



KEEPING CURRENT WITH LEGISLATIVE UPDATES AND COVID-19 (MASKING, VACCINATIONS AND ORDERS)

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YOUR **PERSPECTIVE** OUR **FOCUS**™



Today we will cover

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| 1 | New Sick Leave Entitlements (Provincial and Federal) |
| 2 | Mask Policies - Use, Enforcement and Recent Challenges |
| 3 | Update on Vaccination Policies and Enforcement |
| 4 | Safety Plans and WorkSafe Compliance |



COVID-19 ORDERS AND NEW SICK LEAVE ENTITLEMENTS (PROVINCIAL AND FEDERAL)

Presenter:

Iman Hosseini, Associate



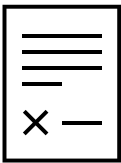
1. BC's new "illness or injury leave"



2. Eligibility and calculation



3. Other key jurisdictions across Canada



4. Sick leave policy – recommendations

BC's "Illness or injury leave"

Previously	Now
<ul style="list-style-type: none">• 3 days paid COVID-related sick leave<ul style="list-style-type: none">• repealed Dec 31, 2021• 3 days of unpaid sick leave per year under <i>ESA</i> – remains in force• Additional paid sick leave – at employer’s discretion<ul style="list-style-type: none">• Considerations if existing policy	<ul style="list-style-type: none">• 5 paid sick days – effective January 1, 2022<ul style="list-style-type: none">✓ BC employees covered by <i>ESA</i>✓ 90 consecutive days of employmentx Professions and occupations excluded (S. 31 of <i>Employment Standards Regulation</i>)x Unionized employers if collective agreement benefits “meet or exceed” <i>ESA</i>

BC's "Illness or injury leave"

1

- Employment year; not calendar year
- No carry over if unused
- Proof of eligibility: sufficient proof, if requested by employer
- Period of leave (days) x average day's pay



amount paid within 30 calendar days preceding leave

(including vacation, commission, stat holiday, excluding overtime)

Average day's pay =

÷

days worked

(number of days earned wages within 30 calendar day period)

Comparison with other Jurisdictions

Jurisdiction	Max Leave Period	Minimum Service	Proof of Eligibility	Additional Info
BC	5 paid days/year 3 unpaid days/year	90 days	If requested	Other leaves not covered
Federal <ul style="list-style-type: none"> Personal Leave (PL)* Medical Leave (ML) <p>*to increase to 10 days (Bill C-3)</p>	PL: Up to 5 days in every calendar year ML: Up to 17 unpaid weeks	PL: None (unpaid) / 3 months (first 3 days paid) ML: None	PL: request within 15 days of return to work ML: If 3+ day, certificate from a health care practitioner	PL: may use for own health, to meet family responsibilities, or attend a citizenship ceremony ML: pension, health/disability benefits, and seniority, accrue during leave
Alberta <ul style="list-style-type: none"> Personal & Family Responsibility Leave (PL) Long-Term Illness and Injury Leave (LT) 	PL: up to 5 unpaid days/year LT: up to 16 unpaid weeks/year	90 days	PL: no provision LT: must provide certificate containing estimated duration	PL: may be used for own health or family responsibilities
Ontario	3 unpaid/calendar yr	2 weeks	reasonable evidence of entitlement	part of a day taken counts as 1 day leave

Recommendations

- Prepare a sick leave policy
 - clearly outline what employees are entitled to in terms paid and unpaid sick leave
 - establish expectations around how much notice required
 - what type of supporting documentation employees have to provide in order to take sick leave
 - define what types of absences qualify as "sick leave"





MASK POLICIES: USE, ENFORCEMENT, AND RECENT CHALLENGES

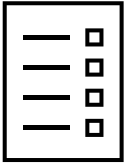
Presenters:

Matthew Desmarais, Associate

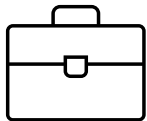
Nicholas Russell, Article Student

Mask policies: Use, Enforcement, and BCHRT Decisions

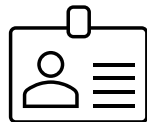
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1. Background



2. The Customer-Business Context



3. The Employer/Employee Context



4. Key Takeaways

Background

2

WorkSafe BC Mask Policies

- On May 15, 2020, WorkSafe BC announced that COVID-19 safety plans would be required for employers
- On June 29, 2021, the Provincial Health Officer repealed the requirement for a COVID-19 Safety Plan, but this requirement was reimposed on January 20, 2022.



