their duty to ensure the health and safety of employees, to fulfill an employee's request for accommodation, or to determine that an employee is fit to return to work. These purposes may be satisfied on the basis of a medical opinion stating that the employee is not contagious, disabled, or unfit to return to work, as the case may be, or a medical note saying that the employee is unable to work due to illness.

¹ *Personal Information and Protection Act*, S.A. 2003, c. P-6.5, s. 15.

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¹ *Personal Information and Protection Act*, S.B.C., 2003, c. 63.

CAN AN EMPLOYER REQUIRE A MEDICAL CERTIFICATE?

QUEBEC

Employers may require medical certificates when they have reasonable grounds to believe employees may not be in a condition to perform their work in a way which is safe for themselves and for others. Employers may also require medical certificates to prove that an employee may continue working or, conversely, return to work after an illness. In Quebec, the content of such certificates is limited by legislation and will generally be restricted to information necessary for the employer to make an informed decision on whether an employee may continue or resume work.¹ Where employees are unionized, the collective agreement provisions may have an important impact on the employer's ability to request medical certificates.

¹ *Syndicat des postiers du Canada et Société canadienne des postes*, [1990] T.A. 533; *Syndicat des employées et employés professionnels et de bureau, section locale 57 et Caisse populaire St-Stanislas de Montréal*, [1999] R.J.D.T. 358; *Blais et C.S.S.T.*, [2000] C.A.I. 1.

ONTARIO

Employers may require an employee to provide proof that he or she is incapable of working or, conversely, that he or she is fit to return to work after an illness. The ability of unionized employers to request this information may be impacted by the scope of the management rights clause in the collective agreement and any express provisions regarding when medical certificates or independent medical assessments can be required.

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CAN AN EMPLOYER REQUIRE A MEDICAL CERTIFICATE?

ALBERTA

Employers may require an employee to provide proof that he or she is incapable of working or, conversely, that he or she is fit to return to work after an illness. Employees are obliged to cooperate in providing sufficient medical information to employers to establish that they are fit to return to work after being ill. This obligation is particularly high where the employee has been ill with a highly contagious disease, such as H1N1, which could impact on the health of other employees and the productivity of the workplace.

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CAN AN EMPLOYER DISCLOSE THE IDENTITY OF AN INFECTED EMPLOYEE OR PATIENT/CUSTOMER?

QUEBEC

Privacy legislation generally requires that information on employees' health be treated as confidential.¹ Significant threats to public health and safety are an exception to this general rule.² Disclosure of personal information without the consent of the employee concerned may thus be justified in situations where an employee's illness poses an imminent and significant risk to the health of other employees or the public. In such cases, an employer may be justified in directly or inferentially disclosing the identity of an employee with a communicable illness to other employees. However, the information disclosed must be limited and there is risk of over-disclosure or overreaction. Therefore, the better course may be for employers to advise employees that an unidentified employee has been diagnosed with a communicable illness to which they may have been exposed and that they may wish to be tested.

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- 1 *An Act respecting protection of personal information in the private sector*, R.S.Q. c. P-39.1, s. 13.
 - 2 *Id.*, s. 18(4) and (7).

ONTARIO

Privacy laws recognize that privacy rights may be outweighed by significant threats to health and safety. The disclosure of personal information without consent may be thus justified in compelling or imminent situations affecting the health and safety of individuals.¹ In these cases, employers may be justified in directly or inferentially disclosing the identity of an employee with a communicable illness to other employees. However, the information disclosed must be limited and there is risk of overdisclosure or overreaction. Therefore, the better course may be for employers to advise employees that an unidentified employee has been diagnosed with a communicable illness to which they may have been exposed and that they may wish to be tested.

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- 1 See for example *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, s. 32(h) and *Freedom of Information and Protection of Privacy*, R.S.O. 1990 c. F.31, s. 42(1)(h), which provide for disclosure of personal information without consent in compelling situations affecting the health and safety of an individual.

FEDERAL JURISDICTION

In the *Personal Information and Protection of Electronic Documents Act* (PIPEDA) recognizes that an individual's privacy rights may be outweighed by threats to health and safety. The disclosure of personal information without consent may thus be justified in emergencies threatening the health and safety of individuals.¹ In these cases, employers may be justified in directly or inferentially disclosing the identity of an employee with a communicable illness. The better course may be for an employer to advise employees that an unidentified employee has been diagnosed with a specific communicable illness to which they may have been exposed and that they may wish to be tested.

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- 1 *PIPEDA*, s. 7(3)(e).

CAN AN EMPLOYER DISCLOSE THE IDENTITY OF AN INFECTED EMPLOYEE OR PATIENT/CUSTOMER?

