

COVID-19: TO DISCLOSE OR NOT TO DISCLOSE IS THE QUESTION – AN OCCUPATIONAL HEALTH NURSE PERSPECTIVE

Anisha Bhardwaj, Student-at-Law
Theresa Hartley

Generally, employers are not entitled to know an employee's medical diagnosis. However, the law as it pertains to the COVID-19 pandemic presents unique circumstances in terms of disclosure of personal health information. Given the importance of a timely public health intervention in the case of COVID-19, it is critical that Occupational Health Nurses ("OHNs") are aware of their obligations to their patients and their reporting obligations.

In order to comply with the law and public health recommendations, an employer has the right to know if an employee is experiencing symptoms of COVID-19, has travelled to another country, has been in personal contact with anyone who has travelled to an affected area, or has received a positive COVID-19 diagnosis. Sections 39(2)(b) and (c) of the *Health Protection and Promotion Act* ("HPPA") permit the disclosure of a person's identity regarding a communicable disease or a disease of public health significance where that person's consent was provided or "where the disclosure is made for the purposes of the public health administration." Pursuant to the HPPA, COVID-19 is a communicable disease of public health significance.

Section 40(1) of the *Personal Health Information Protection Act* permits a health care provider to disclose an individual's personal health information without the individual's consent if the health care provider believes on reasonable grounds that the disclosure is "necessary for the purpose of eliminating or reducing a significant risk of serious bodily harm" to the individual or to others. Consequently, if an OHN believes that the disclosure of a patient's COVID-19 diagnosis to an employer is necessary to prevent or reduce serious bodily harm to the patient and/or to other individuals, the OHN is permitted to disclose that information without the patient's consent, and the employer is permitted to collect that information.

As previously noted, COVID-19 is of public health significance. A pandemic, by its nature, can greatly increase mortality. The Government of Canada states that COVID-19 is a "serious health threat" and that "the risk to Canadians is considered high". While it has never been tested in these circumstances, we believe that an OHN disclosing an employee's COVID-19 diagnosis would be considered necessary for the purpose of eliminating or reducing a significant risk of bodily harm. Preventing a risk of harm to the work site and the rest of the population due to a pandemic is paramount.

OHNs should only disclose a patient's COVID-19 diagnosis in good faith and do what is reasonable under the circumstances. The OHN should disclose no more information than is necessary. Best practice would be to first attempt to obtain the patient's consent to make the

disclosure and if such consent is not forthcoming, to then exercise judgment as to whether the disclosure is necessary for the purpose of eliminating or reducing significant risk of bodily harm. Whether consent is provided or not should be documented in the patient's file and if a disclosure is going to be made, the reasons for same should also be documented in the patient's file.

The content in this article is provided for general information purposes only and does not constitute legal or other professional advice or an opinion of any kind. For specific legal advice, you may contact Theresa Hartley at McCague Borlack LLP at thartley@mccagueborlack.com or (416) 869-7825.