

EMERGENCY PREPAREDNESS IN THE WORKPLACE



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NOVEMBER, 2008**

Facing an emergency situation is the ultimate test for any business. Ensuring that employees are able to continue performing as much as possible through an emergency is the primary means by which a business can survive a difficult situation. However, the desire to maintain operations must be balanced with legal rights granted to employees and the obligations on the part of employers in a crisis. Achieving this balance is no simple task.

(A) INTRODUCTION

Throughout the discussion which follows, there are three themes which should be kept in mind by employers at all times. These are:

1) BE PROACTIVE:

In an emergency setting, there is too little time for an employer to inform itself of its legal rights and obligations, appropriately analyze a situation, and then react while maintaining the full scope of its operations. If analysis is done at the front end, the business will be prepared to react swiftly. Proactive planning can mitigate some of the negatives associated with an emergency.

2) COMMUNICATE CLEARLY DURING AN EMERGENCY:

In an emergency, there is bound to be conflicting information disseminated to the public from various sources. Good communication and clear directives to employees will help to eliminate confusion and promote efficiency within a business. At its best, appropriate communication with employees can help to promote co-operation and reduce stress in overcoming the challenges posed by an emergency.

3) BE AWARE OF BOTH LEGAL AND MORAL OBLIGATIONS:

Fulfilling moral obligations may be just as important as fulfilling legal obligations in making sure that a business operates as smoothly as possible through an emergency. Staff may quickly become disgruntled if an employer stops at the strict letter of the law when dealing with employees affected by an emergency.

(B) LEGISLATION

There is a myriad of legislation which employers should be aware of in the event of an emergency situation. That legislation is summarized immediately below.

(A) THE EMERGENCY MANAGEMENT STATUTE LAW AMENDMENT ACT, 2006

In Ontario, the legal regime concerning emergencies was altered with the passing of the *Emergency Management Statute Law Amendment Act, 2006* (Bill 56).¹ This renamed the existing *Emergency Management Act* as the *Emergency Management and Civil Protection Act* (the *EMCPA*).² The *EMCPA* defines an emergency as:

¹ S.O. 2006, c. 13

² R.S.O. c. E.19

a situation or an impending situation that constitutes a danger of major proportions that could result in serious harm to persons or substantial damage to property and that is caused by the forces of nature, a disease or other health risk, an accident or an act whether intentional or otherwise.³

The *EMCPA* also provides that the Premier or Cabinet can declare an emergency lasting up to 14 days and make expansive orders which may be renewed for successive 14 day periods. In addition, a Judge of the Ontario Superior Court of Justice may make orders under the *EMCPA* and impose severe financial penalties for the contravention of emergency directives.

(B) THE EMPLOYMENT STANDARDS ACT, 2000 (THE “ESA”)⁴

EMERGENCY LEAVE FOR DECLARED EMERGENCIES:

In addition to amending the fundamental piece of emergency legislation in Ontario, Bill 56 made changes to the *ESA* by introducing a regime of emergency leave for declared emergencies which employees may utilize either when: (i) an order applying to the employee is made under the *EMCPA* or the *Health Protection and Promotion Act* (the *HPPA*);⁵ or (ii) it is necessary for the employee to care for the following defined persons:

- the employee’s spouse;
- a parent, step-parent or foster parent of the employee or the employee’s spouse;
- a child, step-child or foster child of the employee or the employee’s spouse;
- a grandparent, step-grandparent, grandchild or step-grandchild of the employee or of the employee’s spouse;
- the spouse of a child of the employee;
- the employee’s brother or sister; or
- a relative of the employee who is dependent on the employee for care or assistance.⁶

Emergency leave under this provision is different from personal emergency leave due to illness, injury or medical emergency but, like personal emergency leave, it is in the form of a leave of absence without pay. It applies to non-unionized and some unionized workplaces with 50 or more employees. An employee must notify his or her employer that this type of leave will be taken either before or as soon as possible after the leave has been commenced, and the employer may require reasonable evidence that the employee is entitled to the leave. Emergency leave for declared emergencies is in addition to whatever leave an employee may be entitled to under the *ESA* for personal emergencies.⁷

FAMILY MEDICAL LEAVE:

As a further measure under the *ESA*, employees are entitled to take “family medical leave” of up to 8 weeks’ duration in order to care for an individual for whom there is a significant risk of death within a period of 26 weeks.⁸ In such a case, a qualified health practitioner must provide a certificate to this effect, and an employer is entitled to ask an employee to produce this certificate.⁹ The class of family members under this provision encompasses:

3 *Ibid.* s.1

4 S.O. 2000, c. 41

5 R.S.O. 1990, c. H.7

6 *ESA*, s. 50.1

7 See page 8, *infra* and *ESA*, s.50

8 *Ibid.*, s. 49.1

9 *Ibid.* s. 49.1(6)

- the employee's spouse;
- a parent, step-parent or foster parent of the employee;
- a child, step-child or foster child of the employee or the employee's spouse; or
- any individual prescribed as a family member for the purpose of this section of the *ESA*.¹⁰

QUARANTINE AND OVERTIME WORK IN EMERGENCIES:

During a public health emergency, it may be the case that a workplace is quarantined. This would be more common in the case of a health care facility or a school, although it could conceivably happen to any place of business.¹¹ Whenever a workplace is quarantined, persons will be prevented from both entering and exiting the premises.

