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The New Working for Workers Act, 2021

Presented by
Landon Young

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Bill 27 - Working for Workers Act, 2021

- Introduced October 25, 2021
- Still at reading stage
- Amends several employment statutes
- Wide range of changes being proposed

Disconnecting from Work Policies

- Employers must have “disconnecting from work” policies
- Applies to employers with 25+ employees

Definition of "Disconnecting From Work"

…not engaging in work-related communications, including emails, telephone calls, video calls or the sending or reviewing of other messages, so as to be free from the performance of work.

Questions Raised

- What exactly is the policy to say?
- Is some working past regular hours permitted?
- Does this apply to exempt employees?
- What happens if employers break their policies?

Non-Competes

- New prohibition on non-competes
- Exception if part of a sale of business
- Definition of non-compete:
  - prohibits the employee from engaging in any business, work, occupation, profession, project or other activity that is in competition with the employer's business after the employment relationship between the employee and the employer ends

Questions Raised

- Does this prohibition apply to non-solicits?
- Can a non-compete be tied to severance payments?
- May other restrictive covenants in a contract be affected?

Other Features of Bill 27

- Licensing requirements for recruiters and temporary help agencies
- Removal of Canadian experience requirements for professional qualification
- Washroom access for delivery workers
- Workplace and insurance fund surplus distribution

Thank you!

The Risk of Pandemic-Related Constructive Dismissal Claims

Presented by
Allison Taylor

What is Constructive Dismissal? *Farber v. National Trust*, [1997] 1 SCR 846

"Where an employer decides **unilaterally to make substantial changes to the essential terms of an employee's contract of employment and the employee does not agree to the changes and leaves his or her job**, **the employee has not resigned, but has been dismissed. Since** the employer has **not formally dismissed** the employee, this is **referred to as "constructive dismissal".** . . The employee can then treat the contract as resiliated for breach and can leave. In such circumstances, the employee is entitled to compensation in lieu of notice and, where appropriate, damages."

Wronko v. Western Inventory Service Ltd. 2008 ONCA 327

“First, the employee may **accept the change** in the terms of employment, **either expressly or implicitly through apparent acquiescence**, in which case the employment will continue under the altered terms.

Second, the employee may **reject the change and sue for damages** if the employer persists in treating the relationship as subject to the varied term. This course of action would now be termed a “constructive dismissal”, as discussed in *Farber. . .*

Third, the employee may **make it clear to the employer that he or she is rejecting the new term**. The employer may respond to this rejection by terminating the employee with proper notice and offering re-employment on the new terms. If the employer does not take this course and permits the employee to continue to fulfill his or her job requirements, then the employee is entitled to insist on adherence to the terms of the original contract. “

Potter v. New Brunswick Legal Aid Services Commission (SCC 2015): Two step test

(1) determine if employer has changed contract unilaterally and detrimentally

- If employer has express or implied right to change, or if employee consents to or acquiesces in change, no breach/no constructive dismissal
- If no right, consent or acquiescence, go to step 2

(2) determine if reasonable person in same situation as employee would feel essential terms of contract substantially changed

- “Highly fact-driven exercise”
- Common for employers not to have express or implied right of layoff
- Being caused by pandemic does not automatically mean implied right to layoff exists (yet to be established by courts) –”what parties would have agreed to had they considered this possibility”
- In many cases consent will not have been sought – even if it has, was there a real choice?
- Acquiescence often the issue

- With respect to step 2, possible that in context of pandemic and society-wide shutdown, reasonable person in same situation as employee would not feel that layoff a substantial change but an exception ie. large numbers in society going through layoffs due to disease is different from one individual
- Onus on employee to meet both arms of test

- *Potter* also established that a duty to act in good faith in contractual dealings
- But where layoff done in good faith for public health-related reasons, and employer open and honest, duty should be met

What is Acquiescence?

- Inference of permission or consent arising when a person raises no objection to/takes no action over infringement of legal right by another
- In effect, consent is inferred from silence over time

How Long is too Long?

- *Lancia v. Park Dentistry* – 13-month delay in bringing claim after resigning too long
- *McGuinty v. 1845035 Ontario Inc.* – two-year delay from leaving work due to mental condition to suing not too long, since delay based on same issue as absence ie. anxiety and depression
- In general, a few months to up to 6 months should be sufficient for an employee to make the decision to challenge or not

Infectious Disease Emergency Leave

- In spring 2020, Ontario introduced Infectious Disease Emergency Leave (IDEL) regulation
- Transformed layoff into IDEL and suspended usual statutory rules re when layoff becomes termination (e.g. after 13 or 35 weeks depending on whether benefits are continued or not) as well as statutory constructive dismissal
- IDEL extended to end of 2021 – unlikely to be extended (?)

- As is often the case, nothing impermissible about conflict between statutory and common law entitlements
- Employment Standards Act provides that on sale of business, employee hired by purchaser has continuity of employment <u>for ESA purposes</u>
- But purchaser by contract can preclude continuity <u>for common law purposes</u> (as long as continuity for ESA purposes maintained)
- S. 8(1) of ESA states that civil remedies not affected by Act

- As a result, employees can be on IDEL and not entitled to statutory notice and severance pay, but may still be constructively dismissed at common law
- Statutory notice and severance pay included in common law damages (although not subject to mitigation, unlike common law damages)

When Does Acquiescence Occur?

- Some early pandemic-related decisions released re: how IDEL interacts with common law
- Cases all brought promptly ie. within a few months after layoff

Case law to date

- In *Coutinho v. Ocular Health Centre Ltd.*, court relied on Section 8(1) of ESA in holding that IDEL regulation did not preclude common law claim for constructive dismissal due to pandemic layoff
- Employee was laid off on May 29, 2020 and sued immediately
- Relied on case law holding that intent of statute “transcends and governs the intent of the regulation”
- Court also relied on Ministry of Labour’s online publication stating that IDEL regulation did not address constructive dismissal at common law

- In *Taylor v. Hanley Hospitality Inc.*, the issue was whether IDEL regulation restricted employee's right to pursue constructive dismissal
- Taylor was laid off on March 27, 2020, recalled on September 3, 2020 and continued to work (!)
- Nonetheless claimed constructive dismissal in March 2020 (presumably to collect compensation for interim)
- Court held that employee cannot be on statutory leave yet have been constructively dismissed at common law as would be "absurd result" - because of IDEL "common law on layoffs has become inapplicable and irrelevant"

- Court held that Section 8(1) was irrelevant because IDEL had changed common law and not constrained by it
- The court relied on 2011 Court of Appeal decision in *Elsegood v. Cambridge Spring Service (2001) Ltd*. in which CA stated: “statutes enacted by the legislature displace the common law” [para 6]

- Rationale that legislature not employer created circumstances in which constructive dismissal could arise when created IDEL
- Amended ESA to avoid employers incurring costs associated with terminations ie. to <u>prevent</u> terminations from happening
- Logically, since that was legislative intent and since legislature created situation, no basis for right to claim constructive dismissal due to pandemic-related layoff to exist
- A matter of “common sense”

- In *Fogelman v International Financial Group Ltd.*, court took more traditional position that because employee not pursuing ESA rights but common law rights, not precluded from pursuing common law action
- In this case employee had been laid off on leave on March 16, 2020 and immediately retained counsel to claim constructive dismissal
- Court relied on Section 8(1) of ESA

