

## STAGE 2 OF REOPENING ONTARIO: AN OVERVIEW FOR BUSINESS OWNERS

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### A. INTRODUCTION

The Ontario government released *A framework for reopening our province* (the “Framework”) on April 27, 2020,<sup>1</sup> outlining the government’s gradual three-stage regional approach to reopen businesses, services and public spaces, by balancing the needs of people and organizations while at the same time ensuring that public health and workplace safety remains a top priority by following the Chief Medical Officer of Health of Ontario’s recommendations. The Framework consists of the emergency orders passed as regulations under the *Emergency Management and Civil Protection Act* (the “Emergency Act”).<sup>2</sup>

Stage 1 of the province’s Framework involved the closure of all non-essential workplaces and strict restrictions on social gatherings in accordance with Regulation 82/20 under the Emergency Act (“Stage 1 Closures Regulation”).<sup>3</sup> Stage 2 permits the reopening of some non-essential workplaces and the

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<sup>1</sup> Government of Ontario, “A framework for reopening our province” (last updated 23 June 2020), online: <<https://www.ontario.ca/page/framework-reopening-our-province>>.

<sup>2</sup> *Emergency Management and Civil Protection Act*, RSO 1990, c E.9 [the “Emergency Act”], s 7.0.2(4). See also the Declaration of Emergency issued under this Act, which has been extended until July 15, 2020, with the possibility of further extensions if needed: see Office of the Premier, “Ontario Extends Declaration of Emergency to July 15” (News Release, 24 June 2020), online: Government of Ontario <[https://news.ontario.ca/opo/en/2020/06/ontario-extends-declaration-of-emergency-to-july-15.html?utm\\_source=ondemand&utm\\_medium=email&utm\\_campaign=p](https://news.ontario.ca/opo/en/2020/06/ontario-extends-declaration-of-emergency-to-july-15.html?utm_source=ondemand&utm_medium=email&utm_campaign=p)>. See also office of the Premier, “Ontario Extends Emergency Orders to July 10” (News Release, 27 June 2020), online: Government of Ontario <<https://news.ontario.ca/opo/en/2020/06/ontario-extends-emergency-orders-to-july-10.html>>.

<sup>3</sup> O Reg 82/20, *Order under Subsection 7.0.2(4) of the Act – Stage 1 Closures* (filed 24 March 2020, as last amended by O Reg 303/20 on 24 June 2020), online: Government of Ontario <<https://www.ontario.ca/laws/regulation/200082>> [“Stage 1 Closures Regulation”].

relaxation of restrictions on social gatherings as per Regulation 263/20 under the Emergency Act (“Stage 2 Closures Regulation”).<sup>4</sup> Finally, at Stage 3, there would be a further relaxation of the restrictions on social gatherings, along with the responsible opening of all workplaces, continued physical distancing and protections for vulnerable populations. The regional approach of the Framework is based on the areas served by each health unit designated by regulations under the *Health Protection and Promotion Act*.<sup>5</sup> As such, most of the province has entered Stage 2 of the Framework, with the exception of the Municipality of Leamington and the Town of Kingsville in the region served by the Windsor-Essex County Health Unit.<sup>6</sup>

This *Bulletin* provides an overview of Stage 2 of the Framework, including the application of workplace health and safety legislation and privacy law.

## B. TRANSITION FROM STAGE 1 TO STAGE 2 REOPENING

The list of businesses and organizations which are allowed to reopen under Stage 2 Closures Regulation is more expansive than under Stage 1 Closures Regulation, which at the time of writing is now only relevant to the two areas mentioned above. In essence, Stage 1 Closures Regulation only allows businesses and organizations classified as “essential businesses” to remain open. Some examples of these include businesses that supply essential support, products, systems, or services, in addition to those providing health care and social services. Other emergency orders under the Emergency Act provide rules applicable

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<sup>4</sup> O Reg 263/20, *Order under Subsection 7.0.2(4) of the Act – Stage 2 Closures* (filed 11 June 2020, as last amended by O Reg 324/20 filed on 26 June 2020), online: Government of Ontario <<https://www.ontario.ca/laws/regulation/200263>> [“Stage 2 Closures Regulation”].

<sup>5</sup> *Health Protection and Promotion Act*, RSO 1990, c H.7. See *Areas Comprising Health Units*, RRO 1990, Reg 553.

