EMPLOYMENT, LABOUR & EQUALITIES LAW WEBINAR SERIES

MANDATORY VACCINATIONS, RAPID TESTING, SCREENING, RECORD RETENTION AND THE LAW

Christopher Andree, Partner – Waterloo Tushar Anandasagar, Associate – Waterloo Cédric Marsan-Lafond, Associate – Montréal

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SPEAKERS



CHRISTOPHER ANDREE Partner

chris.andree@gowlingwlg.com
+1 519 575 7505



TUSHAR ANANDASAGAR

tushar.Anandasagar@gowlingwlg.com +1 519 575 7534



CÉDRIC MARSAN-LAFOND

Associate

cedric.marsan-lafond@gowlingwlg.com

+1 514 878 9641 ext. 65260



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AGENDA

Workplace Vaccination Policies

- 1. Sources of Authority
- 2. Risks of Mandatory Vaccination Policy
- 3. Risks of No Mandatory Vaccination Policy
- 4. Vaccination Incentives
- 5. Practical Issues in the Future



Legislation

- Occupational Health & Safety legislation
 - "Every precaution reasonable in the circumstances"
- School Children
- Day Cares



Legislation (Quebec)

- Charter of human rights and freedoms
- Civil Code of Quebec
- Act respecting occupational health and safety
- Ministerial Order 2021-024



Case law (Quebec)

- Long term care facilities
 - Influenza outbreaks
 - Employee removed from the workplace without pay for refusing to be vaccinated



Case law (outside Quebec)

- Unionized workplaces
- Health care settings
- Congregate living
- "Vaccinate <u>or</u> Mask" may not be sufficient for COVID-19



2 - RISKS OF MANDATORY VACCINATION POLICY

Requirement to undergo a medical procedure

The ability to justify may vary

- More congregate setting = higher need
 - Health Care vs. Long Term Care vs. Food Processing vs Retail vs. Office
 - Blended / hybrid operations



2 – HUMAN RIGHTS RISK

Physical reasons to reject vaccination

• Allergy / pregnancy

Religious reasons to reject vaccination

- Dutch Reform, Faith healing denominations
- Alleged use of aborted fetus cells to develop vaccine

Strongly held view to reject vaccination

• Anti-vaccination, QAnon



2 - HUMAN RIGHTS RISK

Accommodation

Undue hardship test

• Not inconvenience, inconsistency, inefficiency, moderate cost

BFOR

Health and Safety Exception under Code

Employee's Duty to cooperate



2 - HUMAN RIGHTS RISK

• Fundamental Rights (Quebec)

- Right to integrity and inviolability (s. 1 Charter of Human Rights and Freedoms and ss. 3 and 10 Civil Code of Quebec)
- Right to self-determination with respect to healthcare (s. 11 Civil Code of Quebec)
- Right to equality (s. 10 of the Charter of Human Rights and Freedoms)



2 – PRIVACY RISK

• Quebec:

- Charter of human rights and freedoms
- Civil Code of Québec
- Act respecting the protection of personal information in the private sector
- The employee's medical information is private and confidential.
- Is the vaccination required by the nature of the activities?



2 - PRIVACY RISK

Ontario vs. British Columbia & Alberta

Ontario: Common law – collection, use, disclosure

• Consent?

Supreme Court of Canada

• *Irving* - "Reasonable" purpose?

Charter

• Bodily Integrity?



2 - CONSTRUCTIVE DISMISSAL RISK

Consequences of refusal to vaccinate or provide proof of vaccination

- Denial of access to work?
- Denial of attendance on customers?
- Requirement to wear PPE?
- Isolation from teams/ opportunities?

Work refusal under OHSA



2 – WORKERS COMPENSATION / NO-FAULT COMPENSATION

Employee suffers negative reaction to vaccine (Quebec):

- Act respecting industrial accidents and occupational diseases
 - No civil liability against the employer
- Vaccine Injury Compensation Program
 - No-fault regime to compensate any victim of bodily injury caused by vaccination.
 - Public Health Act and Regulation
 - Decree 592-2021 (April 21, 2021)



2 – TORT / NEGLIGENCE RISK

Employee suffers negative reaction to vaccine:

- Ontario: WSIB Coverage
 - Bar to civil claims
- Canadian Vaccine Injury Support Program



3 - RISK OF NO MANDATORY VACCINATION POLICY

Ontario HPPA – Section 22

So far - Toronto, Peel Region and Hamilton Public Health

- Stated intention to close workplaces with transmission
 - 2+ cases = reporting obligation
 - 5+ cases and reasonable to believe some were transmitted at work



3 - RISK OF NO MANDATORY VACCINATION POLICY

• Closure of the workplace (Quebec) :

- Act respecting occupational health and safety
 - Order the suspension of work or the complete or partial shut-down of a workplace and, if necessary, affix seals, if he considers a worker's health, safety or physical well-being to be endangered.
- Public Health Act
 - Order the closing of premises or give access thereto only to certain persons or subject to certain conditions.



4 - INCENTIVES TO PROMOTE VACCINATION

Paid Sick Days (Statute vs. Policy)

Additional pay / incentive

- Risk of shaming
- Risk of collection of medical information

Education vs. propaganda

Perception of communal welfare vs. self-interest



4 - INCENTIVES TO PROMOTE VACCINATION

Quebec protected leaves of absence

Section 79.1 of the Act respecting labour standards: 26 weeks over a period of 12 months for absences owing to sickness (unpaid)

Sections 79.7 and 79.16: 2 paid days for absences owing to sickness or family or parental absences.



5 - PRACTICAL ISSUES IN THE FUTURE

Dishonesty about vaccination status

- Stating vaccinated when really not allowed to RTW
- Stating not vaccinated when really are to avoid return to workplace

Two classes of employees

• Advantages / disadvantages



5 - PRACTICAL ISSUES IN THE FUTURE

Return to "normal" working arrangements

- No more kids / pets / flex hours
- Designated workspace in home
- Wi-Fi quality / cost
- Monitoring software / protocol
- Hours of work / productivity

Vaccine "Passport"



USEFUL RESOURCES

Gowling WLG – COVID-19 Insights

https://gowlingwlg.com/en/topics/covid-19-how-will-coronavirus-impact-your-busines/canadian-resources/

Insights: Mandatory Vaccinations



https://gowlingwlg.com/en/insights-resources/articles/2020/workplaces-vaccination-policies-tomandate-or-not/



QUESTIONS?



CHRISTOPHER ANDREE

chris.andree@gowlingwlg.com
+1 519 575 7505



TUSHAR ANANDASAGAR



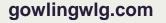


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