

## **Ethics & Legal Policy Brief re: Shared and Non-Shared Staff**

Governance Working Group, Sector Pandemic Planning Initiative (SPPI)

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### **Topic:**

Consideration of Risks Related to Using Shared and Non-Shared Staff During COVID-19 Pandemic

### **Policy Problem:**

Depending on the size of a Developmental Service Agency (DS Agency) many staff may not have full-time roles (e.g., working part-time or relief). DS Agencies are also meeting staffing shortages, using agency staff. All of these are forms of “shared staff” because these employees are likely working at more than one DS Agency or another workplace. Because of the increased number of coworkers and workplaces they encounter, shared staff present a heightened risk of COVID-19 exposure.

### **Policy Questions:**

1. Can DS Agencies fill all shifts if they stop using shared staff, including part-time, relief or agency staff?
2. Is eliminating shared staff an effective tool in eliminating risk of COVID-19 exposure?
3. Are there not COVID-19 risks inherent to all workers entering the home?
4. What strategies could offer a more holistic approach to managing COVID-19 risk?

### **Relevant Ethical Principles:**

<b>Ethical Principle</b>	<b>Brief Interpretation in the Context of the Policy Questions</b>
Need to provide continuous essential services	Some agencies rely on shared workers for their ability to staff. Many staff are employed by more than one organization across the sector. This complement of part-time/casual staff is vital to the human resources strategy within the sector and other organizations.
Minimize risk of harm to staff and people supported	Using shared staff presents an increased risk of COVID-19 exposure simply because they are working at least 2 workplaces, if not more. A head of a DS Agency in New York sees the curtailing of the movement (e.g., accessing multiple worksites) of workers as vital to reducing the risk of COVID-19.

Minimize invasion of privacy while also respecting heightened need for safety	<p>Privacy interests of workers (and the legal risks of disclosing employee information or mandating disclosure) must be balanced against the health and safety risks of operating without relevant information. An employer has the right to require an employee to disclose information that is reasonably necessary to ensure the worker can safely perform their work and that they don't present a risk to people supported by the employer who are medically vulnerable, or to otherwise address risk to health and safety in the workplace. Arguably that may include information about the employee's off-duty activities, including whether and where they are working, and their exposure to people and settings that pose a heightened risk of COVID-19 infection.</p> <p>The greater the health and safety risk, the greater the ability to disclose or require the disclosure of private employee information.</p> <p>In all cases, best practices include:</p> <ul style="list-style-type: none"> <li>a) requirements related to disclosure of personal information should be minimally invasive (minimum amount of information required to assess and address risk to people supported and other workers);</li> <li>b) any information disclosed should be used exclusively for the purpose of assessing and addressing COVID-19 related risks;</li> <li>c) the information should be accessed only by a minimum number of people who need to know;</li> <li>d) information must be maintained in a confidential manner; and</li> <li>e) information must be immediately destroyed when the pandemic is over or when the information is no longer reasonably required for health and safety purposes</li> </ul>
Ensure all staff are treated equitably	All workers present the risk of COVID-19 exposure. Agency, part-time and relief staff should not be singled out and treated differently if they choose to keep working and the DS Agency chooses not to layoff.
Foster partnership	All workers should be treated with respect and with care for their psychological health and wellbeing. Highlight any employee assistance benefits your agency has. In addition,

	government funding is available related to COVID-19. DS Agencies could consider partnering with and paying staff to take additional risk mitigation steps, e.g., using Uber instead of public/shared transit, accessing alternate housing (e.g., a hotel for a staff), paying for time needed to do additional laundry and work clothes prep at home, etc. The <a href="#">Residential Relief Fund</a> can be used for transportation, alternate housing and other needs.
Foster trust	This is a stressful time and direct support workers may be experiencing heightened levels of stress due to the nature of their work as it relates to the pandemic. DS Agencies should take care to not build distrust or animosity between full-time and non full-time staff.

Each of the above principles ought to be upheld wherever possible, but can come into conflict with one another. The process by which the above principles are balanced when making staffing decisions should adhere to principles of procedural fairness, including transparency and consistency.

### **Relevant Legal Principles**

#### **a) Human Rights:**

Any policies or practices implemented to address COVID-19 staffing and shared staffing arrangements (including information gathering related to prohibited ground of discrimination) should consider human rights implications, as well as consider individual concerns when raised by staff on a case by case basis, and consider and provide accommodation where possible.

