



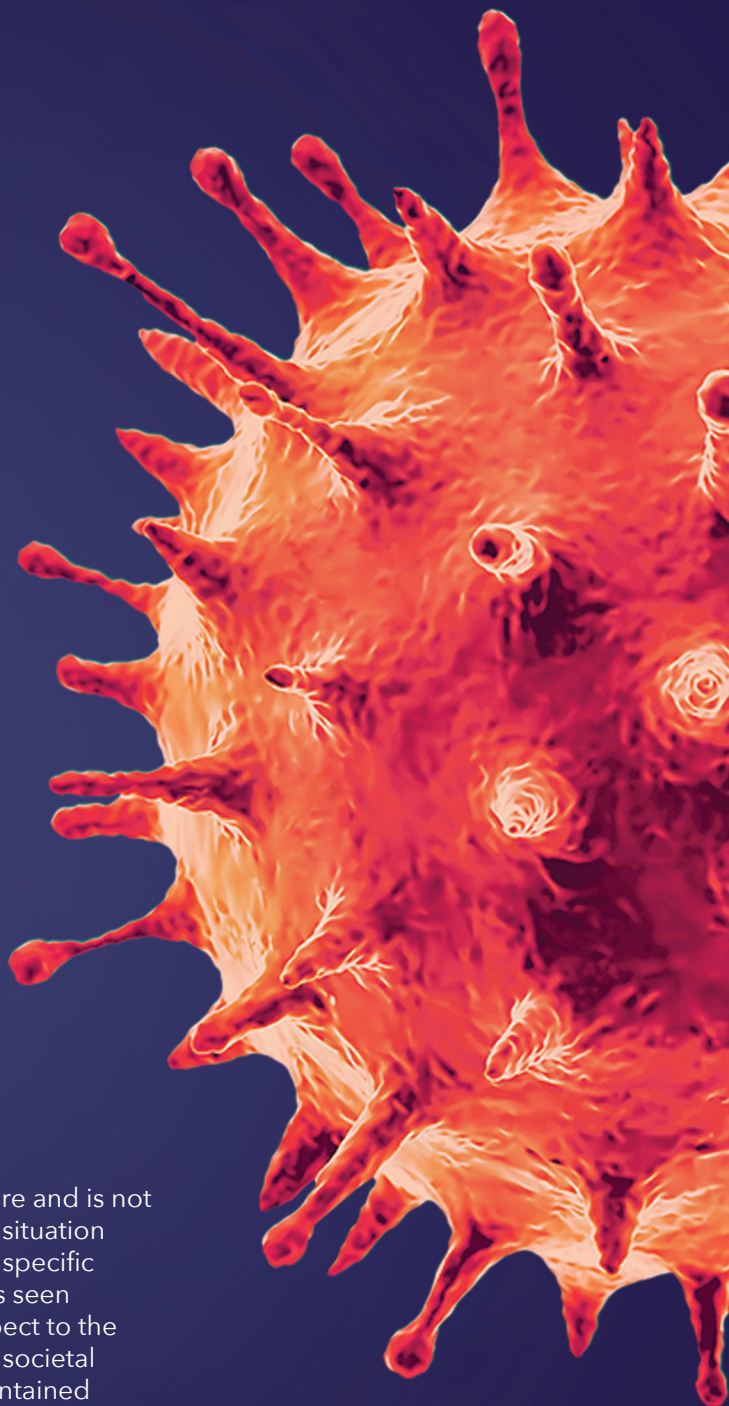
THE CANADIAN DENTAL
HYGIENISTS ASSOCIATION
L'ASSOCIATION CANADIENNE
DES HYGIÉNISTES DENTAIRES

COVID-19

Employment Q&A

With Stuart Rudner, Employment
Lawyer and Mediator, Rudner Law

Disclaimer: The information in this document is general in nature and is not intended to be relied upon as or to replace legal advice. Every situation is different, and your rights and obligations will depend on the specific factual circumstances. Furthermore, the COVID-19 situation has seen continuous change, with constant new developments with respect to the legal framework, the assistance available, and the medical and societal background. As a result, we must stress that the information contained herein is current as of May 18, 2020, unless otherwise indicated.

