**Suggested Action Plans to Compel Disclosure & Establish Exclusive Employment**

Sector Pandemic Planning Initiative (SPPI)

May 8, 2020

**Topic:**

Recommended Actions to Take Regarding Staff Who Ignore Agency Announcements to Limit Employment and Are Continuing to Discretely Work at Other Employers, Including Other Agencies, Companies or Family Respite

**Overview:**

The [Emergency Order regarding staffing and deployment in the developmental services](https://www.ontario.ca/laws/regulation/200121) released April 3, 2020 (the “DS Order”) requires and authorizes DS agencies to take any reasonably necessary measures to prevent, respond to and alleviate an outbreak, including measures that would otherwise breach applicable legislation, collective agreements, policies or directives.

# On [April 24, 2020, another Emergency Order was issued under the Emergency Management and Civil Protection Act regarding single-employer restrictions for congregate care settings](https://www.ontario.ca/laws/regulation/r20177). This order speaks specifically to the issue of single employer requirements – but only within the DS sector, Intervenor Services Sector, and for women’s shelters/shelters for victims of human trafficking.

* “(As of) April 30, 2020, a staff member of a congregate care setting service agency who performs work in a residence operated by the agency shall not also perform work as a staff member of a different congregate care setting service agency in the same sector in a residence operated by the different agency.”
* “(As of)April 30, 2020, a congregate care setting service agency shall ensure that any of its staff members who perform work in a residence operated by the agency do not also perform work as a staff member in a residence operated by a different congregate care setting service agency in the same sector.”
* **As of April 27, 2020, employees to whom this order applies must notify their employers of same.**

Further information in relation to this Order is available here: <https://pooranlaw.com/covid-19-single-employer-emergency-order-for-congregated-care/>

**Considerations for Implementing Broader Single-Employer Restrictions:**

**This new Emergency Act order restricts workers** from working for two agencies within the same sector, but does not restrict them from working in other sectors, including long-term care, health, retail, construction or even other residential sectors outside of the three listed above (developmental services, intervenor services or shelters).

**This new order does not place restrictions on employers** implementing broader restrictions, restricting workers from working in other sectors (such as long-term care or health care) during the pandemic, if “reasonably necessary” to prevent, respond to or alleviate the outbreak.

**However, risk of grievance and “constructive dismissal” claims** **would still exist** and could result in liability if the measures you adopt are deemed to be excessive (i.e., not “reasonably necessary”) to prevent, respond to or alleviate the outbreak.

**Rights of agency to compel multi-employer disclosure**

In the employment context, there is no statutory obligation in relation to privacy, but there are legal rights that flow from employees having a “**reasonable expectation of privacy**.”

However, given the pandemic, the emergency orders and in particular the [“single-employer order” for congregated care](https://www.ontario.ca/laws/regulation/r20177), what information can be shared will depend on what measures are reasonably necessary to:

1. comply with the obligations under the DS order (requiring you to take any reasonable measure to prevent outbreak, in addition to now ensuring that employees are not working at another DS agency’s residential setting); and
2. meet agency obligations to ensure workers aren’t working at another location for another employer, regardless of sector.

**Approach #1 – Compelling Disclosure & Establishing Exclusive Employment**

A circumscribed approach would be to:

1. Provide a very direct notice of:
   1. The legal obligation to declare secondary employment within the DS sector (or elsewhere if an agency chooses to implement broader restrictions);
   2. The legal obligation to work for only 1 employer within the DS sector (or elsewhere if an agency chooses to implement broader restrictions);
   3. The legal obligation for the agency to take all needed measures to prevent outbreaks, as the basis for the agency’s requirement that employees have only one place of work, across some or all sectors;
   4. The fact that an employee found to have breached this directive will be subject to discipline, up to and including termination for cause (and/or zero tolerance).
2. Consider requiring an attestation pursuant to which the employee confirms they will work for your agency only for the duration of the Declared Emergency.
3. Where there is a basis for suspicion of breach, then the suspicion could be presented to the worker and the worker asked to consent to disclosure for the suspected secondary employer to confirm the employee is not actively working for them.  If the employee refuses to provide the consent then this in itself could be grounds for placing them on an unpaid leave for the balance of the Declared Emergency or until they consent, whichever comes first, and potentially further discipline for breach of the order. There is risk with this approach and it should only be adopted with legal guidance.
4. Optional: Allowing for some flexibility in second jobs if the job is conducted alone from the employee’s home (e.g., via computer) or presents little risk of exposure. This would be up to the discretion of the agency and should be adopted with legal advice.

**Approach #2 – Proactively Ensuring Exclusive Employer Locally Within Sector**Local agencies may explore sharing lists of active employees to ensure that employees are complying with the single employer rule. Unions and employee representatives should be engaged if this is an option being explored and confidentiality and privacy measures should be explored and implemented prior to any such measures are implemented.

***Note:*** *There is no case law to support such a broad move.  This would be completely unprecedented and likely subject to legal challenge.  However, given the position that many unions have taken (demanding that employers enforce the single-employer order), they may be onside. Keep in mind, however, that this wouldn’t capture work in other sectors (LTC, retail, etc.).*

**Disclaimer**

Legal input and feedback included in this policy were provided by [PooranLaw](http://www.pooranlaw.com/) lawyers asmembers/consultants of the Sector Pandemic Plan Initiative’s Governance working group. However, the legal input and feedback included in this policy should not be construed as legal advice. Each agency’s circumstances and legal rights may vary and there will also be nuances within each agency. The goal of the legal input and feedback included in this policy is to help present options and highlight risks and other considerations. Agencies may wish to seek legal advice once they have selected the options that meet the needs of their organization.