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# Employment Issues During COVID-19

**YOUR QUESTIONS ANSWERED  
PART III**

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**Vaccines  
and the  
Workplace**



## Employers' Key Questions

- Can we make vaccination mandatory for employees?
- Can we track employees' vaccination status?
- Can we ask employees if they have been vaccinated?
- Can we incentivize employees to get vaccinated?

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# The Current COVID-19 Context

- No current legislation mandating COVID-19 vaccinations
- Vaccine supply is currently limited
- Effectiveness of vaccines and impact on transmission still being studied
- 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?

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## Vaccine Policies: Areas of Risk

- Areas of legal risk and potential challenges (absent legislation)
  - Reasonableness of policy (unionized workplace)
  - Potential wrongful and constructive dismissal claims (non-unionized)
  - Human rights – accommodation issues related to medical/religious grounds
  - Privacy
  - Charter challenges (government employers)



## The Flu Vaccine Cases (Vaccinate or Mask Policies)

- Challenges to vaccinate or mask policies in the unionized healthcare setting
  - *Health Employers Assn. of British Columbia and HAS BC (Influenza Control Program Policy)* (2013)
  - *Sault Area Hospital Assn. and ONA (Vaccinate or Mask)* (2015)
  - *William Osler Health System v ONA* (2016)
  - *St. Michael's Hospital and ONA, Re* (2018)
- Limited precedential value; however, the same considerations may be relevant in both the unionized and non-unionized context

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## 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"
    - Can less intrusive measures meet the objectives?
    - Accommodation
  - Concerns of coercion





## Vaccination Policies: Human Rights

- 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), where the HRTO found that disagreeing with the safety or efficacy of a vaccination is not a valid human rights ground)

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# 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

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## 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



## Vaccine Policies: the Bottom Line

- 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
  - AND
  - Achieve a balance between workplace safety, employee privacy and human rights protections



## 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?

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# Alternatives to Mandatory Vaccination Policies?

- Incentive policies for voluntary vaccination
  - Human rights concerns may still arise where differential treatment based on a prohibited ground exists
  - Privacy best practices and applicable legislation must be followed
  - Avoid inadvertently identifying employees who cannot be vaccinated for legitimate human rights related reasons
  - Ensure policy is truly voluntary and not coercive
- Remove barriers
  - Paid time off (now statutorily required in some provinces)
  - Flexible scheduling
- Consider education program
  - Ensure information provided is accurate, up to date and complete

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**COVID-19  
Testing  
and the  
Workplace**



# Mandatory COVID-19 Testing

- To what extent can an employer require that employees get tested for COVID-19?
  - Periodic testing vs. potential exposure-related testing
- General Considerations:
  - Invasion of privacy?
  - Breach of dignity?
  - Inconvenience?
  - Accommodation considerations?
- Unfortunately, there is limited case law or legislative guidance

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## Mandatory COVID-19 Testing

- *Caressant Care Nursing & Retirement Homes and CLAC (COVID Testing), Re, 2020 CarswellOnt 18430*
- Facts:
  - The employer operates a unionized retirement home in Woodstock, Ontario which is attached to a nursing home
  - The employer implemented policy of mandatory bi-weekly testing for all employees (front-line workers, management, etc.)
  - Staff would be paid for one hour of work and their parking fees at the hospital would be waived
  - A refusal to participate in testing would result in the employee being held out of service until tested

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## Mandatory COVID-19 Testing

- *Caressant Care Nursing & Retirement Homes and CLAC (COVID Testing), Re, 2020 CarswellOnt 18430*
- Held:
  - The policy was upheld as being both reasonable and consistent with the collective agreement.

