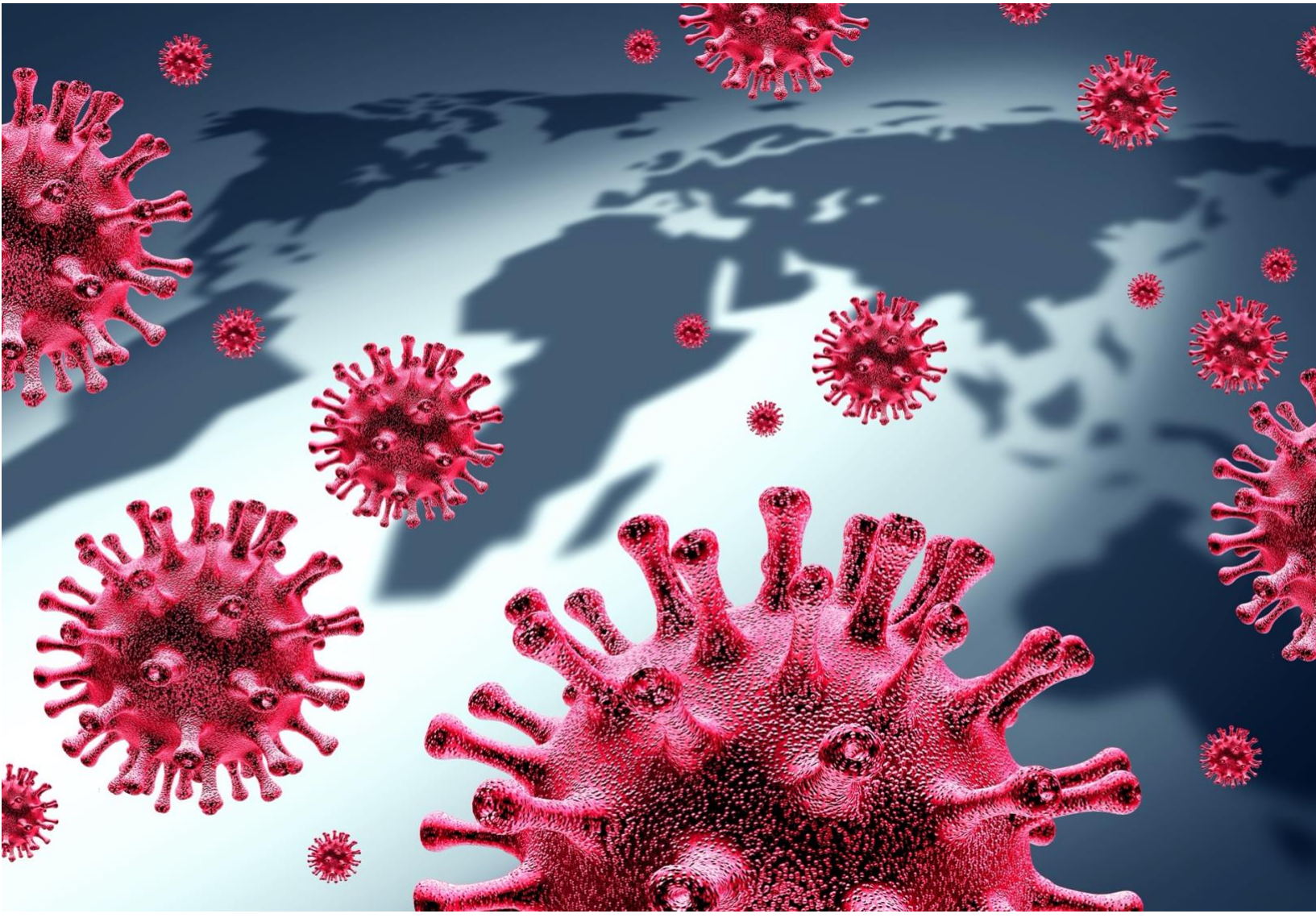
THE COVID-19 PLAYBOOK

(Version 2.0 – May 7, 2020)

KEY CONSIDERATIONS FOR EMPLOYERS



LeClair & Associates

MANAGEMENT LAW

Index **Page**

1. Preface

The Fourth Industrial revolution, 5G, digitization, imports, exports, faster, cheaper, bulls and bears … standstill.

COVID-19.

The CORONA-virus.

It came without warning, finding the world (and in particular the world of work) in a state of unpreparedness.

We are certain that for as long as any reader of this playbook can remember, the modern world of work has been regulated through employment and labour legislation of some kind, catering for the predictable - the frequent and foreseen.

Nothing prepared the world and the global economy for what was to come - where going to work, holding meetings and shaking hands was no longer normal. Where speaking to your staff meant logging on, not because you could, but because you had to.

There's a new game in town. New players, new rules, and you may even have to participate from a different chair.

Welcome to our COVID-19 Playbook, your digest and overview of the relevant COVID-19 related workplace developments within Ontario and Canada.

2. Legislative Framework

2.1 Amendments to the *Employment Standards Act*

- **Initial Employer Reactions:** With the sudden spread of COVID-19, many employers were forced to implement makeshift work arrangements, with little direction being garnered from the law, collective agreements, existing contracts of employment, or even human resources best practices. Overnight, employers were confronted with a significant loss of business, quarantines, travel restrictions and requests for self-isolation, driving a potential economic shutdown the scale of which we have never seen in our lifetimes.

- **Legislative Amendments:** Over the past few weeks we have seen a number of legislative amendments, attempting to restore order to the world of work. This has unavoidably resulted in a wide scale focus on speed (for now), rather than precision and with the unintended consequence being an ever-changing legislative landscape, aimed at alleviating the employment and economic impact of this crisis.

- **ESA:** One significant amendment in Ontario was to the *Employment Standards Act* ("*ESA*"), through the *Employment Standards Amendment Act* (Infectious Disease Emergencies), 2020 ("*ESAA*"). This amendment introduced a new form of 'Job Protected Leave'.

- **Job Protected Leave:** Under the *ESAA*, employees across Ontario now qualify for job protected but unpaid leave, also known as "*Infectious Disease Leave*", provided the employee is:

  - under medical investigation, supervision or treatment due to COVID-19;
  - in isolation or quarantine due to COVID-19;
  - directed by their employer not to work, due to concerns that COVID-19 could spread in the workplace;
  - required to provide care to a person for a reason related to COVID-19, such as a school or day-care closure; or
  - prevented from returning to Ontario because of travel restrictions.