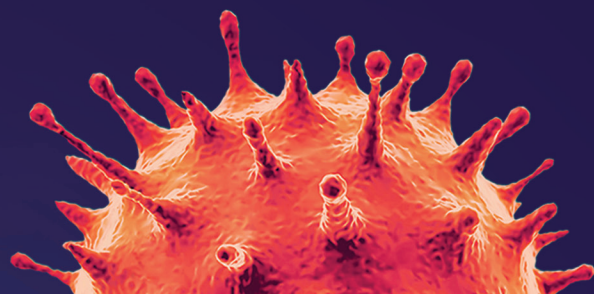


RUDNER LAW

EMPLOYMENT/HR LAW

COVID-19

Employment Q&A

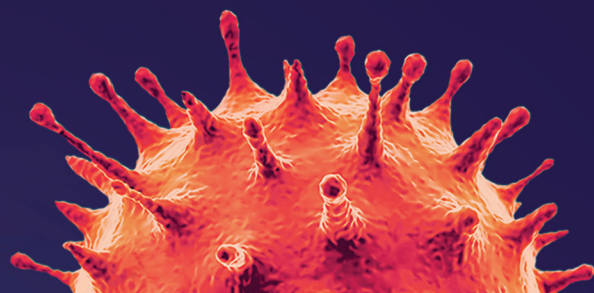


Contents

Disclaimer	1
General Note	3
Contract/Employer Questions.....	4
Health and Safety Concerns	9
Canada Emergency Wage Subsidy (CEWS) specific questions	13

COVID-19

Employment Q&A



General Note

This document complements CDHA's [COVID-19: Employment Q&A Video](#).

Additional information about specific topics discussed in this document is available at www.rudnerlaw.ca.

You can receive Rudner Law's Employment Law updates in your inbox by signing up for their newsletter.

We encourage you to obtain the strategic legal advice that you need before making any decisions that will affect your legal rights.

If you think that you might need an employment lawyer, you probably do.

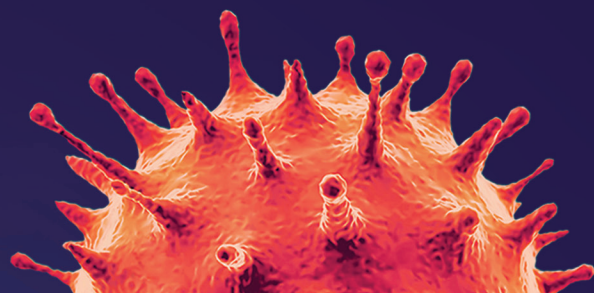
The answers to many of these questions will vary depending on the nature of the relationship between the parties. If it is one of employer and employee, the dental hygienist has substantially more rights compared to an independent business relationship.

It is important to remember that, regardless of what a contract might say or how you are paid, courts, tribunals, and the Canada Revenue Agency will look at the true nature of the relationship in order to assess whether it is really one of employment or a more independent one. When considering the issue of whether an individual is an employee or an independent contractor, courts will consider various factors including:

- The degree of control that the dental hygienist has over her or his activities
- Whether the dental hygienist or the employer provides the required equipment and tools
- Whether the dental hygienist hires her or his own helpers
- The dental hygienist's degree of financial risk (chance of profit and risk of loss)
- The dental hygienist's responsibility for investment and management

Other factors that may be taken into account include whether the dental hygienist can take on other jobs or must provide exclusive services; whether the dental hygienist is providing services through a corporation; and whether there are any other written agreements in place.

True independent contractors will not be entitled to statutory leaves of absence, Employment Insurance benefits, extensive severance, and other legal protections. For that reason, we encourage dental hygienists to assess the pros and cons of such a relationship before agreeing to it.



Contract/Employer Questions

1. **If a dental hygienist has a contract outlining wages and hours, can an employer negate that contract and force the employee to sign a new contract or terminate them if they refuse?**

Every employee has a contract. Some are written, while many are a combination of verbal discussions, rights implied by law, and established practice. No matter which form the contract takes, an employer cannot unilaterally impose substantial changes to fundamental terms such as wages or hours without the risk of triggering a constructive dismissal.

2. **What is constructive dismissal?**

A constructive dismissal is a **unilateral** (made by the employer) and **substantial** change to a **fundamental** term of the employment relationship, unless the employer had the right to make such changes or the dental hygienist agrees to them. A constructive dismissal can have the same legal effect as a "regular" dismissal, although the situation can become complicated and it is highly advisable to get proper legal advice before taking the position that you have been constructively dismissed.