Any employees located within a quarantined facility must be paid for work completed during the quarantine. They will not be entitled to receive pay if they are not completing work or are not on call during this time. Regular rules for hours worked and overtime pay will continue to apply.¹² However, the *ESA* provides that an employer may require employees to work beyond these hours in a number of enumerated exceptional circumstances. These are:

- an emergency;
- should unforeseen circumstances occur where it is necessary to ensure the continued delivery of essential public services or to ensure that continuous processes or seasonal operations are not interrupted; or
- carrying out urgent repair work to an employer's plant or equipment.

In general, extra work of this nature will be deemed to be necessary only to the extent that it avoids serious interference with the ordinary workings of the employer's establishment or operations.¹³

ADDITIONAL CONSIDERATIONS FOR EMPLOYERS UNDER THE ESA:

As is the case under the *Occupational Health & Safety Act* (the "*OHSA*"), an employer may not intimidate, dismiss or otherwise discipline employees who take leave in accordance with the *ESA*.¹⁴ When an employee returns to work following *ESA* leave, this must be to the position that he or she occupied prior to the leave. If that position no longer exists, the employee must be given a comparable position.

It is possible for an employer to lay off an employee for any reason, including a health emergency, if there is legitimately no work for that employee to complete. If circumstances so warrant, an employer may also decide to lay off an employee temporarily during an emergency situation, although after a certain period of time,¹⁵ the employee will be deemed to have been terminated and rights to notice and possible severance will crystallize.

¹⁰ *Ibid.*, s. 49.1(3)

¹¹ For example, during the SARS crisis in April 2003, 197 employees of a Hewlett-Packard plant in Markham, Ontario were ordered to enter quarantine after one worker failed to follow a quarantine order and attended at work with symptoms that were consistent with SARS.

¹² See *ESA*, ss. 17-18

¹³ *Ibid.*, s. 19

¹⁴ *Ibid.*, s. 74(1)(a)

¹⁵ 13 weeks in any period of 20 consecutive weeks, 35 weeks in any period of 52 consecutive weeks, or as outlined in a collective agreement in a unionized work environment; see *ESA*, s. 56.

(C) THE EMERGENCY MANAGEMENT ACT

For emergencies existing on a national scale, the federal government recently introduced the *Emergency Management Act* (the *EMA*)¹⁶ which replaces the former *Emergency Preparedness Act*. The *EMA* is naturally broader in scope than the *EMCPA*, and mainly outlines the powers and responsibilities of the Minister of Public Safety and Emergency Preparedness. The *EMA* provides for the development of an emergency management plan to address both national public health emergencies and also civil emergencies pursuant to the *National Defence Act*.¹⁷ The powers granted under the *EMA* are proactive and reactive, and allow for the co-ordination of specific issues with U.S. authorities.

(D) THE OCCUPATIONAL HEALTH AND SAFETY ACT

The *OHSA* is the main legislation in Ontario which protects an employee's right to work in an environment which will not adversely impact upon his or her wellbeing. Employees may recommend improvements to a work environment which would make for a safer workplace, and employers should consider and respond to reasonable suggestions for such improvements. An employer must additionally take all reasonable precautions in order to protect employees.¹⁸ If a communicable disease is present in the workplace, the provisions of the *OHSA* may impose liability on an employer which fails to ensure that employees do not receive adequate protection from infection.¹⁹

WORK REFUSALS

Under subsection 50(1) of the *OHSA*, employers are prohibited from disciplining, threatening, dismissing, intimidating or coercing an employee who is acting in compliance with the *OHSA*. This provision is of particular relevance with respect to refusals by employees to attend work for fear of being exposed to a communicable disease.

If an employee has reason to believe that the physical condition of a work environment may endanger his or her welfare, that worker will have a right to refuse to work in that environment.²⁰ However, this right does not apply to law enforcement officers, firefighters, hospital workers, ambulance drivers, laundry and food service workers, nor to those employed at correctional institutions, licensed laboratories, or group homes.

In the face of a public health crisis, the main difficulty in evaluating refusals to work will be the potentially conflicting information disseminated through the media and otherwise concerning the status of an outbreak. As such, employers are best to evaluate the characteristics of the work environment compared with the risk criteria for a disease and to make decisions accordingly. For example, it may be more rational for an employee to refuse work in a more public setting such as a hospital or an airport as opposed to a confined office environment to which there is limited access.

