

Best Practices for Returning to the Workplace

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There are many unanswered questions about Canadian workplaces as we look toward reopening offices. The well-established principles and guidelines that employers, unions and employees have followed for many years will certainly help navigate this process. That said, this pandemic takes us into new and uniquely uncharted waters that may well shift some or all of these principles as we move forward. This article will look at the frameworks in place today, as well as best practices for boldly going where few workplaces have gone before.

Management Rights

An important principle is the idea of management rights, in both union and non-union workplaces. Following this principle, employers, for example, have the right to determine work location – remote, in-office, or a mix. In most collective agreements, for example, the management rights clause typically allows management to set all aspects of the work and workplace, unless specific language has been negotiated in the collective agreement. In non-union workplaces, this right can only be constrained by language in individual employment contracts.

This is, of course, not a blanket right – employers cannot violate employment standards legislation or labour laws, nor use this right in any way that is arbitrary, discriminatory, or done in bad faith. Practically speaking, however, if the employer decides they want the workforce to return from remote work to working in the office, they have a right to this.

It would be a mistake, however, for employers to focus too heavily on these rights as a way to make effective decisions for the organization. As a famous saying goes, “Just because you have the right to do something does not make it the right thing to do.” In addition, this right comes along with some significant obligations.

Management Obligations – Safety and Work Refusals

For the workplace as a whole, the employer has a legal obligation to make it “reasonably safe,” and to reduce risk to as “low as reasonably possible.” This means that when an employer makes the decision to have staff return to the office from remote work during a pandemic, it must effectively communicate to the staff the steps that they

have taken to reduce the risk as low as reasonably possible. Some of the areas that should be considered in this pandemic to make a workplace safe include:

- Hygiene requirements and PPE equipment provided
- Staggered start/finish times to minimize crowding
- Screening tools – questionnaire, temperature, etc.
- Physical barriers in place
- Physical distancing required – floor markings, etc.
- Creation of small teams/pods
- Physical distancing
- Common areas closed/adjusted as needed

Obviously, these must be tailored to the structure of each workplace - office, warehouse, construction site, etc. If this process isn't done properly, employees may refuse to return, in essence initiating a work refusal – a refusal to perform “unsafe work”. While it is unlikely that many work refusals related to the pandemic will be upheld by the various ministries of labour (as of early June, out of 280 work refusals related to COVID that were adjudicated by the Ontario Ministry of Labour, only one was upheld¹), there are many unwanted side effects of a workforce who feels unsafe, or have concerns that aren't being addressed. A feeling of safety is a strong marker of employee engagement, and if an employer simply forces employees to return over their objections because it feels it has the right, productivity and employee commitment will likely suffer badly. In addition, grievances, labour board and Ministry of Labour complaints will spike, followed by increased arbitration activity. This benefits no one.

Employers will also likely see a surge in accommodation requests of two types – family status and medical.

Medical Accommodation

Accommodation is an employer obligation that flows from the specific human rights legislation in each jurisdiction in Canada. Accommodation requests, in law, require a *prima facie* showing of discrimination. Legally, the bar is relatively low to meet this first test. With COVID, many employees with an established pre-existing condition that may

¹ Singh, I. (2020, June 22). More Canadians are refusing work due to COVID-19, data shows | CBC News. Retrieved September 03, 2020, from <https://www.cbc.ca/news/canada/work-refusal-safety-covid-1.5617787>.

increase their risk for contracting the virus will likely meet this first requirement, requiring the employer to find a reasonable accommodation. Of course, the easiest accommodation may well be to continue working remotely, and if the employee has been doing their job remotely for the past few months already, it may be hard for the employer to avoid this accommodation.

Medical accommodation requests will likely spill over into spousal issues as well, if an employee lives with a partner who is immune compromised, for example. While this is a grey area for medical accommodations, it may well be given serious consideration in a pandemic environment.

Family Status

Family status accommodation requests will likely fall into two categories – childcare, and care for other family members.

- Childcare accommodation is a significant issue at the moment, given that many daycares are not operating, and many schools will be offering some or all classes online, will be opening at less than full capacity, or will be operating in a way that is not perceived to be safe, leaving many workers having to stay home and take care of smaller children. These requests will need to be taken seriously until schools and childcare operations are fully back up and running.
- Care for other family members – elderly parents, for example – also fall into family status, and if elderly parents with health issues are cared for in the home, this may be grounds for accommodation as well.

