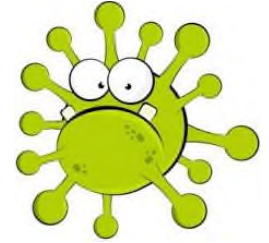


Vaccine Policies in the Workplace

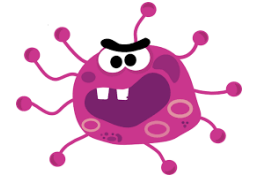
Presentation for members of
ALIGN Association of Community Services
04 October 2021

Sarah Miller (she/her)
Associate, JSS Barristers
millers@jssbarristers.ca



Outline

- The source of an employment relationship
- Imposing policies on employees
- Imposing policies on unionized employees
- Human Rights law
- Occupational Health & Safety
- Privacy

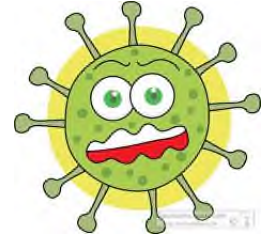


What type of employment?

There are many different types of employment:

1. Independent contractors
2. Dependent contractors
3. Employees
4. Unionized employees
5. Volunteers
6. Gig workers

The **contract** (employment offer, contractor contract, collective bargaining agreement, user license, etc.) is the *most* important aspect of any employment relationship.

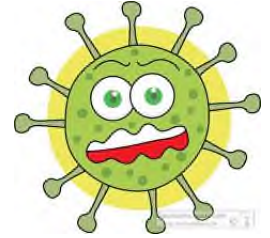


Employment Law

Employment law is just **contract** law.

Contracts are exceedingly important in employment law, but employers and employees often **fail** to draft a proper contract, prescribe specific terms, set out exhaustive provisions, or contemplate how the contract may end.

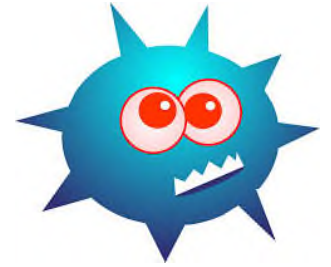
Failing to have a proper contract in place results in the court (or arbitrator) “reading in” or imposing certain assumed terms into the contract in order to make sense of the relationship. This is often what happens with workplace policies, and the Court considers whether the policy was within the **reasonable expectations** of the parties.



Take Away

Many disputes between employees and employers can be addressed at the onset of the employment relationship by fulsome and well thought out contracts which comply with statutory requirements and minimums and guiding principles of law.

Much of employment litigation arises from failing to have a contract in place or failing to contemplate the necessary provisions.



“Employees”

Who is an “employee”?

According to the *Employment Standards Code* in Alberta, an “employee” is “an individual employed to do work who receives or is entitled to wages”

This excludes volunteers (as they are not entitled to wages) but includes what most people consider “contractors” whether they are dependent or independent.



Imposing Workplace Policies

On Employees

The British Columbia Superior Court had the following to say about workplace policies:

Before a 'policy' can form part of a contract of employment, **there must be evidence that the policy was accepted by both the employer and the employee as a term of the employment contract**, and the onus in this respect rests on the party seeking to rely on the policy as a term of the contract. **One party cannot unilaterally impose a contractual term on the other.** The fact that the plaintiff was aware of the policy, and in fact applied it to others in the course of his employment, did not establish that he accepted the policy as a term of his own employment contract.



Imposing Workplace Policies

On Employees

Employers often impose workplace policies to support operations, manage human resources, and to dictate reasonable or appropriate behaviours in the workplace.

Ordinarily, many of these policies (drug & alcohol policies, respectful workplace policies, technology usage policies, etc.) are welcome, expected and accepted by employees. Due to the shared understanding as to the value and importance of these policies, policies can often be implemented with little pushback and implicitly or explicitly accepted by employees.



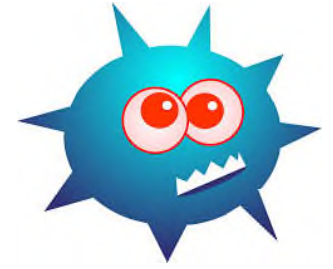
Imposing Workplace Policies

On Employees

Some policies, such as non-competition or exclusive work policies, are not accepted by the employee or otherwise ignored by the employee.

Sometimes the employee's position on a policy does not become apparent, or the employer does not concern itself with ensuring perfect compliance.

Other times, the violation "strikes at the heart" of the employment relationship, causing the employer to terminate **for just cause**.



Take Away

The implementation of a workplace policy is not the subject of litigation, it is the employer's response in trying to enforce its policy by ultimately terminating an employment relationship.

Every employer *can* implement a mandatory vaccine policy, the question is...what can you do if your employees fail to comply?



