GUIDANCE ON COVID-19 VACCINE POLICIES FOR EMPLOYERS

BY NORM KEITH[1]

Introduction

At the time of writing there have been over 91,000,000 reported cases of COVID-19 around the world and over 1,900,000 deaths, according to the Word Health Organization.[2] Health Canada has recorded over 688,000 cases and over 17,500 deaths in Canada.[3] Employers that have been shut down by government orders and are struggling with second wave uncertainty are now seeing a glimmer of hope with the federal approval and roll out of approved COVID-19 vaccines. Health Canada recently approved 2 COVID-19 vaccines that were developed with unprecedented speed. The Canadian Medical Association ("**CMA**") recommends that all Canadians get vaccinated unless they fall within one of several exemptions.[4]

Given the limited availability of the vaccines, the Federal government and the provinces have publicized plans to prioritize providing vaccinations to front-line healthcare workers and the most vulnerable members of society. As more vaccines become available and approved by Health Canada more Canadian residents and workers will become eligible to get an approved vaccine. Further, employers are starting to ask whether they can require employees to provide proof of vaccination before or as a condition of return to the workplace. The Canadian Government has estimated that it will take at least until September 2021 for all Canadians to be eligible to receive the COVID-19 vaccine.

The purpose of COVID-19 vaccines is to protect individuals from becoming infected with the virus and preventing its spread. The World Health Organization ("**WHO**") has publicly stated that achieving population, so called "herd", immunity is critical in order to protect vulnerable groups who cannot get vaccinated for legitimate medical reasons. To achieve population immunity a large percentage of the population must be vaccinated against COVID-19. One estimate is that a

---

[1] Senior Partner, with the grateful assistance of Jeff Adams, Jacob Wagner, articling students and Cathy Chandler and Carla Oliver, OHS Consultants, all in the Toronto office of Fasken.

[2] World Health Organization, "WHO Coronavirus Disease (COVID-19) Dashboard" (11 January 2021), online: <https://covid19.who.int/?gclid=EAIaIQobChMIuK_U5KiD7gIVCJ2zCh3Bcg8TEAAYASAAEgLx0_D_BwE>.

[3] Government of Canada, "Coronavirus disease 2019 (COVID-19): Epidemiology update" (11 January 2021), online: <https://health-infobase.canada.ca/covid-19/epidemiological-summary-covid-19-cases.html>.

[4] The CMA has recommended the elimination of non-medical exemptions from vaccination in provinces that have legislation mandating children be vaccinated in order to attend school. See: CMA Policy Base, "Elimination of non-medical exemptions from vaccination, policy resolution, 2016-08-24, GC16-56: (4 January 2021), online: <https://policybase.cma.ca/permalink/policy11929>.

community, be it a country, province, municipality or workplace must be above an 80% vaccination rate.[5]

The federal and provincial governments have publicly stated they will not, at the present time, make inoculation with an approved vaccine mandatory. This may place employers in an unenviable position because of their legal duties to protect workers by providing a healthy and safe workplace under Canadian law. Unions and workers do not have corresponding legal duties or accountability to provide for worker safety in the same way that employers do, by law. Although, there are current supply limitations, the absence of clear direction from governments on the rules employers should follow regarding employee vaccination is problematic. Employers are justifiably concerned that employees who are not vaccinated and return to the workplace may infect co-workers, patients, customers, clients, suppliers, distributors and third party contractors ("patrons").

This downloading of responsibility of public and occupational safety decision-making from governments to employers understandably creates a challenge and legal risk for employers and causes them to ask the following 3 questions:

1. "Can employers require employees to provide proof of vaccination before workers return to the workplace"?

2. "If the answer to 1. is "yes", are there any human rights or privacy exemptions, restrictions and limitations"?

3. "If the answer to 1 is "no", is it still worthwhile to implement a COVID-19 Vaccine Safety Policy?"

What follows is a review, commentary and guidance on the state of the law on inoculation relating to COVID-19 vaccines and does not constitute legal advice. We recommend that every employer consult with an employment lawyer, with occupational health & expertise, before implementing any type of COVID-19 Vaccine Safety Policy.

Can Governments Make Vaccines Mandatory?

Federal legislation has been passed in several areas under the federal jurisdiction mandating vaccination of Canadian residents and in some specific circumstances, workers. For example, federal legislation requires vaccination of workers engaged in the manufacturing of vaccines, under the Food and Drug Regulations.[6]

Provinces that have broader constitutional authority for public and workplace safety than the federal government, have also exercised legislative authority to require vaccination of specific categories of workers. For example in Ontario:

---

[5] World Health Organization, "Coronavirus disease (COVID-19): Herd immunity, lockdowns and COVID-19, December 21, 2020" (4 January 2021), online: <https://www.who.int/news-room/q-a-detail/herd-immunity-lockdowns-and-covid-19#:~:text=We%20are%20still%20learning%20about,people%20to%20get%20infected>.