- Alternatively, court held that plaintiff’s claim fell within exception that suspension of ESA constructive dismissal provision inapplicable to anyone constructively dismissed <u>before</u> May 29, 2020
- Court in <u>*Fogelman*</u> did not refer to *Taylor* as not released yet and did not refer to *Coutinho*

- Inexplicably, court awarded $25,000 in punitive damages against employer in *Fogelman*, partly because of obstructiveness re service of claim but also because ESA payments were not made on employee demand
- Court found that failure to comply with ESA met test for "independent actionable wrong" deserving punishment
- Since paying these sums might have constituted admission that termination had occurred, puts employer in untenable position
- Court suggested that obvious that termination had occurred, when in fact legitimately debatable

Constructive Dismissal Claims Raised in 2021

- In 2021 employees continue to raise constructive dismissal claims a year or 1.5 years after layoff
- Routine response that employee acquiesced in layoff by failing to object within reasonable time after layoff
- Length of layoff immaterial, at least while pandemic subsists

- Possible that once IDEL lifted, employee could then be laid off under Employment Standards Act (since not on layoff now) for up to 13 or 35 weeks depending on benefits coverage, since only then will ESA terms be reinstated
- Sooner or later employer will recall or terminate ie. no such thing as permanent “temporary” layoff

- May be prudent to negotiate less than 100% severance packages if demanded before IDEL ends, while legal issue is constructive not express dismissal
- Harder for employee to prove constructive dismissal than to litigate length of notice period

Constructive Dismissal and Vaccination

- Since August 24, 2021 employers required to comply with “advice, recommendations and instructions” of local Medical Office of Health
- Not merely compliance with orders
- Where recommendations include having vaccination policy mandating vaccination, as in Toronto, Peel etc., employers required to comply as a matter of health and safety law
- Employers can terminate employees for refusal to comply (although whether with cause yet to be decided)

- Many employers providing alternatives such as daily rapid testing (often at own expense) or unpaid leaves of absence
- Since unpaid leave of absence less harsh than termination, may not be viewed as constructive dismissal – acquiescence issue also applies

- Question is what battle employer prefers to fight
- Easier for employer to argue that entitled, for health and safety reasons, to mandate vaccination for everyone (subject to human rights exemptions) than to argue has right to put employees on unpaid leave ie. to permit them to choose not to comply
- That option may weaken employer’s position if employee’s choice

- Leave of absence does not actually solve underlying question, just delays answer
- At end of leave of absence, vaccination will be just as necessary as previously, since no evidence that COVID-19 disappearing (other than through vaccination!)

- Given government’s plans to lift all public restrictions by March 2022, delay may give employees impression that when March arrives, mandatory vaccination no longer be required
- In fact, since COVID not going anywhere, government plans should not affect employer’s policy
- Lifting public restrictions premised on near-universal vaccination

Constructive Dismissal and Return to Office

- Since March 2020 employees have worked from home based on mandate or recommendation by government
- Employers may not have been explicit that temporary only
- Given pandemic, arguably inherently temporary

- Many employees prefer to work from home due to childcare considerations, commute, etc.
- Some may argue that terms and conditions of employment relative to location changed permanently

- Improbable that temporary measures either legally mandated or strongly recommended will be viewed as permanent change
- But be careful not to create, inadvertently, new term and condition of employment regarding location
- In *Hagholm v. Coreio Inc.,* employee permitted to work from home 3 days per week for over 20 years and required by new owner to return to office held to be constructively dismissed

- For this reason, if return to work is to be gradual, employer’s communications must state that intention is complete return to office (assuming that is employer’s decision) and that will be phased in gradually only for public health-related reasons

- Employees failing to return when required subject to termination for cause based on insubordination or abandonment, particularly if have chosen to move away during pandemic
- But if move expressly or implicitly approved by employer, court may hold that employer agreed to change of location of work
- Employer must be clear that employee expected to make necessary personal changes to comply when requested by employer

- Strongly recommended that return to office phase-in not exceed a few months
- Even if employer proposes permitting some degree of working from home, permission should be subject to change at any time (subject to human rights accommodation)

Damages for Constructive Dismissal

- Damages for constructive dismissal same as for wrongful dismissal ie. common law notice or, if enforceable, contractual clause
- No reason why punitive damages should be awarded as in *Fogelman*, short of abusive or uncivil behaviour by employer

Thank you!

BREAK

HOT POTATOES: MANAGING COMPLEX WSIB CLAIMS

Presented by
Ryan Conlin

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Effective Use of Surveillance

- Surveillance is **sometimes** a useful tool to challenge fraudulent claims or employees who are misrepresenting the extent of their restrictions
- It is relatively rare to get a “smoking gun” result
- Surveillance can get costly very quickly
- Get legal advice before undertaking surveillance

WSIB Surveillance Policy 11-01-08

The WSIB accepts audio/visual recordings as evidence, if they:

- provide new or more complete information than is already in the claim file
- are relevant and pertain to the WSIB's duty to hear, examine, and decide issues under the *Workplace Safety and Insurance Act*
- Is authenticated by a signed statement setting out when and where the recording was made, and confirming that the recording was not altered, and is a true representation of its subject

Types of Cases Where Surveillance Helps

- Where the worker clearly and unambiguously is acting outside of the scope of the restrictions allowed by the WSIB. This is particularly the case where there is a claim of total disability
- Where the worker is committing fraud
- Where the worker is found working at another employer
- Where the worker is caught in a significant lie

“Self Serving” Accommodation Scenario 1

A worker in a plant is diagnosed with a psychological disability which he says was triggered by his supervisor and entitlement was allowed. The employer agrees to transfer the employee to a different section of the facility.

The employee provides a medical note asking that the employer guarantee in writing that the worker will never see the supervisor ever again.

What should the employer do?

“Self Serving” Accommodation Scenario 2

A worker in an office is injured in a compensable car accident. The worker does her job from home during her recovery with no wage loss. The employer is unhappy with the worker’s productivity level while she works at home.

The worker has reached maximum medical recovery and asks to continue working from home on the basis of a driving phobia.

What can the employer do?

“Self Serving” Accommodation Scenario 3

A night shift worker at a hospital is approved for entitlement for a chronic pain condition. A Return to Work meeting with the WSIB is scheduled for the following week. The union notifies the employer that the worker will be asking for straight day shifts at this meeting. No explanation is given.

What can the employer do? What should the employer ask? Is there a distinction between temporary and permanent accommodation?

