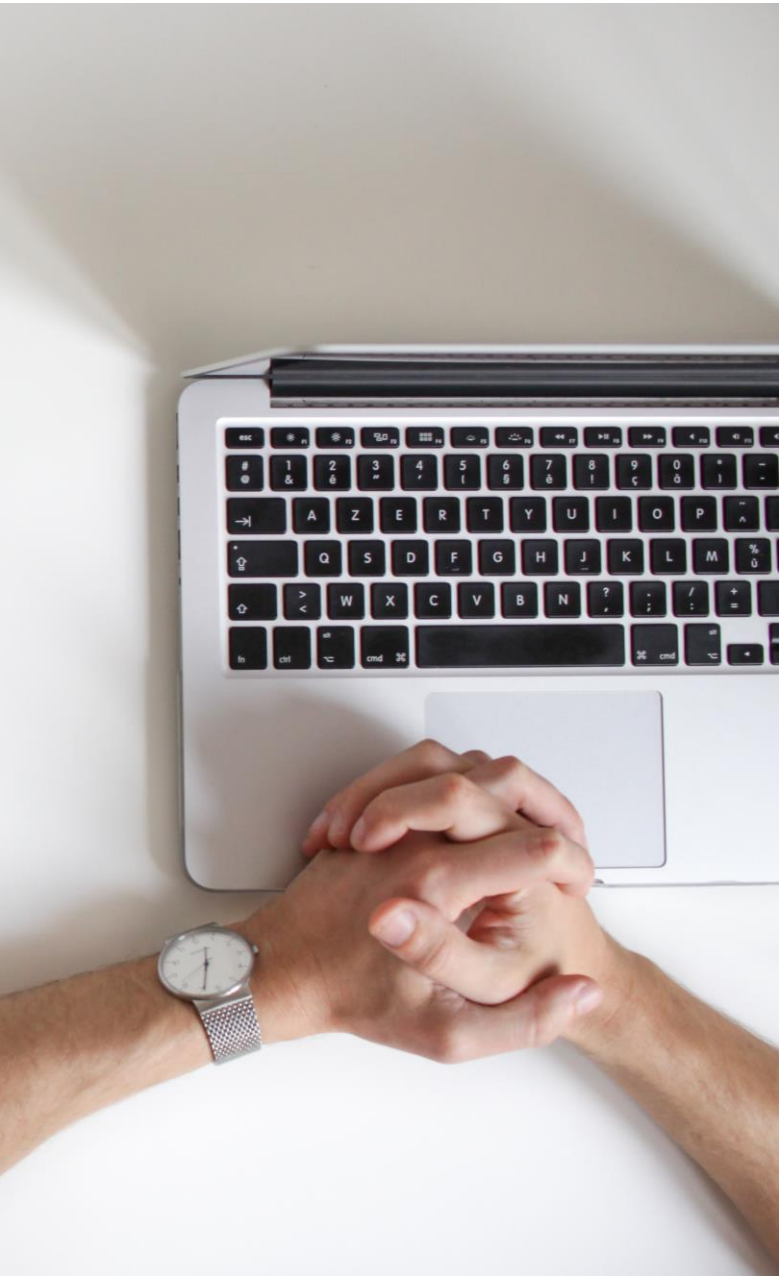
Reopen & Return

A CUNNINGHAM SWAN WEBINAR



Disclaimer

This presentation is provided as a courtesy for your general information and does not constitute legal advice. Every situation is unique and may also be subject to other laws not contemplated in this presentation. This presentation should not be relied on as a substitute for legal advice which necessarily must be specific to your situation.

MEET OUR TEAM

Greg Dobney

Andrea Risk

Kalen Ingram

Alan Whyte

4 TOPICS

1. Recalling Employees
   Greg
2. Human Rights Considerations
   Andrea
3. Occupational Health & Safety Act
   Kalen
4. Other Issues
   Alan