[6] *Food and Drug Regulations*, CRC c 870, ss C.04.071, C.04.135, made under the *Food and Drugs Act*, RSC 1985 c F-27.

1. Licensees under the *Long-Term Care Homes Act, 2007* must ensure that workers have a series of five immunization measures, including a requirement for a staff immunization program in accordance with evidence-based practices, and if there are none, in accordance with prevailing practices;[7]

2. Emergency medical attendants, paramedics, and related volunteers and students must have a certificate of immunization for a specific list of diseases under the Regulations pursuant to the *Ambulance Act*;[8]

3. Operators of child care centres or home child care agencies providing day care must ensure that their employees have "immunization as directed by the local Officer of Health" under the Regulations pursuant to the *Child Care and Early Years Act*;[9]

4. Students are required under *Immunization of School Pupils Act* to have proof of immunization or they may be barred from attending public or private schools in Ontario, and parents of non-compliant students can face fines of up to $1,000.[10]

Further, all provinces have the legislative authority to order mandatory vaccines at the direction of government officials, typically the Chief Medical Officer of Health of the province.[11]

There is clear legal authority and precedent for both the federal and provincial governments to require mandatory vaccination of Canadian workers and in some cases, residents. The policy rationale is that vaccination, once approved by Health Canada, has been demonstrated to mitigate the contracting, spread, and harmful effects of a multitude of diseases that adversely effect individuals, including workers. However, as reviewed above, based on announcements by government officials at both the provincial and federal levels, it appears that even with the arrival of the Health Canada approved vaccines, that will not be the policy direction that either level of government plans to take.

Employers' Obligations under Occupational Health & Safety Laws

A review of the subject of what position employers may take regarding the COVID-19 approved vaccines must start with the purpose of the vaccine as it relates to the workplace, namely worker safety. As we approach 11 months into the pandemic, it has been public health rather than occupational health & safety laws that have been engaged to address both public and occupational exposure to the virus. However, the focus of both legal regimes is the health and safety of workers during a pandemic.

---

[7] O Reg 79/10 s 229, made under the *Long-Term Care Homes Act*, SO 2007 c 8.

[8] O Reg 257/00, ss 6(h) and 14(d), made under the *Ambulance Act*, RSO 1990 c A19.

[9] O Reg 137/15, s 57, made under the *Child Care and Early Years Act*, 2014, SO 2014, c. 11, Sched. 1.

[10] *Immunization of School Pupils Act*, RSO 1990, c I.1, ss 3(1), 4, 6(1), 7.

[11] *Public Health Act*, RSA 2000, c P-37, s 38; *Public Health Act*, SBC 2008, c 28, s 28; *Public Health Act*, SM 2006, c 14, ss 26-27; *Public Health Act*, SNB 1998, c P-22.4, s. 33; *Public Health Protection and Promotion Act*, SNL 2018, c P-37.3, s 32; *Health Protection Act*, SNS 2004, c 4, s 32; *Public Health Act*, SNWT 2007, c 17, s 11; *Public Health Act*, SNu 2016, c 13, s 55(2); *Health Protection and Promotion Act*, RSO 1990, c H7, s 22(1); *Public Health Act*, SPEI 2012, c 20 (2nd Sess), s 39; *Public Health Act* CQLR c S-2.2, s 123; *The Public Health Act*, 1994, SS 1994, c P-37.1, s 38; *Public Health and Safety Act*, RSY 2002, c 176, s 17.

Every jurisdiction in Canada has its own occupational health and safety ("**OHS**") law. OHS laws consist of statutes, regulations, codes and related jurisprudence. No Canadian jurisdiction has passed a specific OHS law to protect workers from the COVID-19 infectious disease in Canada. The range of jurisdictional reaction is quite inconsistent and remarkable – where some provinces have provided detailed guidance for employers and other workplace parties on how to protect workers, patients, and patrons from exposure to the virus in the workplace, other jurisdictions have simply relied upon public health guidance and industry safety associations to recommend "best practices." Workplace stakeholders have been directed by government OHS regulators to the "general duty clauses" in OHS legislation that do not specifically address steps for employers to take to protect workers.

For example, in Ontario, employers have been given direction by the Ministry of Labour, Training, and Skills Development ("**MLTSD**") regarding protecting workers from COVID-19.[12] The relevant Ontario general duty clause for employers states: "employers shall take all reasonable precautions in the circumstances for the protection of workers."[13] Supervisors have a similar legal obligation with which they must comply or face enforcement liability.[14] However, there is no clear direction given by the MLTSD on how to apply the general duty clause in the context of the pandemic. Ontario workplace sector specific safety associations have developed industry guidance that always begins with a strong disclaimer that such guidance is not legal advice. None of these guidance documents address questions regarding vaccines.