“Self Serving” Medical Notes: Lessons from COVID

- Questionable and outright baffling medical notes have been a historic challenge for employers.
- This issue has arisen in the context of dubious vaccine exemptions
- The College of Physicians Surgeons has issued guidance which makes it clear that legitimate exceptions to vaccination are rare
- Discipline proceedings initiated against physicians who have issued notes without a medical basis to do so

“Self Serving” Medical Notes: Lessons from COVID

- Good reminder that employers should respectfully challenge medical notes where there is a basis to do so
- WSIB/WSIAT is the final decisionmaker on whether restrictions in a claim are valid.
- WSIB is not always consistent about what is accepted
- It is bad practice to develop a culture of accepting every medical note at face value

Terminating an Employee in the Re-Employment Window

Accident employers have an obligation to re-employ if the following three conditions are satisfied:

- The worker has been "unable to work" as a result of the work-related injury/disease
- The worker was continuously employed with the injury employer for at least one year before the date of injury, and
- The injury employer regularly employs 20 or more workers
- Different rules apply in the construction industry

Terminating an Employee in the Re-Employment Window

The accident employer is obligated to re-employ the worker until the **earliest of**:

- two years from the date of injury
- one year after the worker is medically able to perform the essential duties of their pre-injury work, or
- the date on which the worker reaches 65 years of age

Terminating an Employee in the Re-Employment Window

- Never terminate an employee during the re-employment window without advice as the penalties are significant
- Only terminate where there is clear evidence of a reason to terminate the employee that does not relate to the claim. Terminations that are even partially motivated by the claim will result in a penalty
- "Just cause" at common law is not necessarily required and may not be relevant
- Initial decisions are usually made on the basis of a written record. Appeals will likely be heard by a way of a hearing before the WSIB and ultimately WSIAT

Terminating an Employee in the Re-Employment Window

- It is critical to make sure everything is in writing
- Evidence that other employees without claims were also terminated for the behaviour (i.e. the injured worker is not the only person who has ever been fired for lateness etc.)
- Make sure you keep track of potential witnesses who leave the company. It can take years for all appeals to be heard
- Make sure the WSIB is notified about the termination. The WSIB should not find out from the worker

No Good Deed Goes Unpunished: Incentive Programs and Claim Suppression

- WSIA prohibits “claim suppression” which is defined to include:
  - Dismissing or threatening to dismiss a worker.
  - Disciplining or suspending, or threatening to discipline or suspend a worker.
  - Imposing a penalty upon a worker. Directly or indirectly intimidating or coercing a worker with threats, promises, persuasion or other means

No Good Deed Goes Unpunished: Incentive Programs and Claim Suppression

- It is possible that an issue could arise where an employee is discouraged from filing a claim to maintain the bonuses associated with an “accident free” workplace
- This issue appears to be an enforcement priority for the WSIB
- It is frustrating that these well intentioned programs could trigger legal problems

No Good Deed Goes Unpunished: Incentive Programs and Claim Suppression

- Try to avoid making “no lost time” accidents the sole/primary basis for awarding a safety bonus. We strongly recommend against it
- Consider relying on a number of metrics to award the safety bonus
- Consider including timely reporting of accidents and near misses as one of the criteria for paying the bonus
- Take swift disciplinary action against anyone engaging in claim suppression

Thank you!

Mandatory Testing and Masking – What we know so far

Presented by
Jeffrey Murray

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Mandatory Workplace Testing – A Tale of Three Cases

Caressant Care Nursing and Retirement Home (December 9, 2020), (Ont. Arb)

- Acting on Government recommendations the employer implemented a mandatory testing policy for all employees
- The Policy provided for:
  - Nasal swab testing every two weeks
  - Accommodation on a case-by case-basis
  - Taking employees out of service if they refused

Mandatory Workplace Testing – A Tale of Three Cases

Caressant Care Nursing and Retirement Home (December 9, 2020), (Ont. Arb)

Background:

- March 2020 -- Heavy PPE and masking introduced
- June 2020 -- EMS provides onsite testing with full employee participation
- July 2020 – Employer requires off-site testing once every two weeks

Some employees complain that the testing is invasive, open-ended, painful, causes nose bleeds, and is ineffective.

The union grieves that the policy is an unreasonable exercise of management rights

Mandatory Workplace Testing – A Tale of Three Cases

Caressant Care Nursing and Retirement Home (December 9, 2020), (Ont. Arb)

Was mandatory testing allowed?

The KVP test:

1. Is the policy or rule consistent with the collective agreement?
2. Is it reasonable?
3. Is it clear and unequivocal?
4. Was it brought to the attention of the employees?
5. If the policy or rule is enforced by discipline, have employees been told that a breach can result in discharge?
6. Is the policy or rule enforced consistently?

Mandatory Workplace Testing – A Tale of Three Cases

Caressant Care Nursing and Retirement Home (December 9, 2020), (Ont. Arb)

Was the policy reasonable?

Irving Pulp and Paper (SCC), (2013)

- Dealt with random breath tests in the workplace
- The court held that the employer can only impose a rule with disciplinary consequences if the need for the rule outweighs the privacy interests of employees
- The employer interest be proportionate to interference with employee interests

Mandatory Workplace Testing – A Tale of Three Cases

Caressant Care Nursing and Retirement Home (December 9, 2020), (Ont. Arb)

The union argued that the employer had not provided a compelling case to require mandatory testing:

- There had been no cases of Covid-19 prior to the introduction of the testing regime
- Most people in the home – residents and visitors – were not being tested
- The employer was testing both symptomatic and asymptomatic employees
- Test results provided only a snapshot in time

Mandatory Workplace Testing – A Tale of Three Cases

Caressant Care Nursing and Retirement Home (December 9, 2020), (Ont. Arb)

Grievance Denied:

- Controlling Covid-19 is not the same as testing for alcohol use
- Covid-19 is a novel virus that public health authorities are still learning about
- Only testing the symptomatic does not do enough to prevent spread

“While the Home had not had an outbreak, I agree entirely with the employer that, given the seriousness of an outbreak, waiting to act until that happens is not an option.”

Mandatory Workplace Testing – A Tale of Three Cases

Unilever Canada Inc. (April 25, 2021), (Ont. Arb)

Background:

- The employer operated an ice cream factory
- At the start of the pandemic, it introduced mandatory masking and social distancing requirements
- In April 2021 community transmissions increased and the employer introduced a mandatory testing policy
- Several employees had contracted the virus in the community
- Two positive tests registered on the first two days of testing

Mandatory Workplace Testing – A Tale of Three Cases

Unilever Canada Inc. (April 25, 2021), (Ont. Arb)

The Policy:

- Weekly rapid antigen tests
- Personal information not retained
- Positive tests referred to public health for further inquiry and employee removed from workplace with sick benefits
- Employees that refused tests placed on layoff, but not disciplined in accordance with attendance management policies

Mandatory Workplace Testing – A Tale of Three Cases

Unilever Canada Inc. (April 25, 2021), (Ont. Arb)

Grievance Denied:

- KVP test applied
- The policy was reasonable
- Food safety an important consideration
- Although no evidence that employees had contracted the virus at work, it was prudent to err on the side caution and take reasonable measures to minimize transmission

Mandatory Workplace Testing – A Tale of Three Cases

EllisDon Construction and Verdi Structures (June 10, 2021), (Ont. Arb)

Background:

- General contractor had numerous construction projects in Toronto
- Specialty contractor worked on one of the general contractor's sites
- The employees of the specialty contractor worked in an open-air environment
- General contractor participated in government sponsored Antigen Screening Program to assess efficacy of testing technology

Mandatory Workplace Testing – A Tale of Three Cases

EllisDon Construction and Verdi Structures (June 10, 2021), (Ont. Arb)

The AP Test:

- A rapid point-of-care test conducted twice weekly
- Throat and lower nostril swabs
- RN conducts the test, reads the result, and destroys the swab and data
- No personal health information is collected

Mandatory Workplace Testing – A Tale of Three Cases

EllisDon Construction and Verdi Structures (June 10, 2021), (Ont. Arb)

The Program:

- Sites were selected by general contractor with reference to community spread, case counts, hot zones, project size, critical infrastructure status, and client demands
- Employees of the specialty contractor that refused the test were reassigned elsewhere, if possible, otherwise laid off
- Positive tests reported to public health and site-ban pending lab-based PCR test and mandatory quarantine
- Employees not paid for time spent getting PCR test
- Requests for accommodation addressed on a case-by-case basis