#### **b) Privacy:**

For employers in the Developmental Services Sector (employed by provincially regulated employers) there is not legislation governing how an employer manages personal employee information (such as information about other employers, information about an employee's personal marital, family or household status). Employee health and medical information may be subject to the Personal Health Information and Protection Act. At the same time, personal information and an employer's treatment of personal information (including in relation to their relationship with other employers) may be impacted by developments related to the Tort of Inclusion upon Seclusion. This area of the law is not well developed. In general, best practices that should be applied from a privacy perspective to any information gathered during the Pandemic include:

- requirements related to disclosure of personal information should be minimally invasive (minimum amount of information required to assess and address risk to people supported and other workers);
- any information disclosed should be used exclusively for the purpose of assessing and addressing COVID-19 related risks;
- the information should be accessed only by a minimum number of people who need to know to achieve that purpose;
- information must be maintained in a confidential manner; and
- information should be immediately destroyed when the pandemic is over or when the information is no longer reasonably required for health and safety purposes

**c) Emergency Order and Orders and Directives by Medical Officers of Health**

The government released an Emergency Order on April 4, 2020 specific to the Developmental Services Sector that provides greater flexibility for employers in the sector to take any reasonable measures to necessary to respond to, prevent and alleviate the outbreak of COVID-19. This may include implementing initiatives (such as gathering information or implementing workplace rules) that would otherwise conflict with other legal obligations, legislation or a collective agreement.

Compliance with Orders and Directives issued by Medical Officers of Health during this crisis may also have the effect of excusing employers from legal obligations where necessary to address the very significant risks to personal health and safety associated with COVID-19.

**d) Employment Law**

Employment law for non-unionized workers generally provides that imposing new workplace rules, laying off workers, imposing periods of unpaid leave when an employee is available to work, or reducing an employee's pay can result in a constructive (or deemed) dismissal entitling an employee to damages in lieu of reasonable notice. Whether a "constructive dismissal" will be deemed to have occurred and any risk of potential liability is assessed on an individual basis.

**e) Labour Law**

Unionized employers will also be subject to the terms of any collective agreements that apply to their bargaining unit employees, and may face grievances in relation to a breach of any specific Article of the collective agreement, exceeding management rights, or alleging that measures adopted pursuant to the Emergency Orders or any directive of the Medical Officers of Health were not "reasonably necessary" and therefore not defensible on that basis.

## f) Other Legislative Considerations

In addition, employers should keep in mind obligations to provide information related to risks under the *Occupational Health and Safety Act*, reporting and ascribing the source of any COVID-19 related workplace illness under the *Workplace Safety and Insurance Act*, reporting obligations under the *Health Protection and Promotion Act*, among other things.

The legal landscape is complex and agencies should be seeking legal advice regarding their own legal obligations in relation to COVID-19.

### General Guidance:

Ethical Framework for Reducing Use of Shared Staff

### Stage 1 – Implement strategies to reduce risk of increased transmission of COVID-19 via staff

#### a) Individually ask and mandate all staff to disclose

The province's [Emergency Order regarding developmental services](#) allows DS agencies to request and require information regarding COVID-19 probable or confirmed exposure. These could be added to an agency's **screening requirements** (i.e., a staff does not come into work if they meet any of the following scenarios or any other requirements previously outlined to staff in the screening policy).

- i. If any other workplace in which they have worked in the past 14 days has any suspected, probable or confirmed cases of COVID-19.
- ii. If there has been any potential exposure or work in the preceding 14 days in an at-risk location (for example, taking a family member to a hospital).
- iii. If anyone in the employee's home or with whom they have had close contact in the last 14 days is a suspected, probable or confirmed case of COVID-19.

The collection, use and disclosure of any information gathered through this procedure should be subject to the best practices identified in the "Relevant Ethical Principles" chart above.

#### b) Individually ask and consider mandating all staff to disclose:

- I. If they are working somewhere else. Agencies could consider making a declaration of off-duty work activities a requirement for continued active service, pursuant to which they would declare if:
  - i. they have or will be working elsewhere;
  - ii. where they have worked or what type of workplace they are working in;

Agencies may wish to proactively compile a staffing registry/staffing report to ascertain how many workers maintain employment at multiple sites, and if disclosed, at which. The collection, use and disclosure of any information gathered through this procedure should be subject to the best practices identified in the “Relevant Ethical Principles” chart above.

