

EMPLOYMENT, LABOUR & EQUALITIES LAW WEBINAR SERIES

ALL THINGS COVID-19 FOR HR PROFESSIONALS

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SPEAKERS



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AGENDA

COVID-19 For HR Professionals – Where are we now?

1. Provincial Vaccination/Safe Workplace Requirements
2. Human Rights & Exemptions
3. Case Law Dealing with C-19 Issues Case Law
4. Mitigating Liability
5. Q&A

1 – VACCINATION REQUIREMENTS

Federal

- *Transportation sector (air, rail, marine & its travelers):*
 - Federally regulated air and rail must be fully vaccinated by Oct. 30; Marine transportation sectors to establish vaccination policies for their organizations by Nov. 1
 - Employees must be fully vaccinated or unable to work
- *Public Sector:* Must be fully vaccinated by Oct. 29, no rapid testing. If do not comply (and no valid exemption), subject to admin leave without pay as early as Nov. 15
 - Applies whether teleworking, working remotely, working on-site and to contracted personnel
- *Private Sector:* Including banks, Canadian Blood Services, Canada Post, mines etc.



1 – PROVINCIAL VACCINATION REQUIREMENTS

Ontario

- *Health Sector:* All LTCH staff/workers vaccinated by Nov. 15, or barred from entering LTCH to work. Rapid testing for those with a valid medical exemption
- *Public Sector:*
 - *Hospitals, ambulance services, home & community care service providers* -- must establish C-19 policy by Sept. 7 requiring proof of full vaccination. Medically exempt to undergo rapid testing at least once every 7 days. Unvaccinated have access to education session
 - Schools – C-19 vaccination status disclosure policy & unvaccinated must undergo rapid testing at least 2x/week; Police Services varies by area; Multiple cities/townships/municipalities
- *Private Sector - O Reg 577/21:* requires businesses/organizations to comply with “any advice, recommendations and instructions” issued by CMOH re: C-19 vaccination policy.

1 – PROVINCIAL VACCINATION REQUIREMENTS

Alberta

- *Health Sector:* Alberta Health Services requires all employees/workers and contracted healthcare providers to be fully vaccinated by Nov. 30 or face unpaid leave of absence
- *Public Sector:* Public service must be fully vaccinated against C-19 by Nov. 30. Unclear what happens to unvaccinated without an exemption



1 – PROVINCIAL VACCINATION REQUIREMENTS

Quebec

- *Health Sector:* Health-care workers now have until Nov. 15 to get fully vaccinated or risk being suspended without pay. Health workers undergoing COVID-19 screening tests must now be taken outside working hours and the employee receives no remuneration or reimbursement costs related to such a test.

British Columbia

- *Health Sector:* All employees in long-term care and assisted living must have a first dose by Oct. 12 and a second dose within 35 days of the first, or they will have to take a mandatory leave of absence without pay.
- *Public Sector:* Public service employees working in core government or ministries required to be fully vaccinated by Nov. 22. Unclear re: rapid testing and unvaccinated

1 – PROVINCIAL VACCINATION REQUIREMENTS

Manitoba

- *Health & Public Sector:* all provincial employees who work with vulnerable populations to be fully immunized for COVID-19 by Oct. 31, or undergo regular testing and a negative rapid-test result taken within 48 hours of the start of any shift. (Including teachers, health-care employees and staff at licensed child-care centres)

New Brunswick

- *Health Sector:* Mandatory vaccination for health-care workers took effect Sept. 7,
- *Public Sector:* the same as for civil servants
- *Private Sector:* A mandatory order requires certain businesses to have a vaccination or masking-and-testing workplace policy (e.g. festivals, restaurants, food courts, colleges/universities, movie theatres, night clubs, organized group rec sports etc.)