ALBERTA

While an employer may collect, use and disclose the personal information of its employees as reasonably necessary for the employment relationship, the employer must be careful not to disclose an employee's personal information to other employees or third parties other than as strictly necessary. An employer may be justified in directly or inferentially disclosing the identity of an employee with a communicable illness to other employees, if doing so is necessary to ensure that other employees refrain from visiting that person, or to assist other employees in being diagnosed and treated themselves. However, an employer should ask for the consent of the ill employee before disclosing his/her identity and diagnosis to others. The better course would be for the employer to simply advise employees that one or more unidentified employees in the workplace has been diagnosed with H1N1 to which they may have been exposed and that they may wish to be tested.

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DO EMPLOYERS HAVE TO REPORT H1N1 OUTBREAKS IN THE WORKPLACE TO PUBLIC HEALTH OFFICIALS?

QUEBEC

The *Quebec Public Health Act*¹ requires that certain infections and diseases set out by regulations must be reported to the public health director. The H1N1 virus has not yet been included in the list of reportable diseases. Even if that becomes the case, employers do not have an obligation to report an outbreak of a listed disease to the public health director. A doctor who suspects the presence of a threat to public health must report it to the public health director.

1 R.S.Q. c. S-2.2, s. 79.

ONTARIO

Influenza is a communicable disease for the purposes of the *Health Protection and Promotion Act* (HPPA).¹ Under the HPPA doctors, chiropractors, pharmacists, school principals, and other medical and paramedical professionals are required to report an outbreak. There is no obligation on employers to report an outbreak. In some industries, there may be additional public health obligations on employers. For instance, regulations under the HPPA require employees who come into contact with food and utensils to be free from infections and agents of disease and to submit to medical tests required by a medical officer of health.² Similarly, the *Milk Act* prohibits employees from working while suffering from a communicable illness.³

1 *Specification of Communicable Diseases*, O.Reg. 558/91, s.1.
 2 *Food Premises*, R.R.O. 1990, Reg. 562, ss. 65(1)(f) and (g)
 3 *Milk and Milk Products*, R.R.O. 1990, Reg. 761

FEDERAL JURISDICTION

Influenza is a communicable disease and medical professionals have an obligation to report an outbreak. Generally, federally regulated employers do not have an obligation to report an outbreak. In some industries, there may be additional public health obligations on employers. For instance, regulations under the federal *Meat Inspection Act* prohibit employees with communicable illnesses from working where there is a possibility of meat contamination,¹ and regulations under the *Canada Labour Code* prohibit individuals with communicable illnesses from working as food handlers.² Similar regulations

appear in food processing regulations under the *Canada Agriculture Products Act* and in drug manufacturing regulations under the *Food and Drugs Act*.

1 *Meat Inspection Regulations*, 1990, S.O.R./90-288, s. 57(1).
 2 *Canada Occupational Health and Safety Regulations*, S.O.R./86-304, s. 9.34(2).

DO EMPLOYERS HAVE TO REPORT H1N1 OUTBREAKS IN THE WORKPLACE TO PUBLIC HEALTH OFFICIALS?

ALBERTA

Influenza is a communicable disease for the purposes of the *Public Health Act*.¹ Under this Act, doctors, chiropractors, pharmacists, school teachers, and other medical and paramedical professionals are required to report an outbreak. There is no obligation on employers to report an outbreak. In some industries, there may be additional public health obligations on employers. If public health authorities implement a requirement on employers to provide information on their employees' health as a part of a pandemic response plan, employers should advise employees of the statutory requirements or orders requiring the employer to provide this information.

¹ *Public Health Act*, R.S.A. 2000, c. P-37, s. 26.

BRITISH COLUMBIA

Influenza is a communicable disease for the purposes of the *Public Health Act*.¹ Under this Act, health care practitioners and school boards are required to report an outbreak. There is no obligation on employers to report an outbreak. In some industries, there may be additional public health obligations on employers. If public health authorities implement a requirement on employers to provide information on their employees' health as part of a pandemic response plan, employers should advise employees of the statutory requirements or orders requiring the employer to provide this information.

¹ *Public Health Act*, S.B.C. 2008, c. 28, s. 10.

WHAT TYPES OF LEAVES CAN EMPLOYEES TAKE DURING A PANDEMIC?

