

Labour and Employment Law Update: Addressing Subsequent Legal Challenges of COVID-19

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Agenda

1. Current Status of Public Health Orders
2. COVID-19 Protocols in Workplaces and Enforcement by Regulators
3. Mandatory Vaccinations in the Workplace
4. Constructive Dismissal in a Global Pandemic
5. Workplace safety During COVID-19: The Right to Refuse Unsafe Work



STATISTICS: AS OF MAY 26

- Current National Statistics:
 - Cases = 1,368,106
 - Recovered = 1,297,960
 - Deaths = 25,361
- Current Saskatchewan Statistics:
 - Cases = 46,001
 - Recovered = 44,031
 - Deaths = 528





PUBLIC HEALTH ORDERS



The State of the Law on COVID-19

- **Current Provincial Public Health Order (PHO) (May 13, 2021)**
- **Mandatory self-isolation for:**
 - Minimum 14-days
 - Anyone who has travelled outside Canada
 - Close contacts of someone with COVID-19
 - Minimum of 10-days
 - People with a confirmed case of COVID-19





Provincial Public Health Order

- Gathering sizes
 - Indoor private gatherings restricted to household members only
 - People who live alone may choose one household to connect with, if gathering is 5 people or less
- Two metre physical distancing
 - Exceptions for critical public services and allowable business services – must have other measures in place to prevent transmission
- Regina Region
 - Travel advisory and restaurant restrictions lifted May 17



Face Coverings Order (May 6, 2021)

- A “face covering” must be worn in indoor enclosed locations
- Persons exempt for medical reasons must receive written confirmation from a health professional
- “Health professional” means:
 - Practicing Physician
 - Practicing Nurse Practitioner or Registered Nurse
 - Practicing Clinical Psychologist
 - Pharmacist
- The Re-Open Saskatchewan Plan follows Health Canada Guidance on homemade masks – should be at least 3 layers

Face Coverings Order (May 6, 2021)

- Exemptions:
 - Under 2 years old
 - Medical exemptions
 - Cognitive impairment
 - Seated and eating at bars and restaurants
 - Alone in an indoor place
 - Services that require removal
 - Providing assistance to person with a disability



Bars and Restaurants Order (May 13, 2021)

- No alcohol sales between 10:00 p.m. and 9:30 a.m.
- No consumption of alcohol after 11:00 p.m.
- No more than 4 patrons at a table
- Minimum 2 metres distance between parties if separated by a barrier or minimum 3 metres distance if no barrier present
- Owners must collect customer information for contact tracing purposes





Enforcement

- Orders made under *The Emergency Planning Act*
 - Recently amended by *The Emergency Planning Amendment Act, 2020* (May 13, 2021)
 - \$7,500 maximum fine for individuals
 - \$100,000 maximum fine for corporations
 - Includes a good faith defence and protection from civil liability, with some important exceptions
- Orders made under *The Public Health Act, 1994*
 - Individuals: \$75,000 maximum fine for first offence; \$100,000 maximum fine for second offence
 - Corporations: \$100,000 maximum fine for first offence; \$100,000 maximum fine for second offence
- Liability of directors and officers who directed, authorized, or participated in the offence



Saskatchewan's Re-Opening Roadmap

- Three step re-opening plan based on vaccination thresholds
- Step One: Begins May 30, 2021
 - Three weeks since 70% over 40 have received first dose
 - Gradual reintroduction of guidelines in place last summer
 - Gathering limits increased
 - Resumption of seasonal activities and sports leagues
 - Mask mandate remains in effect





Saskatchewan's Re-Opening Roadmap

- **Step Two: Begins June 20, 2021**
 - Three weeks since 70% over 30 have received first dose
 - Further lifting of restrictions and capacity thresholds
 - Retail and restaurant thresholds lifted but two metre distancing remains
 - Gathering limits increased
- **Step Three: TBD**
 - Guidance has yet to be announced, but most remaining restrictions are expected to be lifted



Federal Orders



Mandatory Quarantine

- Minimum 14-day quarantine when entering Canada
- Quarantine at government-authorized hotel until negative test result is received
- Must submit suitable quarantine plan

Air Travel

- Not permitted to fly within Canada if:
 - Exhibiting COVID-19 symptoms
 - Denied boarding in the past 14 days for COVID-19 related reason
 - Subject to mandatory quarantine under a local or provincial public health order





COVID-19 Protocols in Workplaces and Enforcement by Regulators



OHS Obligations to Maintain a Safe Workplace

- Section 3-8 of *The Saskatchewan Employment Act* outlines general duties of the employer including to:
 - (a) ensure, insofar as is reasonably practicable, the health, safety and welfare at work of all of the employer's workers;
 - ...
 - (h) ensure, insofar as is reasonably practicable, that the activities of the employer's workers at a place of employment do not negatively affect the health, safety or welfare at work of the employer, other workers or any self-employed person at the place of employment;
- Owners/employers are obliged to provide a safe plant/workplace, training, information, supervision to workers
- A “reasonably practicable” standard applies



