Welcome to Cox & Palmer's Regional Employment & Labour Group Webinar - Vaccines in the Workplace: A Legal Take.

Our presentation will begin shortly.



Vaccines in the Workplace: A Legal Take

April 22, 2021



Housekeeping Items

- For optimal viewing we highly recommend disconnecting from your VPN to ensure strong connectivity throughout the presentation
- If you have any questions during the webinar, you can submit them through the Q&A button at the bottom, and our panel will respond to as many questions as possible at the end of the session
- All registrants will receive a link to the presentation slides



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Agenda

- Welcome & Introduction
- Why have a COVID-19 Vaccine Policy?
- Challenges to Mandatory Vaccine Policies
- Balancing the Competing Interests
- Best Practices
- Q&A
- Closing Remarks

Why have a COVID-19 Vaccine Policy?

James B. Green



Atlantic Canada's Immunization Plan

- Atlantic provinces following similar rollout strategies:
 - Initial phase prioritized frontline and healthcare workers, most vulnerable (70+; underlying health conditions)
 - By age group thereafter, in descending order
- Each Atlantic province expects all individuals 16+ to be able to receive a vaccine by June 2021

Government Mandated Vaccinations

- Provincial governments have only occasionally legislated vaccinations as a condition of certain prescribed activities
 - British Columbia, Ontario, New Brunswick, and Manitoba have immunization reporting requirements for school-aged children
 - For some specialized occupations in Ontario, employers are expressly required by legislation to ensure employees have up-to-date vaccinations

Government Mandated Vaccinations

- No current legislation or public health orders in Canada mandating COVID-19 vaccinations for employees
- Employers will likely have to determine for themselves if and how to incorporate vaccines into their COVID-19 health and safety plans

- Government and public health restrictions related to COVID-19 are expected to eventually ease as vaccination rates increase
- Employers will face growing internal and external pressure to follow suit
- Vaccines are a new tool which can help to control the risks of COVID-19 in the workplace as restrictions ease

Why Have a Vaccination Plan? Occupational Health and Safety (OHS) obligations

- Employers must take every reasonable precaution to ensure the safety of those at or near workplace
- COVID-19 represents a biological hazard
- Even without government mandate, vaccinations may be a reasonable precaution in some workplaces

Why Have a Vaccination Plan? Occupational Health and Safety obligations

- Incorporating vaccinations into COVID-19 health and safety plan will assist in meeting OHS obligations:
 - Establish a protocol to collect necessary information on vaccination rates within the workplace
 - Set clear expectations for employees around vaccinations
 - Guide management decision-making

Workers' compensation liabilities

- More than 60,000 workers' compensation claims in Canada related to COVID-19
- Over 48,000 claims approved
- Each workplace exposure is lost work time and increases employer assessments

Why Have a Vaccination Plan? Liability to third parties who access the workplace

- •Fakhri v. Alfalfa's Canada Inc. (2004, B.C.) class action against grocery store after employee infected with Hepatitis A virus handled food, infected eight customers
- Vezina v. Loblaw Cos., (2005, Ontario) class action after 19,000 potentially exposed by Hepatitis-infected employee

"Take home" liability

- Esperanza Ugalde v. Aurora Packing Co. (2020, Illinois)
- Action brought by estate of employee's wife who contracted COVID-19 after husband infected in the workplace

Refusals to work near unvaccinated employees

- A vaccination plan can help address employee concerns of exposure to COVID-19 by unvaccinated employees
- Cole v. Air Canada (2006, CLRB) work refusal by ticket agent for fear of contracting SARS from airline passengers

- Plan now for when government restrictions are eased
- Consider whether and how your workplace will use vaccinations to improve workplace safety
- Identify how you will meet OHS obligations and mitigate legal risks while easing COVID-19 restrictions

Challenges to Implementing a Mandatory Vaccination Policy

Kate O'Neill



Implementation of Policies in the Workplace

Leading case....