*“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.”*

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# Mandatory COVID-19 Testing

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



# Rapid COVID-19 (i.e. Point-of-Care) Testing

- What is it?
  - Rapid Antigen Tests (RAT) / Rapid Nucleic Acid Amplification Tests (RNAT)
  - Quicker but less reliable than standard COVID-19 test
    - Results available within 15 to 20 minutes
  - Used for initial screening of pre-symptomatic or asymptomatic cases
  - To be privately administered
- Now available as an option for eligible employers in a number of provinces including Ontario, B.C. and Alberta
- Subject to provincial implementation standards and reporting requirements

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## Mandatory COVID-19 Testing

- A worker has tested positive for COVID-19. Can an employer require a negative test before allowing the employee to return to work?
  - In Ontario, generally speaking, workers are not required to provide proof of a negative test result (NAAT) or a positive serological test result to their employers in order to return to work
  - Workers are required, however, to abide by public health direction and advice on when they would be considered clear to return to work, including self-isolation requirements



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# Masking and the Workplace



## Masking Policies

- Masks are widely regarded as an important tool in combatting the spread of COVID-19
- Unlike mandatory testing or vaccination, employers can generally require employees to wear a mask in the workplace
  - But, subject to duty to accommodate any employees who are unable to wear a mask for reasons protected by human rights legislation
    - Disability
    - Religion/creed

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# Masking Policies

- Cases involving customer objections to masking policies:
- *Sharma v. City of Toronto* (Human Rights Tribunal of Ontario)
  - Facts:
  - Customer filed a Human Rights Application against the City of Toronto in response to its masking by-law
  - Argued that he was unable to wear a mask due to:
    - **Creed**
      - “My creed disagrees with covering my face for unsubstantiated claims...”
    - **Disability**
      - “My bodily functions are impaired by face coverings as it impedes my breathing...”

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# Masking Policies

- *Sharma v. City of Toronto* (Human Rights Tribunal of Ontario)
  - Held:
    - The Tribunal held that the Applicant's objection did not fall within the meaning of "creed" as "mere political opinion does not engage creed".
    - But, the ground of disability was engaged (in light of two medical conditions disclosed during the summary hearing).
    - Since the City of Toronto by-law confirmed that members of the public should not be required to provide proof of any medical exemption, there was no breach by the City.



# Masking Policies

- *The Customer vs. The Store (B.C. Human Rights Tribunal)*
  - Facts:
  - Customer at a grocery store was stopped by a guard for not wearing a mask.
  - Customer told the guard she was exempt but refused to explain why (other than to state they “cause breathing difficulties”).
  - Guard insisted and customer left the store
  - Customer filed a Complaint with the Tribunal on basis of disability
  - When asked about her disability by Tribunal, Customer indicated “it is very difficult to breathe with masks, and it causes anxiety”

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# Masking Policies

- *The Customer vs. The Store (B.C. Human Rights Tribunal)*
  - Held:
  - The Tribunal refused to proceed with the Complaint.
  - According to the Tribunal:
    - *“The [B.C. Human Rights] Code does not protect people who refuse to wear masks 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 a pandemic. Rather, the Code only protects people from discrimination based on certain personal characteristics, including disability...”*
    - *“In this complaint, the 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.”*

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# Masking Policies

- *The Worker v. the District Managers (B.C. Human Rights Tribunal)*
  - Facts:
  - Worker contracted to do work at a facility was asked to wear a face mask
  - The Worker refused indicating it was his “religious creed”
  - The Worker was denied entry and subsequently had his contract terminated for not wearing a mask.
  - The Worker then filed complaints alleging discrimination on the basis of religion arguing that:
    - *“We are all made in the image of God, a big part of our image that we all identify with is our face. To cover up our face arbitrarily dishonours God.”*
    - *“God makes truth of high importance that I must follow ethically and morally”, “forced mask wearing does not help protect anyone from viruses” and, therefore, he cannot “live in that lie”.*

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## Masking Policies

- *The Worker v. the District Managers (B.C. Human Rights Tribunal)*
  - Held:
  - The Tribunal again refused to proceed with the Complaint.
  - The Worker failed to set out facts that could establish that his objection to mask-wearing was grounded in a sincerely held religious belief.
  - According to the Tribunal:
    - *“The [Complainant] has not pointed to any facts that could support a finding that wearing a mask is objectively or subjectively prohibited by any particular religion, or that not wearing a mask “engenders a personal, subjective connection to the divine or the subject or object of [his] spiritual faith”. Rather, his objection to wearing a mask is his opinion that doing so is “arbitrary” because it does not stop the transmission of COVID-19.... [T]hat view is not protected under the Code.”*

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**Other  
Workplace  
COVID-19  
Measures**



