INTRODUCTION

Many of our clients are asking important questions about legal issues related to the COVID-19 pandemic. This issue of our Newsletter, like the last issue, attempts to addresses many of these issues.

As always, please feel free to contact us with any questions you may have in relation to any of the topics covered in this Newsletter. This is a fluid situation and many issues, such as the response of various levels of government are continuing to evolve.

A special thank you to all of your members who continue to work despite the challenges and risks to themselves and their safety and health.

We wish everyone good health.

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A. ONTARIO LABOUR RELATIONS BOARD ISSUES ORDERS TO PROTECT FRONT-LINE HEALTHCARE WORKERS DURING COVID-19

Aleisha Stevens

On April 24, 2020, the Ontario Labour Relations Board (the "Board") issued unprecedented orders to protect the health and safety of workers at three different long term care homes: Eatonville, Anson Place, and Altamont.

Dangerous working conditions had plagued all three homes, prompting the Service Employees International Union, Local 1, to take action in the form of Applications filed with the Board demanding swift and effective action to protect the front-line workers.

Among the Union's allegations were reports of managers refusing to provide basic PPE including surgical masks; workers making their own "gowns" out of garbage bags; homes so short staffed that where there would normally have been 8 staff to care for residents there were 4 or less; management failing to communicate the COVID-19 positive status of residents, increasing the likelihood of infection spreading; and the list went on.

It was therefore not surprising that residents were becoming infected and passing away at alarming rates. Staff, too, were rapidly contracting COVID-19, in some cases returning home and infecting their own loved ones before knowing they were a risk. Tragically, several workers lost their lives from COVID-19 infection.

While large numbers of staff were diagnosed and remained home under quarantine, colleagues were left to work double shifts short staffed in abhorrent conditions, since new staff could not be convinced to stay on under the circumstances.

The SEIU asked that the Ministry of Long-Term Care step in and take over the homes, which were clearly in distress. The request was refused, although later – arguably too late - the Ministry of Long-Term Care did issue mandatory management orders for numerous of the hardest hit homes in the province.

The Board's order of April 24, 2020, ordered a Minister of Labour, Training, Skills and Development Inspector to attend the workplaces *in person* to assess compliance with health and safety laws, where previously only telephone "inspections" had been taking place. The difference between in person and telephone inspections was immediately evident: an Inspector attended April 27, 2020 and issued nine (9) Orders for non-compliance with the *Occupational Health and Safety Act*. This is believed to be the first Order issued since the outbreak of Covid-19.

The Board additionally ordered the Homes to engage in appropriate reporting of infections with both employees and the Union; compliance with directives issued by the Chief Medical Officer of Health; engage in efforts to be appropriately staffed; and various other orders to ensure infection control.

A further Board order issued on May 6, 2020, similar in form and function, issued against the Rekai Centre at Wellesley Central Place, and expanded the requirement for in-person inspections to Wellesley and a further eight (8) long term care homes that had failed to control the spread of the COVID-19 infection.

These public decisions were invaluable for highlighting the desperate circumstances faced by workers in these long term care facilities. It was only after the issuance of these Orders that action was taken by the provincial government in the form of Military deployment; appointment of long-term care inspection teams to conduct comprehensive, detailed inspections at high-risk long-term care homes; and the development of an independent commission into Ontario's long-term care system.

CaleyWray continues to provide legal advice and action on behalf of all clients seeking to protect members from dangerous working conditions during the global pandemic of COVID-19. Please contact us if you have any questions about how to best ensure a healthy and safe workplace for front-line staff.

B. HEALTH AND SAFETY COMPLAINT OPTIONS FOR YOUR MEMBERS DURING COVID-19

Robert M. Church

Covid-19 has presented trade unions with extraordinary challenges on how to protect your members' health and safety when working during the pandemic. From advocating for PPE and training in the workplace, ensuring employers are taking all reasonable steps to protect workers, or pushing for premium pay, these efforts are crucial for protecting members during a time when many employers seem overwhelmed.