Penalties for failure to comply with the Ontario general duty clause may result in a fine upon conviction of up to $1.5 million dollars per count for a corporation, and up to $100,000 or twelve months in jail, or both, for an individual.[15] These broad legal duties and legal penalties address the seriousness of legal compliance. It also makes it imperative for employers to place the highest value and responsibility on protection of workers, as well as patients and patrons when it comes to protection from infection of COVID-19.

Under OHS law, failure to protect workers by not taking "all reasonable precautions", may result in enforcement through quasi-criminal prosecution. This places corporate employers, and their directors and officers, at risk of facing serious monetary repercussions, and even the threat of imprisonment. One of the questions that employers are left on their own to answer is this: "is a vaccine policy a reasonable precaution for my workplace?"

In addition to regulatory OHS law, the *Criminal Code* was amended in 2004 under the Westray Bill, establishing a positive duty on employers and other parties who direct workers to protect them from harm. Failure to discharge this duty can constitute an offence of criminal negligence, and under OHS law, charges may be laid against a corporate employer or an individual, such as a manager or supervisor. The *Criminal Code* duty reads: "*every one who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that*

[12] Government of Ontario, "COVID-19 (coronavirus) and workplace health and safety" (4 January 2021), online: Ontario.ca <https://www.ontario.ca/page/covid-19-coronavirus-and-workplace-health-and-safety>.

[13] *Occupational Health and Safety Act*, R.S.O. 1990, c.O.1, s. 25(2)(h).

[14] *Ibid*., s. 27(2)(c).

[15] *Ibid*., s. 66.

work or task."[16] In certain prescribed circumstances, a failure to comply with the duty may apply to the senior officers of the corporate employer, holding them criminally liable for bodily injury or death, if it can be shown that they demonstrated wanton or reckless disregard for the lives or safety of persons in the workplace.

The importance of worker safety as a paramount and overriding legal duty for corporate employers, and their directors and officers, cannot be overstated as failure to comply may result in a criminal prosecution and conviction.

OHS regulators across the country have aggressively enforced OHS laws against employers and individuals who are not in compliance with legal obligations when there are incidents, injury, sickness and death of workers. OHS laws also have been given high priority by governments by the passage of quasi-constitutional prevailing powers such as that found in subsection 2(2) of Ontario's *Occupational Health and Safety Act*, that states "*despite anything in any general or special Act, the provisions of this Act and the regulations prevail*".

Therefore, given that Health Canada has approved COVID-19 vaccines that may literally save the lives of workers and the patients and patrons with whom those workers may come into contact, it is important to remember the purpose of the vaccine and the legal duties of employers under OHS law when questions relating to vaccine policies are considered. It may well be that due to the type of workplace, the nature of the work and the risk of close contact with patients or patrons, that it is a "reasonable precaution" and a "reasonable step" for employers to require proof of vaccination as a condition of employment or return to work.

Although this brief OHS law summary does not provide a direct answer to the question of whether an employer can impose a mandatory proof of vaccine requirement on workers who return to the workplace, it highlights that the analysis must go beyond simply achieving best practices, and is framed by an overarching positive legal duty to ensure worker safety.

Vaccinations and Human Rights and Privacy Laws

Human rights and privacy laws are often referenced in the discussion of employer vaccine policies. Human rights and privacy laws must be understood and applied in a manner that strikes the correct balance between OHS laws and employees right to be free from a hazard in the workplace, such as COVID-19 infection and human rights & personal privacy issues.

It is generally accepted law that employees do not have a right to attend at work if they have a health condition that may expose another employee to the risk of contracting a highly communicable and potential fatal infectious disease. It is also generally accepted in law that employees do not have a right to keep private and beyond an employer's inquiry and management a health condition that may exposed another employee to the risk of contracting a highly communicable and potential fatal infection disease.[17] In the current COVID-19 pandemic, legal action has been taken that reflects these legal principles.

---

[16] *Criminal Code*, R.S.C. 1985, c.C-46, as amended, s. 217.1.

[17] See the above analysis of OHS law in this article.

For example, in Ontario, the provincial mandatory requirement to self-isolate pursuant to a positive test for 10 days and 14 days following a known exposure seems to take away a worker's right to attend at work. It reads, in part:

Self-isolation because of COVID-19 infection – minimum of 10 days. A person who has COVID-19 must self-isolate so they cannot infect others, including other workers ... Workers who have been tested because they have symptoms must remain in self-isolation while waiting for test results. If the test is negative, the worker may return to the workplace if they do not have a fever and their symptoms have been improving for at least 24 hours. The self-isolation period is at least 20 days if the worker either:

- had severe COVID-19 illness (were admitted to intensive care)
- has severe immune compromise described in the governments Public Health Guidance.

Self-isolation because of potential exposure – 14 days. A worker must self-isolate for 14 days if they were:

- out of the country
- in close contact with someone with COVID-19 or who is likely to have COVID-19 as determined by public health.