1 – PROVINCIAL VACCINATION REQUIREMENTS

Newfoundland & Labrador

- Full vaccination required for employees/workers for:
 - *Health Sector:* long-term care and other residential care homes, businesses that employ members of regulated health professions, some community agencies, private health care clinics, fire departments, ambulance services, home care providers,
 - *School:* regulated childcare providers, schools and post-secondary institutions, and
 - *Other:* any of the non-essential businesses, services and events where NLVaxPass is required for entry.
- *Public Sector:* Mandatory vaccination policy requiring to all provincial government workers and contractors to be fully vaccinated by December 17, 2021. The new policy will apply

1 – PROVINCIAL VACCINATION REQUIREMENTS

PEI

- *Congregate Settings:* Beginning Sept. 27, employees working in congregate settings, including schools, provincial group homes, and correctional facilities required to be fully vaccinated or participate in regular testing up to 3x/week

Saskatchewan

- *Health Sector:* Saskatchewan Health Authority announced its employees will be required to provide proof of COVID-19 vaccination beginning Oct. 1, with a phased approach.
- *Public Sector:* Effective Oct. 1, public employers require employees to be fully vaccinated or provide evidence of a negative COVID-19 test result at least every 7 days

1 – PROVINCIAL VACCINATION REQUIREMENTS

Nova Scotia

- *Health & Education Sector:*
 - Proof of vaccination for health-care workers required by Nov. 13. Vaccine mandate covers health care and education (including those in LTCH, public school teachers and those providing services in schools, paramedics, physicians)
 - If an employee is not fully vaccinated by Nov. 30, they will be placed on unpaid administrative



1 - OTHER REQUIREMENTS: SCREENING

RULES FOR AREAS AT STEP 3 AND AT THE ROADMAP EXIT STEP, *under Reopening Ontario (A Flexible Response to COVID-19) Act, 2020.*

2. (3) The person responsible for a business or organization that is open shall operate the business or organization in compliance with any advice, recommendations and instructions issued by the Office of the Chief Medical Officer of Health, or another public health official, on screening individuals by, among other things,

- (a) posting signs at all entrances to the premises of the business or organization, in a conspicuous location visible to the public, that inform individuals on how to screen themselves for COVID-19 prior to entering the premises; and
- (b) actively screening every person who works at the business or organization before they enter the premises of the business or organization.
- This is the Ontario webpage with the screening questions developed by the Ministry of Health:
[https://covid-19.ontario.ca/screening/worker/.](https://covid-19.ontario.ca/screening/worker/)

1 – OTHER REQUIREMENTS: POLICY

RULES FOR AREAS AT STEP 3 AND AT THE ROADMAP EXIT STEP under Reopening Ontario (A Flexible Response to COVID-19) Act, 2020, S.O. 2020, c. 17

Safety Plan

- 3.3 (1) The person responsible for a business that is open shall prepare and make available a safety plan in accordance with this section, or ensure that one is prepared and made available, no later than seven days after the requirement first applies to the person...
- (4) The safety plan shall be in writing and shall be made available to any person for review on request.

2 - HUMAN RIGHTS

What are the human rights tribunals saying about whether requiring vaccination or requesting vaccination status is discriminatory or otherwise a violation of human rights law?

2 – HUMAN RIGHTS: GUIDANCE

Ontario Human Rights Commission:

While receiving a COVID-19 vaccine remains voluntary, the OHRC takes the position that **mandating and requiring proof of vaccination to protect people at work or when receiving services is generally permissible under the Human Rights Code (Code) as long as protections are put in place** to make sure people who are unable to be vaccinated for Code-related reasons are reasonably accommodated. This applies to all organizations.

Organizations with a proven need for COVID-related health and safety requirements might also put **COVID testing in place as an alternative to mandatory vaccinations** or as an option for accommodating people who are unable to receive a vaccine for medical reasons. Organizations should cover the costs of COVID testing as part of the duty to accommodate.



Ontario
Human Rights Commission

Commission ontarienne des
droits de la personne

2 - HUMAN RIGHTS: PROTECTED GROUNDS

There are only 2 known grounds upon which an employee can claim protection under human rights legislation:

1. Medical (Disability)
2. Religious/Creed

2 – HUMAN RIGHTS - MEDICAL EXEMPTIONS

Ontario

1. Pre-existing Conditions
 - Severe allergic reaction; myocarditis
2. Contraindications to AstraZeneca/Covishield Vaccine Series
 - Capillary leak syndrome; thrombosis; thrombocytopenia
3. Adverse Events Following C-19 Immunization
 - Thrombosis with thrombocytopenia; Myocarditis, pericarditis; serious adverse event after
4. Actively receiving monoclonal antibody therapy OR convalescent plasma therapy

