

Coronavirus (COVID-19): Legal update for Canadian employers - Legislative and privacy update

April 9, 2020

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Amendments to Alberta *Employment Standards Code*

April 9, 2020

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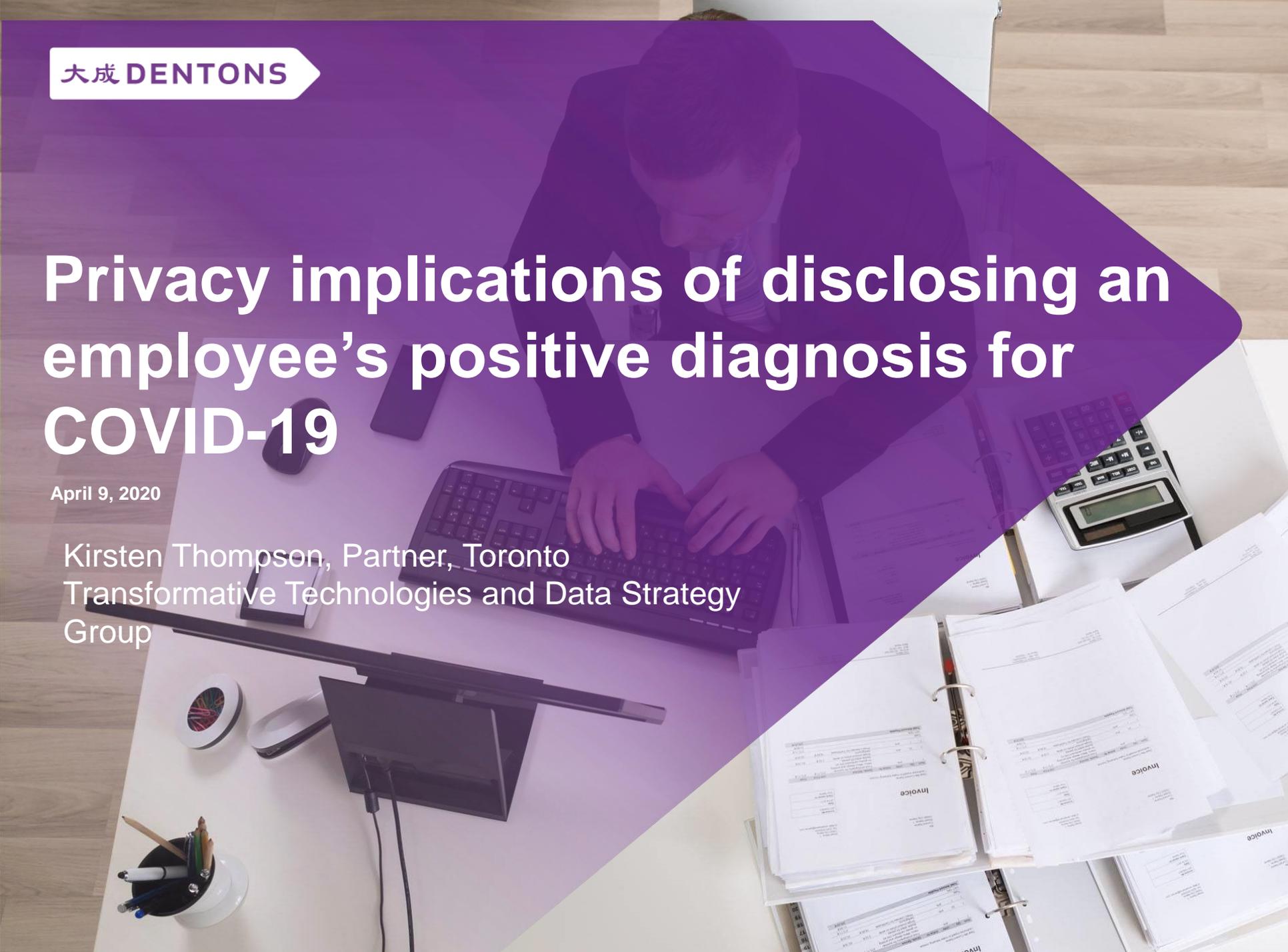
Amendments to Alberta *Employment Standards Code*

