

COVID Continued

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ALEXANDER
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INTRODUCTION

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AGENDA

- 1 Employer Rules - Mandatory Vaccinations
- 2 Privacy: Monitoring Work at Home, COVID Exposures and Symptoms, and Reporting Vaccination Status
- 3 Family Status and Disability During COVID-19
- 4 Questions

Employer Rules - Mandatory Vaccinations

EMPLOYER RULES – MANDATORY VACCINATIONS

With the Provincial vaccination delivery programs being implemented across Canada, now is the time for employers to draft and implement a mandatory **COVID-19 Vaccination Policy (CVP)** as a condition of continuing employment.



CAN AN EMPLOYER LAY OFF OR TERMINATE AN EMPLOYEE IF THEY REFUSE TO GET VACCINATED?

- In order to terminate an employee who refuses to get vaccinated, the employer must invest in ensuring that its mandatory COVID-19 Vaccination Policy (CVP) is:
 - Reasonable;
 - Necessary;
 - Flexible; and
 - Clearly implemented.

EMPLOYER CONSIDERATIONS TO CREATE AN ENFORCEABLE MANDATORY CVP

01

Scientific evidence regarding available vaccines

02

The purpose of the mandatory CVP

03

Occupational Health & Safety considerations

04

Human Rights considerations

05

Compliance with Privacy laws and Avoiding Constructive Dismissal

UNDERSTANDING THE AVAILABLE VACCINES: THEIR BENEFITS AND LIMITS

01

To date, Health Canada has authorized two vaccines:

moderna®



PURPOSE OF THE MANDATORY CVP

- In what environments is it reasonable to implement a mandatory CVP?
 - Environments such as **warehouses, distribution centers, and construction sites**, which are referred to as ‘congregate work settings’, that require workers to work for periods of time in proximity to one another which can lead to massive COVID-19 outbreaks.



DO I NEED THE EMPLOYEES (OR SOME EMPLOYEES) TO BE VACCINATED TO MAKE THE WORKPLACE SAFE?

02

- Should employers implement a blanket CVP?
 - No, employers must consider whether less intrusive options for workers (or some workers) would suffice instead.
 - Any policy for mandatory vaccination should show that it is considered, flexible, and predicated upon ensuring a safe workplace for all.

*Christian Labour Association of Canada v.
Caressant Care Nursing & Retirement Homes*

The union tendered evidence that the employer's policy was overbroad and that the testing was only reasonable in circumstances where an employee is symptomatic.

The employer tendered evidence that the testing was an "important tool" recognized by both medical professionals and the Ministry in controlling and tracking outbreaks.

OCCUPATIONAL HEALTH AND SAFETY CONSIDERATIONS

- What occupational health and safety obligations should an employer consider when performing the workplace assessment to form the basis of the CVP?
- Workplace assessment to form the basis of CVP
 - Consider functions carried out by the workforce
 - Is it flexible enough to reflect the different roles employed by various workers?

OCCUPATIONAL HEALTH AND SAFETY CONSIDERATIONS

- Employers should assess functions carried out by their workforce to ensure they take action to protect against the hazards presented by exposure to COVID-19.
- For example, equipment operators, material handlers, office staff, distribution or operations managers and other warehouse sector employees participate in the nature of work that requires interaction with co-workers, customers and work surfaces.

HUMAN RIGHTS CONSIDERATIONS

- Employers who implement a mandatory CVP must anticipate that some employees may present a medical or other (protected) reason to avoid vaccination.
- In the event the employee claiming a medical reason is laid off or their employment is terminated, they may file a complaint with the Ontario Human Rights Tribunal.

HUMAN RIGHTS CONSIDERATIONS

With a mandatory CVP, the employer may:

- ✓ Lay off the non-vaccinated employee; or
- ✓ Terminate their employment if a worker's continued refusal to be vaccinated leads to the worker frustrating the employment contract -- particularly where a work from home option is unavailable for that position.

