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Day 3

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**DENTONS' ONTARIO EMPLOYMENT
AND LABOUR SPRING WEBINAR SERIES**

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Your presenters



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Agenda

- The latest on mandatory vaccination policies
- Health and safety update
- What federally regulated employers need to know about Federal Workplace Harassment laws





The latest on mandatory vaccination policies

Andy Pushalik

Mandatory vaccination policies

What the caselaw says so far...

- Mandatory vaccination policies are reasonable and consistent with an employer's health and safety obligations and management rights under collective bargaining agreements.
- Requiring unvaccinated employees to test before accessing a workplace is reasonable.
- Employers are generally responsible to pay for the cost of rapid tests but are not required to pay employees for their time spent performing the rapid test.

There are few government restrictions. Is it still reasonable to have a mandatory vaccination policy for my workplace?

- *Extendicare Lynde Creek Retirement Residence v. UFCW, Local 175* (Raymond), April 1, 2022
- Workplace policy requires all newly hired employees to be fully vaccinated as a condition of employment and requires all existing employees effective from October 12, 2021 to be fully immunized/vaccinated (subject to the *Human Rights Code*)
- Employees who are not fully vaccinated are placed on an unpaid leave of absence and may be subject to additional corrective action up to and including termination
- Parties asked that the Arbitrator consider the reasonableness and lawfulness of the Policy in the context of the Government and public health authorities recently reducing or eliminating various vaccination and other COVID-19 restrictions for retirement homes, long-term care homes and more generally, other facilities and venues

There are few government restrictions. Is it still reasonable to have a mandatory vaccination policy for my workplace?

- Arbitrator ruled that workplace policy remained a reasonable workplace rule “...even in the context of the Ontario Government and other public health authorities recently reducing or eliminating various vaccination and other COVID-19 related requirements for staff, contractors, visitors in the context of retirement homes, long-term care homes and, more generally, other facilities and venues.”

COVID-19 remains a significant threat to Health & Safety

Maple Leaf Foods Inc., Brantford Facility v United Food and Commercial Workers Canada, Local 175, 2022 CanLII 28285 (Chauvin), April 10, 2022

“I do not find that as of now COVID-19 has receded, has diminished risks, and no longer is an exceptional threat to health. I find this even though the Company has announced that as of as of April 4, 2022 some of its COVID-19 precautionary procedures will no longer be mandatory, but will remain optional (I am not aware of whether these precautionary procedures were actually discontinued), and that governments in Ontario and elsewhere have reduced and even removed some of their COVID-19 precautionary procedures and limitations. The governmental procedures and limitations have varied from jurisdiction to jurisdiction, and have been implemented, removed, and then re-implemented at various times, as the numerous and different waves of COVID-19 have arrived, receded and then returned, sometimes in greater magnitude, and with different and very challenging risks and variants. Indeed, as of April 10, 2022, the statistics regarding COVID-19 infections, hospitalizations and deaths are rising in Ontario, and around the world, in what is now being referred to as the sixth wave of COVID-19, with a new variant. This may be due to the reductions and eliminations of the COVID-19 precautionary measures. As such, it is very difficult to predict when it is safe, and when it is not safe, to reduce COVID-19 precautionary measures. It is also very difficult to predict which, if any, of those precautionary measures can be safely reduced or eliminated.

[...]

In view of all of this, I find that COVID-19 remains a significant threat to health and safety, and the requirement of mandatory vaccination remains justifiable and reasonable at this point in time.

Are employees who refuse to comply with mandatory vaccination policies eligible for employment insurance benefits?

- *LA v Canada Employment Insurance Commission*, 2022 SST 219
- Employee left her job for an unpaid leave of absence and applied for EI benefits
- Employer's vaccination policy required all staff to be vaccinated unless there was a medical reason not to obtain vaccination
- Non-compliance resulted in employees being placed on indefinite unpaid leave of absence until they provide acceptable proof of vaccination
- Employee testified that she was exercising her freedom of choice
- Adjudicator determined that Employee voluntarily chose to go on unpaid leave; she understood the consequences of non-compliance with the policy

Are employees who refuse to comply with mandatory vaccination policies eligible for employment insurance benefits?

- To qualify for benefits, Employee must have just cause to leave job voluntarily (i.e. there must be no reasonable alternative to leaving her job when she did).
- Employee testified that she has a fear of needles and experiences anxiety towards the vaccine which is still in an “experimental” phase.
- Adjudicator held that Employee cannot prove just cause in the circumstances – she had a reasonable alternative to leaving: comply with the policy and get vaccinated.
- Employee is disqualified from receiving EI benefits.

Will non-compliance with a mandatory vaccination policy result in just cause termination?

- Arbitration decisions have endorsed policies where employees are put on notice that if they remain unvaccinated or fail to disclose their vaccination status (all subject to human rights legislation). They will be subject to being placed on an unpaid leave of absence and may be subject to termination of employment.
- *Chartwell Housing Reit (The Westmount, the Wynfield, the Woodhaven and the Waterford) v Healthcare, Office and Professional Employees Union, Local 2220*, 2022 CanLII 6832 (Misra)
 - Arbitrator ruled that a mandatory vaccination policy which included an automatic termination provision for employees who refused to comply was not reasonable pursuant to the parties' collective agreement – employer had failed to consult the union about the changes.
 - Arbitrator did note that her decision should not be taken to mean that employees who choose not to get fully vaccinated are immune from termination due to non-compliance with the policy: *“No employer has to leave a non-compliant on a leave of absence indefinitely. At some point, and subject to the Employer warning employees of the possibility of termination, and having considered other factors, it will likely have just cause to terminate the employment of such an employee.”*