<sup>6</sup> See Office of the Premier, “Ontario Permits More Businesses and Services to Reopen in the Coming Days” (News Release, 8 June 2020), online: Government of Ontario <<https://news.ontario.ca/opo/en/2020/06/ontario-permits-more-businesses-and-services-to-reopen-in-the-coming-days.html>> [“News Release Easing Restrictions”]. See also, Office of the Premier, “More People Can Get Back to Work as Additional Businesses and Services to Reopen This Week” (News Release, 15 June 2020), online: Government of Ontario <<https://news.ontario.ca/opo/en/2020/06/more-people-can-get-back-to-work-as-additional-businesses-and-services-to-reopen-this-week.html>>; Office of the Premier, “Ontario Moving Toronto and Peel Region into Stage 2” (News Release, 22 June 2020), online: Government of Ontario <[https://news.ontario.ca/opo/en/2020/06/ontario-moving-toronto-and-peel-region-into-stage-2.html?utm\\_source=ondemand&utm\\_medium=email&utm\\_campaign=p](https://news.ontario.ca/opo/en/2020/06/ontario-moving-toronto-and-peel-region-into-stage-2.html?utm_source=ondemand&utm_medium=email&utm_campaign=p)>; and Office of the Premier, “Businesses and Services to Reopen in Windsor-Essex, with Exceptions” (News Release, 24 June 2020), online: Government of Ontario <[https://news.ontario.ca/opo/en/2020/06/businesses-and-services-to-reopen-in-windsor-essex-with-exceptions.html?utm\\_source=ondemand&utm\\_medium=email&utm\\_campaign=p](https://news.ontario.ca/opo/en/2020/06/businesses-and-services-to-reopen-in-windsor-essex-with-exceptions.html?utm_source=ondemand&utm_medium=email&utm_campaign=p)>.

to specific types of businesses and organizations, such as retirement and long-term care homes as well as outdoor recreational amenities, in regions at both Stages 1 and 2 of the Framework.

Stage 2 Closures Regulation lists the businesses and organizations that may or may not reopen during Stage 2 of the Framework, along with a set of specific conditions applicable to the businesses and organizations which are allowed to reopen. Some examples of businesses that may reopen at Stage 2, subject to strict conditions and limitations, include outdoor dining areas of restaurants and other food or drink establishments, public libraries, community centres, certain sports and recreation fitness facilities, day camps for children, golf courses and outdoor driving ranges, as well as museums, zoos, science centres, landmarks, historic sites, botanical gardens and similar attractions. However, conference and convention centres, private schools, casinos, and charitable gaming halls, among others, must remain closed.

Both Stage 1 and Stage 2 Closures Regulations share several similar provisions relating to the operations of businesses and organizations, such as allowing temporary access to a closed place of business if certain conditions are met,<sup>7</sup> ensuring to the fullest extent possible that a physical distance of at least 2 metres between persons is maintained, and not precluding any business or organization from operating remotely.<sup>8</sup>

Businesses and organizations which are permitted to remain open in Stage 1 or to reopen in Stage 2 are all required to comply with “all applicable laws, including the *Occupational Health and Safety Act* (“OHSA”)<sup>9</sup> and the regulations made under it” as well as “the advice, recommendations and instructions of public health officials, including any advice, recommendations or instructions on physical distancing, cleaning or disinfecting.”<sup>10</sup>

### **C. WORKPLACE HEALTH AND SAFETY**

All businesses and organizations under provincial jurisdiction, whether in Stage 1 or 2, are required to comply with the OHSA which imposes on employers the duty to “take every precaution reasonable in the

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<sup>7</sup> See Stage 2 Closures Regulation, *supra* note 4, Sch 1, s 3(3); and Stage 1 Closures Regulation, *supra* note 3, Sch 1, s 1(2).

<sup>8</sup> See Stage 2 Closures Regulation, *ibid*, s 3(4); and Stage 1 Closures Regulation, *ibid*, s 1(3).

<sup>9</sup> *Occupational Health and Safety Act*, RSO 1990, c O.1 [“OHSA”].

