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Day 1

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DENTONS' EMPLOYMENT AND LABOUR FALL WEBINAR SERIES

EMERGING WORKPLACE AND HUMAN RESOURCES ISSUES

NOVEMBER 2-4, 2021

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What you need to know about mandatory vaccinations in Canada

- Russell Groves, Partner, Toronto

Topics

- Privacy related to the collection and retention of information on vaccination status
- Requirements for vaccination policies
- Human rights considerations
- Employment law and labour law issues

Total time: 15 min

Oxford dictionary's word of the year for 2021 is "Vax" which is good news for fans of Scrabble!

Can an employer ask an employee whether they have received the vaccination for COVID-19?

- **Yes**. Generally speaking, under health and safety legislation, employers have a duty to take all reasonable precautions to protect the health and safety of workers.
- Employers must determine what **form of proof (if any)** will be acceptable:
  - Will the employer accept the employee's word that they've been vaccinated?
  - If the employee is required to provide proof, will the employer visually examine it or make a copy of it?
  - Who will inspect/collect the "proof" and for what purpose (demonstrably justified)?
- Privacy guidance materials state that the reason for recording employee vaccination status must be "clear and compelling". **Collecting it 'just in case' will not be sufficient.**

Pro tip: collect only bare minimum of personal information necessary to reduce compliance risk (also decreases impact of any breach).

What information can the employer collect?

- Ask, show or copy?
  - Collection of documentation or other information may not actually be necessary. In many circumstances, it may be appropriate for an employer to simply accept the employee's **verbal statement** that they have had the vaccination (possibly backed up with an attestation as to the truth of that statement).
  - In other circumstances, it may be appropriate to request that the employee to **show a vaccination certificate.**
  - In most cases it will be difficult to justify making and retaining an actual **copy of such a certificate**, and organizations should consider carefully before doing so.
- Federal, Provincial, and Territorial Privacy Commissioners have stated that there should not be active tracking of individuals based on vaccination and that employers should not track the activities of individuals nationally or across jurisdictions.

Requirements for COVID-19 vaccination policies

- Some employers may be required to implement a vaccination policy depending on their sector and/or municipality; however, in most cases there is no strict obligation to do so.
- Despite this many employers are rolling out vaccination policies in response to workplace health and safety obligations or, in some cases, due to customer requirements.
- A strong vaccination policy should contain:
  - A statement regarding the purpose of the policy and any authority for the collection of information;
  - A clear definition of what will constitute being “fully vaccinated”;
  - Information as to how vaccination status will be confirmed;
  - Details on possible actions taken based on whether employee has/hasn’t been vaccinated;
  - A statement on where vaccination information will be stored, who it will be shared with (with public authorities or not); and when the information will be destroyed; and
  - Information with respect to the process for considering accommodation where individuals claim they cannot be vaccinated for a ground protected by human rights legislation.

Human rights considerations

- Only grounds protected by the applicable human rights legislation will create valid exceptions that afford legal protection for those refusing vaccination (i.e. disability, religion, etc.).
- Refusals on other unrecognized grounds (i.e. political, etc.) are not protected.
- Employees are required to inform employers of a need for accommodation and provide supporting documentation.
- Once a request is received employers should follow the normal individualized accommodation process. The standard is still “undue hardship”. Employee and customer health and safety will be significant factors in determining what accommodation will be reasonable in the circumstances.
- Reasonable accommodation will depend on the circumstances, but may include: agreeing to frequent testing; work-from-home; or unpaid leaves of absence. An exception does not equal a “free pass” to be unvaccinated in the workplace.
- Document, document, document.

Human rights considerations – medical exceptions

- OHRC Policy Statement on COVID-19 Vaccine Mandates and Proof of Vaccine Certificates:
  - **Duty to Accommodate for Medical Reasons**: "Consistent with the duty to accommodate, the provincial proof of vaccine regime says that people who are unable to receive the vaccine must provide a written document, supplied by a physician (MD) or by a registered nurse extended class [RN(EC)] or nurse practitioner (NP) stating they are exempt for a medical reason from being fully vaccinated and how long this would apply. The written document may be required until recognized medical exemptions can be integrated as part of a digital vaccine certificate. The OHRC's position is that exempting individuals with a documented medical inability to receive the vaccine is a reasonable accommodation within the meaning of the Code."
  - The Ontario Ministry of Health has provided guidance to medical professionals that limit the scope of acceptable grounds for exemptions, these included, individuals who have experienced serious adverse events following prior COVID-19 immunizations. In many cases, individuals will be referred to an allergist/immunologist. The Ministry states that: **"True medical exemptions are expected to be infrequent and should be supported by expert consultation."**

