

ONTARIO UNDER A STATE OF EMERGENCY

Ontario is once again in a State of Emergency. This will be the case until at least February 9th. Because of rising COVID-19 case counts and overloaded hospital ICUs, this move had been widely expected.

Dealers may be open, by appointment only, from 7 a.m. to 8 p.m. subject to test drive restrictions, described below. Public entrances should remain locked.

On January 12, Premier Doug Ford announced the State of Emergency and a province-wide stay at home order, effective January 14, until further notice.

What this means is that everyone should remain at home with exceptions for essential purposes, such as going to the grocery store or pharmacy, accessing health care services, for exercise or for essential work. In addition to limiting outings to essential trips, all businesses must ensure that employees who can work from home, do work from home.

Having said that, motor vehicle sales and repairs have been deemed essential by the provincial government and therefore, employees who cannot work from home can go into work. Physical distancing, sanitizing and PPE requirements, such as wearing a mask indoors must be followed.

Any employee who is feeling ill should be told to stay home or, if already at work, should be sent home immediately.

When customers are at the dealership, by appointment, they should wear a mask indoors and outdoors when physical distancing is not possible. Customers should not be allowed in any area of the dealership, where they do not need to be, to complete their sale or repair.

Full details about the new measures can be found at: <https://tinyurl.com/y2sppzs6>. For more information on remote sales please visit: <https://tinyurl.com/y64m5pnf>

Members may be eligible for relief from the Federal and Provincial Governments.

Please visit Federal: <https://tinyurl.com/wy4b3gr> and Provincial: <https://tinyurl.com/y26xedr6> for more information.

Test drives:

Members of the public are permitted to test drive vehicles. However, the test drive must be limited to no more than 10 minutes.

A maximum of two people, including up to one sales representative, may be present in the vehicle during the test drive. If two people who are not members of the same household are present in the vehicle during the test drive, any windows in the vehicle must be open at all times.

If an employee of the dealer accompanies the driver, both should wear masks.

Employer Liability For Fraud

On occasion a member will call us about something that a former employee was found to have done wrong. Fortunately, these calls are rare. The Member will tell us something like “so and so sold a car with a previous accident and did not tell the buyer” or “this salesperson is no longer with us, but there is a lien on a car she sold”. Their real question is “*are we potentially liable for the rotten things this person may have done when they worked here?*”

You can probably guess the answer ... the buck stops with the dealership. As the employer, the boss, the owner, you take the good with the bad, and if something improper goes down on your watch, that is on you. At least that is how the consumer who bought the car from your dealership, how OMVIC and how the courts in Ontario will view things. In law this is what is known as “vicarious liability”; legal responsibility for something you did not do yourself, but someone with your authority and for whom you are ultimately responsible did.

Some of these callers will say, “We didn’t know what she was up to. We didn’t know what she was doing.” This is not a defence to the fact the ex-employee did these things because, as the boss, it is up to you to know what your people are doing in your name. It certainly isn’t up to a customer to say “does your boss know what you are doing?” They are free to safely assume the boss knows!

In a recent Ontario court case called *Pallotta v. Cengarle*, a real estate lawyer was found vicariously liable for his law clerk’s mortgage fraud scheme as well as for breach of trust.

The lawyer trusted his long-time real estate clerk. She worked independently and apparently with little supervision. As a result, she had access to large sums of money (as you would expect in a real estate practice) and, sadly, chose to commit fraud using that access.

At issue was the degree to which the lawyer could be expected to answer for \$200,000 stolen by the law clerk in the course of her duties.

The answer, as you have probably guessed, is the lawyer was found to be responsible for the full amount.

The court offers a good deal of legal discussion why this should be so, but we can summarize the important lessons here for dealers and their employees in this way:

- Liability can attach where there is a strong connection between the conduct authorized by the employer and the wrong
- Faced with two innocent parties in the fallout after a fraud, the dealer and the consumer, a much stronger justification exists for placing the risk of loss on the dealer because they introduced the risk and are better able to control it
- Risk can be prevented with greater oversight, supervision and control

- Review your dealership’s internal controls
- Put checks and balances in place around key employees, particularly those with a relatively free hand in relation to sales and money
- Look into your business insurance; see if it provides coverage for acts of employee dishonesty

A Shot in the Arm

While none of us know for sure what 2021 has in store, we all read the news and can make some informed guesses.

