

Frequently asked questions regarding physicians' office staff during the COVID-19 pandemic

On March 11, 2020, the World Health Organization declared the COVID-19 outbreak a pandemic.

On March 22, 2020, Nova Scotia declared a State of Emergency under the *Emergency Management Act*, and the Chief Medical Officer of Health made an Order under the *Health Protection Act*, prohibiting social gatherings of more than five people and establishing requirements for non-essential workplaces and businesses, among other things.

Government and public health officials are providing frequent updates, recommendations, directives, and orders. **The Chief Medical Officer of Health's Order has been amended multiple times since first issued, most recently on June 26, 2020.**¹ The information provided below was written on **March 23, 2020 and updated on June 29, 2020.** We will aim to update and add information as we receive new questions from physicians and as the situation in Nova Scotia changes.

So far, Doctors Nova Scotia has received several questions from physicians regarding their office staff. For physicians whose offices are staffed by employees of the NSHA, employment decisions will most likely be made by the NSHA as employer, and governed by any applicable collective agreement.

For physicians who employ their own staff, the *Labour Standards Code* will apply, as well as the terms and conditions of any employment contract. In these cases, the following answers to frequently asked questions may be of assistance. The following information is not legal advice, and answers may change depending on the facts of each individual case. This information is provided by the labour and employment lawyers at Pink Larkin. Doctors Nova Scotia recommends that individual physicians contact Pink Larkin or their own legal counsel for legal advice regarding employment matters.

What if my employee just returned from out of province?

- All people in Nova Scotia who have travelled outside of Canada are required to self-isolate for 14 days upon return. As of March 23, 2020, people who have travelled outside of Nova Scotia are also required to self-isolate for 14 days upon return. **However, the Province announced on June 24 that interprovincial travel within Nova Scotia, New Brunswick, Prince Edward Island, and Newfoundland and Labrador, without the requirement to self-isolate for Atlantic Canadian residents, will be permitted beginning July 3 (referred to as the "Atlantic Travel Bubble").**
- Exemptions to the requirement of self-isolation following interprovincial travel will be made for "healthy people going to work (e.g. health-care workers)".² However, under the Order, this exemption does not appear to apply to physicians' office staff.
- If you have an employee who has travelled outside of the province **before July 3, or who has travelled outside of the Atlantic Travel Bubble on or after July 3**, they must self-isolate at home for 14 days following their return. If they feel unwell and have paid sick leave available to them under their employment contract, they should use it. If they are not sick, they would

¹ <https://novascotia.ca/coronavirus/docs/health-protection-act-order-by-the-medical-officer-of-health.pdf>

² <https://novascotia.ca/news/release/?id=20200322001>

not technically be able to use paid sick leave, but could choose to use other available paid leave.

- Unless an individual employee's employment contract provides otherwise, you are not required to pay employees during the time they are self-isolating.

Can an employee in self-isolation come to the office to retrieve personal items?

- If an employee is in self-isolation, they should not come to the workplace to retrieve personal items, even at times when no other person is present. You may choose to have personal items delivered to the employee's home by courier or otherwise.

Can I lay employees off?

- A "lay-off" under the *Labour Standards Code* means a temporary or indefinite termination/suspension of employment due to lack of work.
- The *Code* states that, absent just cause such as wilful misconduct, disobedience, or neglect of duty, employers must give a period of notice, or pay in lieu thereof, to an employee who has been employed for three months or more and is terminated or laid off. The notice period depends on an employee's period of employment. Employees of 10 years or more cannot be terminated or suspended without just cause.
- However, under s. 72(3)(d) of the *Code*, notice or pay in lieu thereof is not owed, and just cause protection for employees of 10 years or more does not apply, where an employee is discharged or laid off "for any reason beyond the control of the employer ... if the employer has exercised due diligence to foresee and avoid the cause of discharge or layoff". It is likely that the COVID-19 pandemic would constitute such a reason.
- In this case, unless an individual employee's employment contract provides otherwise, you may terminate or lay off an employee without providing notice or pay in lieu thereof, provided the true reason for termination or lay-off relates to lack of work due to COVID-19 and not some other reason.
- If an employee who has been laid off sues for wrongful dismissal or files a Labour Standards complaint, you should seek legal advice.