Lumber & Sawmill Workers' Union, Local 2537 v. KVP Co. [1965] ("KVP")

- Sets out criteria for implementation of employer policies in unionized workplaces
- Also applied in non-unionized workplaces as a "best practice"

KVP Analysis

Employer policies...

- Cannot be inconsistent with the collective agreement
- Must be reasonable
- Must be clear and unequivocal
- Must be pro-actively brought to the attention of employees
- Employees must be advised that breach could result in discipline
- Must be consistently applied and enforced

Vaccination and Influenza Litigation



Sault Area Hospital and Ontario Hospital Association and Ontario Nurses' Association [2015]

Facts

- Hospital introduced vaccinate or mask ("VOM") policy for all heath care workers
- Influenza vaccination efficacy rate of 65% except in years of "mismatch" where lesser vaccine efficacy found

Union's Position

- Policy contrary to collective agreement
- Intrusive and invasive
- True purpose to increase vaccination rates
- Masking does not protect patients

Employer's Position

- Legitimate purpose to improve patient wellness
- Policy was strongly supported by evidence and therefore reasonable
- Not inconsistent with broader concepts engaged in collective agreement

Decision

- Policy unreasonable and violated collective agreement
 - Motivation behind policy was to increase vaccination rates
 - Expert evidence did not support use of masks to reduce transmission of influenza virus to patients
 - Hospital had past practice of not requiring universal masking. Historic universal mask wearing would have been necessary to cover gap left by vaccination

St. Michael's Hospital and Ontario Nurses' Association, Re [2018]

Facts

- Hospital introduced vaccinate or mask ("VOM") policy
- Influenza vaccination rate of 60% except in years of "mismatch" with lesser efficacy

Union's Position

- Undermines collective agreement
- Weight of evidence did not support VOM policy

Employer's Position

- Not contrary to collective agreement
- New report supported vaccination as "cornerstone" of influenza control
- VOM policy addressed policy objective while balancing interests

Decision

- Collective agreement provided for refusal of vaccinations by nursing staff
- Expert evidence and hospital past practices establish that policy was not reasonable
- Masking was not a reasonable measure to protect from influenza
- "...If a better vaccine and more robust literature about influenza-specific patient outcomes were available, the entire matter might be appropriately revisited..."

Covid Testing Litigation

Caressant Care Nursing and Retirement Homes and CLAC [2020]

Facts

- Nursing/retirement home introduced COVID-19 nasal swab testing every 14 days for employees
- Residents not required to be tested

Union's Position

- Testing was invasive & painful
- Provides snapshot only
- Other measures in place address risks
- Unfair because residents not tested

Employer's Position

- COVID is novel and poorly understood, including long term effects; deadly for elderly
- Highly infectious
- Asymptomatic testing necessary
- Testing results highly valuable

Decision

- Grievance denied
- Policy reasonable
 - COVID is novel and poorly understood, including long term effects
 - Deadly for elderly
 - Highly infectious
 - Asymptomatic testing necessary
 - Testing results highly valuable

Take-aways on Vaccine Policies

- Must not be contrary to collective agreement
- Objective of policy has to be rationally connected to measures implemented by the policy
- Medical and scientific evidence must support policy
- Alternates to vaccination have to be viable
- Accommodations for human rights must be made

Charter of Rights



Charter of Rights and Freedoms

Section 7 - Life, liberty and security of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice

Balancing the Competing Interests

Sandy Jenkins



Balancing of Interests

- Mandatory vaccination policies can face a number of challenges to their enforceability
- The question remains: what considerations should Employers assess when deciding how to respond to the risk of COVID-19 in their workplace?

Balancing of Interests

- In mandatory vaccination and testing cases involving influenza or contagious illnesses, adjudicators and courts have applied a "balancing of interests" approach in order to assess the reasonableness and enforceability of the mandatory policy
- This requires weighing of:
 - The employer's obligations under Occupational Health and Safety legislation; and
 - The individual privacy rights of employees

Occupational Health & Safety requires determining what the risks are:

• The nature of the workplace – what aspects of your business create a risk of spread of COVID-19?