Isolation is a requirement because it can take up to 14 days after exposure for infection to appear either as symptoms or in a positive COVID-19 test. This is also called quarantine. Anyone who has potentially been exposed must self-isolate for the full 14 days even if they have a negative test during this time. Workers can return to the workplace after 14 days of self-isolation if they have not developed symptoms or tested positive.

Every jurisdiction in Canada prohibits discrimination on the basis of a number of enumerated categories, including disability. An individual's privacy and bodily integrity are accorded the highest degree of respect and protection in Canadian law. However, it is not clear that a human rights legislative right or privacy law principle *per se* is engaged when an employer imposes a requirement for mandatory proof of vaccination as a condition of employment. Employers presumably will not be providing vaccines; and even if a hospital worker is vaccinated at a hospital where they work, it is in a health care role, rather than an employment role, that such a vaccination will be given. Therefore, requiring proof of vaccination is not a medical examination and does not necessarily directly engage human rights or privacy concerns, with the exception of two recognized exceptions in human rights law.

First, human rights laws might be engaged when a worker's objection to being vaccinated is based on the ground of a disability that causes an adverse health reaction to vaccinations, including one of the COVID-19 vaccines. In rare instances, according to scientific and medical literature, individuals may have mild to serious allergic reactions to vaccines. The available evidence regarding the approved vaccines is quite limited since the vaccine program has just begun. However, if an employee has a known allergic or other reaction to vaccines or an approved COVID-19 vaccine, this would amount to a disability that would provide a valid human rights exemption to a policy requiring mandatory proof of vaccination. In such cases, the employer's COVID-19 vaccine policy should allow for an exemption from any mandatory vaccine as a condition of employment. The next step in the individual review by the employer would be to then

determine if the employee with that disability could be accommodated in their employment, up to the point of undue hardship to the employer.

Second, human rights laws prohibiting discrimination of the grounds of religious beliefs may be engaged when a worker's sincerely held religious belief is the basis for the refusal to be vaccinated. There are some organized religions that do not accept the scientific validity and medical efficacy of vaccinations.[18] However, in rare instances, if such an objection is made, it may be a proper legal basis preventing an employer from making vaccination a condition of employment. The next step with the analysis would be to then determine if the religious beliefs of the objecting employee could be accommodated in their employment, up to the point of undue hardship to the employer.

An employer's vaccination policy is very likely to be determined to be a *bona fide* occupational requirement if challenged to a human rights tribunal or court. Such a policy is clearly for the purpose of the health and safety of workers and their patients and patrons. The interpretation of this exception to human rights laws may require a balancing of interests. If an employer promulgates a COVID-19 vaccine policy that requires proof of vaccination of all employees, the policy will have to provide for accommodation of employees who fit within one of the two above-mentioned exemptions. Employees and employers both must cooperate with efforts to accommodate the employees objection to a policy requiring mandatory vaccination and there may be a tailoring of accommodations on a case by case basis.

Vaccine Policies and Labour Relations

Workers who are represented by a union and have the terms and conditions of employment governed by a collective agreement may negotiate the terms and conditions of a mutually acceptable vaccine policy. This is the optimal approach to take in developing a vaccine policy in a unionized workplace.

Unions and their members have challenged mandatory vaccination policies in previous health outbreaks and pandemics. The two relatively recent examples that resulted in vaccination litigation were the SARS near-pandemic and the H1N1 pandemic.

If there is no specific provision in the collective agreement authorizing management to require mandatory proof of vaccination, and if an agreement cannot be reached, then employers can attempt to rely upon the Management Rights clause to unilaterally implement a mandatory rule governing the terms and conditions of the workers' employment under the collective agreement. Management Rights clauses in collective agreements have been interpreted by arbitrators, and affirmed by courts, to require compliance with the *KVP*[19] rules.

The *KVP* arbitral test to establish and enforce a rule pursuant to the management rights clause of a collective agreement was endorsed by the Supreme Court in the *Irving Pulp & Paper*[20] case:

---

[18] Wikipedia, "Vaccination and religion" (4 January 2021), online: <https://en.wikipedia.org/wiki/Vaccination_and_religion>.

[19] *Lumber & Sawmill Workers' Union, Local 2537, and KVP Co.* (1965), 16 L.A.C. 73.

[20] *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34.

> "34. A rule unilaterally introduced by the company, and not subsequently agreed to by the union, must satisfy the following requisites: 1. It must not be inconsistent with the collective agreement. 2. It must not be unreasonable. 3. It must be clear and unequivocal. 4. It must be brought to the attention of the employee affected before the company can act on it. 5. The employee concerned must have been notified that a breach of such rule could result in his discharge if the rule is used as a foundation for discharge. 6. Such rule should have been consistently enforced by the company from the time it was introduced."