- Increasing Maximum Time of Temporary Layoffs
- Notice of Group Terminations
- New Job Protected Leaves
- No Notice of Shift Change
- No Notice to Change Work Schedule under Averaging Agreement
- Requests for Variances and Exemptions

Privacy implications of disclosing an employee's positive diagnosis for COVID-19

April 9, 2020

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Privacy implications of disclosing an employee's positive diagnosis for COVID-19

1. Personal Information (“PI”) Handling In the Public Health Emergency Context

- Under Canadian private sector, health sector, and public sector privacy laws, organizations may disclose personal information:
 - with consent of the individual, or
 - or under an exception to consent set out under the applicable statute.
- Exceptions to consent: the disclosure of PI in emergency situations involving threats to life, health or security of an individual and/or the public at large.^{1, 2}

[1] *There are a variety of other exceptions to consent in Canadian privacy statutes that may also be applicable to COVID-19 including disclosure permissible pursuant to law (e.g., Quarantine Act, emergency orders).*

[2] *The statutes use different language to frame the exception – threat to “an individual” vs. threat to “the public” – and may contain conditions.*

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- Exceptions generally require **notice of the disclosure** be given to the individual before disclosure (if practicable) or without delay afterwards.
- Where an organization either has consent or relies on an exception to consent to collect, use or disclose PI (e.g.), it must still:
 - collect, use and disclose PI only as **reasonable and appropriate** in the circumstances.
 - limit the PI to that which is **necessary** to achieve the purpose of the collection, use or disclosure.
 - comply with the **accountability** principle, by documenting the disclosure of PI.
 - be **open and transparent** about its policies and practices (incl. the legislative authority you are relying on to disclose).³

[3] See *Office of the Privacy Commissioner of Canada guidance, Privacy and the COVID-19 outbreak, March 2020*; *Office of the Information and Privacy Commissioner of Alberta, Privacy in a Pandemic, March 2020*.

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2. PI Handling in the Employment Context

- Private sector privacy statutes **do not require consent** to collect, use or disclose PI that is necessary to manage the employment relationship
 - However, employee must have been notified that their PI will or may be collected, used or disclosed for those purposes.
- Where **necessary to fulfill their health and safety obligations** in the context of the COVID-19 pandemic, employers may be justified in asking employees to disclose whether they have tested positive for COVID-19, or been exposed to certain risk factors (e.g., recent travel, contact with others who have tested positive).
- What is “**necessary**” in the circumstances may depend on an employer's health and safety obligations to all of their employees, or may be as required by public health authorities.

Privacy implications of disclosing an employee's positive diagnosis for COVID-19

- There are limits! Employers should not disclose the reasons for an employee's leave, except to those employees who require that information to carry out their employment duties or to maintain a safe workplace.
 - Objective is to provide potentially exposed employees with sufficient information to protect themselves from the risk. Limit the PI to fulfilling this purpose.
- Make reasonable efforts not to disclose information that might (alone or together with publicly available information) identify the specific individual(s) who may have caused the COVID-19 transmission risk.
- Balancing act: in some cases it may not be possible to provide notice of COVID-19 transmission risk without expressly or implicitly identifying the individual at the source of the risk.

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3. PI Handling in the Security Context

- Organizations must implement reasonable safeguards appropriate to the sensitivity of the PI in their custody and control.
 - Employers are handling **more sensitive information** (e.g., health information).
 - **Information security measures are challenged** by remote working arrangements implemented (often quickly) by organizations.
- Must consider the physical, technical and administrative controls necessary to appropriately protect PI from loss, theft, unauthorized disclosure, etc.
 - PI on portable devices? Require authentication and encrypt in transit & at rest.
 - Remote workforce? Secure VPNs with multi-factor authentication.
 - Increased phishing/fraud risk? Supplement privacy training for new remote/WFH context.
 - Consider how remote working will impact data incident response, disaster recovery and business continuity plans

Bonus Tip: PI left on your locked down/empty premises (e.g., laptops, devices, files)? It's at risk for old-fashioned smash and grab theft.