3. **If an employee has accepted a layoff and is collecting either the CERB or EI, and the employer calls them back to work but changes the working environment to the extent that would be considered constructive dismissal (cutting hours of work in half, decreasing wages significantly, etc.), would the employee be eligible for severance?**

If an employer has imposed substantial changes to fundamental terms of the relationship, the first step would be for the employee to clearly express their objection to the changes and give the employer the opportunity to correct the situation. If the employer refuses to change their plans, the employee has three options:

- 1) accept the change, either explicitly or implicitly, by continuing to work without further objection
- 2) reject the change, resign, and claim that he or she has been constructively dismissed
- 3) continue to work while taking the position that there has been a constructive dismissal and reserving their rights

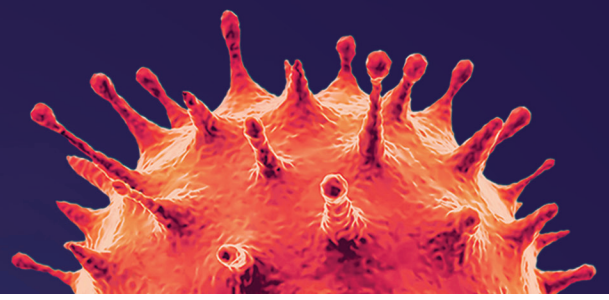
The situation can become quite complicated, and it is certainly advisable to obtain legal advice before doing anything that might jeopardize your employment.

4. **If an employer contacts an employee and asks them to return to work but says that their wages will be reduced significantly, should the employee return to work and negotiate later or refuse to return if they are unwilling to accept the lower wage? Would this be the same for other significant changes in employment conditions that are unacceptable to the employee?**

As above, an employer cannot unilaterally impose substantial changes to fundamental terms such as wages or hours without the risk of triggering a constructive dismissal, unless they have the right to do so (for example, a contract that says their hours are not guaranteed and can be changed). A key factor will be whether the changes rise to the level of "substantial," which is fact-specific analysis. The best strategy will depend on the specific circumstances, including the extent of the proposed changes, the bargaining position of the parties, and the availability of comparable work elsewhere. The first step will almost always be to speak with your employer, raise your concerns, and see if a resolution can be reached.

COVID-19

Employment Q&A



5. What typically constitutes “substantial” changes to employment?

There is no absolute rule on this point, despite the myths that exist. Generally speaking, a reduction of less than ten percent is probably not going to be found to be substantial, but every case will be decided based on its own specific circumstances.

6. Does the law differentiate between a temporary reduction in wages versus a permanent reduction in wages?

A constructive dismissal can be based on temporary or permanent changes, but that will be a factor in assessing how substantial the changes are and will also be an important factor when assessing the costs and benefits of pursuing a claim. The change must be substantial. For example, if the employer is reducing wages for two weeks, it may not be sufficient to be considered constructive dismissal.

7. If an employer terminates an employee, citing the effects of COVID-19 on the practice, but then hires another dental hygienist, is the terminated employee entitled to severance pay?

Any time an employee is dismissed on a without cause basis, they are entitled to either notice or pay in lieu (typically referred to as “severance”). An employee’s entitlement can be extensive, particularly if they do not have a contract with an enforceable termination clause. Common law notice can be as much as two years, and more if there are extenuating circumstances.

Furthermore, bad faith in the course of dismissal can lead to other damages. One form of bad faith is dishonesty, such as where the employer misleads the employee regarding the reason for dismissal, as this question suggests.

8. Does an employer have the right to insist that an employee take vacation or to deny an employee scheduled vacation time?

Employers generally have the right to determine when a dental hygienist takes vacation. The answer to this question will vary depending on the contractual terms and policies in place regarding scheduling and changing vacation time.