Cunningham Swan
LAWYERS

Recalling Employees During COVID-19

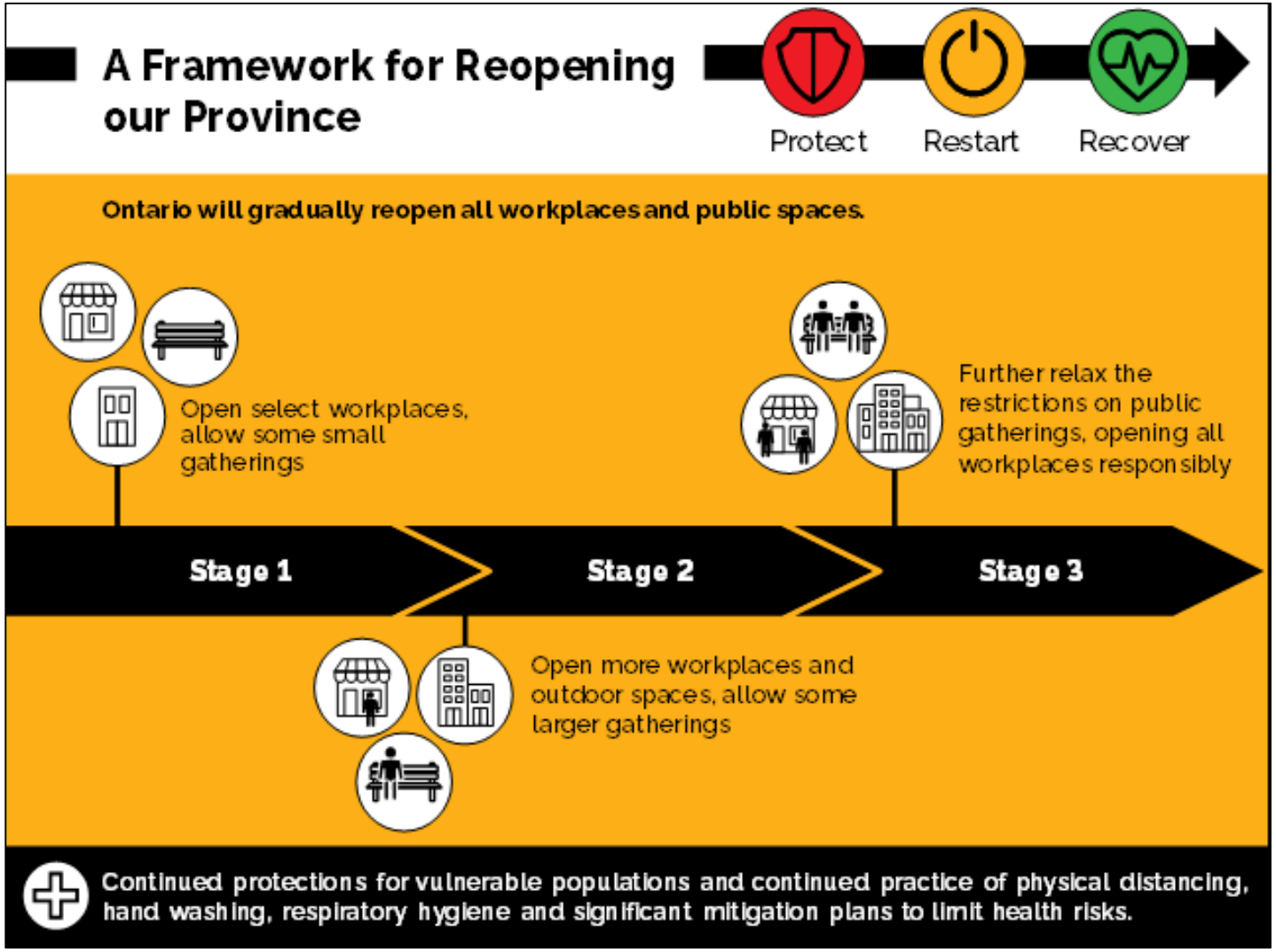
Greg Dobney

OVERVIEW

- Ontario's Reopening Plan
- Initial Considerations
- Recalling Union Employees
- Recalling Non-Union Employees
- Recalling

Cunningham Swan
LAWYERS

Ontario's Reopening Plan



Initial Considerations

- Applicable Restrictions
- Directives & Guidelines
  - Ontario.ca/covid
- Obtaining adequate supplies/PPE
  - Ontario.ca/PPE
- Obligations under *OHSA*

Initial Considerations

- Criteria: seniority, performance, order of layoff?
- Criteria must be non-discriminatory
- Documented rationale for the recall plan
- Recall in stages?
- Changes in schedules, hours, types of work?
  - Remember: Work Sharing Agreements

Initial Considerations

- Leaves (DEL, IDEL) – no recall, but still apply?
- Keep in mind timelines for temporary layoffs
  - 13 out of 20; 35 out of 52
- Ensure recall is to ≥ 50% regular wages
  - Otherwise, still a layoff week
- Mass terminations under *ESA*

Recalling Union Employees

- Collective Agreement
- Usually by role & seniority
- Opportunity for communication
- Notice of Recall
- Consequences of non-return?

Recalling Non-Union Employees

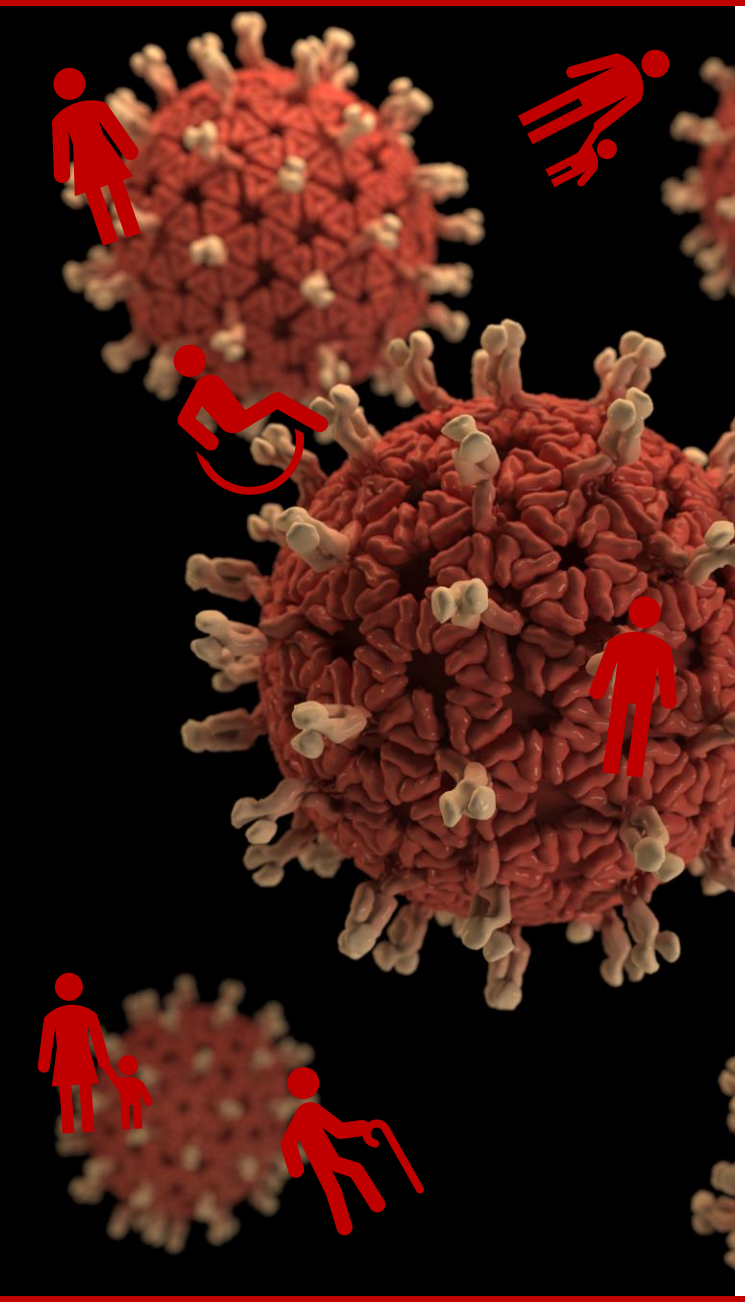
- Policy? Contract?
- If not, no set legal framework
- Opportunity for communication

