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**Back to Work & Back
to School:
Vaccination Policies
& Accommodation of
Parental Status**

**NAVIGATING THE NEW,
“NEW NORMAL”**

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Accreditation

- HRPA
 - This program has been approved for 0.5 CPD hours under Section A of the Continuing Professional Development Log of the Human Resource Professionals Association
- Continuing Legal Education
 - ON: This program contains 30 minutes of Substantive content
 - BC: Submitted to the Law Society of British Columbia for 0.5 CPD Hours. Status: pending
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**Vaccine
Policies at
Work**



Vaccine Policies: Do You Need One?

- Is it legally required for my workplace?
- If not, consider the nature of the workplace
 - Fully remote
 - Primarily remote with limited in-person contact
 - Close contact with coworkers
 - Close contact with members of the public
 - Contact with vulnerable populations

Components of Vaccine Policies

- Disclosure of status
- Vaccination requirement to attend in-person events or worksites with unlimited exemptions
- Vaccination requirement for certain roles only
- Vaccination requirement for all employees



Employee Objections

- Request for medical exemptions
- Request for religious exemptions
- Request for exemption on the basis of political beliefs
- Constructive dismissal



Employer Responses

- Health and safety justifications
- Accommodation to the point of undue hardship
- Other exemptions
- Disciplinary action
- Dismissal



Key Takeaways

- Stay informed
- Keep the focus on health and safety
- Avoid the “noise”



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**Accommodation
of Parental
Status in the
COVID-era**



What's Changed and What to Expect with the 2021/22 School Experience

- Remote learning vs. in-person learning
- School closures
- Obligations to self-quarantine or self-isolate
- More limited availability of reasonable alternative child care options

All of the above = More requests for childcare accommodations!



Legislated COVID-19 Protected Leaves

- In Ontario, Infectious Disease Emergency Leave (IDEL) provides job protected leave for employees for reasons which include providing care to a child for reasons related to COVID-19
- According to Ontario Ministry of Labour, can include caring for a child:
 - Because of a school or daycare closure due to COVID-19
 - Because the employee did not send their child to school or child care out of fear of exposure to COVID-19
 - Because the child was sick with COVID-19 or is following COVID-19 protocols in place at the school or child care
- Majority of provinces have likewise implemented measures in their employment standards legislation to provide similar job protections



Legislated COVID-19 Protected Leaves

- IDEL:
 - ESA does not specify a limit on days of unpaid IDEL that can be taken
 - Employees may be eligible for up to 3 days of paid IDEL where:
 - The employee is providing care or support to a child (or other designated individual) because:
 - The child is under medical investigation, supervision or treatment related to COVID-19
 - The child is in quarantine or isolation or under a control measure as a result of a COVID-19 direction issued by a public health official
- Other job-protected leaves in Ontario:
 - Family Responsibility Leave
 - Family Medical Leave



Family Status and Human Rights Legislation

- “Family Status” is a protected ground under all human rights legislation across Canada, including the Ontario *Human Rights Code*
- What does “Family Status” mean?
- Where engaged, what obligations does an employer have?
 - As with other protected grounds, where prima facie discrimination based on “family status” exists, obligation is to accommodate to the point of undue hardship



Test for Family Status Discrimination

- Not entirely settled
- Variations based on jurisdiction within Canada
- Federal:
 - “Johnstone” Test – *Canada (Attorney General) v. Johnstone* (2014)
 - 4-part test:
 - Establish:
 1. Child was under employee’s care and supervision.
 2. Childcare obligation engaged was a legal responsibility rather than a personal choice
 3. Employee first made reasonable efforts to self-accommodate
 4. The workplace rule in question interfered with the employee’s fulfillment of their childcare obligations in a way that was more than a trivial or insubstantial.



Test for Family Status Discrimination

- Ontario:
- *Misetich v. Value Village Inc.* (2016):
 - Employee must show a negative impact based on a family need that results in a real disadvantage to the parent-child relationship and/or to the employee's work
 - Assessing the impact of an impugned workplace rule must be done contextually and may include consideration of other supports available to the employee
 - If an employee can prove discrimination, the onus then shifts to the employer to establish that the employee cannot be accommodated without undue hardship.

What Kind of Accommodation May Be Requested?

- Leaves of absence
 - Long-term or short-term
- Work-from-home arrangements
- Altered work hours (or work days)
- Requests for flexible work weeks

- But keep in mind...
 - While employees are entitled to “reasonable accommodation” they are not entitled to perfect accommodation or their preferred accommodation



Questions to Consider

- What is the nature of the care-giving obligation that is being impacted or interfered with?
- Does the request for accommodation relate to an essential parental obligation or is it simply a matter of preference or convenience?
- What kind of accommodation is the employee requesting?
- For how long is the accommodation being requested?
- Are there alternate ways of accommodating the employee's request?
- Are other supports/options available to the employee to provide for alternate child care?



How Should Employers Respond?

- Do not be dismissive of accommodation requests
- Be wary of applying a “cookie cutter”/ “one size fits all” approach
 - Different employees will have different needs and different options available to them
- Understand that, with the COVID-19 pandemic, we are in a “new world” where what is reasonably expected of parents may well be looked at through a different lens (*Hydro Ottawa v. IBEW, Local 636 (2020-06) (2021)*)



How Should Employers Respond?

But, at the same time, know that:

- The accommodation process is a multi-party inquiry
 - Employees must be ready to participate in the accommodation process, including by providing information regarding restrictions
 - Do not be afraid to ask questions
- There is a distinction between an employee's preference and an employee's need
- Be prepared for the unexpected. Contingency planning is key!



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