Imposing Workplace Policies On Employees

Do you have just cause to terminate? Does the violation of the mandatory vaccine policy “strike at the heart” of the employment relationship? Is it impossible to continue employing someone who fails or refuses to comply with a mandatory vaccine policy?

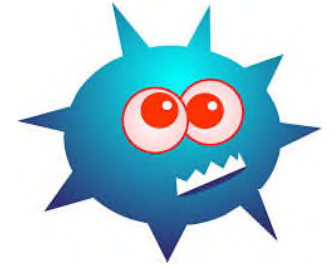
These are subjective issues which require specific analysis in each case.



Imposing Workplace Policies On Employees

The Court of Appeal in New Brunswick provided a framework to help guide a determination as to whether a policy violation can trigger **just cause** for discrimination:

1. whether the rule in question is reasonable and lawful;
2. whether the rule is consistent with the employee's employment contract;
3. whether the rule is applicable to the employee;
4. whether the rule, including the consequences for a breach thereof, is known by the employee;
5. whether the rule is clear, unambiguous and consistently enforced by the employer; and
6. whether the employee's breach of the rule is sufficiently serious, in the circumstances, having regard to the employee's length of service, the employee's position, the nature of the rule and whether the employee has a reasonable excuse, such that the violation of the rule or policy is not merely an isolated transgression or an error in judgment, but a fundamental breach which **evidences a repudiation of the employment contract** or an intention to no longer be bound by a fundamental term therefore.

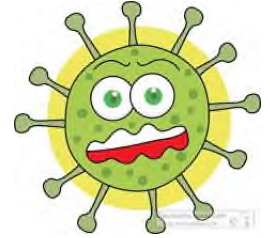


Take Away

Currently unvaccinated employees will be far more likely to oppose a mandatory vaccination policy, fail or refuse to comply, and initiate litigation following termination.

When you implement a policy, you should consider:

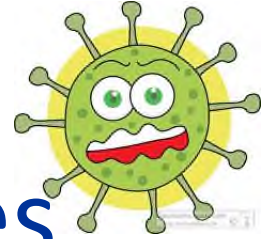
1. If the employee breaches the policy, is the employment relationship **repudiated**?
2. If **yes**, am I willing to terminate the employee for just cause and risk litigation for wrongful dismissal?
3. If **not**, what mechanisms can I build into the policy to exempt certain objectors but still obtain the operational goals of the policy?
4. If **not**, am I willing to terminate without cause and pay severance in order to maintain high rates of vaccination in the workplace?



Unionized Employees

In a unionized environment, the employer “bargains” with the union in order to enter into a collective bargaining agreement which applies to all members of the union. As their representative, the union has standing to “grieve” decisions made by management. If the union decides not to, then the employee has its dispute with the union before the Canada Industrial Relations Board (“**CIRB**”).

The collective bargaining agreement is the **contract** and the first place to look to determine whether management can exercise rights with respect to implementing a mandatory vaccination policy.

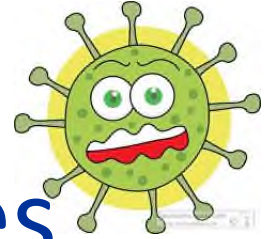


Imposing Workplace Policies

On Unionized Employees

The framework provided in the seminal labour case is for policy implementation and exercise of management rights, the policy:

- (i) Is consistent with the collective bargaining agreement,
- (ii) Is reasonable,
- (iii) Is necessary,
- (iv) Has intended consequence,
- (v) Strikes a reasonable balance between employees' rights and the objectives of the employer,
- (vi) Is clear and unequivocal; and
- (vii) the consequences of the policy were communicated to the employees,
- (viii) enforcement of the policy is consistent.



Imposing Workplace Policies

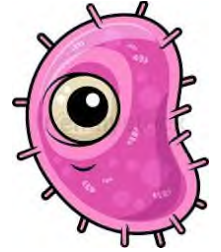
On Unionized Employees

Employers may also be required to bargain with the Union. It remains to be seen whether in *all* cases an employer will be able to exercise residual management rights to implement a vaccine policy.



Occupational Health & Safety

- There is currently no obligation, nor entitlement, under OH&S legislation in Alberta for mandatory vaccine policies in the workplace.
- As indicated by the Government's OH&S materials, other hazard controls are available for consideration:
 1. Engineering controls: ventilation systems, physical barriers
 2. Administrative controls: alternate work arrangements, cleaning protocols
 3. Personal protective equipment: gloves, eye protection, face masks, respirators, hand sanitizer
- The Government of Alberta recommends that employers utilize all three types of OH&S hazard controls to minimize spread of COVID-19
- The Government of Alberta is also very careful not to recommend mandatory vaccine policies and states multiple times on the public information that employers should consider seeking legal advice before implementing a mandatory vaccine policy



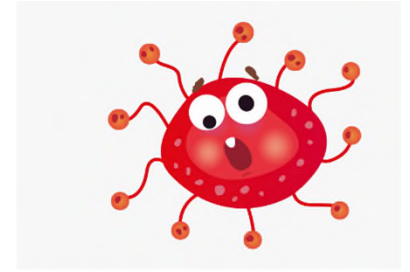
Human Rights

Following the implementation of a mandatory vaccine policy, you may receive requests for accommodation due to an employee's "protected characteristic(s)".

