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# Back to the office? New workplace norms expected to evolve in coming years

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Authors: Melanie Simon, Steven Dickie, Shaun Parker, Emilie Dillon, Shari Cohen, Emilie Dillon, Kelly Twa

As we emerge from the fourth wave of the COVID-19 pandemic in Canada, employers are increasingly focused on establishing new workplace norms following an unprecedented period of disruption. While COVID-19 and related issues, such as vaccine mandates, remain top of mind for many employers, important legal developments in employment law that are unrelated to COVID-19 continue unabated and have even picked up steam.

In this article, we address the continued impact of the COVID-19 pandemic on employers, including vaccine mandates, regular testing requirements and mask policies. We also review other legal developments that have affected employers in 2021 and that employers should continue to plan for in 2022. These include worker-friendly legislative proposals in Ontario, federal pay equity legislation and new French language laws.

## COVID-19: What employers are asking us

More than any other question related to COVID-19, employers most commonly ask us "What are you seeing?" It seems that, in determining how to respond to ongoing issues arising from the pandemic, clients are focused on ensuring that they are generally in line with (or at least, not significantly out-of-step with) market practices. These are some of our top frequently asked questions relating to the COVID-19 pandemic:

### Are employers in the private sector implementing mandatory vaccination policies?

By about August 2021, we witnessed a sharp increase in the number of employers implementing workplace mandatory vaccination policies and we have seen growing enthusiasm for such policies ever since. Many employers that implemented such policies have faced a wave of exemption requests on the basis of protected grounds under human rights legislation, almost exclusively on medical or religious (or creed) grounds. Where an employee cannot comply with a workplace mandatory vaccination policy for a legitimate reason related to a protected ground under human rights legislation, the employee must be accommodated to the point of undue hardship. This could mean excusing the affected employee from complying with a mandatory vaccination policy.

Thanks in large part to the guidance and communications from various governmental authorities and regulatory bodies that have limited their eligible medical exemptions to a short list of conditions, requests for medical exemptions have generally been relatively

straightforward to respond to. For example, the COVID-19 FAQ for physicians issued by the Ontario College of Physicians and Surgeons specifically states that there are "very few" medical exemptions to the COVID-19 vaccine. This FAQ refers to the list of medical reasons why a person may not be able to receive a COVID-19 vaccine published by the Ontario Ministry of Health. That list includes only four circumstances that could provide a medical basis for someone to refuse the COVID-19 vaccine.

We continue to recommend that requests for accommodation on medical grounds be considered on a case-by-case basis. However, the aforementioned guidance is helpful for employers charged with sifting through medical exemption requests, some of which may be little more than disguised personal preferences.

Employee requests for exemptions on the basis of religion or creed in connection with workplace mandatory vaccination policies present somewhat different challenges. Such requests are subjective in nature and existing case law was almost exclusively decided outside the context of a global pandemic. Helpfully, several human rights commissions (including in Ontario and British Columbia) have issued guidance or statements regarding vaccination policies that have, to some extent, clarified that (a) mandatory vaccination policies are not inherently contrary to human rights legislation and may be justified in order to protect the health and safety of workers; and (b) a personal choice or singular beliefs against receiving the COVID-19 vaccine do not amount to creed or religion. While helpful, such guidance has not provided legal clarity to employers regarding how to properly evaluate religion-based requests for accommodation in relation to mandatory vaccination policies in the context of a global pandemic, taking into account the reality that certain requests of this nature may not necessarily be made in good faith.

For employers who are contemplating or in the process of implementing a vaccine mandate in their workplace, more details about the relevant risks and considerations related to such policies can be found in our prior Osler Updates, Mandatory vaccinations for employees: What are the issues? and Can employers mandate vaccines? Answering the biggest COVID-19 employment and labour law questions.

## Can we require employees to undergo regular COVID-19 testing?

Many employers are inquiring about implementing regular COVID-19 testing as an addition or alternative to imposing a mandatory vaccination policy. Generally, if implemented properly, a COVID-19 testing regime can be a valuable tool in preventing the spread of COVID-19 within workplaces. In the unionized context, arbitrators have found such policies to be a reasonable exercise of management rights. For example, in *EllisDon Construction Ltd. v. Labourers' International Union of North America, Local 183*, the arbitrator upheld a twice-weekly rapid antigen testing regime on construction job sites. The testing regime was conducted in accordance with Ministry of Health guidelines and used only a throat and bilateral lower nostril swab (as opposed to the less comfortable nasopharyngeal swab). The arbitrator found that the employer's policy was reasonable when weighing the intrusiveness of the test against the important objective of the policy.

