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Alberta Employment Law & Covid-19 Considerations in a non-unionized context

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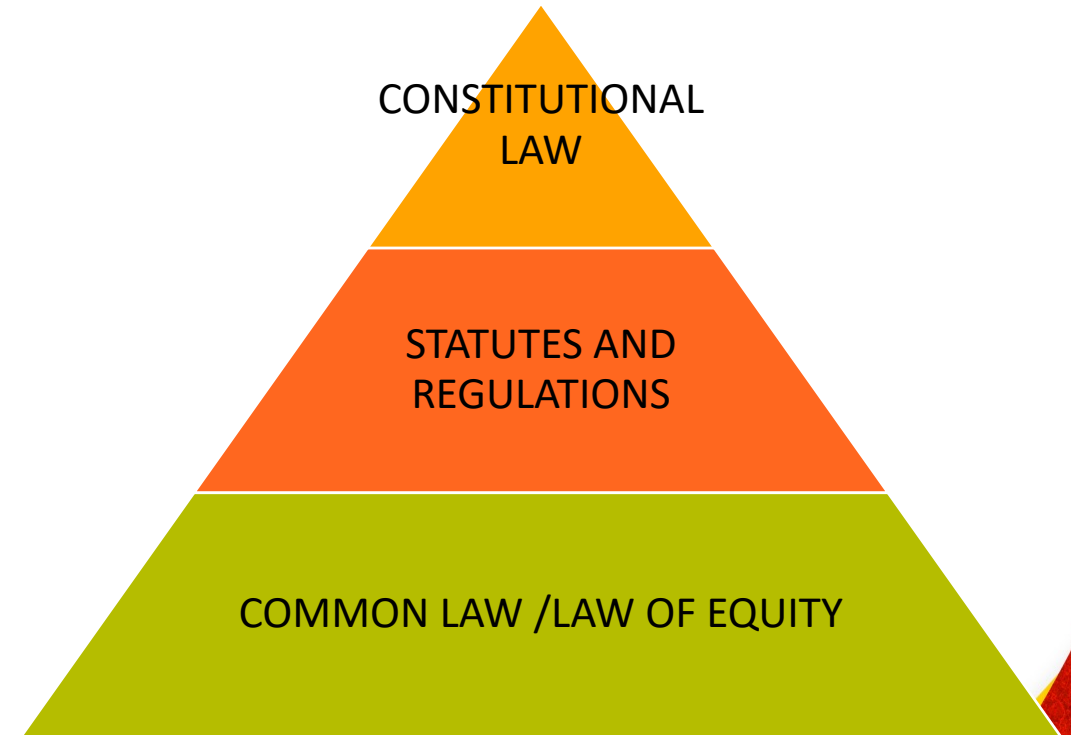
Agenda

1. Employment law framework
 - Where do employment related laws come from?
 - What are some of the key employment statutes?
 - Where can I find employment law related information?
 - What are employer's policy making rights generally?
2. Can employers implement a mandatory vaccination policy?
 - OH&S law & Vaccination Policies
 - Human Rights law & Vaccination Policies
 - Privacy law & Vaccination Policies
3. What if I experience a serious, adverse reaction to the vaccine?
4. Can the employer terminate my employment if I don't comply with the policy?
5. Questions



Where do employment related laws come from?

- Statutes: made by provincial, and federal governments (bylaws affect employers too)
- Common law: rules made by judges based on written decisions
 - contract
- All laws must comply with Constitution Act of 1867 & the Canadian Charter of Rights and Freedoms





Key Employment Statutes Overview

- *Alberta Employment Standards Code*¹
 - *Employment Standards (COVID-19 Leave) Regulation*²
 - 14 day, unpaid, job-protected leave related to COVID-19
- *Alberta Human Rights Act*³
 - protects against discrimination based on protected grounds
- *Occupational Health and Safety Act & Regulation & Code*⁴
 - Sets out rules of employers and employees to ensure health and safety of workplaces
- *Personal Information Protection Act*⁵
 - sets out the ground rules for how employers must handle personal information
- *Workers' Compensation Act*⁶
 - no fault insurance regime for work related injuries

What courts & tribunals hear employment related disputes?

