

Employment Law Update

KEY ISSUES FOR 2021

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- No current legislation mandating Covid-19 vaccinations
- Vaccine supply is currently limited
- Effectiveness of vaccines still being studied, particularly with respect to transmission
- Limited case law guidance
- Consider:
 - Are masking or distancing measures sufficient for your type of workplace? Is requiring a more intrusive method (vaccine) warranted?
 - Have you already been operating safely with these measures in place?
 - Do you permit unvaccinated customers/visitors/contractors in your workplace?
 - When vaccines are more readily available and the majority of the population is vaccinated, will the policy still be required?



- Areas of legal risk and potential challenges (absent legislation)
 - Reasonableness of policy (unionized workplace)
 - Potential constructive dismissal claims (non-unionized)
 - Human rights accommodation issues related to medical/religious grounds
 - Privacy
 - Charter challenges (government employers)
- In general, policies will only be enforceable where they:
 - Are based on evidence demonstrating:
 - A serious risk of infection in the workplace, and
 - The effectiveness of a vaccine or alternative measures in preventing spread of infection
 - Achieve a balance between workplace safety, employee privacy and human rights protections



The Flu Vaccine Cases (Vaccinate or Mask Policies)

Health Employers Assn. of British Columbia and HSA BC (Influenza Control Program Policy), Re 2013 Carswell BC 3189 (Diebolt)

Sault Area Hospital Assn. and ONA, (Vaccinate or Mask), Re 2015 CarswellOnt 13915 (Hayes)

William Osler Health System v ONA, 2016 CanLII 76946 (ON LA) (Hayes) St. Michael's Hospital and ONA, Re 2018 CarswellOnt 14889 (Kaplan)



Themes from the Flu Vaccine Cases

- Flu vaccine cases are not ideal comparators but do suggest the determination of reasonableness/enforceability could turn on the following:
 - Expert evidence required
 - Balancing of employee rights with employer's duties in the workplace
 - Vaccination "highly intrusive"
 - Accommodation
 - Concerns of coercion



- If an employee is unable to comply with a vaccination policy for a reason protected by human rights legislation, the employer must respond through accommodation. For example, an employee might refuse vaccination due to:
 - A disability which prevents them from receiving a vaccination (referred to as medical "contraindication" in vaccination literature)
 - Religious beliefs which forbid receiving a vaccination
- Other possible grounds:
 - Gender (pregnancy)
 - Creed where applicable (but see Ataellahi v. Lambton County (EMS), 2011
 HRTO 1758, where the HRTO found that disagreeing with the safety or efficacy of a vaccination is not a valid human rights ground)



Vaccination Policies: Human Rights

- What information can an employer request to support an exemption from a vaccine requirement?
 - Proof of medical exception
 - Statement of religious belief
- Accommodation and undue hardship?
 - Remote work
 - PPE/physical changes to work environment
 - Physical distancing
 - Screening/testing
 - Leaves of absence



Vaccination Policies - Privacy

- Vaccination status is personal medical information
- Subject to applicable privacy legislation
- Employers must only collect and use employee medical information to the extent reasonable in the circumstances.
- This limitation on collection means the employer should not request information about an employee's vaccination status where vaccination is not reasonably necessary for workplace safety
- Notice, consent, limiting use and disclosure, retention, and security requirements will all apply



Sum up: Balancing Competing Interests

- Is it necessary?
 - Evidence of risk and effectiveness
 - Orders/guidance from public health authorities
 - Risk level of contacts in the workplace
- What alternatives can be reasonably provided that do not compromise the safety of the workplace (to allow for accommodation and individual choice)?
- What standards are being applied to non-employees who enter the workplace?
- Availability of vaccines
- How will the policy change as the pandemic passes?