- **Retroactive:** Contrary to the general presumption against the retroactivity of legislation, the *ESAA*'s job protection for '*Infectious Disease Leave*' was retroactively enacted to January 25, 2020, that being the date of the first presumptive COVID-19 case in Ontario.

- **Medical Certificates:** With the overwhelming demand on the medical profession, the *ESAA* also reduced the need for employees to provide a medical certificate, where their leave of absence was due to an infectious disease under the *ESAA*. The *ESAA* does, however, provide that the

employer is entitled to request evidence that is reasonable in the circumstances that the employee is entitled to such leave. Furthermore, there does not appear to be any limitation on a request for a medical certificate before returning to work, especially in confirmed cases of COVID-19.

2.2 Considerations under the *Ontario Human Rights Code*

- **Employer Obligations:** With the onset of COVID-19, workplaces have been forced to employ additional safeguards to protect their businesses and employees, some of which are pursuant to their existing obligations under the *Occupational Health and Safety Act*, ("*OHSA*"). In doing so, it is also important to pause and consider the possible Human Rights considerations in and around carrying out these obligations, for such measures as temperature testing, fitness declaration forms and the like.

- **Temperature Testing:** This continues to be performed at entrances to a number of workplace facilities and raises the question of whether a high temperature would, on its own, be sufficient to deny someone the right to work. Ordinarily, these checks could also trigger potential claims of discrimination and questions around confidentiality. There is also the lingering question of whether a high temperature would, on its own, constitute a disability worthy of protection. The manner in which these tests are administered will also likely be challenged and at this stage it is unknown what view the Ontario Human Rights Tribunal will take with respect to temperature checks in various circumstances.

- **Risks:** Accordingly, testing of any kind will, for the time being and until future jurisprudence develops, carry with it an element of potential legal risk. Having said that, a greater risk may be borne out by simply allowing the free passage of employees, contractors and third parties into the workplace during the COVID-19 pandemic. Therefore, for employers who want to consider or are testing upon entry, we would recommend the following considerations:

    - The employer should communicate in advance with contractors, employees (and the union where there is one). The testing protocol should be clearly communicated, and employee consent should be sought. It is important to communicate that testing is aimed at protecting the employees' wellbeing, as well as the wellbeing of their families. Any express exclusions regarding medical testing contained in the relevant collective agreement should also be considered;

    - The confidentiality, dignity and privacy of the testing process should be strictly maintained at all times (*i.e.* testing and/or the perceived targeting of one particular group of employees, one gender, one age group or one race etc. will result in claims of discrimination and add unnecessary risk). Therefore, testing, if implemented, should be done across the board and should include management;

- Tests should also be administered with minimal impairment on individual rights and in the least intrusive manner that is possible;

- Preferably (although not always practical), testing should also be undertaken by a qualified health care professional and in private, with the results kept from accidental (or inferential) disclosure to fellow employees. At all times, testing results should be treated as strictly private information, and confidentiality must be respected and adhered to; and

- Presenting a higher than normal temperature on its own, may simply trigger a secondary process, requiring further evaluation.

- **Reliability of Testing:** Despite any argument that testing is a *bona fide* occupational requirement under the *Human Rights Code*, and perhaps even 'required' under section 25(2)(h) of the *OHSA* - which mandates employers to take "*every precaution reasonable in the circumstances*" to protect workers - the reliability of temperature checks may also not capture all cases of COVID-19, as certain carriers may even present as asymptomatic.

- **Denying Entry:** Where employers have implemented testing measures, even if imperfect, anyone refusing the test could (but not without some risk of a challenge) be tentatively denied entry to the employer's premises, although this is an argument which is yet to be legally tested and will in all likelihood turn on fact specific circumstances.

- **Return to Work and Declarations:** For employees who were quarantined or required to self-isolate, a number of employers have required them to sign declarations that they have been symptom-free for a period of at least 14-days, before being permitted to return to work. Although this may be a reasonable measure under COVID-19, the fairness around how the declarations are administered may give rise to human rights related considerations. In the case of individuals diagnosed with COVID-19, employers have been insisting on medical notes confirming the employee's fitness to return to work. Currently the law is silent on this issue (with the *ESAA* only waiving the medical note requirement for the purpose of taking job protected leave, not returning). On a balance, requiring employees to provide medical notes upon return from a COVID-19 related leave is likely to be consistent with other instances where employees were required to provide medical notes and demonstrate their fitness to work, such as in the case of extended medical leave.

- **Is There a Duty to Accommodate?:** Until there is a vaccine, it could be argued there is a duty to accommodate. Having said that, accommodation is generally only possible where there is disclosure, or some other knowledge on the part of the employer. Furthermore, it remains unclear whether, once a vaccine is found, employers will be permitted to compel their employees to get

vaccinated. Could this ever form the basis of a *bona fide occupational requirement*? Given the global impact of COVID-19, could this not be the case for each and every workplace? Only time will tell.

- **Risk of Harassment and Discrimination:** Public health officials have advised that older individuals and those with underlying medical conditions are more at risk of having a severe reaction if infected by COVID-19. From the employment perspective, denying "older" workers or those with an underlying medical condition access to employment is fraught with human rights risks, particularly as you gradually bring individuals back to work. Are being "young" and "without underlying medical conditions" *bona fide* occupational requirements ("BFOR") under the *Human Rights Code*, or would denying those identified groups a return to the workplace constitute discrimination? Furthermore, how do we ensure that individuals of certain ethnic groups or places of origin are not harassed and "blamed" for the pandemic – sadly, we have seen examples of this occurring around the globe.

2.3 Ontario *Occupational Health and Safety Act* and Regulations ("*OHSA*")

- **OHSA:** As described above, every employer remains obligated under section 25(2)(h) of the *OHSA* to take "*every precaution reasonable in the circumstances*" in order to protect the health and safety of its workers. Given the medical uncertainty surrounding COVID-19 generally, it would stand to reason that this provision could be interpreted and applied broadly.