Mandatory Workplace Testing – A Tale of Three Cases

EllisDon Construction and Verdi Structures (June 10, 2021), (Ont. Arb)

During the pilot project:

- 100,237 tests conducted
- 118 cases identified
- 20 false positives
- Two projects partially shutdown by Toronto Public Health

Mandatory Workplace Testing – A Tale of Three Cases

EllisDon Construction and Verdi Structures (June 10, 2021), (Ont. Arb)

The union grieved that policy was an unreasonable exercise of management rights, because:

- The rapid tests were invasive and violated employee privacy
- The AP test was experimental and caused false positives
- Testing was not required in an open-air work environment
- Less intrusive measures available, such as:
    - Pre-access screening
    - Mandatory masking
    - Physical distancing and cleaning

Mandatory Workplace Testing – A Tale of Three Cases

EllisDon Construction and Verdi Structures (June 10, 2021), (Ont. Arb)

Grievance Denied:

- The broader societal context required consideration:
  - Toronto had been in lockdown since November 2020
  - Ontario in lockdown since April 2021
  - Large segments of the economy shutdown
  - Residential construction declared an essential service
  - The transitory nature of the construction industry justified stringent controls

Mandatory Workplace Testing – A Tale of Three Cases

EllisDon Construction and Verdi Structures (June 10, 2021), (Ont. Arb)

Grievance Denied:

- The specific circumstances of the employer and employees considered:
  - Numerous employees infected at the general contractors' sites
  - The AP test was minimally invasive and conducted by a third-party
  - Personal information protected
- While an open-air environment lowers the risk of transmission, it does not eliminate it

Mandatory Workplace Testing – A Tale of Three Cases

Lessons Learned:

- Mandatory testing upheld in a wide range of workplaces
- Both rapid antigen test and PCR testing upheld
- Frequency of testing not a factor in assessing reasonableness
- Societal context most significant factor

Mandatory Workplace Testing – A Tale of Three Cases

Best Practices:

- Consider less intrusive means first – masks and physical distancing
- Where possible use rapid antigen test, not PCR test
- Pay for the test
- Use independent service providers
- Do not retain swabs or employee data
- Do not terminate or discipline non-compliant employees
- Take guidance from public health authorities
- Factor accommodation into the policy

Mandatory Workplace Testing – Non-Union Workplace

- Non-union employees do not have a mechanism to challenge the reasonableness of employer actions
- The only leverage they have is to claim constructive dismissal or simply not comply
- Constructive dismissal occurs where the employer makes a unilateral change to a fundamental term of the employee's employment without consent
- Employers will have strong arguments that mandatory testing is reasonable and implied in the contract of employment
- OHSA imposes a general duty to take every precaution reasonable in the circumstance for the protection of a worker
- Employees must mitigate the consequences of constructive dismissal

Mandatory Workplace Testing – Non-Union Workplace

What to do with uncooperative employees?

- Provide a clear warning that non-compliance will result in suspension without pay
- Do not terminate unless until necessary to replace employee
- Provide final warning before termination
- Seek legal advice – the law is evolving daily

Mandatory Workplace Testing – Non-Union Workplace

What about privacy law?

- Privacy legislation affecting provincially regulated employers in Ontario is minimal
- The Ontario Personal Health Information Protection Act only regulates how personal health information is collected, used, stored, and disclosed by "health records custodians"
- The Federal PIPEDA permits the collection and use of employee personal information where it is necessary to manage the employment relationship

Mask Mandates and Human Rights

Mask Mandates and Human Rights

Disability

- Mask mandates may have an adverse impact on employees with certain disabilities
- The Alberta Human Rights Commission has identified the follow disabilities:
  - Facial trauma
  - Recent Maxillofacial surgery
  - Allergic reactions to mask components
  - Clinically significant acute respiratory disease

Mask Mandates and Human Rights

Disability

- Requiring employees with these disabilities to wear a mask may be discriminatory
- However, such discrimination may be permitted where:
  - The requirement is instituted for a valid reason and in good faith; and
  - It is impossible to accommodate the person without incurring undue hardship
    - *Meorin* (1999), (SCC)

Mask Mandates and Human Rights

Disability

Szeles v. Costco (August 16, 2021), (HRTA)

Background:

- Customer claiming disability denied entry to store without mask
- Customer offered face shield or online service
- Customer rejected face shield claiming it was ineffective and stigmatizing
- Customer rejected online shopping because it required sharing of confidential information

Mask Mandates and Human Rights

Disability

Szeles v. Costco (August 16, 2021)

Complaint Rejected:

- The store had a valid reason to institute mask policy, mainly to comply with municipal and provincial regulations
- Undue hardship for customer to enter the store without face covering due to public health measures
- The fact that face shield may be ineffective did not justify entering store without a mask
- Data concerns regarding online shopping were hypothetical

Mask Mandates and Human Rights

Creed

- Employers must accommodate an employee to the point of undue hardship where mask mandate interferes with the employee’s creed
- Creed is not defined in the *Code*, but has been interpreted to include some of the following characteristics:
  - A sincere and deeply held belief
  - Deeply linked to the persons self-definition and spiritual fulfillment
  - A comprehensive and overarching system of belief that governs one’s conduct and practices
  - Address questions of human existence, including about life, purpose, death, and the existence or non-existence of a Creator
  - A connection or an organization of community that professes a shared system of belief

Mask Mandates and Human Rights

Creed

Sharma v. Toronto (November 7, 2020), (HRTO)

- The fact the complainant disagreed with covering his face for "unsubstantiated claims" and considered it his civic duty to be critical of government and its decisions was not a creed

Mask Mandates and Human Rights

Creed

The Worker v. The District Managers (April 8, 2021), (BCHRT)

- The worker was fired for refusing to wear a mask because of his creed
- The worker said he was made in God's image and that covering his face was dishonorable to God
- The worker referred to his God-given ability to breath
- He claimed that mask wearing did not protect anyone from viruses and so he could not live a lie

Mask Mandates and Human Rights

Creed

The Worker v. The District Managers (April 8, 2021), (BCHRT)

- The complaint was rejected because the complainant did not provide any facts that mask wearing was prohibited by any religion and that not wearing a mask was connected to his spiritual faith
- The complainant's fundamental objection was that mask wearing was an ineffective and arbitrary rule

Thank you!

LUNCH BREAK

Ducking the Jab: “MANDATORY” COVID VACCINATION POLICIES

Presented by:
Jeremy Schwartz

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Key updates

Received at least 1 dose

Total population	12 and older
77.68% (29,706,748)	**88.39%** (29,596,406)

Partially vaccinated

Total population	12 and older
3.72% (1,422,367)	**4.15%** (1,388,672)

Fully vaccinated

Total population	12 and older
73.96% (28,284,381)	**84.25%** (28,207,734)

Partially vaccinated since last week's report

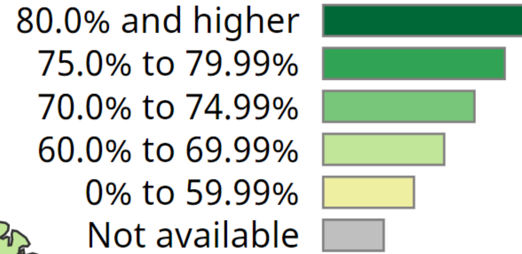
Total population	12 and older
0.25% (92,818)	**0.28%** (93,085)

Fully vaccinated since last week's report

Total population	12 and older
0.52% (198,044)	**0.59%** (197,129)

