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# WELCOME TO TODAY'S HR/EMPLOYMENT WEBINAR

APRIL 15, 2021

This program has been approved for continuing professional development (CPD) hours under Section A of the Continuing Professional Development (CPD) Log of Human Resources Professionals Association (HRPA).

This program has been approved and qualifies for 1 hour and 30 minutes of substantive CPD hours with the Law Society of Ontario.

## TOPICS

- I. Mandatory COVID-19 Vaccination Policies in the Workplace - Tips and Considerations for Employers
- II. Are the CERB and other COVID-19 Benefits Received by an Employee Repayable upon Settlement of a Wrongful Dismissal Claim?
- III. Impact of COVID-19 on Determining an Employee's Common Law Reasonable Notice Period

9:00 a.m.	Opening Remarks
9:05 a.m.	I. Mandatory Vaccination Policies
9:25 a.m.	II. Are the CERB and other COVID-19 Benefits Received by an Employee Repayable upon Settlement of a Wrongful Dismissal Claim?
9:45 a.m.	III. Impact of COVID-19 on Determining an Employee's Common Law Reasonable Notice Period
10:05 a.m.	Break
10:15 a.m.	Q&A Period
10:30 a.m.	Concluding Remarks

# I. Mandatory COVID-19 Vaccination Policies in the Workplace

## Tips and Considerations for Employers

# I. Mandatory COVID-19 Vaccination Policies - Outline

1. Where Vaccines are Already Mandatory
2. Enforceability of Mandatory Vaccination Policies in the Workplace
3. Future Enforceability
4. Specific Considerations for Unionized Workplaces
5. Content of Mandatory Vaccination Policy
6. Practical Considerations

# 1. Where Vaccines are Already Mandatory

- Schools in Ontario and New Brunswick:

Children and adolescents attending primary or secondary school in Ontario and New Brunswick must have proof of immunization against the following designated diseases:

- Diphtheria
- Tetanus
- Polio
- Measles
- Mumps
- Rubella
- Meningococcal Disease
- Pertussis (whooping cough)
- Varicella (chickenpox) – for children born in 2010 or later

- Maximum penalty for failure to complete program of immunization is \$1,000  
(*Immunization of School Pupils Act*)





## 1. Where Vaccines are Already Mandatory

- In both provinces, exceptions from the vaccination requirement are made for ideological reasons:

S. 3(1) Duty of Parent of the Ontario *Immunization of School Pupils Act* “does not apply to a parent who has completed an immunization education session with a medical officer of health or with a medical officer of health’s delegate that complies with the prescribed requirements, if any, and who has filed a statement of conscience or religious belief with the proper medical officer of health” (s. 3(3))

- There is also an exemption for medical reasons, s. 3(2), requiring a statement of medical exemption from a physician or registered nurse

# 1. Where Vaccines are Already Mandatory

- Policy case for mandatory vaccination (Martin Regg Cohn – Political Columnist)
  - “Many people are dying to get vaccinated, while others would sooner die than be vaccinated.”
  - Roughly 1/3 of staff in two major Toronto hospitals (University Health Network and Sunnybrook Hospital) is not vaccinated, despite being offered priority access to the vaccine
  - Smoke-free environments just as desirable as COVID-19-free environments
  - Canadian government may prohibit entry of foreigners into the country without proof of vaccination – same standards for Canadian residents
  - Why should it be permitted for an unvaccinated person to entering a senior’s home or an old age home?
  - If we accept mandatory immunization for students, why not mandatory vaccination for general population?

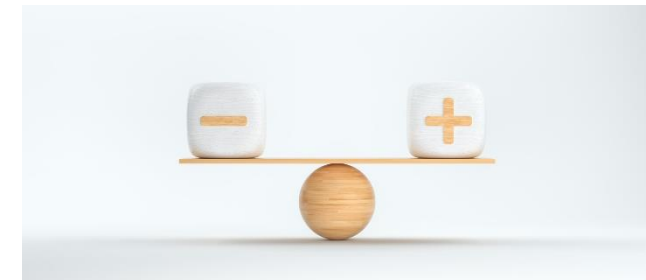
## 2. Enforceability of Mandatory Vaccination Policies

- No case law available as guidance for enforceability of mandatory vaccination policies at the workplace
- Balance of two competing interests:

Employer's obligation to provide safe workplace

vs.

