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Fines and enforcement, mask refusals and vaccination

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DENTONS WEBINAR SERIES
COVID-19 - LEGAL UPDATE
FOR CANADIAN EMPLOYERS

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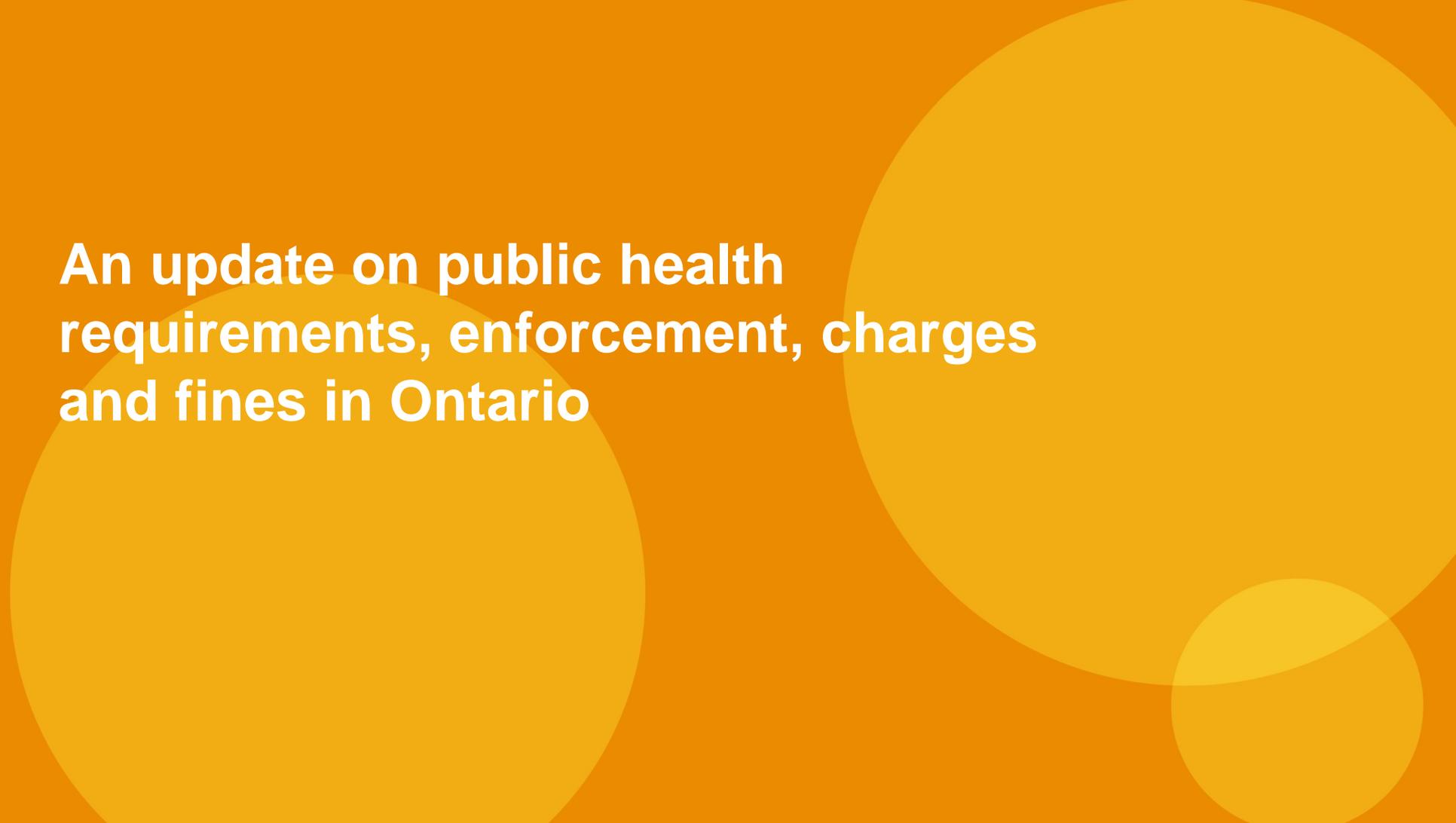
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**An update on public health
requirements, enforcement, charges
and fines in Ontario**

Different Laws

- *Occupational Health and Safety Act*
- *Workplace Safety and Insurance Act*
- *Re-opening Ontario Act*
- *Emergency Management and Civil Protection Act*
- *Health Protection and Promotion Act* (public health Orders)
- *Municipal By-laws* (e.g. *masking*)

Occupational Health and Safety Act

- OHS general duty
- Subs. 52(2): report “occupational illness” to MOL within 4 days
- Enforced by MOL inspectors
- Stats (Ontario MOL):
 - 46,000 COVID-19 related workplace inspections
 - 49,000 orders issued
 - 87 stop work orders issued.