Provincial Indoor Mask Mandate

- On November 19, 2020, masks were mandated in all public indoor spaces in BC
- This mandate was lifted on July 1, 2021, then re-imposed on August 25, 2021
- January 20, 2022: Provincial Health Officer issues orders that maintain mask requirements for certain people in certain circumstances



Background

- Seven BC Human Rights Tribunal decisions on complaints related to mask policies have been issued
- Each complaint was dismissed without a hearing
- However, success is possible for complainants if they prove that they:
 - have a disability or other protected characteristic;
 - have suffered an adverse impact as a result of mask policies; and
 - were not accommodated to the point of undue hardship.





THE CUSTOMER-BUSINESS CONTEXT

Complainants Have Failed to Connect an Adverse Impact to their Disability

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- Denial of entry or expulsion from a business for not wearing a mask constitutes an adverse impact.

Coelho v. Lululemon Athletica Canada Inc., 2021 BCHRT 156 at para. 20

- To succeed in a complaint, the refusal to wear a mask resulting in the denial must be **causally linked to a medical disability** or other protected characteristic.
 - That disability and how it prevents the complainant from wearing a mask **must be proven on the evidence** to succeed at a full hearing. A doctor's exemption is likely insufficient on its own.
 - However, minimal evidence of a medical condition and a plausible explanation for how it prevents mask-wearing may be sufficient to avoid a finding of "no reasonable possibility of success" on a dismissal application.

Coelho at para. 18

Ratchford v. Creatures Pet Store, 2021 BCHRT 157 at para. 15



Rational Connection and Good Faith

2

Once the complainant establishes a connection between a protected characteristic and the adverse impact of refusal or expulsion, the business must show that:

1. the mask policy is rationally connected to its objective;
2. the policy was enacted in good faith on the basis that it is necessary to fulfill its goal; and
3. the business accommodated the customer to the point of undue hardship.

The Tribunal's decisions indicate that on an application for dismissal, mask policies will presumptively meet criteria 1 and 2 in the context of the COVID-19 pandemic.

Coelho at paras. 25-26.

Reasonable Accommodation

The following options have, on their own or in certain combinations, been held likely to meet the requirement for accommodation to the point of undue hardship:



- online shopping;



- curbside pickup;



- free local delivery;



- bringing items to the door; and



- allowing face shields in lieu of masks.

Reasonable Accommodation (Cont'd)

2

Examples:

A pet store was found to have likely met its duty of accommodation by offering to serve a complainant at their door and offering a \$5 dollar face shield in lieu of a mask.

Ratchford at para. 22

Lululemon was found to have likely met its duty by offering online shopping with free shipping or store pickup, as well as assistance from employees outside the store.

Coelho at paras. 33-35

Best Buy was found to have likely met its duty by offering to bring the complainant the items he was looking for at the front of the store.

Ratchford v. Best Buy Canada Ltd., 2022 BCHRT 19 at para. 15

Doctor's exemptions do not give bearers license to do as they please:

1. An exemption on its own does not establish the existence of a disability
2. If the exemption sets out a provable disability, it merely gives rise to a duty to accommodate to the point of undue hardship. As stated in *Coelho*:

[30] If a complainant establishes that they experienced a disability-related adverse impact – such as not being able to wear a mask and being barred from entering a premises as a result – this does not then entitle the complainant to simply do what they please. Rather, it requires the respondent to reasonably accommodate the complainant to mitigate that barrier.



THE EMPLOYER/EMPLOYEE CONTEXT

Few Decisions Touch on Employee Complaints

2

One decision of the BC Human Rights Tribunal involves a complaint made by an employee. The complaint in question alleged religious discrimination rather than discrimination based on medical disability.

While accommodation of employees will inevitably differ from accommodation of customers (and may prove more difficult) the reasoning of the BCHRT regarding customer complaints should be applicable to employee context to the extent it touches on:

1. proof of disability and adverse impact,
2. rational connection between policy and objective, and
3. good faith implementation.

The Worker v. The District Managers, 2021 BCHRT 41

2

In this case, the complainant employee alleged that his employer's mask mandate amounted to discrimination based on the protected characteristic of religion. He argued that because we are all "made in god's image" covering one's face with a mask "arbitrarily dishonours god".