9. Does the employer have the right to ask an employee to sign a liability waiver?

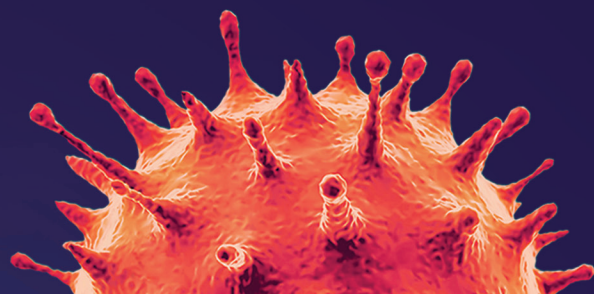
An employer can ask but cannot necessarily require that an employee do so. Even if they do sign, an employer cannot “opt out” of their obligations to take all reasonable steps to ensure the health and safety of workers in the workplace. An employer whose staff are returning to work must ensure that they have taken all reasonable steps to mitigate the risk of infection and contamination from COVID-19 in the workplace. Employers should also keep in mind that employees have the right pursuant to occupational health and safety legislation to refuse to perform unsafe work. None of these obligations and rights would be impacted if an employer asked an employee to sign a liability waiver.

10. If the employee signs a liability waiver and gets sick, do they have any legal recourse for lost wages?

Most employees who become sick as a result of exposure to COVID-19 at work could be entitled to benefits through the Workplace Safety and Insurance Board (WSIB) or similar programs, although coverage is not mandatory for dental practices. If the employer does not participate in such a program, workers may have a common law right to sue for damages. A waiver could impact that right but would have to be assessed in the particular circumstances. Courts and tribunals are generally reluctant to leave a victim without recourse.

COVID-19

Employment Q&A



An employer who has failed to ensure a safe work environment for their workers may be subjected to penalties for failing to comply with their obligations pursuant to health and safety legislation.

11. Can the employer terminate an employee if she or he refuses to sign a liability waiver?

An employer can terminate the employment of an employee at any time without cause, so long as they act in compliance with the law (e.g., the termination is not discriminatory or a reprisal against the employee enforcing their rights under employment standards or health and safety legislation). Compliance with the law also includes providing an employee with reasonable notice or pay in lieu of notice of the termination of their employment. Reasonable notice, or pay in lieu of notice, may not be required in situations where the employer has just cause to terminate the employee's employment.

An employee's refusal to sign a liability waiver is very unlikely to reach the level of just cause for dismissal, which would mean that the employee would be entitled to notice or compensation. Further, an employee who refuses to sign a liability waiver due to legitimate concerns about safety in the workplace may be able to argue reprisal even in situations where an employer proceeds with termination on a without cause basis.

Threatening an employee with dismissal if they refuse to sign a liability waiver may render the waiver void in any event, as an employee could argue that it was signed under duress. Such conduct could also give rise to additional damages for bad faith conduct.

12. Does the employer have the right to ask an employee to sign a consent form daily?

NOTE FROM CDHA: *Some of the regulatory bodies are recommending that dental hygienists determine their fitness to work on a daily basis. A daily consent form is one way to do this.*

It depends on what the employer is asking consent for. For example, an employer may wish to implement temperature testing in the workplace as one of several measures to try to mitigate the risk of COVID-19 in compliance with the employer's obligations to ensure a safe workplace pursuant to occupational health and safety legislation. In this case, employers should ask an employee to consent to the daily screening or testing.

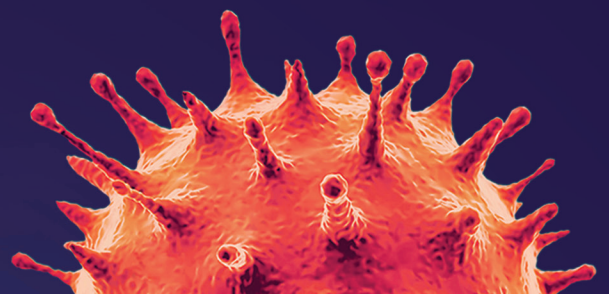
Employers should note that generally in Canada medical testing in the workplace is not acceptable without a legitimate need for such testing, adopted in good faith. Employers who choose to implement temperature testing should ensure that the safety benefits of the testing outweigh the violation of the employee's privacy rights. Employers should always consider if there are less intrusive means of ensuring the health and safety of workers before implementing temperature testing.

13. If a staff member contracts COVID-19 and cannot work, is the employer responsible for paying their wages?

If an employee who has contracted COVID-19 is unable to work because they have to be quarantined, then they will generally not be entitled to be paid for the time off. However, they may be eligible for EI sick benefits. Interestingly, the employee who tests positive for COVID-19 will be in a less advantageous position than someone who does not test positive but cannot work due to quarantine (see question 14). There is an important distinction to be made between the situation where an employee cannot work and the situation where an employer tells the employee they cannot work.