A variety of other considerations relevant to COVID-19 testing programs are discussed in our The second year of COVID-19: A rapidly changing health landscape.

## Do I still have to require my employees to wear masks at work? What if we are all vaccinated?

With the increase in vaccination rates (and anecdotal reports of increasing weariness with

compliance with COVID-19 restrictions and rules), we have seen a growing reluctance among employers to require their employees to wear face coverings in private workplaces (to be clear, masks in public places remain both required and the norm across most of Canada). Where physical distancing of at least six feet can be maintained, employees and employers are more frequently dispensing with the requirement to wear a face covering in the workplace, where permitted by public health regulations. However, even with higher vaccination rates, face coverings may be advisable from a health and safety perspective where there is a risk of accidental transmission and/or poor ventilation.

We suspect that going into 2022, as more employees return to the physical workplace, breakthrough infections may become more common, potentially leading to an increase in workplace requirements to use face coverings through the winter months.

### When do COVID-19 leaves end?

In Ontario, two temporary COVID-19-related leave programs were implemented that are set to end in 2022:

- Paid infectious disease emergency leave provides for up to three days of paid time off for certain reasons related to COVID-19 (as described in our prior Osler Update, Ontario employers must provide new paid COVID-19 leave). This program will end on December 31, 2021 unless it is further extended.
- Unpaid infectious disease emergency leave is a job-protected leave that is deemed to occur where an employee ceases performing their duties for certain reasons related to COVID-19. This program is set to end on January 2, 2022 (as described in our prior Osler Update, Ontario government changes the rules on temporary layoff and constructive dismissal due to the COVID-19 pandemic). Employers in Ontario should consider in advance of January 2, 2022 how they will deal with employees who continue to be on unpaid deemed emergency leave in Ontario. Their change in status as of that date should be approached carefully and in light of the desired business objectives.

British Columbia also implemented a temporary paid sick leave program relating to COVID-19. The B.C. program ends December 31, 2021 as well.

## Federal and provincial employment legislative updates

As more employees are returning to the office, governments are focusing on implementing new employment-related legislation that is unrelated to COVID-19.

### *Bill 27, Working for Workers Act* (Ontario)

The Ontario legislature passed Bill 27, Working for Workers Act, 2021 on November 30, 2021. Bill 27 amends employment-related legislation, including the *Employment Standards Act, 2000* (ESA) and the *Occupational Health and Safety Act* (OHSA). These are some of the most notable of the amendments:

- **Disconnecting from work policy:** Under changes to the ESA, employers with 25 or more employees are required to develop a "disconnecting from work" policy. "Disconnecting

from work" means not engaging in work-related communications such as emails, telephone calls, video calls or sending or reviewing messages, after the end of a work day, so as to free employees from the performance of work in non-working hours.

- **Ban on non-competition agreements:** Subject to commercial exceptions (i.e., in the context of a sale of business), employers are prohibited from entering into a non-competition agreement with a non-executive employee that restricts the employee from engaging in post-employment activity or work. The ban is deemed to have come into force on October 25, 2021. Employers will need to consider other methods for discouraging (without outright prohibiting) employees from competing unfairly, such as by adjusting severance and/or incentive compensation mechanics post-employment. Notably, the ban carves out C-suite executives but does not contain exceptions for other members of management or critical employees.

- **Temporary help agencies:** Temporary help agencies and recruiters operating in Ontario are required to apply for a licence to operate. These agencies are also required to confirm that they have complied with all orders, met the requirements of the ESA and the *Employment Protection for Foreign Nationals Act, 2009* and will carry on business "with honesty and integrity and in accordance with the law." Businesses are prohibited from engaging or using the services of an unlicensed agency or recruiter. The stated intent of this change is to protect vulnerable workers from exploitation.

- **Washroom access:** The OHSA is amended to require business owners to provide washroom access to workers making deliveries. There are exceptions where access would not be reasonable or practical for reasons related to health and safety, security, workplace conditions or the location of the washroom, or where the washroom can only be accessed through a residence.

## *Pay Equity Act* (federal sector)

The new federal *Pay Equity Act* (PEA) came into force in August 2021. The PEA requires federally regulated employers with 10 or more employees to take steps to close the gender wage gap and ensure that workers receive equal pay for work of equal value. Employers were required to post a notice by November 1, 2021 informing employees of the employer's intention to create a pay equity plan. Employers must then develop and post a pay equity plan prior to August 31, 2024.

The PEA requires that employers pay any adjustments that may be required to achieve pay equity. In addition, employers that have 100 or more employees, or employers with fewer employees but where some employees are represented by a union, must establish a pay equity committee with management and employee representatives. Our earlier blog post on osler.com on the PEA provides an overview of the requirements for committee membership.