MOH Medical Exemptions to COVID-19 Vaccination:

https://health.gov.on.ca/en/pro/programs/publichealth/coronavirus/docs/vaccine/medical_exemptions_to_vaccination.pdf

2 – HUMAN RIGHTS - MEDICAL EXEMPTIONS

Alberta

- Anaphylactic reaction in certain circumstances
- Serious adverse event following vaccine
- Acute disseminated encephalomyelitis & future doses contraindicated
- Participation in C-19 vaccine trials

Quebec

- Allergy to all the C-19 vaccines available in Canada
- Myocarditis or pericarditis following C-19 vaccination



2 – HUMAN RIGHTS - MEDICAL EXEMPTIONS

Manitoba

- Severe reaction after 1st dose (myocarditis, Guillain-Barre Syndrome)
- Receiving treatment that affects ability to mount an immune response so vaccination timed with treatment schedule (e.g. after transplant, certain cancer treatments)
- Severe allergy or anaphylactic reaction that cannot be managed by Allergy Clinic

Newfoundland & Labrador

- Severe allergy that cannot be mitigated
- Myocarditis, pericarditis

New Brunswick

- Permanent
 - Anaphylactic reaction; severe allergy
- Temporary
 - Certain thrombosis, thrombocytopenia
 - Participating in immune-modulating therapies

2 – HUMAN RIGHTS - MEDICAL EXEMPTIONS

British Columbia

- Anaphylaxis to components of both types of vaccines
- Deferral of vaccination recommended for various conditions

PEI

- Not commented specifically

Nova Scotia

- Anaphylaxis or Serious adverse event after 1st dose
- Allergy to component of vaccine
- Capillary leak syndrome
- Thrombosis with thrombocytopenia
- Myocarditis or pericarditis

2 – HUMAN RIGHTS - MEDICAL EXEMPTIONS

Saskatchewan

- Contraindications
 - Certain thrombosis, thrombocytopenia
 - Thrombotic antiphospholipid antibody syndrome
- Limitations
 - Capillary leak syndrome
 - Myocarditis; Pericarditis
- Many listed conditions where deferral / consulting with own doctor recommended

2 – HUMAN RIGHTS - CREED EXEMPTIONS

Developing Issue: COVID-19 Vaccines & Creed

- Breadth of belief systems that could be Creed under the *Human Rights Code*
 - Creed not defined in human rights legislation but includes religious beliefs, practices and non-religious belief systems
- Some religions ban use of certain by-products
- Few religions ban vaccinations altogether
- What documentation is required?
- Does your C-19 policy allow for creed-based exemptions?

2 – HUMAN RIGHTS - CREED EXEMPTIONS

Ontario Human Rights Commission:

Personal preferences and singular beliefs not protected

Receiving a COVID-19 vaccine is voluntary. At the same time, the OHRC's position is that **a person who chooses not to be vaccinated based on personal preference does not have the right to accommodation under the Code.** The OHRC is not aware of any tribunal or court decision that found a singular belief against vaccinations or masks amounted to a creed within the meaning of the Code.

While the Code prohibits discrimination based on creed, **personal preferences or singular beliefs do not amount to a creed for the purposes of the Code.**



Ontario
Human Rights Commission
Commission ontarienne des
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2 – HUMAN RIGHTS - CREED EXEMPTIONS

Sharma v. Toronto (City), 2020 HRTO 949

- Applicant refused to wear a face mask at several stores alleged City of Toronto discriminated against him in services because of Creed & Disability
- HRTO found Creed not engaged
- **Applicant disagreed with policy choice to enact by-law because does not think efficacy of masks has been sufficiently proven**
- Ground of Disability was engaged, but named wrong respondent so Application dismissed



2 – HUMAN RIGHTS - CREED EXEMPTIONS

Dubé v. Dutch Love Cannabis, 2021 HRTO 300

- Applicant submits that their creed exemption from wearing a mask is based on independent scientific studies and common sense
- Application dismissed as allegations not connected to a protected ground
- [6] *In this case, the applicant clearly disagrees with the public health mandate requirement to wear a mask in the respondent's store for a variety of reasons, including the alleged harm of wearing masks, and their philosophical disagreement with the requirement. However, these claims do not relate to the protected ground of creed under the Code. See Sharma at paras. 11-12.*



