

# MANAGING THE WORKFORCE DURING THE COVID-19 PANDEMIC

The Labour and Employment Team



April 16, 2020

Zoom

930 – 1030 am

CUNNINGHAM, SWAN, CARTY, LITTLE & BONHAM LLP



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# LEGAL ISSUES ASSOCIATED WITH REMOTE WORK



ALAN WHYTE

APRIL 16, 2020

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## THE CHALLENGE!



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## AGENDA

1. The goal – a robust Work from Home Policy (WHP)
2. Review of legal issues associated with working from home
3. Issues to address in a WHP



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## ELIGIBILITY

Any restrictions on assigning employees to work from home?	<ul style="list-style-type: none"> <li>• Collective agreement</li> <li>• Policies – and which should apply?</li> </ul>
Any reasons not to assign an employee to work at home?	<ul style="list-style-type: none"> <li>• Performance/ability to supervise</li> <li>• Safety</li> </ul>

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## ELIGIBILITY

Competing obligations in the home

Privacy/confidentiality concerns

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## EMPLOYMENT STANDARDS

- ESA (and applicable Employer policies) continue to apply to work performed at home
  - “Employee” definition includes “homeworker”
  - Hours of work, overtime, meal periods, record keeping
  - Extra requirements for tracking of hours of work/overtime?



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## CONFIDENTIALITY



SAME OBLIGATIONS OF EMPLOYEE SHOULD APPLY AS AT THE OFFICE



SECURITY MEASURES/REPORTING OF DATA INCIDENTS



SECURE WORKSPACE AND STORAGE



EMPLOYER MAY MONITOR USAGE OF EMPLOYER TECH RESOURCES

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## HEALTH AND SAFETY



UNCLEAR WHETHER OHS/A APPLIES TO WORK PERFORMED AT HOME



DUTY TO TAKE REASONABLE PRECAUTIONS



CONSIDER REQUIRING REPORTING OF HAZARDS/ACCIDENTS



ISSUES: INSPECTIONS, SUPERVISION, INVESTIGATIONS, ACCIDENT REPORTING, TRAINING

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## WSIB

“Workplace” not defined under the WS&I Act

If employer has required the employee to work from home.....

WSIB has no specific “working from home” policies

COVID-19 Adjudicative Approach document, March 23, 2020

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## HUMAN RIGHTS

Most likely issue – family status

Various tests – Ontario: real disadvantage to the parent/child relationship/responsibilities?

Can the employee perform useful and productive WFH?

Put special/accommodation agreements in writing

• May be different analysis for parent/elder care

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## ISSUES FOR WHP



1. ELIGIBILITY/APPROPRIATENESS



2. SUPERVISION/REPORTING



3. HOURS OF WORK/OVERTIME/BREAKS



4. PRIVACY/CONFIDENTIALITY



5. TECH AND OTHER SECURITY/SUPPORT



6. HEALTH AND SAFETY

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## ISSUES FOR WHP



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## Work Refusals During the COVID-19 Pandemic



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## Work Refusals under the Occupational Health and Safety Act

Workers can refuse to work when they have reason to believe:

- the physical condition of the workplace ... is likely to endanger himself or herself;

→ Reprisals Prohibited

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## Work Refusals Not Permitted...

### 1. Who

- Police & Firefighters
- Person employed in:
  - correctional (or similar) facility
  - hospital, long-term care or residential group home, ambulance, or supporting service

### 2. When

- Dangerous condition is inherent in work

### OR

- Work refusal is likely to endanger life, health or safety of another person.

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## Work Refusals Process

1. Worker reports circumstances to supervisor
2. Employer investigation in presence of worker and H & S representative
3. Remedy dangerous circumstances (if any)

→ If worker still refuses, contact Ministry of Labour

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## Work Refusals During COVID-19 Pandemic

1. TTC Workers on March 12, 2020
2. Chrysler Workers in Windsor on March 12, 2020

→ In both cases, a MOL Inspector determined that refusal did not meet criteria of an OHS work refusal

3. TTC Workers last night (April 15, 2020)

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## Employer Obligations

- Follow guidance of **public health authorities** in developing practices/policies:
  - Restrict access to the workplace;
  - Facilitate social distancing;
  - Promote/Implement heightened hygiene processes

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## What about...

Work refusals based on **personal characteristics** that make a worker particularly vulnerable:

- underlying medical conditions
- age
- vulnerable people at home

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## The Vulnerable Worker...