Under *OHSA*, employers must "take every precaution reasonable in the circumstances" for the protection of its employees. But what are your options if employers are not cooperating and putting the health and safety of your members (and their families, customers, coworkers, residents, etc.) at risk? What legal recourses are available?

There are a number of options for making complaints on behalf of your members, whether to an arbitrator, the Ministry of Labour ("MOL"), or the Ontario Labour Relations Board ("OLRB").

Filing a Grievance Under the Collective Agreement

The first option is to file a grievance against the employer under the collective agreement. There are many health and safety matters that an arbitrator has jurisdiction to address through a grievance: failing to protect the health and safety members or failing to provide appropriate PPE, a breach of the *Human Rights Code* for failing to accommodate any member pre-existing condition, for compensation and scheduling issues (e.g. overworked members), or for an employer's failure to cooperate with members' WSIB claims.

Any grievance filed for these reasons should explicitly argue a breach of the *Occupational Health and Safety Act* and any collective agreement articles concerning health and safety or the JHSC committee.

The upside of a grievance is that it falls squarely within the union's role as the certified bargaining agent, and arbitrators do have wide jurisdiction. The downside of a grievance is that unless a motion for interim relief is brought (seeking some orders while the grievance itself proceeds to hearing) it can take some time to schedule an arbitration and get relief.

Ministry of Labour Complaint

In the event that more immediate relief is needed, a trade union or its members can make a complaint to the Ministry of Labour and ask that the MOL send an inspector to the workplace to conduct a health and safety inspection. These inspections are called field visits. The MOL is able to issue compliance orders in these visits to force employers to make changes.

It does not take a member exercising a work refusal to ask for an inspection. Reasons to call the MOL can range from obvious concerns, like lack of PPE or failing to screen employees, to more broad concerns, like failing to have a pandemic plan in place, or failing to meet with the joint health and safety committee ("JHSC").

Reflecting what you have probably read in the news, our experience with the MOL since the pandemic began has not been inspiring. At the beginning, MOL inspectors were told by senior management not to physically inspect workplaces, but to do inspections by phone.

However, as of May 2020, the inspectors were beginning to attend workplaces again for inspections – but we do recommend that you explicitly request an in-person inspection, since any other type will not be enough to properly "inspect" the workplace.

Health and Safety Applications to the OLRB

Unions and members do not have a freestanding right under *OHSA* to make a general application alleging health and safety violations. There are two specific procedures under *OHSA* which unions should focus on.

First, in the event that the MOL does not issue compliance orders to the union's satisfaction, or the MOL simply does not conduct an investigation in person, trade unions have the ability under *OHSA* to appeal those field visits to the OLRB.

Unions and their members at the workplace have a statutory right under section 61 of *OHSA* to appeal to the OLRB within ***30 days*** of the making of the order (or failure to make an order). In doing so, unions should be prepared to make detailed submissions to the OLRB on the health and safety problems.

In appealing a field visit, a union may also wish to file a corresponding Application for Interim Relief at the same time, in order to seek injunctive relief while the appeal is pending. However, to do so, a union will need to provide witness statements (aka declarations) from both the union representative or chief steward and JHSC members(s) to outline why the union has its concerns. The OLRB generally sets consultation hearings for these applications within 2-3 weeks of the filing date.

The second option is under section 46(1) of *OHSA*. If a certified JHSC member at a workplace has reason to believe that a work refusal will not work or not be sufficient to protect members at the workplace from serious risk to their health or safety, that member may apply to the OLRB for a declaration or recommendation. *OHSA* does not specifically allow the union itself to bring this application. The OLRB may then either appoint an inspector to oversee the workplace on a full or part time basis, or give the union members of the JHSC the right to declare a unilateral work stoppage.

To pursue this option, the union will likely need to submit the application at least in part in the name of the certified member.

