



COVID-19 Legal Q&A for Members

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Federal and Provincial Authority to Stop the Spread of Disease

The federal government has the authority to order a quarantine under the *Quarantine Act*. The Act gives the federal health minister powers to stop the spread of communicable diseases inside of Canada or outside of Canada and coming in. Measures the federal government may enact include everything from routine screenings by quarantine officers at airports to isolating returning Canadian travelers on military bases.

Within a given province, however, it is the responsibility of the provincial government through their Medical Officer of Health to issue orders enforcing isolation and other protective measures. In Ontario this is done under the *Health Protection and Promotion Act*.

Responsibilities as a Physician

- Professional expectations
- Practicing outside of scope and province licensure

Professional Expectations

Do all professional expectations still apply to me in the context of COVID-19?

The CPSO policy on Public Health Emergencies applies.

Refer to:

- CPSO Policy: [Public Health Emergencies](#)

Some non-essential or elective care may be deferred during the emergency. As well, physicians may move some of these services to virtual care. Nonetheless, physicians have a legal duty to ensure that everything they do for their patients meets the standard of care of a reasonably competent physician in similar circumstances.

Practicing outside of Scope and Province of Licensure

I'm a dermatologist, but I'm willing to step in if I'm needed in a pandemic. Can I do so without risking legal action and discipline? Or, what if I want to go help in another province?

During the pandemic, you are not required to inform the CMPA of a change in Type of Work or Province of Work before commencing your efforts, but the CMPA would appreciate hearing from you when it is feasible or if you have any questions. (See bullet 3, <https://www.cmpa-acpm.ca/en/news/2020/2020-covid-19-cmpa-protection>).

As well, under the *Emergency Management and Civil Protection Act*, the government can pass an order “Authorizing, but not requiring, any person, or any person of a class of persons, to render services of a type that that person, or a person of that class, is reasonably qualified to provide.”

If the government invokes this power and orders redeployment of the health work force, you may be able to practice outside your practice area without incurring liability. This has not happened yet, but we are monitoring the situation closely.

In the absence of a formal order, the CPSO states that during public health emergencies, it may be necessary for physicians to temporarily practice outside their scope, but physicians must do so **only** if:

- 1) the medical care needed is urgent,
- 2) a more skilled physician is not available, and
- 3) not providing medical care may result in greater risk or harm to the patient or public than providing it.

Informed Consent

I'm an interventional radiologist, and I always get written consent for procedures. I'm concerned about potential infection spread through paper and pens. Is written consent still required?

While informed consent may be obtained in either oral or written form, frequently it is important and prudent to obtain written confirmation. Patients can change their minds or may not remember what they authorized after the procedure has been carried out, or they may attempt to take the position it had not been agreed to or was not acceptable or justified. However, we also appreciate the need to be practical in the circumstances.

In general, the CMPA advises physicians that consent forms should not replace discussion and dialogue. While forms are helpful as written confirmation that explanations were given and the patient agreed to what was proposed, a written consent form does not, in and of itself, fulfil the requirement for obtaining informed consent. The key for obtaining informed consent is a good discussion between the physician and patient. Such a discussion should be documented on the chart highlighting the relevant details of the consent discussion.

If a consent form cannot be signed or should be avoided, consent may be done verbally and documented in the medical record. If there is concern about sharing pens and paper, we would suggest still giving the patient a copy of the form.

It is also important to note that hospital policies may speak to this issue, and physicians are encouraged to speak to hospital administration prior to adopting new practices in this regard.

How do I obtain informed consent for virtual care?

Please consult the following website for general information on virtual care.

<https://www.ontariomd.ca/pages/ontariomd-covid-19-virtual-care.aspx>

The consent language we are recommending is as follows:

COVID-19 is placing stress on Canada's public health system. Our clinic is starting to offer virtual care to make sure that we can continue to care for our patients safely and effectively. This means that we will be using video and audio technologies for some patient visits rather than asking all patients to come into our office. Some of these technologies are provided by the province. Others have been provided by vendors such as Google or Apple to help make discussions with your care provider as easy as possible during these difficult times. Some health concerns can be addressed with virtual care alone, but in some cases your doctor may ask you to visit a hospital or other health-care facility if necessary, for a physical examination.

