GTSWCA Legal Opinion on IUOE Local 793 Safety Protocol

Local 793 cannot unilaterally dictate employer policies

First and most importantly, employers are not obliged to comply with the Safety Protocol. Local 793 has no right to unilaterally dictate policies and impose them on employers. Employers should not sign the employer endorsement at the end of the Safety Protocol, which is an attempt by Local 793 to have the Safety Protocol become binding and enforceable as part of the collective agreement. Unions cannot bargain individually with employers who are represented by an accredited employers' organization. However, member contractors may be bound to Local 793 in Board Areas and for sectors outside of the GTSWCA's accreditation certificate. If an employer in these circumstances were to sign the Safety Protocol, Local 793 could argue that the employer is legally bound to apply the Safety Protocol and failure to follow the Safety Protocol could prompt Local 793 to file a grievance.

The Safety Protocol

While employers are not required to comply with Local 793's Safety Protocol, employers should consider the guidelines from the Safety Protocol and consult with Local 793 to implement policies to keep construction workers safe while on site, as an exercise of their management rights. Most of the guidelines in the Safety Protocol are generally reasonable, save and except for a few points, which are outlined below. That being said, employers will need to assess whether these guidelines are operationally efficient for their particular business and make clear that any practices and procedures implemented are an exercise of their management rights.

First, employers should comply with social distancing guidelines (2 metres/6 feet apart) and ensure that work sites are arranged accordingly. However, there is no need to limit the number of attendees at meetings to five people. The government's guidelines are to limit gatherings of people to no more than 50 people.

The "Daily Health Review" protocol (Step 2, #2), which would require employees to have their temperature taken three times a day, is not necessary and would impose undue administrative burdens and costs on employers. Employers do not need to take an employee's temperatures. First, ensuring an adequate supply of thermometers and patches will be costly to the employer. Second, the person who is taking the temperature would have to be properly trained to ensure the virus is not transmitted to the temperature taker. There is also a risk that an arbitrator could view an employer taking an employee's temperature (particularly three times a day) as an invasion of privacy. If an employer does want to take an employee's temperature, the employer should obtain consent in writing. The person taking the temperature should be medically trained and provided with appropriate personal protective equipment to avoid virus transmission.

Employers are also not required to provide all employees with N95 masks on site (Step 3, #2). These masks are already in short supply, and it would be prohibitively costly for employers to ensure there is a steady supply of clean masks. However, protective equipment may be required in some circumstances. For instance, if employees are working in close proximity on a job, and there is no other way to avoid this proximity, then it may be reasonable for the employer to provide a N95 mask.

The "Mandatory Public Health Reporting" requirements (Step 2, #4) are mostly accurate and reflect an employer's obligations under the *Occupational Health and Safety Act*. Employers are obliged to report occupational illnesses to the Ministry of Labour in writing within four days; to the joint health and safety representative; to the union; and to the Workplace Safety and Insurance Board. An occupational illness is defined as a condition that results from exposure in a workplace to a physical, chemical or biological agent, to the extent that the worker's health is impaired. If a worker may have caught COVID-19 from the workplace, this definition would be met and the employer's reporting obligations engaged.

However, if an employee tests positive for COVID-19, employers are **not** required to shut down the site.

Other measures (*e.g.*, Step 2, #3 – placing wash stations on every floor of a building) may be reasonable depending on the circumstances. Individual employers must assess whether these measures make sense from an operational and cost-benefit perspective, on a particular site. For instance, employers may want to have employees and visitors complete the COVID-19 questionnaire attached as Appendix 1 of the Safety Protocol. But, this could lead to inefficiencies (and potential safety risks) if employees are lined up outside of the site waiting to hand in their forms. Employers could consider an electronic version of the questionnaire, for instance. Alternatively, employers could implement voluntary reporting requirements, rather than having employees complete a questionnaire.

Next steps

The GTSWCA may want to communicate to contractors that they are not required to comply with Local 793's unilaterally imposed policy, and are not required to sign the employer endorsement. However, contractors should be implementing policies and guidelines in the workplace in light of COVID-19, and although not all aspects of the Safety Protocol are reasonable or required, employers can use the policy as a starting point and consult with the union in determining what measures are appropriate for their workplace.