Protected characteristics in Alberta are:

race, **religious beliefs**, colour, gender, gender identity, gender expression, **physical disability**, **mental disability**, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation

Employers are required to accommodate protected characteristics up to "undue hardship".

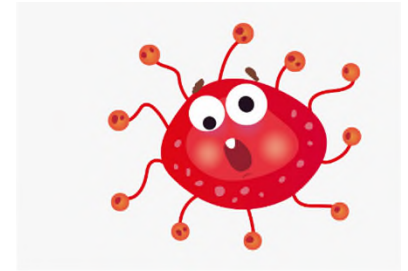


Discrimination

If an employer fails to accommodate someone with a protected characteristic, the employee may submit a complaint to the Alberta Human Rights

The complainant must show:

1. That they have a protected characteristic,
2. That they suffered an adverse consequence,
3. That the adverse consequence had a nexus with their protected characteristic.

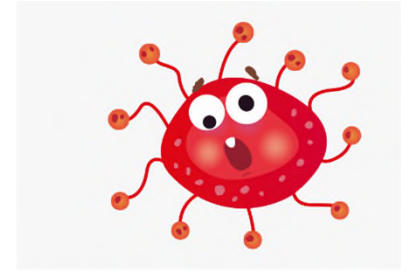


Discrimination

Physical or mental disability:

Does not necessarily require a medical note at first instance to prove the disability but does require reasonable disclosure and engagement in the accommodation process.

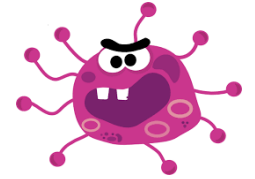
And remember, the employee will eventually have to be able to prove that they have a protected characteristic that caused or contributed to the adverse consequence.



Discrimination

Religious belief:

1. he or she has a practice or belief, having a nexus with religion, which calls for a particular line of conduct, either by being objectively or subjectively obligatory or customary, or by, in general, subjectively engendering a personal connection with the divine or with the subject or object of an individual's spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials; and
2. he or she is sincere in his or her belief

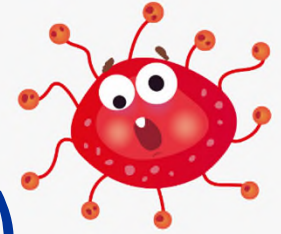


Religious Freedom (s. 2)

The concept of freedom of religion is the right to entertain such religious beliefs as a person chooses... But the concept means more than that.

Freedom means that ... **no one is to be forced to act in a way contrary to his beliefs or his conscience.**

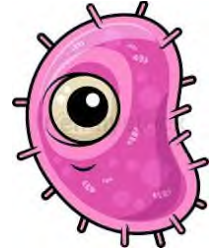
...provided *inter alia* only that such **manifestations do not injure his or her neighbours or their parallel rights** to hold and manifest beliefs and opinions of their own.



Religious Freedom (s. 2)

It follows that when considering an infringement of freedom of religion, the question is not whether the person sincerely believes that a religious practice or belief has been infringed, but **whether a religious practice or belief exists that has been infringed**. The subjective part of the analysis is limited to establishing that there is a **sincere belief that has a nexus with religion, including the belief in an obligation to conform to a religious practice**.

Remember: the *Charter* does not apply to private, contractual relationships, but this case has been cited with approval by the AHRC with respect to religious discrimination. The *Charter* only applies to government action, inaction, legislation, rules, guidelines, etc.



Discrimination - Defence

Section 11 of the *Alberta Human Rights Act* provides that a contravention of the Act is deemed not to have occurred if the contravention was **reasonable and justifiable in the circumstances.**



Discrimination - Defence

Bona fide occupational requirement

The hard hat rule was a *bona fide* occupational requirement which met the *Etobicoke* test: **one honestly imposed in the interest of the performance of the work with all reasonable dispatch, safety and economy and not for extraneous reasons aimed at defeating the Code.** The test does not vary with the special characteristics and circumstances of the complainant. A working condition does not lose its character as a *bona fide* occupational requirement because it may be discriminatory. Rather, as a ***bona fide occupational requirement***, **it may permit consequential discrimination, if any.**

The purpose of s. 14(a) is to make the requirement of the job prevail over the requirement of the employee. It negates any duty to accommodate by stating that the imposition of a genuine job-related requirement is not a discriminatory practice.