COVID-19

Employment Q&A



14. If the office has to close because someone has contracted COVID-19, is the employer responsible for paying the staff's wages during the quarantine period?

If the employer is unable to employ the staff because they must all quarantine, the situation is different and they must be paid. Employees who are not sick but cannot work because the office must close due to the need to quarantine will likely be entitled to a job-protected leave of absence pursuant to the applicable employment standards legislation. These employees may also be eligible to apply for the Canada Emergency Response Benefit (CERB) while the office remains closed. The employer may also qualify for the Canada Emergency Wage Subsidy (CEWS).

15. What options do dental hygienists have if they voluntarily leave a job? What if they ask to have their hours reduced?

Voluntarily leaving a job is a resignation and should always be a last resort, since doing so means that the dental hygienist will have few, if any, remedies. Employees who resign from their job are not entitled to severance or Employment Insurance benefits, nor will they qualify for CERB.

As discussed above, if this is a constructive dismissal situation, that should be clearly asserted so it is not confused with a straightforward resignation.

If the dental hygienist needs time off for other reasons, such as childcare obligations, they may be entitled to either a statutory leave of absence and/or accommodation based on human rights legislation. Even if they are not entitled to it, the dental hygienist can always request either reduced hours or a leave of absence. However, they would not be able to insist upon it unless they have a right to do so.

These situations can be quite complex, and it is wise to seek legal advice before compromising your rights.

16. What are the options for dental hygienists who cannot return to work because they do not have access to childcare or are taking care of immunocompromised family members? Does the employer have the right to terminate the employee?

Simply put, employees are expected to attend work when directed, so long as it is not inconsistent with the terms of their employment. Attending work is not optional. This is true whether you are working day in and day out, in "normal" times, or whether you have been officially or unofficially laid off due to the coronavirus.

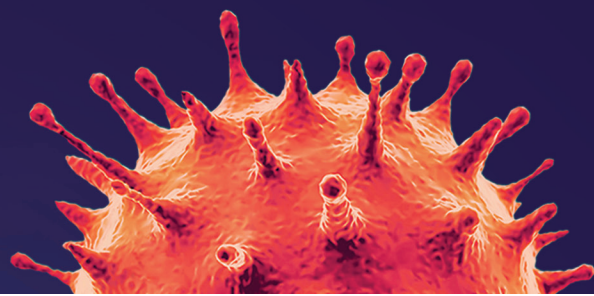
There are some potential exceptions to the requirement that a dental hygienist return to work when recalled. They are:

- 1) An entitlement to job-protected leave, such as the new leaves put in place which protect employees who cannot work due to COVID-19 in some jurisdictions
- 2) An entitlement to accommodation under the Human Rights Code, such as an employee who is immunocompromised or has childcare obligations
- 3) The right to refuse unsafe work

The question suggests that there may be an entitlement to a statutory job-protected leave and/or accommodation based on human rights laws. They should discuss this with their employer and clearly document their request. If they are dismissed, they should pursue a claim for damages and possibly reinstatement.

COVID-19

Employment Q&A



Even if they are not entitled to it, the dental hygienist can always request either reduced hours or a leave of absence. However, they would not be able to insist upon it without a legal right to do so.

These situations can be quite complex, and it is wise to seek legal advice before compromising your rights.

17. Can an employer insist that a dental hygienist stay in the building for the whole shift, including breaks on unpaid time?

An employee's time spent on an unpaid break is generally not considered working time. For example, time taken for meal periods is generally not considered working hours for the purposes of determining the daily and weekly limits on hours of work; daily, weekly, and bi-weekly rest provisions; or overtime pay and minimum wage entitlements under employment standards legislation. As a result, generally speaking, employees are free to leave the premises during their break times. However, an employer may implement policies that govern the workplace, so long as the policies are reasonable and do not conflict with an employee's rights at law (for example, to a safe, harassment- and discrimination-free work environment). A policy that requires employees to remain at work during their entire shift, even during break times, may be reasonable if it is being implemented for health and safety reasons to try to mitigate the risk of COVID-19. However, employers should keep in mind that workers are entitled to be free from work during their break time.