- **Essential Workplaces:** For those employers who have been declared essential workplaces (updated link at https://www.ontario.ca/page/list-essential-workplaces) and therefore required to continue working, they could anticipate receiving work refusals from employees who feel unsafe, despite all of the safeguards and precautions. This is also true of employees returning from elective periods of self-isolation. These work refusals (if left unchecked or becoming widescale) could prevent the workplace from being able to operate at all.

- **Work Refusals:** The risk of work refusals, although ongoing, can be mitigated through active communication with all employees, especially around the safety measures that have been and continue to be implemented by the employer. Where concerns are raised, these should be investigated and where possible resolved. Should a resolution not be possible, the work refusal process set out under the *OHSA* (or in some cases, set out in the collective agreement) should be followed.

- **MOL Intervention:** Generally, during the COVID-19 crisis the MOL's intervention has been *via* telephone. It is advisable to have the refusing employee and their representative (if any) present during any such discussion. It is also important that the refusing employee be kept in a safe place

during both the initial investigation phase and during any call with the MOL. During COVID-19, this may even require sending the employee home temporarily.

- **MOL Decision:** Depending on the outcome of the above questioning, the MOL may issue a decision by phone, with confirmation following by fax or email. Alternatively, they may decide to conduct an on-site investigation. Often, and provided the employer has taken all reasonable precautions to ensure the safety, health and wellbeing of the employee, the MOL can and has ordered the employee/s back to work.

2.4 *Workplace Safety and Insurance Act ("WSIA") / Workplace Safety and Insurance Board ("WSIB")*

- **WSIB Benefits:** Depending on the nature of the workplace, certain workers (particularly in the health care sector) may be at greater risk of contracting COVID-19 at work. As such, the WSIB has confirmed that workers may, in some circumstances, be entitled to benefits for contracting COVID-19 during the course of the worker's employment.

- **Time Periods for Claims:** Importantly, and under the current State of Emergency, the WSIB's website reports that employee claims will not be denied if not submitted within the usual six (6) month time period. However, employees should still file claims as soon as possible. On the other hand, the employer's usual three (3) day time limit for reporting an injury or illness is still in place, unless the employer is prevented from doing so because of the state of emergency.

- **Asymptomatic Claims?** The *WSIA* does not provide coverage for workers who are symptom-free, even if quarantined or sent home on a precautionary basis. However, should a symptom-free worker develop symptoms or illness while in quarantine, they may be eligible for WSIB benefits. A probable link to having contracted COVID-19 in the workplace during the course and scope of employment will likely still be required.

- **Reporting Obligations:** Employers and/or workers may choose to voluntarily report COVID-19 exposure through the WSIB's Program for Exposure Incident Reporting (PEIR) and these claims will be adjudicated on a case-by-case basis. For more information, the WSIB has published an adjudicative approach document at https://www.wsib.ca/sites/default/files/2020-03/adjudicativeapproachnovelcoronavirus.pdf. This should be read together with an informative COVID-19 FAQ page located at https://www.wsib.ca/en/covid-19-faqs-about-wsib-claims.

- **Premium Relief:** The WSIB has also announced a premium relief program that will allow employers to defer premium reporting and any payments until August 31, 2020. Employers who

report and pay monthly, quarterly or annually based on their insurable earnings will be eligible to apply for this deferral.

3. Common Law

3.1 Contract of Employment

- **Initial Reactions:** When COVID-19 first arrived, many employers were understandably uncertain as to how best assist their employees. There were so many uncertainties: How long would it last? How widespread will it be? How long should employees be off work? Employers did the best they could in the early days of the pandemic, utilizing strategies such as permitting employees to start working from home (where possible) and relaxing the application of their policies by encouraging employees to utilize their paid leave entitlements, including any vacation leave, accumulated overtime, sick leave (especially in the case of self-isolation) or banked statutory holiday time.

- **Temporary Layoffs:** With the impact and duration of the COVID-19 pandemic becoming clearer, these immediate measures have now largely run their course, forcing employers to consider more severe measures – most notably, temporary lay-offs.

3.2 Layoffs (and Constructive Dismissal)

- **Legal Position:** Technically, temporary layoffs are only permissible if they are provided for in the language of a contract (including a collective agreement) or where the employee consents. The question remains - can the employer layoff staff during COVID-19, absent contractual language permitting them to do so? Also, in the absence of contractual language, do temporary layoffs constitute constructive dismissal?

- **What Does the *ESA* Say?** Under the *Employment Standards Act*, *2000* ("*ESA*") employers are generally permitted to temporarily lay off employees in the following ways:

    - For a period of not more than 13 weeks in any 20 consecutive week period; or

    - For up to 35 weeks in a 52 consecutive week period in some more limited circumstances (such as when the employer continues to pay benefit premiums in order to maintain coverage, or provides a SUB plan).

- **Strict Interpretation:** It should be kept firmly in mind that the *ESA's* temporary layoff provisions only speak to measures that can be implemented on a *temporary* basis and in order to not trigger the *ESA*'s termination and severance provisions. The *ESA*'s temporary layoff provisions do not, however, protect an employer from the overarching common law principle that to deny the employee's ability to come to work and earn a pay cheque constitutes constructive dismissal. That, in a nutshell, is the rigid, narrow, legalistic concept of constructive dismissal. Therefore, and

technically speaking, there is a risk of constructive dismissal where an employer unilaterally lays off an employee where the employment contract does not provide for same. This is generally not a risk in the unionized environment, where the collective agreement would typically set out the process for temporary layoffs. Often, temporary layoffs in the unionized environment are conducted in reverse order of seniority (with some exceptions and extenuating circumstances).

- **The Alternative:** With that said, the risk of a temporary layoff versus continuing to pay salaries and wages until the point of permanent closure, is one that many employers have been prepared to take, for obvious reasons.

- **Mitigation of Risk:** There are some strategies that the employer can implement to help mitigate the risk of a constructive dismissal claim. These include the implementation of a registered Supplemental Unemployment Benefit Plan ("SUB Plan") (discussed below) which provides for top up payments to an employee's existing EI benefits (which in the case of a layoff, provide for benefit payments over and above the usual EI benefits of 55% or $573 per week). Under a SUB Plan, the employer has the ability to top up the employee's EI Benefits to a maximum of 95% of the employee's regular weekly earnings. In addition, and where affordable, employers that are able to continue benefits during any period of layoff will further mitigate the risk of additional constructive dismissal damages. Additionally, the Federal Work Share program (discussed below) and/or instances where employee(s) have agreed to reduced hours or pay, may also serve as mitigation strategies against constructive dismissal.