(E) THE CANADA LABOUR CODE:

At the federal level, the *Canada Labour Code* also includes provisions governing refusals to work by federally regulated employees.²¹ These have resulted in several examples of litigation over refusals to work during the SARS crisis. In *Chapman and Canada (Customs and Revenue Agency)*,²² a Customs Officer refused to work because he was not provided with protective equipment which would have ensured that he was not exposed to SARS. Similarly, in *Cole and Air Canada*,²³ two Air Canada employees working in close proximity to airplane passengers wanted to wear masks when verifying passenger documents. Although it was ultimately

16 S.C. 2007, c.15

17 R.S.C. 1985, c. N-5

18 *OHSA*, s. 25(2)(h)

19 The litigation resulting from SARS largely concerned work refusals as opposed to claims against employers for violations of health and safety requirements

20 *OHSA*, s. 43(3)(b)

21 R.S.C. 1985, c. L-2, s. 128

22 [2003] C.L.C.A.O.D. No. 17

23 [2006] C.L.C.A.O.D. No. 4

held in *Chapman* that the employee was not in danger, and in *Cole* that the masks were not necessary and were not a part of the employees' uniform, employers need to at least be prepared to deal with these sorts of potential issues during an emergency situation.

(F) THE WORKPLACE SAFETY AND INSURANCE ACT, 1997 (THE "WSIA")²⁴

The scheme under the *WSIA* is to provide compensation for employees who suffer injuries or other adverse health consequences in the workplace. Under the *WSIA*, if an employee reasonably contracts one of a number of enumerated diseases at work,²⁵ that employee may claim benefits under the legislation.²⁶ There is a duty on employers having 20 or more employees to offer to re-employ an employee who has suffered an injury in the workplace and who had been employed continuously for a minimum of one year. There is of course also the duty under the legislation to accommodate injured employees to the point of undue hardship for an employer.²⁷ Employers should take note that in the case of a public health emergency, employer insurance premiums under the *WSIA* may increase drastically. This is especially true with respect to poultry workers and health care workers.

(G) THE ONTARIO HUMAN RIGHTS CODE (THE "CODE")²⁸

The *Code* protects employees against discrimination in hiring and advancement as well as from harassment and unfair treatment by co-workers and superiors. For diseases such as SARS and Bird Flu which seem to bear the specific connotation of having originated in Asia, employers should pay particular attention to the *Code* in light of the possibility of an outbreak of these or similar diseases.

The *Code* operates by listing prohibited grounds of discrimination, with disability being included as one of these grounds.²⁹ The scope of disability often includes diseases and medical conditions. During the SARS crisis, the Ontario Human Rights Commission urged tolerance and respect given the potential for discrimination or harassment to be directed at individuals of Asian origin.

Although there is legislation in Ontario aimed at ensuring safe working environments, employers may have a duty to accommodate employees who could be ill, by providing protective gear, allowing employees to work from home, creating different forms of work for employees or providing unpaid time off.

In light of the *Code*, employers should pay particular attention when implementing health policies in the workplace or when directing certain employees to remain at home because of health concerns, so that no employee is singled out on potentially discriminatory grounds. As much as possible, policies should be applied broadly and consistently to all employees. If it is necessary to ask an employee to refrain from coming to work, employers should always inform that employee that he or she may return to the office after providing a medical certificate stating that he or she will not endanger co-workers.

(H) THE ONTARIO HEALTH PROTECTION AND PROMOTION ACT (THE "HPPA")³⁰

The *HPPA* gives powers to public health officials to make orders and direct the public in attempting to control public health emergencies.³¹ These types of orders may restrict the mobility of persons and may be made with respect to the operation of certain workplaces. The *HPPA* also provides that where orders of Medical Officers of Health are ignored, an application may be made to a Judge of the Ontario Superior Court of Justice to order the removal by force of an individual from a place of work.³² The exercise of quarantine

²⁴ S.O. 1997, c. 16, Sched. A

²⁵ As listed in Schedules A and B to the *WSIA* provided in Ontario Regulation 175/98. As an example, SARS is captured by the list of enumerated diseases.

²⁶ *WSIA*, s. 15

²⁷ *Ibid.* s. 41(1)

²⁸ R.S.O. 1990, c. H.19

²⁹ The *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 creates similar protections for federally regulated employees.

³⁰ R.S.O. 1990, c. H.7

³¹ *HPPA*, s. 22

³² *Ibid.*, s. 35

powers has been held to be a reasonable limit on an individual's right to security of the person under the Canadian *Charter of Rights and Freedoms*.³³

Section 25 of the *HPPA* also imposes a duty on certain health care professionals to report to a Medical Officer of Health or health unit that an individual who is not already a patient at a hospital has or may have a reportable disease. There are therefore numerous provisions under the *HPPA* which may ultimately result in reductions to a company's workforce, and employers will have to be prepared to deal with any unforeseen consequences as a result.