Workplace Safety and Insurance Act

- File “Form 7” with WSIB within 3 days
- Enforced by WSIB

Re-opening Ontario Act

- “Stage 1” etc. regulations
- Require:
 - Screening
 - Safety plan
 - Compliance with all public health recommendations
- Enforced by police, provincial offences officers (including MOL inspectors) and municipal by-law officers

Emergency Management and Civil Protection Act

- Emergency Orders
- Including “Stay at Home Order”
- Enforced by police, provincial offences officers (including MOL inspectors) and municipal by-law officers

Health Protection and Promotion Act

- Public health officers
- “Section 22” Orders
- Enforced by municipal public health officers

Health Protection and Promotion Act

- Recent Section 22 Orders:
- Peel Region
- Toronto

Municipal By-laws

- E.g. masking

Charges and Fines

- Maximum fines
- Charges laid

So, what should an employer do?

- Know which public health unit(s) you operate in!
- Have at least one person monitor Section 22 orders and guidance from public health units daily
- Provide “carry letters” to employees and reception
- Train one or more persons to receive all public health officers, MOL inspectors and by-law officers who attend at your business:
 - Why are you entitled to remain open?
 - What precautions do you have in place?
 - Screening
 - Safety plan
 - Work from home
- Consider segmenting workforce by location, time etc. to reduce risk of full shutdown if COVID-19 cases linked to workplace

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Mask refusals as human rights complaints

Guidance from human rights bodies

Mask refusals as human rights complaints

Introduction

- The ability to enforce mask-wearing rules has been a source of conflict throughout the pandemic.
- Mask refusers frame the issue as a rights-infringement; employers and businesses see it as a health and safety issue.
- In the private sector, the forum for a complaint about masking requirements will be human rights commissions and tribunals.
- So, what are those bodies saying?

It is becoming clear that a mere assertion of a right to be mask-free is not enough to establish a human rights claim.

Mask refusals as human rights complaints

Common themes from human rights commission guidance

- Health and safety requirements (e.g., masks) do not generally cause concern under human rights legislation.
- However, masks may have a negative impact on vulnerable populations based on protected grounds. Exemptions to mask requirements may be necessary to accommodate some individuals under the Code.
- Medical information should be collected and used in the least-intrusive way possible and not go beyond what is necessary to accommodate a person's needs. It should not be collected as a matter of course
- Consideration will be given to the need to balance accommodation obligations with other legal obligations to co-workers or customers.
- Human rights legislation does not apply to those who can wear a mask but choose not to.

Mask refusals as human rights complaints

What is the threshold? BC Human Rights Tribunal screening decisions

- The BC Human Rights Tribunal (BCHRT) issued two screening decisions about discrimination due to mask refusals on the grounds of disability and religion.
 - Disability: *The Customer v. The Store*, 2021 BCHRT 39
 - Religion: *The Worker v. The District Managers*, 2021 BCHRT 41
- Screening decisions are not commonly published in this way, indicating a clear statement from the BCHRT in the public interest.
- In both cases, the BCHRT determined that the complaint was not based on a protected ground and dismissed the complaint.
- The focus was on what was *claimed*, not what could be *proved*. The door remains open for complaints that on their face are in relation to a protected ground.

