

# CGF POINT OF LAW

## SPECIAL BULLETIN



### GUIDELINES ON COVID-19 AND ITS IMPACT ON EMPLOYMENT LAW

*Given the confirmation by the Minister of Health and Wellness that there are two confirmed cases of COVID-19 in Barbados, we have set out in this document general information for employers. This note does not constitute legal advice. If you require legal advice or have a legal question relating to the COVID-19 outbreak which is not addressed in this document, please contact our Mr. Omari Drakes ([omari.drakes@clarkes.com.bb](mailto:omari.drakes@clarkes.com.bb)).*

#### ABSENCE AND PAY

##### Are employers entitled to send an employee home to self-isolate?

- Generally an employer is entitled to send an employee home to self-isolate.
- This is particularly so if:
  - the employment contract gives the employer an express right to require the employee to stay at home; or
  - the employee falls within the category of employees advised through public health guidance to self-isolate.

##### What pay are affected employees entitled to receive in the event of self-isolation?

- If self-isolation is as a result of an employer's decision; it is likely that employees will retain their right to receive full pay based on the employer's implied duty to pay wages.
- If self-isolation is as result of mandate by government, the period of isolation will impact the entitlement to pay. For a short self-isolation period it is our view that an employee would be entitled to receive full pay. For an extended period of self-isolation, the employer is advised to seek legal guidance in light of the potential contractual and statutory exposure.

### **What if an employee refuses to attend work due to fears about Covid-19?**

- If the employee does not fall within a category of individuals who have been advised to self-isolate by public health officials they could be investigated for misconduct (insubordination; absenteeism) and subject to disciplinary action.
- The employer may also be entitled to withhold pay as the employee has withheld work.

### **How does an employee's holiday entitlement factor into the equation?**

- An employer could force an employee to take annual holiday provided that the employer gives the employee no less than 14 days' notice of the date on which the holiday is to commence.
- The employee will be entitled to receive holiday pay in the usual manner.

## **EMPLOYER'S DUTY OF CARE**

### **What safety and health obligations does the employer have?**

- The Safety and Health at Work Act (2005-12) mandates that employers have a duty to ensure so far as reasonably practicable, the health, safety and welfare at work of their employees.
- In this regard, we recommend that you take guidance from the information provided by the Government of Barbados via the Government Information Service's website (<https://gisbarbados.gov.bb/covid-19/>)

### **What should an employer do where an employee who is at work starts displaying symptoms?**

- Follow the guidelines established by the Government of Barbados (See link above).

### **Can employers lawfully conduct temperature checks on employees or visitors?**

- An employer cannot require an employee or visitor to undergo a medical examination without their consent. Temperature checks are considered medical examinations and would therefore require consent.

### **Can you bar visitors suspected of carrying the COVID-19 virus from entering your workplace?**

- In the absence of a contractual provision to the contrary, an employer has the right to refuse entry to any visitor to the workplace.

### **Is an employer entitled to require an employee to work from home?**

- The Employment Rights Act (2012-9) requires an employer to indicate an employee's place of work. A variation of an employee's place of work has been recognised as a variation to their contract of employment at common law. Such a variation without an employee's consent could trigger a claim for constructive dismissal. However, given that the proposed variation would be for the employee to work from home for their safety, it is our view that the likelihood of challenge to the variation would be low.

## **DEALING WITH THE ECONOMIC IMPACT**

### **What action should employers be taking now?**

- The employer should consider its contractual sick pay policy.
- Consideration should be given to how contractual absence management processes may be adjusted to reflect self-isolation and high numbers of diagnosed cases.
- Ensure developments and updated internal guidance is effectively and regularly communicated to employees.

- Identify and meet with any high-risk employees.
- Identify the point at which the business may need to cease operating temporarily and consider the employment law consequences.

**In what circumstances could the employer consider lay-off and short-time working?**

- Statutory and common law guidance will assist in determining the circumstances where an employer could consider lay-off or short-time working.
- Generally, lay-off may need to be considered in the following scenarios:
  - a downturn in work due to the effect of COVID-19 on suppliers and customers means that fewer employees are required on a temporary basis; or
  - temporary closure of the workplace due to insufficient employees being able to work.
- Generally, short-time working may need to be considered where there is:
  - A downturn in work due to the effect of COVID-19 on suppliers and customers meaning that the business does not need all employees to work their contracted hours.

## PRIVACY ISSUES

**Do employees have the right to be notified if a colleague develops the virus?**

- Employees must be notified of the infection risk as soon as possible. However, the identity of the individual should not be disclosed.
- An employer should simply advise that an employee who has been in the workplace has been infected and that appropriate precautions should be taken pursuant to national public health guidance and the employer's duties under the Safety and Health at Work Act (2005-12).

## CONCLUSION

No one can immediately anticipate all possible issues that will arise in what is presently a very fluid situation. However, we view these guidelines as informing necessary considerations for employers as they seek to effectively and efficiently handle their human resources.



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