



WATERSHED LAW
PROFESSIONAL CORPORATION

LABOUR RELATIONS AND EMPLOYMENT SOLUTIONS

Bringing Employees Back to Work

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Agenda

- 1. How do I get my employees back to work?**
- 2. What happens if they don't come back?**
- 3. How do I manage health and safety concerns related to the virus**
- 4. How do I deal with potential Human Rights issues?**





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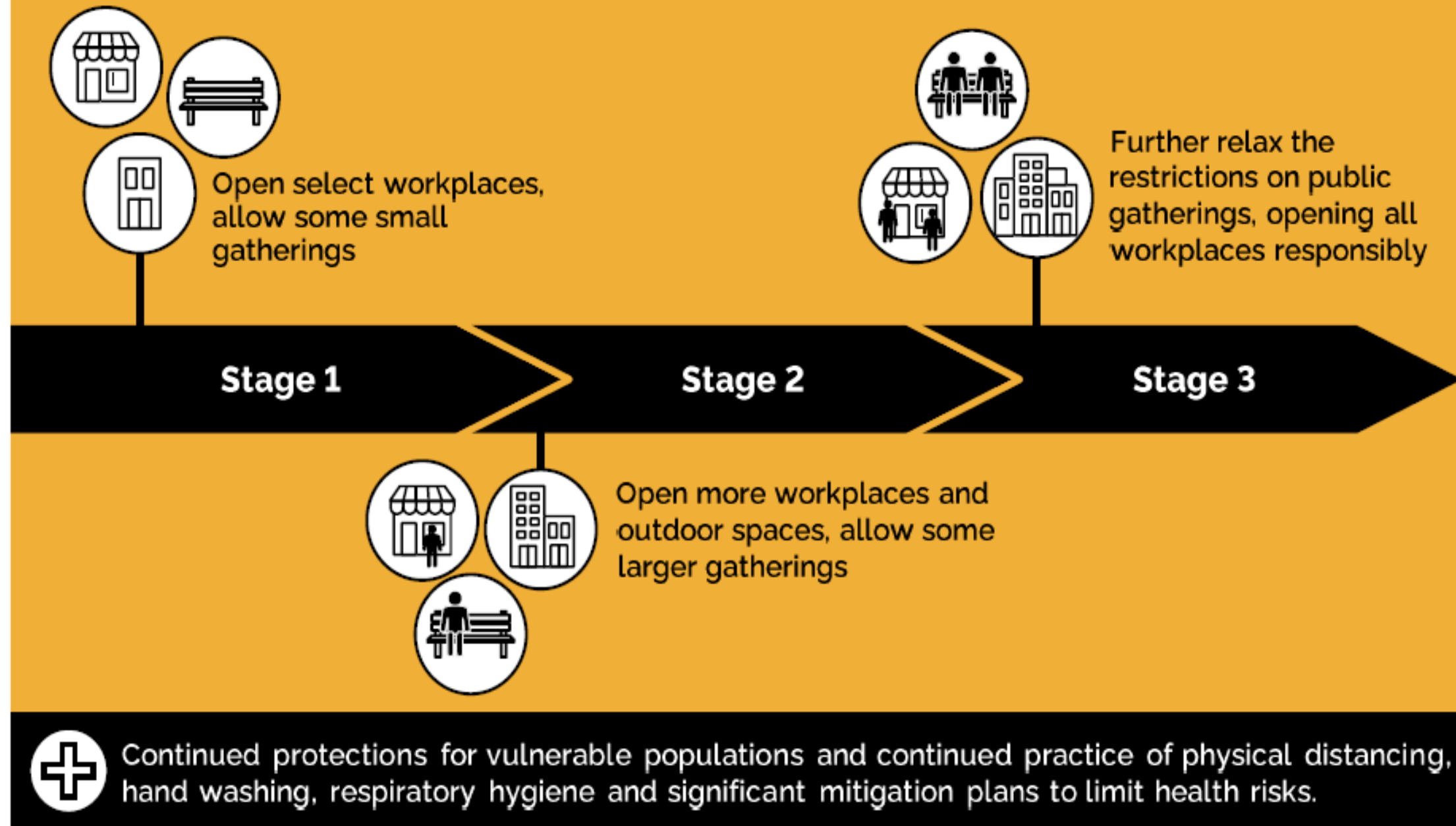
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How do I get my employees back to work?

A Framework for Reopening our Province



Ontario will gradually reopen all workplaces and public spaces.



