



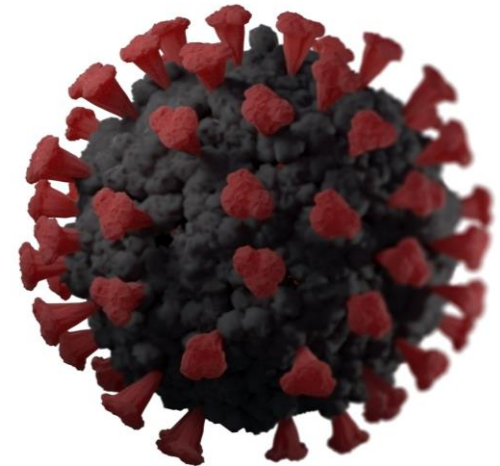
COVID-19 in the Workplace

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COVID-19 Issues in the Workplace

- COVID-19 Layoffs
- Mandatory Vaccination in Canada
 - Legislation
 - Mandatory vaccine litigation
 - Mandatory testing litigation
 - Human Rights exemptions
 - Mandatory mask litigation
 - Employee Privacy



COVID-19 Layoffs

- Do temporary layoffs as a result of COVID-19 constitute constructive dismissal?
- Legislative amendments:
 - Alberta *Employment Standards Code*
 - Ontario *Regulation 228/20: Infectious Disease Emergency Leaves*
- New case law in Ontario:
 - *Coutinho v. Ocular Health Centre Ltd*
 - *Fogelman v. International Financial Group Ltd.*
 - *Taylor v. Hanley Hospitality Inc.*

Mandatory Vaccinations in Canada

- Mandatory vaccination is gaining steam across Canada
- Government of Canada has announced mandatory vaccines for the federal workforce and federally regulated transportation sectors
- Many private employers have publicly announced mandatory vaccine policies

The Alberta Context

- Government has stated many times it will not legislate mandatory vaccines
- Removed legislative authority to mandate vaccines from the *Public Health Act*
- Created Restriction Exemption Program (“REP”) and \$2,000 one-time grant to businesses to develop REP.
- Announced legislation to protect businesses from legal claims related to REP or mandatory vaccination

Vaccine Litigation in the Workplace

- No mandatory COVID-19 vaccine has yet been litigated in Canada
- We know it's coming
- Previous vaccine cases
 - Influenza vaccines
 - Most often in health care context
 - Primarily union workplaces

Health Employers Assn. of British Columbia and HSA BC (Influenza Control Program Policy), (2013) 237 LAC (4th) 1 (Diebolt)

- Employer policy was vaccine or mask
- Arbitrator found policy was reasonable
- Expert evidence was determinative
- Balance employer's interest in patient safety against employee privacy interests
- Employees had the option of a mask – vaccine was not “mandatory”

Sault Area Hospital v Ontario Nurses' Association, 2015 CanLII 55643 (Hayes)

- Leading Ontario arbitration decision
- Union objected to vaccine or mask policy
- Alleged unreasonable exercise of management rights, breaches of privacy, human rights, occupational health and safety legislation
- Arbitrator found policy was unreasonable
- Lack of expert evidence on the use of masks in reducing transmission of influenza

COVID-19 vs Past Vaccine Litigation: What's Different?

- Influenza cases are a different context
- Different risk level
- Ongoing pandemic
- Types of workplaces: moving beyond health care

COVID-19 Issues in the Workplace

Mandatory Testing Cases



Caressant Care Nursing v CLAC, 2020 CanLII 100531 (ON LA)

- Nursing home operator required all employees to be tested for COVID-19 every two weeks
- Testing policy in addition to masks and other measures
- Employees accommodated case-by-case
- Union filed policy grievance – unreasonable invasion of privacy
- Policy was reasonable – COVID-19 highly infectious and deadly for the elderly
- Employer did not have to wait for an outbreak
- COVID was novel and health authorities still learning

COVID-19 Testing and Vaccines in the Workplace

EllisDon Construction v. Labourers' International (2021), 148 CLAS 370 (Kitchen)