## *Canadian Labour Code* (federal sector)

Earlier this year, new federal regulations on workplace harassment and violence came into effect. The new regulations include a duty to investigate workplace harassment and an obligation to provide greater protection for employees. The protections include the ability of

the complainant to maintain agency and control during the resolution process. Additionally, a high threshold of competence is required for an investigator to review a complaint. Greater accountability is also required of employers in preventing and resolving incidents of workplace harassment and violence. For more information, please see our earlier Osler Updates on this topic: Federal government interpretive guidelines on Workplace Harassment and Violence Regulations and Less than 2 months for employers to prepare for the new Federal Regulations on Workplace Harassment and Violence.

### Bill 96, Charter of the French Language (Québec)

Bill 96 was introduced in Québec which, if passed, will require employers in Québec to show compliance with language regulations addressing employee communications, employment offers, job postings, recruitment and hiring – or risk facing fines. Please refer to our Osler Update, Québec aims to strengthen communication in French at work – SHRM, on how Québec employers may need to rethink their strategy on language choice and webinars for an overview of the impact of these changes. Further detail is also provided in our article, Government of Québec proposes stricter French language law.

## Key employment decisions from 2021

There were a number of notable decisions relating to employment law in 2021:

### *Hawkes v. Max Aicher (North America) Limited* (*Hawkes*)

In Ontario, employees with five or more years of service are entitled to severance pay pursuant to the ESA if their employer's payroll is equal to or exceeds $2.5 million. The traditional view was that only the employer's payroll in Ontario needed to be taken into account for the purposes of determining whether the employer's payroll was equal to or more than $2.5 million (and thus whether its employees are entitled to statutory severance pay). This view is supported by, among other evidence, statements from government ministers at the time the ESA was introduced.

In 2021, the Ontario Divisional Court in *Hawkes* found that the entire *global* payroll of the *parent* entity of the employer must be included in determining whether the employer must provide severance pay pursuant to the ESA. This decision has implications for global employers whose payroll in Ontario is less than $2.5 million, but whose global payroll, potentially including that of its affiliates, is equal to or greater than $2.5 million; employees of those employers who have five or more years of service may be entitled to statutory severance pay.

### *Perretta v. Rand A Technology Corporation* (*Perretta*) and *Russell v. The Brick Warehouse LP* (*Russell*)

*Perretta* and *Russell* both have implications for drafting termination letters and executing terminations. In *Perretta*, an Ontario court held that an employer's failure to promptly pay an employee's contractual severance entitlement constituted a repudiation of the employment agreement. As a result, the employee was entitled to reasonable notice of termination at common law.

Similarly, in *Russell*, an Ontario court held that a plaintiff employee was entitled to $25,000 in aggravated damages because the termination letter provided by the employer failed to

strictly comply with the requirements under the ESA. The employer did not inform the employee that he would immediately receive his ESA entitlements if he did not accept the offer of a severance package from the employer. Employers should examine their termination letters closely to ensure that such letters do not result in increased liability.

## *Rahman v. Cannon Design Architecture Inc.* (*Rahman*)

An Ontario judge held that a termination clause in an employment agreement was enforceable on the basis that it was negotiated by legally sophisticated parties with the benefit of independent legal advice and with no marked disparity in bargaining power. In doing so, the judge distinguished the case from the landmark decision in *Waksdale v. Swegon*, in which the court struck down a termination "without cause" provision based on what was essentially a technical flaw (additional commentary regarding the *Waksdale* decision can be found in our earlier Osler Update, The Ontario Court of Appeal's latest decision striking down attempts to control severance cost).

## *Hucsko v. A.O. Smith Enterprises Limited* (*Hucsko*)

In *Hucsko*, the Ontario Court of Appeal upheld the termination of an employee for just cause where the employee engaged in sexual harassment and refused to accept wrongdoing or apologize for the behaviour. This case is notable because, unlike many other "for cause" termination cases, the finding was not based solely on the employee's workplace harassment, but was also based on his post-harassment conduct and his willingness to accept responsibility for his actions.

We expect that the impact of COVID-19 on workplaces will continue to be significant in 2022. Many employers who have not yet opened their physical workplaces plan to do so in the coming months. Having now mastered the virtual work environment, employers and employees will need to reorient their efforts to reintegration and ensuring workplace safety on an ongoing basis. This will be particularly important as COVID-19 restrictions are lifted and people are allowed to gather (outside the workplace) in greater numbers and with fewer protocols in place. At the same time, employers will need to monitor legislative developments as governments turn to non-COVID-19 priorities.