Recalling

- Written Notice of Recall
  - Clear date of return
  - Terms of employment on return
  - Manner of delivery
  - Confirmation of receipt?

Recalling

- Timing – advance notice of recall
- Consequences if no return/communication?
- Communicate re: CERB / EI
- Retraining? New protocols/procedures?



HUMAN RIGHTS CONSIDERATIONS

ANDREA RISK

arisk@cswan.com

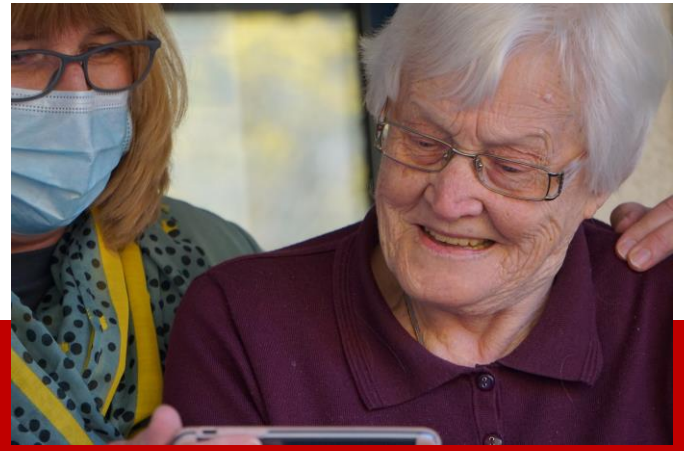
613.546.8090

Potential Claims Under the Human Rights Code

1. Discrimination due to family status
2. Discrimination/harassment due to disability
3. Discrimination/harassment due to nationality, place of origin, race, perceived connections to covid-19

1. FAMILY STATUS

Where an employee needs to care for a child/elder dependents

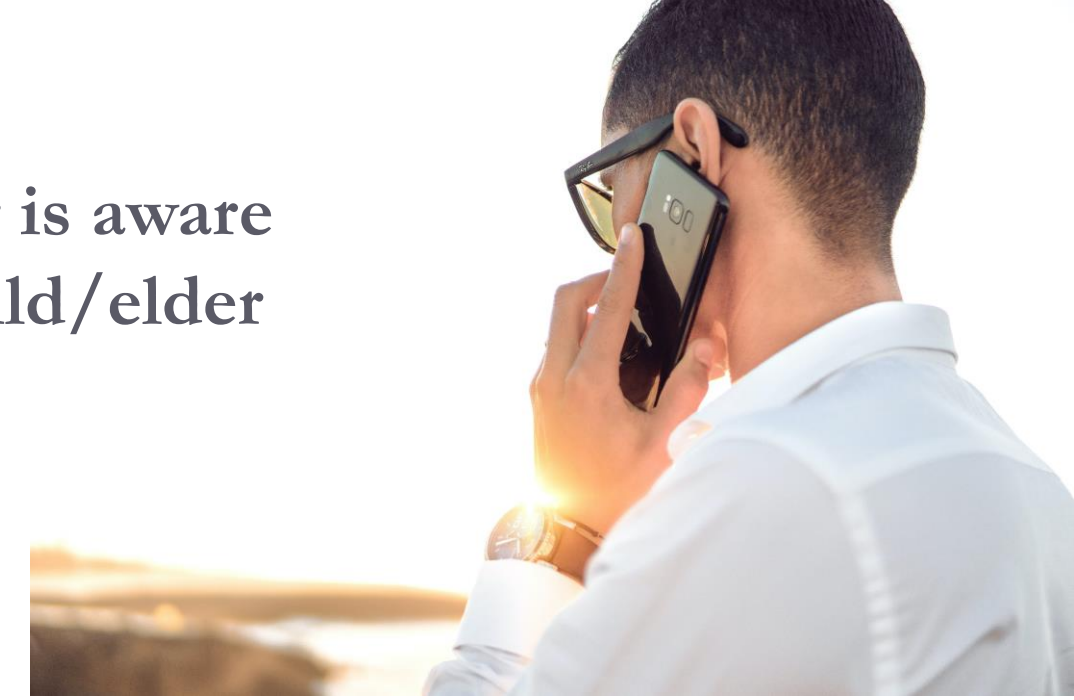


Ontario schools and day cares remain closed, summer camps cancelled (maybe opening in July?)