He also alleged that the mask requirement infringed on his "god given ability to breathe" and that wearing a mask would amount to living a "lie" because he did not believe the data indicating that masks would protect him and others from COVID-19. He argued that living such a "lie" would be out of step with his moral and ethical obligations to god.



The Worker v. The District Managers, continued

2

The complaint was dismissed on the basis that:

- Pursuant to *Syndicat Northcrest v. Amselem*, 2004 SCC 47 at para. 69, a complainant must show that they sincerely believe that the belief or practice giving rise to the adverse impact (a) has a connection with religion; and (b) is “experientially religious in nature”.
- However, the employee had not provided any facts indicating that wearing a mask is “objectively or subjectively prohibited by any particular religion”, or that not wearing a mask “engenders a personal, subjective connection to the divine or the subject or object of [his] spiritual faith”.
- Rather, his refusal to wear a mask was ultimately a matter of personal preference, which is *not* protected under BC’s *Human Rights Code*, and therefore the respondent’s application to dismiss was successful.

The Worker v. The District Managers, continued

2

Key Takeaway: Proof is also required from complainants when alleging religious discrimination. In order to survive an application to dismiss, complainants must at a minimum provide evidence that the wearing of masks is subjectively or objectively prohibited by a religion or that refusing to wear a mask enhances their “subjective connection” to the divine.

Because the complainant had not established a protected characteristic, the Tribunal’s analysis did not move on to consider accommodation.

Are Complainants Sharing Notes?

2

In a recent decision of the Alberta Human Rights Commission, a claim of religious discrimination arising from mask policies at a grocery store included a claim that “God created me in his own image and if he cannot see that image because it is covered with a face mask then I have committed sacrilege”. The complaint was dismissed.

Pelletier v 1226309 Alberta Ltd. o/a Community Natural Foods, 2021 AHRC 192

Takeaways



1. Mask policies are generally reasonable in the context of the COVID-19 pandemic;
2. Complainants' evidence supporting a connection between a protected ground and the adverse effect of wearing a mask has been insufficient to this point;



3. A valid exemption note entitles a complainant to reasonable accommodation, not their ideal accommodation;



4. In the context of consumer-business interactions, curbside pick up, online shopping, or face shields would likely constitute reasonable accommodation by service providers; and



5. The BCHRT has yet to provide a decision considering reasonable accommodation in the employee-employer context. However, their decisions to date suggest that employers can likely expect the Tribunal to be receptive to employers' need to prioritize the health of employees and customers.



UPDATE ON VACCINATION POLICIES AND ENFORCEMENT

Presenter:
Michael Watt, Partner

Vaccine Policies and Enforcement

- Government has generally not mandated requirement for vaccination to work
- Except in specific cases (health care, long term care, federal government employees and transportation workers)
- Most employers have adopted vaccine mandates for the workplace (for continued employment or office attendance)
- Some policies allowed for compliance as late as January 31, 2022



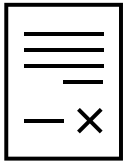


- Policy should ensure it identifies and accommodates claims of disability or religious exemption



- If personal choice, then will not be a basis for human rights complaint

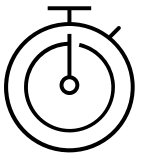
Employment Claims



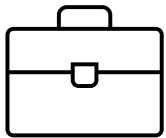
- Does contract of employment allow for unpaid leave / layoff?



- Was employee given advance notice of policy?

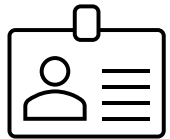


- Does contract provide for fixed termination payment, or damage claim?



- Will employee find other work?

UFCW, LOC 333 And Paragon Protection 2021 Carswell Ont 16048



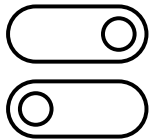
- Company employs 4400 security guards in Ontario



- Vaccination mandate implemented based on operational necessity and for safety concerns, and reliance on CBA terms



- Result of non-compliance was reassignment or other safety precautions



- Union brought policy grievance which was dismissed as policy reasonable





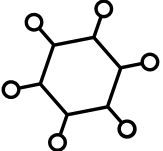
SAFETY PLANS AND WORKSAFE COMPLIANCE

Presenter:

Sarah Hickey, Associate

Updates to WorkSafeBC Safety Plan and Isolation Requirements

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-  1. Renewed requirement to have a COVID-19 Safety Plan
-  2. Key Points about the COVID-19 Safety Plan
-  3. Updated Isolation Requirements from BCCDC

