



infringing purposes”. Moreover, several provinces in Canada have tabled legislation to address the consumer protection implications of the right to repair, including the need to source replacement parts and special tools. However, these calls have come about primarily in the context of consumer protection and competition law. Commentary on the issue has ranged from those who merely wish for more freedoms to tinker with the devices that they own to rightsowners alleging that such exceptions would compromise safety and security. While no consensus has been reached on the issue of how far the right to repair should extend, the current debate is very much contained to the private sphere.

While it is true that precluding independent repair restricts consumer choice, generates more electronic waste

and undermines the downstream market, the public interest implications of these controls have come to light in the context of COVID-19. Should Canada see an increase in cases commensurate with the United States, it may very well be that the strain on our medical system requires the repair and maintenance of numerous computerised medical devices, including ventilators. Any number of these devices can contain TPM protections over software or firmware that will impede maintenance and repair. In some cases, TPMs can act to render an entire piece of equipment inoperative if a replacement part is not “activated” by the devices’ firmware. In other cases, the mere unlawfulness of circumventing the TPMs will preclude independent technicians from taking on the job. In the context of the current pandemic, these logistical barriers act as a block to having these

pieces of equipment back online.

TPM protections should not be used to impede the repair and maintenance of medical equipment in this way. The public interest requires that in the circumstances of a global health crisis, private rights must yield some room to public needs. Therefore, in addition to the consumer protection, environmental and competition law aspects, calls for the right to repair in Canada should find public interest support. In its forthcoming examination of the Act, the Federal government would be wise to strongly consider an exception to TPM protections which would allow circumvention in the context of public health emergencies. By broadening who may offer independent repair and servicing of these devices, we can act more quickly to ensure that crucial equipment is back online and saving lives.

## EMPLOYER'S CHALLENGES AND OBLIGATIONS DURING THE COVID-19 OUTBREAK



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With the combination of serious public health and economic impacts caused by COVID-19, employers are finding themselves facing unprecedented challenges.

While it is not possible to develop a cookie cutter response to every situation,



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it is fundamental that employers make decisions with a grounded understanding of their legislated obligations to employees and increasingly strict public health safety requirements.

The information outlined below represents statutory duties imposed

on employers in Nova Scotia. While this article focuses on these statutory duties, employers should also be aware of possible obligations created through other means such as company policies, collective agreements or employment contracts.

### **Provincial State of Emergency**

On March 22, 2020, Nova Scotia declared a provincial state of emergency pursuant to subsection 12(1) of the Emergency Management Act due to the COVID-19 pandemic.

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Once a provincial state of emergency is declared, the Minister of Municipal Affairs may do everything necessary for the protection of property and the health or safety of persons in the Province. Under the current state of emergency, companies can be fined \$7,500 for failing to practice social distancing guidelines (currently 2 meters) and for not abiding by the limitations on gatherings of more than five people. If a business remains open during the state of emergency, workspaces and other high-touch surfaces must be cleaned and disinfected twice a day, or as needed.

Certain businesses that are essential services must remain open during the state of emergency. Essential services are not defined in either the Emergency Measures Act or the Health Protection Act in Nova Scotia. However, an order issued by the Nova Scotia Chief Medical Officer provides additional clarity on the provincial restrictions in place. This order specifies certain essential businesses and workers who are exempt from various restrictions. Further, while this order directs some public facing businesses to close, most businesses are permitted to continue to operate provided that they practice social distancing and avoid gatherings in excess of 5 people.

While the order provides clarity, it nonetheless must be read carefully and critically to consider what restrictions do, and do not, apply to an employer's business and employees.

## **Legal Considerations**

### **a) Occupational Health & Safety**

The Occupational Health and Safety Act obligates employers to take every reasonable precaution to provide a safe workplace for not just their employees,

but all persons in the workplace. This includes making efforts to identify risks and to implement proper controls to address those risks.

This duty to provide a safe workplace may well include sending an employee home if they are symptomatic and certainly if they meet the requirements for self-isolation or self-quarantine under the current public health order. Similarly, an employer must take steps to identify where a COVID-19 positive employee has been in the workplace and who they have interacted with in order to ensure that those exposed can be notified and that appropriate disinfection can take place. Employers should also immediately contact public health officials where they believe COVID-19 exposure has occurred in the workplace.