Elderly parents may be living with their adult children without paid caregivers

As you prepare for reopening, consider what accommodations you can provide

If an employee expresses a need/employer is aware of a need for an accommodation due to child/elder care issues, then you need to:



- Engage the employee in a dialogue
- What are the job duties + how are they impacted by family status needs?
- Offer an appropriate accommodation, up to the point of undue hardship
- Circumstances can change rapidly, keep in contact with the employee for possible adjustments to the accommodation

If an employee does not return when recalled…

… you need to ask why (duty to inquire)

If you cannot accommodate without undue hardship then...

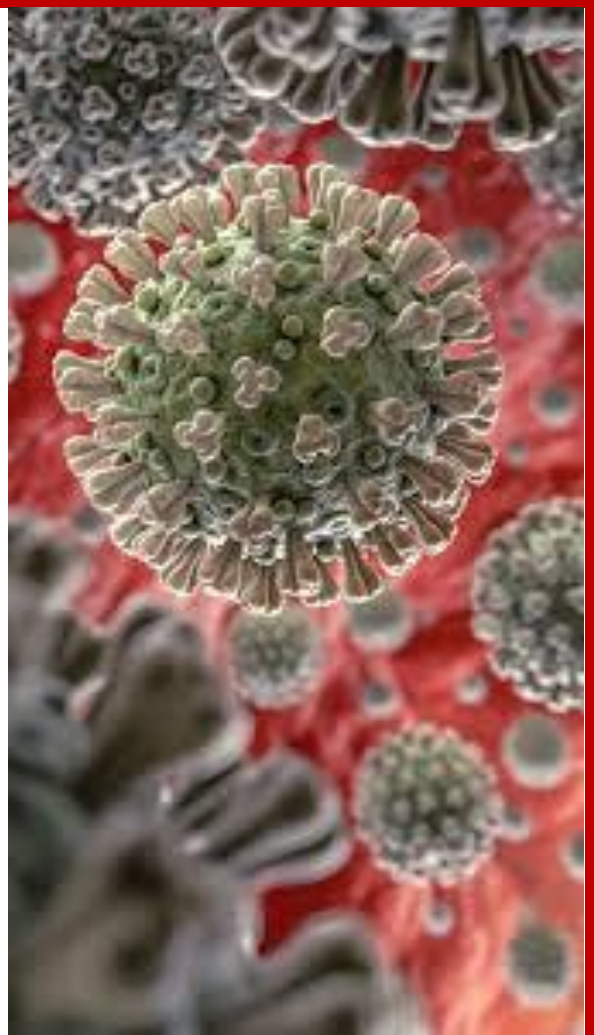
Infectious Disease Emergency Leave

Other ESA leaves:

- Family Caregiver
- Critical Illness
- Child Death
- Domestic Violence
- Family Responsibility
- Bereavement

2. DISABILITY

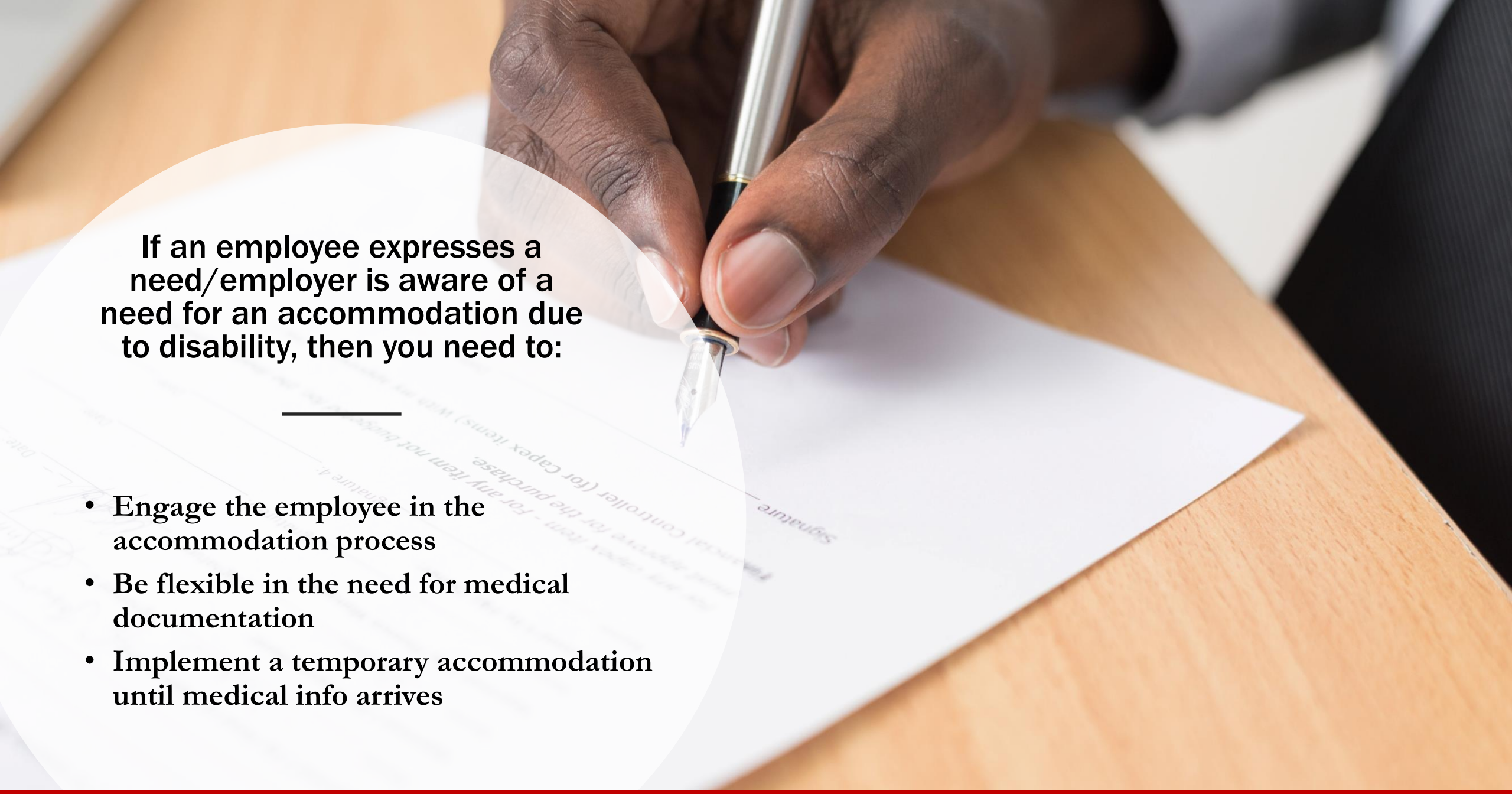
The Ontario Human Rights Commission has stated that the ground of disability is engaged in relation to covid-19, as it covers medical conditions/perceived medical conditions that carry significant social stigma