18. How much notice does an employer have to give a dental hygienist about returning to work?

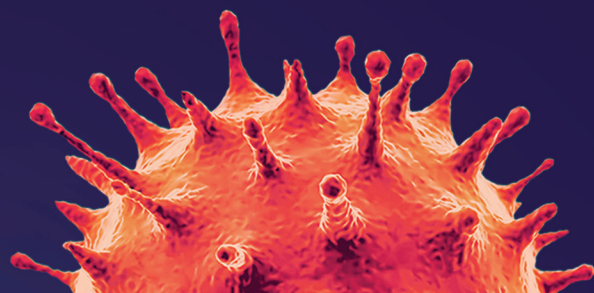
Most employment standards legislation does not set out a specific timeframe, but reasonableness will be the guiding factor. A dental hygienist on layoff is generally expected to be available, so they cannot delay their return too long without the consent of their employer or they will risk being deemed to have resigned. If there is a need for additional time, it will be critical to communicate with the employer.

19. Can the employer force the employee to pay for their own personal protective equipment (PPE) or to purchase equipment?

No, but an independent contractor will generally be expected to provide their own tools and equipment.

20. Do I have any rights to be rehired as an independent contractor?

Generally speaking, if you are an independent contractor and the contract has been terminated, there is no right to be recalled or rehired. Of course, the terms of your contract may provide otherwise. Further, you may actually be an employee. Many dental hygienists are really employees in all but name, although they are treated and paid as contractors. Simply put, an independent contractor is in business for themselves, whereas an employee is a part of the organization.



Health and Safety Concerns

1. **What liability does the employer have if a dental hygienist is asked to perform work without adequate personal protective equipment (PPE)?**

NOTE: CDHA recommends that dental hygienists return to work only if adequate PPE is available as outlined by provincial regulatory bodies.

While there are nuanced differences between jurisdictions, employers are generally expected to take all reasonable precautions to protect the health and safety of their workers. That is no different now than in other times, but the considerations are, of course, different during a pandemic.

An employer does not have to guarantee the safety of workers, which would be impossible. But they must comply with their obligations to prevent safety risks and address any concerns that are raised.

While the current circumstances are novel and unprecedented, and we are all struggling to determine the best safety practices, employers should follow the advice and guidelines provided by provincial regulatory bodies, public health authorities, and our governments in order to reduce the risk of transmission of COVID-19. Most governments and regulatory bodies have provided detailed guidelines in order to help organizations safely resume operations, and an employer would have to justify a failure to abide by them, since that would generally be inconsistent with taking “all reasonable precautions.”

Physical distancing is encouraged but obviously cannot be maintained by practising dental hygienists. That said, practices and procedures should be guided by the directions given by the provincial regulatory bodies. That would certainly require the use of adequate PPE.

Some dental offices will be covered by workplace safety insurance (workers’ compensation) programs, in which case a dental hygienist who becomes ill while at work can seek benefits. They may also have separate insurance plans in place and employees may be able to bring a civil claim for an injury or illness caused by their work.

These remedies are not based on the failure to provide PPE, but upon the dental hygienist sustaining an injury or illness while at work. That would apply even if the employer followed all appropriate directions in maintaining safety.

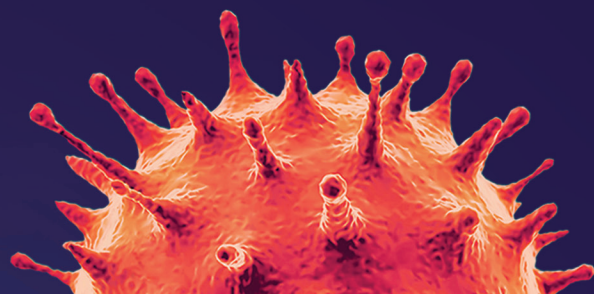
2. **What are the options for dental hygienists who are uncomfortable returning to work? Do they need to demonstrate why they feel unsafe?**

While legislation differs slightly from jurisdiction to jurisdiction, employees are generally entitled to refuse to work if it is unsafe. That can include situations such as being asked to work without proper PPE or not following infection control protocols prescribed by the relevant provincial regulatory bodies, public health authorities, and governments.

If a dental hygienist reports a concern about an unsafe workplace (see question 3 of this section), the employer is required to investigate the situation and advise the employee whether the safety risk has been resolved or not. If the

COVID-19

Employment Q&A



dental hygienist continues to believe there is a safety concern, the Ministry of Labour can be asked to investigate. Recently, several provinces have increased the resources available to respond to and introduce safety concerns arising from the COVID-19 pandemic.