- Employer implemented COVID testing twice per week
- Policy was reasonable
 - Employer interests were legitimate
 - Construction industry more vulnerable to COVID-19
 - Employer had numerous outbreaks
 - Privacy and safety protections were in place
 - Preventing the spread of COVID-19 outweighed the intrusiveness of rapid testing

Unilever Canada Inc., 2021 Arbitration (Bloch)

- Employer COVID testing Policy was reasonable
 - Food safety requirements important
 - Many employees work close to others
 - Several employees got the virus quickly
 - Privacy protections were in place
 - Preventing the spread of COVID-19 outweighed the intrusiveness of rapid testing

Vaccine & Testing Litigation – The Issues

Common Issues:

- Reasonableness of the policy
- Employer interest in protecting health and safety of employees and customers vs.
- Employee interest in bodily integrity and privacy
- Human rights exemptions on religious or medical grounds

Human Rights Exemptions

- Human Rights legislation in Alberta prohibits discrimination on specific enumerated grounds
- Relevant grounds: disability, religion
- Duty to accommodate may be engaged
- Applies to all measures taken in the workplace – mandatory vaccines, testing, masking

Ataellahi v Lambton County (EMS), 2011 **HRTO 1758**

- Influenza vaccine policy
- Employee claimed discrimination on the basis of creed
- Real objection to vaccine was based on “scientific” beliefs not religious beliefs or practices



***Gordon v Hotel, Restaurant & Culinary
Employees & Bartenders Union, Local 40,
2004 CanLII 65459***

- Employee responsible for food handling
- Sought exemption from employers' Hep A vaccination program
- Program had exemptions for religious objections and medical reasons
- Employee claimed infringement of the “right to support himself”

Muskoka Algonquin Healthcare v. ONA, 2015 CanLII 32027 (ON LA)

- Discrimination on the basis of pregnancy
- Influenza vaccine required during outbreak at health care facility
- Grievor held out of work for 14 days after vaccination
- Unable to take Tamiflu due to pregnancy
- Offered to wear a mask
- Arbitrator found employer applied “an uncompromisingly stringent” standard

Ontario Human Rights Commission Policy Statement

- On September 22, 2021, the Ontario Human Rights Commission stated that it took the view that proof of vaccination requirements are “generally permissible.”
- However, people who are unable to be vaccinated due to a protected ground must be reasonably accommodated.
- A person who chooses not to be vaccinated on the basis of personal preference does not have the right to accommodation.

Mandatory Masking

- The Alberta Human Rights Tribunal has found mandatory masking policies to be for a valid business and safety purpose in two instances.



Alberta Human Rights Tribunal Masking Cases

- *Szeles v Costco Wholesale Canada Ltd*, 2021 AHRC 154
 - Masking policy was instituted for a valid business and safety purpose
 - Reasonable and justifiable
- *Beaudin v Zale Canada Co o/a Peoples Jewellers*, 2021 AHRC 155
 - Policy introduced for valid purpose of employee and public safety.
 - Introduced in good faith.

Duty to Accommodate & Undue Hardship

- Legitimate Human Rights exemptions only
- Possible accommodation
 - PPE
 - Physical distancing
 - Hygiene protocols
 - Other screening mechanisms
 - Regular COVID-19 tests as an alternative to vaccinations
 - Reassignment
 - Remote work
 - Leaves of absence

Privacy Considerations

- Vaccine status is personal information
- What collection & use is reasonable?
- Limits on collection, use & retention
 - Necessary, proportionate and effective
- Safeguards and security of information
 - Notices to employees regarding what information is being collected and why
 - Training for any staff handling information

Implications for Employer Policies

Mandatory vaccine policy or not?

- May depend on industry, type of work, state of the pandemic etc.

Policies must be:

- Consistent with any collective agreement
- Reasonable in the circumstances (safety vs privacy)
- Clear, well communicated, consistently enforced

Policies must address the duty to accommodate and employee privacy

Implications for Employer Policies (cont'd)

- Increasingly employers are mandating vaccines
- Alternatives:
 - Encourage/recommend vaccines
 - Vaccine or mask policies
 - Mandatory testing/rapid testing
 - Other mitigation measures
- Policies should address implications for non-vaccinated employees
 - Education
 - Administrative leave
 - Termination (with or without cause)

Questions?



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