RETURN TO WORK: COVID-19 CONSIDERATIONS

GUIDANCE DOCUMENT

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Ontario Retirement Communities Association

DISCLAIMER

This document provides general information about retirement communities and employees returning to work in the context of COVID-19. Although this document has attempted to make sure this information is accurate and useful, it is recommended that you consult a lawyer for legal advice in the subject area that is appropriate to your specific circumstance.

The following document does not constitute legal advice. All parties should seek guidance from a human resources leader or with a legal representative prior to making any final decision.

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INTRODUCTION

The COVID-19 crisis, while not unprecedented in human history, has led to many unprecedented events. As a result, there is a degree of uncertainty as to how the courts and arbitrators will approach issues arising from refusing to work and/or returning to work during and post-COVID-19.

The closest equivalent temporally is the SARS crisis of 2002-2004. The SARS outbreak was classified as an epidemic, not a pandemic, and it did not result in the same level of government intervention in labour relations. There are very few arbitral and court decisions concerning employees returning to work after SARS or refusing to work during the epidemic. As discussed throughout this document, there are two main refusal to work cases that both involved airport employees. There are no return to work cases. This is likely in part the result of the fact that the most affected employees, healthcare workers in hospitals, do not have a right to refuse work under the Ontario *Occupational Health and Safety Act* ("OHSA"). It also speaks to the fact that the parties resolved any such issues without resorting to arbitration or the courts. As a result, there is little arbitral or case law guidance on best practices in such circumstances.

PART ONE: RETURNING TO WORK WITH EMERGENCY ORDERS STILL IN EFFECT

SECTION 1: GENERAL

When employees return to work after being off, decisions must be made as to how they will be reintegrated into the workplace.

Usually, the first consideration in creating a return to work plan would be the terms of the applicable collective agreement. The Emergency Orders currently in effect have relaxed collective agreement requirements around layoff, scheduling, seniority, and job postings to allow employers the flexibility required to properly address COVID-19. In many homes, this has resulted in a number of changes to the pre-COVID-19 schedule and staffing.

Reintegrating employees will require changes as well. The Emergency Orders also allow employers the flexibility to normalize the master and/or regular schedule as employees return to work after the disruption of COVID-19. For example, with the Emergency Orders in effect, it is possible to create a new master schedule and have employees pick lines to return the schedule to normal. This is unlikely to be possible under most collective agreements. It should also be noted that the Emergency Orders permitting such an action will not necessarily prevent Unions from grieving such an action.

However, the Emergency Orders are renewed once every two weeks and it is unclear if the government will provide a transitory period to permit employers to normalize the schedules prior to the Emergency Orders ending. It is very possible that employers will only receive two weeks' notice that the Emergency Orders will be ending.

A recall/return to work plan created while the Emergency Orders are in effect may need to be amended after the Emergency Orders expire.

A. Labour Implications

The Emergency Orders have not relaxed collective agreement provisions regarding the effect of absences on benefits, vacation, sick time, or the like. The applicable collective agreement must be reviewed to determine the impact of any absences on such benefits. Employers will also have to individually determine best practices in how to treat employees who refused to come into work for illegitimate reasons, with the caveats discussed below.

Employers have an obligation to monitor and protect employees from harassment and bullying in the workplace. It is possible that there may be some tension between returning employees and the employees who remained in the workplace during the crisis. Employers should be vigilant in monitoring employee relations throughout the return to work process, both during and after the Emergency Orders expire, and should provide support and management as needed.

B. Training and Reorientation for Returning Employees

To support a safe return to work, employers must ensure that all employees who left the workplace prior to or during the COVID-19 crisis are trained and reoriented in all new policies and procedures relating to COVID-19 health and safety measures when they return to work.

C. Active vs. Passive Return to Work Strategies

Employers may elect to pursue a passive or an active return to work strategy. A passive approach will have employers wait for employees who have been off work to contact the employer to express their desire to return

to work. An active approach will have employers reach out to employees off work to determine if they are able and willing to return to work.

All return to work strategies must be consistently applied to all employees, while leaving the appropriate amount of room for the unique circumstances of the employee's situation to be considered.

D. Determining the Reason for Being Off Work

All employees off work should have provided a reason for their inability to attend at the workplace. Given the crisis, it is possible that the reasons provided were not substantiated.

