

Navigating a Pandemic and (Hopefully) Post-Pandemic World: Handling Covid-19 Considerations in Your Business

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About me & us

- Weaver, Simmons LLP's Labour and Employment Law Department (Sudbury office)
- Represent employers in labour, employment, and human rights matters in the workplace
- **This presentation is intended to provide basic legal information only. This isn't legal advice, and we are unable to provide legal advice to you today (but would be happy to schedule an appointment).**
- **This is a developing situation, and details may change**



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Outline of Presentation

1. Lifting of Vaccine Passport Requirements
2. Lifting of Masking Mandates
3. Isolation Requirements
4. Eligibility for Testing
5. What about my mask policy?
6. What about my vaccine policy?
7. Any new case law?
8. Provincial Leave Deadlines
9. Covid-19 Liability Waivers



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Lifting of Vaccine Passport Requirements

- On March 1, 2022, proof of vaccination requirements were lifted
- Organizations can retain their own policies, but be mindful of consumer expectations.

2. Will I be required to carry proof of vaccination once I receive the COVID-19 vaccine?

Businesses and other settings may choose to continue to require proof of vaccination to enter their facilities. It is recommended that highest-risk settings continue to require proof of vaccination prior to entry. Ontarians who receive a COVID-19 vaccine can obtain a vaccination receipt or certificate. An enhanced COVID-19 vaccine certificate with official QR code can be downloaded from Ontario's [healthcare portal](https://www.ontario.ca/enhanced-covid-19-vaccine-certificate). You can also Call the Provincial Vaccine Contact Centre to get your certificate in the mail: [1-833-843-3800](tel:1-833-843-3800) (available from 8 a.m. to 8 p.m., 7 days a week). A digital or paper version of the enhanced vaccine certificate with QR code can be used.



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Lifting of Masking Mandates

- Effective March 21,
 - General masking requirements are lifted, with some exceptions;
 - Passive screening of individuals prior to entering a business will no longer be required;
 - Businesses and organizations that open are no longer required to prepare and make available a safety plan



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Lifting of Masking Mandates - 2

- BUT, masking will still be required in some environments, per *Ontario Regulation 364/20*, including:
 - public transit, including indoor areas and vehicles (not including sightseeing or touring services)
 - health care settings including: hospitals, psychiatric facilities, doctors' offices, immunization clinics, laboratories, specimen collection centres, home and community care provider locations only if you are an employee or contractor, long-term care and retirement homes, shelters and other congregate care settings that provide care and services to medically and socially vulnerable individuals



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Isolation Requirements

- Isolation requirements for those exposed to Covid-19 have changed several times during the pandemic
- Presently, some requirements still exist
- Differ depending on vaccine status



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Reminder: Symptoms

- fever or chills
- cough
- shortness of breath
- decreased or loss of taste or smell
- 2 or more of:
 - runny nose or nasal congestion
 - headache
 - extreme fatigue
 - sore throat
 - muscle aches or joint pain
 - gastrointestinal symptoms (such as vomiting or diarrhea)



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Isolation Requirements

- Does your employee have symptoms/tested positive. Must isolate for:
 - at least five days if you are fully vaccinated or are under 12 years of age
 - at least 10 days if you are over the age of 12 and not fully vaccinated, are immunocompromised, or live in a highest risk setting
 - Note: If you reach the end of your isolation period and have a fever and/or other symptoms, you must continue to isolate until your symptoms have improved for at least 24 hours (or 48 hours if the symptoms affect the digestive system) and you have no fever.



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Isolation Requirements

- Has your employee been a close contact with a positive case (same household)?
 - **No isolation requirement if:**
 - you have previously tested positive in the last 90 days and do not have symptoms
 - you are over 18 years old and have received a COVID-19 booster dose
 - you are under 18 years old and are fully vaccinated
 - BUT – self monitor, wear a mask, avoid high risk settings
 - Otherwise, same isolation period as positive case



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Isolation Requirements

- Has your employee been a close contact with a positive case (outside of household)?
 - No isolation requirement, but:
 - self-monitor for symptoms for 10 days after your last exposure
 - wear a mask, avoid activities where mask removal is necessary (such as dining out, high contact sports) and follow all other public health measures if leaving home
 - do not visit any highest-risk settings (such as long-term care or retirement homes) or people who may be at higher risk of illness (such as seniors) for 10 days after your last exposure



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Informing – High Risk Settings