Mask refusals as human rights complaints

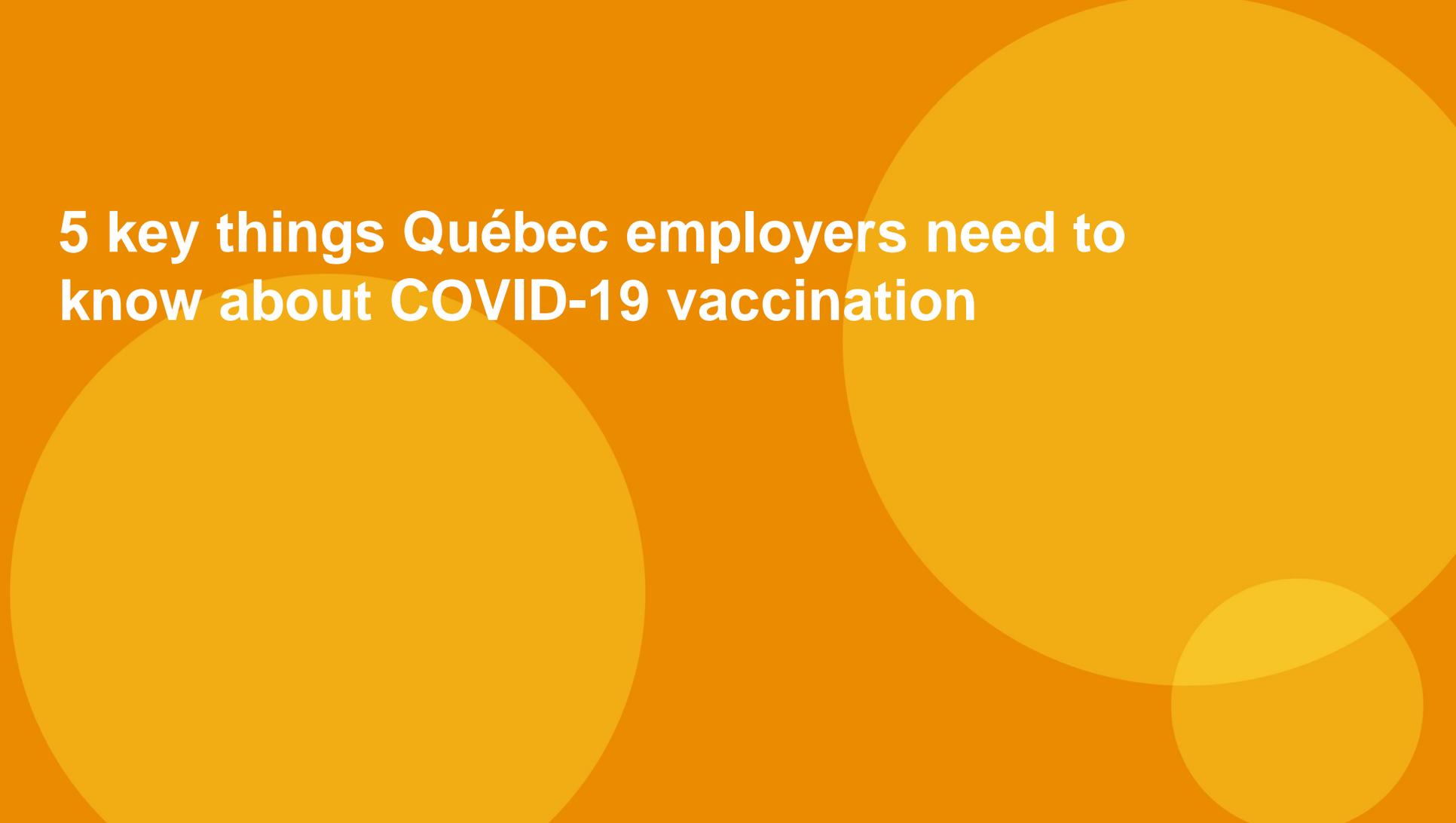
BCHRT screening decisions – key excerpts

- The Code does not protect people who refuse to wear a mask as a matter of personal preference, because they believe wearing a mask is “pointless”, or because they disagree that wearing masks helps to protect the public during the pandemic. Rather, the Code only protects people from discrimination based on certain personal characteristics, including disability...Any claim of disability discrimination arising from a requirement to wear a mask must begin by establishing that the complainant has a disability that interferes with their ability to wear the mask.
- [T]he Customer refuses to say whether she has a disability. She simply says that wearing a mask makes it “very difficult to breathe” and “causes anxiety”. This explanation, on its own, is not enough to trigger the protection of the Code.
- [The] opinion that masks are ineffective is not a belief or practice protected from discrimination on the basis of religion. While the Worker states his belief that it dishonours God to cover his face absent a basis for doing so, the Workers’ complaints, in essence, are about his disagreement with the reasons for the mask-wearing requirement set out in the [Public Health] Orders.