Is Employee Temperature Screening Legally Permissible?

April 9, 2020

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Is temperature screening legally permissible?

- There are human rights, occupational health and safety, and privacy considerations that employers must take into account if they wish to take the temperature of employees entering a premises.
- Generally speaking, medical examinations or health-related tests like temperature testing are generally acceptable ***only*** if the testing or examination is reasonably necessary to confirm the potential employees' ability to perform a *bona fide* occupational requirement of the role.
- It is generally impermissible to require that **all** employees to undergo a health-related test such as temperature screening in the workplace, as that constitutes an invasive action.

Ontario and Quebec

- BUT: COVID-19 may be **sufficiently serious** to allow for a departure from the general rule that temperature screening of all employees is impermissible.
- Where businesses continue to operate, their obligation to take all reasonable precautions for the protection of the health and safety of their employees likely justifies temperature screening in these circumstances.
- The temperature taking process should be as minimally invasive as possible.

The Ontario Human Rights Commission

- The Ontario Human Rights Commission published its position on COVID-19 and Ontario's Human Rights Code in relation to temperature screening:

- 10. *Can my employer make me do a medical test for COVID-19 like take my temperature as a condition for working?*

The OHRC's policy position is that medical assessments to verify or determine an employee's fitness to perform on the job duties may be permissible in these circumstances under the Code.

However, information on medical tests may have an adverse impact on employees with other disabilities. Employers should only get information from medical testing that is reasonably necessary to the employee's fitness to perform on the job and any restrictions that may limit this ability, while excluding information that may identify a disability.

Employees and employers also have rights and obligations for workers' health and safety on the job under the Occupational Health and Safety Act. Visit the Ontario Ministry of Labour, Training and Skills Development website for more information, including how to contact the Ministry.

- Source: http://www.ohrc.on.ca/en/news_centre/covid-19-and-ontario%E2%80%99s-human-rights-code-%E2%80%93-questions-and-answers-0

Alberta and British Columbia

- The *Personal Information Protection Acts* in Alberta and British Columbia put limits on employee screening and require that where collecting personal information, only the personal information that is minimally necessary be collected, and that it is collected in the least intrusive way.
- Permissibility of temperature screening is a question of reasonableness. In the COVID-19 context, it may depend on factors such as:
 - Whether the results are reliable insofar as indicating if someone may or may not have COVID-19;
 - Whether health authorities have recommended or recognized temperature checks as an effective screening method;
 - Whether the checks are carried out in the least intrusive manner possible (e.g. by a professional third party rather than an employee's supervisor);
 - Whether there are less intrusive ways of accomplishing the same goals;
 - The sensitivity of the personal information; and
 - Whether it is necessary to impose blanket screening vs. screening of certain individuals who may be working in closer proximity to others or whose duties otherwise suggest enhanced caution is required.
- Unless there is a scientific basis for requiring such screening, it will likely be difficult to justify the collection of such personal information from a privacy standpoint.

Suggested Best Practices for Temperature Screening in the COVID-19 Climate

1. Ensure the **dignity** of the individual being screened.
2. Conduct the screening **in conjunction with other active screening measures** (including self-monitoring and assessment questions).
3. Conduct the screening in a **private** manner, ensure results cannot be overheard, and keep results in the strictest confidence.
4. Ensure the individual conducting the screening has appropriate **personal protective equipment**.
5. Ensure **physical distancing** throughout the screening process (both during the screening itself, and if individuals are waiting to be screened).
6. Set a threshold temperature for the screening that is **objective and medically supported**, and consistently apply it to all individuals.

Thank you



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