PRIVACY & CONSTRUCTIVE DISMISSAL CONSIDERATIONS

- Implementation of the CVP contemplates requiring employees to report or prove their vaccination status, and perhaps changes their job descriptions.
- Either aspect can lead to a breach of privacy laws or constructive dismissal.
- Plan Ahead - Consider requesting and obtaining consent to the Mandatory Vaccine Policy, or providing reasonable advance notice of the implementation date of the Policy.



■ Privacy: Monitoring Work at Home, COVID Exposures and Symptoms, and Reporting Vaccination Status

COLLECTING PERSONAL INFORMATION

- In all cases where an employer is collecting personal information about an employee the employer must consider



The purpose for the collection,



Whether the personal information sought is necessary to achieve the purpose, and



Whether there is a less intrusive way to collect the personal information that is required.

HOW FAR CAN EMPLOYERS GO TO ENSURE THAT EMPLOYEES WORKING FROM HOME ARE PERFORMING THEIR DUTIES?

- The use of software to monitor employee productivity is a form of surveillance that has the potential to collect a variety of personal information about the employee
- Decisions of the Information and Privacy Commissioner stipulate that the use of surveillance must be reasonable for the purpose of managing the employment relationship



HOW FAR CAN EMPLOYERS GO TO ENSURE THAT EMPLOYEES WORKING FROM HOME ARE PERFORMING THEIR DUTIES?

- Depending on the software, the employer may be collecting significant personal information about the employee that does not relate to the employment relationship
- The collection of keystroke information and screen shots have the potential to collect sensitive personal financial information of the employee



HOW FAR CAN EMPLOYERS GO TO ENSURE THAT EMPLOYEES WORKING FROM HOME ARE PERFORMING THEIR DUTIES?

- Employers generally should avoid over-collection of personal information about their employees
- Over-collection is usually a breach of the relevant privacy legislation, and
- It creates obligations in securing and managing the information and creates risks in the event of a breach



HOW FAR CAN EMPLOYERS GO TO ENSURE THAT EMPLOYEES WORKING FROM HOME ARE PERFORMING THEIR DUTIES?

- The use of monitoring software on all work computers is generally not justified.
- A municipality's installation of monitoring software on all employee computers for system security purposes was found to be unreasonable even where the municipality only accessed the information in limited and specific circumstances.

HOW FAR CAN EMPLOYERS GO TO ENSURE THAT EMPLOYEES WORKING FROM HOME ARE PERFORMING THEIR DUTIES?



The use of **monitoring software** without the consent of or notice to an employee is only justified for the purposes of a specific investigation based on the employer's reasonable suspicions of a **breach of the employment agreement**



Even where there is some evidence of non-authorized personal use of a work computer, privacy commissioners have held that resorting to monitoring software should only be considered if the issue has been discussed with the employee and the workplace computer use rules addressed.

WHAT INFORMATION IS AN EMPLOYEE REQUIRED TO REPORT TO THE EMPLOYER REGARDING POSSIBLE EXPOSURE OR SYMPTOMS?



WorkSafe rules require employers to collect information from their employees who are **attending at the workplace regarding any COVID symptoms**, international travel or potential exposure to persons with COVID



Depending on the nature of the workplace employers may also require employees to submit to a **daily temperature check or regular COVID testing.**

- Examples of workplaces where this may be reasonably necessary are healthcare and workplaces where there is an increased risk of transmission due to the nature of the work or configuration of the workplace

PRIVACY AND VACCINE STATUS

- Employers who want to collect information from their employees about their vaccination status must follow the three steps in collection of personal information



What is the purpose for the collection?



How is the information related to the purpose?



Is there a less intrusive way to collect the information?

PRIVACY AND VACCINE STATUS

- Employers must notify employees of the use that will be made of their vaccination status and any potential disclosure of their vaccination status
- Use may include providing statistical or anonymized aggregate information to all employees about the vaccination level in the workplace

COVID-19 MISCONDUCT: EMPLOYER REMEDIES

- How important is employee compliance with COVID safety directions?
- Statutory - ER mandated Workers Compensation safety plans
- Potential effect on business of positive test in workplace - closure; infection of staff or customers; isolation
- Liability exposure

CASES

- *Garda Security v. IAM, District 140* [2020] OLAA 162
- *LIUNA v. Aecon Industrial* [2020] CarswellOnt 17235
- Outcome if non-union workplace?



