

An aerial, high-angle photograph of a large group of people standing on a paved surface. The ground is marked with a grid of thin yellow lines forming a pattern of squares. Overlaid on this grid are several large, semi-transparent yellow circles of varying sizes. The people are scattered across the scene, some standing alone, some in small groups, and some sitting on the ground. The overall color palette is warm, dominated by the yellow of the grid and circles, and the brownish tones of the pavement and people's clothing. The lighting is bright, casting distinct shadows from the people onto the ground.

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Employment and Labour trends for 2021 — getting back to normal

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DENTONS WEBINAR SERIES
COVID-19 - LEGAL UPDATE
FOR CANADIAN EMPLOYERS

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Update on lockdown measures from coast to coast

Claire Browne, Associate, Toronto

Overview – Status of lockdowns in each Canadian jurisdiction

- **BC, AB, SK, NS:** province-wide restrictions in effect
- **MB:** Provincial response level – Critical (Red)
- **ON:** Declaration of emergency and additional restrictions in effect
- **QC:** Maximum (Red Zone) alert level in effect (including curfew)
- **NB:** Red public health alert level in Moncton, Saint John, Fredericton and Edmundston regions
- **PEI:** post circuit holiday measures in effect
- **NL:** Level 2 of COVID-19 Alert Level System
- **YUK:** Phase 3 of COVID-19 Path Forward plan
- **NWT, NUN:** additional regional restrictions in effect

BC – Province-wide restrictions in effect

- Social gatherings of **any size** at one's private residence are **prohibited**
- All in-person events and community based gatherings identified in PHO order are suspended
- Businesses and organizations required to **suspend** their activities:
 - Religious in-person gatherings and worship services
 - Businesses, recreation centres and organizations that operate high intensity indoor group physical activities
 - All indoor and outdoor sports for people over 19 years of age
- Businesses and organizations **permitted to operate** subject to certain restrictions:
 - Restaurants, pubs and bars
 - Venues that organize or operate low intensity indoor group physical activities
 - Gyms and recreational facilities that offer individual workouts and personal training sessions
 - All organized indoor and outdoor sports for people under 19 years of age

AB – Province-wide restrictions in effect

- All **indoor social gatherings**, public and private, are **prohibited**
- Outdoor social gatherings are limited to a maximum of 10 people (indoor component – prohibited)
- Working from home is **mandatory** unless employer requires physical presence for operational effectiveness
- Businesses required to **reduce capacity or limit** in-person access:
 - Retail services (reduce capacity to 15% of fire code occupancy)
 - Regulated health services and professional services (by appointment only)
- Businesses required to **close**:
 - All restaurants, pubs, bars, lounges and cafes (in-person service)
 - Entertainment businesses including casinos, art galleries, libraries, museums, movie theatres
 - Indoor recreational facilities
 - Indoor group performance and physical activities

SK – Province-wide restrictions in effect

- **Indoor private** gatherings are limited to immediate household members only
- All **indoor public** gatherings are prohibited
- Private and public **outdoor gatherings** are limited to up to 10 people
- Businesses are required to operate in accordance with:
 - Critical public services and allowable businesses list
 - All public health orders
- Businesses serving food, beverages and liquor are subject to additional restrictions
- Retail services **permitted to operate** must reduce capacity to 50%
- Large retail locations **permitted to operate** must limit capacity to 25%
- All casinos, bingo halls and gaming centres are required to close
- All sports, activities or competitions involving more than one individual are suspended

MB – Provincial response level – Critical (Red)

- **Private gatherings** of individuals from outside one's household are prohibited
- Indoor or outdoor **public gatherings** are limited to up to 5 people for a specific purpose
- Retail businesses are only permitted to sell **essential items**
- Businesses required to **close**:
 - Personal service businesses (hair salons, barbers, sites offering esthetic services)
 - Religious and cultural gatherings (for in-person services)
 - Restaurants (for in-person services)
 - Gyms, fitness centres, recreational activities, sports facilities
 - Casinos, museums, galleries, libraries, movie theatres and concert halls
- Effective January 23, 2020, certain restrictions will be loosened in the Winnipeg (except Churchill), Southern Health-Santé Sud, Interlake-Eastern and Prairie Mountain Health regions

