

Notes from a Canadian Bar Association On-line webinar

GETTING TO THE FINISH LINE: VACCINATION POLICIES FOR WORKPLACES (WEBINAR REPEAT)

Webinar Presentation Date: Apr. 30, 2021

Date of viewing and note-taking: Dec 17/18, 2021

The following are my notes of the webinar. The opinions are offered by lawyers chosen by the CBA for their expertise in their subject areas. The opinions are not necessarily my opinions. The opinions are not legal advice but were offered in the context of a fast-moving, multi-panelist discussion on the subject area.

The opinions were offered Ap 30, 2021. Things have changed since then. However, the analytical frameworks offered are equally relevant today as they were earlier this year, in terms of the balancing of individual/constitutional rights versus government mandates.

SYNOPSIS OF THE WEBINAR PROVIDED BY THE CBA

The increasing availability of Covid-19 vaccines require employers and employees to consider relevant employment and human rights law to establish workplace policies. Our panel of leading lawyers from western Canada discuss potential liabilities, health and safety precautions employers should be taking, employees' rights to privacy and the duty to accommodate in the context of Covid-19, and how to balance health and safety considerations with Charter rights or human rights.

This recording provides guidance on:

- Can employers require employees to be vaccinated?
- What are the Charter and human rights implications of vaccine requirements?
 - Does an employer need to accommodate employees who are prohibited from taking the vaccination due to a disability or religious belief?
 - How to maintain privacy obligations in smaller workplaces?

- What, if any, obligations are placed on employers and employees as each province moves through its vaccination plan?

THE LAWYERS INVOLVED

The following descriptions of the lawyers were provided by the CBA.

About Connor Levy

Connor Levy specializes in labour, employment and human rights law, and prides himself on helping businesses of all sizes navigate the complexities of their industry. Connor represents and advises clients on all types of workplace matters, including employee accommodations, arbitrations, wrongful dismissals, human rights and privacy matters. Connor has a particular interest in helping employers develop and retain an inclusive workforce.

About Christian Monnin

Christian Monnin practises in the areas of commercial and civil litigation, and labour and employment law. His practice extends to constitutional and public law, international and domestic commercial arbitrations, and administrative advocacy with an emphasis on regulatory matters and labour law matters. He has experience advising on matters relating to consumer product safety and liability and insurance, and defending clients in multi-jurisdictional and cross-border class actions. Christian regularly advises employers on all labour-management relations and non-unionized matters. Christian is a part-time commissioner representing the public interest for the Workers Compensation Appeal Commission of Manitoba.

About Jana Linner

Jana Linner focuses on labour and employment and human rights law, representing public and private sector employers in a wide variety of industries. In addition to defending employers facing litigation, she advises clients on collective agreement negotiation and interpretation, the drafting and implementation of employment contracts and workplace policies, disciplinary matters and terminations, harassment and accommodation. Jana's athletic background contributes to her strong work ethic in all aspects of her law practice. Jana has represented clients at all levels of Saskatchewan courts, as well as the Saskatchewan Labour Relations Board, arbitration boards and various administrative boards and tribunals. She clerked with the Saskatchewan Court of Queen's Bench.

About Eric M. Adams

Eric M. Adams, BA (McGill), LLB (Dalhousie), SJD (Toronto), is a Professor at the University of Alberta, Faculty of Law. Professor Adams has won multiple awards for his teaching and research including several article prizes for his legal historical work, a Provost's Award for Early Career Teaching Excellence, and a Killam Annual Professorship in 2016-2017 for excellence in research, teaching, and service. Professor

Adams publishes widely in the fields of constitutional law, legal history, employment law, human rights, and legal education. In particular, his multidisciplinary work engages with all aspects of Canadian constitutional law, theory, and history including studies of the classic cases, *Christie v York*, *Roncarelli v Duplessis*, and *R v Drybones*.

About Patricia Gonzales

Patricia Gonzales joined Parlee McLaws as an associate in the spring of 2017 and carries on a general civil litigation practice with an emphasis on insurance defence and employment law. Patricia's primary goal is to help clients obtain an efficient and cost effective resolution which limits the disruption to a client's underlying business or personal circumstances. This includes early assessment of the potential risks and costs associated with pursuing litigation or arbitration and advising of various forms of Alternative Dispute Resolution. When litigation or arbitration is required, Patricia has the necessary tactical and procedural experience to support clients in securing their desired objectives.

The panelists are lawyers from across Western Canada.

The focus of the panel discussion was on COVID as it pertains to workplace requirements.

Patricia Gonzales was the moderator.