Family Status and Disability During COVID-19

BC ESA - COVID-19 LEAVE

Employees can take job-protected leave for the reasons listed.

- 1 They have been diagnosed with COVID-19 and are following the instructions of a medical health officer or the advice of a doctor or nurse
- 2 They are in quarantine or self-isolation and are acting in accordance with an **order of the provincial health officer**, an order made under the Quarantine Act (Canada), guidelines from the BC Centre for Disease Control or guidelines from the Public Health Agency of Canada
- 3 Their employer has directed them not to work due to concern about their exposure to others

BC ESA - COVID-19 LEAVE

- 4 They are outside of BC and unable to return to work due to **travel or border restrictions**
- 5 The employee is providing care to an eligible person, including because of the closure of a school or daycare or similar facility [Note: the focus of this presentation]

**Note: If the employee's job is not protected during a valid COVID-19 leave, the employee could file a complaint with the Employment Standards Branch against their employer.*

WHAT IS AN ELIGIBLE PERSON?



A **child** who is under the day-to-day care and control of the employee by way of agreement or court order or because the employee is the child's parent or guardian



A **person** who

- (i) is 19 years of age or older,
- (ii) is unable, because of illness, disability or another reason, to obtain the necessities of life or withdraw from the charge of the person's parent or former guardian, and
- (iii) is under the day-to-day care and control of the employee, who is the person's parent or former guardian

BC *HUMAN RIGHTS CODE*

- Family Status and Disability are protected characteristics under the BC *Human Rights Code*.
- Could COVID-19 engage family status/disability protection under the HRC? Yes.
- Employers should be aware of their duty to accommodate these employees.
- Does this mean people with disabilities or family obligations can stay home from work?
Depends on the circumstances...

EXAMPLES



Family Status - Employees caring for children, a family member who is disabled, or an older family member



Disability - Employees who are particularly vulnerable to COVID-19 (immunocompromised), employees with mental illness that may be triggered by COVID (e.g. OCD).



Employers must also accommodate employees who are considered particularly vulnerable to the virus, such as elderly or immuno-compromised people [...] It also means that they must provide flexible work arrangements to allow vulnerable workers to work from home or from safe spaces, unless doing so would amount to undue hardship.

Employers may also need to accommodate employees with increased child care obligations due to the pandemic. Protections related to family status may require employers to take all actions short of undue hardship to accommodate family care giving responsibilities where an employee is unable to cover the necessary care through other means. Accommodations may include allowing for flexible work hours, working from home or taking paid leave time. The same may be true for employees who are required to care for sick family members at home.

WHEN IS THE DUTY TO ACCOMMODATE TRIGGERED?

- Employee must show that they (1) have a disability (2) adverse impact in employment (3) disability was a factor in the adverse impact.
- Family Status - when a change in an employment term or condition imposed by an employer results in a “serious interference with a substantial parental or other family duty” of the employee.
- Employee must provide proof that accommodation is required.

RECENT CASES UNDER FAMILY STATUS

- *Ziegler v Pacific Blue Cross (No. 2)*, 2020 BCHRT 125
- *Envirocon Environmental Services, ULC v Suen*, 2020 BCCA 201



ACCOMMODATION

- Employer may need to accommodate employee, unless it would suffer undue hardship
- Reasonable accommodation is the responsibility of both sides - the employer and the employee.
- Accommodation does not mean the employee's personal preference and does not need to be perfect.
- There is no freestanding duty to accommodate.

EXAMPLES



Flexible shift
schedules



Work from home
arrangements (if possible)

For employees susceptible to COVID-19:



Night shift or schedule
work on off-hours



Minimize interactions
with others (work in
back room, in private
office, etc.).



Increased cleaning
and sanitizing

 **Questions?**

Thank you



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