Use objective criteria when recalling employees (not health status)

Hire on merit (not possible susceptibility to COVID-19)

Use objective criteria when terminating /laying off (not health status)



If an employee expresses a need/employer is aware of a need for an accommodation due to disability, then you need to:

- Engage the employee in the accommodation process
- Be flexible in the need for medical documentation
- Implement a temporary accommodation until medical info arrives

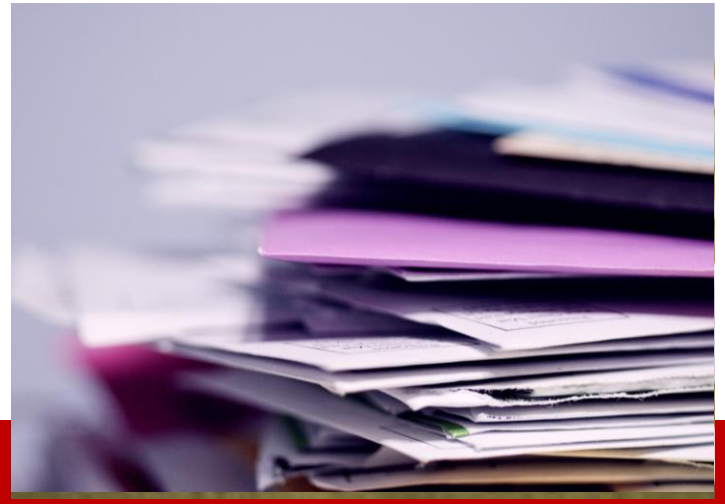
Discrimination includes on the basis of association with someone with a disability

---

eg., laying off an employee whose child had covid-19 due to fears of other employees

3. PERCEIVED CONNECTIONS...

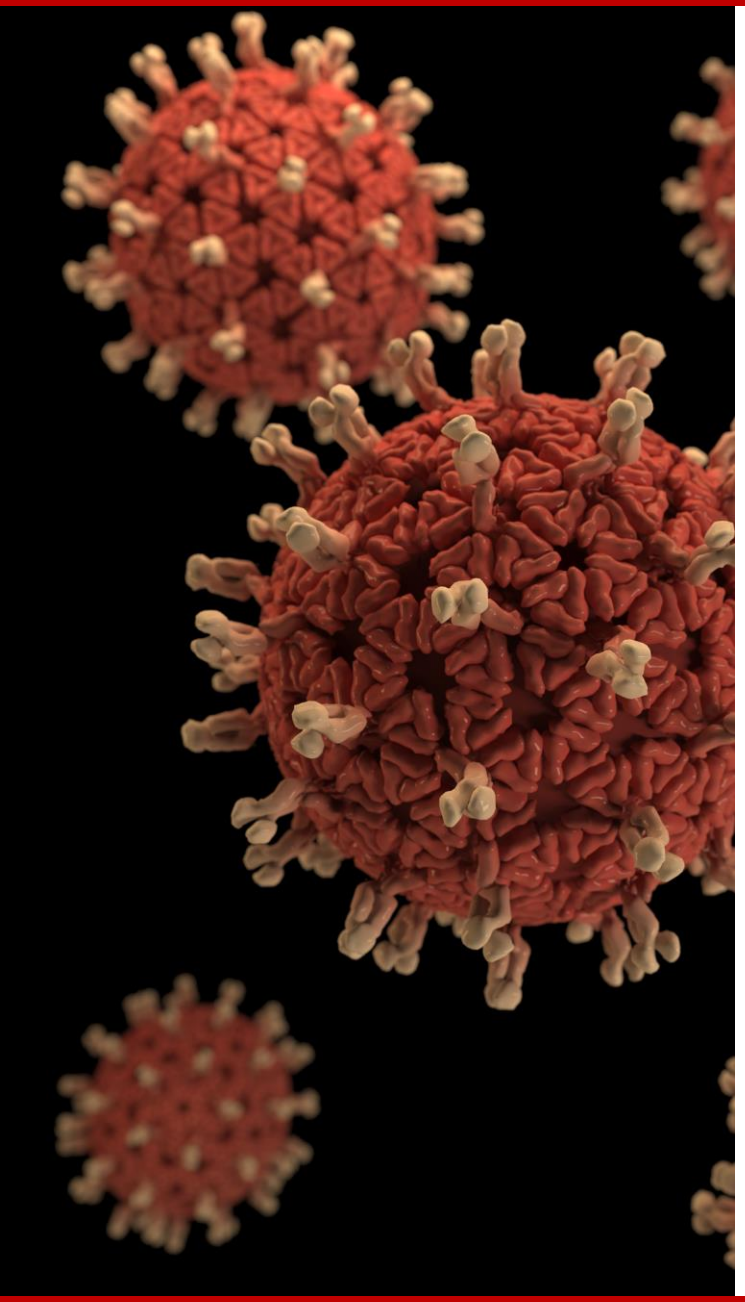
Incidents of harassment and discrimination against Asian Canadians are on the rise