- If it's not an OHSA work refusal then...
  - is (s)he entitled to an **Infectious Disease Emergency Leave**?
  - No? Treat as request for medical or other leave
    - Medical certificate
    - Accommodations at work?
    - Is self-isolation at home possible?

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## Financial Support for Employers

- 1) 10% TWSE
- 2) 75% CEWS
- 3) WSIB relief

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## 1) 10% TWSE

part of the  
**COVID-19 Emergency Response Act**

March 25

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## Who?

- Individual
- Partnership
- Non-profit organization
- Registered charity
- Canadian-controlled private corporation eligible for the small business deduction

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## What?

Subsidy = **10% of the remuneration paid**  
March 18 to June 19

Over 3 months:

Cumulative individual max = **\$1,375** per ee

Cumulative total max = **\$25,000** per er

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## How?

Do not apply

- Deduct income taxes from ees
- Reduce **remittances for income taxes** by the 10% subsidy (up to the max)

 **Must still deduct + remit CPP, EI**

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## 2) 75% CEWS

*A second Act respecting certain measures in response to COVID-19*



April 11

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## Who?

- Individuals
  - Taxable corporations
  - Partnerships consisting of eligible employers
  - Non-profit organizations
  - Registered charities
- ... if not publicly-funded

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If:

**15% decline in revenue March**

**30% decline in April, May**

Compared to:

March, April, May 2019

or

average revenue Jan + Feb 2020

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➔ Must choose which comparator when first apply



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➔ Can calculate revenue accrual method or cash method



➔ Non-profits, charities can choose whether to include government funding

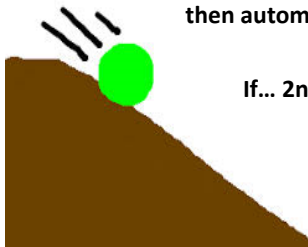


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If eligible for 1st period... then automatically eligible 2nd



If... 2nd then... 3rd

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### Claim Periods (4-week blocks)

If qualify then...  
 March 15 to April 11  
 April 12 to May 9  
 May 10 to June 6

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### What?

Subsidy = the **greater** of:

a) 75% of \$ paid

➔ new ee

or

b) Lesser of

- 75% of baseline \$
- \$ actually paid

➔ non-arm's length ee

to max \$847 per ee/week

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### So...

Get 75% if ees paid 75% or more

If pay less than 75% then get the greater of:  
 actual \$ paid  
 \$847 per week

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**“eligible employee” =**

employed in Canada

+

not been without remuneration for 14 or more consecutive days in the claim period



CERB

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**“eligible remuneration” =**

- salary
- wages
- taxable benefits

(not severance pay, stock option plans, personal use of corporate vehicles)

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**“baseline remuneration” =**

- average weekly eligible remuneration paid
- January 1 to March 15, 2020
- excluding any 7-day periods in which ee was not paid

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**Interaction with CERB**

Same 4-week blocks

- for CERB, ee needs  $\geq 14$  days w/o pay \*
- for 75% subsidy, you need  $> 14$  days with pay

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If recall ee,

then make sure you will pay  
15 or more days in the block  
or no 75% wage subsidy

If lay off ee,

then make sure the employee will be w/o pay  
14 or more days in block  
or no CERB

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**Simplest** = recall or lay off to coincide with  
beginning/end of a block



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## How?



### Repayment of CERB?

Likely going to be an  
ee responsibility

- Apply through CRA's My Business Account portal / new website
- Before October 2020
- Must attest that the application is complete + accurate in all material respects

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### Is an overpayment to the CRA

Will be a

- refund
- credit
- combo of the 2



## Compliance?

- Required to repay amounts received
- Fraudulent = penalties (fines, prison)
- If artificially reduce revenue then penalty = repay + 25 %



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## Overlap?

- 10% TWSE
- EI work sharing program



## And an extra bonus

Refund of employer-paid EI + CPP contributions if:

- employee on leave **with pay** for **entire** week
- employer is eligible to claim the CEWS

Remit, then

apply for refund at same time as apply for CEWS

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### 3) WSIB Rebate

**Defer premium reporting + payments  
until August 31, 2020**

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**Eligible payments:**

**Monthly reporter:**

**March 31, April 30, May 31, June 30,  
July 31, Aug 31**

**Quarterly reporter:**

**April 30, July 31**

**Annual reporter:**

**April 30**

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### How?