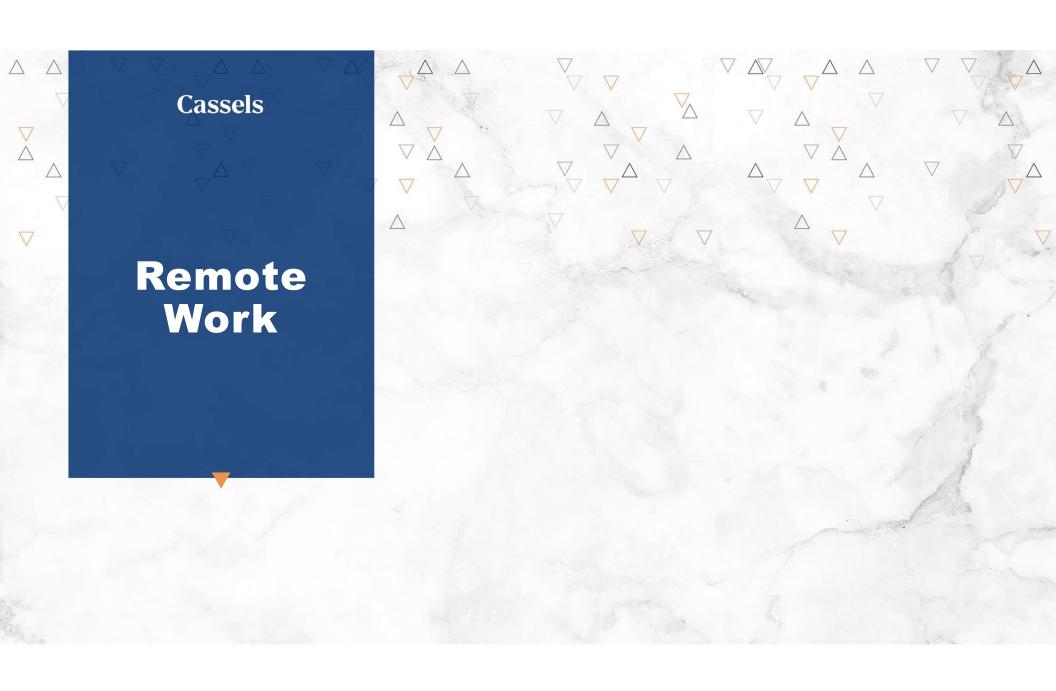
Mandatory Covid-19 Testing

 Caressant Care Nursing & Retirement Homes and CLAC (Covid Testing), Re, 2020 CarswellOnt 18430

"In my view, when one weighs the intrusiveness of the test: a swab up your nose every fourteen days, against the problem to be addressed — preventing the spread of COVID in the Home, the policy is a reasonable one. While the Home had not had an outbreak, I agree entirely with the Employer that, given the seriousness of an outbreak, waiting to act until that happens, is not a reasonable option."

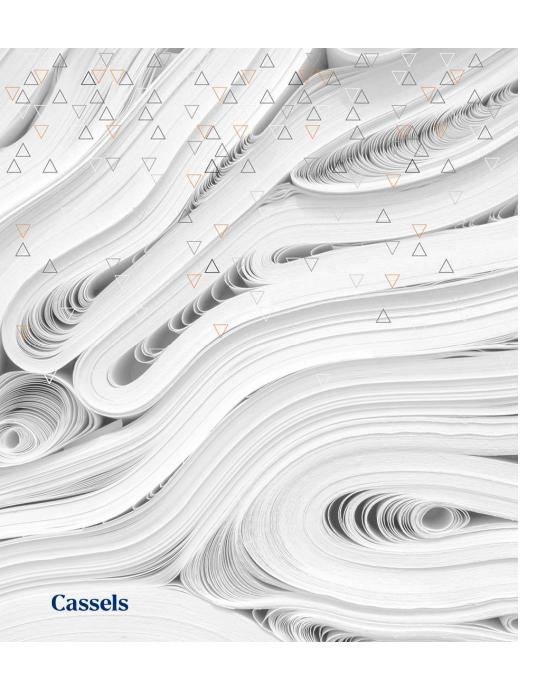
- Remains to be seen how mandatory testing will be treated in cases outside the vulnerable care sector.
 - Nature of workplace?
 - Less intrusive methods?





- Hybrid models of remote work likely here to stay especially for highly educated, well-paid minority of the workforce
- Estimated that Post Covid19 71% of lawyers want to change their work arrangements
- Legal Consideration for Remote Work:
 - Obligations under Employment Standards
 - Complications with OHS and WBC
 - Privacy, Technology and Intellectual Property
 - Human Rights and Duty to Accommodate
 - International Considerations





EMPLOYMENT STANDARDS

Blurring Between Work Time and Personal Time



Employer still responsible for recordkeeping requirements



Non-exempt workers still entitled to overtime

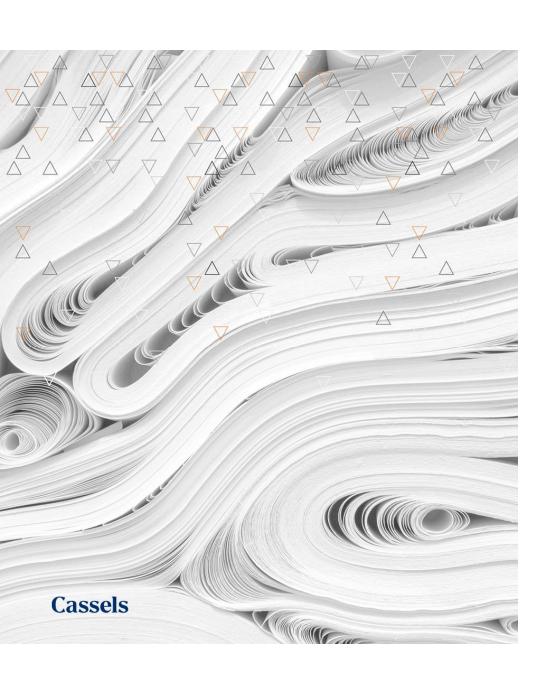


Need clear hours expectations; normal provisions for breaks/meals



Productivity tracking measures: progress reports, monitoring of emails, or slack channels, productivity software

