

Coronavirus (COVID-19): Legal update for Canadian employers – Employee obligations and the reality of working from home

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Making sense of Canada's COVID-19 travel restrictions and self-quarantine requirements

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Overview – Three Orders-in-Council

1. *OIC 25 - Minimizing the Risk of Exposure to COVID-19 in Canada Order (Prohibition of Entry into Canada from any Country other than the United States)* (the “International Order”)
2. *OIC 24 - Minimizing the Risk of Exposure to COVID-19 in Canada Order (Prohibition of Entry into Canada from the United States)* (the “Canada-U.S. Order”)
3. *OIC 26 - Minimizing the Risk of Exposure to COVID-19 in Canada Order (Mandatory Isolation) No. 5* (the “Self-Quarantine Order”)

The International Order - Application

*Any **foreign national** is prohibited from entering Canada if they arrive from a foreign country other than the United States*

The International Order does not apply to Canadian citizens or permanent residents of Canada (“PRs”).

Two-stage analysis in order to qualify for an exemption:

- Must fall within one of 24 enumerated exemptions (they will be denied boarding otherwise); and
- Must not be seeking to enter for an optional or discretionary purpose (e.g., tourism, recreation, entertainment). In practice, CBSA interprets this to mean that only “essential travel” is allowed.

The International Order – Notable exemptions

- Immediate family member of a Canadian citizen or PR (if entering for at least 15 days);
- Entering to reunite with foreign national immediate family member (requires authorization);
- Hold a valid work permit or a study permit, or have been approved for a work permit (at any time) or a study permit (before noon EDT on March 18, 2020) that has not yet been issued;
- Providers of emergency services;
- A class of persons who, as determined by the Chief Public Health Officer appointed under subsection 6(1) of the Public Health Agency of Canada Act [Public Health Agency of Canada (“PHAC”) exemptions – discussed later].
- National Interest Exemptions.

The Canada-U.S. Order - Application

A **foreign national** is prohibited from entering Canada from the United States if they seek to enter for an optional or discretionary purpose.

The Canada-U.S. Order does not apply to Canadian citizens or PRs.

There is no finite list of enumerated exemptions in the Canada-U.S. Order.

Foreign nationals must only demonstrate that the purpose for their entry is not “optional or discretionary.”

In practice, CBSA interprets this to mean that only “essential travel” is allowed.

The Canada-U.S. Order - Application

Unlike in the International Order:

- Applicants do not need to show that they fall within a finite list of specific exemptions. They will not be denied boarding as long as they state that they are exempt from the Canada-U.S. Order.
- There is only a one-stage analysis when seeking an exemption. Applicants must not be seeking to enter Canada for an “optional or discretionary” purpose.
- Visa exempt applicants are allowed to apply for a work permit at the time of arrival.
- If CBSA does not believe the Applicant is exempt, they are supposed to direct that Applicant back to the United States.

Meaning of “optional or discretionary”

- The “optional or discretionary” threshold was likely intended to be a low threshold when the Orders-in-Council were initially drafted.
- Nevertheless, CBSA has generally been applying a higher standard of “essential” travel (i.e., performing essential services in support of critical infrastructure in Canada).
- Over time, the threshold has been lowered in specific cases (i.e. temporary foreign workers, immediate family members who are entering for at least 15 days, etc.).
- Nevertheless, CBSA still appears to be applying the essential travel standard (although not consistently).

CBSA's public messaging regarding workers

CBSA has now confirmed that a foreign worker's proposed purpose for entry is considered non-optional and non-discretionary if:

- Their place of habitual residence is in Canada and they hold a valid work permit; **or**
- They are coming to Canada for the first time to begin employment and are in possession of a valid work permit or a work permit approval letter, and have proof of employment at a Canadian business which is operating; **or**
- They do not have a work permit but they are eligible to apply for a work permit at port of entry (TRV-exempt) and have proof of employment at a Canadian business which is operating. Of course, port of entry applications are only permitted under the Canada-U.S. Order

The self-quarantine order - Application

***Any person** who enters Canada and who does not have signs and symptoms of COVID-19 must quarantine themselves without delay in accordance with instructions provided by a screening officer or a quarantine officer and remain in quarantine until the expiry of the 14-day period that begins on the day on which the person enters Canada*

The Self-Quarantine Order applies to **everyone** who enters Canada, including Canadian citizens and PRs.

