

## Labour and Employment Law

October 2009

### H1N1 – Is Your Workplace Prepared?

As flu season approaches, employers should consider the legal implications that could arise should the H1N1 pandemic prediction become a reality.

Employers have certain safe workplace obligations under the *Occupational Health and Safety Act* (the “OHS”) while workers may be entitled to contractual paid and statutory unpaid work absences under the *Employment Standards Act* (the “ESA”), *Employment Insurance Act* (the “EIA”) and *Workplace Safety and Insurance Act* (the “WSIA”). Prudent employers will develop appropriate workplace policies to address the likely impact of a flu pandemic.

While implementing preventative steps to reduce potential transmission in the workplace is an important focus, employers should not overlook the legal issues that will inevitably arise from work absences. The *Globe & Mail* reported that most American workers say that they have not had any H1N1 direction from their employers and continue to feel pressure to show up for work when ill given the current economic climate.<sup>1</sup> There is no reason to think Canadian workers have different perceptions. Employers should review their existing employment or collective agreements as well as company policies to determine whether they sufficiently explain the duties and entitlements of employees.

#### What are my Obligations as an Employer?

An employer’s legal obligations to employees during a pandemic outbreak are essentially statutory. The key obligation of an employer is found in the *OHS*. Employers are required to take “reasonable precautions” to protect workers. How do you provide a safe work environment during a flu pandemic? Reasonable precautions should include having a policy in place that restricts workplace access for employees who have exhibited the symptoms of H1N1. Employees who have contracted H1N1, who have been in contact with someone with H1N1, who are subject to quarantine orders or who have recently visited an area under a travel ban or where H1N1 is prevalent should be told to remain away from the workplace. You may wish to take steps to reduce business

travel and to consider alternatives such as off-site work, e-mailing and teleconferencing as an alternative to in-person meetings. Reasonable precautions would also include communicating prevention information such as the importance of hand washing and cough etiquette, as well as providing hand sanitizers, masks or gloves to decrease the risk of infection. Employers may consider posting notices advising visitors not to enter the workplace if they exhibit symptoms of the flu.

The *OHS* also grants employees the right to refuse work if they feel their safety is at risk. During a pandemic outbreak workers may perceive that the workplace environment is unsafe, particularly if an employer is not enforcing the “stay at home” rule. Any “safety risk” perception must have a rational basis in fact, such as direct contact with an infected person, to establish a genuine work refusal. Your managers and supervisors must be aware of the proper process for dealing with work refusals.

While it is important to document absences from work and to keep employees informed about workplace hazards, employers need to be mindful of their privacy obligations. Any health information collected about an employee must be maintained on a confidential basis. The fact that one of your employees has contracted H1N1 is information that workers will want to know. As with any communicable disease, you should share the minimum information necessary to properly communicate the message while respecting the privacy of the infected individual.

#### Employee Entitlement to Unpaid Leave

Employees are entitled to take unpaid leaves of absence under the *ESA* in the following circumstances:

- Employees whose employers regularly employ 50 or more employees are entitled to an emergency leave of absence of 10 days without pay due to personal illness, injury or medical emergency or the death, illness, injury or medical emergency of family members such as spouses, parents, children and siblings.

<sup>1</sup> *Globe & Mail*, Friday, October 2, 2009

- Employees are entitled to a leave of absence without pay if the employee will not be performing the duties of their position because an emergency has been declared under the *Emergency Management and Civil Protection Act* and orders have been made under that Act or the *Health Protection and Promotion Act* that apply to the employee or because the employee is needed to provide care or assistance to certain family members.
- Employees are entitled to a family medical leave of absence without pay of up to eight weeks to provide care or support to certain family members if a qualified health practitioner issues a certificate stating that the family member has a serious medical condition with a significant risk of death occurring within a period of 26 weeks.

## Paying Employees During a Disease Outbreak

Entitlement to paid absence when ill depends upon the specific employment or collective agreement. If you do not have a policy dealing with short-term leaves of absence, now is the time to put a policy in place. Your policy should deal with the following issues: the available number of paid sick days; whether the policy will only apply to workers who have contracted a communicable disease or extend to employees subject to a quarantine order or who need to be home to care for family members; whether employees are

entitled to access paid vacation days after they have used their paid sick day allotment, and whether a physician's note should be obtained indicating that the employee is medically fit to return to work. You should also consider whether employees who are medically able to work could do so from home.

Employers should be consulting their disability insurer to determine whether employees are eligible for short-term disability coverage should they contract H1N1.

You should also be aware that if employees are sent home early from work because they exhibit symptoms, the employer may be liable to pay the higher of the employee's regular wage for the time worked or three hours at the minimum wage.

Employees who contract a contagious disease during the course of their employment and are unable to work may also be entitled to benefits under the *WSIA*. It must be clear that the disease arose out of or in the course of employment. Employees unable to work as a result of exposure to disease may also be entitled to up to 15 weeks of employment insurance pursuant to the *EIA*. Six weeks of compassionate care benefits are also available under the *EIA* for those individuals caring for a family member suffering from a serious medical condition with a significant risk of death occurring within a period of 26 weeks.

## Pallett Valo is Prepared

Pallett Valo LLP is committed to protecting the health and interests of all of its employees, clients and guests. In the case of Pandemic Influenza, Pallett Valo LLP is actively promoting measures to prevent or minimize the risk of transmission of infection, including the development of a Pandemic Policy and Business Continuity Plans, increased common area cleaning, and employee education.

## Pallett Valo LLP Labour & Employment Practice

We have the legal expertise and rich experience to provide employers with creative and pragmatic solutions for a wide variety of issues. We offer support to management in drafting employment contracts and company policies, collective bargaining, collective agreement administration and grievance arbitration. Our advice minimizes the time, costs and disruption associated with labour and employment disputes.

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