- **Are We Required to Give Advanced Notice of a Temporary Layoff:** Although there is no legislative requirement to provide advanced notice to staff of any temporary layoff, it is recommended that employees be provided with as much notice as possible, as a matter of good employee or labour relations.

- **Union Environment:** In the unionized setting, collective agreements set out procedures to be followed in the event of temporary layoffs. As aforementioned, layoffs are typically conducted in reverse order of seniority, subject to certain conditions such as the remaining employee(s) having the requisite skill and ability to perform the remaining work (as an example).

4. Company Framework

4.1 Staff Policies

- **Flexibility:** Under COVID-19, many employers were forced to immediately relax the application of their policies, especially around paid leave entitlements (vacation, accumulated overtime, sick, family and other).

- **Other Considerations:** These included reduced working hours to allow for additional cleaning and sanitization of workplaces, reduced pay as an alternative to any layoff, and telecommuting arrangements which have generally been implemented with pay, where the employee is able to continue their duties remotely. These mechanisms would generally be introduced with the employees' consent.

- **Telecommuting/Work-From-Home**: The depth and sufficiency of these arrangements are often overlooked. Many important considerations include: ensuring and measuring productivity and expectations, data security, privacy and confidentiality and hours of work (including overtime), which remain practical difficulties to control under any telecommuting arrangement.

- **Policy:** One such tool which we have included with our Playbook is a simplified telecommuting policy, which addresses these considerations.

- **Other Benefits:** Additionally, any benefit plans should be reviewed to ascertain eligibility for laid off employees. This would include any extended health and dental plans, Short-Term and Long-Term Disability, Life Insurance and Accidental Death and Dismemberment.

4.2 Union Engagement:

- **For unionized employers**, their union may claim that the employer should better protect employees against future unforeseen events (including a second or third wave) through enhanced leaves with better pay (even if the employee is only seeking a leave because they do not feel safe at work) enhanced pay if you have to work and SUB Plans to "top up" employees who are laid off. Unions may also try to "poke holes" the employer's health and safety program and policies, claiming that employees were forced to work in unsafe conditions during the pandemic.

- **Unionized Employers** should carefully review and apply their collective agreement, including any layoff, recall, sick leave and extended leave provisions. Following the collective agreement will be important as you bring unionized employees back to work. Employers should anticipate that the

pandemic will provide unions with fertile ground from which to make demands at your next round of collective bargaining. In particular, they should also be prepared for coordinated work refusals, slowdowns, absenteeism and be familiar with the options available for dealing with each of these – *i.e.* discipline, the MOL work refusal process, grievances, OLRB and Unlawful Strike. It will also be important to manage how the union and its members felt about the employer's handling of the layoffs (or conversely how they felt about having to stay at work), and ensuring that any bad feelings are not allowed to fester.

5. Governmental Programs

5.1 Employment Insurance (EI)

- **Employment Insurance** (**EI**): Provides regular benefits to individuals who lose their jobs for various reasons (for example, due to shortage of work, seasonal or mass lay-offs) and those that are available for and able to work, but cannot find a job. Employees that find themselves in these positions during the crisis should be advised to apply for EI benefits as soon as they stop working and even before their employer issues a record of employment ("ROE").

- **Normal Coverage:** Qualifying employees with sufficient insurable hours (between 420 – 700 hours) will generally be covered for up to for 55% of their average weekly insurable earnings, up to a weekly maximum of $573. EI benefits will last for between 14 and 45 weeks, depending on individual employee contributions to EI and regional unemployment rates. Employees applying for this benefit will still be subject to the mandatory one (1) week waiting period.

- **EI Sickness Benefits:** Provide qualifying employees with up to 15 weeks of financial support, again up to 55% of their earnings and up to a weekly maximum of $573. Employees who would typically qualify for this benefit include employees who are unable to work because of illness, injury or quarantine. This benefit aims to allow the employee time to restore their health and return to work. Canadians required to "quarantine" or "self-isolate" are being asked to apply for EI sickness benefits online, but before doing so, they should first check whether they are entitled to any short-term disability coverage through their employer.

- **EI Waiting Period Waived (Sickness):** The one-week waiting period for EI sickness benefits has been waived as a result of COVID-19 so that impacted individuals can claim payments from the first week of their claim.

- **Medical Certificate:** For EI Sickness Benefits related to the COVID-19 crisis, employees are no longer required to provide a medical certificate in order to be entitled to apply.

- **Delays:** Given the sheer volume of applications for EI benefits and the associated delays in processing those claims, the Federal Government's 'Canada Emergency Response Benefit' ("**CERB**") can be utilized by employees in the interim, while waiting for their EI claims to be processed. Employees who exhaust their EI entitlements may also become eligible to fall back on the CERB which currently provides up to $2000 per month. CERB payments are typically being made within a ten (10) day period after any application.

- **Employer Obligation to File a ROE:** Whenever there is a break in earnings (*i.e.* unpaid leave, sickness, layoff or termination), the employer is obliged to file a ROE with Service Canada. This facilitates the EI claim process. In the current crisis, it is possible that employees apply for their EI benefits before a ROE is filed. When filing a ROE, the following codes should be used (without inserting a comment, as this is delaying the processing times):

    - **Code "A" - Lay-off:** owing to a shortage of work related to COVID-19. **Note**: Currently there is still a one-week waiting period before these benefits can be claimed;

    - **Code "D" - Symptomatic / Diagnosed / Quarantined**: where required absences are imposed due to illness. **Note**: the one (1) week EI waiting period will be waived in these instances;

    - **Code "N" - Elective self-isolation / Asymptomatic**: based on current information, the ROE should be coded as "N" which provides for "leave of absence". Service Canada also appears to have been accepting **Code "K"** – which is the "other" category;

    - **Code "H" - Work Sharing**: should be used where any work sharing program is registered.

