

# COVID-19 VACCINES & THE WORKPLACE: Your Questions Answered

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BRITISH COLUMBIA  
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Presenter | Ryan Anderson, Mathews Dinsdale & Clarke LLP  
June 15, 2021

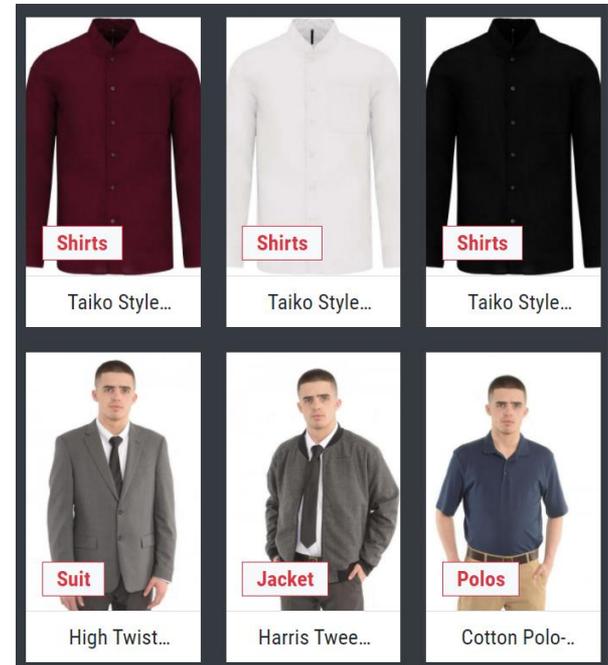
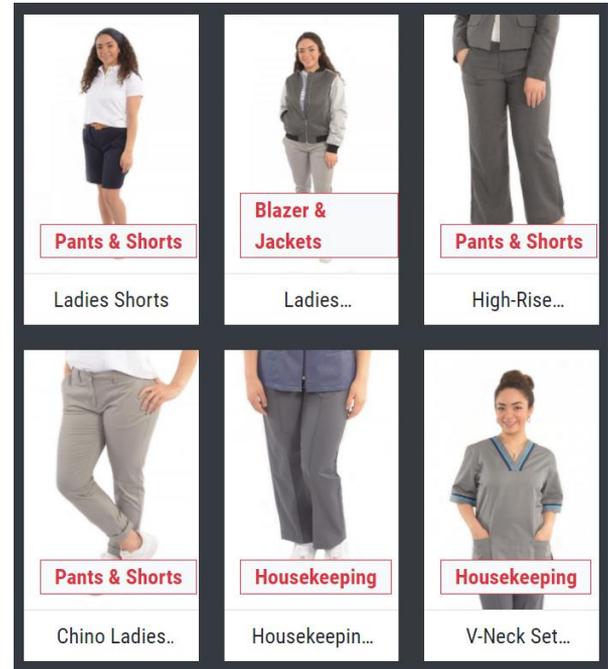
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**Ryan Anderson,  
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# COVID-19 VACCINES & THE WORKPLACE: Your questions answered

**Presenter:**  
Ryan Anderson

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# Session Overview

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- **Introduction – Current COVID-19 Context**
- **Topic 1: Infectious Disease Case Law**
- **Topic 2: OHS, WSBC & Privacy Considerations**
- **Topic 3: Human Rights Considerations**
- **Topic 4: Vaccination Policies**
- **Open Discussion, Questions & Answers**



# Introduction

# Current COVID-19 Context

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- Where do we find answers?

**Google !!!**

- A very promising FAQ, published by WSBC!

***Can an employer require a vaccination as a condition of employment?***



Every workplace is different, so individual employers should seek legal advice when developing a mandatory vaccination policy, as they need to address not only workplace health and safety and employees' interests but also consider labour and employment issues.

# Current COVID-19 Context

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## ➤ Key Considerations for Employers:

- Human Rights, OHS and/or Privacy **complaints**
- (Union) **grievances** in labour context
- Wrongful dismissal **lawsuits** in employment context
- WSCB **claims**
- Charter challenge **litigation** (if government employer)



# Topic 1: Infectious Disease Case Law

# What do we know?

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- No current legislation mandating COVID-19 vaccines
- Evidence and science regarding vaccine efficacy will be key to policy arguments
- Unlikely that *all* employers will be able to enforce mandatory vaccination policies
- Governments and public health officials: vaccine will be voluntary, even at high risk workplaces
  - *Will that change?*

# Law on Workplace Vaccination Policies

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- Before COVID-19 there was SARS; also law on employers requiring the influenza vaccine
- Adjudicators will look at the prior law on vaccines, but consider many factors:
  - Seriousness of illness
  - Effectiveness of vaccine
  - Nature of workplace
  - Alternative safety measures

# British Columbia

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- Policy requiring individuals to either vaccinate or mask was found to be an “acceptable intrusion on employee privacy rights” and was therefore reasonable

*Health Employers Assn. of BC (2013 - Diebolt)*



- Policy requiring Employees to get a vaccination that also allowed Employees to refuse the vaccine was found to be reasonable

*Interior Health Authority (2006 - Burke)*

# Alberta

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- Influenza vaccine policy that placed workers on unpaid leave until outbreak subsided was reasonable and did not violate the *Charter*

**Carewest (1999 - Smith)**

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- Policy placing non-vaccinated employees on unpaid leave during influenza outbreak was rationally, crucially connected to Employer's **legitimate** business interests, justified, justified to and protect the safety of the residents of the region

**Chinook Health Region (2002 - Jolliffe)**

# Ontario

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- Employer's "vaccinate or mask" policy was held to be an **unreasonable** exercise of management rights, and a breach of employee privacy rights.