Jana Linner

There is no legislation that mandates COVID 19 vaccinations [JW NOTE; THIS HAS CHANGED SINCE THE DATE OF THE WEBINAR]. Bonnie Henry has said this. Similar statements across the country. Even if there was an intention, it would be subject to challenges.

The decision to vaccinate is left up to employers. Privacy, human rights, accommodation issues all apply.

The decision to mandate this in the workplace and implementation will be underscored by science.

How do we advise clients in terms of upcoming case law. No specific cases yet but guidance exists.

Two decisions are relevant wrt COVID mandatory policies.

Health Employer Assn of BC and HSA BC (Influenza Central Program Policy, Re 2013 B AAA, No 138 (Diebolt)

Union brought the challenge. The arbitrator said there was an appropriate balancing of privacy and health rights.

CONTRAST

Leading Ontario case: Sault Area Hospital v Ontario Nurses Assn, 2015 Can LII 55643 (Hayes)

Substantial reference to the science.

Arbitrator Hayes found that in the case before him, it had less to do with safety and more about driving up vaccination rates. He found there was “scant evidence” in the effectiveness of masks.

The speaker says, people now accept more the effectiveness of masks.

There were many relevant cases cited.

LESSONS LEARNED

To justify a vaccine policy, you must have significant scientific evidence that goes to safety.

You’ll have to deal with real questions, such as degree of coercion.

We need to pay attention to collective agreements or employment agreements.

Absent legislation, mandatory vaccination policy carries a high liability risk for the employer.

Must pass a reasonableness test.

Accommodation must be done - medical and religious. Privacy considerations. Human rights.

Constructive dismissal claims are growing. Present idea on how courts examine these things.

Charter challenges: sections 7, 8, 15

Consider alternatives to mandatory vaccinations. The most important one is communication and education. You can increase worker knowledge in terms of the vaccine, how it works, the lack of side effects (or presence thereof). Host clinics at the workplace to lower the problems associated with vaccination. The scope of who can administer a vaccine has broadened. There is a number of approaches that can get to the same result as a mandatory vaccination policy.

Incentives can also be used. Be cautious. There will be differential treatment that could result in human rights complaints. The use of incentives also triggers privacy considerations. “What are you going to do with that information? How will it be stored? When will it be destroyed?”

Eric Adams, University of Alberta
Vaccines and Constitutional and Human Rights

Two years ago, he hypothesized a pandemic and postulated results of a mandatory vaccination policy.

Is the Charter engaged by a mandatory policy?
Would it be saved by Section 1?

Does the Charter apply?

First obvious example would be legislated mandatory vaccination policy. Such a law would be subject to charter scrutiny. That would be the case even if a municipality passed a bylaw.

Alberta has announced they will not do this.

Federally, there would be division of powers issues if the federal gov't tried to do this.

More germane, if as employer, federal, provincial or municipal gov't imposes mandatory vaccinations, then it's possible that a charter claim could be raised against that policy. Even there, the human rights complaint will be the more viable option even if you're dealing with a public employer.

What Charter rights engaged?

Freedom of conscience and religion - sn 2(a)

Thought, belief, opinion and expression - sn 2 (b)

Sn 7 - "right to life, liberty, and security of the person ..." - would have to be significant - includes physical and psychological harm - "fundamental personal choices" under the ground of "liberty"

Sn 15 - equality - is someone being discriminated against based on a physical or mental disability?

Because of this constitutional context, the formulation of these regimes would have exemptions built in, the speaker thought.

All of this will turn on the interpretation of Section 1, "Is it saved?"

Reasonable limits - has come up a lot in terms of charter-infringing COVID policies. I have argued consistently that Section 1 will save them, based on the reasoning of Chief Justice Brian Dickson in *R. V Oakes*: "It may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance."

3 themes in doing the balancing:

Deference of courts to gov't and scientists.

As hospitalization rates fall, the gov't will face harder challenges. It will be more difficult to justify infringements.

Irwin Toys case - the court should display deference where public rights interests balancing is involved.

Context is important. What workplaces? For what reasons?

Evidence will be crucial - evidence of vaccination and why it is necessary.

Canadian Human Rights Legislation

This is where the real litigation will unfold, according to this speaker.

Does an employer's mandatory vaccination policy discriminate? If new hires or targeted incumbents are required to vaccinate. People may object, based on a disability or religious ground. Provinces have different grounds. BC has one Alberta lacks: political belief. Cdn HR law has a new grounds: DNA.

Obvious objections: bona fide religious belief; physical disability.

Just because someone does not believe in efficacy is not enough. Needs to be genuinely held, not a passing idea nor a position taken for convenience or advantage in the circumstances in which the conflict arises. It must be broader than an individual's own personal interests and be core to a person's concept of a system of social cooperation, reaching further, generally, than matters such as operational decisions that an employer or other entity may make.