- Provincial Court
- Alberta Court of Queen's Bench
- Alberta Human Rights Commission
- Alberta Labour-Occupational Health & Safety Officer enforces the OHS Legislation
- Employment Standards
- Dispute Resolution and Decision Review Body (DRDRB) through the Workers' Compensation Board (WCB)

Where to find employment law information?

Useful Websites

CanLII

- <https://www.canlii.org/en/>

Alberta Employment Standards

- <https://www.alberta.ca/employment-standards.aspx>

Alberta Human Rights Commission

- <https://www.albertahumanrights.ab.ca/Pages/default.aspx>

OH&S & Covid-19

- <https://ohs-pubstore.labour.alberta.ca/covid-19>

Worker's Compensation

- <https://www.wcb.ab.ca/>



Employment Policies Generally

- Employers can implement workplace policies to manage day-to-day operations
- Sometimes policies are required by statute
- “Employers have the right to set the ethical, professional and operational standards for their workplaces.”¹
- Employees are expected to obey the lawful orders and instructions of their employer, including the workplace policies.²
- For workplace policies to be considered enforceable, they must be reasonable, unambiguous, well published, consistently enforced, and the employee must know or ought to have known of the policies' contents, including the consequences of breach³
- Fresh consideration is only required if workplace policies purport to change a fundamental aspect employee’s employment contract



Occupational Health & Safety in Alberta

- Occupational Health & Safety Act, Regulations & Code
- Obligation on employers to create a safe work environment
- Obligation to comply with all public health orders in force
 - Industry specific orders in place (ex. Hospice settings & long-term care facilities)
- Mandates an OH&S policy
- Employers must conduct a workplace hazard assessment, and develop and implement safe workplace policies
- Policies must be reviewed & revised as circumstances change

Occupational Health & Safety & Covid-19

- OH&S Act state that employers must address all identified hazards¹
- COVID-19 and other respiratory infections are workplace hazards²
- Hierarchy of controls of hazards³
 - 1st choice: elimination & control at sources
 - Vaccinations, physical barriers, ventilation systems
 - 2nd choice: administrative controls
 - Worker training, alternate work arrangements
 - 3rd choice: PPE
 - Facemask, respirators, gloves
- Policy needs to be based on the assessment & what is reasonable in the circumstances
- No one-size-fits-all approach



Vaccine Policy-Factors to Employers Should Consider

- Public Health Orders applicable to the workplace
- Mandatory COVID-19 vaccination requirements for air travelers
- Number of employees & work arrangements
- Active cases or symptomatic workers
- Active cases in the area, city, province
- Presence of persons with health vulnerabilities
- Type and duration of interactions with other workers or the public
- Physical distancing at the workplace
- Type of work or activities performed etc.



Work Refusals

- If employer fails to manage effectively Covid-19 hazard employees can refuse work
- Workers can refuse work if they believe “on reasonable grounds that there is a dangerous condition at the work site or that the work constitutes a danger to the worker’s health and safety”¹
- Employers must follow the process laid out in the OH&S legislation and investigate & document reasons
- May not be able to assign another employee to do the same job unless concern investigated (case by case analysis)



Vaccine Policy-Factors to Employers Should Consider

- The City of Calgary Vaccine Passport Bylaw 65M2021 requires many businesses to require proof of vaccination, recent negative COVID-19 test, or valid medical exemption letter to gain entry to the business¹
 - Businesses affected
 - Restaurants, including patios, nightclubs
 - Casinos, Bingo halls, VLT lounges
 - Entertainment and recreation centres
 - Museums and art galleries & movie theatres
- The by-law does not apply to employees, but...
- Provincially, September 20, 2021 CMOH Order 44-2021 (partially amended by Oct. 6, 2021-Provincial CMOH order 47-2021) includes masking, distancing & other requirements²



Case Law

- No Covid-19 specific challenge to an Alberta vaccine policy
- *Alberta Health Services and UNA, Local 301 (Hiob-Mayfield), Re 2020 CarswellAlta 1872, [2020] A.W.L.D. 3409, 146 C.L.A.S. 30*
 - Measles vaccine mandate
 - “There has been an increase in measles cases in Canada. Measles is one of the most highly communicable diseases.”
 - Unpaid leave of absence if non-compliant
 - Policy upheld
- Similar policy upheld for flu vaccine, in *Chinook Health Region v. U.N.A., Local 120 (Flu Immunization Policy Grievance), [2002]*

What if an employee has an adverse reaction to vaccine?