*Sault Area Hospital (2015 - Hayes)*



- After *Sault* decision, hospital modified policy and included a "recommendation" to wear a mask in any patient area in influenza season, but arbitrator found policy not sustainable based on scientific evidence regarding transmission.

*William Osler Health System (2016 - Hayes)*

# Ontario

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- Employer “vaccinate or mask” policy was unreasonable based on lack of persuasive expert evidence on policy effectiveness

*St. Michael’s Hospital (2018 - Kaplan)*



- Employer policy providing mandatory unpaid leave for unvaccinated nurses during an outbreak was held to be reasonable.

*North Bay General Hospital (2008 - Chauvin)*

# Topic 2: OHS, WCB and Privacy Considerations

# COVID-19 Vaccination Policies

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1. Do employers have an **obligation** to ensure employees are vaccinated?
  - i.e. ... is vaccination tied to a legal obligation?
2. Can employers **choose to require** that employees become vaccinated?
  - i.e. ... can employers make vaccination mandatory absent any legal obligation?



# OHS Obligation to Ensure Vaccination?

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- At present, no legislation in BC expressly requires any group of employees to be vaccinated for COVID-19
  - That does not appear likely to change.
- Employers do have a general duty obligation under OHS legislation to ensure safety in the workplace
  - Could vaccination be considered obligatory under this duty?
  - Unlikely in absence of other legislation.

# Workers' Compensation Considerations

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## Compensation for work-related COVID-19 where ...

- (1) There's evidence of COVID-19; and
- (2) Risk of contracting disease at work is ***significantly greater*** than ordinary risk for public

*Is this risk sufficient to justify mandatory a vaccination policy?*



# Privacy Considerations

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- Vaccination status is personal health information
- **At minimum, any vaccination policy must address the following key concerns:**
  - the type of information being collected, stored, used and/or disclosed
  - how and for what reason information is being collected, stored, used and/or disclosed
    - employees who do / don't receive vaccination
    - employees who request or require accommodation

# Topic 3: Human Rights Considerations

# Protected Grounds

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- The *BC Human Rights Code* prohibits employers from:
  - Refusing to employ any person;
  - Terminating the employment of any person; or
  - Discriminating against any person with respect to their employment on the basis of a protected ground
  
- Protected grounds likely applicable:
  - Physical / Mental Disability
  - Sex (Pregnancy)
  - Religion
  - Political Belief (?)

# What Can an Employer Request?

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## ➤ Medical information

- Vaccination exemption
- Pregnancy
- Other medical issue



## ➤ Proof of religious prohibition

## ➤ Political Belief – basis for beliefs/convictions

# Bona Fide Occupational Requirement

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## ➤ The ***BFOR***

- Rational connection to job/workplace
- Honest and good faith belief in necessity
- Reasonably necessary – undue hardship

## ➤ Key considerations

- Workplace/job environment
- COVID-19 data/status

# Topic 4: Vaccination Policies – Key Considerations

***Mandatory or  
Voluntary?***

# Practical Considerations

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- What does “mandatory” really mean ...

*... who holds him down, and who jabs in the needle?*



- Real question is, what is the best way to persuade employees to get vaccinated?

# Legal Considerations

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- Legal considerations lend credibility to a vaccination policy ... mandatory or voluntary:
  - Rational connection to job/workplace
  - Honest and good faith belief in necessity
  - Reasonably necessary

# Legal Considerations

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- Requires careful assessment of the workplace....
  - Risk assessment / frequency of public contact
  - Effectiveness of existing controls
  - Vulnerability of those served
  - Ability to accommodate those who cannot vaccinate
  - Ability to safeguard privacy rights
  - Effectiveness of education/training and rate of voluntary compliance
  - Current level of community transmission

# So, get on with it ...

## ***Can Vaccination Be Mandatory Or Not?***

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- **Maybe**
- An employer may, ***in some circumstances***, implement policies that require vaccination as a condition of continued employment
- In order to be lawful, such a policy must be:
  - Rationally connected to the workplace
  - Reasonably necessary
- Seek legal advice if considering such a policy

# Mandatory Policies

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## ➤ Essential Components

- Sufficient notice and clarity, then consistent enforcement
- Express reference to privacy, human rights and accommodation
- Clear consequences and alternatives to those who cannot / will not vaccinate
  - Vaccinate or mask?
  - Vaccinate or rapid testing / assessments?
  - Workplace leave (likely unpaid) ?
  - Remote work?
  - Termination?
- Unionized setting
  - CBA compliance & Union consultation
- Policy review and updates

# Discussion Topics

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## ➤ **Alternative Considerations**

- Effectiveness of current safety measures
- What is the anticipated voluntary vaccination rate?
- Consultation with employees
- Employee morale – what will land best?
- Do employees have access to sufficient information?
- Are we making it easy for employees to get vaccinated?
  - Vaccination incentives
  - Worksite vaccination clinics
- Reference to Privacy Policy
- WSCB “risk” associated with mandatory policy

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