(I) THE EMPLOYMENT INSURANCE ACT (THE "EIA")³⁴

The *EIA* attempts to provide support to employees in the case of unemployment. It allots a maximum of 15 weeks of benefits during which a claimant is unable to work because of illness or quarantine, and a maximum of 6 weeks of benefits for a claimant providing care and support to another individual.³⁵ Normally, there is a two week waiting period before benefits may accrue, the exception being if an employee has been in receipt of paid sick leave from an employer and a medical certificate is provided.³⁶

During the SARS outbreak however, the regulations under the *EIA* were amended to give benefits in cases of quarantine and to render both the requirement for a medical certificate and the two week waiting period unnecessary.³⁷ These amended regulations are still in force and could be utilized by an employee in the case of a future outbreak or public health emergency.

(J) THE CANADIAN QUARANTINE ACT³⁸

In 2005, Bill C-12 replaced the then existing *Quarantine Act* to strengthen the measures that may be taken to prevent the spread of communicable diseases. The Act states that quarantine officers may order any person entering Canada to undergo a health assessment where there are reasonable grounds to presume that he or she has been in close proximity to a person who has a communicable disease or is infested with vectors (an insect or animal capable of transmitting a communicable disease).³⁹

Given that the point of application of this provision is upon entry into Canada, employers who have staff that routinely travel abroad on business or who regularly have visitors from other countries to their workplaces should advise staff to make alternative arrangements if the risk of a wasted trip is particularly high. Alternative arrangements would obviously include video conferences, telephone conference calls or the use of agents or other company representatives who live in closer proximity to those other countries.

(K) THE PERSONAL INFORMATION PROTECTION AND ELECTRONIC DOCUMENTS ACT ("PIPEDA")⁴⁰

In general, *PIPEDA* prohibits the non-consensual collection, use or disclosure of personal information, with exceptions. Some of the exceptions in this context include:

- where information is *used* in acting in the course of an emergency that threatens the life, health or security of an individual;⁴¹ or
- where information is *disclosed* because it is needed in the course of an emergency which threatens the life, health or security of an individual and, if the individual to whom the information relates is alive, he or she is informed in writing without delay of the disclosure.⁴²

33 See *Toronto (Medical Officer of Health v. Deakin)*, [2002] O.J. No. 2777

34 S.C. 1996, c. 23

35 *EIA*, s. 12(3)

36 SOR/96-332, s. 40

37 SOR/2003-131, s. 1

38 S.C. 2005, c. 20

39 *Ibid.*, s. 20

40 S.C. 2000, c. 5

41 *PIPEDA*, s. 7(2)(b)

42 *Ibid.*, s. 7(3)(e)

(L) THE ONTARIO *PERSONAL HEALTH INFORMATION PROTECTION ACT, 2004* (“*PHIPA*”)⁴³

PHIPA specifically governs the disclosure of patient information by medical practitioners, including to employers. It also controls what an employer can do with patient information once it is received.

PHIPA uses the concept of “health information custodians”, defined as certain classes of health professionals including doctors, ambulance drivers, pharmacists and the Minister of Health in prescribing permitted disclosures of information.⁴⁴ Because *PHIPA* is substantially similar to *PIPEDA*, an order was made exempting health information custodians from the application of *PIPEDA*.⁴⁵

Under *PHIPA*, a “custodian” may disclose information in an emergency where there are reasonable grounds to believe that disclosure will be necessary in preventing a serious risk of bodily harm.⁴⁶ Non-health information custodians such as employers may only use information that is disclosed to them for the limited purpose for which the custodian was permitted to disclose the information, or for the purpose of carrying out a statutory or legal duty.⁴⁷

There are certain cases when consent to disclose information must be obtained under *PHIPA* or other legislation. In such circumstances, consent may be express or implied.⁴⁸ However, consent must be express if disclosure is made:

- to a non-health information custodian, or
- to a health information custodian who will not use the information for the purpose of health care or assisting in providing health care.⁴⁹

As employers may be involved in the receiving of health information regarding employees, they should be aware of the restrictions which *PHIPA* imposes on the disclosure and use of this type of information.

(M) BILL C45:

Following the Westray mining disaster, the federal government sought to enact tougher legislation to hold companies liable when they do not provide safe environments for their employees. *An Act to Amend the Criminal Code (criminal liability of organizations)*⁵⁰, otherwise known as Bill C45, added a section to the *Criminal Code* stating that everyone who directs how a person performs his or her work is under a legal duty to take reasonable steps to prevent bodily harm to persons or anyone else resulting from the work.⁵¹

The *Criminal Code* was also amended to create liability for an organization in criminal negligence: (i) when a “representative” acting in the scope of his or her authority is a party to an offence; (ii) where two or more persons engage in conduct such that one person would be a party to an offence had one person been acting instead of two; and (iii) where a senior officer or senior officers collectively depart markedly from the standard of care reasonably necessary so as not to be a party to an offence.⁵² A “representative” is defined broadly under the *Criminal Code* as being a director, partner, employee, member, agent or contractor of the organization.⁵³

43 S.O. 2004, c. 3, Sched. A

44 *PHIPA*, s. 3

45 P.C. 2005, C. Gaz. 2005.I.331

46 *PHIPA*, s. 40(1)

47 *Ibid.*, s. 49(1)