The obligation on the employer to provide a safe work environment is paired with the right of the employee to refuse unsafe work where the employee has reasonable grounds to believe their health and safety is likely to be endangered. So far, indications are that regulators do not view the general public risk of COVID-19 as grounds for a work refusal, but an employee may have valid grounds to refuse work where the employer has failed to implement necessary safety precautions, such as social distancing, provision of adequate PPE or implementation of appropriate sanitation.

In any event, if an employee invokes the right to refuse work, the Nova Scotia Occupational Health and Safety Act addresses the steps that must be taken pending a determination of whether the refusal is valid. Employees who refuse unsafe work may be reassigned pending the determination, although, given the

nature of possible COVID-19 related complaints that may not be possible. Another opportunity is to consider work from home options.

### **b) Labour Standards**

Many employers are facing the need to institute lay-offs as a result of the impacts of COVID-19. Some articles recently written have stated that lay-offs are unlawful and may attract civil claims from employees. While civil claims are a possibility in virtually any scenario, the point seems to overlook the practical reality of the unprecedented situation employers currently find themselves. Ultimately, the most important thing for employers to do before instituting lay-offs is to ensure they have obtained proper advice with respect to their contractual obligations (implied and explicit) and the Nova Scotia Labour Standards Code.

That being said, employers must not forget that the Nova Scotia Labour Standards Code also provides several types of unpaid job-protected leave that may be taken by employees for themselves or to care for family members who have contracted COVID-19. Employees may pre-emptively seek these job-protected leaves before any lay-off is instituted.

Perhaps most notably, employees in Nova Scotia are entitled to unpaid leave where an emergency prevents them from performing their duties or results in a requirement to care for a family member impacted by the emergency. Emergency leaves continue as long as the emergency prevents the employee from completing their duties and ends on the day the emergency is terminated or the emergency no longer prevents the employee from performing their duties. As Nova Scotia declared a provincial state of emergency on March 22, 2020,



this leave will be available to certain employees, particularly those who are specifically prevented from working as a result of public health orders.

## **c) Workers' Compensation**

A significant portion of the Nova Scotia employers participate in the Workers' Compensation scheme established under the Workers' Compensation Act. This legislation generally provides that the Workers' Compensation Board will pay compensation to an employee who suffers injury through an accident arising out of and in the course of their employment.

Questions may arise as to an employee's right to claim Workers' Compensation for work missed due to COVID-19. In determining whether the injury is "arising out of and in the course of employment", courts in Canada have interpreted the phrase to include activities that are incidental to employment. Accordingly, an employee who becomes exposed to COVID-19 in connect with employment may have a claim to Workers' Compensation benefits. In addition, the employer of such an employee may be shielded from civil claims set out in the Workers' Compensation Act.

## **d) Human Rights and Discrimination**

Disease-related illnesses are not a specific protected characteristic pursuant to the Nova Scotia Human Rights Act. That said, this legislation does protect employees from discrimination on the basis of physical or mental disability. While transient temporary illnesses have generally been found not to constitute a physical disability, during the 2003 Severe Acute Respiratory Syndrome (SARS) outbreak, SARS was treated as a "disability" under the Ontario Human

Rights Code. Therefore, an individual inflicted with COVID-19 may be entitled to protections under human rights legislation and employers should consider that in dealing with afflicted employees.

Another important and unique prohibited ground to consider in Nova Scotia is discrimination on the basis of "an irrational fear of contracting an illness or disease". This human rights protection prevents employers from discriminating against employees who have been diagnosed with illnesses or diseases where there is no rational reason to fear transmission or spread of the illness or disease. For example, a Nova Scotia Human Rights Board of Inquiry has held that terminating an employee who once had hepatitis on the basis he could spread the disease to children he worked with was discriminatory because the employee was no longer infectious. Therefore, while employees must be prudent in preventing the spread of COVID-19 in the workplace, they must also ensure that they are acting reasonably and based on actual government/medical guidance rather than purely subjective assumptions.

Employees who are required to take time off work to care for family members may also be protected from discrimination and entitled to accommodation on the basis of family status. Whether the duty to accommodate applies will depend on many factors. Where an employee wishes to take a leave of absence to care for a family member due to COVID-19, employers should carefully assess the specific circumstances to determine if the duty to accommodate applies.

