

COVID-19 and Vaccines: What an Employer Needs to Know

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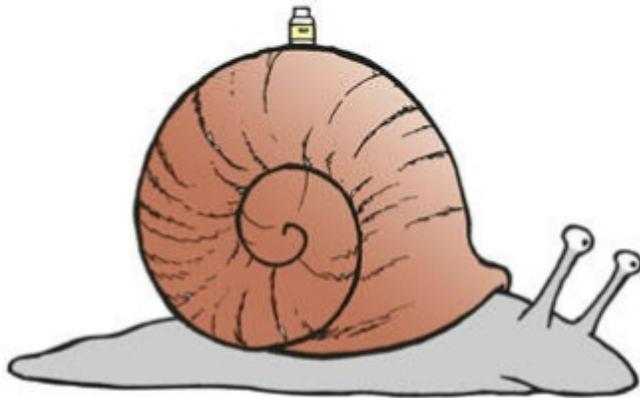
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Session Overview

- **Introduction**
- **Topic 1: Infectious Disease Case Law**
- **Topic 2: OHS, WCB and Privacy Considerations**
- **Topic 3: Human Rights Considerations**
- **Topic 4: Vaccination Policies**
- **Open Discussion, Questions & Answers**

Introduction

CANADA ROLLS OUT ITS
VACCINATION PROGRAM...



RHSIDE
2020

Victoria Times Colonist ©Halcyon Dog Productions, Inc. rhesidecartoon.com

Current COVID-19 Context

- 12 months into a **global pandemic** with multiple variants and legitimate concern about a 3rd wave & evolving response
- Multiple **vaccines approved**, some delivered, delays feared
- Prime Minister Trudeau has repeatedly promised - all Canadians can be vaccinated by of **September 2021 (possibly sooner)**
- Unlikely that mandatory vaccination policies could be effective before early fall 2021.
- **Mandatory policies will work in some circumstances**, as long as human rights & privacy issues are effectively balanced with worker safety

Current COVID-19 Context

➤ Key Considerations for Employers:

- Human Rights, Employment Standards, OHS and/or Privacy **complaints**
- (Union) **grievances** in labour context
- Constructive dismissal **lawsuits** in employment context
- WCB **claims**
- Charter challenge **litigation** (if government employer)



Topic 1: Infectious Disease Case Law

Themes in Infectious Disease Case Law

1. **Mandatory COVID-19 Testing**
2. **Paid Absences**
3. **Protective Equipment**
4. **Not Adhering to COVID-19 Protocols**

Mandatory COVID-19 Testing

- Nasal swab testing continues to be predominant
- Rapid testing mechanisms becoming available (e.g. saliva testing)



Mandatory COVID-19 Testing

➤ Employee concerns

➤ Intrusive

➤ Uncomfortable / painful

➤ Testing not universal

➤ Testing only provides snapshot

Mandatory COVID-19 Testing

- ***Caressant Care*** [2020] CanLii 100531 (ON LA)
 - Context: Retirement Home, without any outbreaks
 - COVID-19 testing required every two weeks
 - Union grievance alleged policy unreasonable; should only test symptomatic employees
 - Policy deemed reasonable and proactive approach justifiable in advance of an outbreak

Mandatory COVID-19 Testing

- Alternatives to testing administered by Employer's
 - Direction to Health Authority testing
 - Direction other medical advice by Health Authority
 - Medical proof of fitness to work

Paid (and unpaid) Absences

- Contractual entitlements?
 - What qualifies for “sick leave”
- BC *Employment Standards Act*: COVID-19-related leave (unpaid)
- EI and Federal Government subsidies for absences

Paid (and unpaid) Absences

- ***Participating Nursing Homes*** [2020] CanLii (ONLA)
 - Part-time employees forced to miss work, without pay, due to positive COVID-19 test or close contact
 - Union grievance alleged Employer obligated to pay
 - Case dismissed: Employers obligation under OHSA to ensure safe workplaces includes removing employees who pose risk of spreading virus

Protective Equipment



Protective Equipment

- ***Inovata Foods Corp.*** [2020] CarswellOnt 10534
- ***Ste. Anne's Country Inn and Spa*** [2020]
CarswellOnt 12818
 - Employers directed to ensure that employees wear masks while they work
 - Dismissed concerns over the employees touching their face while wearing masks and concerns over food safety

Protective Equipment

- ***Maplewood Nursing Home*** [2020] CarswellOnt 19306
 - Employer directed to install a temporary plexiglass barrier at a nursing station
 - Employer argued plexiglass not necessary, as the employees were wearing PPE
 - OLRB disagreed: installing plexiglass consistent with Employer's OHSA obligations

Not Adhering to COVID-19 Protocols



Not Adhering to COVID-19 Protocols

➤ **Aecon** [2020] CanLii 91950 (ONLA)

- Grievor exhibiting COVID-19 symptoms, told not to report to work until directed by the Employer
- Grievor attended work the next day and indicated he no longer had symptoms
- Grievor dismissed for failing to follow stay home direction
- Arbitrator upheld the termination, stating:

“... the Grievor's deliberate and cavalier attitude toward the COVID safety risks he represented both to his co-workers and in turn to the Company's obligations to protect the workplace was unconscionable, unreasonable and totally unacceptable”

Lessons for Tourism/Hospitality Sector

- Context and Circumstances Matter
 - Consider alternative protective measures
 - Consider alternatives to employer-administered testing

- Safety Protocols & Access to Paid Leave
 - Be familiar and up to date

- Manage Safety in the Workplace
 - Sometimes disciplinary measures necessary/appropriate

Topic 2: OHS, WCB and Privacy Considerations of Workplace COVID-19 Vaccination Policies

COVID-19 Vaccination Policies

1. Do employers have an obligation to ensure employees are vaccinated?
 - i.e. Is vaccination mandatory?
2. Can employers require that employees become vaccinated?
 - i.e. ... Can employers make vaccination mandatory?