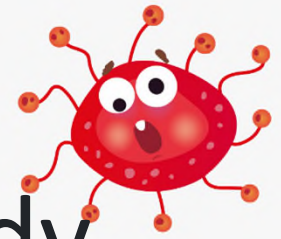


Discrimination - Defence

Bona fide occupational requirement

From the Alberta Human Rights Commission:

“an employer or service provider is not required to accommodate a religious belief if the employer or service provider can show that the neutral rule is a *bona fide* occupational requirement (“BFOR”) or is “reasonable and justifiable”



Webber Academy – Case Study

Webber Academy: non-denominational, accredited private school in Calgary, Alberta

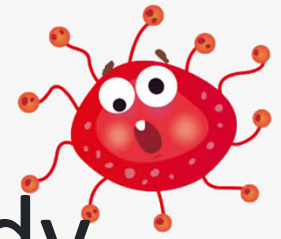
Webber Academy refused to create safe space to allow children to stand, bow and kneel safely during time of prayer.

Moore Test

Protected characteristic: The students had a genuine religious belief

Adverse effect: Quiet private spaces were customarily available to the student body and that the students were denied the use of these spaces because they wanted to use the space for prayer.

Nexus: the fact that the students wanted to pray was the only reason they were denied access to a quiet private space at Webber Academy. Furthermore, their continued enrollment was denied because they insisted on performing their mandatory prayers.



Webber Academy – Case Study

Was the discrimination reasonable & justifiable in the circumstances, pursuant to section 11?

In order to justify a policy that resulted in *prima facie* discrimination, it must be demonstrated that **the standard or policy was adopted for a purpose or goal that was rationally connected to the function being performed**, that the policy was adopted in good faith and that the standard was necessary to accomplish the purpose because the request for services could not be accommodated without incurring undue hardship.

The AHRC concluded that there was little evidence of hardship and no reason not to accommodate the students. Reasons raised by the school were speculative. The students were awarded \$18,000 in damages each.

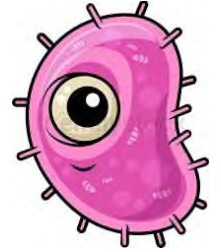


Take Away

For some places of work, a vaccine requirement may be a bona fide occupational requirement.

For others, it may not be. In those situations, an employer must accommodate a person up to undue hardship **for the employer**, such as masking, distancing, testing, amended work hours/conditions, cleaning protocols, etc.

Consider whether it is discriminatory to impose testing requirements on a protected employee **at their expense**. Is the expense of testing worth risking a human rights complaint? Consider whether the employer can provide that option as part of the accommodation.

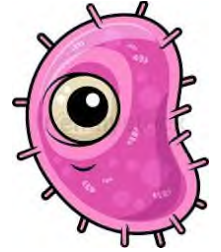


Privacy

The *Personal Information Protection Act* (“**PIPA**”) applies to the collection of “personal information” including “personal employee information”.

Personal employee information includes personal information **reasonably required by the organization** for the purpose of establishing, managing, terminating or managing post-termination the employment or **volunteer-work** relationship.

There is currently no way to obtain vaccine records without the consent and cooperation of the person who holds the records.

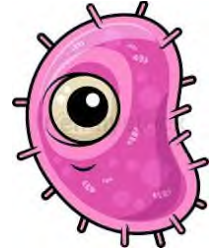


Privacy

An organization may only collect personal information for purposes that are **reasonable**.

It is arguable that public health and workplace safety issues would make the collection of information related to an employee's vaccination status reasonable, but employers **must** notify its employees as to the **purpose of its collection and the name and title of a person who can answer questions regarding the collection**.

In addition, employers can only use the information for reasonable purposes related to the managing the employment relationship, and in almost all circumstances would **require the employee's consent before that information could be disclosed to any other entity or person**.



Take Away

Privacy legislation applies to your volunteers.

Document control management is key in collecting personal details of your employees and volunteers.

Consider whether you need to retain records (likely you do not), and whether there are other ways to confirm vaccination status (statutory declarations, visual confirmation, etc.)

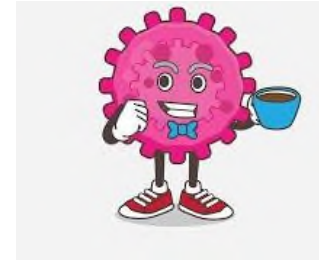


Final Take Away

Conversations on vaccines should be approached with compassion, as it is a personal choice that may have strong emotions attached. It is important to try to understand where a person is coming from and discuss their concerns.

(Government of Alberta, COVID-19 Immunization Program: Vaccine Hesitancy)

If you are implementing a policy, be prepared to incur costs with respect to changing human resources, termination of employment, related liabilities and litigation risks.



Questions?

(Don't forget to wash your hands)

Which is your virus avatar?

