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COVID-19

A Roadmap For Navigating Return-To-Workplace Decisions

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Plans to emerge from the COVID-19 lockdown and return to the workplace present special challenges for organizations and their internal and external legal advisors. Although both law and medical science have bearing on the decision to re-open the workplace, at heart each decision will be founded on the exercise of business judgment and risk oversight by business leaders in their own circumstances. The in-house legal team can be an important resource to guide the board and management through these processes..

Building a Roadmap for Decision-Making and Risk Oversight

Precision and accuracy are impossible against the current background of uncertainty and change. The most helpful guidance from legal advisors will therefore centre on helping business leaders navigate their decision-making and risk oversight process in a practical manner tailored to their business, emphasizing prudent and

balanced judgment over definitive answers.

Below is the roadmap and some basic tools that we are currently using to frame our own decisions around the return to the workplace.

Gather Information to Ground Decision Making

It is critical that your decision-making be informed and grounded in available facts. The legal team can play an important role not only performing legal research but also coordinating relevant information and reports from internal and external health and safety experts which will inform the decision-making process. Because the scientific data is incomplete and expert advice is evolving, this compilation will be not be perfect or produce certainty - the goal is to assemble the best information in the time available, with appropriate caveats for decision-makers to consider.

We have found it useful to group our own information into three general categories:

- **Legal requirements**

Identify the legal requirements that apply to the business and lay these out. Prescriptive requirements and applicable legal

obligations can be found in sources including¹:

- Orders issued under emergency management legislation including orders regarding essential businesses and operational requirements
- Orders and guidance issued under public health legislation
- Occupational health and safety legislation
- Occupiers' liability legislation
- Other regulatory requirements applicable to a particular business or industry

Some of these legal requirements are stated in general terms without clear prescriptive guidance, although provincial governments appear to be trying to clarify the requirements in a quickly evolving situation. See for example, Ontario's "Resources to prevent COVID-19 in the workplace", Alberta's "Alberta Biz-Connect", Work Safe BC's "What Employers Should Do" and Quebec's "Going Back to Work Safely". For more information and resources on legal requirements, please see our COVID-19 Canadian Legal Resources site.

- **Health and safety guidance and in-**

dusty practices

A second information requirement where legal teams can help is to distill down health and safety expert guidance and industry practice into a manageable summary. Given the volume of guidance available, uncertainty and range of workplace situations, it may not be practical or possible for all businesses to follow all of the (sometimes conflicting) guidance in all circumstances – so this distillation is very important to identify the key topics and different options that boards and senior management will need to consider.

• Internal policies and governance information

Finally, legal teams can gather an organization's own internal governance information that is relevant to the return-to-work decision. This could include any existing corporate governance documents and policies, risk committee and health and safety committee charters, business continuity plans, pandemic preparedness plans, and health and safety documentation. Any such existing documents may be relevant in guiding decision-making and should be followed and potentially updated for the current circumstances.

Assess Your Internal Business Operations

Once you have assembled the relevant information, decision-makers will need to know in practical terms how these new legal requirements, guidance and other measures could impact the specific business and its risks. For legal teams coordinating such an assessment for the board and senior management, this will entail working hand in hand with operational colleagues and in some cases with outside experts to identify and catalogue the processes, operations and locations where changes may be required.

Experience with this type of assessment will vary from business to business depending upon your industry and other factors. Businesses operating in an industrial environment will be familiar with evaluating their workplaces for hazards and risks and documenting the results. For many other businesses this exercise will be new, requiring a plan and framework for the assessment. Below is a list with some resources that can assist you.

Establish the Framework for Risk Oversight and Business Judgment

Although there are relatively few definitive legal requirements for a return-to-work plan, there are many broad concepts such as 'public health' and 'safety' that must be adhered to. Business leaders will need to make judgments to interpret these concepts on a case-by-case basis.

Legal advisors can help by framing the key decisions in return-to-work plans within the context of directors' and officers' duties of risk oversight, ensuring that good governance processes and documentation are in place for health and safety risks so that business leaders have the benefit of the business judgment rule. For a more detailed discussion of legal principles of risk oversight and business judgment applicable to boards and management please see our parallel post *Exercising Business Judgment Through COVID-19*.

Case law in both Canada and the U.S. highlights the importance of process in the exercise of business judgment, over the substantive result of the decision. In practice, this means that legal advisors can provide

some governance tools so that directors and officers can demonstrate good governance and business judgment processes:

- a risk oversight framework with a system of information, reporting and controls
- a process followed by directors and officers in reaching decisions on risk based on the exercise of business judgment; and
- documentation of the risk oversight system, the decision-making process, and what was considered in reaching a decision.

For some resources on decision-making processes and frameworks please see the resources section below.