Health and safety update

Adrian Miedema

Workplace Safety in the Ongoing Pandemic: Applicable Laws

- *Occupational Health and Safety Act*
- *Workplace Safety and Insurance Act*
- *Re-opening Ontario Act*
- *Health Protection and Promotion Act*
- *Municipal By-laws (e.g. masking)*

Changes to *Occupational Health and Safety Act*

Bill 88, *Working for Workers Act*, 2022

- Increase to maximum fines for directors and officers of a corporation
 - From \$100,000 CAD to **\$1.5 million CAD**
- Increase to maximum fines for other individuals
 - From \$100,000 CAD to **\$500,000 CAD**
- Introduction of list of “aggravating factors” to be considered while determining penalty under the *Act*
- Extension of limitation period applicable to instituting prosecutions under the *Act* from one year to **two years**

Changes to *Occupational Health and Safety Act*

Bill 88, *Working for Workers Act*, 2022

- Introduction of requirements for employers regarding naloxone kits, including:
 - Providing and maintaining naloxone kits in workplaces where the employer becomes aware (or ought reasonably to be aware) that there may be a risk of worker opioid overdose at the workplace
 - Providing training to workers responsible for the naloxone kit, including:
 - How to recognize an overdose
 - How to administer naloxone
 - Hazards related to the administration of naloxone
 - Ensuring that the naloxone kit is in the charge of a worker who has received naloxone training

Ontario (Labour) v Sudbury (City)

2021 ONCA 252

- Struck by incident involving a road grader performing repairs
- Road grader driver was employed by Interpaving Limited
- City of Sudbury contracted Interpaving Limited to complete the road repairs
- Ontario Court of Appeal determined the City of Sudbury was an “employer” within the meaning of the *Act*
 - Employed one or more workers (inspectors) at the project site
- One person or entity may meet the definition of several different workplace parties
- *Act* establishes overlapping responsibility for health and safety amongst workplace parties

R v Bondfield Construction Company Limited

2022 ONCA 302

- Arc flash incident
- Ontario Court of Appeal considered whether the Crown established the “actus reus” of two offences
- Provisions of the *Occupational Health and Safety Act* and regulations are to be interpreted generously
- However, a generous interpretation is not limitless
- “... [*Occupational Health and Safety Act*] seeks to achieve a reasonable level of worker protection, not an entirely risk-free work environment”



What federally regulated employers need to know about Federal Workplace Harassment laws

Larysa Workewych

Where did we leave off?

- *Workplace Harassment and Violence Prevention Regulations* came into effect on January 1, 2021
- *Pre-Regulations*: fragmented legal framework for federally regulated workplaces
- *Post-Regulations*: streamlined and consolidated approach to responding to workplace harassment and violence
- New definition of harassment and violence:

Any action, conduct or comment, including of a sexual nature, that can reasonably be expected to cause offence, humiliation, or other physical or psychological injury or illness to an employee, including any prescribed action, conduct, or comment.

New “language”

Applicable partner: The policy committee, or if there is no policy committee, the work place committee or the health and safety representative.

Designated recipient: A work unit in a work place or person that is designated by the employer.

Principal party: An employee or employer who is the object of an occurrence of harassment and violence.

Responding party: The person who is alleged to have been responsible for the occurrence in the notice of an occurrence.

Occurrence: An occurrence of harassment or violence in the work place.

What obligations are imposed on employers?

- Carry out and review work place assessments (joint with the applicable partner)
- Develop and implement an implementation plan (joint with the applicable partner)
- Develop a prevention policy (joint with the applicable partner)
- Develop or identify training program to be given to employees (joint with the applicable partner)
- Develop and implement emergency procedures (joint with the applicable partner)
- Make available to employees information related to medical, psychological or other support services available
- Comply with record-keeping obligations
- Comply with reporting obligations, including annual reports and employee deaths
- Ensure the resolution process is followed
 - Resolution process must be completed within 1 year

Prevention policy requirements

- Mission statement regarding prevention of and protection against harassment and violence in the workplace
- Description of different roles in relation to harassment and violence in the workplace
- Description of identified risk factors that contribute to workplace harassment and violence
- Summary of training that will be provided
- Summary of the resolution process
- When and how workplace assessments will be reviewed and updated
- Summary of emergency procedures that will be implemented
- How employer will protect privacy of individuals involved in an occurrence / the resolution process
- Description of any recourse, in addition to *Code* and *Regulations*, that might be available
- Description of support measures available
- Name of designated recipient

Steps in the resolution process

1. Notice of occurrence is received
2. Initial review of the notice of occurrence
3. Contact with principal party
4. Contact with witnesses (if applicable)
5. Contact with responding party
6. Review of notice of occurrence with principal party
7. Commencement of negotiated resolution / conciliation (optional)
8. Commencement of investigation
9. Completion of investigator's report
10. Implementation of investigator's recommendations (joint responsibility)
11. Completion of resolution process

Monthly status updates for investigations

- The following information should be included:
 - Process that is being followed
 - Status on review and update of the work place assessment
 - Status on timelines for the selection and/or hiring of a conciliator (if applicable)
 - Status on timelines for the selection and/or hiring of an investigator (if applicable)
 - Status of the investigation report
 - Status on implementing recommendations from the investigator's report
- Investigator cannot provide monthly updates

Key considerations for employers

- Use of new “language” in policies and during investigations
- Keep track of timelines
- Be mindful of the alternative methods of resolving a complaint
- Resolution process versus general employer obligations
- Investigation reports must be circulated

Thank you



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