The arbitral jurisprudence regarding mandatory vaccination policies imposed by employers under collective agreements deals with the balancing of interests. This largely flows from the adjudication of issues in the health care sector. Arbitrators have been asked to consider the safety of health care workers and the patients and the public, and balance those interests with the freedom to choose not to be vaccinated for personal, privacy and dignity reasons.

Labour arbitrators in this area have generally held that mandatory vaccination policies must be reasonably connected to the employers' legitimate interests in protecting their workers, patients, and patrons, and that the vaccines must also be sufficiently effective. Arbitrators in British Columbia have tended to support employer policies requiring mandatory vaccination, while in Ontario an arbitrator overturned such an employer policy in a flu-shot decision. The discrepancies in the arbitrator's decisions turned on different conclusions following the balancing of interests analysis. In the flu-shot cases, the focus was on the medical evidence with respect to the quality of the vaccine, and its efficacy in actually preventing the seasonal influenza or flu.

Condition of employment policies requiring vaccination for certain diseases have been upheld in some, but not all jurisdictions, and are disease-specific. Influenza related "Vaccinate or Mask" ("**VOM**") policies in Ontario have been found to be unreasonable, whereas they have been upheld in Alberta and British Columbia. There is widespread acceptance for influenza vaccination as a condition of employment, with some academic articles reporting that 57%–85% of health care workers supported or strongly supported influenza vaccination as a condition of service.[21]

As part of the federal government's National Immunization Strategy objectives for 2016-2021, vaccination coverage goals and vaccine-preventable disease reduction targets were set based on international standards and best practices. The goals and targets are consistent with Canada's commitment to the WHO disease elimination targets and the Global Vaccine Action Plan, while reflecting the Canadian context. The 2025 goal for seasonal influenza vaccination coverage for health care professionals is 80%.[22]

---

[21] Vanessa Gruben LLB LLM, Reed A. Siemieniuk MD, Allison McGeer MSc MD, "Health care workers, mandatory influenza vaccination policies and the law", page 1076, CMAJ, October 7, 2014, 186(14), DOI:10.1503.

[22] Government of Canada, "Vaccination Coverage Goals and Vaccine Preventable Disease Reduction Targets by 2025, National Immunization Strategy: (16 December 2020) online: Canada.ca <https://www.canada.ca/en/public-health/services/immunization-vaccine-priorities/national-immunization-strategy/vaccination-coverage-goals-vaccine-preventable-diseases-reduction-targets-2025.html>.

The Canadian Nurses Association (the "**CNA**") has published the following position statement:[23]

- Annual influenza immunization through vaccination is the most effective method of preventing influenza and its complications. There is significant evidence that influenza vaccinations are safe and reduce patient harm.

- CNA strongly recommends all nurses receive the influenza vaccine annually (unless contraindicated) to protect themselves, their families and those in their care.

In 2012, the Government of British Columbia implemented a mandatory influenza immunization program for healthcare workers, with a VOM policy. The policy provided for punitive action against healthcare workers choosing not to be immunized or to wear a mask, which included loss of work hours and termination of employment. In December 2019, the Office of the Provincial Health Officer announced a change to the policy, which maintained the global policy of vaccinate or mask, but removed the possibility that healthcare workers would face disciplinary action for their choice.[24] It is widely speculated that although the policy had been upheld in arbitration, that it would not survive judicial review.

In *Decision No.: 2016-0127*,[25] the issue was a claim for a left shoulder injury found to have been caused by an influenza vaccination that the worker received in the workplace, at a clinic arranged by the employer. The success of the worker's claim turned on the issue of whether they were in the course of their employment, and if the flu shot constituted an employment hazard such that the injury was compensable pursuant to the Alberta *Workers' Compensation Act*. During the 2014/2015 flu season, the employer organized five clinics throughout the city, including one at the employer's headquarters. The flu clinic was part of a "wellness expo", and the flu vaccine was administered by nurses contracted for that purpose. Although it was not compulsory for employees to attend the employer's clinics to get a flu shot, the employer did everything short of mandating that its employees attend and get vaccinated, and approximately 500 out of 2800 employees were vaccinated.

The panel said that if the flu vaccine was administered in order to prevent the worker from contracting an infectious disease, namely the flu, then the flu could be considered to be an occupational disease. Further, if immunization was required for the prevention of a work-related disease or infection, and as a result of a reaction to the compulsory immunization, a worker experiences loss of earnings, the Alberta Workers Compensation Board will consider it compensable.

---

[23] Canadian Nurses Association, "Influenza Immunization of Nurses, Approved by the CAN Board of Directors, November 2019" (16 December 2020), online (pdf): Canadian Nurses Association < https://cna-aiic.ca/-/media/cna/page-content/pdf-en/influenza-immunization-of-nurses_position-statement.pdf?la=en&hash=5CCB6B34EFF68DC89369E425C18027C525078CBE>.