48 *Ibid.*, s. 18(2)

49 *Ibid.*, s. 18(3)

50 S.C. 2003, c. 21

51 *Criminal Code*, R.S.C., c. c.46, s. 217.1

52 *Ibid.*, s. 22.1

53 *Ibid.*, s. 2

(N) THE PUBLIC HEALTH AGENCY OF CANADA ACT (THE “PHACA”)⁵⁴

A final piece of federal legislation that may play a role in the context of a public health emergency is the *PHACA*. This statute was introduced in order to create the Public Health Agency of Canada (PHAC) as an organization to deal with threats to the health of the nation. Generally speaking, the *PHACA* does not go into the same level of detail as some of the statutes described above. However, it does vest in PHAC powers to set policy and to collect personal health information in order to share with the provinces.

Because this legislation is more clearly designed to deal with public health issues proactively and on an ongoing basis, employers should be prepared to monitor any policies created by PHAC and to consider integrating them into their own workplace practices.

EMPLOYER COMPLIANCE WITH PUBLIC HEALTH DIRECTIVES AND REPORTING OBLIGATIONS

During a public health emergency, information and directives may be issued from varying levels of government and also from public health officials. Employers must be careful to monitor all such information and co-ordinate as necessary with their workforce because it is possible that an employee may be following instructions from one of these authorities to stay home from work or to enter quarantine.

If one or more employees do not show up at work, this may create complications for a business, and employers may be left to react to sudden absences in a very disorganized way. When an employer notices that certain directives are being issued from public health authorities, clear lines of communication with employees need to be in place. On the one hand, employers may have a moral obligation to make sure that affected employees stay home. At the same time, employers will want to make sure that any employees who are acting in compliance with certain orders inform their superiors so that disruptions to operations can be avoided.

Aside from issues of co-ordination, employers and employees alike should be concerned that they act in accordance with their legal obligations as prescribed under the applicable legislation. The *HPPA* creates a series of offences for failing to comply with an order given pursuant to the Act.⁵⁵ When an order is not complied with, a person may be liable on conviction for a fine to a maximum of \$5,000 for each day of non-compliance.⁵⁶ While it is likely the case that orders made under the *HPPA* will be directed at affected individuals, it is certainly conceivable that orders may be made concerning businesses as well. For example, a particular office or building may be subject to a quarantine order.

Under the *OHSA*, employers have a duty to take all reasonable precautions in the circumstances for the protection of employees.⁵⁷ Supervisors are also under an obligation to advise workers of potential or actual dangers to health, to provide employees with written instructions regarding precautionary measures where prescribed, and to further take all reasonable precautions in the circumstances to protect workers.⁵⁸

An employer is under no legal duty to report to public health officials that an employee may have contracted a communicable disease. However, if businesses employ physicians or other health care professionals,⁵⁹ these staff members would be under an obligation to report. Although there may not be an absolute legal duty to report issues with respect to an individual employee, if the employer is unsure how to proceed, it would be a good idea to contact public health officials in order to inform them that a potentially affected employee has been at the workplace, and to then follow the instructions given. Where the public may be at risk, this course of action will more likely constitute a moral duty rather than a strict legal duty on the part of an employer.

⁵⁴ S.C. 2006, c.5

⁵⁵ *HPPA*, s. 100

⁵⁶ *Ibid.*, s. 101

⁵⁷ *OHSA*, s. 25(2)(h)

⁵⁸ *Ibid.*, s. 27(2)

⁵⁹ As set out in *HPPA* section 25(2)

Regarding specific issues of quarantine, if an employer becomes aware that one of its employees should be in quarantine, the employee should be told to leave the workplace immediately. If an employer learns that one of its employees has entered quarantine, it may be necessary to inform other employees if the quarantined employee is symptomatic of disease. If the quarantine is precautionary, it is not strictly necessary to inform other employees. In fact, where the underlying illness may constitute a disability, the employer may be specifically prohibited from informing other employees. At the end of the day, the employer should investigate the matter, exercise common sense and seek legal advice as necessary.

DUTY TO DISCIPLINE EMPLOYEES ACTING IN VIOLATION OF LEGISLATION

As mentioned above, employers may not discipline employees who are acting in compliance with applicable legislation.⁶⁰ While it would be open to employers to do so, there is no duty on employers to extract discipline. Given the likely sensitive nature of the issue and the rarity of perfect decision making in an emergency setting, employers will want to exercise discretion whenever opting for disciplinary measures against an employee.

(C) TYPES OF EMERGENCIES

PUBLIC HEALTH EMERGENCIES

Whether the province of Ontario or Canada as a whole is facing a public health crisis, or whether an employer is simply interested in operating as efficiently as possible, there is an obvious interest in maintaining a full and healthy workforce. It will be impossible to account for all contingencies in the moment of an emergency at large. However, there are several steps which employers can take prior to the occurrence of a health emergency and which may reduce the impact of that emergency on business.

