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MEMO

Date: **September 2, 2021**

To: **OMIA**

From: **Rob Bickle**

Re: **Overview of Issues Relating to Reopening, Return to Work and Covid Safety Protocols**

This memo is to address a number of the frequent issues that arise as a result of Covid-19 as businesses look to move forward with reopening (or partial reopening). The focus of this memo is on issues particularly relevant to the Mutual Insurers in Ontario.

There remains a lot of uncertainty in this area given a reluctance for government authorities or public health to implement direction for private workplaces other than in long-term care settings or for frontline workers (who are largely unionized). The federal and provincial governments have passed legislation to apply to their governmental workplaces, but have not provided new legislation to deal with office spaces where Ontario Mutuals perform most of their work.

The issue is further complicated because of three main competing obligations relating to obligations for employers to maintain a safe workplace under the *Occupational Health and Safety Act*, and the intersection of Human Rights Considerations (and a duty to accommodate) balanced against privacy protection of employees in the workplace.

It is important that each mutual keep abreast of the changes or directions which may come from the provincial government or local public health units relating to practices and obligations of employers. The following is intended to be an overview of the most relevant issues, and it is important to remember that the situation is fluid, and may be impacted by changing legislation, public health mandates, or new requirements. The information is general in nature, as local Public Health units may have different requirements or recommendations that will need to be followed

Review of Current Obligations

Ontario still remains in stage 3 of the *Reopening Ontario Act*. As such, employers are still required to provide the following:

- 1) Screening for employees attending the workplace, and for visitors or clients that attend the office space. This includes having employees and visitors confirm they are not symptomatic of Covid-19 and asking questions including whether there has been travel, any exposure to covid, and other questions that serve to identify potential covid risks.
- 2) There remains masking requirements at the workplace. All public units and municipalities have passed local mask by-laws. Most municipalities have by-laws that require masking (with exceptions for Human Rights accommodation), which have been extended to at least the end of the year.
- 3) There is still an obligation to make sure that steps are taken to have physical barriers, personal protective equipment, masking requirements, and to limit congregation of employees to protect against exposure of Covid-19 in the workplace.
- 4) Employers are to have a Covid Safety Plan outlining rules and protocols relating to the identifying how screening will occur, how risk of transmission is being controlled in the workplace, and what to do in the case of a positive Covid-19 or suspected case or close contact.

IDEL (Infectious Disease Emergency Leave) still remain available to employees. Employees are entitled to 3 paid days (from the employer) if they have no other sick or other personal paid days off, if they are required to isolate, are sent home by the Employer due to Covid symptoms, have tested positive for Covid-19 and need to stay home, or if they require time to get vaccinated or to recover from vaccine after effect.

Unpaid IDEL covers the same need for time off related to Covid, and also includes time off needed to care for family members and children. Such leave is unlimited, though the employer does not have an obligation to pay for the time away. The Unpaid IDEL is akin to a maternity leave in which there is job protection for the time away.

These obligations remain in effect indefinitely. No end date has been provided as the last stage of the *Reopening Ontario Act* provides that certain thresholds in relation to vaccination rate and case numbers must be met.

1) Return to Work Issues

The province has moved from the lock-down phase. Moreover, with Stage 3, the regulation requiring employers to ensure employees work remotely (unless the need for the employees requires them to be onsite) has been removed. This opens the doors to allowing employees to return to work. Employees can work from the office, subject to the masking and physical distancing provisions, and steps taken by the employer to ensure that the workplace is "safe" under the *Occupational Health and Safety Act*.

Although the requirement to have employees work from home where possible has been removed, it is an option for employers to continue to allow for work from home. Alternatively, some employers are moving to a "hybrid" model that will allow employees to work from home and from the office and be flexible in their approach to work location.

Can an employee be compelled to return to work?

Generally, the employer can compel an employee to return to work at the physical workplace so long as the workplace has been made reasonably safe and the covid protocols including masking and screening are being followed. As will be discussed in more detail below, other measures may include rapid testing or possibly vaccination policies that require inoculation.