3 – CASE LAW

Injunctions

ON – *Blake v University Health Network*, 2021 ONSC 7081

- unvaccinated workers challenging a Toronto hospital network's COVID-19 vaccine mandate. ONSC issued a temporary injunction that paused enforcement of the hospital network's deadline for staff to be immunized, which is now lifted. unionized setting & health care.
- Justice Centre for Constitutional Freedoms announced it launched a legal challenge against the province's proof of vaccination mandate



3 – CASE LAW

Injunctions

QB – legal challenge to Quebec's vaccination mandate for health-care workers. Superior Court Justice Michel Yergeau began hearing arguments for an injunction and will render a decision on Nov. 15

SK - The Saskatchewan government won a court case challenging its COVID-19 proof-of-vaccination policy. A Court of Queen's Bench justice has said no to an application for an injunction against the proof of vaccination policy.



3 – CASE LAW

Constitutional Challenges

BC - Two women with physical disabilities filed a constitutional challenge to the provincial government's COVID-19 vaccine cards. The B.C. Supreme Court petition seeks a number of court orders including an injunction staying the legal effect or enforcement of the vaccine card orders.

- Canadian Constitution Foundation filed legal challenge to the BC vaccine passport regime and its discriminatory impact on people who cannot be vaccinated for medical reasons.

MB -- *Gateway Bible Baptist Church et al. v. Manitoba et al.* 2021 MBQB 218

- Ruling that province's public health orders neither unconstitutional nor an undemocratic delegation of power. The two decisions stemmed from a Charter challenge brought forward by a group of churches. The decision found the restrictions were a reasonable response to COVID-19 based on credible science

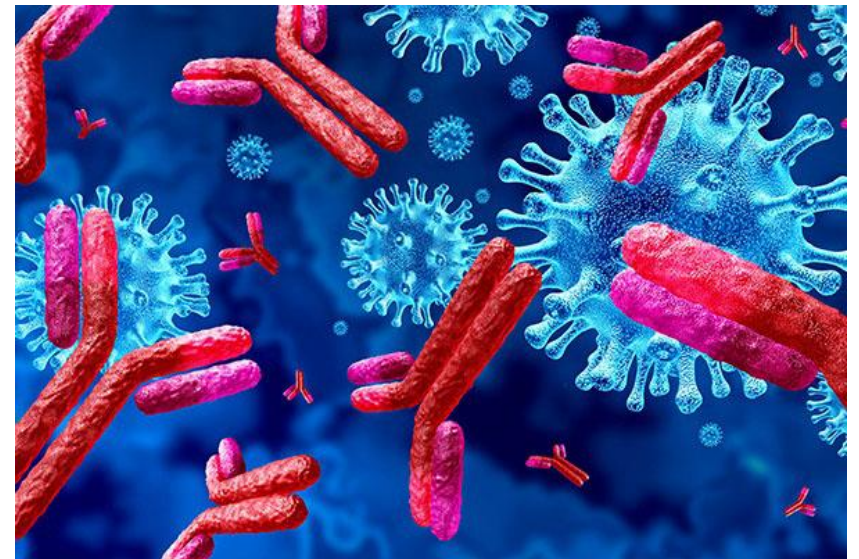
4 – MITIGATING LIABILITY: PUBLIC REACTION

Notice of Liability Letters

- They are usually form letters obtained from the internet
- Don't get frazzled, but don't ignore them

Legal Bulletins/Articles/Blogs

- Plaintiff bar at odds with each other (for once!!!)



4 – MITIGATING LIABILITY WITH VACCINE POLICIES

- Require vaccination only for those employees who will be in physical contact with others while working.
- This does not mean that you must implement remote working if you don't wish to, except for those with a legitimate protected ground. You have the right to require everyone to come to the physical work place.
- Offer alternatives, such as rapid testing/remote working.

