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# Employment Law Update

**KEY ISSUES FOR 2021**

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Angela Jackson, University of  
Calgary

Jed Blackburn, Cassels

Pam Hinman, Cassels



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# Vaccines and the Workplace



# The Current Covid-19 Context

- 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?



# Vaccine Policies

- 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

# 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 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?



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# **Covid-19 Testing and the Workplace**



# 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?





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**Angela  
Jackson**

**EMPLOYMENT  
COUNSEL & SENIOR  
DIRECTOR,  
CONTRACTS &  
IMMIGRATION  
UNIVERSITY OF  
CALGARY**





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**Remote  
Work**



# Legal Consideration for Remote Work

- 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**

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# 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

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# Ensuring a Safe Work Environment at Home

- 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**

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# Privacy, Confidentiality and IP Risks of Remote Work

- 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**

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# 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**

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# 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



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# Noteworthy Cases in 2020



# Noteworthy Cases

- *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 resigns or 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.



# Noteworthy Cases

- *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?







# Cassels

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Suite 2100, Scotia Plaza  
40 King Street West  
**TORONTO, ON**  
M5H 3C2 Canada

**t:** 416 869 5300  
**f:** 416 350 8877

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Suite 2200, HSBC Building  
885 West Georgia Street  
**VANCOUVER, BC**  
V6C 3E8 Canada

**t:** 604 691 6100  
**f:** 604 691 6120

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Suite 3810, Bankers Hall West  
888 3rd Street SW  
**CALGARY, AB**  
T2P 5C5 Canada

**t:** 403 351 2920  
**f:** 403 648 1151

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