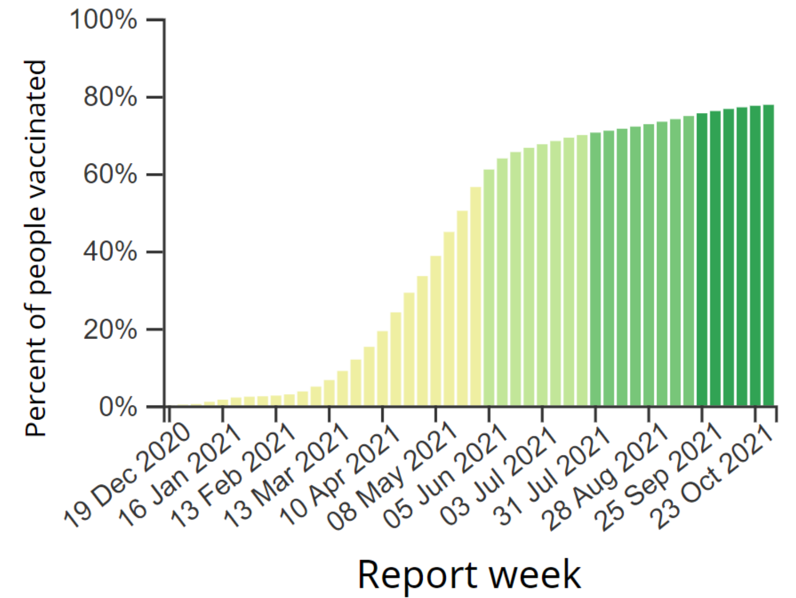
Source (as of November 8, 2021): https://health-infobase.canada.ca/covid-19/vaccination-coverage/

Canada 77.68%



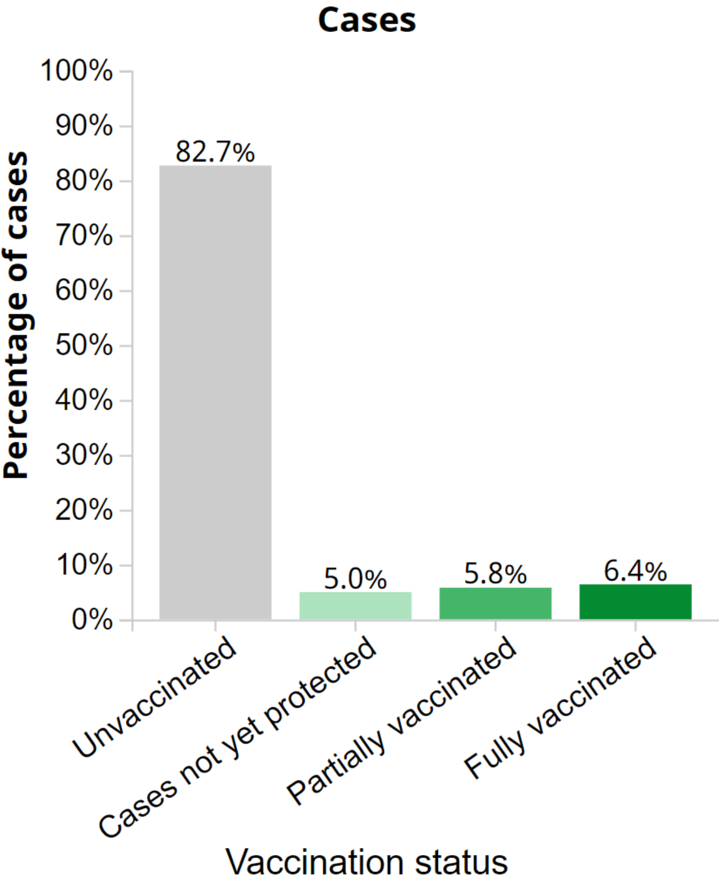
76.26%
71.88%
66.32%
79.60%
73.40%
72.57%
75.65%
77.55%
78.70%
86.01%
82.70%
81.62%
81.03%

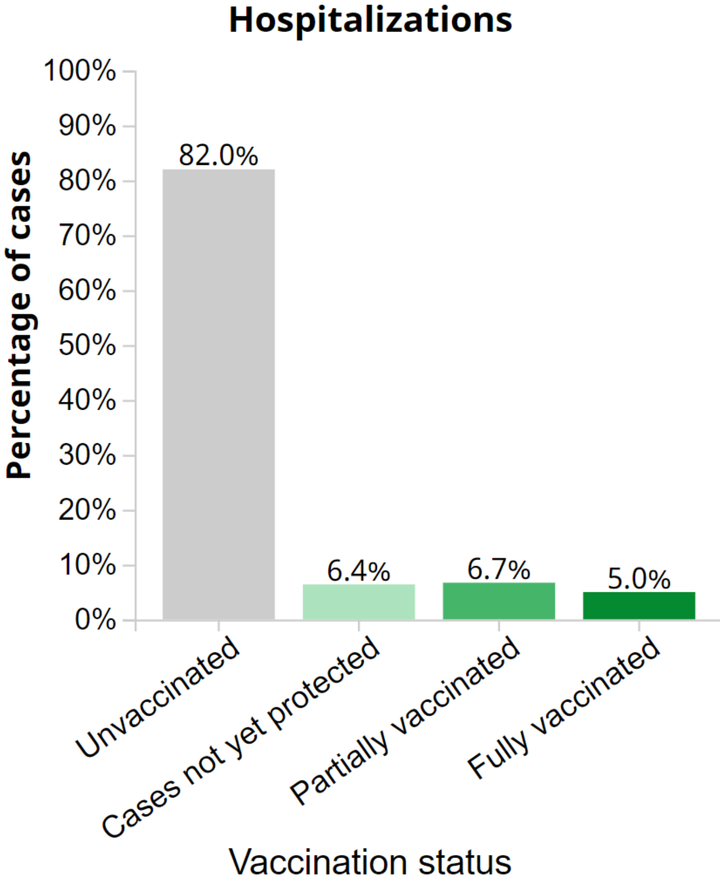
The cumulative percent of people who have received **at least 1 dose** of a COVID-19 vaccine in **Canada** was **77.68%**, as of October 30, 2021.

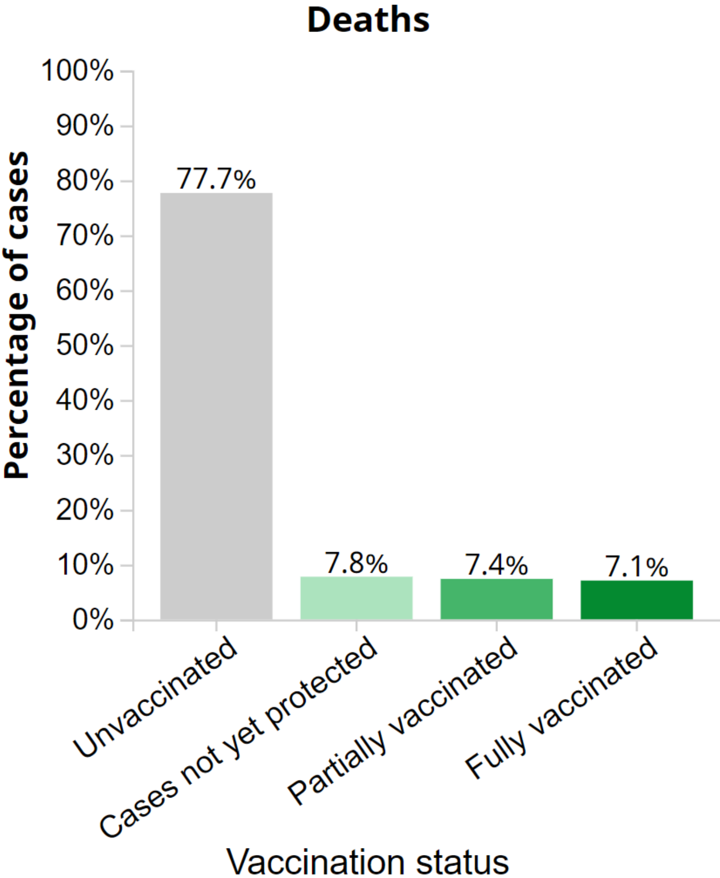


Source (as of November 8, 2021): https://health-infobase.canada.ca/covid-19/vaccination-coverage/