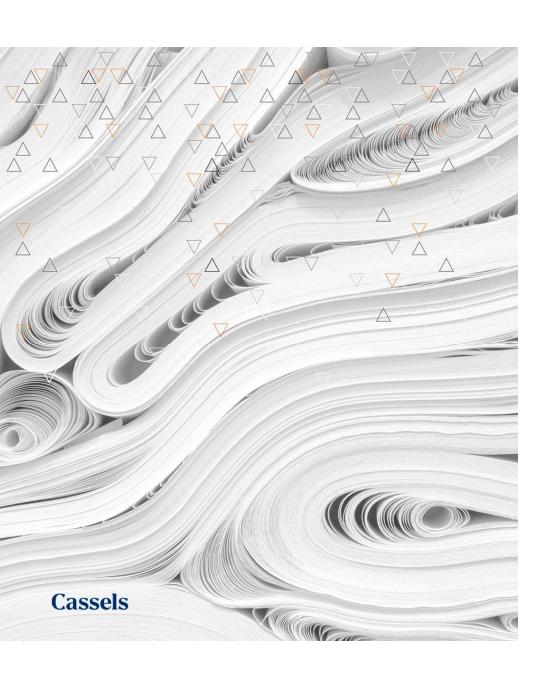




OHS & WCB

- Employers health and safety obligations to telecommuting workforce varies across country
 - Some provinces exclude work in private residences; others are more broadly applicable
 - Modify existing health and safety policies to make applicable to remote work
- Work Alone Procedures & Ergonomics
 - Workers covered by provincial worker's compensations schemes remain covered while working from home
 - Will include injuries sustained while performing a work-related duty or an activity reasonably related to the worker's employment
 - Need to take steps to ensure the employer's reporting obligations are met



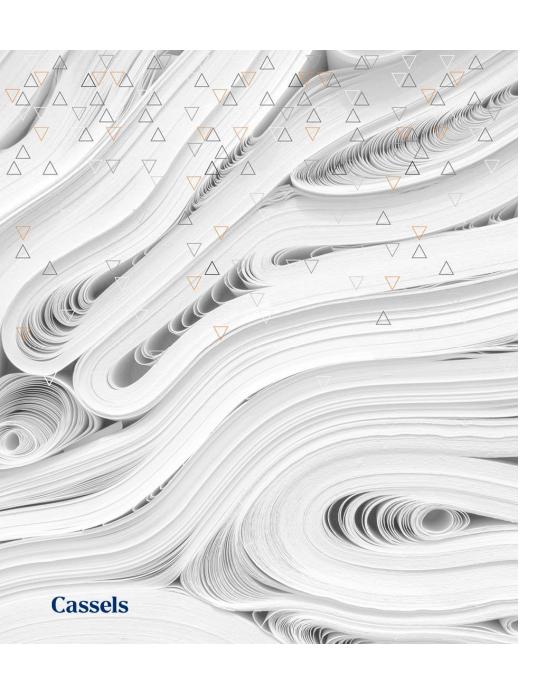


TECHNOLOGY, PRIVACY AND INTELLECTUAL PROPERTY

- Employer needs to take steps to ensure the security of confidential information
 - Use VPN, passwords, firewalls, company-managed devices
 - Policies/guidelines on how employees can safeguard information, use of personal devices, working from locations other than home, printing/document destruction
 - Comply with licensing agreements owned or held by company
- Require employees to report any breaches or inadvertent disclosures







DUTY TO ACCOMMODATE

Balancing Work & Other Responsibilities

- Duty to accommodate for family status/caregiving (childcare and elder care)
- Accommodations can include flexible hours requirements, flexible schedules, reduced workload, tolerance of occasional disruptions, leaves, access to EAP programs
- Duty to accommodate disability, need process to manage employee sick time, quarantine/self-isolation



INTERNATIONAL CONSIDERATIONS

Considerations for International Remote Workforce

- Contractor/Employee is required to be legally allowed to work in location where work is being performed, but no need to deal with Canadian immigration
- Need to comply with laws of country work is being performed in
- Preference is for ICA or consulting agreements over employment agreements
 - Mitigates risk for being required to meet employer of record in those countries
 - Mitigates risks for local payroll/tax compliance
 - Can be structured to put duty for local compliance on worker
- Need to track number of people working in each country may hit a threshold that you are required to take further steps to remain compliant





- Matthews v. Ocean Nutrition, 2020 SCC 26
 - Limiting incentive compensation on termination of employment
 - Not enforceable:
 - 2.03 [Ocean] shall have no obligation under this Agreement to the Employee unless on the date of a
 Realization Event the Employee is a full-time employee of [Ocean]. For greater certainty, this Agreement
 shall be of no force and effect if the employee ceases to be an employee of [Ocean], regardless of
 whether the Employee resignsor is terminated, with or without cause.
 - The Long Term Value Creation Bonus Plan does not have any current or future value other than on the date of a Realization Event and shall not be calculated as part of the Employee's compensation for any purpose, including in connection with the Employee's resignation or in any severance calculation.



- Waksdale v. Swegon North America Inc., 2020 ONCA 391 (leave to SCC refused)
 - Impacts in Ontario
 - Impacts outside of Ontario?
- C.M. Callow v. Zollinger, 2020 SCC 45
 - How might the expansion of the duty of honest performance in contract impact employer obligations?



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