The location of work is a fundamental term of employment. Generally, most traditional contracts provide that the work will occur at the office or in a place designated by the Employer. As a result of pandemic measures and regulations, employers were required to have employees to work from home where possible to do so. For those employees that regularly worked in the office prior to the pandemic, but were compelled to work from home, there should be no difficulty with their recall. There is no right to continue to work from home, and no legal basis that would prevent a return to work, so long as appropriate safeguards at the workplace are implemented.

If employees were hired during Covid-19 (i.e.. after March 2020) and the location of the work was not specifically addressed at the time of hiring or in a contract, there may be some argument that requiring the employee to work from the office was not part of the original terms. This would be the main instance in which the ability to bring an employee into the workplace could be challenged.

In such circumstance, it may require reasonable notice be given to those newly hired employees if their return to the workplace is to be compelled. Given that these employees would have been hired only in the last year or year and a half, the reasonable notice period would not be significant. The employee would then elect to work from the office, or their employment would be ended.

The only exceptions with respect to compelling a return to work relate to medical exemptions or accommodation under the *Human Rights Code* which most commonly would relate to family care obligations of family members, particularly if schools and day cares were to close.

When hiring new employees, it is important to address where the location of work will take place. It would be prudent to include terms that the work location may be flexible (unless the individual will be hired exclusively for an 'out of office' role).

Implementing Work-from-Home or Hybrid Policies

It would be advisable for employers that are allowing employees to work from home to have a work-from-home (or hybrid policy) that provides guidance on frequent issues. Items that generally should be addressed include the following:

- 1) A clause allowing the employer to require employees to work from the office at their sole discretion or to end the policy by giving short notice.
- 2) Some outline and expectation that the employees will perform regular hours to ensure they are available for meetings, responding to client's request, and available to participate in phone calls or video conferences during regular business hours. It would also be prudent to preserve the right of the employer to bring back employees to the workplace, who are not meeting reasonable expectations working from home.
- 3) A clause setting out that the employee will be responsible for protecting private documents, personal information, and all electronic information of customers and clients to ensure there are adequate privacy safeguards in place. Most commonly, this may require that employees use a computer provided for by the employer, which has suitable programs and privacy protections in place and that such computers are password protected (and not used by other family members).
- 4) Some clauses should be included identifying that the employee would primarily be responsible for costs of working from home or identifying and exceptions which may apply.

A work from home policy can be used for any of those employees that are working exclusively from home (for now) and for those who are in a hybrid model working from home and from the office from time-to-time.

Refusals to Return to Work

There are limited reasons that an employee can legitimately refuse to return to work at the office. Moreover, although employees may have a preference to work from home, it does remain in the purview of most employers to dictate where the work occurs, particularly if the work-from-home arose solely because of Covid-19.

The two most common basis to refuse a return to work will be as follows:

- A) A need for accommodation under the *Human Rights Code*, most likely relating to family care, or child care;

B) A refusal to return to work due to workplace safety.

A) Accommodation Requirements Relating to Return to Work

During the initial lockdowns, the Ontario Government passed legislation requiring employers to allow employees to work from home and to prohibit the suspension or termination of employees unable to work because of childcare obligations with the closure of schools and daycares.

The unpaid IDEL still remains available to parents who remain home to care for children if they are concerned about Covid-19. IDEL may entitle the employee to receive EI benefits and their job is protected (similar to a maternity leave). There is no limit to the amount of unpaid IDEL that may be taken.

Apart from the unpaid leave, there does remain an obligation to accommodate legitimate care needs for family members (which under the *Employment Standards Act* relates to parents, spouses, siblings and children of the employer).

The most common basis for refusing to return to work is because an employee is concerned they live with a vulnerable member (for instance a parent who has health issues) and do not wish to increase the chance of exposure. Or they are required to stay at home to care for their children given the closure of schools (and most daycares).