Figure 5. Distribution of confirmed COVID-19 cases reported to PHAC by vaccination status as of October 16, 2021



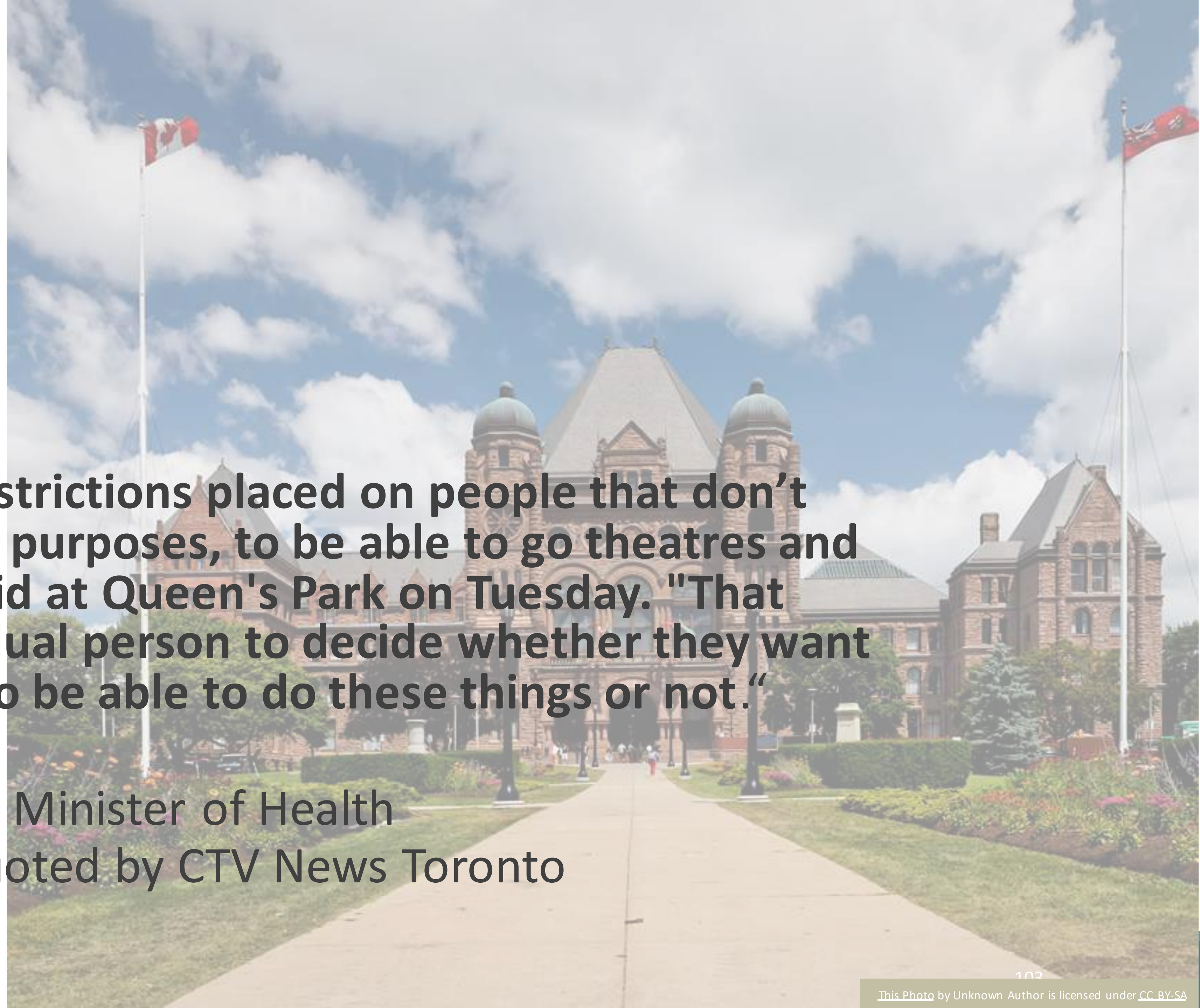




Source (as of November 8, 2021) : https://health-infobase.canada.ca/covid-19/epidemiological-summary-covid-19-cases.html

Just the facts

- Children:
  - (Roughly) 4.3 million children under 12 in Canada
  - >20% daily cases, but 12% of population
  - Per Public Health Agency of Canada: cause is unvaccinated >12
- About 59 million doses administered in Canada as of last week
- Compared to unvaccinated, fully vaccinated 80% less likely to be hospitalized and 66% less likely to die as a result of their illness (not adjusted for co-morbidity)



Early days…

"There may be some restrictions placed on people that don’t have vaccines for travel purposes, to be able to go theatres and other places," Elliott said at Queen's Park on Tuesday. "That will be up to the individual person to decide whether they want to receive the vaccine to be able to do these things or not.“

Christine Elliott, Ontario Minister of Health
December 8, 2020 as quoted by CTV News Toronto

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Vaccination Req'ts By Province <u>for the Public</u>

- Alberta: Proof + app for "non-essential"
- B.C.: Proof + app for "non-essential"
- Manitoba: Proof + app for "non-essential"
- N.B.: Proof for "non-essential" (no app, pre-reg. to enter prov. w/exceptions)
- Nfld. & Labrador: Proof for "non-essential" (no app, "retail" exempt)
- N.S.: Proof for "non-essential" (no app, "retail" exempt)
- Ontario: Proof + app for "non-essential"
- P.E.I: Proof for "non-essential" (no app, "retail" exempt)
- Quebec: Proof + app for "non-essential"
- Saskatchewan: Proof for "non-essential" (no app)
- Yukon: Vaccine passport for travelers, not within territory

Legislation viz. Employment

Private-sector: Spotty at best

Federal (public) sector employees (c.268,000 employees) = mandatory vaccination (human rights exemptions)

- 95.3% fully vaccinated
- 2.7% partially immunized
- 1.2% (c.3,150) have requesting exemption

Provinces have generally implemented vaccinate or test policies, even in high-risk settings for public/quasi-public sector employees

Chief Medical Officer Advice

O.Reg. 364/20 now requires employers to follow comply with any advice, recommendations, and instructions issued by local public health officials about vaccination policies.

Employers legally bound to follow the advice that the specific public health unit has issued.

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Chief Medical Officer Advice

Most of the public health units have "strongly recommended" that employers implement vaccination policies and have provided "tool kits" to assist in the developments of these policies.

Most public health units do not mandate that employees be vaccinated. It is usually suggested that a testing and PPE regime be considered for employees who refuse to get vaccinated.