We do our best to make sure that any information you give to us during virtual care visits is private and secure, but no video or audio tools are ever completely secure. There is an increased security risk that your health information may be intercepted or disclosed to third parties when using video or audio communications tools. To help us keep your information safe and secure, you can:

- *Understand that this method of communication is not secure in the same way as a private appointment in an exam room.*
- *Use a private computer/device (i.e., not an employer's or third party's computer/device), secure accounts, and a secure internet connection. For example, using a personal computer or tablet is more secure than using someone else's computer, and your access to the Internet on your home network will generally be more secure than an open guest Wi-Fi connection.*

You should also understand that virtual care is not a substitute for in-person communication or clinical examinations, where appropriate, or for going to an emergency department when needed (including for any urgent care).

If you are concerned about using video or audio tools for virtual care, you can ask our office to arrange for you to visit a different health-care provider or other health-care center where you can be seen in person. However, please note that visiting a health-care provider in person comes with a higher risk of coming into contact with COVID-19 and the possibility of spreading the virus.

By providing your information, you agree to let us collect, use, or disclose your personal health information through video or audio communications (while following applicable privacy laws) to provide you with care. In particular, the following means of electronic communication may be used (identify all that apply): audio or videoconferencing (including Skype, Facetime, etc.).

Note that if express verbal consent is collected, it should be documented in the chart.

Rights as a Worker

- Working in a clinic with insufficient PPE
- Income replacement in the event of exposure or illness
- Hospital-based physicians

Working in settings with insufficient PPE

I have a contract to work at a walk-in clinic. I am an independent contractor. The clinic has no masks but is still treating patients with respiratory symptoms. Do I have to keep working there? What can they do to me if I do not?

The clinic has a duty under the *Occupational Health and Safety Act* to provide equipment necessary to carry out your work safely. Physicians will be permitted to refuse to practice only if they reasonably believe that the work environment creates an unacceptable hazard and that hazard is based in evidence/breach of best practices.

The standard for patients exhibiting respiratory systems is to ask them to apply hand sanitizer, wear a mask and to isolate them from others. Health-care workers should take droplet precautions (including medical mask, gown, gloves and eye protection) when conducting a physical examination of patients with respiratory symptoms.^{1,2}

1. World Health Organization. (2020). Rational use of personal protective equipment for coronavirus disease (COVID-19): interim guidance, 27 February 2020. World Health Organization. <https://apps.who.int/iris/handle/10665/331215>. License: CC BY-NC-SA 3.0 IGO

2 Public Health Ontario (2013). Annex B: Best Practices for Prevention of Transmission of Acute Respiratory Infection In All Health Care Settings March 2013. <https://www.publichealthontario.ca/-/media/documents/bp-prevention-transmission-ari.pdf?la=en>

Note that the landscape is constantly changing and the standard could change quite suddenly. This is an evolving issue.

If you refuse to go to work, the clinic could sue you for breach of contract. However, given the circumstances and the cost of executing this action, they may choose not to. Note that the CMPA does not offer assistance with contractual issues.

The clinic may also complain to the CPSO that you failed to provide care and thus behaved in a manner unbecoming a physician under the *Medicine Act* regulations. CMPA provides assistance with CPSO complaints on a discretionary basis.

Note that this may not apply to many other types of physician workplaces (e.g. hospitals, long-term care homes, mental health centres, etc.) See below for more information on hospitals.

What responsibilities does my clinic have to provide PPE?

Clinics must meet the standard of care to avoid liability and uphold their duty to patients. In the absence of available PPE, physicians may wish to consider other measures to screen patients prior to arrival. For example, some provincial/territorial health ministries have published guidance recommending, amongst other things, that patients be screened over the phone before scheduling appointments; signage be posted on entry to the office and at reception areas for patients with symptoms to self-identify, perform hand hygiene, wear a procedure mask, and have access to tissue and a waste receptacle; and for staff conducting screenings to potentially be behind a barrier (e.g. plexiglass) to protect from droplet/contact spread.

Documentation of the facts and circumstances of care provided in the circumstances, including the steps taken to attempt to obtain PPE, will be invaluable in the event of medical-legal developments in the future when memories may have faded about working conditions at the time.

As with any resource constraint, physicians are expected to do the best they can for patients and act reasonably in the circumstances. Physicians may need to adapt and be resourceful in this rapidly changing and challenging environment.