First, a vaccination policy may reduce the number of working days lost for a business in the event of an outbreak. This would be most applicable in the context of an influenza pandemic. A key decision for employers will be whether such a policy is to be made mandatory or voluntary. A mandatory policy may be more applicable and may better withstand legal scrutiny for certain high-risk workplaces such as hospitals or other health care facilities. However, a mandatory policy has also been held in the unionized setting to violate an individual's right to security of the person and to potentially constitute assault.⁶¹ A mandatory policy would have to be carefully crafted to avoid these concerns.

Second, in order to prepare and reassure employees who may need to take leave during a health crisis, it will be prudent to examine private health insurance policies held by employees and to determine in advance whether short-term disability coverage under these policies takes into account absences due to communicable diseases or quarantine. Employers may also wish to examine the possibility of whether short-term paid leave may be appropriate to include on the company's accounts as a business expense.

Third, there is a host of very simple steps and precautions employers can take in ensuring that disease does not spread easily through the workplace. Employees exhibiting any sign of illness should be encouraged to stay home from work. Some employment contracts include bonuses for excellent attendance. In certain situations though, this type of incentive may ultimately work against a business if employees are of the mindset that they should attend work in borderline cases. At a minimum, employers should make it clear to employees that in an existing public health emergency, they should rather err on the side of caution and remain home. It may also be appropriate to adjust bonus structures for excellent attendance to account for declared public health emergencies. That being said however, businesses need to keep operating, even in time of emergency. Ways to work around this conundrum include permitting work from home.

Finally, providing hand washing or sanitizing stations in the workplace may also be of assistance both in curbing the spread of disease and in creating a visual reminder for employees. Common areas such as

⁶⁰ See *OHSA* section 50(1) and *ESA* section 74(1)(a)

⁶¹ See *St. Peter's Health System v. C.U.P.E., Local 778*, (2002) 106 L.A.C. (4th) 170

kitchens or cafeterias should be cleaned regularly. Employers should seek to co-ordinate between employees and cleaning staff so that horizontal surfaces are kept clear for wiping. Special attention should be paid to taps, door handles, banisters, toilets, telephone handsets and keyboards. Although these steps may be seen as being of limited effectiveness in the overall scheme of a serious emergency, if nothing else, they will help to instil a mindset in employees that health in the workplace matters.

LOGISTICS AND INFRASTRUCTURE-RELATED EMERGENCIES

Ontario has had the unfortunate experience of having to deal with several man-made and natural disasters in recent years. In August 2003, a severe power outage blanketed eastern North America in darkness. Increasing demands for energy, particularly in the summer months, may create future stresses on electricity supplies. As well, the 1998 ice storm in Ontario and Quebec devastated certain communities. With increasing volatility in weather patterns due to changes in global climates, severe meteorological activity may also be an issue for businesses going forward.

A main concern for businesses during these types of emergencies should be the immediate physical safety of their employees. In all likelihood, a power outage or weather disruption will render an office inhospitable or simply undesirable as a place to seek shelter. In this type of scenario, employees would normally want to return home and make sure that their friends and family are safe.

The major concern for employers then becomes how to safely evacuate a workplace. Business premises will each be different, with a multi-level high rise office tower presenting different concerns than a remote suburban or rural factory location. Across all situations, employees who are disabled or who have special needs will be disproportionately impacted. Not all employees will be able to exit a building under their own power and walk or drive home. Accordingly, it is advisable to delegate a person or persons who will be responsible for making sure that any employees who do have special needs receive the assistance they require not only in leaving the office premises, but in getting home as well.

Beyond assisting vulnerable employees, employers must ensure that a formalized evacuation plan is in place which will ensure that all personnel leave a building safely. For large commercial premises, landlords themselves may have an obligation to put an evacuation plan in place. Employers should therefore discuss this issue with their landlord if a plan has not been implemented.

Within a company, it is prudent to appoint evacuation monitors (and back-up monitors) who are responsible for clearing areas, counting personnel and reporting back to a central co-ordinator. These monitors may also be the ones to maintain a list of employees with special needs in an evacuation. If a company regularly has visitors to its office, monitors should determine who will be responsible for ensuring that visitors are accompanied during an evacuation. For smaller workplaces, it may be desirable to designate a place to convene following an evacuation. For larger offices, a reporting system will be more manageable. Safety equipment such as flashlights, blankets, air masks and any equipment necessary to assist disabled employees should be on-hand in the work environment. Personnel should also be trained in basic first aid and first-aid kits should be widely available. As is the case with home emergency preparedness, other items may be of value including things like extra water, food, emergency radios, walkie-talkies and flares.

TRANSIT ISSUES

Many employees depend on a transit service provider, a colleague, or a family member to arrive at work each day. In weather emergency or power outage situations, sources of transportation may simply be unavailable. A first-line solution to this issue is for employers to develop a means by which employees can work either at home or from an alternative location if necessary. A secondary option would be for employers to organize alternative or backup transportation for their staff. It would be advisable to assemble a list of neighbourhoods where employees live that is cross-referenced with employees who have their own vehicles. While it would be strictly voluntary, employees could be matched into carpool groups which would take effect in emergency situations.