Unless exempt, an international traveller must present a self-quarantine plan to the screening officer upon arrival, showing that they are willing and able to self-quarantine for 14 days.

If they do not, or if the plan is considered insufficient, the international traveller could be sent to a quarantine facility for 14 days.

The self-quarantine order - Exemptions

The Self-Quarantine Order contains 15 exemptions, but most do not apply to business persons (e.g., exemptions are available for crew members, armed forces, providers of emergency services, etc.).

However, several Group Exemptions have been established by the PHAC under Subsection 6(e) of the Self-Quarantine Order:

A person or any person in a class of persons whom the Chief Public Health Officer determines will provide an essential service

There are currently 7 PHAC Group Exemptions, two of which may apply to business persons.

The self-quarantine order – PHAC group exemptions

Regular Border Crossers

“Persons who must cross the border regularly to go to their normal place of employment, including critical infrastructure workers (Energy and Utilities, Information and Communication Technologies, Finance, Health, Food, Water, Transportation, Safety, Government and Manufacturing), provided they do not directly care for persons 65 years of age or older within the first 14 days after their entry to Canada”

- Applicants must be providing an “essential” service.
- There may now be a CBSA Internal Directive that requires daily or weekly travel.

The self-quarantine order – PHAC group exemptions

Technicians and Specialists

*“Technicians or specialists specified by a government, manufacturer, or company, who enter Canada as required for the purpose of maintaining, repairing, installing or inspecting equipment necessary to support critical infrastructure (Energy and Utilities, Information and Communication Technologies, Finance, Health, Food, Water, Transportation, Safety, Government and Manufacturing) **and** are required to provide their services within 14 days of their entry to Canada and have reasonable rationales for the immediacy of the work and the inability to plan for a 14 day quarantine”*

- Must be entering to maintain, repair, install, or inspect equipment.
- Must be necessary to support critical infrastructure in Canada.
- The need must be so urgent that it is not possible for the applicants to self-quarantine for 14 days before commencing the work.

Critical infrastructure and essential services

Public Safety Canada's *Guidance on Essential Services and Functions in Canada During the COVID-19 Pandemic: 10 Critical Infrastructure Sectors*

- Energy and Utilities
- Information and Communication Technologies
- Finance
- Health
- Food
- Water
- Transportation
- Safety
- Government
- Manufacturing

Essential services

- Public Safety’s Guidance contains an exhaustive list of workers that provide “essential” services, most of which support critical infrastructure sectors.
- Examples of essential services include:
 - Manufacturing: Workers from the upstream supply chain for essential services needed to support critical infrastructure.
 - Finance: Workers who are needed to support financial transactions, advice, and services.
 - Information Technology: Client service centres, field engineers, and other technicians supporting critical infrastructure.

Essential services

- Health: Manufacturers and distributors of medical equipment, medical devices, personal protective equipment, pharmaceuticals and other health products.
- Food: Employees engaged in the manufacture and maintenance of equipment and other infrastructure necessary to agricultural, aquaculture, and fishery production and distribution
- Communications: Maintenance of communications infrastructure (wireline, wireless, internet, broadcast, satellite, news), including privately owned and maintained communication systems and/or networks.
- Energy and utilities: Workers who maintain, ensure, or restore the generation, transmission, and distribution of electric power.

Remote work issues: What we've seen so far...

Catherine Coulter, Counsel, Ottawa

Remote work considerations

- Do I really have liability for the occupational health and safety of my employees working from home?
 - think ergonomics; is an assessment required?
 - equipment loan or purchase; home equipment allowance?
 - domestic violence issues
 - Joint Health & Safety committee/representative obligations
 - keep stress issues top of mind
 - accommodation issues

Remote work considerations, con't.

- Possible overtime issues when employees are in their workplace 24/7
 - keep in mind that for remote employees, work bleeds into home
 - managers to limit expectations
 - clear policy
 - robust overtime clocking system

Remote work considerations, con't.

