



Vaccines And The Workplace – Let The Battles Begin

BY: **CHRIS PRYCE**

As COVID-19 cases rise in most large centres in Canada, the news that the Pfizer vaccine has already been administered to UK citizens and is weeks away from our Canadian shores is encouraging. Estimates are that three million people will be immunized

by March; before production and inoculations (hopefully with multiple vaccine candidates, ie Moderna) really ramp up to the point where enough Canadians are vaccinated that some semblance of a return to normal is possible.

In many cases, some elements of virtual office 'work' will no doubt become the new normal. Senior leaders are planning for the day where significant numbers of employees will

again inhabit workplaces and buildings, at the same time, without the need for social distancing.

Layered on top of these plans is the legal requirement that workplace health and safety polices be put in place to protect workers from bodily harm. This requirement is super relevant because there is criminal liability that can be handed down to corporations, representatives,

and directors who fail to adhere to provisions in certain legislation (Bill C-45 federally and the Occupational Health and Safety Act (OHSA) in Ontario), for example.

Right To Choose

Vaccinations have not been as ‘politicized’ here as we have seen south of the border, but that, of course, does not mean that vaccinations and the right to choose will not be a significant issue for employers in Canada. Balancing ‘choice’ with OHSA guidelines to maintain a safe workplace may pit employers against employees (and even employees against employees), particularly, those who would prefer to be in in the third, fourth, or last wave of those who are vaccinated. More importantly are those waiting for their day in the ‘spotlight’ – those employees with medical considerations (i.e., weakened immune systems, severe life-threatening allergies, pregnancy, those with lung/heart/kidney/liver or other metabolic disorders). Those groups no doubt will be amongst the last groups to get vaccinated, if they ever get vaccinated at all. How will employers handle those accommodations in the context of ensuring that their other employees be kept safe.

The Ontario government has already come out and said that vaccinations will not be mandated ... but that there will likely be ‘proof of vaccination cards’ issued. Those refusing vaccinations will ‘ultimately’ have restrictions placed on their entrance to venues, travels, etc. Does that then mean that an employer who knowing lets an employee circulate in their workplace without being vaccinated is then in contravention of the OHSA? This, of course, would not be an issue right away, but a year down the road as most residents are vaccinated, what will that mean for employees, for businesses with front line employees serving the general population etc.? Will those who refuse vaccines be forced to wear N95 respirators if they can’t show a proof of vaccination card in a place of work?

With this backdrop, a number of people have been questioning the issue of ‘proof of vaccinations’ in the workplace. According to a poll conducted by Toronto-based firm Riwi, one-third of Canadians and Americans say they won’t get the vaccine, even if mandated by law. In an article by Brock Ouellet of Samfiru Tumarkin LLP – ‘Can My Employer Force Me to Take a COVID-19 Vaccine?’ – the suggestion is in the context of COVID-19 prevention and management, an employer will not be permitted to make a COVID-19 vaccine mandatory as a condition of employment.

This is not surprising since the Ontario government has come out and said that vaccinations will not be mandatory. It is important to note that although not mandated by law, employers could ‘highly recommend’ that their staff get the vaccine. What recourse an employer has beyond that seems limited.

Ouellet cites the OHSA in Ontario which sets out the employer’s obligation to take precautions to meet reasonable health and safety standards, which can include the introduction of policies and guidelines to limit the spread of infectious disease in the workplace. The fact that employers in high-risk industries (hospitals, nursing homes, etc.) have required work-



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ers to obtain annual flu vaccines for decades, suggests that employers in certain cases might do well to establish frameworks and guidelines, but there seems to be no appetite/willingness to suggest that an employer has the ‘legal power’ to do anything more rigid.

Another question then is can employers terminate employees if they refuse a COVID-19 vaccine?

The answer seems pretty clear, based on the above, ‘NO.’ Ouellet suggests it is highly improbable that a business would even have ‘grounds’ to terminate staff based on a refusal to show proof of a COVID-19 vaccine. Once again, the employer might insist that the individual remain out of the normal work environ-

ment (i.e., remain virtual until the pandemic is contained), but at what point will COVID-19 be truly contained, given that we don’t know how long immunity from the Pfizer and Moderna vaccines will even last.)

If an employee chooses not to vaccinate and to remain virtual, could we see situations two years from now where an employer’s only recourse would be to look at contract frustration to fill a position that has been occupied by someone who the employers has been ‘accommodating’ virtually; even as their colleagues had returned to work months earlier. Going forward, undue hardship based on remote work will no doubt be increasingly difficult to prove.

Tread Carefully

Employers will need to tread carefully to ensure that no employee is terminated because of vaccine refusal or perhaps even ‘implied pressure’ of vaccinations. Where there is a valid medical, religious, or other material considerations, employers will need to determine in advance of any disciplinary measures being handed down based on the employee’s reason is for refusing to vaccinate. In those cases, an employer will have to do their best to accommodate the employee, if it is safe and reasonable to do so. If the employer does not ‘accommodate’ and instead attempts to sever employment, they may face serious penalties and damage awards if the termination was shown to be a violation of human rights.

It turns out that social media is creating a growing number of anti-vaxers. Worldwide, there is fears that a hastily produced vaccine may be more dangerous than being unvaccinated. Weighing safety in the workplace considerations against a likely rare, but bad, outcome for a vaccinated employee is likely a reasonable risk that an employer ought to accept as they draft policies and frame language around a safe return to the workplace. In advance of that return, employers would be wise to start the process of educating and promoting safe practices, that will need to be adhered to in the workplace to protect all workers and to allow employees to feel safe when ‘normalcy’ does, in

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