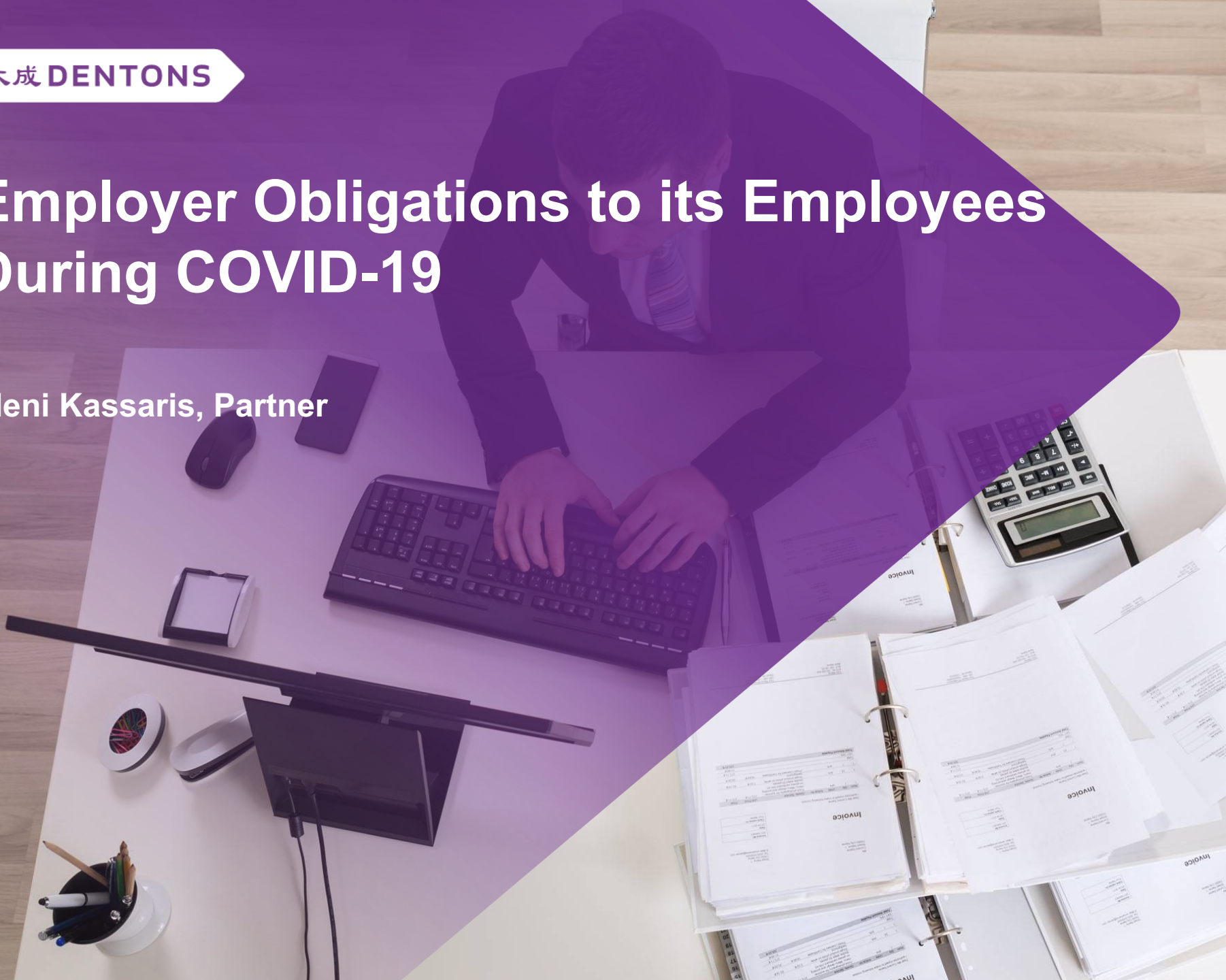


Employer Obligations to its Employees During COVID-19

Eleni Kassaris, Partner



Health and Safety Matters



WorkSafeBC: Preventing Exposure to COVID-19 in the Workplace

- Publication to assist employers online:
<https://www.worksafebc.com/en/resources/about-us/guides/preventing-exposure-to-covid-19-in-the-workplace?lang=en>
- Indicates that following the Public Health Officer's orders represents the **minimum** standard that all employers that continue to operate must meet
- WorkSafeBC laws continue to apply and employers have the same responsibilities to assess risks and hazards and implement proper health and safety measures