C. PANDEMIC PAY

Rita DeFazio

The Ontario government is set to provide workers on the frontlines with additional pay on a temporary basis to reflect the increased risk that these workers are facing in their efforts during the COVID-19 Pandemic. This "Pandemic Pay" will provide a wage increase in the amount of $4.00 per hour for the period of April 24, 2020 until August 13, 2020. Employees working over 100 hours within a designated four-week period will also be

eligible for lump sum payments in the amount of $250 for each period between April 24, 2020 to August 13, 2020.

Eligibility

In order to be eligible for temporary pandemic pay, an employee must work at an eligible workplace and work within an eligible profession.

Eligible workplaces include:

- hospitals; and
- home and community care providers such as care homes, retirement homes and certain shelters and supportive housing facilities.

Eligible workers include:

- Personal support workers including those who work in a residential setting;
- Registered nurses, registered practical nurses, nurse practitioners and Public health and infection prevention and control nurses
- Attendant care workers
- Auxiliary staff, including those who provide the following services:
    - food preparation;
    - cleaning;
    - maintenance;
    - security;
    - stores/supply workers;
    - client facing reception and administrative staff;
    - community drivers; and
    - Developmental services workers.
- Mental health and addictions workers;
- Paramedics; and
- Respiratory therapists.

For a full list of eligible workplaces and workers please visit Ontario.ca/page/covid-19-temporary-pandemic-pay.

The province has faced criticism for the decision to limit eligibility to certain professions at a time when all frontline workers are making a valuable contribution to the fight against COVID-19. For instance, lab technicians and radiologists are not currently eligible for the temporary Pandemic Pay increase.

For those who are eligible for this wage top-up, they can expect to receive this money in June, though there may be a delay in some cases. These earnings will be non-pensionable

and will not form part of an employee's base salary. Unions may collect dues on the temporary pandemic pay.

D. WORKERS' COMPENSATION IN A DANGEROUS TIME

Ken Stuebing

It's become trite to note to one another that we live in extraordinary times. Since mid-March 2020, our ordinary patterns and systems have been upended in myriad ways, big and small. Institutions on which workers depend for health, safety and justice are endeavouring to catch up with the COVID-19 crisis, to varying degrees of success. One system needing a timely tune-up is Ontario's workers' compensation system—particularly with respect to fair and expedient adjudication of workplace exposure claims involving workers who have contracted COVID-19.

On June 1 - Injured Workers' Day in Ontario - the Canada Labour Congress issued a powerful statement calling for, among other things, provincial governments across Canada to implement presumptive compensation coverage for COVID-19 related illness, so that workers are not denied access to supports, waiting for their claims to be accepted. Presumptive coverage is critically important for essential workers in this pandemic. If a frontline worker gets sick and/or needs to be quarantined, he/she needs to rely on our workers' compensation system to fully support them in real time.

To date, only the Province of British Columbia has heeded this call towards implementing presumptive compensation coverage for frontline workers. On April 30, WorkSafeBC announced that it has added COVID-19 to a list of presumptive conditions; this represents significant reform to B.C.'s workers' compensation system to make it easier for those sick with COVID-19 to make claims for lost pay. While this addition of COVID-19 as a presumptive condition will not be effective until later this fall, once in place the presumption will ensure that all workers in industries deemed essential will be able to make a claim to workers' compensation without having to prove they contracted the disease at work.

Presumptive compensation coverage for infectious diseases is not a novel concept in Canada. Newfoundland and Labrador already has an infectious disease presumption which they are applying to COVID-19. What is more, many jurisdictions in the United States have implemented or proposed similar measures. Presumptive coverage is critical for streamlining the process for accessing supports and will result in better health outcomes and safer return to work for workers at higher risk of COVID-19 infection.

Presumptive WSIB coverage for COVID-19 is needed both for claims directly related to the virus itself as well as the trauma, PTSD and mental health challenges that may flow.

The WSIB has received thousands of COVID-19 related claims since the beginning of the pandemic. Unfortunately, neither the Ontario government nor WSIB have committed to establishing a regulatory presumption of work-relatedness for COVID-19 health conditions.