Best Practices

Some of the principles above are well tested in the law, and the only variable will be applying the facts of each case to the principles. From a best practices perspective, however, the emphasis on law, on the rights of employers and employees, should be minimized (though certainly not ignored!). In other words, COVID concerns should be seen less as legal issues and more as relationship issues, the relationship between the employer, their workforce and their union.

The antidote to almost all of these issues is to approach them as a joint problem-solving exercise. Resolving these difficult issues collaboratively means:

1. Make your union your partner in this process:

- Establish a weekly meeting time with union/management leadership.
- Share information and the reasoning before finalizing or implementing decisions – often, you’ll get excellent input from your union, and your decisions will be better for it.
- Make sure the union is in the loop ahead of the workforce. The union should never be surprised.
- Make clear to the union that you are sharing information unconditionally. That means that if the union decides to grieve something, they are not then left out of the loop by management as a result. Ironically, the more unconditionally management shares information with the union, the less likely grievances will be filed.
- When interim decisions are made in this ever-changing environment, constantly identify for the union that the decisions are not precedent setting.
- When dealing with urgent issues, act quickly if needed, but engage the union and explain “why” as soon as possible.
- Where there is differential treatment (some staff are returning to the workplace, others are staying remote for now, etc.), management should acknowledge this and explain “why”, rather than simply assert their rights.

2. In non-union workplaces, find a way to partner with the workforce:

- Create a joint COVID safety committee with employee representatives, or engage the joint health and safety committee, and follow the best practices above.
- Without a union to partner with, it’s even more important for management to create a forum for communication and problem solving. As the saying goes, “nature abhors a vacuum” – if there is a vacuum of employee information and engagement, it will be filled with fear-based and negative assumptions about the employer.

3. Communication is critical:

- Be transparent. This includes saying you don’t have an answer when you don’t, explaining the thinking process as you go, sharing data, and outlining the process for how and when larger decisions have been or will be made.

- Explain “why” for decisions and actions taken. By explaining the thinking, it minimizes staff jumping to negative conclusions as to why a decision was made.
- Ensure communication is two-way – solicit feedback, ask for input and take it seriously, survey the workforce where appropriate, and ensure the workforce feels they’ve been heard.
- Communicate, and over-communicate, regularly. As an employer, even when you think you’ve been clear, communicate it again and again. In fearful times, people don’t absorb information well, and the message fades quickly. Reinforce the message regularly.

Summary

It is not lost on anyone that COVID has upended almost everything in our workplaces, and no one is expecting miracles. That said, everyone is expecting that reasonable decisions will be made in the circumstances, and done collaboratively. There is a great deal of stress and anxiety in the working world these days, and the best practices above will work to mitigate this anxiety and get employers, unions, and employees the best results possible.

The more that everyone is engaged and the more that everyone understands why decisions are being made, the more these decisions will be accepted and supported. At the end of the day, this is our best path back to healthy work relationships, healthy organizations, and a healthy economy.

About the Authors

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Gary Furlong has extensive experience in labour mediation, alternative dispute resolution, negotiation, and conflict resolution. Gary is past president of the ADR Institute of Ontario, is a Chartered Mediator (C. Med.) and holds his Master of Laws (ADR) from Osgoode Hall Law School. Gary has delivered collective bargaining negotiation skills training for both management and union bargaining teams, bringing a strong focus of effective and collaborative skills to the table. Gary specializes in leading joint bargaining training for intact negotiation teams just prior to negotiations, with a focus on helping parties maximize joint gains at the table. In addition, Gary also conducts relationship building interventions to strengthen day-to-day union-management effectiveness away from bargaining. Gary is also the author of *The Conflict Resolution Toolbox*, John Wiley and Sons, 2005; the co-author of *The Construction Dispute Resolution Handbook*, Lexis Nexis 2004; and *The Sports Playbook*, Routledge, 2018. Gary is a facilitator for the Queen's IRC **Negotiation Skills** and **Managing Unionized Environments** programs.

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Kenda Murphy's legal career has involved work in the public sector, para-public sector and private sector. Kenda has represented employer clients in collective bargaining negotiations and labour arbitrations while also providing day to day human resources and labour relations advice. Conducting workplace and institutional investigations in both large and small organizations, Kenda has enquired into a wide range of issues including Human Rights Code based harassment and discrimination; workplace harassment; sexual violence and sexual harassment; poisoned work environment; and ethics or codes of conduct breaches. Kenda's practice background affords her the unique opportunity to bring multilayered understanding to complex workplace interactions and incidents of conflict that arise within those interactions. Kenda is the accredited creator of the testbank questions and PowerPoint slide decks for Fiona McQuarrie's *Industrial Relations in Canada*, 2nd, 3rd and 4th editions.



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