WorkSafeBC: Summary of Key Employer Obligations

- Reasonable precautions, communicate hazards, train:
 - Written plan (engage safety committee)
 - Educate on infection prevention (hand washing, etc.)
 - Require employees to stay home if sick
 - Require employees to stay home if travel to affected area
 - Require employees to report location of travel
 - Post signs – screen entrants
 - Personal protective equipment (PPE)
 - Regular cleaning
 - Disinfectants available
 - Engage third-party medical advisor: take advice from experts

WorkSafeBC: Health and Safety Responsibilities When Working From Home

- Published March 19, 2020: <https://www.worksafebc.com/en/about-us/news-events/announcements/2020/March/health-safety-responsibilities-when-working-from-home>
- At minimum, the employer should have a basic health and safety policy that requires:
 - employees to conduct an assessment of their workplace and report any hazards to their manager
 - Protocols for evacuating from the home or temporary workplace to a safe location if needed and how contact the employer in case of emergency
 - Discussion of safe workplace practices and how to report any work-related incidents or injuries
 - Discussion of ergonomic considerations

WorkSafeBC: Working From Home Continued...

- Emphasis in guidelines that regular health and safety laws apply equally for at-home workers as they do for more traditional workplaces, including:
 - Reporting workplace injuries
 - Requirements for education and training
 - Worker's duty to follow safe work procedures
 - Other rules for relating to check-in and other procedures are required if the worker is working alone or in isolation.

WorkSafeBC: Right to Refuse Unsafe Work

- Section 3.12 of the *OHS Regulation* provides that a person must not carry out or cause to be carried out any work process or operate or cause to be operated any tool, appliance or equipment if that person has reasonable cause to believe that to do so would create an undue hazard to the health and safety of any person
- Section 3.13 provides that a person must not be subject to prohibited action as defined in the *Workers Compensation Act* (see Part 2 Division 6 - Worker Protection in Relation to Prohibited Actions)
- These provisions do not give employees the right to refuse work on the basis that they are afraid that they will get COVID-19 by coming to work where all public health orders and WorkSafeBC guidelines and laws are being followed

Workers' Compensation Legislation

Duty to report occupational disease?

- Yes, within three day of “injury”
- If in doubt if work-related: likely best to report
- Court lawsuit precluded if properly a WorkSafeBC claim
- Also advisable to report to local public health unit

Employee privacy



Employee Privacy in a Pandemic

Legislation Overview

- *Personal Information Protection and Electronic Documents Act (PIPEDA)*
 - Federal works and undertakings
- *Personal Information Protection Act (BC PIPA)*
 - private sector organizations
- *Freedom of Information and Protection of Privacy Act (FOIPPA)*
 - public bodies

Employee Privacy in a Pandemic

General Privacy Principles

- Generally, organizations may collect, use and disclose personal information about employees only with meaningful (i.e. informed) consent or notice (when collection, use or disclosure is for the purpose of establishing, managing or terminating an employment relationship)
- The purpose for the collection must be reasonable
- Organizations that collect personal information must take appropriate measures to protect that information
 - The more sensitive the information, the greater the protection
 - Health information considered very sensitive
 - Once personal information is no longer required, the organization should no longer keep it

Employee Privacy in a Pandemic

Consent Exceptions

- **Emergency Consent Exceptions** – Organizations can generally disclose personal information without consent in emergency situations
 - Disclosure necessary for medical treatment and consent cannot be given
 - Disclosure is clearly in the person's interest and consent cannot be obtained in a timely manner
 - Disclosure is for the purpose of contacting the next of kin or a friend of the injured or sick person
- **Legal Authorization Exception** – Personal information may be collected or disclosed without consent when required by law

Employee Privacy in a Pandemic

- A declared public health emergency triggers emergency powers for governments
- Legislation can be overridden – including privacy legislation
- Other rights and protections for illness-related personal information may apply
- For instance, under the Federal *Quarantine Act* – Employees who report suspected infected individuals can request to have their name withheld from their employer

Employee Privacy in a Pandemic

Privacy Principles Applied

- Think about what information is necessary and useful – have a reasoned basis for collecting information
 - This will vary from workplace to workplace
- Provide notice or, where necessary, get consent
- Give information about why you are collecting information and how it will be used
- Assure employees that their information will be protected (and protect it)
- Collect the information discreetly and respectfully, respond to the information respectfully
 - Only share the information with necessary personnel
- Do not keep information indefinitely