TERRORISM AND SIMILAR THREATS

An act of terrorism or a threat on a building may be the toughest type of emergency to plan for. Terrorism by definition is intended to instil fear in people and to breed confusion and irrationality on a mass scale. It is easy to see how planning for and reacting to a specific threat would be incredibly difficult.

(i) The Emergency Management and Civil Protection Act

On a provincial level, the *EMCPA* will be the mechanism through which the Ontario government responds to an emergency brought on by terrorism. Cabinet may make orders under the legislation to prohibit travel, evacuate individuals or property from a specified area or close any building including businesses, schools and hospitals.⁶² It may also authorize a person to provide services that he or she is qualified to provide. In such a case, the *EMCPA* states that a person's employment shall not be terminated because of the provision of these services.⁶³

Penalties for contravening the *EMCPA* are steep. Failing to comply with an order, or interfering with or obstructing an order, can result in a fine for an individual to a maximum of \$100,000 and up to one year in prison. For a director or officer of a corporation, the maximum fine is \$500,000. A corporation itself may be liable up to an amount of \$10,000,000.⁶⁴

Federally, the provisions relating to the making of orders under the *EMA* are very broad. Federal Cabinet may generally allocate civil resources and funds to be brought to bear in an emergency,⁶⁵ so it should be expected that federal directives would come in a variety of forms.

(ii) Human Rights Concerns

It is trite to say that the effects of the September 11, 2001 attacks in the United States are still being felt within workplaces and throughout society on the whole. The fallout from these events created tensions with respect to Islamic individuals and those who may trace their ethnic origin to the Middle East region.

As discussed above, both the *Ontario Human Rights Code* and the *Canadian Human Rights Act* prohibit discrimination and harassment in the workplace. Ethnic origin, place of origin, colour, citizenship and creed are all listed as prohibited grounds of discrimination.

In the immediacy of a terrorist act, employers will want to ensure that they are fulfilling their legal and moral obligations to see that employees are evacuated safely and that any possible threats are promptly investigated and referred to the appropriate authorities. However, employers must also ensure that notwithstanding a terrorist attack, a climate of tolerance free from discrimination and harassment is established in the workplace and continues to exist on an ongoing basis.

(D) PROACTIVE PLANNING

EMERGENCY COMMITTEE

All companies are well advised to assemble an emergency committee. This group of staff should complement the size of the company's workforce and be comprised of a full spectrum of the company's employees from management on down. It may be thought that implementing a committee of this nature in advance will be too burdensome for an organization. However, if the size and scope of the committee is properly matched to the resources of the company, the benefits will outweigh the costs if and when emergency strikes.

⁶² *EMCPA*, s. 7.0.2(4)

⁶³ *Ibid.*, s. 7.0.2(6)

⁶⁴ *Ibid.*, s. 7.0.11(1)

⁶⁵ *EMA*, s.7

The emergency committee should put into place a structure for determining decision-making authority in a crisis, and this structure should be made known to all employees. As part of the structure, an individual or group of persons should be vested with the authority to declare that an organization move into “emergency” mode.

The committee should also establish a communication pyramid. All employees must know to whom they will report in an emergency, who will be responsible for reporting to them, and on what basis. The committee should also be responsible for compiling a list of employee skills in order to determine who will be able to fill jobs or roles that are left vacant as a result of absences. Pairing employees together under a type of “buddy” system whereby partners are able to assume each other’s responsibilities in an emergency will likely be effective.

An additional responsibility of the emergency committee should be to monitor local and worldwide news in order to be able to respond to challenges when they are first identified. Even if information is learned the morning of a crisis, this can provide several hours of leeway which may avoid the added confusion of delivering news in the middle of a busy work day. On a local level, this monitoring function may be as simple as checking weather forecasts.

COMMUNICATION PLAN

Following from the communication pyramid, a comprehensive plan should establish what forms of contact will be the most effective for the company to use in an emergency. Telephone conversations may be the easiest for person-to-person communication, although email will have the advantage of creating a textual record of correspondence. It will also be possible to include more people on correspondence with electronic communications. The only drawback with email may be that messages will quickly build up for those near the top of the communication pyramid. A system to reduce unnecessary email or copying may be desirable. Finally, thought should be given to possible communication mechanisms in the event of a widespread communications failure arising from things like power outages.

In any event, a master list of key contact information for all employees should be summarized in a form that can be distributed to every employee prior to an emergency, and also accessed by employees during an emergency. Employees should be able to contact each other without ever having to come to their place of work. Persons with the appropriate authority should also maintain a list of passwords for each individual within an organization in case it becomes necessary to access a person’s voicemail or computer programs. A list of medical needs for company personnel should also be kept on file if an organization does not have a roster of medical staff.