In the event of a refusal to return to work, or a request for accommodation relating to family care or school care, the analysis shifts to a more traditional accommodation for family status approach. It is also an option if work cannot be accommodated, to suggest that the employee take a leave permitted by the *Employment Standards Act*, which includes family caregiver leave. This would allow the employee to take time away from work (and apply for EI benefits while off).

The employer would also have to consider accommodation if it can be established there is a *bona fide* reason the employee's children cannot attend school and homecare is required. Ordinarily this requires the parent requesting accommodation to show that reasonable efforts have been made in relation to finding alternate care, including daycare providers, babysitters, their spouse, or other family members.

Only after reasonable efforts have been exhausted does the employer generally need to consider alternate work hours, and work-from-home accommodation (unless the employer is prepared to accommodate work-from-home). It is important that each case be considered separately on a case by case basis.

Moreover, the employer does need to go to some length to confirm they engaged with the employee to look for a solution where appropriate, particularly if the employee has shown they have taken steps to find alternate care.

There have been limited cases considering child related care issues due to Covid-19, given that legislation in place prohibited termination or suspension from work (and EI benefits were immediately available to parents who could not work because of school closures). However, usually a choice of a parent to keep a child home from school without a medical need will not engage the need for accommodation, if the parent's choice is merely a preference of the parent, and not a requirement or based on a medical recommendation.

If a school closure was implemented, or daycares were once again closed (or unavailable) or if there is a legitimate concern (usually related to health or compromised immune system) with a child returning to school or childcare, it likely is reasonable that a decision not to have the child attend school would meet the threshold for accommodation.

It should be noted the IDEL is available whether a school/daycare is open or not, if a parent chooses to keep a child home to due infection concerns. The employee can request the unpaid leave at any time, and the leave must be granted.

In contrast, seeking accommodation for family status in the Human Rights context is usually a more difficult request, because the employee may have greater difficulty demonstrating the necessity of the accommodation in the absence of a forced school closure or existing health issue. However, each case must be assessed on its own merits.

B) A Refusal to Return to Work because of an Unsafe Workplace

An employee who feels that a workplace is unsafe does have the right to refuse to return to work. There are few instances where a claim that a workplace is unsafe would likely be supportable, unless negligible steps were taken to implement and enforce required screening, physical distancing, and rules in the workplace to limit exposure to Covid-19.

Ordinarily a refusal to work needs to be communicated to the Ontario Ministry of Labour who will investigate. Overwhelmingly, the Ministry of Labour has not supported a refusal to return to work unless there is a clear and overriding lapse in Covid-19 protocols and no steps taken to make the workplace environment suitable given the criteria from Public Health or the Ministry of Labour.

If a refusal to work because of the work environment is made, the employer should immediately review the concern to determine if there is a legitimate (case specific) workplace safety issue. Having a proper safety plan and confirmation that public health directives are being followed in the workplace would usually address an unsafe work complaint relating to Covid-19.

2) Requesting Information on Vaccination Status, Mandatory Testing or Vaccination

Under the *Occupational Health and Safety Act*, an Employer has the obligation to implement reasonable measures to protect employees.

Apart from mandated daily screening of employees and visitors, and physical distancing, barriers and Personal Protective Equipment, there are some additional steps that could be considered by an employer which would be introduced for the protection of other employees and visitors to the office.

Request for Vaccination Status

Overwhelmingly, legal writers agree that an employer is entitled to obtain confirmation that an employee has been vaccinated, arising out of the employer's obligation to maintain a safe workplace. The obligation on the Employer is to make sure that the gathered information is kept confidential, and only relevant information is maintained. Moreover, it would be prudent to make sure that access is limited to select decision makers or human resource employees, who need the information to make informed decisions about the need for safety protocols.

Subject to protecting private information, an employer can ask whether an employee is fully vaccinated, intends to be vaccinated, or if not vaccinated, why they are not vaccinated (and ascertain if the reason is related to a medical condition, religious belief or other ground protected under the Human Rights Code).

That information can be used in determining what other protocol or measure may be necessary. The most frequently discussed options other than continuing to allow work from home, include either mandatory testing or vaccinations of employees in the workplace.