- When an employee contracts Covid-19 at work, they are entitled to compensation¹
- If an employee has an adverse reaction to vaccine, they are entitled to compensation under WCB when the immunization is a mandatory condition of employment²
- Federal Government created Vaccine Injury Support Program (VISP) compensation for adverse, serious effects from the vaccine³



Human Rights & Vaccination Policies

- Employers must comply with the Alberta Human Rights Act
- AHRA prohibits discrimination against any person on the grounds of:
 - Race
 - **Religious beliefs**
 - Colour, ancestry, place of origin
 - Gender, gender identity, gender expression
 - **Physical disability**
 - **Mental disability**
 - Age
 - Marital status, source of income, family status or sexual orientation

Grounds Not Covered by the Act

- AHRA prohibited grounds cover many situations that involve discriminatory conduct, but **not all**
- Examples of not protected grounds:
 - Political convictions
 - Personal preference or opinion
 - Social status
 - Dexterity
 - Car ownership
 - Educational background
 - IQ/EQ
 - Tattoos

What is discrimination?

Legal test

1. The complainant has a characteristic protected by the legislation
 2. The complainant experienced an adverse impact with respect to their employment
 3. The protected characteristic was a factor in the adverse impact
- Intention and motives are irrelevant



Understanding the AHRA

- Employers are required to maintain workplaces **free** from discrimination and harassment
- Exists for the entire life of the employment relationship
- Employers have a duty to **accommodate** employees when there is discrimination
- If an employer makes a decision, adversely affecting an employee, and the decision is based in part on a prohibited ground, means it has infringed the AHRA
 - Unless one of **the exceptions applies**



Accommodation

- **Accommodation:** refers to making changes that allow a person or group protected by the AHRA to participate in the workplace
- Employers have a legal duty to take **reasonable** steps to accommodate an employee's individual needs
- Accommodation that is reasonable in one case may not be reasonable in another
- Must accommodate a person up to “**undue hardship**”
- Employers must accommodate unless there is a ***bona fide*** justification for not being able to do so



Accommodation up to “Undue Hardship”

- “Undue hardship” means the accommodation would create onerous conditions for employer
- What is “undue hardship” will depend on the circumstances
- Factors that help determine if the accommodation will create “undue hardship” :
 - Cost
 - Size and resources of the employer
 - Operational disruptions
 - Morale problems
 - Substantial interference with the rights of other individuals or groups
 - Interchangeability of work force and facilities
 - Health and safety concerns



Accommodation & Bona Fide Occupational Requirement

BFOR: reasonably necessary job qualification or requirement imposed because it is necessary for job performance

*British Columbia v BCGSEU (Meiorin)*¹

- To be regarded as a BFOR (a standard that is necessary in spite of being discriminatory), the workplace policy, practice, or requirement must:
 - be adopted for a purpose rationally connected to the job,
 - be adopted in an honest belief that it was necessary to satisfy a legitimate business purpose, and
 - be reasonably necessary to accomplish that purpose—and it must be **impossible** to accommodate the individual without creating undue hardship.