5 – MITIGATING LIABILITY WITH RAPID TESTING

- A rapid antigen test is an easy to use point-of-care test that looks for proteins from the COVID-19. Rapid antigen tests:
 - are less sensitive than molecular (diagnostic) tests
 - can be performed anywhere (i.e., on-site, at the place of employment, or at home) by a health professional or trained individual. This could include the person who is being tested ('self-screening') and does not require shipping a specimen to a lab for processing.
- Results are available in 15-20 min.
- Can be administered through a nasopharyngeal swab, combined swabbing of the throat and both nares, deep nasal swabbing (both nares) or anterior nasal swabbing (both nares) and takes approximately 15 min to yield results, depending on specific test being used. (ON Gov)
- Free tests may be obtained by applying at this link: <https://covid-19.ontario.ca/get-free-rapid-tests>

5 – MITIGATING LIABILITY WITH RAPID TESTING

- Should be undertaken by someone who is trained to perform the test
- In private
- No less than once per week, but as many times as you wish during the work week
- Test kits are considered biohazardous waste and must be disposed of in accordance with the *Environmental Protection Act*: Safe Handling and Management of Rapid Antigen COVID-19 covid 19 Testing Waste
- Cost should be born by the employer

5 - MITIGATING LIABILITY WITH DISCLOSURE OF VACCINE STATUS/TEST RESULTS

- Varies depending on province and who collects the information which is driven by privacy legislation
- Alberta, British Columbia, Quebec are the only Canadian provinces with privacy legislation governing employee personal information for provincially regulated employers; federal workers are protected by PIPEDA
- If you have an in-house nurse or other medical professional collecting the information, then you will assume obligations under personal health privacy legislation

5 - MITIGATING LIABILITY WITH CUSTOMER DEMANDS

- Complying with the demands of a customer if not supported by law, is not sufficient to require your employees to comply
- Disclosure of vaccination status or test results to any third parties will require written, informed consent
- Should work with third parties to disclose as little information as possible
- If employee refuses to consent with no legitimate reason and the customer has good reason for requesting the information, warn employee that failure to comply may result in a change of duties, unpaid layoff, loss of income, termination

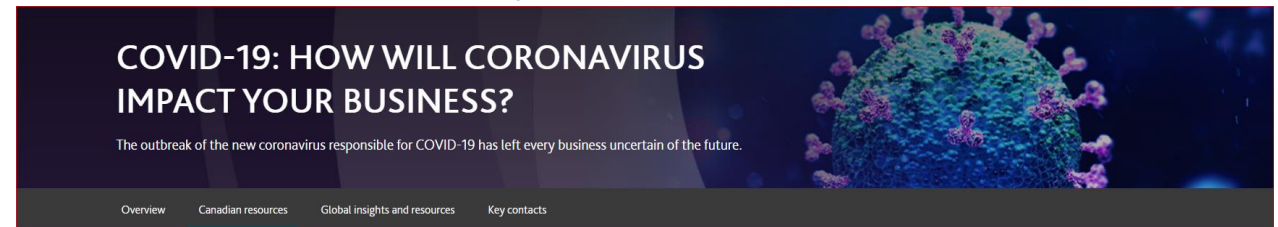
5 - MITIGATING LIABILITY WITH REMOTE WORKING AND NOMAD POLICIES

- If employees will be working remotely on a temporary or permanent basis, ensure to include the following terms in a written agreement – not just a policy:
 - You may require the employee to come to the office or other work place at any time on x days/hours notice (or none at all);
 - You may require the employee to cease working remotely and attend at the workplace on a permanent basis at your sole discretion on x days/weeks notice;
 - Employee may only work for you in x province, and may not relocate outside of x province for more than x weeks without obtaining written approval
- Employers' obligations the *Occupational Health & Safety Act* apply to home workplaces

USEFUL RESOURCES

Gowling WLG – COVID-19 Insights

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



Update on EI for Vaccine Refusal

<https://gowlingwlg.com/en/insights-resources/articles/2021/update-on-ei-for-vaccine-refusal/>

Top 10 Considerations for Employers in Implementing a Vaccination Policy

<https://gowlingwlg.com/en/insights-resources/articles/2021/top-10-considerations-employers-vaccination-policy/>

Update on Vaccination Policies in Canada

<https://gowlingwlg.com/en/insights-resources/articles/2021/update-on-vaccination-policies-in-canada/>

6 - QUESTIONS?



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