

APRIL 16, 2020

Due Diligence for COVID-19: Health Exposure Prevention and Response

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Companies must ensure that COVID-19 measures in the workplace are robust enough to protect the health of employees and the public and to prevent legal liability. This is equally important whether employers are meeting current regulatory requirements to protect employees or whether they are responding to regulators' special measures regarding exposure risk.

Throughout Canada, employers must take precautions to prevent exposure risk to workers. For example, Ontario's *Occupational Health and Safety Act* provides that employers have the obligation to, among other things, "take every precaution reasonable in the circumstances for the protection of a worker." Québec's *Act Respecting Occupational Health and Safety* similarly provides that all employers "must take the necessary measures to protect the health and ensure the safety and physical well-being of" their workers.

The federal *Quarantine Act* and provincial and municipal public health legislation provide regulatory order powers ranging from employee screening and facility disinfection to site closure (for more details, see our bulletins [How to Work When Nothing Is Working: Canadian Employment Law and COVID-19](#) and [COVID-19 and the Workplace in Québec: What Employers Need to Know and Do](#)).¹

Measures to meet regulatory requirements must be proportionate to the risk presented by COVID-19. A company that is charged with an offence for an alleged breach of its regulatory obligations may defend itself on the basis that its efforts to prevent exposure demonstrated due diligence. Establishing a due diligence defence requires the company to prove, on a balance of probabilities, that it took all reasonable care to prevent a breach of its obligations.

The scientific understanding of the nature of the effects of COVID-19 and their potential gravity is still evolving. Notwithstanding the current uncertainty, the significant risk posed to vulnerable populations and the high degree of transmission of COVID-19 necessitate a high degree of care in preventing exposure in order to demonstrate due diligence. In ensuring that an exposure prevention system and associated policies meet the standard of reasonable care, employers should consider the following measures:

- In planning to prevent COVID-19 exposure, take into account all operations and activities and related risk of such exposure.
- Where a company's operations could foreseeably affect vulnerable persons, consider stringent alternatives to prevent exposure and if these are not followed, demonstrate (and document) reasonable justification for not doing so.
- Implement and document rigorous staff training and managerial oversight of exposure prevention activities.
- Consider whether a means of anonymous internal incident reporting may be appropriate.
- Ensure that frequent reporting on the exposure prevention system is made to senior management.
- Although economic considerations may be considered, when sufficient resources to prevent exposure risk cannot be justified, temporarily shutting down operations may be the only reasonable alternative.
- Use the input of external experts when expertise is not available within the organization.

All management systems intended to demonstrate due diligence should reflect current best practices – the fast pace of scientific knowledge with respect to COVID-19 requires companies to regularly update procedures from reliable, industry-appropriate sources.² When exposure occurs, a company must respond promptly to prevent further risk, with a high degree of decisiveness and care.

Regulatory enforcement with respect to COVID-19 exposure is expected to increase over the short term, as government policies and standards have now been in place for sufficient time to provide notice to organizations. Prevention programs should be fully operational now, and employers should undertake frequent reviews to confirm and improve implementation.

¹In addition, the federal *Criminal Code* imposes criminal liability on employers that do not take reasonable steps to protect the safety of workers and the public.

²The Canadian Centre for Occupational Health and Safety has provided industry-specific tip sheets: <https://www.ccohs.ca/products/publications/covid19/>

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