Examples of BFOR

- Requirement for drivers that can see (discrimination against blind people)
- Flight attendants that are of certain height (discrimination against shorter people)
- Not being in the later stages of pregnancy for a physically demanding job
- Liquor store employees must be at least 18 years of age to sell liquor



Accommodation & Vaccination Policies

- Employers must accommodate an employee that cannot be vaccinated¹
 - Disability
 - Religious belief
- An employer can request medical information to confirm employee has a disability that prevents them from being vaccinated
- Accommodation based on religious belief must be supported by a sincerely held belief that is connected to a person's faith



Religious Belief & Accommodation

- religious belief triggers workplace accommodation
- does not equate to an automatic exemption
- The Supreme Court of Canada stated that the
 - “freedom of religion ensures that every individual must be free to hold and to manifest without State interference those beliefs and opinions dictated by one's conscience. This freedom **is not unlimited**, however, and is restricted by the right of others to hold and to manifest beliefs and opinions of their own, and to be free from injury from the exercise of the freedom of religion of others. **Freedom of religion is subject to such limitations as are necessary to protect public safety, order, health or morals and the fundamental rights and freedoms of others.**”¹



Case Law Example

Rishi Sharma v City of Toronto, 2020 HRT0 949¹

- Sharma alleges that the City discriminated against him with respect to services because of his creed (religion) and disability, contrary to the Human Rights Code with respect to provision of services

Mr.Sharma stated:

“My creed disagrees with covering my face for unsubstantiated claims...My creed requires that I do not blindly accept what government or agencies claim, mandate or enact into laws (or by-laws).”

“My bodily functions are impaired by face coverings, as it impedes my breathing. I do not know whether not being able to wear a mask qualifies as a disability, but what I do know is that I cannot wear a mask due to bodily/biological/medical conditions”

- “often engages an applicant’s sincerely held religious beliefs or practices. ...made up of a recognisable cohesive belief system or structure...However, mere political opinion does not engage creed.”²
- an applicant has the onus of proving that they have a disability



Alberta Human Rights Act & Definitions

Section 44:

(h) “mental disability” means any mental disorder, developmental disorder or learning disorder, regardless of the cause or duration of the disorder;

(l) “physical disability” means any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes epilepsy, paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, and physical reliance on a guide dog, service dog, wheelchair or other remedial appliance or device;

(m) “religious beliefs” includes native spirituality

Summary of Employer Obligations

- Assess the grounds for request for accommodation
- Carefully review information provided and seek additional information if necessary
- Accommodate employees up to undue hardship
- Work with employee to find accommodation option



Summary of Employee Obligations

- Provide information in support of accommodation request
- Provide information in support of accommodation modalities
- Facilitate the implementation of a reasonable accommodation plan
- No obligation to provide a specific solution
- Employer may refuse accommodation request if no sufficient cooperation



Privacy & Vaccination Policies

- 3 laws exist to protect privacy and provide access to information rights in Alberta
- ***Personal Information Protection Act* applies to private sector organizations**
- *The Freedom of Information and Protection of Privacy Act* applies to public sector bodies
- *The Health Information Act* regulates the collection, use and disclosure of health information and applies to health “custodians”, such as Alberta Health Services, Alberta Health, doctors, nurses, and others

Can employers ask for my vaccination status under the policy?

- Rules for the collection, use and disclosure of personal information
- PIPA aims to protect the privacy of clients, employees and volunteers
- Requires businesses and organizations to have reasonable safeguards to protect that information
- Section 15 of PIPA expressly gives permission to employers to collect and use employees' personal information where it is necessary manage the employment relationship

Can employers ask for my vaccination status under the policy?

- Vaccination records and related details are personal health information
- Employer must give the employee reasonable notice that their personal employee information is going to be collected, and the purposes for which the information is going to be collected
- Employers should collect only the minimum amount of information necessary for implementing the policy and ensuring the health and safety of individuals in the workplace is collected

Can the employer terminate my employment if I don't comply with the policy?

- Yes, but with reasonable notice or pay in-lieu
- Yes, but only if “for cause” is proven
- Context specific:
 - Can the employee work remotely?
 - Is compliance fundamental to the employment relationship?
 - Lying about vaccination status is likely grounds for cause dismissal
- Constructive dismissal?

Summary:

Policies requiring vaccinations must:

- be reasonable
- include accommodation
- be clearly communicated to all employees
- be applied consistently
- comply with OH&S, AHRA, and PIPA

Questions?