

EMPLOYMENT, LABOUR & EQUALITIES  
LAW WEBINAR SERIES

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

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# SPEAKERS



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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

# 1 - SOURCES OF AUTHORITY FOR POLICY

## Legislation

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

# 1 - SOURCES OF AUTHORITY FOR POLICY

## Legislation (Quebec)

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

# 1 - SOURCES OF AUTHORITY FOR POLICY

## Case law (Quebec)

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

# 1 - SOURCES OF AUTHORITY FOR POLICY

## Case law (outside Quebec)

- Unionized workplaces
- Health care settings
- Congregate living
- “Vaccinate or 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-business/canadian-resources/>

## Insights: Mandatory Vaccinations

<https://gowlingwlg.com/en/insights-resources/articles/2020/workplaces-vaccination-policies-to-mandate-or-not/>




# QUESTIONS?



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**MAY 27, 2021**