- If you live, work, attend, volunteer, or have been admitted in one of the highest-risk settings, you are required to inform:
 - That you have been exposed
 - Avoid going there for 10 days from your last exposure, unless you have tested positive for covid-19 in the last 90 days and have no symptoms
 - "High-risk settings" include:
 - hospitals and health care settings, including complex continuing care facilities and acute care facilities
 - congregate living settings, such as long-term care and retirement homes, First Nation elder care lodges, group homes, shelters, hospices, temporary foreign worker settings, correctional institutions and Provincial Demonstration Schools and hospital schools
 - home and community care settings



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Eligibility for Testing

- As you know, there is less eligibility for PCR testing than before
- You are eligible for PCR testing if you have at least one COVID-19 symptom and you are any of the following :
 - a patient-facing health care worker
 - a patient in an emergency department, at the discretion of the treating clinician
 - a staff member, volunteer, resident, inpatient, essential care provider, or visitor in a highest risk setting
 - a home and community care worker
 - a Provincial Demonstration School and hospital school worker
 - someone who lives with a patient-facing health care worker and/or a worker in the highest risk settings



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Eligibility for Testing - 2

- As you know, there is less eligibility for PCR testing than before
- You are eligible for PCR testing if you have at least one COVID-19 symptom and you are any of the following :
 - an outpatient being considered for COVID-19 treatment
 - an outpatient who requires a diagnostic test for clinical management
 - a temporary foreign worker living in a congregate setting
 - underhoused or experiencing homelessness
 - pregnant
 - a first responder, including firefighters, police and paramedics
 - an elementary or secondary student or education staff who has received a PCR self-collection kit, if available through your school
 - directed by your local public health unit



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Eligibility for Testing - 3

- Others are eligible without symptoms
- Whether you have symptoms or not, you are eligible for PCR or rapid point-of-care molecular testing if you:
 - are from a First Nation, Inuit, or Métis community or self-identify as First Nation, Inuit or Métis or live with someone who does
 - are travelling into First Nation, Inuit or Métis communities for work
 - are being admitted or transferred to or from a hospital or congregate living setting



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Eligibility for Testing - 4

- Others are eligible *without* symptoms
- Whether you have symptoms or not, you are eligible for PCR or rapid point-of-care molecular testing if you:
 - are a close contact in a confirmed or suspected outbreak in a highest risk setting, or other settings as directed by the local public health unit
 - have written prior approval for out-of-country medical services from the General Manager of OHIP or are a caregiver for someone who does
 - are in a hospital, long-term care, retirement home or other congregate living setting, as directed by public health units, provincial guidance or other directives
- **If you have tested positive on a rapid antigen test, you don't need a PCR test to confirm the result.**



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What about my mask policy?

- **Can workers continue to wear masks voluntarily?** Sure, and we recommend permitting them to do so. This assists source control in your workplace and does not hamper health and safety. Do not single out employees for wearing a mask. Encourage those wearing a mask to proceed at their comfort level and prevent any comments from other employees.
- **Can employers ask workers to wear a mask anyway?** Sure. Employers generally have broad discretion in their own policies. But, consider accommodations, and specific H&S needs.



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What about my vaccine policy?

- Per the Ministry of Health, organizations can retain their own policies with respect to vaccination.
- However, consider the necessity of your policy and the consequences for non-compliance. As provincial measures ease, the need for stricter policies may reduce.
- If hiring new employees, consider if an offer conditional upon policy compliance is appropriate.

Date	What's Changing?	Ongoing Support
March 16 Mandatory vaccination policies end	<ul style="list-style-type: none">• Revoke Directive 6• Revoke letters of instruction to Ministry of Children, Community and Social Services, Ministry of Seniors and Accessibility and Ministry of Education• Revoke Minister of Long-Term Care directive on immunization policy	<ul style="list-style-type: none">• Province to continue providing rapid-antigen tests to organizations• Organizations can retain their own policies



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Any new case law?

- **Power Workers' Union v Elexicon Energy Inc., 2022 CanLII 7228 (ON LA)**
 - Before C. Michael Mitchell, decision of February 4, 2022
 - The union challenged the mandatory vaccination policy introduced by the employer, an energy distributor owned by 5 municipalities
 - Employer is an essential service
 - Employers have an independent obligation under the OHSA to take measures to protect workers, which could include vaccine requirements provided this is not prohibited by the government and measures were reasonable
 - Arbitrator actually permitted booster requirements in some circumstances



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Any new case law?