Workers should be mindful of the fact that the right to refuse unsafe work is intended to protect them when the workplace is unsafe. There must be reasonable and legitimate grounds for the employee to believe there is a safety risk in the workplace. A fear of getting sick, if there are no current incidents in the workplace or other risk factors, is likely not sufficient. However, in a situation where another employee has been diagnosed with COVID-19 or where the employee is interacting regularly with the public, there may be a legitimate concern that needs to be addressed by the employer to ensure the health and safety of all workers.

3. What are the steps that an employee should take if they return to work and are being asked to do something that they think will endanger themselves or others (e.g., perform unsafe work)?

The following steps provide general direction. Legislation differs slightly from jurisdiction to jurisdiction. Dental hygienists are encouraged to contact their appropriate provincial office.

- 1) Notify your employer in writing that you are refusing to work because it is unsafe and state the reason for refusal.
- 2) Employer must investigate.
- 3) Employer must remedy unsafe working conditions.
- 4) If you believe a danger still exists, file a complaint with the appropriate provincial government officer.
- 5) The officer will investigate the complaint and determine whether working conditions are unsafe.
- 6) If you are not satisfied with the recommendations, you must legally return to work. However, you may appeal.

4. Is the employer obligated to just attempt to fix the concern or have it addressed, or does that concern have to be resolved before the dental hygienist is obligated to return to the workplace?

As above, a dental hygienist can refuse to work if it is unsafe. That does not change if the employer is “trying” to fix it; they are only required to work when it is no longer unsafe. This can include a temporary reassignment or change in duties in some circumstances.

5. Can a dental hygienist be penalized for reporting their workplace?

No, as long as the report is made honestly and in good faith.

6. What happens if a dental hygienist does not want to return to work, even if the workplace has been deemed safe?

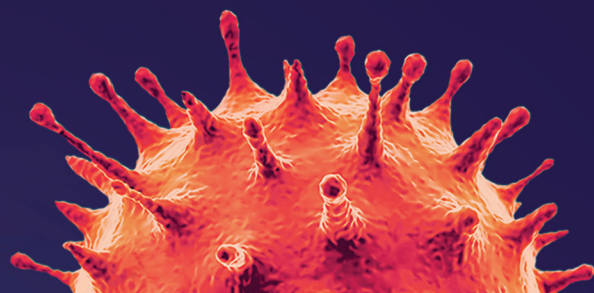
If the workplace is safe, a dental hygienist is expected to attend work when directed, so long as it is not inconsistent with the terms of their employment. Attending work is not optional. That is true whether you are working day in and day out, in “normal” times, or whether you have been officially or unofficially laid off due to the coronavirus.

There are some potential exceptions to the requirement that an employee attend work when recalled. They are:

- 1) An entitlement to job-protected leave, such as the new leaves put in place which protect employees who cannot work due to COVID-19 in some jurisdictions

COVID-19

Employment Q&A



- 2) An entitlement to accommodation under human rights legislation, such as an employee who is immunocompromised or has childcare obligations
- 3) The right to refuse unsafe work (as discussed below)

With respect to the third point, the danger must be specific to the workplace and not a general concern about going out during the pandemic. The legislation generally refers to danger as opposed to risk; the threshold is high, even in times like these.

That said, while a more general concern about contracting the coronavirus may not constitute reason to refuse work, an employee with a medical condition that causes them to be at elevated risk may be entitled to accommodation. Similarly, employees with family members who have medical concerns, with whom they live, may also be entitled to accommodation.

Without a legally valid reason, refusing to attend work for regular working hours is, effectively, an abandonment of one's job and a resignation. Therefore, all discussions regarding the reason for the refusal should be documented.

7. Are my rights to refuse an unsafe work environment any different as an independent contractor?

This is one area where independent contractors have the same rights as employees, including the right to refuse unsafe work. "Worker" is broadly defined under occupational health and safety legislation and includes individuals providing services to the employer as an independent contractor.

8. If an employee becomes sick as a result of unsafe working conditions, what recourse is there?

If an employee becomes sick due to unsafe work conditions, they may be entitled to benefits through the applicable workers' compensation body in their jurisdiction, if their office is covered. Alternatively, an employee may be entitled to other insurance coverage and/or to pursue a court action. They may also be entitled to an unpaid leave of absence from the workplace pursuant to employment standards or human rights legislation. An employer who has failed to ensure a safe work environment for their workers may be subjected to penalties for failing to comply with their obligations based on health and safety legislation.