Such legislative and/or regulatory change is overdue from the Ontario government. A private member's bill for a presumptive coverage in Ontario was introduced in May by NDP Labour critic for Workplace Health and Safety, Wayne Gates. Readers who wish to add their voice to the chorus calling for this necessary change can find more information at the Ontario Federation of Labour's Power of Many website:

www.powerofmany.ca/workers_comp_for_covid_19

There are other unanswered, pressing questions for workers' compensation systems in these interesting times. Given the unprecedented numbers of people who are working from home to flatten the curve, there are questions how WSIB will adjudicate claims arising in the context employees performing their duties at locations other than their employer's fixed premises and their usual, fixed hours.

Whether disablements due to poor ergonomics of working in cramped home offices, hunching over kitchen tables, etc., to chance events like slips/falls while retrieving file materials, it is anticipated that 2020 will see a variety of novel, work-related disablements and chance events. WSIB's operational policy deems an accident to have occurred in the course of employment if the surrounding circumstances relating to place, time, and activity indicate that the accident was work-related. We would anticipate that factors such as the lack of witnesses, direct supervision and so forth may pose unique challenges to prove that an accident/injury at home occurred in the course of employment.

2020 has wrought numerous unique, systemic challenges. In workers' compensation terms, these range from overdue reform of our workers' compensation scheme to provide timely and effective support for frontline workers' COVID-19 related claims, to providing clarification and guidance for employees trying to work from home. The COVID-19 pandemic has exposed cracks in the WSIB's adjudication process with respect to occupational disease. Hopefully, with concerted attention and feedback from critical stakeholders in the workers' compensation system, these overdue reforms can be implemented without further delay.

E. EMPLOYER IMPOSED COVID-19 TESTING: PRIVACY OR SECURITY?

Patrick Enright

In normal times, employers can impose medical testing on employees only in limited circumstances. The test for the propriety of such testing is one of reasonableness, i.e. is testing reasonably necessary to ensure the safety of others and the interests of employers? The answer to the question turns on a balance of interests approach, with employee privacy being balanced against the legitimate interests of employers.

Employee privacy is, in normal times, jealously protected by the law. Arbitrators have rejected alcohol and drug testing where the evidence of drug abuse is circumstantial or where there is no evidence of such abuse, even in the case of safety-sensitive work environments. Arbitrators have also rejected the imposition of psychiatric examinations on employees where employers do not have "reasonable and probable grounds" for having a worker submit to such an exam.

But times are, of course, anything but normal. The facts of COVID-19 makes the wisdom of relying on these precedents questionable if not altogether wrong. Employee privacy is likely to be greatly circumscribed in light of the threat to public health posed by the virus and the need to ensure worker safety.

Compounding matters is that employers are statutorily required to take measures to ensure the safety of workers, and employees have a corresponding right to refuse unsafe work. This places employers in the difficult position of striking an appropriate balance between employee privacy and workplace safety. COVID-19 is, as we know, extremely contagious and – more importantly – can infect those who do not, or are yet to, exhibit symptoms. This likely casts great doubt on the applicability of case law that imposes a "reasonable suspicion" or "reasonable grounds to believe" requirement as a pre-condition for any testing to occur.

COVID-19, however, is unlikely to change the underlying test for determining the reasonableness of testing requirements. The "balancing of interests" approach is likely to continue to be used. In each case, courts and arbitrators will look at the entirety of the circumstances to determine whether testing workers for COVID-19 is ultimately reasonable. Some of the most important considerations will be:

- The nature of the work and the extent of contact with other workers.

- The demographic of the workforce. Are there vulnerable members of the workplace, such as those with autoimmune disease, the elderly, or compromised respiratory systems?

- The status of the global pandemic and the effectiveness of treatments for those who test positive for the virus.

- The availability of work-from-home arrangements for those who wish to refuse testing.

The guiding principle for decision-makers will undoubtedly be public health and safety. For example, health care employers will assuredly be allowed to screen employees who are expected to come into close contact with vulnerable people. It is also plausible that employers will be allowed to screen workers who must be physically present in the office to work and will have to be in close quarters with other workers – especially if many in the workforce are elderly and vulnerable.