## Other COVID-19 Measures in the Workplace

- Occupational health and safety legislation, being public welfare legislation, is to be broadly interpreted in accordance with its purposes
  - In Ontario, OHSA requires employers to take “every precaution reasonable in the circumstances” to protect workers (section 25(2)(h))
- *Liquor Control Board of Ontario (2021 CanLII 15607 (ON LRB))*
  - Facts:
  - Inspector from Ministry of Labour attended at warehouse facility and identified concerns about insufficient physical distancing in the lunchroom

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## Other COVID-19 Measures in the Workplace

- *Liquor Control Board of Ontario (2021 CanLII 15607 (ON LRB))*
  - Facts (cont'd):
  - Several Orders were made including Orders requiring:
    - That tables in the lunchroom be separated so that an employee walking between tables can maintain at least 6 feet of separation
    - The opening of additional lunch areas to reduce capacity
    - Employees to wear face shields in addition to masks when in the lunch area.
  - The Employer brought an application to suspend the above Orders arguing that:
    - (a) they were “clearly” not reasonable requirements;
    - (b) they exceeded any standard recommended by public health authorities; and
    - (c) compliance could create additional health and safety risks.

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## Other COVID-19 Measures in the Workplace

- *Liquor Control Board of Ontario (2021 CanLII 15607 (ON LRB))*
  - Held:
  - The Ontario Labour Relations Board declined to suspend the Order.
    - *“The Board must seriously weigh suspending an order where there is no scientific certainty concerning the spread of the virus.”*
    - *“[E]ven assuming that the order exceeds the public health standards the LCBO relies on, those may not cap what is reasonable in individual circumstance, and the statutory requirement to take all reasonable precautions necessary in the circumstances for the protection of workers may require measures greater than those set out in any recommendation, statute or regulation.”*
    - *“The LCBO has not satisfied the onus it has of convincing the Board that suspending the Order would not endanger worker safety.”*

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## Other COVID-19 Measures in the Workplace

- *Liquor Control Board of Ontario (2021 CanLII 15607 (ON LRB))*
  - Held (cont'd):
  - The Board then considered the effect of variants/mutations in the virus and continued:
    - *“It would be contrary to the public interest, however, if the Board did not take judicial notice that in the current environment in Ontario there are confirmed cases of mutations of the virus which are thought (based on what has occurred in England and elsewhere, but not proven), to be transmissible significantly more quickly and widely than the predominant strain of the virus... Had it been necessary to do so in order to decline to suspend the Order, the Board would have been prepared to rely on the unproven but serious risks posed by the mutations of the virus to workplaces at this time... “*

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**COVID-19 and  
Termination  
of  
Employment**



# COVID-19 Termination Case Law

- Cause for Dismissal
- Reasonable Notice Periods and CERB Payments
- Constructive Dismissal

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## Cause for Dismissal

- *Garda Security Screening Inc. and IAM, District 140 (Shoker), Re, 2020 CarswellOnt 19859*
  - Unionized Pearson airport employee failed to self-isolate pending results of COVID test
  - Grievance of the termination dismissed
  - “The actions of the grievor were a clear violation of the employer’s and public health guidelines. Her claim of not feeling sick is absolutely irrelevant. She was required to isolate, as she knew, for the safety and health of others. She chose not to, thereby putting countless others at risk of illness or death.”

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## Cause for Dismissal

- *Labourers' International Union of North America, Loc. 183 v. AECON Industrial*, 2020 CanLII 91950 (ON LA)
  - Unionized employee exhibiting COVID symptom returned to work contrary to instructions and failed to disclose symptom (runny nose) during COVID screening
  - Termination for just cause upheld
  - The Employee's "deliberate and cavalier attitude toward the COVID safety risks he represented both to his co-workers and in turn to the Company's obligations to protect the workplace was unconscionable, unreasonable and totally unacceptable."