Be aware of the risk, be prepared for increased tension in the workplace due to changes, fear

Consider reviewing your discrimination and harassment policies with your employees

Treat all complaints seriously, investigate them



The Occupational Health & Safety Act During COVID-19

KALEN INGRAM

kingram@cswan.com

613.546.8060

OVERVIEW

OHSA During COVID-19

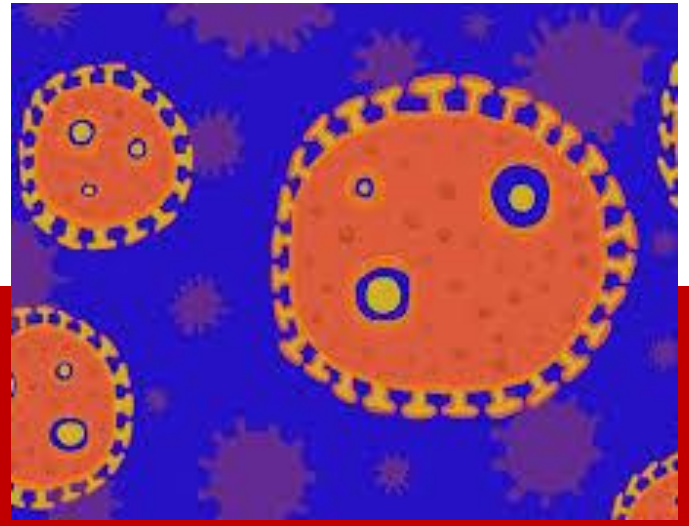
1. Reasonable Precautions
2. Reporting Requirements
3. Work Refusals
4. Reprisals

Cunningham Swan
LAWYERS

GET READY...

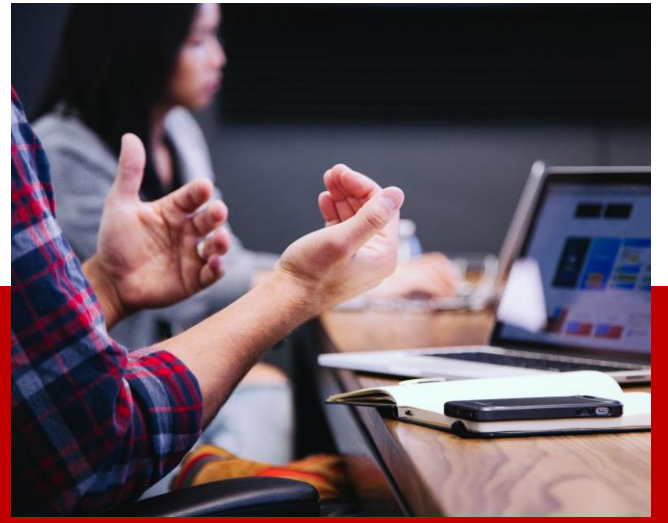
JOINT HEALTH & SAFETY COMMITTEE

- Involve your JHSC on all health and safety planning



STAY INFORMED

- Public Health and Government updates



OPEN COMMUNICATION

- Ensure timely and open communication with staff

1. REASONABLE PRECAUTIONS

Section 25(2)(h): An employer shall take **every precaution reasonable in the circumstances** for the protection of a worker.

What's Reasonable?

- Depends on the workplace
- Public Health Directives
- Safe Workplace Association Guidelines