ON – Declaration of emergency and stay-at-home order

- Indoor organized private or public events and social gatherings are prohibited
- Outdoor organized public events and social gatherings are limited to up to 5 people
- **Stay-at-home order** is in effect for all of the province of Ontario
 - Individuals are required to stay at home at all times unless leaving for necessities
 - Businesses are required to ensure all employees work from home (subject to certain exceptions)
- Businesses engaged in **retail** may operate by curbside pickup and delivery where:
 - Item is ordered prior to arriving at the business for pickup or delivery
 - During the hours of 7:00 am – 8:00 pm
- **Capacity limits** for grocery stores, convenience stores, pharmacies, discount and big box retailers
- **Capacity and hours of operation restrictions** for stores that sell liquor, safety supply stores, optical stores and businesses that sell motorized vehicles
- New **mask or face covering requirements** in effect

QC – Maximum (Red Zone) alert level in effect

- Indoor and outdoor **private gatherings** are prohibited (subject to certain exceptions)
- Activities organized in **public** spaces are prohibited (subject to certain exceptions)
- Telework is **mandatory** for all office workers in all regions (subject to certain exceptions)
- **Curfew** prohibits Quebecers from leaving their homes from 8:00 pm to 5:00 am
 - Pharmacies and service stations permitted to remain open during curfew (with restrictions)
- All **commercial enterprises** are required to close by no later than 7:30 pm
- Businesses required to **close**:
 - Non-priority commercial enterprises
 - Restaurants (in-person services), bars, brasseries, taverns and casinos
 - Auditoriums, cinemas, theatres and museums
 - Personal and beauty care services, including spas and saunas (with certain exceptions)
- Private professional and health services are **permitted to operate** only for services requiring an in-person presence

NB – Regional restrictions in effect

- In New Brunswick, the Moncton, Saint John, Fredericton and Edmundston regions are currently classified as in the **Red** public health alert level
- The remainder of the province is classified as in the **Orange** public health alert level
- Restrictions in the Red public health alert level include:
 - Outdoor gatherings are limited to up to 5 people
 - Businesses required to **close**:
 - Personal services such as barbers, hair stylists and spas
 - Gym and fitness facilities
 - Public spaces such as casinos, amusement centres, bingo halls, arcades and cinemas
 - Food and beverage establishments (reduced to drive-thru, take-out and delivery)
- All other businesses and public services, including retail, may operate under a **COVID-19 operational plan**
- Mandatory masking requirements

NS – Province-wide restrictions in effect

- Households are permitted to have gatherings of up to **10 people**
- Individuals may form a close **social group** of up to 10 people without social distancing
- Businesses permitted to operate subject to certain restrictions:
 - Art Gallery of Nova Scotia, museums and libraries
 - Casino Nova Scotia (Halifax and Sydney) and video lottery terminals
- Restaurants and liquor licensed establishments are permitted to serve customers until 10:00 pm subject to certain restrictions
 - Required to close by 11:00 pm
- Retail stores and shopping malls are required to follow the **Health Protection Act Order**
- Fitness establishments are permitted to operate subject to certain restrictions

PEI - Post circuit holiday measures in effect

- Personal gatherings of one's household and up to **10 additional individuals** are permitted indoors or outdoors
- Organized gatherings of up to **50 people** are permitted for activities including:
 - Concerts, worship services, bingo halls and movie theatres
 - Weddings and funerals
- Businesses **permitted to operate** with certain restrictions:
 - Gym, fitness facilities, museums and libraries (including 50% capacity)
 - Organized recreation and sports teams
 - Retail stores, markets and craft fairs (including 50% capacity)
 - In-person consumption of food and beverage at food premises and licensed facilities
 - Personal services (including on an appointment only basis)

NL - Level 2 of COVID-19 Alert Level System

- Distanced gatherings run by a **recognized business or organization** are permitted for up to **100** people
- Distanced gatherings **not** run by a **recognized business or organization** are permitted for up to **20** people
- Business permitted to open with restrictions:
 - Places of worship
 - Gyms, fitness facilities, arenas, indoor pools
 - Bars, lounges, indoor entertainment facilities, performance spaces (with reduced occupancy)

YK - Phase 3 of COVID-19 Path Forward plan

- Social gatherings are limited to up to **10** people **indoors** (subject to certain restrictions)
- Social gatherings are limited to up to **50** people **outdoors** (subject to certain restrictions)
- Indoor, planned seated events are permitted for up to 50 people (physical distancing)
- Outdoor, planned seated events are permitted for up to 100 people (physical distancing)
- Businesses **permitted to operate** subject to certain restrictions:
 - Restaurants can provide dine-in services at full capacity with physical distancing
 - Bars, pubs and lounges with capacity restrictions and an operational plan in place
 - Retail services where there is an operational plan in place
 - Faith-based services with capacity restrictions
 - Fitness studios with public health measures in place
 - Personal services and allied health professional services with operational plans in place