Employers must remember that privacy legislation will continue to apply during an emergency in certain situations. The personal information of employees should be kept in a secure location where privacy and confidentiality may be preserved. In addition, as the decision of whether to disclose medical information can be difficult when attempting to balance issues of privacy against health and safety concerns, employers should attempt to plan certain scenarios in advance in order to determine the appropriate scope of disclosure in given circumstances.

TECHNOLOGY PLAN

One of the simplest ways for a company to maintain operations in an emergency will be to enable employees to work from home. Using technology that is currently available for businesses, it would be possible for employees to use their personal computers to log on to the company’s server remotely and to simulate their office computer environment at home.

The costs of implementing such a policy would not have to be allocated only to emergency preparedness. The ability to work from home may be desirable for employees who seek greater flexibility in accommodating other commitments in their lives. As an alternative way to achieve the same objective, employers may want to

consider entering into contracts with IT service providers to set up essential employees at an off-site location in an emergency if working from home would not be possible.

As part of a company's technology or communication plan, a system should be devised to answer incoming calls during emergencies. Calls from clients as well as from employees should be addressed, the latter by way of an employee hotline if available. A company intranet or secure portal may also be useful in conveying information.

ANTICIPATING EMERGENCY LEGISLATION

In a serious emergency, it can be anticipated that governments will enact further legislation to deal with the crisis. It may be helpful for employers to examine what has been done in the past in this regard in order to be prepared for similar legislation in the context of a future emergency.

During the SARS crisis, the government of Ontario enacted the *SARS Assistance and Recovery Strategy Act, 2003* (the *SARS Act*).⁶⁶ This was a piece of emergency legislation which took retroactive effect from March 26, 2003, the day on which the SARS emergency was declared, and applied to leave taken between that date and May 5, 2003.

The *SARS Act* prescribed a form of unpaid job-protected emergency leave which was in addition to the emergency leave outlined in section 50 of the *ESA*. The coverage under the *SARS Act* was intended to include all relationships similar to that of traditional employment. In expanding the scope of "employment" to include independent contracting, the *SARS Act* intended to afford protection to as wide a category of workers as possible.

Upon return from leave under the *SARS Act*, employees were entitled to resume the same position they had prior to the leave, or to assume a comparable position. They could not receive any lower pay. Employers were provided with a right to downsize their operations only if it could be demonstrated that the SARS crisis impacted negatively on their business.

(E) REACTIVE APPROACHES

The first line of defence in any emergency should be for a workplace to implement the plans they have diligently prepared prior to an actual crisis. Going beyond proactive steps, to the extent that an emergency is health-related, it may be possible for employers to set up clean worksites in order to isolate employees.⁶⁷ This may more appropriately apply for laboratories or for work that constitutes some form of essential service. If a clean worksite is established, precautions should be taken to ensure that employees stationed at the site do not mingle with other staff on breaks or when traveling to and from work.

It may also be a good idea to keep records of where employees have traveled, with whom they have had contact, and to take steps such as requiring that employees provide fitness certificates from medical professionals where appropriate. It would be possible for an employer to take steps to limit the freedom of employees to circulate during their lunch breaks if certain locations are known to be health risks, although this would be possible only if employees receive pay during their lunch breaks. For unionized work environments, the collective agreement should be consulted before an employer initiates this type of response to a crisis.

REPLACEMENT WORKERS

The use of substitute staff will always be of concern to employees, particularly in unionized workplaces. There have been legislative movements in recent years to ban the use of replacement workers under the *Canada Labour Code*.⁶⁸

⁶⁶ S.O. 2003, c.1

⁶⁷ Employers may consider placing a clean worksite provision into their employment contracts if the nature of the work performed by their staff warrants this consideration. If such a provision is introduced, notice should be given to employees. In unionized environments, employers should be particularly careful when imposing rules of this nature and should be prepared to justify these rules by pointing to a legitimate business interest.

⁶⁸ R.S.C. 1985, c. L-2

Currently, there exist some restrictions on the use of replacement workers to undermine trade unions in the federal sphere,⁶⁹ although these are not expected to have application in an emergency. Similar provisions under the *OLRA* are also not expected to apply in an emergency setting.⁷⁰ Employers in unionized workplaces should nevertheless be wary of using replacement workers, as collective agreements may address this issue.

For non-unionized work environments, employers may be more free to utilize substitute workers or temporary assistance suppliers. However, the rights of employees who are absent due to an emergency as outlined in this paper will continue to apply when affected employees return to the workplace. If an employer wishes to hire a substitute employee in a work refusal situation, the new employee must be made aware of the work refusal and the reasons given for the refusal.

69 *Ibid.*, s. 94(2.1)

70 See *OLRA*, s. 78

APPENDIX: EMERGENCY MANAGEMENT RESOURCES

As a result of the SARS crisis, several organizations have posted details on their websites regarding the responsibilities of the varying levels of government as well as information for individuals and businesses on how to be prepared for emergency situations. Some of the best of these online resources include the following websites:

- www.halton.ca/services/EmergencyServices/EmergMgmt.htm
- www.waterlooregionpandemic.ca
- www.region.peel.on.ca/health/bcp

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