5.2 Supplemental Unemployment Benefit Plans (SUB Plans)

- **Top Up:** A SUB Plan can be used in instances where employers choose to top up their employees EI benefit payments beyond the 55% benefit - up to a maximum of 95% - provided the SUB Plan is registered.

- **Layoffs:** SUB Plans may also provide some protection to employers in case of layoffs, as the top up payments made to employees on layoff could serve to partially mitigate alleged damages for lost income, in the event of a future claim for constructive dismissal.

- **What Is the Effect of Registering the SUB Plan:** Registering the SUB Plan in the event the employer has to layoff for "shortage of work" is beneficial, as any top up payments made thereunder will not be considered earnings and will not reduce the employee's EI entitlements (up to the 95% maximum). SUB Plans can also provide some support to employees with insufficient insurable hours (such as in the case of employees returning from maternity leave or for new employees). The CERB is also an option for employees who would not otherwise qualify for EI benefits.

- **How to Register a SUB Plan:** The registration office can be reached at 1-800-561-7923 or by fax to 506-548-7473. Current information suggests that they are processing same-day registrations. More information on SUB Plans can also be found at

https://www.canada.ca/en/employment-social-development/programs/ei/ei-list/ei-employers-supplemental-unemployment-benefit.html. Please contact our firm at any time – we would be happy to help you through the process.

5.3 Work Share Programs

- **What is a Work Share Program?** Work Share is an EI program that helps employers and employees avoid layoffs when there is a temporary decrease in business activity. Work Share allows eligible employees who agree to reduce their normal working hours and share available work with their co-workers to receive EI benefits, without having those EI benefits reduced by the amount of income they are earning by working for their employer. The goal of the program is restorative and aimed at the eventual return to normal working hours.

- **Is the Work Share Program an Appropriate Response to COVID-19?** Initially, the Work Share Program did not "fit" the COVID-19 crisis particularly well. During the first few weeks of COVID-19, Work Share still had a thirty (30) day waiting period and also required employers to file a recovery plan – something which was more appropriately suited to economic downturns, rather than the global pandemic of COVID-19. Fortunately, the requirement to file a recovery plan has been relaxed to only require a one-line reference to COVID-19, and the waiting period has been reduced to ten (10) days as part of the federal government's commitment to "streamline" the program. Accordingly, the Work Share Program may now be a more attractive option for some employers.

- **Must There be an Equal Sharing of Work?** Yes, all members of the defined Work Share Unit (or a trade union) must agree to reduce their hours by the same percentage and share any available work. Absent an agreement, a Work Share Program will not be possible. This requirement of an agreement with the identified Work Share Unit (or, in a unionized environment, with the union) which makes the Work Share plan sometimes difficult to obtain and not appropriate for all workplaces.

- **How Much of Reduction Should There Be?** There must be a reduction in business activity of at least 10% in order to qualify for a Work Share Program. Furthermore, the employees regular work schedule must be reduced by 10% to 60% in an average week.

- **What are the time periods that we can Work Share for?** The Work Share Agreement has to be for a period of at least 6 consecutive weeks and owing to COVID-19, can now be extended for up to 76 weeks in total.

- **How to Implement a Work Share Program?** A tri-partite agreement is required between the employer, employee (or union if applicable) and Service Canada. An EMP5100 and EMP5101 form should be completed and submitted by email to ESDC.ON.WS-TP.ON.EDSC@servicecanada.gc.ca. Both of these forms have been enclosed with this booklet.

- **What if We Have an Expired Work Share Program?** Employers with expired agreements can immediately apply for new agreements (without any cooling-off period) and further information is available at https://www.canada.ca/en/employment-social-development/services/work-sharing/temporary-measures-forestry-sector.html

5.4 Wage Subsidy

- **Initial Announcement – 10%:** Early on, the Federal Government announced a temporary wage subsidy for small-to-medium sized enterprises, providing assistance equivalent to 10% of their wages, subject to a cap of $25,000, for up to three (3) months.

- **Updated – 75%:** More recently, the Canada Emergency Wage Subsidy ("CEWS") was also announced. It provides "qualifying businesses" with a 75% wage subsidy that is taxable, up to a maximum of $847 per week per employee, with a view to reducing the need for layoffs across Canada.

- **Which Businesses Qualify for the 75%?** This benefit is now available to employers of all sizes and across all sectors. Currently, the only exception appears to be public sector entities, along with specialized rules being planned for non-profit organizations and registered charities.

- **What about Business Owners who are Employees within their own Businesses?** For non-arms length employees (typically business owners who are also employees), they too will qualify for the CEWS provided they were employed prior to March 15, 2020 and in such cases, the subsidy will be limited to the lesser of 75% of their pre-crisis remuneration, or a maximum of $847 per week.

- **Can foreign owned Employers qualify for the CEWS?** It appears at this stage that foreign-controlled companies may also be eligible, as the Federal Government has announced that an employer's revenue would include its revenue from business carried on in Canada and earned from arm's-length sources.

- **Does the Benefit Have Any Limitations?** The benefit will be available for a 12-week period, backdated to March 15, 2020 and available until June 6, 2020, with the possibility of being extended to no later than September 30, 2020. Also, the benefit will be limited to the lower of an

employee's actual earnings or $58,700. The federal government announced that it will also expect employers to use their best efforts to continue to top up employee salaries, although it remains unclear how these efforts will be measured and/or whether the future receipt of these benefits will depend on such top up efforts actually being made. Bill C-14 does not clarify this aspect.

- **What is the Criteria for Eligibility?** To become eligible, employers will only have to apply once and provided that can demonstrate a decline in gross revenue as follows:

Eligible Periods

	Claiming period	Required reduction in revenue	Reference period for eligibility
Period 1	March 15 to April 11	15%	March 2020 over: • March 2019 or • Average of January and February 2020
Period 2	April 12 to May 9	30%	Eligible for Period 1 **OR** April 2020 over: • April 2019 or • Average of January and February 2020
Period 3	May 10 to June 6	30%	Eligible for Period 2 **OR** May 2020 over: • May 2019 or • Average of January and February 2020

- **How Are the Revenues to Be Calculated?** Revenues will be calculated through normal accounting practices and either the accrual or cash methods may be used, but not a combination of the two. Furthermore, the method of calculation selected when first applying (accrual or cash) will continue for the duration of the CEWS in relation to that applicant employer.

