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COVID-19 Protocols in the Workplace

Ontario Motor Coach Association
June 1, 2021

Agenda

- 1. Most common vaccination questions**
- 2. How to deal with mask refusals**
- 3. *Covid-19 Putting Workers First Act***
- 4. Adapting to the remote workplace**



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1. Most Common Vaccination Questions

Can we require employees to get vaccinated?

Current Law on Mandatory Vaccination

- Ontario does have some vaccination requirements for specific workers:
 - *Child Care and Early Years Act*
 - *Long-Term Care Homes Act, 2007*
 - *Ambulance Act*
- The provinces and the federal government said that they will not make vaccination mandatory.
- Current health and safety measures may be sufficient.



Mandatory Vaccination Policies

- Risk of constructive dismissal claims
- Human rights risks
- Difficulty in establishing the insufficiency of existing measures
- Insufficient guidance as to whether the vaccine prevents asymptomatic transmission
- Privacy?

Can we make vaccination mandatory for new hires?

Mandatory Vaccination for Candidates

Human rights laws protect candidates from discrimination on the basis of:

- Disability
- Religion
- Pregnancy
- Other grounds

**Do we have to give employees
time off work to get
vaccinated?**

Vaccination Leave

- Provinces with paid vaccination leave:
 - Saskatchewan
 - British Columbia
 - Alberta
 - Manitoba
 - PEI
 - Nova Scotia
 - Ontario

**If we can't require employees to
get vaccinated, how can
we encourage them to get
vaccinated?**

Vaccination Incentives

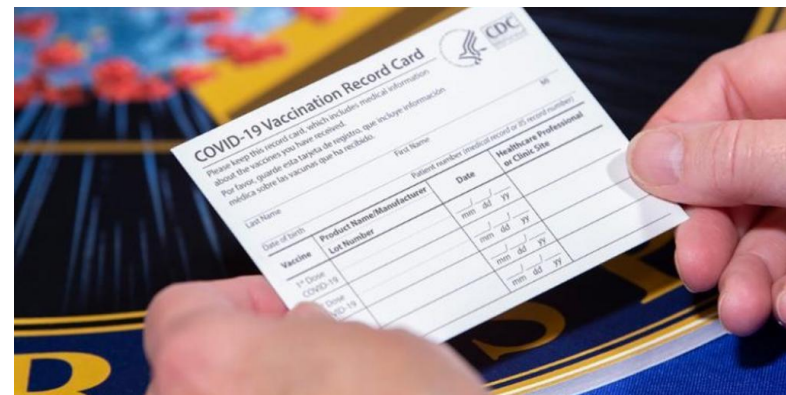
- Paid time off work
- Cash/gift card
- Group incentives

- Human rights risk

**Can we ask employees
to show proof of
vaccination?**

Proof of Vaccination

- Appointment confirmation
- Vaccination confirmation
- Follow confidential information collection protocols





**Could we be liable for
complications of
Vaccination if we
mandate or encourage
vaccination?**

Employer Liability

- Mandatory vaccination policy
- On-site vaccination clinics
- WSIB benefits?





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2. COVID-19 *Putting Workers First* Act (a.k.a. COVID-19 Sick Days)

Paid COVID-19 Sick Days

When are they Available?

- Going for a COVID-19 test
- Staying at home to await test results
- Being sick for COVID-19
- Going to get vaccinated
- Experiencing side effects related to vaccination
- Having been advised to self-isolate by an employer, medical practitioner or other authority
- Taking care of a dependent who is sick with COVID-19 or who is self-isolating

Paid COVID-19 Sick Days

Who is Eligible?

- Employees who are covered by the *Employment Standards Act*
- Employees who do not receive paid sick time through their employer
- A doctor's note is not required

How Does it Work?

- Employers can apply for a reimbursement of up to \$200 per day
- If the employee's wages are less than \$200 a day, the employer is eligible for the employee's wages for the day
- Employers must apply for reimbursement within 120 days

Paid COVID-19 Sick Days

Pre-existing Contractual Entitlement

- What if an employee has exhausted their contractual paid sick days prior to April 19?
- Relevant inquiry is whether, on April 19, 2021:
 - The employee had a right to a paid leave for the same reasons that paid IDEL can now be taken
 - These days were not exhausted
 - The contractual leave provided at least as much pay as paid IDEL; and
 - The employment contract did not contain more restrictive conditions for taking the leave

A Comment on IDEL, Layoffs, and Constructive Dismissal

O. Reg 228/20

O.Reg 228/20 Infectious Disease Emergency Leave ("IDEL Regulation")

- Provincial regulation in response to COVID-19
- During the "COVID-19 period", non-unionized employees are "deemed" to be on a job-protected emergency leave if the employer has temporarily reduced their workforce due to COVID-19
- COVID-19 period = March 1, 2020 – July 3, 2021
- Section 7: The temporary layoff will not constitute a constructive dismissal if related to COVID-19

Coutinho v Ocular Health Centre Ltd.