Certain Businesses Allowed to Reopen as of May 4

- Provided they comply with strict public health measures and operate safely during the COVID 19 outbreak
 - Garden centres and nurseries
 - Lawn care and landscaping
 - Additional essential construction
 - Golf courses and marinas to prepare for upcoming season
 - Automatic and self serve car washes
 - Auto dealerships, by appointment only
 - Hardware and safety supply stores (May 9)
 - Retail stores with a street entrance (May 11)



Recalling Union Employees

- Review your collective agreement to properly follow the rules and procedures involved in your recall process.
- This is also a good opportunity for good labour relations.
 - Use the recall notice to explain the Company's updated safety policies or measures taken to address the risk of COVID-19



Recalling Non-Union Employees

- There is typically no pre-set plan on how to return non-union employees to the workplace
- Communication is essential
 - Send your employees a written notice of recall stating what is expected when they return to the workplace.
 - Share with your employees the measures you have taken to ensure that they are returning to safe employment



Considerations When Recalling Non-Union Employees

- Identify essential business functions and essential employees
- Document your recall plan
- Consider using a “phased ramp-up” and returning employees to work in phases
- Use non-discriminatory criteria
- Consider how much advance notice to provide for recall
- Will you request written acknowledgement of the employee’s intent to return to the workplace?
- Will you provide a deadline for when an employee must return to work, or risk abandoning their jobs

Other Considerations with Re-calling Non-Union Employees

- Proactively address safety concerns in your recall notice
- Include a reminder to end Employment Insurance or Canada Emergency Relief Benefit claim upon return to work.
- Is there any training (e.g. safety or personal protective equipment) employees need to complete before returning to work?



Infectious Disease Emergency Leave

- Established in mid-March
- Leave has no specified limit to the number of days that an employee can utilize
- Cannot require an employee to provide a medical note or certificate as evidence
 - But may require evidence reasonable under the circumstances, at a time that is reasonable under the circumstances



Infectious Disease Emergency Leave – Employee Eligibility

- An employee may be eligible for this leave if:
 - They are under medical investigation, supervision or treatment for COVID-19
 - They are following a COVID-19 related order under the Health Promotion and Protection Act
 - They are in quarantine, isolation, or subject to a control measure, and those measures were implemented by a designated third party (like a public health official)



Infectious Disease Emergency Leave – Employee Eligibility (Continued)

- An employee may be eligible for this leave if:
 - They are under direction from their employer in response to the employers concern that the employees may expose individuals in the workplace
 - They are providing care to a family member because of a matter related to COVID-19 (includes employees caring for children whose school or daycare has been closed due to COVID-19)
 - They are directly affected by travel restrictions and cannot return to Ontario



Returning from Infectious Disease Emergency Leave

- Cannot threaten, fire, penalize in any way an employee who takes or plans on taking an infectious disease emergency leave
- Infectious disease emergency leave can be taken in part in days, full days, or periods of more than one day
- An employee's obligation to return to work is triggered once the event that entitled them to leave is over.
 - Example: An employee is no longer subject to a quarantine order from Telehealth Ontario then their entitlement to leave is over and can be expected to return to work





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What happens if they don't come back?

Reasons why an employee may not come back

- They do not believe the workplace is safe
- They have quit or abandoned their employment
- They are sick and unable to return
- They are treating a change in their employment as a constructive dismissal
- They want to work from home forever



Get more information

- Consider appropriateness of reasons
- If someone “disappears” do not ignore the issue
 - Investigate/follow-up
 - Consider treating employment relationship as abandoned
- Be willing to consider decisions based on new information



Quitting vs. Abandoning

- In both cases there must be evidence that a person unequivocally indicated that they no longer intend to be bound by their employment contract
- Do the statements or actions of the employee, viewed objectively by a reasonable person, indicate an intention to no longer be bound by the employment contract?



Beliefs about safety of the workplace

- Difference between legitimate concerns and personal beliefs
- Provide information, work with the JHSC, address issues that can be addressed
- Be strategic in choosing battles
 - Do you have all the information necessary?
 - Do you really want them to come back?
 - What impact, if any, will this have on other employees?



Constructive Dismissal

- Constructive dismissals have attracted media attention amidst the pandemic
- Employees may choose to treat a change of the terms and conditions of employment as a constructive dismissal (e.g. a cut in pay or temporary layoff) as a constructive dismissal
- Generally, an employee has to protest the change in order to claim constructive dismissal
 - May do this by resigning or notifying the Employer that they do not accept the change



Employee Who Want to Work from Home Forever

- Many employees have been working from home for a long period of time – some may not want to come back
- No right to insist to work from home indefinitely
- The terms of the employment relationship (either written or implied) likely required attendance at a physical workspace





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How do I manage health and safety concerns related to the virus

Stay informed

- Both federal and provincial governments are updating information daily
- For instance, the government of Ontario released new safety guidelines on April 30, 2020 for several industries
- Keep up to date by watching the news and checking government web sites and by other trustworthy sources.