Employee's refusal to get vaccinated, due to *Human Rights Code* ground, medical reason, or personal preference



## 2. Enforceability of Mandatory Vaccination Policies

- Employees cannot physically be forced to get the vaccine
- It may be possible to refuse hiring unvaccinated job seekers
- It may be possible to introduce certain requirements for employees who refuse to get vaccinated
  - working from home,
  - strict social distancing requirements,
  - mandatory masks
  - termination  
(proceed with caution and after obtaining legal advice!)
- Enforceability of employer's mandatory vaccination policy will depend on the nature of the workplace (ex. office setting with separate offices, factory, hospital, restaurant, call centre where employee can make and answer calls from home)



## 2. Enforceability of Mandatory Vaccination Policies

- A balancing exercise:
  - Risk level of workplace – will employees be exposed to COVID-19 patients or to high risk individuals?
  - Can employee be accommodated while maintaining a safe workplace?
  - Is the employee's objection for refusing to get vaccinated covered by a protected ground under the *Human Rights Code*?
    - Required exemption for medical reasons
    - Sincerely held religious beliefs
  - Personal belief or general concern about the vaccine? (“vaccine hesitancy”)
  - How effective is the vaccine in preventing the spread and symptoms of the virus? (new/changing data could shift the balance between workplace safety and employee's preference not to get vaccinated – ex. blood clots caused by AstraZeneca vaccine)

## 2. Enforceability of Mandatory Vaccination Policies

“Requiring proof of vaccination to ensure fitness to safely perform work, or protect people receiving services or living in congregate housing, may be permissible under the Code if the requirement is made in good faith and is reasonably necessary for reasons related to safety.”

Ontario Human Rights Commission (Ena Chadha, Chief Commissioner) – March 2021



### 3. Future Enforceability

- Information available about COVID-19 and vaccines is evolving rapidly
- Balance between workplace safety and an employee's preference not to get vaccinated can change quickly
  - It may turn out that the vaccines
    - are not as effective as previously thought at preventing infection, serious COVID-19 which requires hospitalization and/or death
    - have significant side effects (ex. blood clotting – AstraZeneca – not discovered during trials)
    - should not be administered on a certain age group
- Each of these would strengthen an employee's position that they should be permitted to refuse a vaccine
- If the reverse is true, it would strengthen the employer's position

## 4. Specific Considerations for Unionized Workplaces

- In the unionized context, it will likely be more difficult to implement and enforce a mandatory vaccination policy at the workplace
- Union may agree – but probably not in most cases
- If not, employer may be able to implement policy under the “Management Rights” clause contained in most Collective Agreements, which permits employers to introduce policies, among other things
- A rule or policy introduced by the employer without the union’s consent, which could result in discipline if not followed, must meet the following criteria:



## 4. Specific Considerations for Unionized Workplaces

- Consistent with collective agreement (i.e. is it a reasonable exercise of management rights?)
- Reasonable
- Clear and Unequivocal
- Brought to the attention of employees before employer attempts to act on it
- Where the rule is relied upon to justify termination, the employee was advised that a breach could result in termination
- The employer has enforced the rule consistently since its introduction



(see *Re Lumber & Sawmill Workers' Union, Local 2537, and KVP Co.* (1965), 16 L.A.C. 73 as cited in *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34 (CanLII), [2013] 2 SCR 458)

## 4. Specific Considerations for Unionized Workplaces

- Management retains the right to make and implement decisions, policies, and conditions, so long as this right is exercised reasonably and in a manner consistent with the collective agreement.

“Determining reasonableness requires labour arbitrators to apply their labour relations expertise, consider all of the surrounding circumstances, and determine whether the employer's policy strikes a reasonable balance. Assessing the reasonableness of an employer's policy can include assessing such things as the nature of the employer's interests, any less intrusive means available to address the employer's concerns, and the policy's impact on employees.”

*Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34 (CanLII), [2013] 2 S.C.R. 458

## 5. Content of Mandatory Vaccination Policy

- exemption comparable to those of the *Immunization of School Pupils Act* to accommodate for the *Human Rights Code* concerns
  - Medical reasons (i.e. disabilities rendering side effects more likely)
  - Religious belief
  - Conscience
- Employees to advise once vaccinated, so employer can stay up-to-date on current COVID-19 risk in workplace
- Employees to advise if they do not intend to get vaccinated; explain why; management/HR to discuss with employee
- Employer to comply with *Human Rights Code* and accommodate up to the point of undue hardship

## 6. Practical Considerations

- Most people do not like being required to take certain action– in particular a medical decision – mandatory vaccination policy could result in more opposition from employees who are undecided
- Ultimate goal of employer is to have as many employees vaccinated as possible – achieve workplace “herd immunity”
- More employees may be willing to get vaccinated if they are simply encouraged, rather than forced to do so
- Employer as educator – have information about benefits of vaccines readily available – post on Intranet – send to employees to address vaccine hesitancy
- if encouragement does not succeed, then introduce a mandatory policy?