[24] Bonny Henry, MD, Provincial Health Officer, Ministry of Health, "Influenza Control Program Policy – 2019/2020 Influenza Season Letter" (16 December 2020) online pdf: British Columbia Provincial Health Officer <https://www2.gov.bc.ca/assets/gov/health/about-bc-s-health-care-system/office-of-the-provincial-health-officer/influenza-control-program-policy-2019-20-season-letter.pdf>.

[25] *2016-0127 (Re)*, 2016 CanLII 20829.

The panel then found that notwithstanding this set of circumstances, that there is no coverage for voluntary immunization, and the flu vaccine was not mandatory in the case of the worker. This determination was arrived at, in part, because the employer did in fact ensure that vaccinations for hepatitis B and C were administered to every new employee, whereas only 18% of the employees received the flu vaccine at the employer provided clinics.

In *Re Health Employers Assn. of British Columbia and HSA BC (Influenza Control Program Policy)*,[26] Arbitrator Diebolt dismissed the union's grievance and upheld the employer's VOM policy. He accepted the expert evidence that influenza is a serious disease with the potential for complications and death, particularly among vulnerable persons such as the elderly, the immune compromised, and those with underlying health conditions.

The arbitrator recognized that the policy could not be found in the collective agreement, and was a unilateral rule imposed by the employer. Applying the *KVP* test, Arbitrator Diebolt concluded that the policy was reasonable. He found that the purpose and effect of the policy was not simply to increase rates of immunization among health care workers, but that the policy had a patient safety purpose and effect, as well as an accommodative purpose for health care workers who conscientiously objected to immunization.

With respect to whether the policy violated B.C.'s *Human Rights Code*,[27] the union submitted that the policy was discriminatory because it made no provision for either workers with medical disabilities that did not permit them to be immunized, or for workers who had conscientious objections to immunization. However, the arbitrator observed that the policy did not require employees to immunize, rather, they had a choice to immunize or mask, and any alleged breaches of an employee's human rights would have to be dealt with individually.

Finally, Arbitrator Diebolt questioned whether the *Charter* applied in this case, concluding that even if it did apply, the VOM policy would survive *Charter* scrutiny. Any violation of the impugned sections, which included freedom of expression and the right to life, liberty, and security of the person, was saved under s. 1 as a justifiable infringement of *Charter* rights. He concluded that the employer's VOM policy was a valid exercise of management rights, and dismissed the grievance.

In *Re Sault Area Hospital and Ontario Hospital Assn. (Vaccinate or Mask)*,[28] the VOM policy was substantially the same as in the previous case, but in this instance, Arbitrator Hayes allowed the union's grievance. In his view, the dominant purpose of the employer's VOM policy was to drive up vaccination rates. He found that the policy operated in a coercive fashion, by forcing employees who chose not to get the vaccine to wear a mask for up to six months a year (the approximate length of flu season).

Applying the balancing of interests endorsed in *Irving Pulp & Paper* the arbitrator concluded that the policy was unreasonable, because unvaccinated employees were forced to wear an unpleasant

---

[26] *Re Health Employers Assn. of British Columbia and HSA BC (Influenza Control Program Policy)* (2013), 237 L.A.C. (4th) 1.

[27] *Human Rights Code*, RSBC 1996, c. 210.

[28] *Sault Area Hospital and Ontario Hospital Assn. (Vaccinate or Mask), Re*, [2015] O.L.A.A. No. 339.

device for extended periods, in the face of a business need or rationale which, in his opinion, the medical evidence did not support. In addition, Arbitrator Hayes found that the policy violated the collective agreement, which gave employees the right to refuse vaccination. Ultimately, he held that the employer's VOM policy was inconsistent with the collective agreement and unreasonable.

Arbitrator Kaplan reached a similar conclusion in *St. Michael's Hospital and ONA, Re*.[29] The case involved the same policy, the same legal issues, and much of the evidence led by the parties was the same. Unlike Arbitrator Hayes, though, he did not find the employer's VOM policy coercive. Arbitrator Kaplan found that the employer had introduced its policy because it believed it to be in the interest of patients. Furthermore, there was no evidence that masking was intended as a punishment or stigma to encourage vaccination.

However, that was not enough to justify the employer's VOM policy. Arbitrator Kaplan held that, to satisfy the *KVP* test, objective evidence of a real problem was required that would be addressed by a specific solution. In his opinion, there was no persuasive evidence that wearing a surgical mask protected against influenza transmission. The fact that there was "some evidence" that masking could prevent transmission of influenza was, in his view, insufficient to justify the policy: the negative impact of having to wear a surgical mask for an entire shift, for up to a six-month period, outweighed the limited benefits of masking. He concluded that the policy lacked proportionality and was, therefore, unreasonable. It was also inconsistent with the collective agreement, which explicitly gave nurses the right to refuse any required vaccine.