Don't forget the basics

- Normal health and safety obligations apply
- Continue standard practices
 - Work with JHSC
 - Take all reasonable steps to ensure employee safety
 - Comply with orders from the Ministry of Labour
- Employees with health and safety issues (COVID or otherwise) should raise them with their supervisor or health and safety representative



Policy Options

- Employers may want to consider creating new policies or directives to address any of the following:
 - Maintaining Social Distancing
 - Handwashing/Sanitation standards
 - Staggering of lunch/breaks
 - PPE requirements (masks)
 - Revamping policies with respect to sick leaves, medical notes, work from home etc.



Physical Changes

- We have seen many workplaces make physical changes, including,
 - Creating transparent barriers
 - Marking boundaries on floors
 - Reducing capacity of enclosed spaces
 - Checkpoints at entrances, including temperature screening
- Employers may have to rethink the layout of workspaces



Dealing with Employee Concerns

- Employees are able to contact the Ministry of Labour to report unsafe work conditions, as well as refuse to perform unsafe work
- Unionized employees will continue to have the right to grieve health and safety violations through the grievance and arbitration process



Work Refusals

- The *Occupational Health and Safety Act (OHSA)* gives a worker the right to refuse work that they believe is unsafe to themselves or another worker
- A work refusal requires an employer to investigate the cause of the issue. If a resolution can not be reached between the employee and the employer the MOL will investigate and issue a decision.



COVID-19 and Work Refusals

- On April 27, 2020 the Toronto Star published an article stating that the MOL has received over 200 work refusals since the outbreak of COVID-19, and not one of those complaints has been upheld.
- The fear of being exposed to COVID-19, absent any other factors is not enough to justify a work refusal
- Generally an employee will have to be at the workplace, performing work in order to submit a work refusal





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How do I deal with potential Human Rights issues?

Potential Human Rights Issues

- Employers may see a rise in claims under the *Human Rights Code* for several reasons:
 - Discrimination/harassment based on family status
 - Discrimination based on disability
 - Discrimination/harassment based on nationality, place of origin, race, and perceived connections to COVID-19



Family Status

- As Ontario schools and child care centres continue to be closed, employers must be prepared to engage with employees to find a reasonable accommodation without undue hardship on the employer's business
- As you prepare for re-opening, consider what accommodations you can offer to parents and caregivers who may be unable to leave their children or elder dependents alone during their scheduled work time



Family Status – Duty to Accommodate

- If an employee expressed a need for an accommodation due to child care or elder care issues or if the employer is aware of a potential family status need:
 - 1) Engage with the employee in a dialogue
 - Accommodation can be a highly individualized process
 - 2) What are the employee's job duties and how are those impacted by their family status needs?
 - 3) What are the employee's goals for the accommodation process?
 - 4) Develop an understanding of the nature of the family status relationship and the nature of the family status obligation involved?

Family Status – Duty to Accommodate

- 5) How would any potential accommodation interact with the Employee's family status needs?
- 6) Offer an appropriate accommodation, up to the point of undue hardship for the employer
- 7) As circumstances may change rapidly, keep in contact with the employee for possible adjustments to the accommodation when schools and care facilities open



Disability

- Be aware of the many ways a claim for disability discrimination may arise:
 - When recalling employees, a person's health status should not be a consideration – use objective criteria
 - When hiring new employees, a person's disability or perceived disability and/or possible susceptibility to COVID -19 should not be a consideration
 - When terminating an employee, a person's disability should not be a factor



Disability Accommodation

- Engage with the employee in the accommodation process
- Be flexible in need for medical documentation
- A temporary accommodation may be appropriate until the employee is able to be seen in person by their health care provider



Race, Ancestry, Place of Origin, Colour or Ethnic Origin

- Media reports have suggested incidents of harassment and discrimination against Asian Canadians are on the rise
- Be aware of the risks and how it may impact your workplace
- Consider reviewing your discrimination and harassment policies with your manager, supervisors and employees
- Treat all complaints seriously



Overall Human Rights Considerations

- Employees may return to the workplace in a heightened state after working from home or being laid off for several weeks
- This may result in increase friction in the workplace
- Be mindful of the potential for an increased risk of human rights based claims
- We can assist you and your management team in addressing those concerns or addressing concerning behaviour from employees early in the return to work adjustment process



Questions?

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