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## Cause for Dismissal

- *Trillium Health Partners v. CUPE, Loc. 5180, 2021 CanLII 127 (ON LA)*
  - Unionized employee exhibited pattern of disrespect for hospital's authority re: COVID safety protocols (including ignoring prohibitions on sharing of food and communal gathering)
  - Termination for just cause overturned and employee reinstated, but without compensation and subject to being terminated for cause if any further misconduct in following 18 month period

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## Impact on Reasonable Notice Periods

- *Yee v. Hudson's Bay Company*, 2021 CarswellOnt 876
  - Employee terminated on August 28, 2019
  - *“It seems clear terminations which occurred before the COVID pandemic and its effect on employment opportunities should not attract the same consideration as termination after the beginning of the COVID pandemic and its negative effect on finding comparable employment.”*





## Impact on Reasonable Notice Periods

- *Nahum v. Honeycomb Hospitality Inc.*, 2021 CarswellOnt 2487
  - Employee terminated on October 31, 2019
  - *“While the COVID-19 pandemic might reasonably be thought to impact Ms. Nahum’s job search, the parties agree that it is not a factor in determining the notice period in this case, because Ms. Nahum’s termination pre-dated the pandemic, which could not have been anticipated at the time. As a result, I do not consider it in my analysis.”*



## Impact on Reasonable Notice Periods

- *Lamontagne v. J.L. Richards & Associates Limited*, 2021 CarswellOnt 4676
  - Employee terminated on February 19, 2020 (approximately one month prior to WHO declaration of global pandemic)
  - *“I take judicial notice that by February 19, 2020, there was the threat of a possible global pandemic. This threat created uncertainty about what might happen, including how our economy might fare, if a global pandemic ever became a reality. This degree of uncertainty, which existed on February 19, 2020, is one of the many factors that I consider in assessing the reasonable period of notice applicable to the circumstances of this case”*



## Impact on Reasonable Notice Periods

- *Marazzato v. Dell Canada Inc.*, 2021 CarswellOnt 3977
  - Employee terminated on March 4, 2020
  - Court concluded that economic downturn caused by COVID pandemic did not favour an increased notice period:
    - No evidence was presented that there would be greater difficulty in finding new employment and it would be inappropriate to speculate without evidence
    - The employee's "skill set is in the computer business which may have actually benefited from the COVID pandemic and its resulting greater use of computers for access to the internet and remote practices"
- Also see: *Perretta v. Rand A Technology Corporation*, 2021 CarswellOnt 3971

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## Impact of CERB Payments

- *Iriotakis v. Peninsula Employment Services Limited*, 2021 CarswellOnt 1663
  - Employee terminated on March 25, 2020
  - Court noted that impact of COVID on economy and job market was “highly speculative and uncertain” at the time of termination, and it appears to have had a limited impact on the ultimate notice period (3 months)
  - CERB payments received during the notice period were not deducted “on these facts” due to fact they were significantly below normal compensation and in light of lost commission income



## Impact of CERB Payments

- *Gray v. Safecross First Aid Ltd.*, 2021 CarswellOnt 3307
  - Employer found to have engaged in and unlawful reprisal contrary to s. 50 of Ontario's *Occupational Health and Safety Act* and ordered to pay 12 weeks of wages
  - OLRB held that CERB payments should not be deducted, and that employer should pay full amount to ensure employee is made whole
  - “There will be no “double award” as suggested by the Employer as Ms. Gray may be required to repay any amounts determined to be in excess by the CRA”



## Constructive Dismissal

- *Kosteckyj v. Paramount Resources Ltd.*, 2021 CarswellAlta 784
  - On March 27, 2020, employer instituted 10% reduction in employees' salaries, suspension of RRSP matching program, and cancellation of bonuses as part of "Cost Reduction Program" in response to pandemic
  - Subsequently terminated 15% of its workforce on April 22, 2020
  - Cost Reduction Program found to be a legitimate business reaction but significantly impacted employee's compensation and constituted constructive dismissal
  - Notice period took into account that dismissal was in "the midst of an economic downturn in the Alberta oil and gas industry and during the COVID-19 pandemic"



# Constructive Dismissal

- Ontario's Infectious Disease Emergency Leave
  - Employees subject to reduced hours/wages related to COVID-19 deemed to be on job-protected leave and not constructively dismissed during the "COVID-19 Period"
- But see Ontario Government publication "Your Guide to the Employment Standards Act":
  - *"These rules affect only what constitutes a constructive dismissal under the ESA. These rules do not address what constitutes a constructive dismissal at common law."* (<https://www.ontario.ca/document/your-guide-employment-standards-act-0/covid-19-temporary-changes-esa-rules>)

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## Employment Issues During COVID-19

### YOUR QUESTIONS ANSWERED - PART III

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