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Chief Medical Officer Advice

London Middlesex issued a directive "strongly recommending" that all employers and business operators implement workplace COVID-19 vaccination policies, requiring all employees, volunteers, and contractors who have in-person interactions to be vaccinated against COVID-19, with exemptions for medical conditions and other protected grounds under the Ontario Human Rights Code.

A "strong recommendation" is not usually the same thing as imposing a mandatory legal requirement. Mandatory directives usually includes such words as "*shall*" or "*required*". May be wiggle-room or a defence; but employers are strongly encouraged to follow the recommendation.

Supporting Ontario's Recovery Act, 2020

Prohibits causes of action against "any person as a direct or indirect result of an individual being or potentially being infected with or exposed to coronavirus (COVID-19) on or after March 17, 2020, as a direct or indirect result of an act or omission of the person" if the person acted or made a "**good faith**" effort to act, in accordance with public health guidance and laws relating to COVID-19, and if the act or omission does not constitute "**gross negligence**."

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OHSA General Duty Clause

Section 25(2)(h) of the *Occupational Health and Safety Act* requires employers to take all precautions reasonable in the circumstances for the protection of workers.

The Ministry of Labour has taken the position that failing to follow health and safety standard not referenced in legislation can be treated as a breach of the general duty clause.

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Inovata Foods Corp., 2020 CanLII 49519 (ON LRB)

"The Board recognizes that we are in a dynamic and evolving situation where the facts and risks must be constantly revaluated in light of new and emerging evidence and experience. Information on how to best control the virus is subject to constant revaluation and possible change but reasonable precautions must be taken based on the available evidence at this time. At present, it clearly appears that the risks of not masking at all would outweigh the risks of masking. While there is a risk of contamination from touching face masks while working on the production line, it is subject to mitigation and the much greater risk would appear to be to have no mask wearing at all."

Typical: “Mandatory” Policy Components

01

Provide proof of full vaccination against COVID-19 by set date; <u>or</u>

02

Provide proof of a medical or other human rights reason for not being vaccinated against COVID-19; <u>and/or</u>

03

Work unvaxxed):

- Complete a COVID-19 vaccination educational session; <u>and</u>
- Submit to regular testing

04

Layoff, leave of absence, termination (without cause)

Can an employer require an employee to be vaccinated?

- Employees can't be "forced" to be vaccinated

- But…Consequences of being unvaccinated?
  - Unpaid leave?
  - Layoff for lack of available "safe" work?
  - Accommodation (for valid human rights exemptions)?
  - Terminated for "just cause" or "without cause"?

Human Rights Issues

- Likely Human Rights Grounds:
  - Disability (allergy to vaccine, heart conditions, conflict with meds)
  - Religious/Creed
- Duty to accommodate disability to the point of "undue hardship"
- OHS risk (for worker/coworkers/public) may be "undue"
- Accommodation options: working from home, masking, testing, leaves of absence and social distancing

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Human Rights Issues

- Employee has an obligation to advise an employer of their need for accommodation, duty to cooperate and provide information
- Human rights obligations are triggered by a discrimination based on a prohibited ground
- Does not deal with whether employer action was "fair" or "reasonable"
- Question of whether vaccine is a "BFOR"

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Human Rights Code Definition of "Disability"

"(a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes…
(b) a condition of mental impairment or a developmental disability…"

Claim for workers' compensation benefits

"Disability" interpreted broadly, but mere speculation about vaccines or questionably sourced medical "studies" unlikely enough

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College of Physicians and Surgeons Advice to Doctors

There are very few acceptable medical exemptions to the COVID-19 vaccination

Circumstances of the pandemic support physicians declining to write notes or complete forms when the patient making the request does not have a medical condition that warrants an exemption

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College of Physicians and Surgeons Advice to Doctors

Clearly suggests that the College is making it clear to Doctors that they are not to provide medical notes to employees unless there is a clear medical justification

Given the fact that legally legitimate exceptions are rare, it will be hard for employees to get an exemption

Doctors under investigation for providing invalid exemptions

Four doctors being taken to court for failing to cooperate

One doctor's license suspended (allegedly evidence to support that patients would otherwise be exposed to risk of harm or injury)

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Human Rights Commission Guidance

While receiving a COVID-19 vaccine remains voluntary…mandating and requiring proof of vaccination to protect people at work or when receiving services is generally permissible as long as protections are put in place for accommodation of Code related exemptions

OHRC says that choosing not to be vaccinated based on personal preference does not have the right to accommodation under the *Code*.

This Photo by Unknow

Religious Exemptions

The *Human Rights Code* prohibits discrimination based on “creed” (religion). The Tribunal has defined “creed” to include spiritual beliefs which go beyond the traditional organized religions which are common in Canada.

A political opinion has not historically been considered a religious belief in Canada. We can expect to see religious exemption requests rise in light of the tight limits on medical notes.

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Syndicat Northcrest v. Amselem, 2004 SCC 47

Religious beliefs are those that have *"…a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith…"*

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Sharma v. Toronto, 2020 HRTO 949 (CanLII)

"Creed is not defined in the Code, but most often engages an applicant's sincerely held religious beliefs or practices. The case law has left open the question of whether a political perspective, such as communism, that is made up of a recognisable cohesive belief system or structure might constitute a creed. However, mere political opinion does not engage creed."

"In essence, the applicant disagrees with the City's policy choice to enact the By-Law because he does not think that the efficacy of masks has been sufficiently proven. This does not engage creed within the meaning of the Code. The applicant's recourse is to engage with the City's elected officials about his concerns, not to file an Application alleging discrimination because of creed."

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What does the caselaw tell us?

Almost of all of the cases are labour arbitration decisions from the healthcare setting

The cases primarily relate to is reasonable to require healthcare workers to get a flu shot and in some instances require those who refuse the shot to wear a mask

Unions have generally but not always been successful in resisting mandatory vaccinate or mask policies

Health Employers Assoc. (B.C., 2013)

- Union challenged vaccinate or mask policy (re flu shot)
- Arbitrator came to a different conclusion than in subsequent Ontario cases and ruled in favour of the employer
- Expert evidence tipped the scale in the employer's favour
- Arbitrator determined that safety concerns trumped employee privacy rights
- Our view is that is the approach more likely to be taken in most healthcare settings during COVID

St. Michaels Hospital v ONA (Ont., 2018)

- Union challenged vaccinate or mask policy (re flu shot)
- Arbitrator found insufficient evidence that masking was effective
- Visitors to the hospital did not need to mask
- Distinguishable from COVID-19 pandemic

Ataellahi v. Lambton County (EMS), 2011 HRTO 1758 (CanLII)

In his written submissions, the applicant suggests that he believes he is being "*discriminated against*" because the requirement to be immunized is not uniformly applied to all health care workers and other emergency personnel…. However, the Tribunal does not have a general power to inquire into all claims of unfair treatment, but only those that are specifically based on grounds listed in the Code. Specifically, "occupation" is not an enumerated ground.

Testing as an alternative for non-Code protected cases

This is a very fact specific question and will depend upon the nature of the workplace and the inherent risk of transmission.

Employees who refuse to get vaccinated for non-Code related reasons will face significant legal hurdles.

There is an open question about whether an employer should adopt a regular testing and PPE regime for employees who refuse to get vaccinated for reasons not protected by the *Human Rights Code*.