OHS Obligations to Maintain a Safe Workplace

- **If an employer suspects that an employee is at a material risk of contracting/spreading COVID-19, an employer may consider taking the following measures:**
 - **Disclosure:** Require certain disclosure from employees to self-monitor and assess their risk level (e.g. recent travel and symptoms)
 - **Removal from the Workplace/Quarantine:** Remove the individual from the workplace or request that they be voluntarily quarantined within the workplace
 - **Medical Confirmation:** Keep employee out of the workplace pending medical confirmation of their fitness to return to work
 - **Testing:** Employers can consider symptomatic testing for COVID-19 provided it is not discriminatory or in violation of human rights. Need to consult OHS and privacy legislation and be conscious of privacy concerns.

OHS Obligations to Maintain a Safe Workplace

- Obligations Regarding Hazardous Biological Substances
 - Monitor presence of biological substances in the workplace
 - Duty to prevent exposure
 - Provide information regarding nature and effects of hazardous biological substances

Exposure Control Plan – s. 6-22 of *The Occupational Health and Safety Regulations, 2020*

- Required if workers are “likely to be exposed” to an “infectious material or organism” at a place of employment
- Requires “an infectious disease hazard that poses a significantly increased exposure risk to a worker”





Exposure Control Plans

- The Re-Open Saskatchewan Plan states:
“All businesses must develop and implement an exposure control plan. Exposure control plans provide information and identify appropriate precautions to protect workers from COVID-19.”
- WorkSafe Saskatchewan requires employers to develop and implement an exposure control plan to limit COVID-19 exposure in the workplace
- Provincial OHS legislation and regulations also drive the need to have these plans in place, in a manner that is tailored to the particular workplace at issue





Exposure Control Plans

- The plan will be a compilation of policies, safe work procedures, training and information requirements, first aid requirements and investigatory/reporting requirements
- Among other things, the plan needs to:
 - to be in writing
 - To describe infection control measures
 - Set out procedures if a worker has been exposed or believes they have been exposed
 - Require the investigation of work-related exposure to identify route of exposure, circumstances of the exposure and measures to prevent further infection
- It should cover infectious materials or organisms, biological hazards and communicable diseases.





Outbreaks in the Workplace

- Duty to maintain a safe workplace even where there is an outbreak
- Confirmed outbreak – 2 or more cases that likely occurred in a “common non-household setting”
- One potential tool is the Communicable Disease Control Manual

Communicable Disease Control Manual

- “Close contact”:
 - Healthcare worker, if appropriate PPE not used
 - Lives with a case and has direct physical contact
 - Within 2 metres for more than 15 minutes (cumulatively within 24 hour period)
 - Had a close range conversation
- The assessment is discretionary and will vary depending on a number of factors, including:
 - Respiratory exertion/effort
 - Whether physical distance can be maintained
 - Outdoors/indoors
 - Well ventilated area vs. poorly ventilated area
 - Whether medical masks and eye protection have been properly used



Inspections – 3-63 of the *SEA*

- The Communicable Disease Control Manual requires a referral to the Ministry of Labour Relations and Workplace Safety in a work-related exposure situation
- Following worksite outbreaks, OH&S Officers are inspecting for sufficiency of and compliance with the employer’s exposure control plan
- OH&S Officers are also inspecting for compliance with the Re-Open Saskatchewan Plan due to employers’ general duties to protect workers from “work-related illnesses”



MANDATORY VACCINATION POLICIES





VACCINATION POLICIES IN THE WORKPLACE

- No current legislation mandating COVID-19 vaccines.
- Evidence and science of the effectiveness of the vaccine will be key vaccination policy arguments.
- Unlikely that all employers will be able to enforce mandatory vaccination policies.

Vaccination Policies



- Employer vaccine policies are a legal minefield
 - Employment law issues (constructive dismissal)
 - Labour law issues
 - Human rights issues
 - Occupational health and safety issues
 - Privacy law issues
 - WCB issues / Liability
 - Constitutional law issues (public employers)





Law on Workplace Vaccination Policies

- Before COVID, there was law on employers requiring the influenza vaccine.
- Arbitrators will look at the prior law on vaccines but:
 - in the context of an illness that can be more serious depending on the individuals; and
 - the science of the efficacy of the vaccine.