Moore v BC, 2012 SCC 61

Yes, there will be unlawful discrimination if the complainant can

"demonstrate prima facie discrimination, showing that they have a characteristic protected under the Code; that they experienced an adverse impact; and that the protected characteristic was a factor in the adverse impact." This would succeed if the policy would prevent the hiring, continued employment, or negatively impact the wages of an employee.

Connor Levy - connor@millertiterle.com

Do Employers Need to Accommodate an Employee Unable to be Vaccinated by a Medical Disability or Religious Belief?

Vancouver lawyer

What are the steps an employer has to go through?

Review of situation

Duty to accommodate - bona fide occupational requirements - first thing an employer must consider. Employer will ask, "Is the policy justifiable"

1. Condition must be rationally connected to the purpose of the condition;
2. Adopted in a good faith belief to fulfill a legitimate purpose
3. Policy reasonable as set out?

Undue hardship?

If there's exposure to immuno-compromised team, then employer will have an easier time to justify your requirements than if the team works remotely.

What if employee seeks accommodation?

Employer could say, yes or seek more information. How do I ask the questions? What's successful?

How to frame those questions.

Employers should reach out to legal counsel!

Tips in framing questions as employer:

1. Be cognizant of the context. Is the request legitimate? Being asked in good faith? There are stigmas associated with COVID 19; vaccinations; religious belief. The employee may be stressed in coming to you with the question. Be aware of this tension.

2. Be minimally intrusive in asking the questions, specifically when it comes to disabilities, the employer is only entitled to the minimal amount. You may not be entitled to know the name of the medical or mental disability but you may be entitled to know symptoms and how those will manifest in workplace, and how vaccine could impact them.

3. Religious beliefs - less clear-cut. What tribunals have said, when employee comes to you with request for accommodation, you should be able to make reasonable inquiries. There has to be some connection in the question to the context. BC Human Rights Tribunal has said, "May be a subjective belief. The complainant is not required to prove an objective standard, or how it's practised by other believers." You are probably not entitled to seek documented communication about the person's religious beliefs. It goes back to the subjective element, "How does the employee feel the vaccine will impact his religious belief?"

4. Let's assume the employee qualifies for some sort of accommodation. Then you have to look at whether you can provide an accommodation or whether it will cause employer undue hardship. Factors: cost, safety, other things. Employer must provide objective evidence to back up claim of undue hardship. Not enough to say, "It will be too expensive." OR "It would be unsafe." You need more objective evidence to back that up. What's reasonable accommodation in one workplace may not suffice in another.

5. What might a reasonable accommodation look like? Working remotely. People in office, but wearing masks; extra cleaning measures. If you've done something one way the last 13 months and want suddenly to change, you may have a hard time.

6. Recent BCHRT decision - dealt with wearing masks, not vaccines. 2021 BCHRT 39 - *Customer vs. Store*. BC Govt introduced mask requirement for indoor spaces but there were some exemptions. Medical conditions. Tribunal got hit with

dozens of complaints from people who said they were being discriminated against due to disabilities. Gov't initiated this test case. If individual complaining of the mask requirement merely claimed "breathing difficulties, health issues, or anxiety" this was not enough. This gives the confidence to ask certain questions. The Tribunal realizes duty to accommodation exists but these are unprecedented times. You can ask for additional information, as an employer.

7. Many unknowns remain. Will there be federal or provincial mandates? Industry-specific concerns? But if an employee seeks accommodation, you should take that request seriously. If, as employer, you decide we cannot accommodate due to undue hardship, you must have something concrete to support your contention, especially if you're reversing previous accommodation.

Christian Moonin, Vaccines and Privacy Considerations

Privacy leg'n on collection, use and disclosure of info is silent whether an employer can force an employee to disclose vaccine status but that same leg'n presumes a person's personal health info is highly sensitive.

Requiring an employee to prove COVID vaccination - highly controversial - doing it causes a potential challenge.

There exists a body of law - tort of breach of privacy - not focusing so much on this tort in remarks today. The damages are typically modest but the issue is still important.

Federal - *Personal Information Protection and Electronic Documents Act* - PIPEDA - regulates personal information collection, use and disclosure in the private sector. "Personal info" is broadly defined.

It applies to work, undertakings, and businesses, at least those that are federally regulated and to provincial situations where the specific province does not also have substantially similar leg'n. "Commercial activity" - any transaction where the course of the transaction takes a commercial nature.

BC - we have Info Privacy Commissioner responsible for overseeing a suite of leg'n. Includes a law deemed to be similar to PIPEDA. Alberta also has one. Sask, Man - do not have an act substantially similar to PIPEDA.