Lawyers engage in the same exercise as the rest of us, so we are thinking 2021 will be “the year of the vaccine”.

For employers, this opens unexpected and unexplored areas of concern. We don’t have all the answers, far from it, but we can use our informed judgement and make some observations about issues to keep in mind as 2021 plays out.

As the courts have not yet ruled on any of this (although we expect they will very soon) we have to make it clear that this is not legal advice, just our thoughts being shared:

Will employers have the right to insist employees get vaccinated?

That depends. Unless workers can be accommodated, by working from home, employers will probably be able to require employees to prove they have been vaccinated in order to re-enter the workplace. This is obvious in health care settings and elder home care, but it may also extend to retail environments where interaction with people is the bread and butter of the operation. This of course depends on some assumptions about the vaccines themselves, namely, that they are safe and effective. What we do know is that COVID-19 is no ordinary flu, and the vaccines are no ordinary flu shot. This is definitely new territory here.

What is the potential liability for employers?

We already know the government is not going to make vaccination compulsory as they roll out their planning on this. That does not mean employers are off the hook. Indeed, employers, certainly in our industry, can be seen to be bending over backwards in a sincere desire to protect their staff and customers, as they should. Failing to ensure a fully vaccinated crew at the dealership might be seen as bordering on negligence, actionable by anyone harmed.

What about employee and consumer privacy?

Well, there is a balancing going on. We can all see it with our own eyes. How many of us ever expected to be asked a series of personal questions about our state of health, travel itinerary or have our temperature taken to get a haircut? Of course we have privacy concerns, but generally these are overruled by the real and present health danger posed by the pandemic that is COVID-19. Worker and consumer safety wins in a battle over personal privacy, so

we expect employers will be shielded from accusations of violation of privacy when they ask for proof of vaccination.

Are there any possible exemptions from having to be vaccinated?

Two obvious ones from an employer's point of view: a sincerely held religious prohibition against it or a disability making the vaccine potentially dangerous to the person. Here again, a balancing will need to be applied to see if such persons can be effectively accommodated, but the reality is some may lose their jobs if they cannot realistically be placed.

Here is hoping 2021 will be a better year than 2020, but that is setting the bar pretty low, let's face it.

Dude, Where's My Car?

Driving.ca reports an unnamed rental operation is asking where their rented Lamborghini is.

Rented out on Boxing Day, the customer and the \$200,000 SUV are in the wind. The GPS was disabled shortly after it was rented and chances are it is in a shipping container bound for some foreign land as we speak.

If you are optimistic, however, keep your eyes peeled for a black 2019 Lamborghini Urus with a red leather interior and plate number CSB B761.

Police are encouraging anyone with information on the Lamborghini's whereabouts, or anyone who "believes they are a victim of a similar theft in the Toronto area," to contact Crime Stoppers at 416-222-TIPS.

Read the full story here: <https://tinyurl.com/y5653qrs>

Keys

We are always reminding members to watch their keys. We have done Dealer Alerts to remind dealers, keys are like gold. They have always been useful to thieves, even back in the days when you could "hotwire" a vehicle, but today, with all the tech and electronics, you simply can't drive most of these vehicles without the key.

So if the goal is to get the key, put yourself in the mind of the crook.

A dealer related a story to us that makes perfect sense when you think about it. A guy comes on the lot, he already knows the one or two vehicles he is targeting, he has dummy key fobs ready to go, a quick switch after a test drive and when he hands the key ring back to the dealer its got the dummy fob on it. The dealer is none the wiser.

Presto!

The bad guy has your good key fob. He waltzes on the lot after hours, hops in and drives away.

If keys are like gold, watch them like a hawk, make sure they come back to you as they left – exactly as they left.

