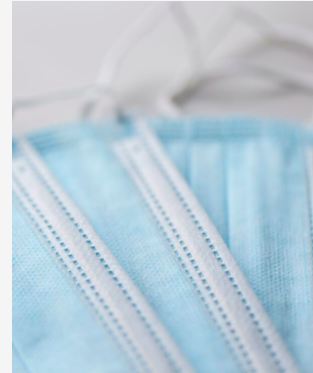


The second year of COVID-19: A rapidly changing health landscape

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Over the course of 2021, workplaces across all industries and sectors faced ongoing challenges when implementing and adapting their policies and procedures in response to the COVID-19 pandemic. In particular, boards of directors (Boards) were required to discharge their fiduciary duties and duties of care in an environment with dramatically fluctuating standards of care as industry standards, government restrictions and scientific knowledge changed at a rapid pace.

Boards and management teams have been subject to intense scrutiny as they make decisions relating to the timing of return to the workplace and the conditions under which employees will be expected to operate. These decisions have potentially significant impacts on the health and safety of workers and, in some cases, the ability of employers to continue operations or continue employing some of their workforce. In making decisions regarding their organization's response to COVID-19, Boards are required to satisfy certain common law, contractual and statutory obligations (including under occupational health and safety legislation in relation to hospitals and other high risk settings, as we outlined in our post, [Ontario COVID-19 vaccination policy update for high risk settings: Key considerations for hospitals and healthcare organizations](#)).

When considering what is reasonable in the circumstances, Boards should take into account many factors, including the relative risks of implementing mandatory vaccination policies and other response measures, the impact of their decision on key stakeholders, the then-current COVID-19 circumstances and the measures and policies adopted by other employers and organizations in similar industries.

The third and fourth waves of COVID-19 experienced in 2021 brought with them a variety of new legal issues, some of which we describe below.

The mayhem of the COVID-19 vaccine rollout in Canada

In addition to authorizing new drugs and medical devices for COVID-19, the federal government has been responsible for procuring vaccines for Canadians which it then distributes to the provincial and territorial governments, who have primary responsibility for healthcare matters, to make available to their residents. Much like the responses of the provincial and territorial governments in early matters relating to COVID-19, the strategies

implemented by the public health authorities across Canada in connection with vaccine distribution were varied and lacked cohesion.

Canada's access to vaccines lagged behind other countries' due to a lack of local manufacturing. Early in 2021, many international employers with Canadian operations attempted to proactively implement vaccine policies in their Canadian workplaces at a time when U.S. residents were able to easily access vaccines and their Canadian counterparts were months away from being considered eligible. This created an interesting predicament for employers with cross-border operations. Encouraging, incentivizing or requiring vaccination was impractical at a time when Canadian employees were unable to access the vaccine and Canadian public health authorities had not yet issued guidance regarding whether any of the public health measures, such as masking and social distancing, could be relaxed for those who had been vaccinated.

Interesting legal issues also arose when certain employers and organizations implemented programs to offer vaccines directly to their employees on behalf of public health authorities or otherwise voluntarily offered to assist other organizations experiencing COVID-19 outbreaks. As the private sector participants assumed the cost and responsibility for matters falling squarely within the purview of the public health authorities in an effort to help, issues related to the allocation of the corresponding liability arising from providing such assistance presented unique challenges. By way of example, pursuant to the *Health Protection and Promotion Act* (Ontario) (the HPPA), persons working under the direction of a medical officer of health or pursuant to a directive or direction under the HPPA have statutory protection from liability so long as they are acting in good faith. As a result, parties responding to and assisting with potential problems proactively in a benevolent manner were exposed to potential legal liability they would not have encountered if they had waited until they were legally compelled to take action pursuant to a directive under the HPPA.

As vaccines became more readily available, vaccination regrettably morphed into a political issue, as well as a public health issue, with passionate views emerging on both sides. Mandatory vaccination policies in the workplace and public spaces were widely debated. Once again, public health authorities implemented fragmented orders, directives and legislation on the issue across Canada.