- **Power Workers' Union v Elexicon Energy Inc., 2022 CanLII 7228 (ON LA)**
 - 4. The enormous change in circumstances since the policy was introduced three months ago, with the subsequent new rapid spread of the COVID-19 virus, the large increase in the number of cases including at Elexicon, new lockdowns, reimposed public health restrictions, dramatically increased hospitalizations, the closing of schools and business again after a lengthy period of being open, and new measures introduced by Elexicon itself to address the spread of Omicron, demonstrates very clearly that what constitutes a reasonable mandatory vaccination policy in the course of a pandemic is contextual and highly dynamic. [. . .]



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Any new case law?

- **Power Workers' Union v Elexicon Energy Inc., 2022 CanLII 7228 (ON LA)**
 - 5. I have determined that the general policy of the Employer requiring vaccination by its employees is reasonable in the particular circumstances of this case, particularly as it requires a small minority of unvaccinated employees to become vaccinated with three doses of the vaccine and requires the large majority of employees with two doses of the vaccine to become vaccinated with the third or booster dose.



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Any new case law?

□ Power Workers' Union v Elexicon Energy Inc., 2022 CanLII 7228 (ON LA)

- 6. [. . .] Here vaccinated employees are at less risk of becoming infected with the Omicron virus than are unvaccinated employees, and the more likely employees are to become infected, the more likely they are to transmit the disease to others. The Union's argument [. . .], is inconsistent on these facts with the precautionary principle which justifies that action be taken to protect employees where health and safety are threatened "even if it cannot be established with scientific certainty that there is a cause and effect relationship between the activity and the harm. The entire point is to take precautions against the as yet unknown": Ontario Nurses Association v. Eatonville/Henley Place, 2020 ONSC 2467 (CanLII).



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Any new case law?

□ Power Workers' Union v Elexicon Energy Inc., 2022 CanLII 7228 (ON LA)

- 7. The second reason the policy is reasonable is that the Employer has the responsibility of providing essential services, namely the transmission of electricity in the community, and must assure that it has a workforce that can provide the necessary services. [. . .]
- 8. I have also found, however, that the policy is not reasonable at this time as it applies to unvaccinated employees who have been working exclusively from home and for whom there is no expectation of a return to the office until April at the earliest, or to employees who work exclusively outside or who can be accommodated such they can work exclusively outside.



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Any new case law?

□ Unifor Local 973 v Coca-Cola Canada Bottling Limited, 2022 CanLII 20322 (ON LA)

- Before Arbitrator Mark Wright, decision on March 17, 2022
- Brampton bottling plant (700 workers)
- On October 26, 2021, company announced a nationwide Covid-10 vaccination policy, requiring employees to be fully vaccinated by January 1, 2022 (subject to accommodation)
- On January 12, 2022, employees were advised that unvaccinated employees would be placed on unpaid leave
- The company had many covid cases and two deaths among employees from covid-19
- Union grieved the placing of employees on unpaid leave
- Grievance was dismissed



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Any new case law?

□ **Unifor Local 973 v Coca-Cola Canada Bottling Limited, 2022 CanLII 20322 (ON LA)**

- 22. The Union challenges the reasonableness of the Policy on three grounds. First, it argues that the Policy is unreasonable because less intrusive means, such as enhanced PPE and rapid antigen testing, are sufficient to keep employees safe at work and enable the Company to meet its statutory obligation under the Occupational Health and Safety Act. Second, it expresses a concern that an employee's decision to not get vaccinated is almost always based on a strongly held personal belief, that may reflect a political perspective or lifestyle choice, because no one gives up a regular salary for no reason. This, it suggests, should be considered when judging the reasonableness of the Policy. Third, it argues that the Policy puts employees in an untenable situation; they must choose between their livelihood or their bodily integrity/autonomy.



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Any new case law?

□ **Unifor Local 973 v Coca-Cola Canada Bottling Limited, 2022 CanLII 20322 (ON LA)**

- 26. On the basis of the evidence before me and the submissions of the parties, I find that the Employer's mandatory vaccination Policy establishes a reasonable balance between an employee's interest to privacy and bodily integrity, and the Employer's interest in maintaining the health and safety of the workplace.
- 28. Moving to the specific context of this case, employees must attend the workplace to do their jobs. Most work in close quarters with fellow employees. Even the drivers in the bargaining unit regularly interact in close contact with dock workers and customers. Some drivers assist customer employees in setting up displays to "merchandize" the product at retail outlets. Most of the customers have their own vaccination policies, many of which require vaccination.