Human rights considerations – religious exceptions

- OHRC Policy Statement on COVID-19 Vaccine Mandates and Proof of Vaccine Certificates:
  - **Duty to Accommodate for Religious Reasons:** "…the OHRC's position is that a person who chooses not to be vaccinated based on personal preference does not have the right to accommodation under the Code. The OHRC is not aware of any tribunal or court decision that found a singular belief against vaccinations or masks amounted to a creed within the meaning of the Code. While the Code prohibits discrimination based on creed, personal preferences or singular beliefs do not amount to a creed for the purposes of the Code."
  - "Even if a person could show they were denied a service or employment because of a creed-based belief against vaccinations, the duty to accommodate does not necessarily require they be exempted from vaccine mandates, certification or COVID testing requirements. ***The duty to accommodate can be limited if it would significantly compromise health and safety amounting to undue hardship – such as during a pandemic***.

Employment law implications

- Employee's failure/refusal to get vaccinated without a valid exemption may result in:
  - Dismissal without cause;
  - Dismissal for just cause;
  - Dismissal for frustration of contract; or
  - Employees being placing on an unpaid leave of absence (i.e. IDEL in Ontario) or "temporary" layoff.
- Such actions may result in claims of wrongful or constructive dismissal; however, offering employees the ability to work remotely (with or without working notice) will be a good defence for mitigation purposes.
- Consider whether benefits need to be continued during any unpaid leave of absence.
- Offers of employment to new employees could be made conditional on the employees being fully vaccinated (subject to human rights accommodations).

Labour law implications

- Unions have generally been supportive of employers introducing mandatory vaccination policies due to health and safety considerations.
- Jerry Dias, president of UNIFOR, has stated:
  - “I’m not going to say to our members, ‘If you don’t wanna take it, screw it, we’ll take ’em on.’ Because I know if I take ’em on, I’ll lose. So if I’m telling people not to get vaccinated or don’t worry about it, and they get fired? They’ll stay fired,”
- Not yet known how most unions will respond when actual terminations, layoffs, or unpaid leaves occur due to a refusal to become vaccinated, or how such actions will be interpreted by arbitrators. Outcomes are likely to be industry specific based on health and safety considerations.
- Policies should: be consistent with the CBA; reasonable in terms of scope and implementation; clearly drafted; brought to the attention of employees before implementation; and consistently enforced.
- Employers are encouraged to involve the union in the drafting and rollout of vaccination policies where appropriate.

Conclusion

- Consult employment and labour counsel to determine if a vaccination policy is required in your sector and/or jurisdiction.
- Ensure you are “on-side” with any jurisdictional privacy considerations.
- Offer accommodation for appropriate protected grounds but be prepared to require adequate medical documentation and consider what accommodations are possible.
- Be prepared for a fight with a small number of individuals who resist.

Issues in wrongful dismissal settlements

- Andy Pushalik, Partner, Toronto

Agenda

1. **When is a settlement reached? -** *North Atlantic Marine Supplies & Services Inc. v Hickey*, 2021 NLCA 4

2. **Protecting Confidentiality -** *Acadia University v. Acadia University Faculty Association*, 2019 CanLII 47957

3. **Relying on After Acquired Cause to Set Aside a Settlement -** *Ruder v. 1049077 Ontario Limited*, 2014 ONSC 4389

4. **The Impact of Rule 49 Offers -** *Lake v. La Presse (2018) Inc.*, 2021 ONSC 4459

When is a settlement reached?

North Atlantic Marine Supplies & Services Inc. v Hickey, 2021 NLCA 4

- **Facts**:
- Wrongful dismissal case
- Negotiations between counsel for the parties continued over several weeks
- Timing and method of settlement payment was contentious
- In responding to the employee's lawyer, the company's lawyer stated as follows:

  "I can confirm settlement of the amount owing and in my last email to you should have simply stated that I was hopeful that the matter could be fully resolved (ie: manner and schedule of payment.) ..."
- Company later changed lawyers and submitted a new offer to settle at a lower amount than previously agreed

When is a settlement reached?