Unions will no doubt want to know how to best protect employee privacy when and if employers seek to require such testing. The best approach to protecting workplace privacy is to ensure that the scope of the testing is reasonable, and that testing is limited to testing for COVID-19 and not other ailments, such as pre-existing conditions that could make an employee vulnerable to the virus. Unions may also wish to consider proposing work at home arrangements for those who do not wish to be subject to testing, especially if working from home would only be of a short duration (i.e. the request is made at a time where a vaccine is close to being approved and distributed).

F. THE CIRB AND THE NEW PROCEDURE UNDER SECTION 240 OF THE *CANADA LABOUR CODE*

Micheil Russell

New procedures have been introduced in connection with complaints filed pursuant to section 240 of the *Canada Labour Code*. This section of the *Code* protects employees against unjust dismissal provided that they work for a federally regulated employer and have completed 12 months of continuous employment with the same employer. It does not apply to employees who are covered by a collective agreement.

The change is significant for trade unions active in the federal sector who are in the process of organizing workplaces with a view to filing an application for certification. The right to file a complaint pursuant to section 240 of the *Canada Labour Code* continues after certification up until a first collective agreement becomes effective. This is in addition to the right to have arbitration under section 36.1 of the *Code* for discipline or dismissals without just cause.

The historical procedure under section 240 required the filing of a complaint with the labour program of Employment and Social Development Canada ("ESDC"). ESDC would

assign the complaint to an Inspector who would investigate the complaint and if it remained unresolved, an adjudicator was appointed by ESDC to determine the complaint.

The new procedure provides that if the complaint is not settled with the assistance of the Inspector, then the complainant can request that the complaint be referred to the CIRB for adjudication. The request is made directly to ESDC and not directly to the CIRB. The complainant will receive a letter have advising them of this right along with the form that must be completed and returned within 30 days.

The procedure at the CIRB is also new. The CIRB requires the employer to file a written response to the complaint within 15 days. The complainant will then receive a further 10 days to finally reply. The CIRB will appoint an Industrial Relations Officer to manage the complaint. The Industrial Relations Officer will be responsible for managing the file and assisting the parties in working towards a settlement. The Industrial Relations Officer will offer a voluntary mediation meeting.

If the complaint remains unresolved, the complaint will be determined by the CIRB. The CIRB is not obliged to schedule an oral hearing in connection with the complaint but may decide it based on the submissions filed by the parties. If the CIRB determines that an oral hearing will be held, the CIRB can select whether it will determine the complaint itself or refer the complaint to an external adjudicator.

The remedies utilized by the CIRB are the same as an adjudicator appointed under the prior process: the CIRB can reinstate the employee, order compensation, etc.

What are the consequences for trade unions engaged in organizing activities and what decision should be made about the various options? Prior to the certification of the trade union, section 240 remains the only vehicle through which the reinstatement of an employee can be obtained in circumstances where there is no basis to file a complaint under the *Canada Labour Code* that there is an anti-union basis for the dismissal of the employee.

After certification, but prior to the effective date of the first collective agreement, the trade union will have a choice between the two procedures. Under the section 240 procedure, there are no legal fees payable by the complainant and there is the assistance of the Industrial Relations Officer, however, the trade union is not a party to the proceeding and there is also the possibility that the complaint will be dismissed without a hearing.

Under section 36.1, the parties have the right to agree upon an arbitrator and the trade union is a party to the proceeding. There is no assistance from an Industrial Relations Officer and the trade union will be responsible for half of the fees of the arbitrator.

The decision in terms of which process to follow is one that is likely best made in the unique circumstances of each particular situation. It is too early to know whether or not the revised procedures will result in more prompt satisfactory adjudication of these complaints.

G. ONTARIO LABOUR RELATIONS BOARD HOLDS THAT UNION ACTED REASONABLY IN RELYING ON THIRD PARTY SOURCES FOR RESPONDING PARTIES CONTACT INFORMATION IN CERTIFICATION CASE

Raymond Seelen

In a recent decision, *Carpenters District Council of Ontario v Honey Construction Limited*, OLRB Case No. 1857-19-R (unreported), the Ontario Labour Relations Board considered whether it had the discretion to assist a union that had allegedly delivered an application improperly. In extending the timelines for delivery, Vice-Chair Slaughter stressed the importance of the Union's reasonable efforts to obtain a correct fax number for the Responding Parties.