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Any new case law?

□ **Unifor Local 973 v Coca-Cola Canada Bottling Limited, 2022 CanLII 20322 (ON LA)**

- 45. I have found that the Policy and the placing of non-compliant employees on leave without pay to be reasonable and not contrary to the collective agreement. I note that **notice** has been one of the hallmarks of the Company's implementation of this Policy. Consistent with this approach, I believe it appropriate that non-compliant employees be provided with an opportunity to commence the vaccination process before facing the potential for discipline. In light of this, in the course of submissions I was asked by the parties for my opinion of what a reasonable period of time would be before the potential for discipline should arise. In my view it would be appropriate for non-compliant employees to be given to at least April 4th, 2022 to commence the vaccination process before facing the potential for discipline.



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Provincial Leave Deadlines

- Infectious Disease Emergency Leave (paid)
 - The ESA was amended on April 29, 2021 to require employers to provide eligible employees with up to three days of paid infectious disease emergency leave for certain reasons related to COVID-19.
 - Eligible employers can apply to the Workplace Safety and Insurance Board (WSIB) to be reimbursed for these payments.
 - Paid infectious disease emergency leave is retroactive to April 19, 2021 and continues until July 31, 2022.



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Provincial Leave Deadlines

- Temporary Layoffs
 - In response to the COVID-19 pandemic, the Ontario government made a regulation that changed certain Employment Standards Act (ESA) rules during the "COVID-19 period". This regulation has been amended, extending the COVID-19 period to July 30, 2022.
 - a non-unionized employee is deemed to be on unpaid IDEL when not performing the duties of their position because the employer has temporarily reduced/eliminated their hours of work for reasons related to COVID-19
 - Beginning on July 31, 2022 employees will no longer be **deemed** to be on infectious disease emergency leave and the ESA's regular rules around temporary layoff resume



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COVID-19 Liability Waivers



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Supporting Ontario's Recovery Act, 2020

- Liability protection against COVID-19 exposure-related lawsuits.
- Came into force when received royal assent on November 20, 2020, but is retroactive to March 17, 2020.
- considered one of the "most controversial bills of 2020".



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Supporting Ontario's Recovery Act, 2020

- **What kind of protection?**
2 (1) No cause of action arises against **any person** as a direct or indirect result of an individual being or potentially being **infected with or exposed to coronavirus (COVID-19) on or after March 17, 2020** as a direct or indirect result of **an act or omission of the person** if,
 - (a) at the relevant time, the person acted or made a **good faith effort** to act in accordance with,
 - (i) **public health guidance** relating to coronavirus (COVID-19) that applied to the person, and
 - (ii) **any federal, provincial or municipal law** relating to coronavirus (COVID-19) that applied to the person; and



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Supporting Ontario's Recovery Act, 2020

- (b) the act or omission of the person does not constitute **gross negligence**.
- **What is "good faith effort"?**
1 (1) In this Act, "good faith effort" includes an **honest effort**, whether or not that effort is reasonable
- **Who is covered?**
1 (2) A reference in this Act to a person includes a reference to any **individual, corporation or other entity**, and includes the **Crown** in right of Ontario.



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Supporting Ontario's Recovery Act, 2020

- Who is not covered?

3 Section 2 does not apply with respect to acts or omissions of a person that,

- (a) occurred while a law required the person's operations to close, in whole or in part; and
(b) relate to an aspect of the person's operations that was required to close under the law.

4(2) Section 2 does not apply with respect to any of the following:

- 1. A cause of action of a worker who is or was employed by a Schedule 1 employer or Schedule 2 employer, or of the worker's survivor, in respect of a personal injury by accident arising out of and in the course of the worker's employment or an occupational disease.



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Horizontal lines for notes

Supporting Ontario's Recovery Act, 2020

- Who is not covered?

- 2. A cause of action of a worker who is or was employed by a Schedule 1 employer or Schedule 2 employer, or of the worker's survivor, to which the Workplace Safety and Insurance Board or Schedule 2 employer, as the case may be, is subrogated under section 30 of the Workplace Safety and Insurance Act, 1997.
3. A cause of action of an individual in respect of an actual or potential exposure to or infection with coronavirus (COVID-19) that occurred in the course, or as a result of employment with a person or in the performance of work for or supply of services to a person.



