

COVID-19 and the Workplace (For Local Governments)



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In response to the COVID-19 pandemic, local governments in the Northwest Territories and Nunavut need to know their rights and obligations as employers. If your local government is unionized, the first thing you should review is the collective agreement. If you are non-unionized, consult your employment agreements and policies and/or employment bylaws before making any decisions regarding workforce modifications/ reductions.

Providing a Safe Working Environment

Employers have a responsibility under occupational health and safety legislation in the Northwest Territories and Nunavut to maintain a safe and healthy work environment for their workers. Due to the seriousness of the threat of COVID-19, employers will need to be flexible when accommodating the safety concerns of their employees.

Any worker who has been advised by a health official to self-isolate or be quarantined must be advised by their employer to do so. If the worker is not exhibiting symptoms of COVID-19, the employer should have a plan in place that includes risk assessments and mitigation measures that allow for services to continue while minimizing the risk to the public. If the employee can work from home, it will likely be in the employer's best interest to provide this option.

An employee has the right to refuse to work in an unsafe work environment. Whether it is reasonable for an employee to refuse to work due to concerns about COVID-19 will depend on the nature of the workplace, the suspected safety risk, the individual needs of that employee and individual the circumstances.

Public Health officials in the NWT have recommended that non-essential businesses such as tour operators, hair salons, and bars should be closed but businesses considered essential services such as grocery stores, gas stations and convenience stores can stay open if they can maintain a two meter separation between individuals within the facility. So far, this is a recommendation not an order. Neither territory has set out a list of "essential workers".

Employee Leave and Compensation

If an employee has symptoms or is diagnosed with COVID-19 or they cannot work because they are required by health officials to self-isolate or be quarantined the employer is not required to pay the employee. However, the employee may be eligible for:

- sick leave benefits provided by the employer
- banked overtime, paid vacation time or unpaid sick leave for this period

Check your collective agreements or employment policies or bylaws first. If an employee cannot access the above benefits, they may be eligible for Employment Insurance (EI) benefits. Canada has announced enhanced eligibility for EI and new emergency benefits for employees even for workers who are otherwise not entitled to EI. More information on EI COVID-19 emergency benefits are available on the government's website at <https://www.canada.ca/en/services/benefits/ei/ei-sickness/apply.html>

Can an Employer Force an Employee to Self-Isolate?

Where an employee has no symptoms, is able to work and has not been ordered by a health official to self-isolate or be quarantined, the employer's fear, alone, is likely insufficient reason to ban them from work.

However, if the employer is aware that the employee has recently travelled outside of the territory it is reasonable for the employer to inquire about the travel and also require that the employee not attend work for 14 days. In the NWT the Chief Medical Officer has ordered that anyone who comes into the territory is required by law to self-isolate for 14 days. In Nunavut, the Chief Medical Officer has ordered that anyone coming into the Territory self-isolate for 14 days at one of the self-isolation centres in Toronto, Ottawa, Montreal or Winnipeg before coming into the Territory.

Employers can ask that employees follow the directives of public health including the directive by with respect to self-isolation and filing self-isolation plans in the NWT. Employers who wish to contribute to flattening the curve of the spread of this virus may wish to have their workers work from home, if possible. Employees working from home are entitled to receive their regular pay and benefits.

Can Employees be Temporarily Laid Off?

Local governments may find themselves in a situation where they no longer have a choice but to reduce their workforce. This may mean laying off employees. Check your collective agreement or employment policies first with respect to temporary lay-offs. Also check your employment agreements. While an employment contract may include lay-off provisions it cannot negate statutory obligations. The Employment Standards Legislation (applicable to non-unionized employees) sets out the following with respect to temporary lay-offs:

- Employment Standards legislation in Northwest Territories and Nunavut employment allows employers to temporarily lay off their employees for a period not exceeding 45 days during a period of 60 consecutive days upon provision of written notice. It is possible to apply to the Employment Standards Officer for an extension to exceed the 45 days in special circumstances provided that the employee will be recalled.
- Notice must include the expected date on which the employer will require the employee to return to work. This can be done without triggering notice or severance obligations. This of course is subject to any lay-off provisions in the employment contract or collective agreement.

- Notice may also have to be provided to the Employment Standards Officer depending on the circumstances of the terminations, the number of employees being terminated and timeframe of the terminations.

There is some case law in other jurisdictions that suggests that lay-offs can only be lawfully made if (a) there is an express condition in the employment contract that permits lay-offs (b) where lay-offs are anticipated in the industry (for example seasonal employees), or (c) if the employees voluntarily agree to the lay-off. If these conditions do not exist- there is a risk that an employee could claim that they have been constructively dismissed. It is not clear what a court would decide if an employee challenged a lay-off, given the impact that COVID-19 is having on the economy and the fact that this point of law has not been considered before in the NWT or Nunavut. We recommend seeking legal advice before laying off employees.

Subject to an employment agreement, policy or collective agreement that says otherwise, layoff periods are generally unpaid. However, employees may qualify for EI generally or for the COVID-19 Canadian Emergency Response Benefit. Employers should also consider whether or not they can continue to pay benefits.

Also, it's important to keep in mind that some of provinces have started to implement emergency legislation to protect employees who are forced to stay home instead of working because of COVID-19. It's unclear right now how far reaching those protections will be and whether the Northwest Territories or Nunavut will be implementing emergency legislation.

Municipal and local governments do not qualify for the Canada Emergency Wage Subsidy that has been announced by the Federal Government to provide employers with a subsidy to cover up to 75% of employee wages.

Privacy and Human Rights Considerations

Within the context of the COVID-19 pandemic it seems reasonably necessary to collect some personal information about employees to ascertain the level of risk they pose to others in the workplace and to implement measures to satisfy occupational health and safety obligations. While an employer is limited by privacy laws, an employer might ask the following questions without violating an employee's right to privacy:

- Are you exhibiting any symptoms of illness?
- Have you had close personal contact with anyone exhibiting any of the symptoms?
- Have you travelled to an affected area?
- Have you been in close personal contact with anyone who has travelled to an affected area?

Employers should not target employees of a certain race, age, religious background or ethnicity in this respect. Differential treatment of employees due to a perception that they may have COVID-19 or been exposed to the virus, or differential treatment of employees due to their race or place of origin may be a violation of human rights legislation unless the employer can show that it had bona fide reasons for such differential treatment.

In short, an employer should not send an individual employee home or ask them not to work because of concerns over COVID-19 unless the concerns are reasonable and consistent with

the most recent advice from medical and Public Health officials. Employers should give employees flexible options, such as working remotely, when feasible as an accommodation if they are not currently sick but need to self-isolate or stay home due to other reasons related to COVID-19.

Questions? Contact Us.

Circumstances are changing and this article was last updated on April 8, 2020. If you have any questions, please contact Sandra MacKenzie, Lawson Lundell LLP, at smackenzie@lawsonlundell.com.

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