**c) Special consideration when staff have probable or confirmed exposure to COVID-19 but are asymptomatic:**

- Staff who provide service at a COVID-19 impacted home should not be permitted to work elsewhere, though asymptomatic, until the outbreak is cleared or at the direction of the local public health unit. For more on this, see part “I” (Regarding risks to other agencies).

**d) Understand that each staff has risk factors**, including full-time staff. Other risk evaluation questions for staff could include:

- Do you live alone?
- Do you live with another person who continues to work outside the home during the pandemic?
- Do you live with people who are all staying in?
- How do you travel to work?
- When not at work, do you stay in?
- When not at work or at home, do you practice social distancing and hand hygiene?

The collection, use and disclosure of any information gathered through this procedure should be subject to the best practices identified in the “Relevant Ethical Principles” chart above.

**e) Understand that visitors to the home pose risks**, e.g., Supervisors, cleaning staff, short-term staff or volunteers. With the province’s new Emergency Order specific to developmental services, it is possible that there will be many new faces in a group home. Volunteers may be providing supports. New staff may be hired. Staff may be redeployed from working from home. Residential staff may be reassigned to work at another site. Include them in any risk management questionnaire or risk prevention strategies implemented. Supervisors should be cautioned to support from a distance when in the home and avoid direct contact with the people supported in the home.

**f) Establish strict screening protocols at each home** to prevent and mitigate the risk of transmission to others. Provide clear instructions for employees and

contract personnel on staff screening and sick leave reporting protocols, including the requirement to inform all employers/organizations if they become symptomatic, in accordance with each organization's processes. See also part a.

- g) Follow all appropriate Infection Prevention and Control practices** and regulatory standards to ensure a consistent approach to prevent and mitigate the risk of transmission.
- h) Analyze individual risk levels for the people supported.** For example, COVID-19 death rates are highest for people who have respiratory concerns. Other high-risk groups include: people with chronic health conditions and people with age-related frailty (for people with developmental disabilities, frailty should be evaluated for everyone who is 50+). Consider whether to segment the most high-risk people supported, possibly relocating them or relocating the lower-risk residents of the home. This was a strong recommendation from a DS Agency in New York. Possibly only the staff deemed most low risk would be scheduled to work with the most vulnerable people supported. Another recommendation was to identify high risk people supported and monitor them daily for symptoms, including taking their temperatures twice daily.
- i) Implement strategies that support staff in lowering risk**, including:
  - i. paying for Uber where staff are using the TTC or other forms of shared transit.
  - ii. offer incentives (such as guaranteed minimum hours) to staff in return for them agreeing to work exclusively for your organization – such arrangements may even be made a condition of active employment and may even be justified in some cases, particularly if recommended by Public Health. In this case employees not agreeing to exclusive work with your organization would be subject to leave of absence or layoff. Before undertaking any steps of this nature we recommend speaking with your legal advisor.
  - iii. Implement practices at work for all staff to remove any possible COVID-19 exposure before starting their shift (see Stage 3 practices below).
  - iv. Offer alternate offsite residence to staff to minimize exposure to or from their families (e.g., paying for a hotel).

The [Residential Relief Fund](#) will help to cover these expenses (e.g., i and iv).

- j) Consider layoffs for high risk staff**, which may include shared workers. A DS Agency using this strategy has instructed their HR team to provide extra supports to staff so they can more readily access Employment Insurance and CERB. This may include SUB plans if these are extended to application with the CERB. Learn more: [Government of Canada](#) | [Online article](#). Would recommend that this

be only for involuntary layoffs. Before laying off shared staff due to heightened risk, we recommend speaking with your legal advisor.

- k) Consider offering more hours to perceived safer staff** to alleviate the need for using agency staff. Public Health is now viewing DS Agency direct support staff supporting residential services as essential workers.
- i. The Toronto Public Health Unit/York Region Public Health Unit has advised that although DS Agency employees are not traditional essential workers as are fire, police, healthcare etc., the Medical officer of health has deemed and is supportive that at this time, employers can make the assertion that their workers are in fact essential service workers if their service is critical to the health and safety of vulnerable people.
  - ii. The province's Emergency Order specific to developmental services allows DS agencies a number of freedoms, including redeploying or reassigning staff and having non-bargaining unit staff or volunteers doing bargaining unit tasks. Where reasonably necessary this Order may also allow scheduling of staff outside of the normal process under any collective agreement, including not following normal backfilling procedures or seniority based scheduling procedures.