Dealer Quiz

1. In what year did the Ontario *Motor Vehicle Dealers Act, 2002* Regulations come into effect?
 - a) 2009
 - b) 2010
 - c) 2005
 - d) 2002

2. During COVID-19 customers got used to test drives being offered at their home. Some want to buy the vehicle there too.
 - a) This is not permitted
 - b) If the customer test drives the vehicle from their home, the dealer can then sell it there too
 - c) It is allowed as long as the signed bill of sale is also emailed to the customer
 - d) As long as the sale is done during regular business hours, it is legal

3. Dealers are often inspected by OMVIC. During an inspection a dealer has the right to:
 - a) Refuse the inspection
 - b) Ask to see ID
 - c) Ask for a different inspector
 - d) Take pictures

4. OMVIC is overseen by the Ministry of Transportation
 - a) True
 - b) False

5. The *Consumer Protection Act* provides consumers with some protections, but the *Sale of Goods Act* allows you to contract out of these as long as you do so in writing on a fully signed contract.
 - a) True
 - b) False

Replaced Parts On Used Vehicles

We often have dealers ask us if they are obliged to declare repairs or replacements on the sale of used vehicles. Say the engine or transmission was replaced at some point in the past, and the dealer knows that. Are they obliged to declare that to the buyer?

Some may disagree, but we think the answer, in most cases, has to be "No".

We say "most cases", because every rule has exceptions. For example, certainly in a new vehicle, or even a "nearly" new, used vehicle, this answer may have to be tweaked, because the reasonable expectation of the buyer is that such a vehicle will be pretty much original. Otherwise, it may need to be disclosed that it is not.

Another example may be a case where a used 2005 motor with higher kilometers is installed in a 2009 vehicle. That would likely require a declaration.

It should also go without saying that any used vehicle with an existing unrepaired condition, like a non-functioning air conditioner, should have that defect declared in writing as well.

But, if you are selling a 13 year old vehicle with over 200,000 kms on it, is it really a "material fact" that at some point in the vehicle's long history of use the engine or transmission ... or radiator, water pump, wiper motor, catalytic converters and on and on may have been repaired or replaced? It's a used vehicle. It was sold with used parts and generally, used parts can be used as replacements, as long as the parts are of good quality.

What we do know is that a dealer's obligation on the sale of any used vehicle is to ensure it is reasonably fit for the purpose the buyer is buying it (usually as a means of transportation) and that it will remain that way for a reasonable time, pass the safety and be fairly priced.

Some may have a different view, and we'd love to hear your thoughts of course!

Dealer Plate Reforms

As previously reported in Front Line, the UCDA is very pleased to report progress on a number of areas affecting use of Dealer plates that have caused members difficulties for many years.

After meetings with the Ministry of Transportation (MTO) by the UCDA and other stakeholders, the results are now evident in significant changes to a variety of policies and regulations:

As of January 1, 2021:

- Dealer plates can be used on a light-duty commercial vehicle (i.e. pickup truck), that is part of a dealer's inventory of motor vehicles and that is "loaded with goods" of a private nature, for private use, provided the manufacturer's Gross Vehicle Weight Rating of the pickup truck does not exceed 3,400 kg (Reg 628). pickup trucks displaying Dealer plates while being operated for private use may not tow another vehicle.

MTO has also issued communications to the law enforcement community to clarify that the current Dealer plate regulations support using a Dealer plate in the following situations:

- On a used motor vehicle being transported from auction with no vehicle registration permit, and
- While transporting a new unregistered motor vehicle where only the New Vehicle Information Statement (NVIS) is present.

We hope members will agree this is a nice way to start a new year, especially given everything else that's going on!

Answers

1. **The answer is (b).** 2010.
2. **The answer is (a).** The MVDA regulation states;
*No person shall,
(b) invite the public to deal in a place other than the place that is authorized in the registration of the motor vehicle dealer. 2002, c. 30, Sched. B, s. 4 (2).*
3. **The answer is (b).** A dealer has the right to ask an OMVIC inspector for identification confirming his or her position with OMVIC
4. **The answer is False.** OMVIC oversight is provided by the Ontario Ministry of Government and Consumer Services
5. **The answer is False.** The SGA and CPA cannot be contracted out by either party.

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