I work in a hospital or other institutional care setting. If there is insufficient personal protective equipment supplied, can I refuse to work?

Hospitals have an obligation by statute and common law to provide a safe environment for their patients and staff. However, there is also language in the *Occupational Health and Safety Act* that states that those working in hospitals cannot refuse work if it puts others at serious risk of endangerment or death. A Ministry of Labour decision from the post-SARS era indicated that a lack of proper personal protective equipment such as an N-95 mask during an infectious disease outbreak will justify a work refusal in a hospital setting. This suggests that a worker in a hospital can refuse work only if there is a legitimate unacceptable hazard that is not inherent to the physician's ordinary occupation. **We would suggest contacting the CMPA prior to any work refusal.**

Income replacement in the event of exposure or illness

If I am exposed to COVID-19 and have to self-isolate for 14 days, OR, if I contract COVID-19 and cannot work, will I be compensated for lost income?

There is currently no specific physician funding for income replacement as there was with SARS. However, the OMA is advocating to the government that this should be put in place. Updates will be shared when available.

Hospital-Based Physicians

Hospitals have an elevated duty of care as theirs is a private duty to patients and staff rather than the public duty government has. Hospitals have a duty to incorporate the Precautionary Principle into their decision making regarding a new pathogen and thus their recommendations and rules do not have to match those of the government. In fact, legally, they may be expected to be more stringent under the regulations of the *Occupational Health and Safety Act*.

Can hospitals require physicians to declare their travel plans? Are physicians obligated to comply with the hospital's request to disclose their travel plans?

You are not required to provide information about your travel plans, but at that point they may ask you to voluntarily not come in, or they may decide you cannot work there temporarily by invoking a temporary suspension provision in their by-laws. However, this would only be reasonable in a legitimate public health emergency. Right now, we believe it is reasonable only to ask about travel to affected areas.

Can hospitals restrict physicians from working in the hospital based on hospital rules and not government directives?

Yes, it is possible that hospitals could restrict physicians from working based on their by-laws.

Hospitals are considered government actors for the purposes of the Canadian Charter of Rights and Freedoms. Your right to personal privacy under the Charter in an urgent public health situation may be trumped by Section 1, which permits the override of rights for purposes justifiable in a free and democratic society.

During a pandemic, hospitals are likely to be given broad leeway to make difficult choices. Under the Professional Staff By-laws, the hospital can temporarily suspend privileges if there is a "reasonable" risk to patient safety or workplace safety. What is reasonable is fluid depending on the situation and the legal obligations of the hospital.

I work in a hospital and I'm pregnant/immunocompromised/over 65. Basic preliminary data suggests the risk to me is greater if I contract coronavirus. Do I still have a legal responsibility to go in during an outbreak?

Employers have a duty under human rights law to try to accommodate workers with particular susceptibilities. An employer who refuses to accommodate an employee or independent contractor may be found to be discriminating on the basis of sex (when pregnancy is the source of susceptibility) or disability (when an underlying medical condition is the source of susceptibility). What is considered appropriate accommodation depends on each case. Human rights law requires accommodation to the point of undue hardship.

From a CPSO perspective, you have a responsibility to your patients and the regular professional expectations apply. If you will be away from your practice, you must ensure appropriate coverage. Refer to the [CPSO Availability and Coverage policy](#).

Responsibilities as an Employer

- Ensuring appropriate safeguards for staff (PPE)
- Paid sick time for self-isolation

Ensuring appropriate safeguards for staff (PPE)

I'm a clinic owner and I can't get access to masks. If there is a sudden outbreak in Ontario, can my staff legally refuse to come to work?

Yes, staff can legally refuse to come to work because of unsafe or dangerous conditions.

For this to be justifiable, labour boards across Canada have affirmed that workers must satisfy four criteria to justify a refusal to work because of unsafe or dangerous conditions:

1. Workers must *honestly* believe that their health or well-being is endangered.
2. Workers must *reasonably* believe that their health or well-being is endangered. For example, if the standard of practice does not require masks and the staff are demanding them, this is not reasonable and would not meet the criteria.
3. Workers must communicate their concerns to their supervisor in a reasonable and adequate manner.
4. The danger must be sufficiently serious to justify the action; it must be immediate and more than a matter of repugnancy, unpleasantness or fear of minor injury. In this case, this would likely mean that there has to be a real and pressing threat to coming into work.