Employers pursing an active approach should contact employees to determine

1. their stated reason for being off work, and
2. if this reason has been resolved and they are able to return to work.

The appropriate approach to take with a return to work will depend upon the reason provided by the employee for being off work.

Generally speaking, there will be two main groups of employees:

1. employees off work due to medical reasons (this will include both COVID-19-related medical reasons and non-COVID-19-related medical reasons), and
2. employees off work due to non-medical reasons (this will include childcare obligations, underlying conditions, fear, and financial reasons).

For suggested scripts for conversations with employees regarding their reasons for being off work and employees reluctant to return to work even if able to do so, please see Ontario Health's *Toolkit for Assessing and Supporting Return to Work for Long-Term Care and Retirement Home Employees*.

Section 2: Employees Off Work Due to Medical Reasons

A. COVID-19 Related Medical Reasons

Employees who have been off work due to being COVID-19 positive or due to self-isolation are able to return to work once they are no longer positive and/or symptomatic.

Return to Work Requirements

Employers should establish policies clearly outlining what is required before an employee who has been off work due to a positive COVID-19 test or due to self-isolation after symptoms or possible exposure returns to work. These policies must be clearly communicated to employees off work due to COVID-19.

The Ministry of Health's *COVID-19 Quick Reference Public Health Guidance on Testing and Clearance* recommends two different types of return to work clearance procedures. The first is test-based and permits healthcare workers to return to work after they have received two negative tests at least 24 hours apart. The test-based approach is now only recommended for healthcare workers who required hospitalization during the course of their illness. The second is non-test-based and permits healthcare workers to return to work under work self-isolation after positive test a minimum of 72 hours after the resolution of fever and improvement in respiratory and other symptoms or a minimum of 72 hours after the test results if the worker is asymptomatic. Healthcare workers in self-isolation due to potential exposure may also return to work under work self-isolation for a period of 14 days.

"Work self-isolation" is defined in the Guide as "maintaining self-isolation measures outside of work for 14 days from symptom onset (or 14 days from positive specimen collection date if consistently asymptomatic) to avoid

transmitting to household members or other community contacts. While at work, the health care worker should adhere to universal masking recommendations, maintain physical distancing (remaining greater than 2m/6 ft from others) except when providing direct care, and performing meticulous hand hygiene."

It is important to remember that these guidelines have changed and may continue to change as the medical community's understanding of the virus evolves.

Once clear return to work requirements have been established, employers may contact employees to assess their current condition, to inform them of the return to work requirements, and to encourage them to return to work if able to do so.

B. Non-COVID-19 Related Medical Reasons

Employees who have been off work due to non-COVID-19-related medical reasons are able to return to work as per the standard return to work practices for medical absences.

Section 3: Employees Off Work Due to Non-Medical Reasons

The Employees captured in the following section may be on approved LOAs or may be on unapproved LOAs. There are many operational reasons for treating the approved and unapproved leaves differently, with the caveats discussed below. The relationship with the applicable Union may also determine how employers approach approved versus unapproved LOAs.

A. Human Rights Considerations

Employees may be off work on approved or unapproved leaves of absence due to claims made regarding family status or disability. Even if the employees did not follow the appropriate procedure and have their leaves approved, employers must respond to such claims as being legitimate claims made on human rights grounds and must consider them as such.

Family status is a protected ground under the Ontario *Human Rights Code* and includes childcare obligations and care obligations for an adult dependent, including family members who rely upon the employee for care and support who have underlying conditions making them more susceptible to COVID-19. An employee has the right to request accommodation on the basis of family status if they have childcare or family care obligations. Once a request for accommodation has been made, as for all requests for accommodation under the *Human Rights Code*, the employer must evaluate the request to determine whether the employee is entitled to accommodation and what form such accommodation should take. The standard of undue hardship applies.

In addition to the above, section 50.1 of the Ontario *Employment Standards Act, 2000* provides employees with the right to a LOA without pay if the employee cannot perform their duties because of an emergency declared under the *Emergency Management and Civil Protection Act* or because of an infectious disease in certain circumstances. This leave covers employees providing necessary care to family members and providing childcare due to school or daycare closures. If an employee makes a claim for leave under section 50.1 of the ESA, the employer is permitted to ask for proof that is reasonable in the circumstances but cannot require a medical certificate from a medical practitioner as evidence.