- What issues may arise if my employee is now working remotely in a different province/country?
 - what jurisdiction governs the employee's employment?
 - what if the employee refuses to return to their regular place of work?
 - what about other considerations (eg. tax/immigration/corporation)

Remote work considerations, con't.

- Confidentiality issues in a virtual workplace
 - be wary of workplace tools used for personal downloads (eg. games & streaming)
 - what does your employee's home office look like?
 - working outside of a home or workplace is not secure
 - consider training sessions and an updated confidentiality policy which takes remote work into account

Provincially required COVID-19 self-assessments

Claire Browne, Associate, Toronto

Overview: Provincially required COVID-19 self-assessments

- **ON:** requires screening of individuals entering work environment
- **BC:** consideration while drafting COVID-19 Safety Plan
- **AB:** encourages active daily screening of employees
- **SK:** requires self-monitoring using provincial screening tool
- **MB:** encourages self-monitoring using provincial screening tool
- **QC:** encourages use of symptom-based screening questionnaire
- **NB:** component of COVID-19 Operational Plan
- **NS, PEI, YK:** encourages self-monitoring of symptoms
- **NL:** requires employees self-monitor for symptoms of COVID-19
- **NWT, NU:** encourages employers to implement COVID-19 screening of workers and clients prior to attending worksite

Ontario: COVID-19 screening tool for workplaces

- September 25, 2020: Government of Ontario amended [Ontario Regulation 364/20](#) under the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020*
- Businesses or organizations are required to comply with **advice, recommendations and instructions** issued by the Office of the Chief Medical Officer of Health on screening individuals for COVID-19
- September 25, 2020: Ministry of Health published the “COVID-19 Screening Tool for Workplaces”

Ontario: Application of the COVID-19 screening tool

- Applies to any worker or essential visitor entering the work environment
 - “Worker”: staff, including students, contractors or volunteers that conduct business or related activities
 - “Essential visitors”: individuals providing a service in the establishment who are not employees or patrons
- Does **not** apply to:
 - Patrons entering the workplace
 - Emergency services or other first responders in the context of an emergency

Ontario: When should the COVID-19 screening occur?

- Screening should occur:
 - **Before** or **when** a worker enters the workplace at the beginning of the day or shift; or
 - When an essential visitor **arrives**

Ontario: What questions should the COVID-19 screening include?

- 1) Do you have any of the following **new or worsening** symptoms or signs?
 - Fever or chills (Y/N)
 - Difficulty breathing or shortness of breath (Y/N)
 - Cough (Y/N)
 - Sore throat, trouble swallowing (Y/N)
 - Runny nose/ stuffy nose or nasal congestion (Y/N)
 - Decrease or loss of smell or taste (Y/N)
 - Nausea, vomiting, diarrhea, abdominal pain (Y/N)
 - Not feeling well, extreme tiredness, sore muscles (Y/N)

Ontario: What questions should the COVID-19 screening include?

- 2) Have you travelled outside of Canada in the past 14 days? (Y/N)
- 3) Have you had close contact with a confirmed or probable case of COVID-19? (Y/N)

Note: Employers are required to use the screening questions outlined in the Screening Tool “at a minimum”

Ontario: Results of the COVID-19 screening

- If the individual answers **NO** to all questions from **1 through 3**, they have passed the screening and can enter the workplace
- If the individual answers **YES** to any of questions from **1 through 3**, they have not passed the screening and should be **advised that they should not** enter the workplace
- Workers who do not pass the COVID-19 screening should:
 - Go home to self-isolate immediately; **and**
 - Contact their health care provider or Telehealth Ontario

British Columbia: COVID-19 safety plan

- Every employer must develop a [COVID-19 Safety Plan](#)
- Outlines the policies, guidelines and procedures in place to reduce the risk of transmission of COVID-19
- Includes workplace policies that restrict the following individuals from entering the workplace:
 - Anyone who has had symptoms of COVID-19 in the last 10 days
 - Anyone directed by Public Health to self-isolate
 - Anyone who has arrived from outside of Canada in the last 14 days
- COVID-19 Safety Plan must be posted at the worksite and on the employer's website