Emergency Order applicable to Developmental Services:

<https://www.ontario.ca/laws/regulation/200121>

- l) Regarding risk to other agencies posed by shared staff** contracting COVID-19, consider:
- i. Updating any policies for staff concerning COVID-19 disclosure and the screening in place for staff accessing different worksites. DS Agencies could consider making it mandatory for staff to immediately declare that they are in or have had close contact with, have worked in an environment with or are themselves a suspected, probable or confirmed case of COVID-19 to all other employers – this would create a responsibility of any shared employee to inform a secondary employer if they have been exposed at a primary employer and vice versa.
  - ii. Alternatively, if a DS Agency wishes to share the name of the employee with other DS Agencies, then they should seek consent from the employee. The agency could commit to only sharing it with a sister organization identified by the worker as being their other employer and on the condition that: a) only a designated privacy officer of that other employer receive the information, b) the sister agency use the information for the limited purpose of assessing and addressing risk and c) the sister agency will permanently delete any records in relation to the disclosure when the risk has been appropriately assessed and addressed.



- iii. If another agency alerts DS Agencies that there is a staff who is confirmed or probable, but does not disclose the name of this staff, any DS Agency receiving this alert could send a message to all staff that reminds all staff of their obligation to immediately notify the agency of any change in their COVID-19 status (as described in (m) below) and notifying all staff of the confirmed or probable unnamed staff at the other agency and indicating that they must disclose confidentially inform the director of HR if they are the unnamed staff. If they fail to do so, it could result in discipline up to termination.
- m) Reinforce with all staff their important role in providing a safe environment, including the difference it makes when there is staff consistency – both for the mental health of the people supported and that this helps to reduce the risk of COVID-19 exposure. **Be clear with staff that they are required to stay home and immediately notify a designated confidentiality information officer if:**
- they have symptoms, such as difficulty breathing, severe chest pain, confusion or lost consciousness
  - any person in their household is a suspected, probable or confirmed case
  - they have had close contact with a person outside the agency who is a suspected, probable or confirmed case in the last 14 days
  - another workplace in which they have worked in the last 14 days involves providing support or care to a person who is suspected, probable or confirmed case

## Stage 2 – Primary Staffing Principles

Consideration of **risk of exposure and risk of harm (self/others) through staff:**

Highest		Moderate	Lowest
Risk of harm from infection	Risk of being a vector for transmission of COVID-19	Risk of exposure	Other relevant risks
People supported with vulnerable conditions (e.g., respiratory issues, chronic health conditions and age-related frailty)	Workers who: have multiple jobs; ride TTC; live with another essential worker; and/or living with those not heeding orders to stay in	All lower-risk people supported and lower-risk workers, including Supervisors and cleaners (who don't directly interact with people supported).	Heightened risk strategies can raise anxiety levels for people supported and staff.

### **Stage 3 – Apply Secondary Principles**

If no other staffing principles are agreed or adopted, consider adapting principles used for other invasive risks, for example, bed bugs. These principles can guide all staff in the home.

- Staff bring a change of clothes in a sealed bag marked “clean” and a garbage bag marked “dirty” (in which to place the clothes they wore to work).
- Create a route to a COVID-19 staff change room, so staff enter the work site and travel without touching others.

In the COVID-19 staff change room, they can:

- remove their clothes and bag them
- have access to wash face and hands
- put on their clean outfit
- clean their shoes (including the soles)
- use paper towel to handle change room doorknob
- wash hands and doorknobs touched

At end of shift, staff re-enter the COVID-19 staff change room:

- un-bag their coat and exit workplace. Clean any doorknobs touched and wash hands before exiting the workplace.

The room should not be entered by other staff or people supported except:

- to ensure it is kept clean and supplies are refreshed. Once out of the change room, staff should clean their face and hands, in addition to the doorknobs touched.

At home:

- staff should clean all clothes worn to work and at work. Each day they must come with fresh clothes in the “clean” bag to wear for their shift.

### **Recommended Policy**

It is the opinion of the SPPI Steering Committee that agencies consider their own staffing strategy after considering the ethical and legal principles (page 1), the ethical framework (Stages 1-3), and risk framework (see Stage 2). It is recommended that all agencies implement a more holistic risk management strategy that understands and acknowledges the risk related to COVID-19 that all staff and volunteers bring to a home.

**Disclaimer**

Legal input and feedback included in this policy were provided by [PooranLaw](#) lawyers as members/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.