Finally, misconceptions and stereotypes regarding people who may carry COVID-19 due to the suspected origins

of the virus should not be tolerated. These notions are unfounded and any action by an employer to discriminate on the basis of race, colour, ethnicity or national origin will be in breach of human rights legislation.

## **e) Privacy Concerns**

Generally, employers should not disclose the identity of people diagnosed with or suspected of having COVID-19. For example, Nova Scotia labour standards legislation requires an employer to maintain confidentiality with respect to all matters that come to the employer's knowledge in relation to an employee's leave. Employers may not disclose that information, except with the employee's written consent, and only to employees who require the information to carry out their duties, or as required by law. Additionally, an employer subject to the Federal Personal Information Protection and Electronic Documents Act (PIPEDA) must protect the personal information of their employees where such information can be used to identify the individual.

Identifying information about an individual's physical or mental health is further protected. While most employers will not be custodians of personal health information as defined in the Personal Health Information Act, employers should be aware of the confidential nature of this information. Practically speaking, protecting information about employees who have or may have COVID-19 avoids adverse treatment of the infected employee in the workplace, but may in certain cases be necessary to address outbreak concerns.

Where employees have been approved to work remotely, employers should

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also take steps to prevent unwanted data breaches due to malicious malware and phishing scams looking to take advantage of the COVID-19 pandemic. Already, we are seeing that several platforms for e-meetings are being targeted.

Further, employers should be implementing a clear and consistent communication system that keeps employees connected and aware of the importance of securing their devices while working from home. IT teams should also remain in contact with employees working from home to ensure programs and security software is kept up to date. Minor steps, such as reminding employees to constantly save/back up their work and to lock their computer when leaving workspaces in a shared environment, can help prevent unwanted privacy breaches.

### **f) Employment Insurance/Federal Programs**

The Federal Employment Insurance Act provides unemployment benefits to qualified insured persons. This legislation defines insured person as an individual who is or has been employed in insurable employment. An insured person qualifies if the person:

- has had an interruption of earnings from employment; and
- has had during their qualifying period a prescribed minimum number of hours of insurable employment in relation to the regional rate of unemployment that applies to the person.

The specific terms of benefits available will depend on the reason why the

employee is off work. Most commonly in the COVID-19 pandemic, the reason will be a lay-off due to lack of work or leave due to illness/quarantine requirements.

While Employment Insurance is the standard benefit for persons off work, the Federal Government has announced a number of special measures to assist employers and employees during the COVID-19 pandemic. This includes:

- Enhancement to Canada's Work-Sharing Program, which is a program designed to help employers avoid layoffs when there is a temporary reduction in the normal level of business activity due to circumstances beyond the control of the employer. The amount of time an employer or employee may qualify for Work-Sharing benefits has been doubled from 38 to 76 weeks.
- The Canada Emergency Response Benefit (CERB). The CERB provides \$500 a week for up to 16 weeks to any worker over the age of 15 residing in Canada who has stopped working because of COVID-19. The applicant must have had income of at least \$5,000 in 2019 or the last 12 months prior to their application and must not have voluntarily quit their job. The Federal government has also recently announced that the CERB will be expanded to cover workers who have not completely lost work, but are earning \$1,000 or less per month. Notably, many persons not otherwise eligible for EI will be eligible for the CERB.

- Introduction of the the Canada Emergency Wage Subsidy ("CEWS"). Employers who have suffered a qualifying reduction in revenue in periods between March 15 and June 6 will be eligible to receive government support of up to 75% of employee salary (up to \$847 per week) for up to 12 weeks, retroactive to March 15, 2020. While the roll out of this benefit and timing of payments continue to be finalized, applications for the CEWS will be processed online through CRA business accounts.
- Introduction of the Temporary Wage Subsidy ("TWS") available to qualifying privately held Canadian businesses. This program is currently available and allows employers a subsidy of 10% of wages paid between March 18 and June 20, 2020, up to a maximum of \$1,375 per employee and \$25,000 per employer. Note that no application is needed for this program. Instead, qualifying employers are to deduct the TWS from normal payroll remittances.

### **Takeaways**

The continued outbreak of COVID-19 poses incredible challenges for many businesses. The result is that difficult decisions must be made on a daily basis. While that cannot be changed, a proper understanding of legal obligations and considerations will help guide employers through these decisions and ultimately mitigate their employment risks.