Mandatory Testing or Vaccinations

The federal government, provincial government, and certain front line organizations have instituted mandatory vaccination policies. In those cases, there has been a demonstrably justifiable basis for implementing the policy with a change to legislation to allow those employers to implement mandatory testing or vaccinations for employees. By and large, those employers are unionized, and the cooperation of the union has been obtained to allow for the mandatory vaccinations.

Recently, the Province of Ontario has amended the regulations under the Reopening Ontario Act to include specifically:

(2.1) The person responsible for a business or organization that is open shall operate the business or organization in compliance with any advice, recommendations and instructions issued by the Office of the Chief Medical Officer of Health, or by a medical officer of health after consultation with the Office of the Chief Medical Officer of Health,

(a) requiring the business or organization to establish, implement and ensure compliance with a COVID-19 vaccination policy; or

(b) setting out the precautions and procedures that the business or organization must include in its COVID-19 vaccination policy.

(2.2) In subsection (2.1),

“medical officer of health” means a medical officer of health as defined in subsection 1 (1) of the Health Protection and Promotion Act

The legislation does not go so far as to require vaccination policies, but it does give the authority for local Public Health Units to recommend or require such policies, which businesses would be required to follow. This may be a precursor to requiring private employers to enact vaccination policies which comply with human rights and privacy requirements.

The Toronto Public Unit has strongly recommended a vaccine policy, and other health units may follow. They could even *require* such policies which would provide a legal basis for the implementation of such policy.

In the absence of a public health unit requirement or recommendation there is risk of a legal claim either arising from constructive dismissal, breach of human rights, or ramifications arising from improper collection or safeguarding of privacy information. Generally, it is advisable to consider less intrusive measures than mandatory vaccination unless it can be shown that mandatory vaccination is necessary given the nature of the workplace and interaction with a large percentage of a vulnerable population. Most office environments for the insurers would not likely meet the test for a *bona fide* occupational requirement that does exist for nurses, long-term care facilities, and workplaces in which there cannot be physical distancing of workspaces. If a position requires regular travel (including requiring travel by plane), meeting with an ‘at risk’ population, or other identifiable risks, there may be a greater likelihood of justifying a mandatory vaccine policy.

However, if a local health unit does recommend or require a policy, an Employer would be required to follow those recommendations, which should eliminate the risk of a claim for constructive dismissal, if an employer follows a properly designed policy that addresses privacy and accommodation.

Vaccination Policies

The major concern with implementing a mandatory vaccination policy has been that the majority of workplaces do not have terms of employment that require an employee to have a vaccine. There is generally no reserved right for the employer to implement change that requires an employee to obtain a vaccination before reattending at the workplace. The basis for such authority would arise from the *Occupational Health and Safety Act* which does require employers to take all reasonable steps to ensure a safe workplace or from the recent amendment that requires employers to follow the recommendations of Public Health Authorities

Given the potential concerns related to health, human rights, and privacy, it is suggested that less intrusive options be considered first or in addition to mandatory vaccination policies unless mandatory vaccine policies are recommended by the local Public Health units.

One option could include incentivising employees obtaining vaccinations, like including prizes or draws or other incentives for vaccinated employees. It is important that a reward program does not discriminate against employees who are unable to get a vaccination because of a medical condition or other relevant exemption under the *Human Rights Code*.

Other alternatives to a mandatory vaccination policy would include the requirement for regular testing (i.e. rapid testing) if proof of vaccination is not provided, or allowing ongoing work-from-home.

It may be that testing is used along with vaccinations as an option for those who are not able to be vaccinated.

Can a Mandatory Vaccination Policy be Implemented?

An employer can implement a mandatory vaccination policy if:

- 1) It is recommended by a local Public Health Unit, Or
- 2) Subject to demonstrating it has a *bona fide* occupational requirement (i.e. - is necessary for the job), that achieves a valid occupational health and safety objective.