Note that allied health professionals may also have their own college policies related to refusal to work. Employees can be directed to

<https://www.canada.ca/en/services/benefits/ei/ei-sickness/apply.html>.

The government has announced it will provide compensation to individuals unable to work during this time.

Paid sick time for self-isolation

If my staff have to go into self-isolation, do I have to pay them? Does it matter whether they were exposed at the clinic or outside of work?

Whether you will need to pay your staff if they need to go into self-isolation would depend on where they were exposed: at work or outside of work.

If an employee has to self-isolate for reasons outside of work:

The physician isn't legally required to pay for sick days. Under the Employment Insurance Act, employees who face a reduction in "normal weekly earnings" of at least 40 per cent because of illness, injury or quarantine are eligible for EI sickness benefits, provided they have accumulated sufficient insurable hours.

The provincial government has indicated it is currently in the process of drafting legislation that would amend the *Employment Standards Act* to provide protections for workers impacted by COVID-19. Employees should be directed to <https://www.canada.ca/en/services/benefits/ei/ei-sickness/apply.html>.

If an employee contracts COVID-19 at work:

It would be covered as an occupational disease and potentially compensated by WSIB or, if the physician has no WSIB coverage, other insurance the physician has. In the absence of proper insurance, physicians may be required to pay for sick employees.

As emergency measures have been invoked, there are provisions that may facilitate WSIB coverage for anyone involved in the emergency event. The provincial government has also indicated it is currently in the process of drafting legislation that would amend the *Employment Standards Act* to provide protections for workers impacted by COVID-19. We are working to get more clarity on the steps involved.

If an employee is exposed to COVID-19 at work:

If exposed and required to isolate (no symptoms), the requirement to compensate is grey. It doesn't appear to be covered by WSIB. Physician employers should behave in a manner suggesting reasonableness and good faith. The provincial government has indicated it is currently in the process of drafting legislation that would amend the *Employment Standards Act* to provide protections for workers impacted by COVID-19.

Declaration of Emergency

The province has declared an emergency. What does that mean, exactly?

The province has the ability to declare an emergency under *the Emergency Management and Civil Protection Act*. This gives the government the ability to make orders and suspend and/or change other laws for the purpose of the emergency and to promote the public good and the health and safety of all Ontarians.

Can the government do whatever it wants, then?

No. The government must still operate according to the Canadian Charter of Rights and Freedoms. As well, this Act and its orders cannot override the *Occupational Health and Safety Act* or the Human Rights Code. This is important, as the pandemic situation has implications for health-care workers who will therefore continue to have the right to rely on a safe work environment. Orders made under this Act can also be challenged legally in court.

How will this affect me or my practice?

Supplies

Invoking this legislation means that the government can make orders that provide for obtaining and distributing materials, equipment and supplies during an emergency. This is good news. It gives the government control over the supply chain for things such as PPE and medical equipment. This will ensure those who most need masks, gowns and ventilators are able to get them. The same would apply to medications should that become necessary.

Human Resources

The Act gives the power for the government to reassign or redeploy people as needed for the management of an emergency. This may mean that, if necessary, physicians could be redeployed to other practice areas or locations. We have no indication that this is happening as of yet and will provide updates as we receive them on this question.

Liability

Those who are redeployed or working outside of scope for the purposes of an emergency under this Act, or under an order made under this Act, are afforded liability protection. They cannot be held liable for work done in good faith. That being said, in the absence of being officially redeployed, we continue to recommend adhering to the CPSO policy on emergencies and to consult with CMPA as needed.

Can my office stay open?

Yes, your office can remain open. We do encourage you to limit in-person visits to those that are essential. Non-essential care can be provided virtually or deferred can be considered. Please see [our recommendations and policy on realignment](#).

How long will this go on for?

The order should be effective only for as long as necessary. The government is required to periodically re-evaluate and extend only if needed.

Why didn't the federal government declare an emergency?

The provinces are responsible for property and civil rights under our Constitution. This means the province is responsible for health care and related matters. Since the province declared an emergency, the federal government does not have to at this time. Should the situation change and federal coordination becomes crucial, this would likely be revisited.

I'm concerned that certain businesses, such as malls, continue to be open. What can I do?

Encourage your patients, friends and family to observe social distancing, and limit interactions to those that are absolutely necessary, such as shopping for groceries and other essentials.