



# Employment Law

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## Jobs as Social Welfare Programs: The Case of H1N1

*There were times when everybody in the house has the flu. You're cleaning up vomit and it's 2 in the morning, and you're wishing there was somebody else there to help you.*

— Meg Tilly, American actress

### The Job as Ultimate Social Welfare Program

A job has become the most comprehensive modern social welfare program of our time. For decades, government has obliged employers to ensure the financial, social, and physical well-being of Canadians. This overwhelming transfer of legal obligation to the employer is found in the regulation of human rights, dismissals, unions and collective action, disability, minimum wages, foreign workers, employment insurance, compensation for worker-related injuries, maximum hours of work and minimum rest periods, payroll taxes, leave for holidays, pregnancy, parenthood, family emergencies and annual vacations, safety, pensions, freedom from harassers and bullies, day care, and the concept of vicarious liability, to name a few examples.

When the employment relationship is considered in conjunction with other civil obligations in tort, equity, and contract, and a liberal array of volunteer benefits such as extended health, supplementary insurance, educational upgrading, and employee assistance programs, most employees and their families have their needs covered.

Employer-provided social welfare aspects of a job may be legally mandated or offered voluntarily in a competitive market for workers. They come in the form of economic benefits and less pecuniary policies. It should be clear that employer benefits and policies also serve the best long-term interests of the employer by recruiting and retaining the human talent essential to achieve the employer's profit objectives.

One of the best illustrations of the employer's comprehensive social welfare obligations is found in the current H1N1 flu pandemic. There are four statutory domains of employee protection in the H1N1 context. These provide a broad social welfare model for employers to use in caring for their employees.

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## 1. Human Rights and Disability

Disability is one of the prohibited grounds of discrimination in Canadian human rights legislation. Since disability is not a fault-based condition, employers must reasonably accommodate the disabled worker in instances where the disability does not affect job performance. It is not clear across Canada whether short-term illness comprises a disability under human rights legislation.

In most cases, symptoms of the H1N1 flu endure only a few days – a time period which may be readily covered by most benefits plans. The employer and flu-sick employee will agree that one should not attend work during the illness. Hence, the issue of reasonable accommodation is unlikely to arise. The employer would have no basis to dismiss an employee for this short period of non-culpable absenteeism.

## 2. Workers Compensation

Often the H1N1 influenza will spread through the workplace or as a result of the employee performing the job in other locations. This may entitle affected employees to compensation through workers compensation legislation if the work-related illness continues for an extended, unremunerated period.

## 3. Employment Standards

Employment standards legislation grants various types of job leave to employees if they or their family members take ill. Some provinces require one or more of compassionate care leave, family responsibility leave, sick leave, or personal emergency leave to be given to employees. Others stipulate leave for government-declared emergencies. Each of these types of leave is defined and regulated. The H1N1 influenza outbreak pandemic could be covered by this legislation.

## 4. Occupational Health and Safety

Finally, occupational health and safety legislation compels employers to ensure their workplaces are safe and to take further reasonable measures to protect employee health and safety. Health and safety programs associated with the H1N1 pandemic may be considerable as there are several well-known protocols designed to contain this virus. At the minimum, most employers should develop and implement policies designed to contain the spread of this virus such as education, vaccination, and hand sanitation.

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## Conclusion

The above four categories of employer obligation may all be invoked to address the H1N1 flu outbreak. Canadian governments have teams monitoring this flu and might still enact other legislation to specifically address it.

As with other types of legal obligation, including environmental protection, data privacy, and prevention of sexual harassment, employers are advised to establish and widely circulate an H1N1 Influenza Response Policy. This would prepare the organization to not only meet its legal obligations minimally but to continue to operate during the outbreak. The policy, or plan, should create a co-ordination team to educate employees on the H1N1 virus, and to develop risk-reduction measures and procedures for employees to follow if they experience H1N1 symptoms. The organization must identify alternative work and communication arrangements, such as telecommuting, as well as dealing with other stakeholders up and down the supply chain. Corporate operations must also be maintained, so backup systems and worksites ought to be considered and tested.

Canadians do not have much experience in managing pandemics. In many ways, the workplace is the laboratory model for dealing with such threats to society. What we do know is that the broad statutory contours of human rights, workers' compensation, employment standards, and occupational health and safety law create a framework of employee protection that addresses this problem. Ultimately, this demonstrates how one's job, robustly regulated by the law, is one of the most powerful social welfare programs ever devised.

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