Section 50.1 of the ESA provides narrower protection to employees than the *Human Rights Code*. Under s. 50.1, once the emergency has been declared over or schools have been reopened, the employee is no longer entitled to the leave. Under the *Human Rights Code*, an employee may still make a claim for accommodation on the basis of family status regardless of emergency status, including for childcare obligations after schools have reopened if the employee does not feel it is safe to send his or her children to school.

Employees may be off work on approved or unapproved leaves of absence due to claims made regarding disability. Here, there are two main categories. The first category is employees asserting an underlying medical

condition which renders them more susceptible to COVID-19. The second category is employees asserting a fear of COVID-19 which rises to the level of a mental disability. These are requests for accommodation on the basis of disability. As per the above, they must be evaluated on an individual basis to determine whether the employee is entitled to accommodation and what form such accommodation should take. The standard of undue hardship applies.

Employers should be cautious when discussing claims with employees if they are encouraging the employee to return to work, especially regarding employees claiming their fear of returning to work rises to a mental disability. Employers may seek to reassure employees that the workplace is safe, including detailing the safety procedures and precautions in place.

B. Other Reasons

Employees may provide other reasons for being off work. These may include a fear of COVID-19 which does not rise to the level of a mental disability under the *Human Rights Code* or financial reasons, namely a claim that they wish to remain off work as they make equivalent or sufficient money from the Canadian Emergency Response Benefit (CERB). These LOAs are the most likely to be unapproved.

In such circumstances, the employee does not have an established right to remain off work. Employers must decide how they wish to respond to such absences. If an employee has openly admitted to fraud by deliberately deciding to remain off work to claim the CERB benefit, the employer would be in a stronger position to take disciplinary action than if an employee has claimed a genuine fear. The employer bears the onus for establishing disciplinary action was justly administered at arbitration.

Section 4: Refusals to Return to Work

A. Right to Refuse Work

Some employees may refuse to return to work even if able to do so. A prolonged refusal to return to work without legitimate grounds to do so may be treated as a resignation from employment and/or a just cause for termination in certain circumstances.

As stated above, it is possible for such a refusal, even if not positively identified as such, to be the result of a human rights protected ground, such as disability if the employee later claims the fear of COVID-19 affected their mental health. It is also possible that such a refusal, even if not identified as such, may be treated as a work refusal under s. 43(3) of the OHSA.

Unlike hospital and long-term care home employees, retirement home employees are not directly excluded from work refusals under s. 43 of the OHSA. While a direct work refusal is unlikely, it has been established that there are no “magical words necessary” for an employee to exercise a right to work refusal.[1] In other words, an employee is not required to directly state that he or she is refusing to work due to health and safety concerns in order to receive protection under s. 43. As such, employers should be aware that employees refusing to return to work may be able to claim their refusal was a work refusal under the OHSA.

Employers considering disciplining or terminating employees for refusing to return to work while the state of emergency and the Emergency Orders remain in effect should consider the possible ramifications of issuing discipline. There are also operational considerations that must be taken into account. These will vary from employer to employer.

If an employer decides to issue discipline and or terminate, they must firstly review the applicable collective agreement, especially any provisions addressing discipline, termination, job abandonment, or administrative termination. The employer must directly inform the employee that he or she is required to return to work and

[1] Sproule v. Frankel Steel Ltd., 1985 CanLII 1023 (ON LRB) at para 6.

may face discipline, up to and including termination, if he or she does not do so by a specified date. The date provided should give the employee sufficient time to adequately consider their options. The employer should attempt to speak with the employee to understand their concerns and may consider possible accommodations which may help allay such fears (this is outside of the human rights accommodation process). It may also be helpful for the employer to inform the employee as to the impacts of termination on his or her access to benefits such as the CERB.

Refusal to Return to Work, MLTSD Inspections and Discipline

Under s. 43(7) of the OHSA, a Ministry of Labour, Training and Skills Development (MLTSD) inspector may investigate the workplace after a refusal to work occurs. A MLTSD inspector may also inspect a workplace separately from a refusal to work.