## 6. Practical Considerations

- COVID-19 vaccination/booster shot clinics at workplace
- Many workplaces organize an annual flu shot clinic to encourage vaccination



## II. Are the CERB and other COVID-19 Benefits Received by an Employee Repayable upon Settlement of a Wrongful Dismissal Claim?

## II. CERB Repayment upon Settlement - Outline

1. Background
2. *Iriotakis v. Peninsula Employment Services Limited*, 2021
3. *Shana Marie Gray v Safecross First Aid Ltd.*, 2021
4. When is CERB repayable?

## 1. Background

- Employees laid off due to COVID-19 may have received Canada Emergency Response Benefit (CERB), Canada Recovery Benefit (CRB) or other COVID-19 related benefits from the Government of Canada
- Does this reduce employer's severance liability to employee?
- Is CERB comparable to income earned from another employer (i.e. mitigation income), or to Employment Insurance (which is typically repayable upon settlement of a wrongful dismissal claim when funds are payable as wages or as a retiring allowance)?
- Mitigation income earned by an employee would reduce an employer's liability
- EI would be repayable by the employee once he or she receives severance payment allocated as severance (wages or retiring allowance) from the employer, but does not reduce common law entitlements of employee



## *2. Iriotakis v. Peninsula Employment Services Limited, 2021*

### FACTS:

- Mr. Iriotakis was terminated from his employment without cause on March 25, 2020. He was then 56 years old.
- His position was in sales and involved working largely from home or on the road selling the various human resources and health and safety compliance services offered by Peninsula to clients.
- Majority of Mr. Iriotakis' compensation was commission-based. He received a base salary of \$60,000 per year. His compensation for the last full year of his employment (2019) was \$145,186.30, including commissions.
- Mr. Iriotakis secured alternative employment starting October 19, 2020, just under seven months following the termination of his employment.

## *2. Iriotakis v. Peninsula Employment Services Limited, 2021*

### ISSUE:

- Do the CERB payments received by Mr. Iriotakis during the notice period impact the severance package owed to him by the employer?

→ NO

## *2. Iriotakis v. Peninsula Employment Services Limited, 2021*

### Differences between EI and CERB

EI	CERB
EI is governed by elaborate statutory regime	CERB was an <i>ad hoc</i> programme
Employer and employee pay into the program	neither employer nor employee can be said to have paid into the program
Entitlement can be considered to be earned by this contribution of the employee	Employee has not “earned” an entitlement over time beyond their general status as taxpayers of Canada

### Case-specific Consideration

The level of benefit paid (\$500.00/week, about \$2,000/month) was considerably below the employee’s base salary – and total annual earnings.

## *2. Iriotakis v. Peninsula Employment Services Limited, 2021*

- “On balance *and on these facts*, I am of the view that it would not be equitable to reduce Mr. Iriotakis’ entitlements to damages.” (Emphasis in original)

### CONCLUSION:

- CERB and EI are treated differently; suggests CERB is not repayable upon severance settlement, unlike EI, which is repayable
- different outcome if employee’s income is lower, and closer to amount of CERB payment received?

### 3. *Shana Marie Gray v Safecross First Aid Ltd., 2021 (OLRB)*

- Another case about whether CERB affects severance entitlement
- Ms. Gray began working at Safecross on October 15, 2019 as a Customer Service & Office Support Associate. She was hired on a twelve-month contract.
- She was terminated in August 2020 for business reasons.
- employee earned \$711.54 per week in wages (\$37,000 per annum)
- Board determined that the employer was not entitled to credit for the \$500 weekly CERB benefit. The Ontario Labour Relations Board considered the *Iriotakis* decision.

### *3. Shana Marie Gray v Safecross First Aid Ltd., 2021*

“The way to ensure that she is made whole is to require the Employer to pay the entire amount owing. There will be no “double award” as suggested by the Employer as Ms. Gray may be required to repay any amounts determined to be in excess by the CRA. Ms. Gray should not have to bear the risk of not being whole as a result of the Employer’s reprisal. Accordingly, the Employer’s payment is to be made without offset or deduction for CERB payments received.” (para. 5)



### *3. Shana Marie Gray v Safecross First Aid Ltd., 2021*

#### CONCLUSION:

- CERB not deductible from severance owed to employee
- CERB may be repayable to CRA in the future – unfair for employee's severance to be reduced by the amount of CERB received – if ultimately repayable, then employee would be left with a lesser entitlement