Mask refusals as human rights complaints

BCHRT screening decisions – takeaways

- The screening decisions do not close the door to complaints that on their face are based on protected grounds.
- The BCHRT still recommends that employers and businesses follow the guidance of the Human Rights Commission with respect to not probing for too much information.
- The tension between safety and human rights therefore remains.
- Comfort can be taken, however, that not every anti-mask claim will support a human rights complaint.

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5 key things Québec employers need to know about COVID-19 vaccination

Is the vaccination for COVID-19 mandatory in Québec?

- The right to inviolability is protected by the Charters and the *Civil Code of Québec*
 - ❖ **Canadian Charter of Rights and Freedoms, S.7** “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”
 - ❖ **Charter of human rights and freedoms, S.1** “Every human being has a right to life, and to personal security, inviolability and freedom. He also possesses juridical personality.”
 - ❖ **Civil Code of Québec, A. 10** “Every person is inviolable and is entitled to the integrity of his person. Except in cases provided for by law, no one may interfere with his person without his free and enlightened consent.”
- Consent to care is mandatory
 - ❖ **Civil Code of Québec, A. 10** No one may be made to undergo care of any nature, whether for examination, specimen taking, removal of tissue, treatment or any other act, except with his consent. Except as otherwise provided by law, the consent is subject to no other formal requirement and may be withdrawn at any time, even verbally.

Is the vaccination for COVID-19 mandatory in Québec?

- S.1 of the Canadian Charter and S. 9.1 of the Québec Charter set out the circumstances that justify a limitation on fundamental rights.
 - ❖ “the party seeking to justify a limitation [...] must bear the burden of proving both that such a limitation is imposed in furtherance of a legitimate and substantial objective and that the limitation is proportional to the end sought, inasmuch as (a) it is rationally connected to that end, and (b) the right is impaired as little as possible”
 - *Godbout v. Longueuil (City)*, [1997] 3 SCR 844

Is the vaccination for COVID-19 mandatory in Québec?

- In the context of a public health emergency, the Government of Québec has the authority to order the compulsory vaccination of the entire population or any part of:
 - ❖ **Public Health Act, S. 123** *Notwithstanding any provision to the contrary, while the public health emergency is in effect, the Government or the Minister, if he or she has been so empowered, may, without delay and without further formality, to protect the health of the population:*
 - (1) *order compulsory vaccination of the entire population or any part of it against smallpox or any other contagious disease seriously threatening the health of the population and, if necessary, prepare a list of persons or groups who require priority vaccination;*

The Government did not avail itself of this option.

1. Can Québec employers adopt a mandatory vaccination policy?

- In some cases yes, but it subject to strict parameters:
 - Reasonable for the circumstances;
 - Clear and unequivocal;
 - Brought to the attention of the affected employees as soon as possible;
 - Consistently enforced;
 - Consistent with the collective agreement (in a unionized context).

1. Can Québec employer adopt mandatory vaccination policy?

- Shall meet a legitimate need in the workplace and be reasonable in light of the circumstances;
 - ❖ Nature of the employer's operations;
 - ❖ Specificities of the workplace;
 - ❖ Clientele;
 - ❖ Other available protective measures;
 - ❖ Shall be based on facts and science → will very likely evolve over the months!

1. Can Québec employer adopt mandatory vaccination policy?

- The consequences of not being vaccinated shall be as reasonable and proportionate as possible.
 - ❖ Except possibly in very limited circumstances, a mandatory vaccination policy cannot provide that the consequence of not being vaccinated will be termination of employment.
 - In ***Association des policiers de St-Jérôme métropolitain inc. et Ville de Saint-Jérôme, 2019 QCTA 645***, the arbitrator confirms that an employee's right to integrity may be violated by forcing him/her to submit to a medical treatment in order not to lose his/her job is an infringement.
 - ❖ Allowing non-vaccinated employees to go on an unpaid leave of absence when the risk of workplace transmission is high, like during outbreaks would likely be a reasonable option
 - In ***Syndicat des professionnelles en soins infirmiers et cardio-respiratoires de Rimouski (FIQ) c Morin, 2009 QCCS 2833***, the Superior Court of Québec confirmed that as long as the employer does not force the employee to be vaccinated, it does not infringe on any employee's fundamental rights by taking administrative steps against him/her as a result of his/her refusal to be vaccinated. The salary deprivation is a mere economic constraint.