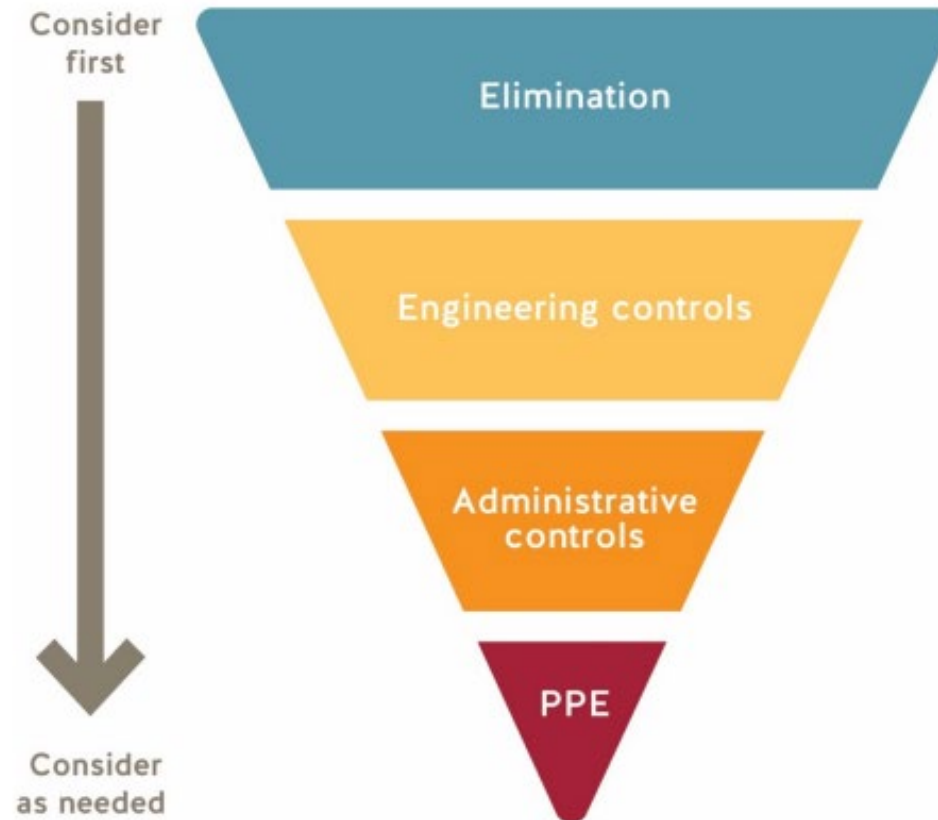
Requirement to Implement COVID-19 Safety Plan

- Early in the pandemic, all employers were required to create and implement COVID-19 Safety Plans in accordance with WorkSafeBC requirements
- On July 1, 2021, the province began to re-open and COVID-19 Safety Plans were no longer required
- As of January 7, 2022, COVID-19 Safety Plans are now required again as a result of the resurgence in infection caused by the Omicron variant
- Requirement is for all employers covered by the BC *Workers Compensation Act*



What is The Purpose Of a COVID-19 Safety Plan?

4



Source: WorkSafeBC COVID-19 Safety Plan Guidance

Key Points About the COVID-19 Safety Plan

- Should be completed in accordance with WorkSafeBC guidance (available on the WorkSafeBC website)
- Should be posted on company website if employer has one and at the workplace
- The following must be included:
 - Measures to prevent workers from congregating or crowding indoors
 - A requirement for facemasks covering the mouth and nose to be worn indoors
 - Policies to support workers who have COVID-19 symptoms
 - Measures to promote hand hygiene
 - Measures to ensure a clean work environment
 - Measures to ensure proper workplace ventilation
 - Measures to support workers receiving vaccinations for COVID-19

Update from the BC Centre for Disease Control (BCCDC) on Isolation

- New requirements are in place from BCCDC relating to isolation
- For vaccinated individuals who have tested positive for COVID-19:
 - Must self-isolate at home for 5 days and until symptoms improve and no fever
 - After self-isolation period, individual must avoid non-essential visits to “high-risk settings” for 5 days
 - Attending work is not classified as a “high risk setting”
- For non-vaccinated individuals who have tested positive for COVID-19:
 - Must self-isolate at home for 10 days, until symptoms improve and no fever
- Note: the requirements are different for individuals under 18, individuals who have returned from travel, individuals who are required to be hospitalized, and/or immunocompromised individuals

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THANK YOU

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