- **How do we calculate revenue if we have various divisions in our business?** This can be done on a consolidated basis (within a corporate group) or on a stand-alone basis. It should however be borne in mind that once a method of calculation is elected, the qualifying employer will not be permitted to use an alternate method of calculation.

- **Are there any other benefits of the CEWS:** Yes, in addition to the subsidy itself, a 100% refund will be available for certain employer contributions to EI and the Canada Pension Plan. Employers who are eligible to claim the 75% CEWS for an eligible employee, will through this refund be covered for their contributions to these plans and for each week for which the employee is on leave with pay. Employees who are on leave with pay for only a portion of a week will not qualify. Employers will still be required to collect and remit employer and employee contributions to each payroll remittance program as usual and will then apply for a refund.

- **What If We Don't Qualify?** Businesses that do not qualify will still be able to apply for the initially announced 10% wage subsidy (up to a maximum of $1,375 per employee and capped at $25,000). This seemingly still appears to be limited to qualifying small and medium businesses only. Currently, the 10% subsidy is to be addressed through payroll remittances, as opposed to money flowing directly to employers, as is the approach with the CEWS.

- **How Will the Wage Subsidy Be Accessed?** It was announced that the subsidy will be applied for through the Canada Revenue Agency's online portal, commencing on or about April 6, 2020. Current indications are that it could take up to six (6) weeks to receive the subsidy.

5.5 Canada Emergency Response Benefit (CERB)

- **Consolidation:** Initially and in response to the COVID pandemic, two employment insurance benefits were introduced, namely the "*Emergency Care Benefit*' and '*Emergency Support Benefit*". In the days that followed, these two benefits were combined into the "*Canada Emergency Response Benefit*" ("CERB"), which is now regulated under the *Canada Emergency Response Benefit Act* ("*CERBA*"), which was enacted under Part 2 of the *COVID-19 Emergency Response Act* ("*ERA*").

- **What Benefits Are Provided for Under the CERB?** The CERB has already started paying applicants a taxable benefit of $2000 per month. It should be kept in mind that section 7(1) of the *CERBA* states that "*the amount of an income support payment for a week, is the amount fixed by the regulation for that week*". Therefore, with regulations yet to be published, the amount of this benefit could still change in time to come. It is also possible under section 7(3) of *CERBA*, that the CERB payment may, by way of regulations to be published, distinguish between different classes of workers, rendering its future beneficiaries somewhat uncertain. It is also not clear what these classes of workers may be at this stage.

- **Over What Period of Time Will CERB Benefits Be Available?** The CERB will provide income support for a period of 16 weeks (4 months), but this will be limited to the period falling between March 15, 2020 and October 3, 2020.

- **Who Is Eligible to Apply for the CERB?** To qualify for the CERB, an individual must first be a "worker" as defined in the legislation. This includes an individual who is at least 15 years of age and a resident of Canada, and who, during 2019 or in the 12-month period preceding their application for the CERB, received a total income of at least $5000.00, inclusive of any benefits and/or allowances. Once qualified as a "worker", eligibility is then further determined in terms of section 6(1) of the *CERBA*, meaning that income support will be paid to the worker (whether employed or self-employed), where they have had to cease working for reasons related to COVID-

19 and for at least 14 consecutive days within the four (4) week period in respect of which they apply for the payment. In order to be eligible, the "worker" must not have received:

- income from employment or self-employment;
- benefits in terms of the *Employment Insurance Act*;
- allowances, money or other benefits paid to the worker under a provincial plan because of pregnancy or in respect of the care by the worker of one or more of their new-born children, or one or more children placed with them for the purpose of adoption; or
- any other income that is prescribed by the regulations.

- **The Remaining Gap:** As a result of the 14-consecutive day requirement under which no income or benefits may be received, a number of contract and *ad hoc* workers who rely on short project or day jobs were confronted with the choice of taking on piecemeal work and excluding themselves from the CERB, or alternatively turning down this work in order to keep qualifying for the certainty of its benefits. The Federal Government has since announced that qualifying employees who earn up to $1000.00 per month from other sources, will still be eligible to apply for the CERB.

- **How Does the CERB and Ordinary EI Benefits Overlap?** In order to apply for the CERB, the worker must not have qualified for EI benefits, subject to the exception that (i) workers who are otherwise waiting to still receive their EI benefits but are experiencing delays in their application might be permitted to apply for the CERB in the interim, and (ii) individuals who have exhausted their EI benefits may, in certain cases, also potentially apply to receive the CERB. These two exclusions appear to have been adopted by practice, as they do not appear in the *CERBA* legislation itself.

- **What About Workers Who Voluntarily Cease with Their Work?** These individuals are not intended to qualify for the CERB. As a practical matter, however, the Federal Government has said that they will essentially approve all applicants. Those who receive the CERB and may not have been entitled to it will likely have to pay it back.

- **How Do Employees Apply for the CERB?** Through the Canada Revenue Agency ("CRA").

- **Is the CERB a "Save All" Benefit?** For now, no. The CERB is a taxable benefit, meaning portions of it (which will be used now by the individuals receiving it) will effectively have to be repaid at the time of that individuals tax filing. Furthermore, if receiving the CERB is found to have constituted excess income, it can be clawed back by the CRA. It is also, as aforementioned, not currently available to workers who experience a reduction in hours but still receive some income (*e.g. ad hoc* contract work or short terms projects that only last a few days).

5.6 Summer / Student Program

- **Relief for Employers Who Hire Summer Students:** These employers will qualify for a subsidy of up to 100% of the provincial or territorial hourly minimum wage, helping to create jobs for Canadians between the ages of 15 and 30, and helping them to obtain work experience.

5.7 Canada Emergency Business Account (CEBA)

- **Interest Free Loans:** of up to $40,000 for qualifying businesses were made available by the Federal Government, with up to $10,000 being forgivable if the balance of the loan is fully repaid on or before December 31, 2022.

- **Qualifying Criteria** was previously limited to business that had paid between $50,000 and $1 million in total payroll for 2019, and that qualifying criteria has since been expanded to now include businesses with a total 2019 payroll of between $20,000 and $1.5 million.

- **How do we apply of the CEBA?** You can contact your local business banker to find out more information as each banking institution has its own application process.