Arbitrator Kaplan acknowledged that Arbitrator Diebolt had come to a different conclusion in B.C., but he distinguished that award on the basis that it was a different case with a different evidentiary focus. Arbitrator Kaplan shared the view of Arbitrator Hayes that there was little scientific evidence regarding the efficacy of masks in reducing transmission of the virus to patients.[30]

The past arbitration decisions may be reasonably distinguished from the COVID-19 pandemic and its responding vaccines that have been approved by Health Canada. Seasonal influenza, and its annual vaccine, vary both in severity of the illness and the effectiveness of the vaccine from the COVID-19 pandemic. Both the Pfizer and Moderna vaccines have been accepted by Health Canada based on efficacy rates of over 90%. Notwithstanding some foreign political posturing that the COVID-19 is no more serious than the seasonal influenza, the WHO and other credible independent medical opinions do not support this conclusion. The benefits of employers implementing a mandatory proof of COVID-19 vaccination policy are consistent with other mandatory health and safety best practices mandated by general duty clauses under OHS laws.

Therefore, in reviewing the health and safety benefits of an employer policy of mandatory proof of vaccination, the severity of a COVID-19 infection and the high efficacy of the two vaccines approved by Health Canada would rationally support an employer passing a reasonable rule pursuant to a management rights clause of a collective agreement to protect workers health and safety, as well as patients and patrons of any particular workplace or business.

---

[29] *St. Michael's Hospital and ONA, Re* (2018), 137 C.L.A.S. 172.

[30] Norm Keith and Matthew Stanton, "COVID-19 and Body Temperature Screening in the Canadian Workplace, Memorandum to Firm Clients", May 12, 2020.

A decision released on December 9, 2020 may be indicative of a changing view in light of the death toll of the COVID-19 pandemic. In *Caressant Care Nursing & Retirement Homes v Christian Labour Association of Canada*,[31] Arbitrator Dana Randall upheld a unilaterally imposed policy requiring all staff at a retirement home in Woodstock, Ontario, to undergo nasal-swab surveillance testing for COVID-19. Despite no positive cases of COVID-19 among staff, management, or residents, the tests were done every two weeks, and refusal to participate would result in the employee being held out of service until they complied. Employees could submit to testing either at the facility or through a third party, outside of working hours, and with compensation for same. Staff who participated in the testing at the facility were paid for one hour of work and received a waiver for parking fees at the hospital. Those who declined were given the option to don full PPE for the entirety of their shifts. An option for a throat swab instead of the nasal swab was available.

The matter was argued in the context of *KVP*, with the Union relying on the *Irving Pulp &Paper* decision. It bears mentioning that the employer policy was implemented at all ten of the retirement homes it manages, with over 1900 employees represented by numerous unions, none of which challenged the mandatory COVID-19 testing protocol. The union took the position that the bi-weekly testing was invasive, painful, indefinite, and did not accomplish its purpose, pointing to an instance where the nasal swab caused an employee to experience a multi-day nose bleed. The employer relied on the fact that Ontario Public Health had issued a directive that surveillance testing was recommended as an important tool, recognized by both medical professionals and the government to control and track outbreaks, taking the position that although there had not been an outbreak, that delaying testing until one occurred was not a reasonable option.

Arbitrator Randall essentially adopted the submissions of the employer, finding the policy to be consistent with the collective agreement, a reasonable exercise of Management Rights, clear and unequivocal, and incorporated a generous accommodation provision, but that the disciplinary nature of being held out of work required a balancing analysis. Although the intrusion on privacy was found to be analogous with drug and alcohol testing, the arbitrator distinguished the *Irving Pulp & Paper* case in a number of critical elements.

Ultimately, relying in large part on i) the fact that a positive test for COVID-19 does not reflect culpable behaviour, ii) the COVID-19 virus is highly infectious and often deadly for the elderly, especially those who live in contained environments, and iii) the high value of a testing regime to combat the spread of the virus, the grievance was dismissed. Tellingly, Arbitrator Randall ended his decision with a warning shot: "Arguably, the only way the testing could be improved is to increase its frequency, but that is not a proposal likely to have legs in the bargaining unit."

Instructive Guidance from the U.S. EEOC

The U.S. Equal Employment Opportunity Commission ("**EEOC**") has provided significant review and guidance to U.S. employers regarding policies around checking employees' temperature and asking employees about COVID-19 symptoms, and most recently addressed questions related to the administration of COVID-19 vaccinations to employees. The guidance by the EEOC confirms that the "vaccination itself is not a medical examination" for the purposes of the *Americans with*

[31] *Caressant Care Nursing & Retirement Homes v Christian Labour Association of Canada*, 2020 CanLII 100531.

Disabilities Act ("***ADA***"), and the administration of the vaccine is not held to be a medical examination limited or prohibited by the *ADA*.