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Horizontal lines for notes

Supporting Ontario's Recovery Act, 2020

Schedule 1 Employers (O. Reg. 175/98 under Workplace Safety and Insurance Act, 1997)

Class O — Leisure and Hospitality

Industries engaged in providing services to meet the cultural, entertainment and recreational interests of their patrons, including preparing meals, snacks and beverages and providing short-term lodging and complementary services.



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Horizontal lines for notes

Want to benefit from protection provided under Supporting Ontario's Recovery Act?

Things to consider:

- a) understand the public health guidance and provincial or municipal law relating to COVID-19 that applies to your organization;
- b) document the steps undertaken to comply with the law and relevant guidelines;
- c) take additional precautions to minimize liability by developing liability waivers for people to sign.



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Liability Waivers

A liability waiver is a legal document that a person who participates in an activity may sign to acknowledge the risks involved in their participation. It prevents the signing party from taking legal action against the organizer of the activity.



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Liability Waivers

General requirements for enforceable waivers:

1. the waiver must have clear and unambiguous language and be easily understandable to an average person;
2. the waiver must clearly identify the associated risks and exclude liability for those risks or injuries caused by negligence;
3. the risks and exclusion of liability must be brought to attention of the signing party before they agree to participate; and
4. the participant must be free to choose to accept the terms.



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Liability Waivers

Useful tips:

1. Have the waiver in a separate document or at least a separate page;
2. use capital letters, bold font, bold colours to draw attention;
3. identify the risks with as much detail as possible (keep in mind that any ambiguity will be interpreted against you);
4. identify the measures taken by your organization and the requested measures to be undertaken by the signing party.



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Sample Waiver developed by Canadian Physiotherapy Association, BMS Group Canada and Gowling LLP*

Waiver Release of Liability, Waiver of all Possible Claims and Assumption of Risk ****Please review before signing**** [bringing attention] I hereby acknowledge that I have agreed to meet with (insert name of professional here) (the "HCP") at (insert name and address of facility here) for the purposes of receiving (insert services provided here)

I acknowledge and accept that there is a risk that I could be exposed to COVID-19 while attending at the Facility. I also acknowledge and accept that while receiving services, the HCP may need to be closer than the recommended social distancing guidelines in order to assess and/or treat me. I acknowledge and confirm that I am willing to accept this risk as a condition of attending at the Facility using services from the HCP. [identifying the associated risks]

In consideration of the HCP agreeing to see me in person at the Facility, I agree to release the HCP and the Facility (if applicable), their officers, directors, employees, agents and volunteers (the "Releasees") from any and all causes of



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Sample Waiver*

action, claims, demands, requests, damages or any recourse whatsoever in respect of any personal injuries or other damages which may occur or arise as a result of exposure to COVID-19 during my visit to the Facility and/or through the provision of services to me by the HCP.

I do hereby acknowledge and agree that notwithstanding the generality of the foregoing, I declare that I will not commence litigation or otherwise seek to recover damages or other compensation against the Releasees based on any action, claim, demand, request, loss or any recourse whatsoever arising from any potential or actual exposure to COVID-19 while attending at the Facility and/or through the provision of services to me by the HCP. I further acknowledge that the Releasees can rely on this Release of Liability, Waiver of all Possible Claims and Assumption of Risk as a complete defence to any and all claims, damages, causes of action, or recourse or liability that may arise at any time. [exclusion of liability for those risks or injuries caused by negligence]



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Sample Waiver*

I have carefully reviewed this Release of Liability, Waiver of all Possible Claims and Assumption of Risk and acknowledge that I fully understand the terms as set out above. I acknowledge that I am signing this Release of Liability, Waiver of all Possible Claims and Assumption of Risk voluntarily. [acknowledging understanding of terms of waiver]

*This is provided as a sample for illustrative purposes only. We encourage you to seek advice specific to your circumstances before using any waiver language.



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Takeaways

- As Ontario continues to soften its regulations for COVID-19 protections, it is important to remember that the pandemic is not over.
- While requirements are reduced from a government standpoint, many individuals and organizations will continue to apply internal policies to prevent the spread of COVID-19 in their workplaces.
- It continues to be important to do your part to avoid the spread of COVID-19, and caution should be taken to avoid densely populated workplaces and high-transmission risk activities
- COVID-19 exposure will continue to impact workplaces



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**End
Thank you!**

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