COVID-19 BULLETIN – APRIL 2, 2020

By Rebecca Klass and Ryan Copeland

The Office of the Human Rights Commissioner of British Columbia has released a policy statement and accompanying FAQ, providing guidance to employers, as well as service providers and governments, with respect to human rights in the context of the COVID-19 pandemic.

The Office of the Human Rights Commissioner is distinct from the BC Human Rights Tribunal, and works proactively though education, research, and investigations into systemic discrimination to prevent discrimination in our province. Its policy statement provides the first directive from our province's human rights system, the content of which may be influential to our Tribunal in the future, as complaints will no doubt arise from this unprecedented period of time.

The BC Human Rights Commissioner has identified COVID-19 as a condition which amounts to a disability, citing both the seriousness of the illness, as well as the potential stigma that attaches to it. On that basis, the Commissioner has provided that:

> *[D]iscrimination on the basis of someone having (or appearing to have) COVID-19, is prohibited under the Code except where the duty bearer can justify such treatment (for example, to prohibit or diminish the transmission of the virus).*

The Commissioner's directive to employers, specific to the COVID-19 crisis, includes the following key points:

- Employers cannot make hiring or firing decisions on the basis of whether someone has or appears to have COVID-19, or comes from (or appears to come from) a COVID-19 hotspot such as China or Italy;
- It is not discriminatory to lay off employees if there is no work for them to do because of the impacts of COVID-19;
- Employees are required to accommodate a person who *may have* COVID-19, unless doing so would amount to undue hardship;
- Employers are required to take all necessary precautions to stop the spread of the virus in the workplace, unless doing so would amount to undue hardship, which may include: providing flexible work-from-home arrangements, delaying state times for new employees, or providing sick leave;
- Employers cannot discipline or terminate employees unable to work because medical or public health officials have quarantined them or advised them to self-isolate in connection with COVID-19;

- Employers are entitled to expect that employees will continue to perform their work unless they have a legitimate reason for why they cannot. If an employee is required to self-isolate, the employer is required to explore alternative options for how the employee may still continue to perform work for the employer, unless unable to work due to illness;

- Employers must accommodate employees who are considered particularly vulnerable to the virus, such as elderly and immune-compromised people, unless doing so would amount to undue hardship; and

- Employers must accommodate those with increased child care obligations short of undue hardship, including flexible work hours or working from home. This may also be the case for employees who are required to care for sick family members at home.

With respect to the duty to accommodate as it arises for those with increased child care obligations, the FAQ clarifies that the duty to accommodate is *unlikely* to apply to workers whose terms and conditions of employment have not changed but who no longer have child care available to them as a result of a daycare or school closure. That said, the *Employment Standards Act* has been amended to provide leave without pay to employees who are unable to work because of need to care for a child as a result of such a closure: if an employee needs to take leave for these reasons, those leaves are protected by legislation.

The FAQ further provides that the Commissioner may view medical assessments or self-assessments to verify or determine an employee's fitness to perform job duties to be permissible at this time. However, an employer should only seek information from medical testing that is reasonably necessary to the employee's fitness to perform the job and the employer's duty to protect the health and safety of workers on the job.

While the Commissioner's directive provides valuable guidance, in this vast array of new circumstances in which we find ourselves, employers should continue to approach accommodation issues with caution, and seek legal advice where necessary.

Canada Emergency Response Benefit Update

In our March 25, 2020 bulletin we outlined the establishment of and eligibility criteria for the new Canada Emergency Response Benefit ("CERB"), a taxable benefit providing $2,000 a month for up to four months for workers who have lost their income as a result of the COVID-19 pandemic. We continue to monitor the development of the CERB, and its potential interaction with other programs, including Supplemental Unemployment Benefits ("SUB") Plans.

The Federal Government's information page with respect to the CERB was updated this morning. This update confirms that if an Employment Insurance ("EI") application was made on or after March 15, 2019, and the reason for the EI application is COVID-19 related, the application with automatically be processed under the CERB, and those individuals once approved will receive CERB benefits ($500.00 per week) regardless of whether they would be

entitled to more under regular EI benefits. Employees can access regular EI benefits after the 16 week CERB benefit period ends.

The information page further provides that employees must be without employment income for at least 14 consecutive days within the initial four-week period, including income from paid leave, self-employment income, or collection of any Employment Insurance benefits. For subsequent periods, the employee "must expect to have no income".

While SUB Plans require employees to be in receipt of EI benefits, as noted above the current information suggests that any employee making an EI application on or after March 15, 2019 will not be entitled to EI benefits and will instead be automatically processed under the CERB. At present, SUB Plan payments are currently not applicable to individuals who qualify for the CERB benefits.

This is a significant gap that will have implications for any employer who has or intends to register a SUB Plan for employees who will now automatically be processed under the CERB. We anticipate the government will provide clarification around this issue, and we will update you as more information becomes available.

Navigating COVID-19 in the Workplace

For further information relating to the COVID-19 pandemic and how it may impact your workplace, please look to our previous bulletins, which can be found on Roper Greyell's COVID-19 resource page.

This memorandum is current to the morning of April 2, 2020, but the pandemic and the responses of federal and provincial governments continue to evolve, and this may impact the accuracy of the information in this bulletin. If in doubt about whether anything in this document is still current, please do not hesitate to **contact us**.

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