The EEOC distinguishes between where the vaccine program is voluntary, meaning that any decisions to answer pre-screening questions would also be voluntary, thereby relieving the restrictions under the *ADA* around questions likely to elicit information about a disability. Notwithstanding the application of the restrictions, employers in the U.S. can always ask pre-screening questions if they are job-related and consistent with business necessity. If an employer has a reasonable belief based on objective evidence, that an employee who does not answer the questions and, therefore, does not receive a vaccination, will pose a direct threat to the health or safety of her or himself or others, questions are permissible.[32]

In Canada, employers do not have such formal guidance at the present time and must balance competing OHS and human rights considerations before deciding whether to unilaterally implement mandatory proof of vaccination policy requirements.

Employers Policies and the COVID-19 Vaccine

The above review and analysis of the law supports a general conclusion that there is legal authority of an employer to develop a policy of mandatory proof of COVID-19 vaccination, with some limited exceptions based on human rights law. Given that the vaccination and accompanying medical questioning is performed by a health care professional and not the employer, a mandatory policy cannot be said to involve a medical examination or medical procedure conducted by the employer. This may alleviate many of the health care privacy concerns of employees. Further protection of the information of a workers vaccination status can and should be managed by the terms in an employer's COVID-19 Vaccination Policy.

The lack of government mandatory vaccination legislation may have the effect of undermining the establishment and enforcement of such a mandatory proof of COVID-19 vaccine policy by employers. Employers are well advised to consider the potential problems that a mandatory proof of COVID-19 vaccine policy may create in terms of worker morale and from a labour relations perspective. However, the public health requirement of a high level of compliance with COVID-19 vaccinations required to achieve population immunity may outweigh these concerns.

The primary goal is the health and safety of workers, bolstered by the business advantages of a mandatory proof of vaccination policy. It remains to be seen if Canadian OHS regulators will provide guidance on this issue. Employers are recommended to obtain employment law advice before promulgating a mandatory proof of COVID-19 vaccination policy.

Employers who choose to institute a mandatory proof of COVID-19 vaccine policy should consider the following issues:

1. Is the policy consistent with the current collective agreement or employment contract?

[32] Elizabeth N. Hall, Thomas G. Hancuch, Kenneth F. Sparks and Kathryn A. Rosenbaum, "COVID-19 Vaccines Receive Emergency Approval: But Can and Should U.S. Employers Force Employees to Take it?" (21 December 2020), online: The National Law Review <https://www.natlawreview.com/article/covid-19-vaccines-receive-emergency-approval-can-and-should-us-employers-force>.

2. Does the policy comply with the *KVP* test for management rules?

3. How will the policy be enforced?

4. What kind of proof of vaccination is the government providing and will the employer require?

5. How will the employer identify and accommodate those workers who have lawful exceptions to such a policy?

6. What will the consequences be for a worker who chooses not to be vaccinated?

Summary and Conclusion

There is now at least two approved COVID-19 vaccinations available in Canada. No level government has expressed an intention to make getting the vaccination mandatory.

No public or occupational health and safety law, labour or employment law, or human rights and privacy law directly addresses the questions that employer's are asking:

1. "Can employers require employees to provide proof of vaccination before workers return to the workplace"?

2. "If the answer to 1. is "yes", are there any human rights or privacy exemptions, restrictions and limitations"?

3. "If the answer to 1 is "no", is it still worthwhile to implement a COVID-19 Vaccine Safety Policy?"

There is legal authority, reviewed in this article to generally support answering the questions, "yes", "yes" and "yes". We recommend that every employer consult with an employment lawyer, with occupational health & expertise before implementing any time of COVID-19 Vaccine Safety Policy.

The continuing COVID-19 worldwide pandemic has resulted in the illness and death of millions of individuals, a number that is increasing every day. Governments in Canada and around the world have massively intervened in the operation of the economy and businesses, going so far as ordering partial or complete socio-economic shutdowns to stop the spread of the virus. This has resulted in temporary layoff and permanent termination of the employment of hundreds of thousands of Canadian workers. At the time writing, two COVID-19 vaccines have been approved by Health Canada and others have proven levels of efficacious response to the virus. The federal and provincial governments are spending billions of dollars to respond to the COVID-19 pandemic, including but not limited to purchasing COVID-19 vaccines to ensure that every Canadian resident may be vaccinated.

Although there is some anticipated resistance by individuals often self-described as "anti-vaxxers" there are few individuals with lawful grounds to refuse vaccination in the employment law context. With COVID-19 killing so many Canadian, with the social-economic effects of the pandemic

being so devastating, and with population immunity only achieved at high vaccination levels, there are compelling public and occupational health and safety rationale for ensuring that as many workers receive the vaccine as possible. The health and safety of all Canadians, especially the elderly and most vulnerable, depend on it.