2021 ONSC 3076

Coutinho v Ocular Health

Facts

- Ocular operated clinics in Kitchener and Cambridge
- The employee was employed at the Cambridge clinic as a manager
- May 1, 2020: Ocular contacted the employee to advise that the Cambridge clinic was closed until further notice, but that she would receive pay

Coutinho v Ocular Health (cont'd)

- May 29, 2020: Ocular advised that the employee was placed on temporary lay-off
- June 1, 2020: The employee commenced a claim for constructive dismissal
- July 22, 2020: The employee was re-employed by Ocular
- Ocular pleaded that Coutinho was deemed to be on emergency leave pursuant to O.Reg 228/20: *Infectious Disease Emergency Leave*

Coutinho v Ocular Health (cont'd)

Motion for Summary Judgment

- Employer moved for summary judgment
- IDEL Regulation did not preclude a claim for constructive dismissal at common law
- Section 8(1) of ESA: “no civil remedy of an employer against his or her employer is affected by this Act”
- Employee was allowed to treat the unilateral imposition of a layoff as a termination of her employment contract
- Employer ordered to provide the employee her statutory termination entitlements

**Ristanovic v. Corma Inc., 2021
ONSC 3351 (CanLII)
2021 ONSC 3076**

Ristanovic v. Corma Inc

Facts

- Corma, a manufacturer, depended upon China for key supplies.
- In late 2019 and early 2020, the outbreak of COVID in China disrupted the company's supply chain, with revenues declining 40%
- Corma temporarily laid off approximately 17% of its workforce due to delays in orders and “the unstable political climate”
- Corma had no history of laying off employees

Ristanovic v. Corma Inc (cont'd)

- Two laid-off employees commenced a constructive dismissal after being laid off on January 31 and February 18, 2020
- Neither plaintiff was recalled within 35 weeks
- Corma argued that the employees' contracts contained an implied term authorizing layoffs when faced with the extraordinary circumstance of a global pandemic

Ristanovic v. Corma Inc

Holding

- The Court rejected the implied term for two reasons:
 - The layoffs occurred well before COVID evolved to the point of being a global pandemic.
 - The layoffs had extended beyond 35 weeks
- The employees, aged over 60 with 30 years' service, were entitled to 22 months' notice of termination



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3. Mask Refusals & Human Rights

Sharma v Toronto (City)

2020 HRTO 949

Toronto v Sharma (City)

The Facts

- A City of Toronto By-Law required masks to be worn in enclosed spaces
- The applicant refused to wear a mask
- The applicant was lectured, harassed and denied service throughout the City for his refusal to wear a mask
- The applicant brought a human rights application on the following grounds:
 - Discrimination based on creed
 - Discrimination based on disability

Sharma v Toronto (City) cont.

The Tribunal Decision

- Are the protected grounds engaged?
 - Creed – **No**
 - Disability – **Yes**
- Creed – engages religious beliefs and practices; not political beliefs
- Disability – requires the applicant to identify their disability-related needs
- Application dismissed – no adverse treatment by the City

The Worker v The District Managers

2021 BCHRT 41

The Worker v The District Managers

Facts

- The respondent had a mask policy
- The worker refused to wear a mask
- The respondent terminated its contract with the applicant for his failure to wear a mask
- Tribunal considered whether the facts alleged, if proven to be true, could be a contravention of the Human Rights Code

The Worker v The District Managers

The Tribunal Decision

- The worker was required to establish the following:
 1. A religious belief;
 2. An adverse impact; and
 3. That religion was a factor in the adverse impact.
- A religious belief must have:
 1. A connection with religion; or
 2. Be experientially religious in nature.
- Application dismissed: “The *Code* does not protect people who refuse to wear a mask 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 the pandemic.”

What Can be Learned from these Cases?



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4. Adapting to the Remote Workplace



WSIB - Is Home a Workplace?

- Are employees working from home covered by WSIB?
 - Likely to see an increase in claims arising from injuries in the course of working from home
 - Employers and employees have the same responsibilities as in the regular workplace
 - Unique challenges and best practices

Health & Safety - Practical Considerations for the Home Office

- Physical workspace used by employees
 - Ergonomics, etc.
- Risk management approach
 - Workplace assessment
 - Incident reporting protocols
- Standard reporting obligations
- Remote Working Policy – one place where all expectations are listed

Human Rights

- Accommodation requests due to family circumstances
- *Ontario Human Rights Code* and *Employment Standards Act* require COVID-19-related accommodation
- Be creative!

Employment Standards Act

- Employment standards legislation does not stop at the threshold of the physical workplace.
- It is imperative to have policies and procedures in place to ensure that you are tracking:
 - Hours of work;
 - Overtime;
 - Vacation time and vacation pay;
 - Leaves of absence

Remote Working Policy

- Employment standards – hours of work, overtime, vacation
- Location of remote work
- Location of home office
- Communication
- Privacy issues
- Technology
- Return of equipment

Culture, Retention and Mental Health

- Creating a culture that acknowledges the difficulties this pandemic created
- Communication
- Recognition
- Empathy

What's next?



Questions?

Thank you!



[Inna Koldorf](#)
Partner, Vaughan
905.532.6647



[Michael Cleveland](#)
Associate, Toronto
416.597.6049

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