## 4. When is CERB Repayable?

- CERB may be repayable if you “return to work earlier than expected, including being paid retroactively” - Government of Canada  
(<https://www.canada.ca/en/services/benefits/ei/cerb-application/return-or-repay.html>)
- Being paid retroactively is not equivalent to receiving a severance package
- Being paid retroactively = “backpay” (ex. employee’s wages temporarily reduced during the pandemic; employer pays the difference back to the employee at a later date)
- CERB may be repayable if you “earned more income than expected during the time you received the CERB payment”  
(<https://www.canada.ca/en/revenue-agency/services/benefits/apply-for-cerb-with-cra/return-payment.html>)



## 4. When is CERB Repayable?

- CERB is taxable but government did not withhold on CERB payments
- CERB Frequently Asked Questions:

**Q:** Does being in receipt of severance impact a person's eligibility for the Canada Emergency Response Benefit?

**A:** A severance payment does not impact an individual's eligibility for the Canada Emergency Response Benefit.

(<https://www.canada.ca/en/services/benefits/ei/cerb-application/questions.html#eligibility>)

- Suggests CERB not repayable upon receipt of severance

## 4. When is CERB Repayable?

- Repayment of EI – temporary new rules?
- Transition to Employment Insurance – Questions and Answers
  - Q: Do any monies I received as separation when I was laid off affect the payment of EI benefits?
  - A: No. As a temporary measure most separation monies received when you are laid off will not affect the payment of your EI benefits for the claims established on or after September 27, 2020 for one year.

<https://www.canada.ca/en/services/benefits/ei/cerb-application/transition/ei-questions.html>

## III. Impact of COVID-19 on Determining an Employee's Common Law Reasonable Notice Period

### 3. Impact on Reasonable Notice Period - Outline

1. Background: Caselaw which addresses the Impact of the Employer's Financial Situation of the Notice Period
2. *Iriotakis v. Peninsula Employment Services Limited*, 2021
3. *Yee v Hudson's Bay Company*, 2021
4. Conclusion

## 1. Impact of Employer's Financial Situation

- In *Michela v. St. Thomas of Villanova Catholic School*, 2015 (Court of Appeal), 3 teachers were dismissed by their employer.
- The Ontario Court of Appeal held that the dire financial situation of the School did not justify a reduction of the notice period: “[an employer’s financial circumstances] justify neither a reduction in the notice period in bad times nor an increase when times are good.” (para. 17)
- Does the same principle apply during financial hardship caused by a pandemic?

## *2. Iriotakis v. Peninsula Employment Services Limited, 2021*

“I was asked to make findings about the job market and the possible impact of Covid-19 on Mr. Iriotakis. I have little doubt that the pandemic has had some influence upon Mr. Iriotakis’ job search and would have been reasonably expected to do so at the time his employment was terminated in late March 2020. (the termination was without cause on March 25, 2020)

However, it must also be borne in mind that the impact of the pandemic on the economy in general and on the job market, in particular, was highly speculative and uncertain both as to degree and to duration at the time Mr. Iriotakis’ employment was terminated. [...]

I must be alert to the dangers of applying hindsight to the measuring of reasonable notice at the time when the decision was made to part ways with the plaintiff.” (para 19)

## *2. Iriotakis v. Peninsula Employment Services Limited, 2021*

- Reasonable notice is assessed at the time the decision to terminate is made; not a guaranteed bridge to alternative employment
- At the time of the termination, the extent and length of the lockdowns and impact on businesses/the economy was not fully known
- If the termination had occurred later in 2020, perhaps a longer notice period because there would have been a better sense of the impact of COVID-19 on the availability of similar work



### 3. *Yee v Hudson's Bay Company, 2021*

- Employee was terminated on August 28, 2019; 11.65 years of service; 62 years old; Director, Product Design and Development, Private Brands
- 16 months of common law notice awarded
- The Court concluded:

“It seems clear terminations which occurred before the COVID pandemic and its effect on employment opportunities should not attract the same consideration as termination after the beginning of the COVID pandemic and its negative effect on finding comparable employment.” (para. 22)



## 4. Conclusion

- Time of termination (ex. during pandemic) relevant to reasonable notice period and assessing duty to mitigate
- Acknowledgement that the pandemic will likely make it more difficult to find a new job – longer reasonable notice periods?
- Employee still needs to make reasonable efforts to mitigate; can't just blame inability to find new job on pandemic with minimal or no mitigation efforts

Thank you.

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