Employment related business continuity issues: Layoffs, Wage Reductions and Terminations



New *Employment Standards Act* job-protected leaves

– Sick leave

- Available to employees with 90 consecutive days of employment
- Up to three days of unpaid leave per year for personal illness or injury
- Employers can ask employees to provide reasonable proof of their illness or injury
- This leave brings the BC ESA in line with the employment standards legislation of the other Canadian jurisdictions

New *Employment Standards Act* job-protected leaves – COVID-19-related leave

- Available to all employees
- Unpaid leave for as long as any of the following circumstances applies, **retroactive to January 27, 2020**:
 - Diagnosed with COVID-19 and away from work per medical instructions
 - In quarantine or self-isolation per legal order or guidelines of the BC Centre for Disease Control or federal Public Health Agency
 - Employer has told employee not to work due to concern about exposure to other people
 - Providing care to a child or incapable adult in their day-to-day care due to facility closure
 - Outside of BC and cannot return because of travel or border restrictions
- Employers can ask for reasonable proof of circumstances, but cannot ask for proof in the form of a medical note.
- Government can add to this list as the situation develops

BC Update: New *Employment Standards Act* job-protected leaves – Duties of employer

- Same employer duties as other ESA leaves (may be greater under a collective agreement)
- Employers may not terminate an employee because of an ESA leave
- Employers may not change a condition of employment of an employee who is on an ESA leave without written consent
- Employers must place the employee back into the position held before taking the leave, or a comparable position
- If business operations are suspended or discontinued at the time an ESA leave ends, the employer must comply leave requirements when operations resume
- If an employer reduces operations for genuine business reasons during an ESA leave, it is not a breach if the employee would have been affected in the same manner if they had not taken leave

BC Update: Essential services

- BC released its list of essential services on March 26
- No shutdown order for non-essential businesses has been made (yet), but this list will presumably form the basis for any future shutdown.
- Guidance from the government states that essential services “should and are encouraged to remain open”, but must otherwise follow the Provincial Health Officer’s (PHO) orders and guidance
- The guidance adds that businesses that have not been ordered to close and are not on the essential service list may stay open if they can adapt their services and workplace to the orders and recommendations of the PHO
- <https://www2.gov.bc.ca/gov/content/safety/emergency-preparedness-response-recovery/covid-19-provincial-support/essential-services-covid-19>

Layoffs, Wage Reductions and Terminations

- Many organizations are doing a combination of layoff, wage reductions and terminations
- Employment standards defines “temporary layoff” as:
 - a) in the case of an employee who has a right of recall, a layoff that exceeds the specified period within which the employee is entitled to be recalled to employment, and
 - b) in any other case, a layoff of up to 13 weeks in any period of 20 consecutive weeks.

Layoffs, Wage Reductions and Terminations

- Well established principle of employment standards case authority that an employer may only temporarily lay off an employee if the right to do so exists within the employment relationship; either by a term of the employment agreement, by a well-known industry-wide practice, or with the consent of the employee
- As a result there is no express right granted to an employer to temporarily layoff workers such that a “temporary layoff” may be considered a termination at law, creating different categories of potential claims against the employer

Legal Fallout from Layoffs, Wage Reductions and Terminations

- Employment Standards complaints:
 - Section 63 notice (0 to 8 weeks based on length of service)
 - Section 64 notice (an additional 8 to 16 weeks of notice depending on number of employees terminated in a two month period at a “single location”)
 - Subject to exceptions including “unforeseeable circumstances”
 - is a global pandemic unforeseeable?
 - Whether a contract of employment is frustrated at law will depend on the factual circumstances of each case – a shut down order is probably frustration; a business decision to reduce headcount in order to keep the business afloat is probably not frustration

Legal Fallout from Layoffs, Wage Reductions and Terminations

- Civil claims
 - breach of contract / constructive dismissal related to layoffs or wage reductions
 - Regular wrongful dismissal risk relating to terminations
- Other Statutory Claims
 - Human Rights Complaints where treatment during health crisis may be considered discriminatory under listed protected grounds
 - Workers Compensation Discriminatory Action Complaints
 - In circumstances where the layoff, wage reduction or termination occurred after a refusal to do unsafe work or a complaint about safety conditions

Thank you

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