QUEBEC

An employee with three or more months of service may be absent from work, without pay, for a period of up to 26 weeks over a period of 12 months owing to sickness, amongst others, due to becoming ill with the H1N1 flu.¹ An employee may also qualify for unpaid family or parental leave of up to 12 weeks over a period of 12 months to stay with his child, spouse, his spouse's child, his father, his mother, his father or mother's spouse, his brother, his sister or one of his grandparents because of a serious illness.² An employee is also entitled to 10 days per year without pay to fulfil obligations relating to the care or health of the employee's child or the child of the employee's spouse, or because of the state of health of the employee's spouse, father, mother, brother, sister or one of the employee's grandparents. Employees could also have the right to a leave if provincial authorities were to declare an emergency under the *Civil Protection Act*.³ Unionized employees may have access to additional paid and unpaid leaves under their collective agreement.

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- 1 *An Act respecting Labour Standards*, R.S.Q., c. N-1.1, s. 79.1.
 - 2 *Id.*, s. 79.8.
 - 3 *Civil Protection Act*, R.S.Q., c. S-2.3.

ONTARIO

Employees may qualify for unpaid Personal Emergency Leave of up to ten days due to personal illness or injury, or death or urgent matter involving a spouse, parent, child, grand-relation, spouse of a child, brother or sister, or other dependant, if their employer regularly employs at least 50 people.¹ An employee may also qualify for unpaid Family Medical Leave of up to eight weeks to care for a spouse, parent, child, or other family member suffering from a serious medical condition with a significant risk of death within 26 weeks.² Employees also have a statutory right to unpaid Declared Emergency Leave. This leave will not be available in the current pandemic, however, unless provincial officials declare an emergency under the *Emergency Management and Civil Protection Act*.³ Unionized employees may have access to additional paid and unpaid leaves under their collective agreement.

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- 1 *Employment Standards Act*, 2000, S.O. 2000, c.41 [ESA – Ont.], s. 50(1) and 50(5)
 - 2 *Id.*, s. 49(1)-(3).
 - 3 *Id.*, s. 50.1(1) and 50.1(8).

FEDERAL JURISDICTION

An employee with three or more months of service may qualify for up to 12 weeks of sick leave.¹ An employee may also qualify for Compassionate Care Leave of up to eight weeks to care for a family member with a serious medical condition and who is at a significant risk of death within 26 weeks.² Unionized employees may also have access to additional paid and unpaid leaves under their collective agreement.

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- 1 *Canada Labour Code*, s. 239(1).
 - 2 *Id.*, s. 206.3(2).

WHAT TYPES OF LEAVES CAN EMPLOYEES TAKE DURING A PANDEMIC?

ALBERTA

The Alberta *Employment Standards Code*¹ does not expressly provide leave for medical reasons or to care for an employee's family members who are ill. However, employers will be required to comply with any public health directives, and in addition, must comply with human rights requirements. A refusal to allow reasonable time off to an employee who is required to care for ill family members may give rise to a claim of discrimination on the basis of family status. Thus, employers should do their best to accommodate reasonable requests for leave in a pandemic situation. Unionized employees may have access to additional paid and unpaid leaves under their collective agreement.

¹ R.S.A. 2000, c. E-9.

BRITISH COLUMBIA

In addition to medical leave for the employee's own illness, an employee who is required to care for ill family members may qualify for unpaid Family Responsibility Leave of up to five days per employment year due to the need to care for a child or other member of the employee's immediate family. An employee may also qualify for unpaid Compassionate Care Leave of up to eight weeks to care for a spouse, parent, child, or other family member suffering from a serious medical condition with a significant risk of death within 26 weeks.¹ Unionized employees may have access to additional paid and unpaid leaves under their collective agreement.

¹ *Employment Standards Act*, R.S.B.C. 1996, c. 113, s. 52 and 52.1.

CAN SICK EMPLOYEES BE REQUIRED TO STAY HOME?

QUEBEC

Employers may require a sick employee to stay at home, but care should be taken to ensure that this decision is not made on the basis of a prohibited ground of discrimination. Ideally, employers will require sick employees to stay home pursuant to a clearly worded and consistently enforced communicable illness policy.

In the absence of a collective agreement or employment contract provision requiring payment, there is no general obligation to pay employees who are staying home sick or voluntarily quarantined. However, many employers choose to offer, or are required by a collective agreement to offer, paid sick leave or other short-term disability benefits. Where these benefits are not available, employers may encourage employees to draw on unused vacation or other banked time to offset any loss of income. Alternatively, sick employees may be eligible for workers' compensation benefits provided they can demonstrate that the illness was contracted at work. They may seek employment insurance sickness benefits if their regular weekly earnings have decreased by more than 40%, they have accumulated a sufficient number of insurable hours in the last year, and they obtain a medical certificate.¹

¹ *Employment Insurance Regulations*, S.O.R./96-332, s. 40(1).

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