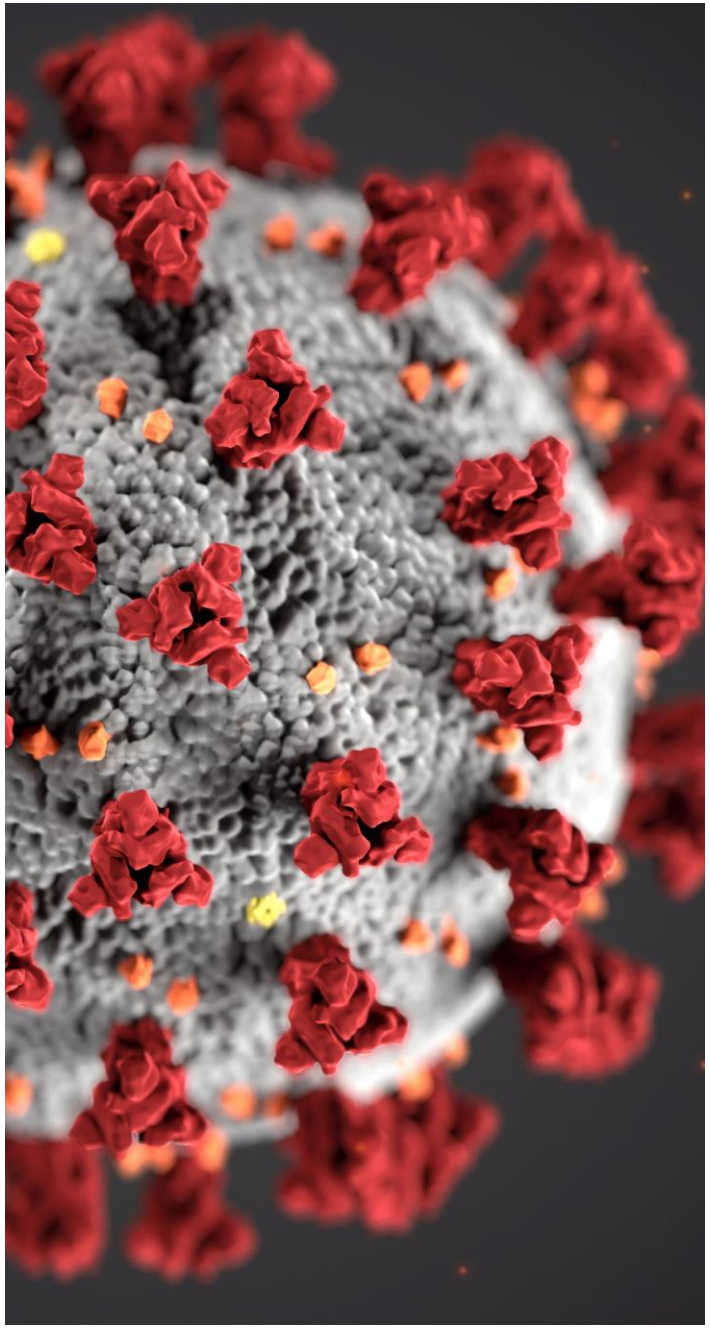
Reasonable Precautions

1. Assessing Risks

2. Implementing Controls

Assessing Risks

- Demographic of your workers and clientele
- Type of Service
- Setting/Location of Workplace
- Business Continuity Plan



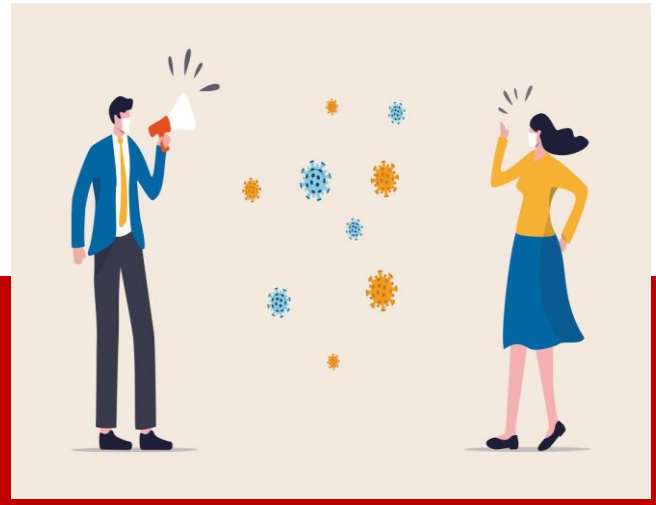
IMPLEMENTING CONTROLS

SCREENING

- Health Checks
- Restricted Access
- Sick Leave Policies

PPE/SANITIZING

- Masks, gloves, hand sanitizer
- Cleaning Protocols

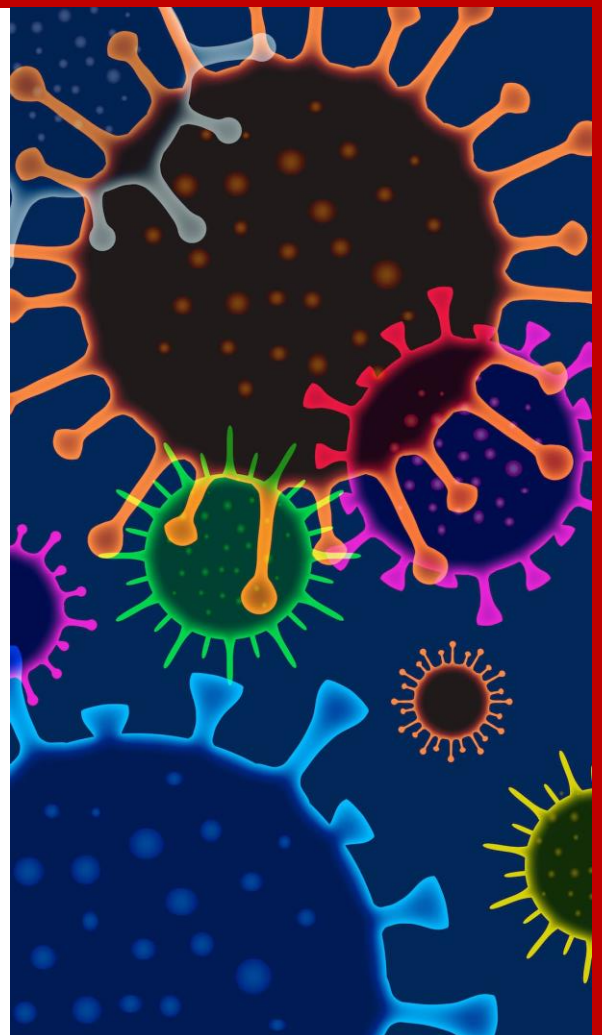


PHYSICAL DISTANCING

- Rearrange work stations
- Limiting movement within workplace
- Staggered starts
- Remote work

2. REPORTING REQUIREMENTS

Section 52(2), (3): Employers are required to report to the MOL, the JHSC (or a health & safety representative) and the union (if applicable) **within 4 days** of being advised that a worker has an **occupational illness** or that a claim in respect of an occupational illness has been filed with the WSIB by or on behalf of a worker.



Is COVID-19 an Occupational Illness?