The facts in this case were straightforward. The Union applied for certification of the Responding Parties' business and, pursuant to Rule 25.3 of the Board's Rules of Procedure, was required to deliver a copy of the application to the Responding Parties within 2 business days. The Union attempted to do so by fax and received a confirmation that all 79 pages of its application were transmitted successfully. However, almost two weeks later, the Union received a decision of the Board and was informed that the Responding Parties alleged that it did not have a fax machine and that the Union had not complied with the Board's Rules.

The Union initially submitted that the Responding Parties was simply lying and that it did in fact have a fax machine. In the alternative, it argued that the Board should use its discretion to extend the time limits for filing. The parties ultimately agreed to argue the discretion point on the basis of an agreed statement of facts. As such, the Board did not determine whether the Responding Parties did or did not receive the application. Instead, the Board simply assumed that it had for the purpose of the application.

The Responding Parties initially argued that the Board did not have the discretion to extend the timeline for delivery as the Union requested. Vice-Chair Slaughter dismissed this argument, finding that his conclusion "emerges from a plain reading of the relevant provisions of the Ontario *Labour Relations Act* and the Board's Rules of Procedure, which is supported by labour relations policy considerations and the vast majority of the Board's case law." This decision unequivocally puts to rest any suggestion the Board cannot, in appropriate circumstances, extend the timeline for delivery of certification applications.

The more significant portion of the Board's decision comes from its determination that it was appropriate to apply its discretion in this case. The Responding Parties argued that the Union was sloppy in its attempts to determine an appropriate fax number and that, as such, the Union should bear responsibility for an error resulting from its efforts.

Both the Union and the Board disagreed. The Board identified three steps which the Union undertook to determine the correct fax number: (1) it found a fax number on the Better Business Bureau page for the Responding Parties; (2) it ordered a report from a credit rating agency which contained the same fax number and (3) a union representative called the fax number to ensure that it was active. The Board also noted that the Union faxed the application a day before it was required to do so and that the fax was confirmed to have been delivered. The Board found these to have been reasonable steps and dismissed the Responding Parties' argument that the Union acted carelessly.

The Board's discussion of the Better Business Bureau is particularly noteworthy. At paragraph 53 of its decision, the Board noted that the fax number included on the Better Business Bureau page was provided by the Responding Parties and that the Responding Parties had allowed it to remain listed on the page for years after they allegedly ended the use of the fax number. It also noted that the Responding Parties had changed their physical address and had provided the Bureau with their new address. As such, the Board concluded that the Responding Parties had "held out the fax number to the public as a valid means of contact for it for literally years after it ceased to be operational." In making this finding, the Board correctly relied on the fact that, even when information about a business is published by a third-party, the business retains a responsibility to ensure its accuracy. The fact that the Better Business Bureau's website is not operated or owned by the Responding Parties does not prevent the Responding Parties from taking reasonable steps to ensure it is accurate and up to date.

Ultimately, the prospect of having an application delivered to the wrong address (or not delivered at all) must keep many Union organizers up at night. This decision stresses that an error in delivery is not the end of the world, if the Union took reasonable steps to ensure that delivery would have been made. It also endorses, for the first time, the use of third-party services – such as Lumbermans' or the Better Business Bureau – to determine a business' contact information. Unions should follow the Carpenters' example, especially when relying on fax transmission. Good practices include:

- verifying contact information through multiple, reliable sources;
- verifying that an identified fax line is in fact an active fax line by calling it; and,
- leaving enough time that, if the fax transmission is not completed, delivery can be made by another method.

Note: *The information contained in this Newsletter is not intended to constitute legal advice. If you have any questions concerning any particular fact situation, we invite you to contact one of our lawyers.*

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