Alberta: COVID-19 relaunch guidance

- Employers are encouraged to consider implementing active daily screening of attendees for symptoms of COVID-19
- Alberta Health Services [COVID-19 Self-Assessment Tool](#) may be used by individuals attending the workplace
- Employers may also use the [Alberta Health Daily Checklist](#) to screen workers, volunteers and attendees at the worksite
- Workers, volunteers and attendees should complete the screening prior to entering the workplace
- Individuals who do not pass the screening **must not** be allowed to enter the workplace

Saskatchewan: COVID-19 workplace information

- All workers must self-monitor for symptoms of COVID-19 by using the Government of Saskatchewan [COVID-19 Self-Assessment Tool](#)
- Employers are encouraged to have plans in place for increased worker absences due to illness or isolation
- Employers are also required to have a workplace illness policy in effect
 - Sick employees must stay home or be sent home from work
 - Sick employees must use the Government of Saskatchewan COVID-19 Self-Assessment Tool

Manitoba: Workplace guidance for business owners

- Employers are urged to encourage employees to use the screening information in the [Government of Manitoba COVID-19 Screening Tool](#) before leaving for work
- Employers must prohibit individuals who are exhibiting symptoms of COVID-19 from entering the workplace
- Employers are also encouraged:
 - To post guidance on entrance requirements, including screening information, at all entrances of the workplace
 - To emphasize that employees must stay home if they are experiencing symptoms of COVID-19

Quebec: COVID-19 symptom-based screening questionnaire

- Developed by Institut national de santé publique du Québec
- Recommended workers self-assess their symptoms using the [screening questionnaire](#) before leaving home to attend the worksite
- In addition, recommended the questionnaire is administered upon arrival at the worksite
 - Alternatively, employer may obtain verbal validation from all workers confirming that the questionnaire is negative upon arrival at the worksite

New Brunswick: COVID-19 operational plan guide

- Employers are required to develop a [COVID-19 Operational Plan](#) outlining how the employer will manage the safe opening and operation of the business
- Plan must follow the recommendations and requirements of Public Health and WorkSafe NB
 - Employer may be asked to share their plan with public health and safety authorities upon request
- Plan must include a procedure for active screening of staff and attendees at the worksite

Nova Scotia: Coronavirus (COVID-19): Working and businesses

- Employers are required to assess and eliminate workplace hazards to reduce workplace exposure to COVID-19
- Actions may include restricting workplace entry
- Employers are also encouraged to consider:
 - Training employees on how to self-assess symptoms and identify when to stay home
 - Ensuring employees understand their responsibility to comply with the safety practices set out by the employer

Prince Edward Island: COVID-19 operational plan

- Employers are required to develop and follow a COVID-19 Operational Plan
- Plan must identify how the risk of transmission of COVID-19 will be mitigated in the workplace
- May include the following requirements:
 - All staff are required to self-monitor for symptoms and report concerns about possible COVID-19 exposure to their supervisor
 - Symptomatic staff are required to self-isolate until tested for COVID-19 and results are confirmed
- Employer must clearly communicate to all staff the Exclusion Policy in place for employees experiencing symptoms of COVID-19

Newfoundland and Labrador: COVID-19 workplace information

- Employers are required to develop a plan to reduce the risk of COVID-19 exposure to workers and the general public
- All workers must self-monitor for symptoms of COVID-19 and stay home if they are sick
- Employers are also encouraged:
 - To ensure workers are pre-screened prior to entering the workplace
 - To create and implement plans for increased worker absences due to illness or self-isolation requirements
 - To create and implement a workplace illness policy

Yukon, Northwest Territories and Nunavut

- **YUK:** encourages employees to monitor their health before entering the worksite
 - If employee is experiencing symptoms of COVID-19, recommended the employee stay at home
- **NWT/ NUN:** Workers' Safety and Compensation Commission
 - Employers are encouraged to follow five steps to identify safety measures and procedures required to be in place to operate their business safely
 - As part of the steps, employers are encouraged to consider implementing COVID-19 screening of workers and clients

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