It is important to remember that the inspector's finding is not determinative for the purposes of upholding a suspension or termination of an employee at arbitration under a collective agreement. An Employer cannot rely solely upon the results of a MLTSD investigation to justify a termination. The inspector's jurisdiction is limited to the OHSA, while employers have additional obligations under collective agreements, the *Human Rights Code*, and the common law.[2] The inspector's findings are relevant to the arbitrator when determining whether the Employer violated the OHSA, and will be considered when determining the reasonableness of the Employer's actions in issuing the discipline but the findings are not determinative. The reasonableness of the discipline will also depend upon the standard considerations such as the employee's record, the circumstances, and the actions of the Employer.

In *Campbell v. ABB Combustion Engineering Systems Combustion Engineering Canada Inc.*, 1991 CanLII 6106 (ON LRB), an employee's termination for still refusing to work after three investigations by the MLTSD which all found the workplace was safe was revoked by the Board and replaced with a four week suspension because the Employer had not made efforts to allay the grievor's fear before termination. The Board also found that the grievor had no reasonable grounds to believe he was likely to be endangered and, as such, the Employer had not violated the OHSA.

Additionally, employers should be aware that a termination for a continued work refusal, even after a MLTSD inspector finds the workplace to be safe, may appear to be a reprisal under the OHSA. An employee cannot be disciplined, suspended, or terminated for acting in compliance with the OHSA.[3] An employee is acting in compliance with the OHSA if they refuse to work and have a "reason to believe" there is a danger covered under s. 43(3). A finding that there is not a danger is not a finding that the employee did not have a reason to believe there was a danger. An employee is also acting in compliance with the OHSA if they refuse to work after a MLTSD investigation has been completed and they have "reasonable grounds to believe" there is a danger as per s. 43(6). This is a higher standard, but, again, a finding there is no danger by the MLTSD does not mean the employee did not have reasonable grounds to believe there was a danger.

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[2] *Re Gentek Building Products Ltd. and United Steelworkers, Local 1105* (2010) 119 L.A.C. (4th) 193 (Surdykowski): the arbitrator found that the Employer could not rely solely upon the WSIB's determination that the grievor was able to work safely.
[3] OHSA, s. 50.

PART TWO: POST-EMERGENCY ORDERS

Section 1: General

Once the Emergency Orders have expired, all provisions of the collective agreement relating to layoff, scheduling, seniority, and job postings will apply in full. Employers must ensure that their return to work policies comply with the terms of the collective agreement.

The end of the Emergency Orders does not necessarily mean the end of the COVID-19 threat. It indicates that the government no longer considers COVID-19 a crisis, but it is very likely that COVID-19 will remain an issue for some time. As with SARS, it is also possible that a second wave of the virus will occur. As such, there will still be a degree of uncertainty after the state of emergency ends which will continue make labour relations decisions difficult.

Section 2: Employees Off Work Due to Medical Reasons

Employees off work due to COVID-19-related or non-COVID-19-related medical reasons will generally follow the same return to work process as while the Emergency Orders were in effect. Employees with underlying medical conditions may still feel unsafe coming to work, even if the threat to the general population has been deemed to be over. There may be some difficulty in determining the risk posed to such employees as the scientific understanding of COVID-19 is still evolving. This calculation of risk may be different before and after the Emergency Orders have expired. Employers will have to consider any such concerns and make accommodations where necessary and possible.

Section 3: Employees Off Work Due to Non-Medical Reasons

After the Emergency Orders expire and the state of emergency is declared over, Employers should check in with employees off work due to non-medical-related reasons.

It is likely that many of the reasons provided for being off work will be resolved by the end of the crisis. However, as stated above, parents who do not feel comfortable sending their children to reopened daycare and schools may make a claim for accommodation under the *Human Rights Code* on the basis of family status. Employees who have dependents with underlying medical conditions may still feel unsafe coming to work, even if the threat to the general population has been deemed to be over. Employers will have to consider any such concerns and make accommodations where necessary and possible.

It is also likely that the financial reasons for not returning to work, such as CERB, will expire shortly after the Emergency Orders.

Section 4: Refusals to Return to Work

Employees who still refuse to return to work at this time will have a more difficult time arguing that there is a legitimate reason for their refusal. Employers, if they choose to do so, will likely have a higher chance of successfully disciplining such employees. Employers should remain aware of the appropriate steps and possible pitfalls outlined in the Refusal to Return to Work section above.