For example, in August 2021, British Columbia's Public Health Officer announced a public health order requiring mandatory vaccination for certain healthcare workers and the federal government announced mandatory vaccination for certain federal employees. On August 17, 2021, the Chief Medical Officer of Health in Ontario issued a directive requiring the implementation of a mandatory vaccination policy in healthcare settings. Under these policies, workers are required to be vaccinated or undergo regular testing if a specified medical exemption was not available. Further detail is included in our Osler Update, [Ontario COVID-19 vaccination policy update for high risk settings: Key considerations for hospitals and healthcare organizations](#). The Boards of many public hospitals in Ontario approved vaccination policies that went beyond the government directive, requiring mandatory vaccination for all workers (without permitting the alternative option to undergo testing) with limited scope for human rights exemptions.

These announcements followed Alberta's decision to lift most public health restrictions and Saskatchewan's decision to lift all public health restrictions in July 2021, creating a disjointed federal landscape for employers attempting to implement nationwide policies.

When viewed in the context of the ongoing worldwide pandemic, states of emergency, ongoing public health orders and legislation and directives requiring that vaccination policies be adopted, the pre-pandemic common law addressing vaccination policies for influenza provided very little in the way of relevant guidance. By September 2021, we witnessed

mandatory vaccination policies being implemented more frequently in a variety of workplaces, including non-essential ones. As these policies came into force, a variety of court challenges to vaccination policies quickly followed, discussed in more detail in our Osler Update, [Ontario Superior Court of Justice dissolves injunction to stay terminations under hospital's mandatory vaccination policy](#).

Additional information regarding employment considerations are included in our article, [Back to the office? New workplace norms expected to evolve in coming years](#).

Further evolution of COVID-19 testing in the workplace

In 2021, the COVID-19 testing and screening landscape also evolved from simple symptom-checking to on-site workplace testing and screening for certain employers. Provincial governments made asymptomatic antigen screening testing programs available to some employers, with testing devices being paid for by government. Many provincial public health authorities provided detailed guidance regarding how antigen screening should be conducted.

Some employers wanted to implement other types of asymptomatic screening or testing in the workplace, such as self-testing devices recently authorized by Health Canada or PCR tests (considered the gold standard in COVID-19 testing). These employers had the challenge of navigating the legal, health, employment and privacy issues with limited (and in some cases no) guidance from public health authorities. Many employers engaged third-party providers to assist them to avoid having to consider complex matters relating to the implementation of testing programs. Such matters include collecting specimens, handling personal information, engaging laboratory services, communicating a diagnosis, reporting test results to public health authorities (where applicable) and disposing of hazardous waste.

Vaccine passports and privacy matters

Throughout 2021, the term “vaccine passport” also became politically charged as each provincial government adopted their own approach to the issue. For example, vaccine passports were initially rejected by the Ontario government. They were subsequently introduced through a QR code after the government imposed restrictions requiring that patrons attending restaurants for indoor dining or gyms had to be fully vaccinated or hold a medical exemption. Every province or territory has now implemented a process to obtain a Canadian COVID-19 proof of vaccination.

Privacy issues remain relevant to employers, since COVID-19 response measures generally involve collecting or using personal information from employees that is deemed to be sensitive in nature and that should be protected by appropriate safeguards. Regardless of whether an employer is subject to privacy legislation in Canada, they will want to take care in collecting and storing employees' personal information, including their vaccination status and any related information. Those employers that are subject to private sector privacy legislation in Canada will also need to consider compliance with the limitation on collection and use principles, and what personal information is strictly necessary to collect and to store, all for the purposes of ensuring a safe workplace.

Conclusion

Boards of organizations who have not yet had employees return to work and organizations who are already operating under existing COVID-19 policies, including with respect to

vaccination, should continue to be vigilant in monitoring the constantly evolving circumstances relating to COVID-19. In formulating a decision with respect to appropriate COVID-19 return to work policies, including vaccination policies, Boards should exercise their judgment on an informed and independent basis, after reasonable investigation and analysis of the situation and with a reasonable basis for believing that their actions are in the best interests of the organization.

It will be important that Boards follow an appropriate decision-making process and appropriately document the discharge of their duties, given the risks that decisions made could be challenged in the courts, particularly if they relate to vaccination status. These decisions should not be treated as final and should be continually reassessed on an ongoing basis.