1. Can Québec employers adopt mandatory vaccination policy?

- Other reasonable alternatives :
 - Assignment to different tasks;
 - Transfer;
 - Suspension without pay;
 - Recurrent testing could also be considered.
- Shall be dealt with administratively; not being vaccinated is not a misconduct!

1. Can Québec employers adopt mandatory vaccination policy?

- Do not forget the duty to accommodate!
 - ❖ The measures set out in a vaccination policy may constitute indirect discrimination;
 - Could likely affect certain protected groups more adversely
 - ❖ Is triggered when the refusal to be vaccinated is based on a prohibited grounds of discrimination;
 - Health grounds;
 - Religion;
 - ❖ The policy has to provide for alternative solutions for these employees up to the point of the undue hardship.

2. Can an employer require an employee to disclose whether he/she is vaccinated?

- The right to respect of one's private life is protected by the Québec Charter.
 - ❖ **Charter of human rights and freedoms, S.5** “Every person has a right to respect for his private life.”
- The right to privacy may also be limited in accordance with section 9.1 of the Québec Charter, subject to the following conditions being met:
 - The limitation is imposed in furtherance of a legitimate and substantial objective
 - The limitation is proportional to the end sought (rationally connected and minimal impairment)
- At this time, the right to know whether the employee is vaccinated is closely related to the employee's obligation to be vaccinated to perform some activities, but may potentially be broader.
- When an employee refuses to provide information regarding his/her vaccination status, the employer is justified to assume the employee is not vaccinated.

3. Can an employer disclose to others whether an employee has had the vaccine or not?

- The right to respect of one's private life is protected by the Charter.
- Whether an employee is vaccinated or not is a “personal information” pursuant to Québec privacy legislation.
 - ❖ ***Act respecting the protection of personal information in the private sector, S. 14*** – “Consent to the collection, communication or use of personal information must be manifest, free, and enlightened, and must be given for specific purposes. Such consent is valid only for the length of time needed to achieve the purposes for which it was requested”
- Therefore, the fact that an employee voluntarily disclosed to his/her employer whether he/she is vaccinated does not automatically allow the employer to share such information with others.

4. Can an employee refuse to work with a colleague who has not had the vaccine?

- Right of refusal based on danger.
 - ❖ ***Act respecting occupational health and safety, S.12***

“A worker has a right to refuse to perform particular work if he has reasonable grounds to believe that the performance of that work would expose him to danger to his health, safety or physical well-being, or would expose another person to a similar danger.”
- The refusal must be justified by a hazard that relates to a risk factor associated with COVID-19.
- No statutory protection for a worker whose spouse or dependent has a condition which puts them at increased risk of complication from COVID-19.
- An employee could refuse to work with a colleague who has not had the vaccine in specific circumstances.

5. Can a worker who experiences side effects from the COVID-19 vaccine be compensated?

- A worker who receives a COVID-19 vaccine in the course of his or her work and who develops an injury as a result of the administration of the vaccine may be entitled to benefits under the *Act respecting industrial accidents and occupational diseases* (AIAOD).
- To qualify for these benefits, the worker must: .
 - ❖ Consult a physician to obtain a medical certificate confirming that the diagnosis of injury is related to the vaccination;
 - ❖ Notify his or her employer as soon as possible after obtaining such medical certification;
 - ❖ Demonstrate that the vaccination was administered arising out of or in the course of his or her work;
 - ❖ Demonstrate that there is a causal relationship between the injury and the vaccination;
 - ❖ Complete the Worker's Claim form available online on the CNESST website and send it to the CNESST
- On the other hand, there is at least one precedent (*Val-Bélair (Ville de) et Drolet, 1993 CanLII 14502*) in which it was suggested that an employee who refuses or neglects to be vaccinated against a disease, while aware that he is exposed to a significant risk of contamination in his workplace, could be considered grossly negligent and therefore non-eligible for the workers' compensation benefit if he/she contracts the disease in the workplace.

Thank you



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