NWT – Additional regional restrictions in effect

- Households may have up to a **maximum of 5 additional persons** visit at any given time
- Organized indoor events are permitted for up to 25 people
- Organized outdoor public events are permitted for up to 50 people
- Businesses **permitted to operate** subject to certain restrictions:
 - Indoor sports and day programming (up to 25 people)
 - Outdoor tourism operators (up to 50 people)
 - Movie theatres (with reduced seating)
 - Dine-in restaurants and bars (with limited capacity)
 - Gyms
 - Personal service establishments
 - Indoor faith-based and spiritual gatherings
- Additional temporary COVID-19 restrictions in effect in Fort Liard

NUN – Regional restrictions in effect

In the **Baffin, Kitikmeot, Chesterfield Inlet, Baker Lake, Coral Harbour, Nauyasat and Rankin Inlet** regions:

- Indoor organized public gatherings are permitted for to up to 15 additional people
- Outdoor organized public gatherings are limited to up to 100 people
- Businesses **permitted to open** with restrictions:
 - Food service and licensed establishments
 - Businesses and organizations
 - Gathering community halls and conference spaces
 - Personal service providers
 - Theatres, libraries, public swimming pools, recreation centres, gyms, galleries, arenas, places of worship
 - Public playgrounds, municipal parks, territorial parks, reserves (buildings required to remain closed)

In the **Arviat and Whale Cove** regions:

- Indoor organized public gatherings are limited to up to 15 additional people
- Outdoor organized public gatherings are limited to up to 100 people
- Grocery stores, pharmacies, service stations and banks are permitted to operate
- Businesses **required to close**:
 - Food service and licensed establishments (in-person service)
 - All non-essential businesses
 - Recreation centres, gyms, theatres, libraries, galleries, museums, place of worship
 - Personal service providers
 - Public playgrounds, municipal parks, territorial parks

Terminations during the pandemic

Will there be an increase to notice periods?

Allison Buchanan, Associate, Toronto

Can you dismiss an employee during the pandemic?

- Factors to consider
 - Age
 - Length of service
 - Character of employment
 - Availability of comparable work in the marketplace
 - Human Rights and Job Protected Leaves of Absence

Will COVID-19 be a factor to be considered?

- *George v Laurentian Bank Securities Inc*, 2020 ONSC 5415
 - 58 year old Vice President Equity Trading, employed for 5 months and awarded 2 months reasonable notice.
- *Rothenberg v Rogers Media Inc.*, 2020 ONSC 5853
 - 73 year old broadcaster, employed for almost 20 years and awarded 21 months of reasonable notice.
- *Hunsley v. Canadian Energy Services LP*, 2020 CarswellAlta 2624
 - “The amount of reasonable notice must be determined based on circumstances at the time of dismissal, not subsequent events or length of actual unemployment.”

Is the economic hardship of the employer a factor?

- The Ontario Court of Appeal says “no” in *Michela v St. Thomas of Villanova Catholic School*, 2015 ONCA 801.
 - “It is important to emphasize, then, that an employer’s poor economic circumstances do not justify a reduction of the notice period to which an employee is otherwise entitled...”
- However, other jurisdictions have indicated it remains a relevant factor.
 - *Freeman v PetroFrontier Corporation*, 2017 ABQB 340: “the state of the economy may in any given case militate either for or against an extended notice period. In some cases, it may indeed be unrealistic (and unfair) to burden an employer with the same notice period in a depressed economy as it would be in a time of prosperity.”

Virtual investigations

Best practices for conducting workplace investigations
in a virtual world

Eleni Kassaris, Partner, Vancouver

Employer's legal obligations remain the same

- While the pandemic has changed how we view work and the workplace, the laws relating to the obligations that employers owe their employees have remained the same
 - 1) Obligation to ensure a safe workplace
 - 2) Obligation to train workers regularly on appropriate workplace conduct
 - 3) Duty to investigate certain workplace complaints relating to safety, bullying and harassment, etc.
- **What has changed is *how* investigations are conducted**
 - Employers must adapt their investigative procedures to address COVID-19 safety concerns
 - Importance of continuing to conduct investigations, virtually or otherwise, without delay

COVID-19-Safe workplace investigations

- **Virtual interviews**

- Various videoconferencing technologies have become popular, i.e. Zoom
- The key to conducting successful remote investigations is to **know your platform**, and to ensure that participants do as well
- Consider which circumstances accommodate phone or video interviews and which require in-person interviews