<sup>10</sup> Stage 2 Closures Regulation, *supra* note 4, Sch 1, s 4(1), (2); and Stage 1 Closures Regulation, *supra* note 3, Sch 3, s 1.

circumstances”<sup>11</sup> to protect the health and safety of employees, and the duty to provide them with the information and training to protect against hazards and ensure that all equipment, materials and protective equipment are provided and maintained in good condition. Conversely, employees also have the “right to refuse unsafe work” if they have “reason to believe” that the workplace is unsafe (except for workplaces where risk is inherent as part of the job), and the employer may not discipline or retaliate against the employee.<sup>12</sup> The OHS Act also imposes a duty to report “occupational illnesses” of employees, such as where an employee contracts COVID-19 at work, to the Ontario Ministry of Labour, Training and Skills Development (“Ministry of Labour”) as well as the union, if present, within 4 days.<sup>13</sup> Violations of the OHS Act can lead to penalties or the possibility of a lawsuit against the business or organization in addition to directors and officers potentially being held personally liable.<sup>14</sup>

In addition to complying with the OHS Act, Stage 1 and Stage 2 Closures Regulations provide that businesses and organizations *must* comply with the advice, recommendations and instructions of public health officials, including any advice, recommendations or instructions on physical distancing, cleaning or disinfecting. In this regard, the Ontario government has released resources to prevent COVID-19 in the workplace,<sup>15</sup> including guidance for employers to develop their COVID-19 workplace safety plan (“Safety Plan Guidance”).<sup>16</sup> The advice, recommendations and instructions of public health officials may not in all cases constitute stand-alone legal requirements. However, given the requirement of Stage 1 and Stage 2 Closures Regulations, failure to comply with the advice, recommendations and instructions from public health officials could give rise to administrative fines and potential civil tort claims for failure on the part of the employer to maintain a safe workplace, making this advice and recommendations the *de facto* legal standard. As well, some regional public health units have issued orders under section 22 of the *Health Protection and Promotion Act*<sup>17</sup> establishing specific instructions regarding the screening and training of

<sup>11</sup> OHS Act, *supra* note 9, para 25(2)(h).

<sup>12</sup> OHS Act, *ibid*, s 43(3). See also Ministry of Labour, Training and Skills Development, “Rights and Duties: FAQs” (last updated October 2013), *Health and Safety*, online: Government of Ontario <<https://www.labour.gov.on.ca/english/hs/faqs/rights.php>>.

<sup>13</sup> See OHS Act, *ibid*, s 52(2).

<sup>14</sup> See Barry W. Kwasniewski, “Employer Obligations and Considerations in Response to the COVID-19 Pandemic” (24 March 2020), *Charity & NFP Law Bulletin* No. 465, online: Carters Professional Corporation <<http://www.carters.ca/pub/bulletin/charity/2020/chylb465.pdf>>.

<sup>15</sup> Government of Ontario, “Resources to prevent COVID-19 in the workplace” (last updated 23 June 2020), online: <<https://www.ontario.ca/page/resources-prevent-covid-19-workplace>>.

<sup>16</sup> Government of Ontario, “Develop your COVID-19 workplace safety plan” (last updated 23 June 2020), online: <<https://www.ontario.ca/page/develop-your-covid-19-workplace-safety-plan>>.

<sup>17</sup> *Supra* note 5.

employees, in addition to requiring crowd control and face coverings be worn in commercial establishments.<sup>18</sup>

Other recommendations and guidance are available from sources, such as the World Health Organization,<sup>19</sup> Public Health Agency of Canada,<sup>20</sup> Public Health Ontario,<sup>21</sup> Ontario Ministry of Health and Long-term Care,<sup>22</sup> as well as Ministry of Labour.<sup>23</sup> Some municipalities and regional public health units have also issued their own sets of guidance documents,<sup>24</sup> as well as organizations such as Workplace Safety and Prevention Services.<sup>25</sup>

It is important to note that the advice, recommendations and instructions from public health officials is often updated, as research regarding COVID-19 continues. Therefore, businesses and organizations should stay informed and monitor the advice, recommendations and instructions from public health officials on a regular basis.

#### **D. PRIVACY IMPLICATIONS**

The duty to take all reasonable precautions to maintain the health and safety of employees may include implementing measures such as asking employees and volunteers to self-evaluate and answer personal questions about their or their family's health, or taking the employees' or volunteers' temperatures as they enter the workplace, in order to ensure they are not exhibiting any symptoms or have been exposed to

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<sup>18</sup> See, for example, Eastern Ontario Health Unit, "Public Health Orders", online: <<https://eohu.ca/en/covid/public-health-orders>>. See also, for example, Wellington-Dufferin-Guelph Health Unit, "Public Advisory" (10 June 2020), online:

<<https://www.wdgppublichealth.ca/alerts/dr-nicola-mercier-has-issued-order-under-section-22-health-protection-and-promotion-act>>.

