

Employment Law Considerations When Reopening Your Optical Business

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As the Ontario economy begins to restart, employers should have a strategy in place to minimize legal liability when reopening their businesses. This article highlights employment law considerations that are critical for the successful reopening of an optical business.

Ensuring Safety in the Workplace

Employers are responsible for ensuring safety in their workplaces. These responsibilities are primarily established by legislation such as the [Occupational Health and Safety Act](#). The following section provides information on how employers can satisfy their legal obligations, including the general obligation to “take every precaution reasonable in the circumstances for the protection of a worker”.

Referring to Government and College Guidelines and Directives

Optical businesses must implement appropriate measures to protect the health and safety of workers. When identifying potential safety measures, optical businesses should refer to:

- [health and safety guidelines issued by the Government of Ontario](#);
- [fact sheets released by Public Health Ontario](#);
- [guidance](#) and [directives](#) of the Chief Medical Officer of Health and the Ministry of Health; and
- guidance provided by regulatory bodies such as the [College of Opticians of Ontario](#) and the [College of Optometrists of Ontario](#).

As we progress through the COVID-19 pandemic, optical businesses should monitor for updates to the listed resources and continuously re-evaluate the safety measures that have been implemented.

Updating Existing Policies and Developing New Policies

Employers should also determine whether their existing policies are sufficient to ensure that employees comply with any new safety measures. It may be necessary to update existing policies or develop new policies altogether.

For example, employers should consider policies that specifically address screening procedures (for employees and patients), social distancing requirements, hygiene and sanitation requirements, and personal protective equipment requirements.

When modifying existing policies or implementing new policies, employers should consider all restrictions established by applicable laws, contracts, or collective agreements.

Complying with the Work Refusal Procedure

An employee may have the right to refuse work if they believe that the workplace is unsafe. The right is established by Part V of the *Occupational Health and Safety Act*, which also establishes a formal refusal procedure. When an employee refuses work based on health or safety concerns, optical businesses should speak with their legal advisor to determine whether the circumstances actually trigger the work refusal procedure. Optical businesses should also ensure that they comply with the procedure if it applies.

Returning Employees to Work

Many optical businesses have temporarily laid-off employees during the temporary shutdown of their businesses. The following section of this article provides information on recalling employees to work.

Selecting Employees to Return

In unionized workplaces, a collective agreement will likely require employees to be recalled in a specific order.

In non-unionized workplaces, employers typically have more freedom to select the employees who will be recalled first. Employers should select employees for recall based on objective, non-discriminatory criteria. Employers should also ensure that the recall order complies with restrictions in applicable laws and employment contracts.

Providing Written Notice of Recall

Once employees have been selected for recall, employers should notify the employees in writing.

When recalling employees in a unionized workplace, employers should notify employees in accordance with the requirements in the applicable collective agreement. The collective agreement may contain rules regarding the specific form of the notice or the amount of notice that must be provided.

In non-unionized workplaces, the written notice of recall should:

- clearly state when the employee must return to work;
- provide information about new health and safety measures; and
- direct the employee to acknowledge the notice and to either: (a) confirm that they will be returning to work; or (b) identify the reason why they will not be returning to work, and provide that reason before a specified date.

Educating Employees on Safety Measures and Policy Updates

It is important for optical businesses to educate employees on new safety measures and policy updates, before the employees begin to perform their duties. Employers should think about how they will do this, whether through virtual training or otherwise.

Managing Employees Who are Unwilling or Unable to Return to Work

Some employees may choose not to return for a variety of reasons. The appropriate response will depend on the legitimacy of the employee's reason for not returning to work. The following discussion addresses some of the common scenarios. However, optical businesses should contact their legal advisor in all circumstances where an employee fails to confirm that they will be returning to work in accordance with the notice of recall. Legal advisors will be able to develop a strategy and provide an appropriately drafted letter for the employee.

Managing Employees Who Do Not Respond to the Notice of Recall

An employee may not respond to the notice of recall. It is important to follow-up with the employee, and to properly document the follow-up. An employee might be deemed to have abandoned their employment if they fail to respond to the follow-up inquiry.

Managing Employees Who Sue for Wrongful or Constructive Dismissal

An employee might sue for wrongful or constructive dismissal instead of returning to work. If this occurs, *immediately* contact your legal advisor to ensure that you comply with applicable deadlines in the litigation process. Your advisor will also be able to inform you about next steps and legal defences that might be available to defeat the employee's lawsuit.

Managing Employees Who Would Prefer to Receive Government Benefits

Employees may prefer to receive government benefits instead of working for their income. Unfortunately, employees generally do not have the right to refuse work merely because work is less beneficial than government benefits. In these circumstances, the employer should inquire into other potential reasons for the employee's refusal to return. It may also be appropriate for the employer to reiterate that the employee will be deemed to have abandoned their employment if they do not return to work and do not provide any other reason to justify a continued absence from work.

Managing Employees Who Do Not Believe the Workplace is Safe

An employee may refuse to return to work because they do not believe the workplace is safe. Employees are not entitled to remain off work based on a general fear of becoming infected by COVID-19. For example, an employee is not entitled to remain off work because they are scared about taking public transit. In addition, employees are typically required to be at the workplace to initiate the work refusal process under Part V of the *Occupational Health and Safety Act*. That said, it may be preferable to allow the employee to remain off work to maintain employee morale.

Managing Employees Who are Entitled to a Leave of Absence

Employees may be entitled to remain off work on a leave of absence. For example, an employee may be entitled to a disability-related leave, an Infectious Disease Emergency Leave or other leave of absence under the *Employment Standards Act, 2000*, etc. Employees might also be entitled to a leave of absence or a modified work schedule due to family obligations. It is important to inquire and understand the employee's needs, without over-inquiring and violating the employee's privacy rights.

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