5.8 Canada Emergency Commercial Rent Assistance (CECRA)

- **Ontario's Response:** Following the Federal Government's announcement of the CECRA**,** Ontario has since formed the Ontario-Canada Emergency Commercial Rent Assistance Program (**OCECRA**).

- **What role will the OCECRA play?** It will facilitate the process for forgivable loans that will be made available to eligible commercial property owners experiencing rent shortfalls where their small business tenants have been heavily impacted by the COVID-19 crisis.

- **How does the program work?** The program aims to share the costs between small business tenants and landlords, with each being asked to cover 25 per cent of the rental cost, and with the Federal and Provincial Governments sharing the remaining 50 per cent between them. This amount would then be paid back through forgivable loans – with 37.5 percent being covered by the Federal Government and 12.5 percent by the Provincial Government.

- **How does the landlord get paid?** The landlord would in effect forego 25 percent of their rental income under the OCECRA, with the 50 percent portion then being recovered through the forgivable governmental loans and the business tenant paying the remaining 25 percent.

- **What qualifies as a small business?** In order to qualify, the small business must be a non-essential business that has temporarily closed OR, is experiencing a 70% drop in pre-COVID-19 revenues (determined by comparing revenues in April, May or June to the same month in 2019 or alternatively compared to average revenues for January and February 2020), and pays monthly gross rent that does not exceed $50,000.00. Not-for-profit organizations and charities are also eligible to apply.

- **Are there any exceptions to qualifying as a small business?** Yes, a small business that provisionally qualifies under the above criteria, will be excluded if it is an entity:
  - owned by individuals holding political office;
  - that promote violence, incite hatred or discriminate on the basis of race, national or ethnic origin, color, religion, sex, age or mental or physical disability; and
  - falls into the Lenders special accounts or Restructuring Group prior to March 1, 2020.

- **We are a small business. What can we expect from our landlord under the OCECRA?** First, the landlord will need to agree with your business that your rental costs will be reduced for the period between April to June 2020 and by at least 75 percent, given that the small business tenant will still be responsible for 25 percent of the rental cost. Your landlord will also need to provide you with a signed '*rent forgiveness agreement*' which must include a moratorium on any evictions for a period of three months. These are all pre-conditions for the landlord to qualify under the OCECRA.

- **Our business is a landlord. How do we apply under the OCECRA?** The OCECRA will be administered by the Canada Mortgage and Housing Corporation (CMHC) and can be applied for up to and including September 30, 2020. It follows that support would be retroactive to April 1, covering April, May and June 2020.

5.9 **Temporary Pandemic Pay**

- **Pay Bump:** Premier Doug Ford has announced that pandemic pay for health care workers across the Province will be provided, resulting in a $4 an hour pay bump. There will be an additional monthly $250 lump-sum payment for employees that work 100 hours or more.

- **Will the Pandemic Pay be indefinite?** No, the Premier has announced that the pandemic pay will be effective for 16 weeks, from April 24, 2020 until August 13, 2020.

- **Who qualifies for the Pandemic Pay?** The eligibility criteria was determined and then expanded upon all within the same week. Pandemic Pay will apply to frontline public sector employees, excluding management. The updated list of eligible front-line employees can be found here:

https://news.ontario.ca/opo/en/2020/04/pandemic-pay-provides-support-for-frontline-workers-fighting-covid-19.html

- **What's next?** Although the Provincial Government has generally been applauded for its introduction of Pandemic Pay, there appears to be further calls for it to now be made retroactive, as has been the case with other benefits and subsidies.

6 Key Considerations in Managing the Pandemic

- **Active and Frequent Communication:** Remains key during this outbreak. While words of encouragement and fostering a protective environment should be the foremost message, staff should be reminded that they are obligated to disclose any symptoms so that the company can reasonably react to same. A failure to do so could amount to dishonesty and could result in disciplinary action being taken.

- **Dealing with Symptomatic Employees:** Employees who believe that they have been exposed to COVID-19 or have recently returned from travel, can and should be required to go into self-isolation for a minimum of fourteen (14) days. These measures have been sanctioned by Public Health Ontario, and all levels of government. Their absences will be treated as sick leave potentially under any available STD benefit scheme and failing this, under EI, with the usual one-week waiting period now being waived. It should be remembered that a medical certificate is not required for COVID-19 related sick leave.

- **Tele-Health and an Online Diagnosis Tool:** This has been made available online at https://covid-19.ontario.ca/self-assessment/#q0 and symptomatic workers have been asked to utilize this tool prior to seeking out testing centers.

- **Discipline**: Where employees refuse employer directives, especially those around health and safety, these incidents should be dealt with on a disciplinary basis in order to safeguard the rest of an employer's workforce. Employees should be made aware that non-compliance with reasonable COVID-19 related directions can and will result in discipline up to and including termination.

- **Privacy and Employee Data:** The *Personal Health Information Protection Act* ("*PHIPA*") deals with the disclosure of medical information by an employee to an employer. As such any information regarding a positive COVID-19 test (or any related symptoms prompting quarantine or self-isolation), ought to be treated as a confidential matter. Under the *PHIPA*, employers should:

- limit access to personal health information by designating an exclusive person within the organization as a “Health Information Custodian” (typically the HR manager);

- implement contingency measures to provide access to a second person (typically the President, CEO or a senior executive, or a “person to be designated by the Board / CEO / President”), as a failsafe if the primary Health Information Custodian falls ill or is absent from the workplace for other reasons;

- limit disclosure of health information to all other third parties, including colleagues and co-workers, save and except as required by law;

- protect the integrity of personal health information, whether in physical or virtual form; and

- take steps to communicate with employees so that employees are aware that their personal health information will be kept confidential, to the extent possible and as required by law.

- **Confidentiality:** Should remain of paramount importance for two reasons. First, it provides employees anonymity around their personal reasons for leave, self-isolation or diagnosis. Secondly, it prevents unnecessary panic amongst the workforce. It will also provide for a smoother return to work for affected employees.

- **Compulsory Disclosure**: Disclosure of a positive COVID-19 test result may be ordered by a third party pursuant to statute (for instance in order to comply with an Order by the Ministry of Labour, following a work refusal) and the *PHIPA* permits legally mandated disclosure, in limited circumstances.