Occupational Health & Safety requires determining what the risks are:

• Degree of contact with vulnerable populations – what would be the impact of COVID-19 spread in your workplace?

What is an effective response to the risks identified?

- Consult with health experts
- Consult with your Joint OHS committee or representative

What is an effective response to the risks identified?

Vaccine effectiveness on <u>symptoms</u>:

- Moderna → 94.1% effective
- Pfizer-BioNTech → 95% effective
- AstraZeneca → 62% effective
- Janssen → 66% effective

All are highly effective in preventing death

^{*}https://www.canada.ca/en/public-health/

What is an effective response to the risks identified?

- Consider alternatives to vaccination
 - Masks/PPE
 - Regular testing
 - Paid vacation time
 - Paid/unpaid leave
 - Return to work upon proof of immunity

What is an effective response to the risks identified?

• Chinook Health Region v UNA, Local 120 (Alberta, 2002)

"the board observes that [...] it is **not** a situation of the Employer having made the vaccinations **mandatory**, [...] or even requiring all unimmunized staff simply to be excluded from the facility during the flu season as the "choice". [...] Rather, it has sought to take a more **balanced approach in providing alternatives**, **admittedly with consequences**, keeping in mind its hugely legitimate **concern for residents' safety**. There is no evidence that the vaccine has ever proven to be ineffective in immunizing caregivers as opposed to frail elderly persons for whom it is far less effective having regard to the "efficacy" limitations."

Employee privacy:

- Try to get your union on board, but do not wait!
- Check PIPEDA, even if you are not federally-regulated

- Employee privacy:
 - COVID-19 is still novel. In light of this, adjudicators are adopting a precautionary principle favouring workplace safety over privacy and autonomy
 - Inovata Foods Corp. v. Ontario (2020) frozen food manufacturer ordered by OHS officer to require employees wear masks:

"While it would be preferable to have more reliable and definitive evidence, it is a reasonable precaution in the circumstances [...]"

Best Practices

Jessica Bungay



 Develop a Vaccine Policy that encourages vaccination and describes employment consequences for those who choose not to be vaccinated

- Educate employees on COVID-19, the various vaccines, how vaccines are regulated in Canada, etc.
 - Government Resources:
 - Know the facts about COVID-19 https://www.canada.ca/en/public-health/services/publications/diseases-conditions/know-facts-about-coronavirus-disease-covid-19.html
 - <u>Vaccines and treatments for COVID-19</u> https://www.canada.ca/en/public-health/services/diseases/2019-novel-coronavirus-infection/prevention-risks/covid-19-vaccine-treatment.html

More resources:

- <u>COVID-19 MRNA vaccines</u> https://www.canada.ca/en/healthcanada/services/drugs-health-products/covid19-industry/drugsvaccines-treatments/vaccines/type-mrna.html
- <u>Viral vector-based vaccines</u> https://www.canada.ca/en/health-canada/services/drugs-health-products/covid19-industry/drugs-vaccines-treatments/vaccines/type-viral-vector.html
- Regulating vaccines for use in Canada https://www.canada.ca/en/health-canada/services/drugs-health-products/biologics-radiopharmaceuticals-genetic-therapies/activities/fact-sheets/regulation-vaccines-human-canada.html

More resources:

- What you need to know about the COVID-19 vaccine https://www.canada.ca/en/public-health/services/diseases/2019-novel-coronavirus-infection/awareness-resources/know-vaccine.html
- <u>Vaccine development and approval in Canada</u> https://www.canada.ca/en/health-canada/services/drugs-health-products/covid19-industry/drugs-vaccines-treatments/vaccines/development-approval-infographic.html

 Offer an incentive to employees who receive the vaccine (e.g. paid time off, lump sum payment, gift card, etc.)



 Provide accommodation to those employees who are unable to be vaccinated as a result of a disability, gender, religion or creed. Consider:

- Leave of absence
- Work from home
- Alternate work hours
- Mandatory testing
- Increased PPE

Make vaccination a condition of employment for new

hires



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