- Yes, if:
  - Results from exposure in the workplace
  - Health of worker is impaired

What if...

a worker tests positive or has symptoms?

- Will you be able to identify:
  - where in the workplace that worker has worked?
  - who may have been exposed?

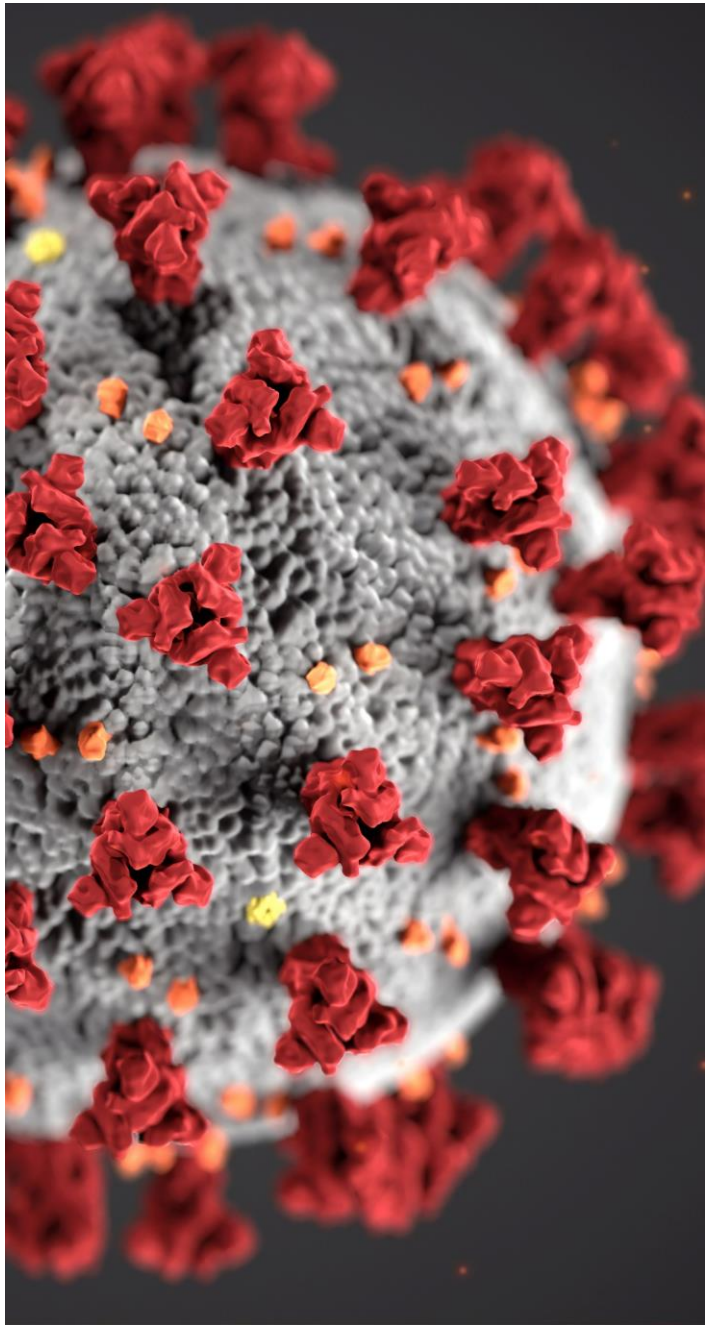
3. WORK REFUSALS

Section 43(3): workers have the right to refuse work where they have reason to believe that the physical condition of the workplace is likely to endanger the worker.

Back to Work…

Toronto Star, April 27, 2020:

- 213 COVID-19 related work refusals
- None met the MOL criteria for a work refusal



4. REPRISALS

Section 50(1): employers are prohibited from disciplining or otherwise penalizing/ intimidating a worker because the worker has acted in compliance with the *OHSA* or sought enforcement of the *OHSA*.

POTENTIAL ISSUES IN RETURNING YOUR EMPLOYEES TO WORK

Alan Whyte

AGENDA

1. Privacy Considerations
2. Constructive Dismissal
3. WSIB Update
4. Reminders for those who remain closed

PRIVACY

MUST BALANCE:

- "take every precaution reasonable in the circumstances for the protection of a worker"…
- against the actual or perceived privacy interests of the employee
- No legislation in Ontario re: employee privacy

PRIVACY

General Principles

1. Collection - identification of purpose(s) + how
2. Use – only for intended purpose(s)
3. Safeguards – re confidentiality/storage
4. Retention – only for so long as required

PRIVACY

Disclosure of employee with C-19 symptoms or diagnosis

As limited as possible internally

As required externally
-MOL
-WSIB

CONSTRUCTIVE DISMISSAL

- Two scenarios
- Did the employee agree to the temporary layoff?
- Individual analysis re duties, pay, etc.

CONSTRUCTIVE DISMISSAL

Claims available?

Defences – agreement, waiver, condonation

Duty to mitigate – importance of RTW messaging

WSIB UPDATE

C-19 claims – case by case (but Private Member's Bill)

When and how to report a C-19 case?

Program for Exposure Incident Reporting

Timelines for claims and objections

If still closed...

- Track the expiry of the temporary layoffs – 13 or 35 weeks – otherwise deemed termination
- And remember – 13/20 or 35/52 weeks
- Remote work policy/agreements
- Frustration of contract

THANK YOU

CONNECT WITH US

LinkedIn

Cunningham Swan
Carty Little &
Bonham LLP

Facebook

Cunningham Swan
Carty Little &
Bonham LLP

Twitter

@CunninghamSwan