9. Is my employer obligated to pay for sick days?

Most jurisdictions do not require paid sick days, so this will depend primarily on your contract or the policies in place in the workplace.

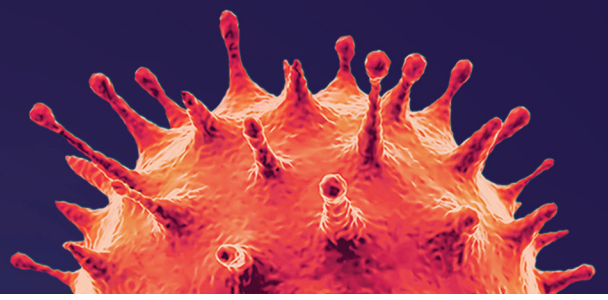
10. Can an employer force a dental hygienist to get tested for COVID-19 or other infectious diseases?

NOTE FROM CDHA: A dental hygienist is responsible for ensuring that they are fit to work. Therefore, anyone with symptoms of COVID-19 or who suspects they have been in contact with COVID-19 should not report to work. Consult your provincial regulatory body's guidelines for direction.

Many efforts to ensure a safe working environment will involve infringing on an employee's privacy rights. As a result, there will have to be a careful balancing of a dental hygienist's right to privacy with the employer's duty to take all reasonable steps to ensure a safe workplace.

COVID-19

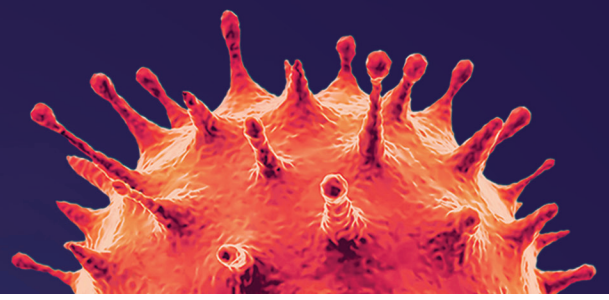
Employment Q&A



Generally speaking, infringing the privacy rights of a worker is not permissible. Employers may be given more leeway in these circumstances. However, any proposed requirement will have to be shown to reasonably achieve the goal in question, and it will be up to the employer to show that no less intrusive means would achieve the same result. Furthermore, the reasonableness of the proposed means will have to be assessed based on the particular work environment. Given the unprecedented nature of this situation, it is difficult to offer a general opinion as to whether testing could be mandated in a dental office, although we know that some hospital departments have done so.

11. Due to the COVID-19 crisis are there any special considerations in place for pregnant employees?

A pregnant dental hygienist can be entitled to accommodation pursuant to human rights legislation. If, for example, they are at increased risk of illness, then they should discuss their need with the employer so that accommodation options can be assessed.



Canada Emergency Wage Subsidy (CEWS) specific questions

1. **If a dental hygienist is offered to be rehired under CEWS and refuses (e.g., due to lack of childcare, or to working part time at two offices and one isn't applying for CEWS so they won't earn as much as on CERB), can the employer refuse to rehire them at a later date? Are they entitled to severance if that happens?**

If there is an inability to work because of COVID-19, then they may be entitled to a statutory job-protected leave of absence. Furthermore, if the inability to work relates to a ground protected by human rights legislation, such as childcare obligations, then they may be entitled to accommodation. Otherwise, if someone refuses to work, then they are not entitled to severance, employment insurance or CERB benefits.

2. **Can my employer hire me back under CEWS, which pays me 75% of my salary, but expect me to work full-time hours?**

As discussed above, that could constitute a constructive dismissal, depending on the contract and policies in place and other factors specific to the circumstances.

3. **If a dental hygienist returns to work under CEWS and signs a contract that specifies a change in working conditions while working under CEWS, does that negate their previous contract?**

No, if it is clear that the new arrangement is temporary. You should be very cautious when accepting any change to the terms of your employment, even if it is purportedly temporary.

4. **If an employer rehires an employee under CEWS and doesn't pay them 75%, can the employee report their employer?**

Yes, if an employer receives a subsidy but does not pay an employee in accordance with the program, then they can be reported and the employee should not be subject to reprisal.