<sup>19</sup> World Health Organization, "Getting your workplace ready for COVID-19" (3 March 2020), online: <<https://www.who.int/docs/default-source/coronaviruse/getting-workplace-ready-for-covid-19.pdf?ua=1>>.

<sup>20</sup> See Government of Canada, "Guidance for workplaces and businesses operating during COVID-19" (last modified 12 June 2020), online: <<https://www.canada.ca/en/public-health/services/diseases/2019-novel-coronavirus-infection/prevention-risks/measure-reduce-community/guidance-workplaces-covid-19.html>>.

<sup>21</sup> See, for example, Ontario Agency for Health Protection and Promotion, "Guidance and Best Practice" (last updated 24 June 2020), *Coronavirus Disease 2019 (COVID-19)*, online: <<https://www.publichealthontario.ca/en/diseases-and-conditions/infectious-diseases/respiratory-diseases/novel-coronavirus>>.

<sup>22</sup> See Ministry of Health and Long-term Care, "Guidance for the Health Sector" (last updated 23 June 2020), online: Government of Ontario <[http://www.health.gov.on.ca/en/pro/programs/publichealth/coronavirus/2019\\_guidance.aspx#guidance](http://www.health.gov.on.ca/en/pro/programs/publichealth/coronavirus/2019_guidance.aspx#guidance)>.

<sup>23</sup> See Ministry of Labour, Training and Skills Development, "Resources to prevent COVID-19 in the workplace" (last updated 23 June 2020), *Health and Safety*, online: Government of Ontario <<https://www.ontario.ca/page/resources-prevent-covid-19-workplace>>.

<sup>24</sup> Public Health, "COVID-19: Community & Workplace Settings" (last updated 23 June 2020), online: City of Toronto <<https://www.toronto.ca/home/covid-19/covid-19-protect-yourself-others/community-settings-workplaces/>>.

<sup>25</sup> See Workplace Safety & Prevention Services, "COVID-19 Resources", online: <<https://covid19.wsps.ca/resources?audience=for-businesses-preparing-to-reopen>>.

COVID-19. Ontario's Safety Plan Guidance does not address privacy law issues.<sup>26</sup> Although these types of measures may raise concerns regarding the privacy of individuals, businesses and organizations should exercise good judgment and put in place adequate strategies and measures to mitigate the risks of privacy and data breaches.

Businesses and organizations subject to the *Personal Information Protection and Electronic Documents Act* ("PIPEDA")<sup>27</sup> should ensure that any measures taken are in line with the legislation. Other organizations should abide by any privacy legislation that may apply to their activities – which could vary depending on the nature of the entity as well as on the nature of their activities – and, even if there is no applicable privacy legislation, should comply with basic, overarching privacy law principles when collecting, using and disclosing personal information, as set out in Schedule 1 to PIPEDA.<sup>28</sup> These principles include only collecting, using or disclosing personal information for purposes that are reasonable and appropriate, identifying the purpose for which personal information is being collected, at or before the time of collection, limiting its collection, use and disclosure to the minimum necessary for the purposes identified, obtaining appropriate and meaningful consent for the collection, use or disclosure of personal information, and having adequate safeguards in place appropriate to the sensitivity of the personal information collected. As well, working remotely raises additional privacy concerns such as increasing the risk of cyber attacks and privacy breaches. Businesses and organizations should ensure participants' privacy is safeguarded and proper precautions are taken when using videoconferencing services, which are widely being used to maintain social distancing.

## **E. CONCLUSION**

As almost all of the province has entered Stage 2 of the Framework, businesses and organizations are having to address the conditions under which operations may be resumed. The regulations mentioned above should be carefully reviewed, giving special consideration to the workplace health and safety guidelines, along with the privacy considerations involved, especially given the fast pace at which the legal requirements and the advice, recommendation and instructions from public health officials are

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<sup>26</sup> *Supra* note 16.

<sup>27</sup> SC 2000, c 5.

<sup>28</sup> *Ibid*, Schedule 1 Principles Set Out in the National Standard of Canada Entitled Model Code for the Protection of Personal Information, CAN/CSA-Q830-96.

changing. It is important to also recognize that public health and safety may supersede the usual privacy obligations during this time. As such, businesses and organizations should ensure proper procedures are implemented and followed as they restart or continue their operations.



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