North Atlantic Marine Supplies & Services Inc. v Hickey, 2021 NLCA 4

- Trial judge found that method of payment was not an essential condition of the agreement that the matter had been settled
- Overturned on Appeal.
  - Appeal court concluded that there was no settlement – no agreement on timing of payments
  - Both parties, including the employee had the opportunity to close the settlement negotiations. She did not.

Takeaway – When is a settlement reached?

"To be a good contract there must be a concluded bargain, and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties. Of course, it may leave something which still has to be determined, but then that determination must be a determination which does not depend upon the agreement between the parties."

Protecting confidentiality - Acadia University v. Acadia University Faculty Association, 2019 CanLII 47957

- **Facts**:
- Minutes of Settlement included a “no admission of liability” clause and confidentiality covenant
- Minutes of Settlement also included the following covenant:

“If asked, the parties will indicate that the matters in dispute proceeded to mediation and were resolved, and they will confine their remarks to this statement. Stated somewhat differently, it is an absolute condition of these Minutes that no term of these Minutes will be publicly disclosed.”

Protecting confidentiality - Acadia University v. Acadia University Faculty Association, 2019 CanLII 47957

- Following the settlement, professor tweeted: *"Vindicated former professor! Advocate for free speech and institutional transparency in universities."*
- One of the professor's followers tweeted *"congrats Rick! Hope you got a nice sum monz."*
- Professor responded as follows: *"All I will say is that I left with a big grin on my face."*
- Professor subsequently tweeted: *"Because I got the vindication that I was seeking. In other words, I have left the university on my term, as opposed to the administration's or union's terms. The NDA that I was required to sign by law is not for my protection."*

Protecting confidentiality - Acadia University v. Acadia University Faculty Association, 2019 CanLII 47957

- Arbitrator ordered professor to delete his tweets
- In response, the professor made further tweets disparaging the University and making numerous references to his “severance pay”
- Subsequently wrote to the University’s President and threatened to release the Minutes to the media unless certain conditions were met
- Arbitrator ruled that there was no ambiguity in the Minutes about the confidentiality obligations
- As a result of the professor’s repeated breach of the Minutes, the University was relieved of its payment obligations

Takeaway – Protecting confidentiality

- Confidentiality provisions should be clearly drafted
- Breach of confidentiality provisions will attract significant consequences

Relying on after Acquired Cause to set aside a settlement

Ruder v. 1049077 Ontario Limited, 2014 ONSC 4389

- **Facts**:
- Employer dismissed employee for poor work performance
- Parties subsequently entered into a settlement agreement and the employer paid a portion of the settlement funds
- Shortly after signing the minutes of settlement, the employer discovered that the employee had been doing some work on the side for a competitor and some clients
- As a result, the employer refused to pay out anymore settlement funds. The employee subsequently filed a motion to enforce the terms of the settlement.

Relying on after Acquired Cause to set aside a settlement

***Ruder v. 1049077 Ontario Limited,* 2014 ONSC 4389**

- Court accepted the employer's argument and dismissed the employee's motion
- Court held that there was a real risk of clear injustice if it upheld the settlement

Takeaway – Relying on After Acquired Cause to set aside a settlement

- Court will exercise its discretion and refuse to enforce a settlement agreement where to enforce the agreement would “create a real risk of injustice”
- Employers should have strong evidence when advancing this type of argument

The Impact of Rule 49 offers

Lake v. La Presse (2018) Inc., 2021 ONSC 4459

- **Facts**:
- Wrongful dismissal – at trial, court awarded employee with 8 months' notice = $97,500
- Shortly after action commenced and before employer filed statement of defence, employer served a Rule 49 offer to settle for $107,000
- Employee's recovery therefore $10,000 less than employer's settlement offer
- Under the Rules of Civil Procedure, when a plaintiff recovers less than a Rule 49 offer made by the defendant, the plaintiff is entitled to partial indemnity costs to the date the offer was served, and the defendant is entitled to partial indemnity costs thereafter, unless the court orders otherwise
- Court ordered employee to pay costs of $27,000 to the employer

Takeaway – The Impact of Rule 49 offers

- Rule 49 Settlement Offers can be a very effective tool for employers

"*The policy behind encouraging parties to consider seriously offers to settle has application in this case. The plaintiff had a better offer in hand at a time when she had spent far, far, less in costs than she has today. Her net recovery had she taken the offer would have been significantly better than it is at the end of the litigation. The parties' and the court's resources would have been put to better use. The plaintiff's position on settlement was rigid. She was entitled to make the decisions she made, but decisions have consequences. In this case, the likely consequences if the defendant beat its offer to settle were easy to discern; they are set out in r. 49.10(2).*" Justice Akbarali at para. 16.