Benefits of virtual interviews

- Can often be scheduled more easily
- Witnesses feel less apprehensive with the interviewer as often in their own homes or other personal space as opposed to being summoned to a meeting room to speak with what may be a stranger
- Eliminates stress on parties to the interview to ensure compliance with COVID-19 protocols
- Sharing of electronic documents often streamlines the interview and allows questions about documents to be asked more easily than hardcopy documents being put to a witness in person

When virtual interviews don't work

- Where the documents that need to be put to the witness are too sensitive to risk a copy being made
- Where the documents are not readily available electronically and would need to be uploaded to the investigator which could delay commencing or completing an investigation in a timely manner
- Where there may be difficulty in gauging body language / other cues that speak to credibility if not able to see someone in person
- Where the subject matter is so sensitive that you cannot risk a surreptitious recording; the presence of an outsider off screen or another security breach

Know your technology: Cybersecurity concerns

- Security and privacy concerns to be addressed when using technology to ensure there is no unauthorized access to investigative data
- Consider:
 - Is end-to-end encryption available?
 - How vulnerable is the platform to hacking?
 - Are you using strong passwords and two-factor authentication?
 - Otherwise conforming to your internal IT policies?
 - Other controls to reduce security breaches (Enable waiting room; confirm that the interview is not to be recorded; confirm that no one else is communicating with the witness)

Confidentiality & privilege

- While the laws of privilege and confidentiality remain the same, privilege and confidentiality concerns should be top of mind with remote investigations
- Continue to train your workers regularly on appropriate workplace conduct, including expectations surrounding your workplace's privacy and confidentiality policies and obligations to participate in investigations and answer questions as directed by the employer
- Instruct investigation participants to find a private space for virtual interviews
- Communicate privilege and confidentiality expectations to witnesses
- Put rules around disclosure of information and documents relating to the investigation
- Don't forget about international borders!

Best practices in the age of COVID-19

- 1) **Know the legal requirements**, i.e. provincial and federal statutes have different investigation obligations
- 2) **Train your external investigator on COVID-19 safety protocols and cybersecurity expectations** (as applicable)
- 3) **Encourage your investigator to conduct interviews virtually where appropriate**, i.e. by phone or videoconference
- 4) **Ensure any onsite or offsite in-person interviews can be undertaken safely**, i.e. symptom screenings, social distancing, and wearing masks
- 5) **Keep track of any in-person meetings at the workplace for subsequent contact tracing**
- 6) **Once the investigation is completed, safely communicate the outcome**

Help is on the way...

The COVID-19 vaccine and the workplace

Andy Pushalik, Partner, Toronto

“75% of Canadians aged 12 and older, or approximately 22.3 million people, indicated that they would be somewhat or very likely to get a COVID-19 vaccine.”

- Majority of Canadians intend to get the COVID-19 vaccine, September 2020, Statistics Canada, online: <https://www150.statcan.gc.ca/n1/daily-quotidien/201217/dq201217c-eng.htm>

Can an employer require an employee to get the COVID-19 vaccine?

- Currently no legislation in Canada requiring individuals to obtain the COVID-19 vaccine
 - There is already some legislation where employees are required to be vaccinated against communicable diseases
- Employers in certain industries where employees are working with vulnerable populations will have a good case to support a mandatory vaccination policy:
 - Health Care
 - Long-term care homes
- Other situations where employers could argue that a mandatory vaccination policy is necessary:
 - Employees working in close quarters (e.g. food processing; factories);
 - Employees who are customer-facing (e.g. transportation; some retail).

What do employers need to consider when drafting a mandatory vaccination policy?

- Privacy
- Human Rights
 - Disability
 - Religion
 - Duty to Accommodate

Lessons from the flu shot case law

- Cases arise from union setting – Mandatory Vaccination Policies are within an employer’s management rights
- Mandatory Vaccination Policies require a balancing of interests – Safety vs. Employee Privacy; Human Rights; Exemptions will be necessary
- Employee Non-Compliance could result in discipline up to and including dismissal

Can an employer ask an employee for proof that they have been vaccinated?

- May be permissible depending on the employer's circumstances and conditional on the employer complying with privacy law principles:
 - Limited purpose
 - Collecting the least information possible
 - Limited disclosure
 - Security of information
 - Destruction of information

Questions?

The background is a solid orange color. It features three large, semi-transparent yellow circles of varying sizes. One circle is on the left side, another is on the right side, and a smaller one is positioned at the bottom right, overlapping the larger circle on the right.

Thank you



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