Can I reduce employees' hours?

- The *Labour Standards Code* does not prohibit an employer from reducing an employee's hours (and reducing the employee's pay accordingly). However, if an employer makes a fundamental change to a term or condition of employment, an employee can quit and attempt to sue for constructive dismissal. Alternatively, an employee may be able to make a claim for constructive dismissal under the *Code*.
- If under an employee's written or oral contract they are to be paid a certain amount to work a certain number of hours, and their hours are reduced, the employee could claim breach of contract.

- If an employee sues or files a Labour Standards complaint regarding a change made to their employment, you should seek legal advice.

Can I put employees on vacation?

- Where an employee is owed vacation under the *Labour Standards Code*, the *Code* provides that an employer shall notify the employee of the date the employee's vacation begins at least one week in advance of the vacation.
- This means that, unless an individual employee's employment contract provides otherwise, you must give an employee at least one week's notice before putting them on vacation.

Can I require employees to use any available paid leave under their employment contract?

- This will depend on the terms and conditions of an individual employee's employment contract. However, if an employee has banked overtime or accrued vacation, they may prefer to choose to take that paid leave rather than be laid off.

Do I need to maintain an employee's benefits if they have been laid off or terminated?

- This will depend on the terms and conditions of an individual employee's employment contract and benefit plan. However, most benefit plans are contingent upon continued employment. In such case, if an employee is laid off or terminated, they would not be entitled to benefits.

What other benefits can employees access if I lay them off or terminate their employment, or if they otherwise can't work due to the COVID-19 pandemic?

- **Previously, employees may have been able to apply for Employment Insurance ("EI") benefits, EI sickness benefits, the Emergency Support Benefit, or the Emergency Care Benefit.³**
- EI sickness benefits provide up to 15 weeks of income replacement. They are available to eligible claimants who cannot work due to illness, injury or quarantine.
- The Emergency Care Benefit **provided** up to 15 weeks of income support to workers who do not have paid sick leave or similar workplace accommodations and who are quarantined or sick with COVID-19 but do not qualify for EI sickness benefits, workers who are taking care of a family member who is sick with COVID-19, and workers who are parents with children who require care or supervisions due to school closures, and who are unable to earn employment income as a result.

³ <https://www.canada.ca/en/employment-social-development/corporate/notices/coronavirus.html>

- The Emergency Support Benefit **provided** financial support to workers who are not eligible for EI and are facing unemployment.
- **On April 1, the government announced that, as of April 6, workers could apply for the Canada Emergency Response Benefit (CERB) under the *Canada Emergency Response Benefit Act*. The CERB replaced the Emergency Care Benefit and the Emergency Support Benefit. On April 15, the government made Regulations to the *CERB Act* to the effect that CERB recipients who receive income over \$1,000 in respect of the consecutive days on which they have ceased working will no longer be eligible for the CERB, and must repay CERB amounts received.**
- **Also on April 15, the government amended the *Employment Insurance Act* retroactive to March 15, to the effect that employees who qualify for EI regular or sickness benefits from March 15 onward will instead receive the EI Emergency Response Benefit (EI ERB). On April 29, the government again amended the *EI Act* to the effect that EI ERB claimants who receive income over \$1,000 over a period of four successive (but not necessarily consecutive) weeks in respect of which the EI ERB is paid will no longer be eligible for the EI ERB, and must repay EI ERB amounts received.**

Can I top up employees' Employment Insurance?

- You can top up employees' EI **regular or sickness** benefits during a period of unemployment, including due to a temporary stoppage of work, illness, and/or quarantine, by establishing a Supplemental Unemployment Benefit Plan (SUBP). A SUBP must meet the requirements set out in the *Employment Insurance Regulations*,⁴ and be registered with Service Canada **and the Canada Revenue Agency** so that amounts paid to an employee as top-up are not considered income, and so will not result in a reduction of the employees' EI benefits. **Employees who became eligible for EI regular or sickness benefits before March 15 can have their EI benefits topped up via a SUBP.**
- **Employees who became eligible for EI regular or sickness benefits on or after March 15 will instead receive the CERB or EI ERB. Employers cannot use a SUBP to top up employees in receipt of the CERB or EI ERB. Any amount received by an employee in receipt of the CERB or EI ERB from an employer would be considered income, and, if over \$1,000, could render the employee ineligible for the CERB or EI ERB and liable for repayment.**

Can an employee refuse to work?