Work Refusals

Work refusals may be successful in the absence of vaccination policies that comply with local public recommendations

It will be harder for employees to successfully advance a work refusal if an employer is in compliance and has taken reasonable precautions

OHS law not meant to eliminate every conceivable risk in the workplace

Practical Thoughts

Comply	Comply with public health recommendations and updated legislation and regulations
Don’t Politicize	Do not get into political or legal debates with employees about vaccinations
Avoid Fear	Do not let fear of litigation prevent the company for making difficult decisions
Privacy	Remember to respect the privacy rights of employees
Calm	Keep calm and carry on

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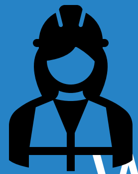
Thank you!

Health and Safety Due Diligence During the Pandemic: Lessons Learned and What's Next?

Presented by
Haadi Malik



Work Refusals & the Ontario *Occupational Health and Safety Act*

Employees have the right to refuse work that they consider unsafe without fear of reprisal if they have reason to believe that it is “likely to endanger” themselves or others.

Work refusals that cannot be resolved between the employee and employer must be reported to the Ministry of Labour, Training and Skills Development

On receiving a report of a work refusal, Ministry inspectors investigate and render a written decision on the refusal

Section 43(3) of the *Occupational Health and Safety Act*

Refusal to work

43(3) A worker may refuse to work or do particular work where he or she has reason to believe that,

(a) any equipment, machine, device or thing the worker is to use or operate is likely to endanger himself, herself or another worker;

(b) the physical condition of the workplace or the part thereof in which he or she works or is to work is likely to endanger himself or herself;

(b.1) workplace violence is likely to endanger himself or herself; or

(c) any equipment, machine, device or thing he or she is to use or operate or the physical condition of the workplace or the part thereof in which he or she works or is to work is in contravention of this Act or the regulations and such contravention is likely to endanger himself, herself or another worker.

*Certain categories of workers are exempt under s.43(1) and (2)

Employer’s Duty to Investigate a Work Refusal

At first instance, employers are responsible for investigating work refusals. This normally involves:

- conducting the investigation in the presence of the refusing worker and a health and safety representative or worker representative;
- recording the circumstances of the work refusal and investigation; and
- ensuring any necessary action to remedy the “danger" is taken.

If the matter is still not resolved and the employee continues to refuse to work, then the refusal must be reported to the Ministry of Labour, Training and Skills Development, which will inspect and launch its own investigation.

Work Refusals: Lessons Learned from SARS Cases

- *Cole v Air Canada*
  - Work refusals by two ticket agents who would interact with airport attendees or passengers at Pearson International Airport
- *Caverly v Canada (Human Resources Department)*
  - Work refusals by Investigation and Control officers in a Human Resources center who would meet with clients who came directly from an international airport to apply for social insurance numbers
- *Chapman v Canada (Customs and Revenue Agency)*
  - Officer employed by CCRA at Pearson International Airport refused to work because he said he was not provided personal protective equipment and information to protect his health and safety

How have COVID-19 related work refusals held up?

Good news for employers: by and large, a vast majority of COVID-19 related work refusals have been denied by the Ministry of Labour, Training and Skills Development

However, employers must nonetheless investigate, try to remedy, and report any unresolved work refusals to the Ministry

Practically speaking, what do COVID-19 related work refusals mean for employers?

- The Ministry of Labour, Training and Skills Development's approach to denying most COVID-related work refusals seems to recognize the real purpose of the OHSA work refusal provisions—that is, to provide the employee a *legitimate* avenue to refuse actually unsafe work (i.e. where there is a real risk of injury or even death).
- For employers, as long as they comply with the law, there appears to be little to worry about.

What are the latest recommendations from public health authorities regarding COVID-19?

Employers may be required to notify local public health authorities of workplace COVID-19 outbreaks

Workplace vaccination policies strongly recommended by many local health units in Ontario

Ontario has introduced its *Plan to Reopen,* which may change how we approach workplace COVID safety

COVID-19 related Occupational Health and Safety Inspections

- Ontario has ramped up workplace OHS inspections in workplaces such as construction sites, big box stores, manufacturers, and warehouses
- From January to April 2021, the Ministry of Labour, Training and Skills Development conducted 15,000 COVID-19 workplace inspections, but only issued 450 tickets and ordered stoppages of work just 24 times

Do employers face a risk of legal liability if an employee contracts COVID-19 at work?

Employees who are covered by the Workplace Safety and Insurance Act may be able to file WSIB claims

Employees not covered by the WSIB regime may be able to sue in court

In any case, it may not be easy for the employee to prove that they contracted the virus in the course of employment

The *Supporting Ontario's Recovery Act*: No lawsuit protection for employers

The *Supporting Ontario's Recovery Act,* introduced by Bill 218 in November 2020, bars any cause of action (with exceptions) against any person as a direct or indirect result of an individual being or potentially being infected with or exposed to COVID-19 on or after March 17, 2020 as a result of an act or omission of the person if:

1) the person acted or made a good faith effort to act in accordance with public health guidance and federal, provincial or municipal laws relating to COVID-19; and
2) the person's act or omission does not constitute gross negligence.

Exception: Employers are not protected from a cause of action of an employee with respect to exposure to or infection with COVID-19 that occurred in the course of employment.

WSIB Claims: remember your reporting obligations

According to the WSIB:

1. If the employee tests positive for COVID-19 and tells you that they believe they contracted COVID-19 in the workplace, you are required to report the illness to the WSIB, even if you feel that the employee did not contract it at work

2. You also have an obligation to report an employee's COVID-19 (they have a diagnosis/positive test or symptoms of COVID-19) when you have a reason to believe there was a potential workplace exposure (e.g. other employees have tested positive)

What types of COVID-19 related WSIB are compensable?

- Adverse reactions to vaccination *may* be compensable, but (1) vaccination needs to be a compulsory requirement of employment and (2) the reaction needs to be truly adverse (a serious, unexpected reaction to vaccination; e.g. not the mild short-term flu-like symptoms one could ordinarily expect post-vaccination)
- Getting COVID while working from home would not be compensable. However, other injuries from working from home, if they can be shown to be in the course of employment, may be compensable

Do employers' COVID-19 OHS obligations only go as far as meeting minimum governmental standards?

Ontario (Labour) v. Quinton Steel (Wellington) Limited, 2017 ONCA 1006:

"[45] It may not be possible for all risk to be eliminated from a workplace, as this court noted in *Sheehan Truck*, at para. 30, **but it does not follow that employers need do only as little as is specifically prescribed in the regulations. There may be cases in which more is required – in which additional safety precautions tailored to fit the distinctive nature of a workplace are reasonably required by s. 25(2)(h) in order to protect workers**. The trial justice's erroneous conception of the relationship between s. 25(2)(h) and the regulations resulted in his failure to adjudicate the s. 25(2)(h) charge as laid."

COVID-19 health and safety: best practices

Prepare	Prepare a COVID-19 safety plan or make sure your current plan is up to date
Comply	Be alert to the evolving COVID-19 guidance or orders issued by public health authorities and take steps to ensure compliance
Keep	Keep your workplace policies (i.e. COVID, overtime and remote work policies) up to date

Thank you!

BREAK

Legal Roundup

- Hot topics for collective bargaining: Inflation, Reconciliation, and Pay Equity
- Impact of the Supreme Court’s recent decision on the litigation of human rights claims for unionized employers
- Latest caselaw on termination clauses
- Recent developments for federally regulated employers
- COVID sick pay leave

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