**No application required**

**Just stop reporting  
(or keep reporting but don't pay)**

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### Until when?

**We don't know yet when the deferred  
payments will be due**



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### COVID-19

#### ***Employees & Lack of Work***

Greg Dobney

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### Overview

- Work Sharing Agreements
- Leaves of Absence
- Temporary Layoffs
- Supports for Employees Out of Work
  - Canada Emergency Response Benefit
  - Employment Insurance

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## Work Sharing Agreements

- Agreement between E'er, work unit of E'ees & Service Canada
- E'ees in work unit agree to proportional reduced work schedule to share available unit work
- SC provides EI benefits to unit E'ees
- At least 6 weeks long, reduction of 10-60% in work hours

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## Work Sharing Agreements

- COVID-19 special measures:
  - Can be extended up to 76 weeks (previously 38)
  - Lesser recovery plan requirements in application
  - Reduced eligibility requirements (1 year in business)
  - Submit application at least 10 calendar days before requested start date (reduced from 30 days)
  - Expanded E'ee eligibility – can now have WSA for those "essential to recovery"

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## Leaves of Absence

- Paid Leave of Absence
  - E'ee remains on payroll
  - Could be asked to perform work, if needed
  - No change to the terms of employment
  - E'er may access supports for its business
    - e.g TWSE or CEWS

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## Statutory Leaves of Absence

- *ESA*: Declared Emergency & Infectious Disease
  - E'ee right
  - Unpaid (eligibility for federal income supports)
  - Job-protected
  - Benefits must be maintained (unless E'ee opts-out)
  - E'er entitled to "evidence reasonable in the circumstances" that E'ee is entitled to the leave

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## Declared Emergency Leave

- If an E'ee will not be performing the duties because of a declared emergency and:
  - An order applies to the employee under *the Emergency Management and Civil Protection Act (EMCPA)* or the *Health Protection and Promotion Act (HPPA)*; OR
  - The E'ee is needed to provide care to a prescribed individual (e.g. spouse, parent, child etc.)
- Lasts until E'ee is able to resume duties, or when emergency is terminated/disallowed

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## Infectious Disease Emergency Leave

- If an E'ee will not be performing the duties because of designated reasons relating to an infectious disease (COVID-19).
- Lasts as long as the disease remains a designated infectious disease and the E'ee is not performing duties because of a designated reason
- Cannot require a doctor's note

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## Infectious Disease Emergency Leave

- Reasons – E'ee is:
  - under medical investigation, supervision, or treatment for COVID-19;
  - acting in accordance with an order under *HPPA*;
  - in quarantine, isolation or subject to a control measure implemented by public health, Telehealth ON, or government;
  - under E'er's direction resulting from concerns of exposing others in workplace to COVID-19;
  - providing care to a designated individual because of a matter related to COVID-19 (incl. school or day care closures); or
  - directly affected by travel restrictions related to COVID-19

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## Temporary Layoffs

- ESA permits temporary layoff, but ability depends on whether it is a term of employment
  - Express in written contract; or implied by nature of business
- If no right/agreement - constructive dismissal (?)
- "Temporary":
  - No more than 13/20 weeks, if no benefits or substantial payments;
  - Less than 35/52 weeks, if benefits or substantial payments.

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## Canada Emergency Response Benefit

- Worker criteria:
  - 15+ years old
  - Resident in Canada
  - For 2019 or 12 months preceding application, total income of at least \$5,000 from: employment, self-employment, EI benefits (certain), provincial parental/pregnancy benefits
- Worker must be without income for 14 consecutive days in a 4-week period\*
  - Coming changes – up to \$1k while on CERB; seasonal E'ees; those with exhausted EI and unable to find a job

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## Canada Emergency Response Benefit

- If not entitled to EI as of March 15, go to CERB
- Applications for 4-week periods between March 15 & October 3
- Benefit amount: \$500 per week
- Available for a maximum of 16 weeks
- No applications after December 2, 2020
- Over-payments must be returned

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## Employment Insurance

- Still available:
  - for those entitled to EI before March 15;
  - if eligible, after CERB is exhausted;
  - for pregnancy, parental, caregiving, work-sharing benefits, or if job loss is unrelated to COVID-19.
- Supplementary Unemployment Benefit Plans & EI/CERB interaction?
  - New changes may allow partial income (\$1,000/mo)

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