- The *Occupational Health and Safety Act (OHS Act)* entitles employees to refuse work if they have "reasonable grounds for believing that the act is likely to endanger the employee's health or safety or the health or safety of any other person."
- Whether an employee has reasonable grounds for believing work is likely to endanger their health or safety, or the health or safety of any other person, will depend on their particular circumstances, including but not limited to:

⁴ <https://laws-lois.justice.gc.ca/eng/regulations/sor-96-332/index.html>

- whether there have been any suspected or confirmed cases of the virus at the workplace;
 - whether anyone in the workplace has travelled **outside of the province (before July 3), or outside of the Atlantic Travel Bubble (on or after July 3)**, within the previous 14 days;
 - the employee's age;
 - whether the employee has any underlying health conditions that makes them more vulnerable;
 - whether the employee is pregnant or breastfeeding or lives with someone who is;
 - whether the employer has provided equipment, including personal protective equipment, and implemented policies to protect the employee; and
 - whether the employee cares for someone who is particularly vulnerable due to, for example, age or underlying health conditions.
- A general fear of contracting the virus within the workplace, without further reasons, would likely be considered unreasonable. However, the situation is dynamic and likely to change.
 - Additionally, the right to refuse cannot be exercised under certain circumstances, notably:
 - (1) where the refusal places the life, health or safety of another person in danger; or
 - (2) where the danger is inherent to the employee's work.
 - The *OHSA* provides a procedure whereby employees can exercise their right to refuse work. The process can be summarized as follows:
 - (1) The employee must immediately notify their supervisor or employer of the reason for their refusal.
 - (2) If the matter is not resolved to the employee's satisfaction, the employee must then report it to their worker health and safety representative.
 - (3) If the matter is not remedied to the employee's satisfaction, the employee must then report to the Occupational Health and Safety Division of the Department of Labour and Advanced Education.
 - Employers have the right to reassign employees to other work during a period of work refusal. Employees cannot continue a work refusal if their worker health and safety representative decides the employee should return to work.

Do I need to provide extra protection for employees related to COVID-19?

- The Province stated in a March news release that workspaces must be cleaned and disinfected at a minimum of twice daily or as required, and employees must follow proper hygiene practices.

- The Order in effect under the *Health Protection Act* requires that any workplace or business that is not deemed **exempt** may remain open if a two-metre or six-foot physical distance can be maintained between people. **If that is not possible, the Order currently requires that the number of customers or clients on the premises must be limited to no more than 10 people at a time (the limit was previously 5).**
- **The Order previously stated that physicians who are "independent practitioners engaged in community practice" are "deemed necessary to provide essential services", and therefore are not required to observe the person limit rule or physical distancing requirement. However, this provision does not appear in the current version of the Order.**
- **The Order currently provides that, effective June 5, 2020, all self-regulated health professionals may provide in-person care services if they have adopted a compliance plan in accordance with the directions established by their governing college and approved by the Chief Medical Officer of Health, and states that self-regulated health professionals must comply with the person limit rule and physical distancing requirement.**
- **The Order states that developing and complying with a Workplace COVID-19 Prevention Plan is a requirement of ongoing operations. In addition to the physical distancing requirements and person limit rule, the Workplace COVID-19 Prevention Plan must address:**
 - (i) how to work and interact with customers;**
 - (ii) physical distancing in the workplace;**
 - (iii) cleaning;**
 - (iv) equipment;**
 - (v) preparing employees to return to work;**
 - (vi) preparing for customers or clients; and**
 - (vii) monitoring and communicating of plan.**
- **A Workplace COVID-19 Prevention Plan may be substantially similar to proposals listed in Schedule "B" to the Order.⁵ All health professionals who are members of an association or regulatory body listed in Schedule "B" may adopt as their Workplace COVID-19 Prevention Plan the proposal submitted by their association or regulatory body. At this time, there is no proposal listed for the College of Physicians & Surgeons of Nova Scotia.**

⁵ <https://novascotia.ca/coronavirus/docs/health-protection-act-order-by-the-medical-officer-of-health.pdf>