New federal pay equity act

- Larysa Workewych, Associate, Toronto

How did we get here?

- What is pay equity?
  - Equal pay for equal value, not equal pay for equal work
- Federal *Pay Equity Act*
  - Purpose: achieve pay equity for employees in jobs commonly held by women by addressing gender-based discrimination in the pay practices and systems of employers
  - Received royal assent in December 2018
  - Came into force on August 31, 2021
  - Applies to federally regulated employers with 10 or more employees

What obligations are introduced?

- Establish Pay Equity Committee (if applicable)
- Post notice of obligations within 60 days – i.e., by October 31, 2021
- Develop and post final pay equity plan within 3 years
  - In the 3-year period, post a draft pay equity plan and provide employees with 60 days to comment
- If pay equity plan reveals a disparity between female and male salaries, females must receive increases by September 1, 2024
- Review and update pay equity plan on 5th anniversary of final posting
- Annual statement to the Pay Equity Commissioner

When is a pay equity committee required?

- Two circumstances where required:
  1. Employer (or group of employers) has 100 or more employees
  2. Employer (or group of employers) has 10 to 99 employees and some or all of them were unionized when the *Pay Equity Act* came into effect
- If employer (or group of employers) doesn't meet the criteria, can still choose to establish a committee
  - Must notify the Pay Equity Commissioner
- Committee requirements:
  - At least 3 members, and two-thirds of members must represent employees
  - At least 50% must be women
  - Employers and employees select one member to represent them
  - (If unionized) Same number of members to represent unionized employees as are bargaining agents

Notice of obligations

- Must post notice stating obligations under the *Pay Equity Act*, including the following:
  - Obligation to establish a pay equity plan;
  - Employer is in a group of employers (if applicable)
  - If pay equity committee is required:
    - Obligation to make all reasonable efforts to establish a pay equity committee
    - Requirements for the committee's membership
    - Employee's right to designate the committee members or, for unionized employees, right of bargaining unit to select committee members
  - If pay equity committee is voluntarily established:
    - Requirements for the committee's membership
    - Employee's right to designate committee members
- Must remain up until final version of pay equity plan is posted

Pay equity plan requirements

- Number of pay equity plans required to be established
- Number of employees that employer is considered to have for purposes of determining whether a pay equity committee must be established
- Whether a pay equity committee has been established and if it meets requirements
- List of job classes identified as occupied by employees to whom plan applies
  - Whether any job classes are predominantly female or male job classes
  - Whether a group of job classes is treated as a single predominantly female job class and which job classes fall into this group including which of those job classes are predominantly female job classes
  - Method of valuation used to determine value of work performed (if applicable)

Pay equity plan requirements cont'd

- Any job classes in which compensation differences have been excluded and why
- Which methods were used to make comparisons of compensation (if applicable)
- Each predominantly female job class that requires an increase in compensation, how that increase will be made and the amount of the increase
  - Date on which increase (or first increase, if applicable) is payable
- Dispute resolution procedures available under *Pay Equity Act*, including timelines

Employee comments

- Must post draft plan for comments from employees
  - 60 days to provide written comments to employer
- Must consider any comments provided by employees when preparing final version of the pay equity plan

If payment increases are required…

- Must increase compensation for predominantly female classes (if differences in compensation are identified) the day after the third anniversary of the *Pay Equity Act* coming into force
  - I.e., by September 1, 2024
- If increase in compensation is more than 1% of employer's payroll, can opt to phase in the increase

What about after the plan is finalized?

- Plan maintenance is required
  - Review at least once every 5 years
  - Similar requirements regarding notice, committees and employee comments on drafts
- Obligation to submit annual statements to Pay Equity Commissioner before June 30th

Final considerations and tips

- Serious penalties for non-compliance
  - Maximum penalties range from $30,000 to $50,000
- Complaint mechanism to the Pay Equity Commissioner
  - Potential for referral to the Canadian Human Rights Tribunal
- Give plenty of time to meet the deadlines
  - Start collecting required data about compensation and jobs

Thank you

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