Influenza Vaccination Policies – Cases

- *Health Employers Assn. of British Columbia and HAS BC (Influenza Control Program Policy), Re 2013 CarswellBC 3189 (Diebolt)*
 - Employer implemented mandatory mask or flu shot policy
 - Union argued the policy was unreasonable
 - **Held: Policy was reasonable**
 - Deciding factor was employer's expert evidence
 - Policy reasonable after balancing employer's interest in patient safety against harm to employee privacy
 - Employees had a choice to wear a mask, not coerced into vaccine

Influenza Vaccination Policies – Cases

- *Sault Area Hospital v Ontario Nurses' Association*, 2015 CanLII 55643 (Hayes)
 - Employer implemented mask or flu shot policy
 - ONA alleged unreasonable exercise of management rights, breaches of privacy, human rights, OHSA
 - **Held: Policy unreasonable but no other breach**
 - Turned on sufficiency of expert evidence and perceived coercion to vaccinate
 - Arbitrator found the policy was put into place to drive up vaccination rate
 - “Scant scientific evidence of the use of masks in reducing the transmission of influenza virus to patients”

Influenza Vaccination Decisions – Other Examples

- *Carewest v Alta Union of Provincial Employees (Nasr Grievance)*, [2001] A.G.A.A. No. 76
- *Carewest Alta Union of Provincial Employees (Nasr Grievance)*, [2001] A.G.A.A. No. 76
- *Chinook Health Region and U.N.A., Local 120*, [2002] A.G.A.A. No. 105
- *Interior Health Authority v. BCNU*, 2006 CarswellBC 3377
- *North Bay General Hospital*, [2008] O.L.A.A. No. 669
- *St. Michael's Hospital and ONA*, 2018 CanLII 82519





Influenza Vaccination Decisions – Lessons Learned

- Key issue of balancing safety (employees, clients, patients and public, more generally) with the privacy and human rights of employees.
- Disputes over reasonableness of vaccination policies typically turn on:
 - expert evidence;
 - effectiveness of the policy;
 - intrusiveness of the policy (including other COVID-19 protocols in place);
 - terms of the collective agreement (for unionized workplace), employment agreements or legislative requirements;
 - the nature of the Workplace; and
 - the employer's legitimate business interests.



Litigation Risks with Mandatory Vaccinations

- Absent legislation, mandatory vaccination policy carries high liability risk
 - Must pass scrutiny of reasonableness test (Union)
 - Constructive Dismissal (Non-Union)
 - Human Rights / Accommodation issues and surrounding substantiated medical and religious reasons
 - Privacy and coerced medical treatment allegations
 - Charter challenges (ss. 7, 8 and 15)
- Consider Alternatives to Mandatory Vaccinations



Vaccination Policies

- Different kinds of policies
 - Mandatory – battery
 - Voluntary/encouraged (with incentives?)
 - Vaccinate as a “condition of service” (otherwise can’t work)
 - VOM (vaccinate or mask):
 - Where patients are present
 - During flu season or flu outbreaks only
 - Vaccinate or other options:
 - Voluntary to get vaccine and voluntary to disclose vaccination status
 - If not, then: mandatory PPE, physical distancing, remote work if possible, reassignment (location/shift), regular COVID-19 tests, LOA, etc.





Constructive Dismissal in a Global Pandemic





Constructive Dismissal - Generally

- May arise where the employer has not formally dismissed the employee but has made fundamental changes that amount to a dismissal
- For example:
 - demotions
 - reductions or fundamental changes in duties
 - reductions to compensation
 - reductions in hours



Test for Constructive Dismissal

- Constructive dismissal can arise where:
 1. A substantial change is made to an essential term of the employment contract, or
 2. An employer's conduct would lead a reasonable person to conclude that the employer no longer intends to be bound by the terms of the employment contract.

Potter v New Brunswick Legal Aid Services Commission, 2015 SCC 10



Constructive Dismissal During COVID-19 Pandemic

- Minor changes likely will not trigger a constructive dismissal, such as the requirement to wear personal protective equipment.
- What about?
 - Reductions to compensation
 - Reduction to hours of work
 - Layoffs as a result of COVID-19 pandemic
 - Mandatory Vaccination



KOSTECKYJ V PARAMOUNT RESOURCES LTD., 2021 ABQB 225

- Cost-cutting program implemented by employer in response to COVID-19 Pandemic:
 - Reduced employee salaries
 - Discontinued pension contributions
 - Delayed or cancelled bonus program
- Employee later terminated as a result of program
- Alleged constructive dismissal from when program initiated



KOSTECKYJ V PARAMOUNT RESOURCES LTD., 2021 ABQB 225

- Parties agreed program was reasonable response to COVID-19 pandemic
 - Court still held that employee was constructively dismissed
 - Cost cutting measures breached essential terms of the employment agreement
 - Legal test for constructive dismissal unaffected by economic challenges in pandemic
- **Key Takeaway:** Poor economic conditions may not always be given much consideration in determining whether an employee was constructively dismissed. However, there has been mixed messaging on this.