Obligation to Ensure Vaccination?

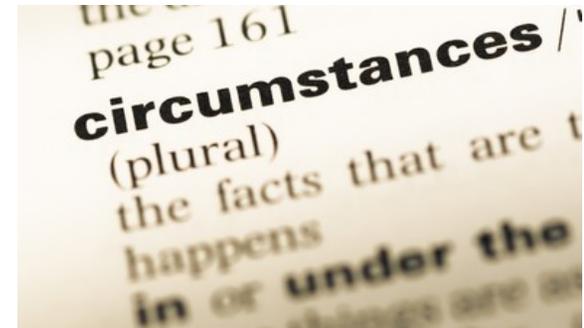
➤ At present, no legislation in BC expressly requires any group of employees to be vaccinated for COVID-19

➤ **That may change!!!**

➤ Employers do have general duty obligation under OHS legislation to ensure safety in the workplace

➤ Could vaccination be considered obligatory under this duty?

➤ Unlikely in absence of other legislation.



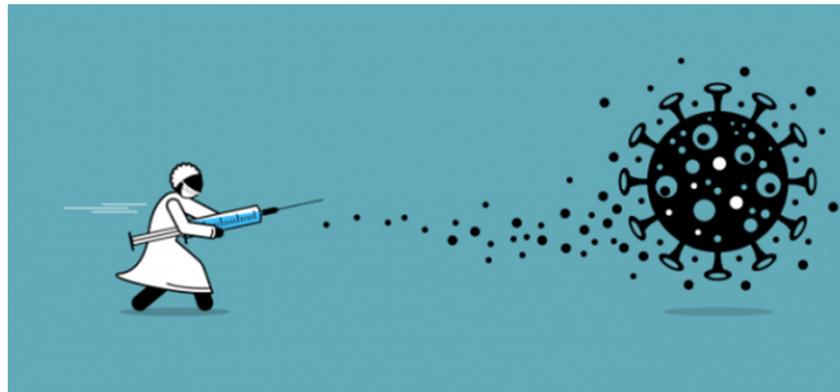
Can Vaccination Be Mandatory?

- An employer may, *in some circumstances*, implement policies that require vaccination as a condition of continued employment
- In order to be lawful, such a policy must be:
 - Reasonably necessary
 - Rationally connected to the workplace
- Seek legal advice if considering such a policy

Reasonably Necessary & Rationally Connected?

Key considerations ...

- Likelihood of encountering an infected person
- Risk of transmission
- Preventive measures and procedures
- Public health orders and recommendations



Workers' Compensation Considerations

Compensation for work-related COVID-19 where ...

- (1) There's evidence of COVID-19; and
- (2) Risk of contracting disease at work is ***significantly greater*** than ordinary risk for public



Privacy Considerations

At minimum, a vaccination policy should include:

- the type of information being collected, stored, and/or used
- how and for what reason information is being collected and stored
 - employees who do / don't receive vaccination
 - employees who request or require accommodation

Topic 3: Human Rights Considerations

Legal Framework

- Provincial/Federal human rights legislation
- *Canadian Charter of Rights and Freedoms*
- Application to vaccination policies?



Prohibited Grounds

- Race, Colour, Ancestry, Place of Origin
- ***Political Belief***
- ***Religion***
- Marital Status, Family Status
- ***Physical Disability*** or Mental Disability
- **Sex**, Sexual Orientation
- Gender Identity or Expression
- Age
- Criminal Or Summary Conviction Offence

What Can an Employer Request?

➤ Medical information

- Vaccination exemption
- Existing immunity
- Pregnancy
- Other medical issue



➤ Proof of religious prohibition

➤ Political Belief – basis for beliefs/convictions

Bona Fide Occupational Requirement

➤ The *BFOR*

- Rational connection to job/workplace
- Honest and good faith belief in necessity
- Reasonably necessary – undue hardship

➤ Key considerations

- Workplace/job environment
- COVID-19 data/status



Topic 4: Vaccination Policies – Key Elements and Implementation

What do we know?

- No current legislation mandating COVID vaccines
- Evidence and science of the effectiveness of the vaccine will be key vaccination policy arguments
- Government / public health officials have indicated COVID-19 vaccine will be voluntary, even for health care workers

Lessons Learned from Influenza Vaccination Policies

- *Health Employers Assn. of BC and HSA, 2013*
CarswellBC 3189
 - Policy required that employees vaccinate **or** wear mask
 - Deemed to be reasonable intrusion on employee rights
 - Important: Employer's expert evidence on effectiveness of vaccine

Lessons Learned from Influenza Vaccination Policies

- ***Interior Health Authority v BCNU, 2006***
CarswellBC 3377
 - Policy required vaccination
 - If worker refused and outbreak occurred - sent home without pay

- **Conclusions:**
 - ***Policy is reasonable*** to meet legitimate and critical objectives
 - No violation of *Charter* or Collective Agreement

Effective Implementation

- Assess
 - Nature of work and worksite
 - Existing controls and effectiveness
 - Less intrusive measures?
- Lots of Notice
- Consultation with employees/unions
- Worksite vaccination clinics
- Incentives
- Privacy considerations
- Accommodate where warranted

24 HOUR COVID-19 EMPLOYER SUPPORT

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