Balancing of obligations and rights. Safety of workplace must be balanced with employee's right to privacy. Do you really need the vaccine policy? If so, then policy must not unduly infringe on employee's reasonable expectations. Is it to keep workplace safe? Protect from transmission to colleagues and customers? Both? These help you determine if it's really necessary.

There may be workplaces where options to mandatory vaccination work: masks, social distancing, hand washing.

If you're going down that route, establish a written policy. Scientific reporting is changing fast but you should still prepare a written policy. What's the authority? What statute? Purpose? Consequences? What if certain employees confirm or refuse? How is that info stored? Used? When destroyed?

These presentations from today should be used conjunctively.

Employees should be transparent, if their reasonable expectations can be met. How would info be shared? Best, do not share with other employees. Store off site - better. Destroy by third party. What info should be collected?

Only collect what is necessary to achieve purpose of the vaccine policy. Ask for oral response? Only ask for proof of vaccination, not necessarily certificate.

Who in organization needs to know? Employer should not make names available. Must be treated as highly confidential.

What do you do when you get the info? Employer must protect it and not share beyond what's necessary. Keep in locked desk. If electronically stored, password-protected; encrypted.

How long should employer retain the info? Only as long as you need for specified purposes. Applicable leg'n will specify some terms. The longer you keep it, the more likely you'll breach. Identify purpose of keeping - that will help confirm the length of retention.

Employee refusals. Employer should think this out in advance. Human rights consideration? Health? Do you accommodate? Ask to work from home? Send home w/o pay? End relationship? He says ending the employee relationship is last resort and should generally not be done.

Q&A

Employee vaccination event at workplace - is that unduly coercive?

Is it required or discretionary?

Option - memo to staff

Could be connected to other options. Paid leave.

Always add in the education portion. Links to govt websites and health authorities.

Boosters. Will employees be required to provide proof of vaccination every year?

Evans: will probably track the evolution of the 'flu vaccine. The extended nature of this likely pandemic will weaken the ability of an employer to impose mandatory vaccinations. If there is a compelling case to be made that this particular workplace requires it, this will affect the ability of employer.

Comment on Ministerial order in Quebec of health care workers to get vaccinated or be re-assigned.

Subject to the Charter. The Order would have to comply with Section 1. Does it infringe a particular right and if so is it saved by Section 1?

In the middle of a pandemic with tens of thousands dying, it's a good chance gov'ts will succeed. That will be less the case as time goes on.

I read that none of the companies that furnished the vaccine can be held liable. But if an employee has an adverse reaction, can he sue the employer?

Of course, someone can always sue the employer. Does not mean the case is necessarily strong.

What does the province look like?

What does the workplace look like?

Duty to accommodate?

If a vaccination policy is properly rolled out, I feel confident in the employer's ability to defend himself successfully.

Important for the employer to communicate risk. Not completely risk-free but the vaccination does reduce other risks. Educate the employee. Get employee to generate true consent. There is a small risk in 'flu vaccine. Employer could still protect itself.

Are vaccination clinics at workplace not a form of coercion? (Similar to question above)

Depends on how you roll it out.

How you communicate.

Having a clinic - not a mandatory vaccination - it's a voluntary vaccination but we're bringing it in and making it more convenient to you - we're not tracking participation. Beyond human rights and other legal concerns, there are other considerations.

If employee does not get vaccinated in health care world, with immune-compromised people, this could be legitimate grounds for termination for cause.

Can you ask if people are vaccinated in the workplace?

Ask following questions:

Necessary?

Effective?

Proportionate?

Minimally intrusive?

Many workplaces avoided the discussion by moving to a remote working situation. Others have just operated on the assumption that people are moving as quickly as possible to be vaccinated. But unvaccinated persons are an inevitable part of every workplace. Some employers will proceed, not knowing. You have a choice to make. Deal with uncertainty or be more directed in implementing a policy, asking the question, accommodating people.

The time is right now - vaccines are coming at quite a pace. Before, most people could not get them. Now there's a surge of vaccines. So hand of employers is being forced.

How do employers balance allowing a person to not be vaccinated where immuno-compromised persons are affected? Who has to make the move? The vulnerable person take additional precautions or the unvaccinated person to make a change?

You have two employees who need to be accommodated. Employer has to be reasonable. You have to be creative. Have a process. Don't make it up as you go. We know working from home is feasible. Employers should expect to be flooded with requests to work from home.

Accommodation is a two-way street. Involve the people in the discussion. Union involved? Lean on the union to help figure out the situation. It's a resource that can be used profitably.