Constructive Dismissal During COVID-19 Pandemic – Layoffs

- Constructive dismissal can arise during a layoff period, even where a layoff is permitted under provincial legislation
- Courts have held that a temporary layoff constitutes constructive dismissal if the employment contract does not provide for the right to temporarily lay off employees
- Given the number of layoffs and the fact that many layoffs are due to government-mandated business closures, it will be interesting to see how (un)successful this argument is in Court





COUTINHO V OCULAR HEALTH CENTRE LTD., 2021 ONSC 3076

- Employee temporarily laid off due to clinic closure
- Ontario enacted *Infectious Disease Emergency Leave* to apply during COVID-19 period
- Regulations stated temporary layoff related to COVID-19 not a constructive dismissal
- Parties disputed whether layoff for reasons related to COVID-19





COUTINHO V OCULAR HEALTH CENTRE LTD., 2021 ONSC 3076

- Civil remedies are not necessarily affected by statutory exemptions;
- Changes in terms of employment permitted by statutory public health emergency amendments may still result in employer liability at common law;
- Employees have an immediate right to sue for constructive dismissal once they are unilaterally laid off;
- Employees are not obligated to inquire into when they will be called back but are obligated to mitigate their losses; and
- Accepting an alternative job is an act of mitigation and not a resignation.





The Right to Refuse Unsafe Work in the Context of COVID-19





Work Refusals

- ***The Saskatchewan Employment Act***
 - Right to refuse work "if the worker has reasonable grounds to believe that the act or series of acts is unusually dangerous to the worker's health or safety or the health or safety of any other person at the place of employment."

 - Once work has been refused the worker is not required to perform the work until:
 - Sufficient steps have been taken to satisfy the worker the work is not unusually dangerous
 - The occupational health and safety committee has investigated and advised the worker the work is not unusually dangerous



Work Refusals

- ***The Saskatchewan Employment Act***
- If a worker is not satisfied with the occupational health and safety committee's decision:
 - Worker can request OHS Officer investigate
 - Worker is entitled to continue to refuse to perform work until OHS investigation concludes
- Employer cannot ask others to perform the refused work without telling other employees in writing:
 - That a worker refused work and the reasons for the refusal
 - The reason why, in the employer's opinion, the work can be performed safely
 - The worker's right to refuse to do unusually dangerous work

Work Refusals in the Context of Covid-19

- Investigation into work refusal at B.C. correctional facility
- Worker concerns:
 - Inmates kept together instead of isolating cases
 - Lack of Plexiglas barriers
 - Protective clothing could interfere with personal alarm transmitters
 - Workers wanted reduction of number of inmates allowed in open areas
 - Risk of infection of workers' household members





Work Refusals in the Context of Covid-19

- WorkSafe BC investigator determined that concerns did not amount to “undue hazard”
- Employer relied on medical advice that inmates should be kept together to prevent spread of COVID-19 to other units
- Employer was testing personal alarms with protective equipment on and noted the personal alarms could be worn outside under coveralls to reduce interference, if disinfected daily



Work Refusals in the Context of Covid-19

- Concern of COVID-19 transmission due to multiple inmates in the same area was related to incidents of violence, which had not increased since COVID-19
- The investigation did not consider the risk of transmission to household members, as those individuals were not workers



Work Refusals

▪ SARS Case Law

- SARS case law – If the employee has limited contact and proximity to others (in particular potential carriers of a virus), an argument exists that the work requested to be performed is unlikely to be a danger to the employee
 - *Chapman and Canada (Customs and Revenue Agency)* (2003)
 - *Caverly v Canada (Human Resources Development)* (2005)
 - *Cole v Air Canada* (2006)
- WHO guidelines, Health Canada Guidelines and Provincial Guidelines will be considered
- Context specific



Work Refusals

▪ Key Considerations

- SARS case law – work refusal cannot be based on a speculative danger
 - The employee will be exposed to the hazard
 - Reasonable expectation that the hazard will cause injury/illness immediately upon exposure
 - Limited contact & proximity = limited danger
- WHO guidelines, Health Canada Guidelines and Provincial Guidelines will be considered
- Context specific – consider what steps the employer has taken to prevent exposure



Q&A



THANK YOU FOR ATTENDING!

- Note: This presentation is of a general nature only and is not exhaustive of all possible legal rights or remedies. In addition, laws may change over time and should be interpreted only in the context of particular circumstances such that these materials are not intended to be relied upon or taken as legal advice or opinion. Readers/viewers should consult a legal professional for specific advice in any particular situation.