Frame the Key Business and Operational Decisions to be Made

Developing a return-to-work plan entails a wide range of risk-related decisions – starting with threshold questions such as when, who and how – down to more operational topics such as numbers of coworkers on-site and the properties of PPE. The legal team can help the board and senior management by framing the key business decisions and highlighting the key elements of the plan that require special board attention. It can be helpful for boards and their legal advisors to think of risk governance as entailing both "risk oversight" decisions which are in the board's purview, and "risk operations," where teams can make operational decisions to implement the board's direction.

At their core, decisions to be made by the board and senior management involve balancing the benefits of rejuvenating the business and workforce, against the health and safety risks and risk mitigation strategies associated with emerging from lockdown. This balance will vary significantly depending on the business and the workplace. For example:

- What are the benefits of returning to the workplace at a given time? For a business that is unable to operate remotely and has laid off employees, the benefits are very different from a business that is effectively operating remotely with all its employees.
- What are the risks of returning? The risks of infection are higher in some communities and can be different depending on the type of workplace and degree of contact with others. The level of risk must be evaluated against this background and weighed against the benefits to the business and workforce.

- Can we mitigate the risks to an acceptable level in light of the benefits that can be achieved? The health risks associated with leaving home cannot be eliminated entirely presumably until a vaccine exists. However, many industries and businesses do operate in environments where heightened health and safety risks exist and are managed. Measures such as screening and testing, physical distancing, and PPE can be evaluated and put in place if they are judged to be effective in reducing risk to an appropriate level.

- How do we respond if risk levels elevate, mitigation strategies fail, or infections or other incidents occur? In line with risk management best practices, the return-to-work plan should include response protocols for infections and other triggering incidents for increased risk, which may include circumstances where restrictions on workplace access would need to be re-imposed.

The decisions made by business leaders should then form the basis of a return-to-work plan to move forward, which will address broader threshold issues as well spe-

cific operational decisions for the business.

Document, Monitor and Maintain the Plan

In accordance with good governance processes, the legal team can help by ensuring the return-to-work plan and board decision-making processes are documented – either as part of existing documentation in the organization such as a BCP plan, or as part of a risk or health and safety committee's mandate, or as a stand-alone document.

The plan, once made, will not be static. Updates may be needed to account for operational adjustments based on day-to-day experience. Updates will also be required to reflect new legal requirements, easing of restrictions and evolving guidance. The legal team can play an ongoing role in the risk oversight system of information, reporting and controls by monitoring external developments and business operations and identifying ongoing decisions for business leaders.

As all our organizations face these unprecedented challenges, now more than ever we can benefit from sharing information and experiences to learn from each other's successes and mistakes. Please get in touch if you have ideas, experiences or comments to offer.

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Resources

Business Judgment:

- "The Elements of Good Judgment" by Sir Andrew Lakerman (2020). Harvard Business Review: <https://hbr.org/2020/01/the-elements-of-good-judgment>
- "Risk Management and the Board of Directors" by Martin Lipton, Daniel A. Neff, and Andrew R. Brownstein of Wachtell, Lipton, Rosen & Katz (2019). Harvard Law School Forum on Corporate Governance: <https://corp-law.harvard.edu/2019/11/20/risk-management-and-the-board-of-directors-7/>

Return to Work Frameworks:

- Risk-informed decision-making guidelines for workplaces and businesses during the COVID-19 pandemic. Government of Canada: <https://www.canada.ca/en/public-health/services/diseases/2019-novel-coronavirus-infection/guidance-documents/risk-informed-decision-making-workplaces-businesses-covid-19-pandemic.html>
- Developing Guidelines for Returning to Work. Business Roundtable: <https://s3.amazonaws.com/brt.org/Business-Roundtable-GuidelinesforReturning-toWork-2020.04.24.pdf>
- Back to Work Toolkit. Joint project led by Madrona alongside the Seattle Venture Community, Leading Tech, Retail and Aerospace Companies in the Region and the Seattle Metropolitan and Bellevue Chambers of Commerce: <https://www.backtoworktoolkit.com/#resources>

Legal Resources:

- A list of Province by Province [Back to Work and Re-opening Plans](#)
- Our series of posts regarding [Essential Services, Workplaces and Commercial Activities in Alberta, British Columbia, Ontario and Quebec](#).
- [COVID-19: Employment Resources](#), including a Reintegration FAQ and Reintegration Checklist

1. By way of example in Ontario: Orders under the Emergency Management and Civil Protection Act (Ontario); compliance with the advice, recommendations and instructions of public health officials which is required under O. Reg. 82/20: Order under Subsection 7.0.2 (4) – Closure of Places of Non-Essential Businesses; orders under the Health Protection and Promotion Act (Ontario); Occupational Health and Safety Act (Ontario); Occupiers' Liability Act (Ontario)..