7 The Post-Pandemic Workplace

- **Will Social Distancing be a Thing of the Past?** We think it unlikely. The world as we knew it may never quite return to the way it was before. Sneezing and coughing (normal human reactions) have never turned so many heads and this will probably continue – yes, "sneeze shaming" is a new social phenomenon. Shaking hands may well be replaced by a nod and friendly smile (or perhaps an elbow bump) instead. This does not mean we will forever be six (6) feet apart, but the social distancing measures may need to be eased in through a phased approach, respecting the realities of each employee's concerns. One could foresee a new form of "*social contract"*, where the employer balances these new public health concerns with the operational requirements of the business and where, equally, employees become more accountable to each other.

- **The Minstry of Labour has published various RTW Guidelines:** In anticipation of the staged re-opening of the economy, the MOL has published guidelines to help protect workers, customers and the general public from contracting coronavirus (COVID-19) in Ontario. These *'per sector'* guidelines can be located at https://www.ontario.ca/page/resources-prevent-covid-19-workplace.

- **Employees Returning from Any Period of Layoff and "Work Refusals" under the *OHSA*:** Is it safe to return to work or not? What happens if your workplace was one that had one or more confirmed COVID-19 cases? How do you address employee anxiety about returning to work? Additional safety measure introduced under COVID-19 may need to become living measures in the post-COVID world of work. Where work refusals persist, matters will need to be considered on a case-by-case basis to determine whether the refusal is reasonable and whether the concerns can be addressed, or alternatively whether the refusal warrants discipline, education, training, or some other action.

- **Increased Union Activity**: **Post-COVID:** Employers should anticipate that unions will become increasingly active as COVID-19 levels off. From an economic and business perspective, unions will likely pursue strategies to recoup lost revenues due to COVID-19. This could include aggressive certification attempts. Furthermore, unions are adept at playing "Monday morning quarterback". We can anticipate that they will poke holes in efforts made by the employer in trying to navigate the COVID-19 crisis. In fact, unions might unfairly criticize employers, and make claims that employers should have handled things differently, all in an effort to garner union support and "protection". It would be

important to have a proactive strategy in place for addressing this possibility, starting with active communication to staff so that the narrative is properly controlled. Certainly, we have seen certain trade unions becoming more sophisticated by digitizing their communication efforts (even during times of self-isolation).

- **Future Demands:** For unionized employers, we anticipate seeing future demands around pandemic-related protections and protective policies for employees.

- **Opportunity:** Conversely, for employers within a constructive labour relations environment, the aftermath of COVID-19 presents an opportunity to collaborate with the union and strengthen relationships through enhanced health and safety programs, testing, policies, pandemic planning and collective agreement language regarding layoffs and continued operational plans during any future pandemic.

- **Constructive Dismissal:** The risks around constructive dismissal and in particular some of our thoughts on this topic have been shared above. Moving forward, it may be prudent to "future proof" your organization to the extent possible by revising contracts of employment to include layoff provisions. From a budgeting perspective, it might be prudent to assess your litigation risk as a result of layoffs, and preparing for the cost of either litigating those matters or accruing reasonable settlement funds.

- **Individual Privacy vs. Health and Safety:** Medical testing and privacy related concerns will again be issues for debate as employers will demand greater freedom around testing their workforce in order to protect it, while employees will want this too, but not at the expense of their privacy. It will also be interesting to see what case law develops from the existing testing that has been conducted under COVID-19. It will be important, from an organizational perspective, that you are very familiar with your health information privacy obligations, and adhere strictly to those legislative requirements.

- **Mental Health Support:** Employees (and their families) might experience significant anxiety at the thought of returning to work following the lifting of restrictions. You may already have in place an Employee Assistance Program ("EAP") or other supports and services for your employees. In Ontario, the Centre for Addiction and Mental Health ("CAMH") is available to assist employees who may require counselling and support. "ConnexOntario" is a resource for individuals over the age of 18, and has a help line available at 1-866-531-2600. For family members or younger workers, "Kids Help Phone" (for children and youth under the

age of 18) is a possible source of support (1-800-668-6868). An “App” that could assist employees by providing them with coping tools even before they return to work is “Headversity” – www.headversity.com. Over and above these, employers may want to investigate further, what (if any) resources are available in their area, or through any benefits plan, and to communicate these to staff upfront and even before they return to work, as troubled employees are unlikely to actively seek out help.

- **Dealing with Employee Overpayments**: Between the CERB, EI and the CEWS, duplicate payments are bound to occur as these programs have rolled out. The Federal Government has acknowledged as much, noting that a plan is being implemented to deal with any overpayments. For the time being, we would suggest that employers simply inform their employees that any overpayments should be banked and saved for now, as any overpayments will need to be repaid by the employee.

- **Legislation:** We also anticipate that legislative changes will be made for the long term, assisting both the Federal and Provincial governments in appropriately responding to any future pandemics or public health crisis.

- **Public Sector Employees – Bill 124:** With Bill 124 taking effect and effectively capping public service remuneration at 1% per annum, it will be interesting to watch how this develops. There will be particular focus on the health care sector, where demands may be made for danger / risk pay, should the effects of COVID-19 continue, forcing the Government of Ontario to revisit these limitations.

- **Online Security:** Internet watchdogs have indicated a sharp increase in malicious activity on the web, taking advantage of the many employees working from home and exposing their IT infrastructure to unsecured and/or shared internet connections. Sufficient firewall protections and telecommuting policies should set the standard in order to adequately deal with these new risks.

- **Deferred Tax Filing**: It has also been announced that the CRA will allow all businesses to defer the payment of certain income tax amounts that become owing during the COVID-19 crisis until August 31, 2020. No interest or penalties will accumulate on these amounts during this deferral period.

8 Closing

- As you know, things are evolving as the COVID-19 crisis continues to develop. We are continuously monitoring new legislation, regulation, policy and directives.

- The goal of this Playbook is to provide you with information on the key considerations to help you navigate through these challenging times. As we have all seen, however, the law and policy are changing rapidly as governments at both the Federal and Provincial level try to manage this crisis. We will continue to provide regular updates as new developments arise. If you require any assistance, please just reach out to us at any time. We would be happy to assist.

Sincerely

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