In either event, there will need to be sufficient safeguards to ensure accommodation is available for those unable to be vaccinated. There also needs to be appropriate safeguards to maintain the privacy of employee information.

A vaccination policy does need to include exemptions to accommodate human rights code requirements, including relating to disability, religion, or other enumerated grounds protected by the code.

The Ontario Human Rights Commission has noted that anti-vaccination beliefs, do not constitute a "creed" and thus, is not a protected ground. The most common exemption to a mandatory vaccination policy would relate to health or a medical reason that creates an inability to receive a vaccine.

Employers considering mandating Covid-19 vaccination in the workplace should consider:

- 1) Has the Local Public Health unit passed a recommendation relating to a vaccination policy or any specific direction on what a policy should require. If so, a policy should be implemented conforming to the recommendations
Or
- 2) If there has not been a recommendation from Public Health:
 - a) Weigh the level of health and safety risk against other competing interests including employees privacy interests.

- b) Explore if alternatives exist that are less intrusive and beneficial.
- c) Plan for accommodating requests based on employees disability or other Human Rights Grounds.
- d) Some notice period should be implemented to allow employees to comply with the vaccination if it is the preference over testing.

Implementing a mandatory vaccination policy

If a decision is made to implement a mandatory vaccination policy or it becomes required, it is extremely important that the employer only collect necessary information and ensure that personal health information including vaccination status and other information received in the course of implementing the mandatory vaccination policy is protected.

There should be a discreet number of custodians who are able to access information to make necessary decisions and deal with the issues which would include for instance office managers, HR staff and senior directors and manager. These information custodians would need to make sure that they understand the importance of privacy.

Moreover, a vaccination policy does need to include exemptions to accommodate Human Rights Code requirements which include relating to disability, religion, or another protected ground.

A policy that provides a range of options is preferable. For instance, testing may be used in place of vaccination, so that employees who are not fully vaccinated (or who do not wish to disclose) can opt to test for covid regularly. This would help in preventing a constructive dismissal claim (as the employee has a reasonable option to vaccination) while the Employer is still able to secure the workplace to the best of its ability.

The policy should clearly set out the expectations, and consequences of not complying with vaccination (or testing alternative). Lastly, the policy does need to be enforced uniformly across all employees.

Attached to this Memo is a Notice from Toronto Public Health, that includes information about what should be included in a vaccination policy. It would be important to verify if an employer's local health unit has any other specific requirements or directions.

Covid Testing and Rapid Testing

Employees, whether vaccinated or not, experiencing symptoms of Covid-19 should continue to follow public health mandates in relation to when to get tested.

For employees not demonstrating symptoms of Covid -19, Public Health generally recommends that fully vaccinated employees not be regularly tested.

However, employers may consider a testing policy for partially vaccinated or unvaccinated employees. A policy requiring unvaccinated employees to obtain a negative Covid-19 test before attending work on a regular basis (once or twice a week) is a less intrusive measure of curbing the risk of transmission of the virus than mandating a vaccination.

If a testing alternative is preferred, some description of antigen testing and information about where testing can be done should be given. Some regional health authorities are providing rapid antigen tests at no costs to employer (usually provided that the Employer agrees to report number of tests given and the outcomes on an anonymous basis). The tests could be administered in a secluded setting at the workplace, and the results of the test would need to be protected as confidential personal information of the employee. A positive antigen test would require an employee to isolate and obtain a Covid Test from an approved Testing Facility.

Or, non-symptomatic employees can get screened at most Shopper Drug Mart pharmacies, though there is a cost involved. The current cost is \$40/test. One question to be considered will be whether the cost is borne by the employee or the employer requesting the test. There is an argument that if the test is at the request of the Employer, the Employer should bear the cost.

Potential Issues

The major potential issues of implementing a mandatory vaccination policy, or testing policy relates to allegations of invasion of privacy and human rights violations, particularly if information gathered is shared (whether accidentally or deliberately), such that the personal health information of an employee is not kept to the information custodians who require the information.

There are other potential human rights violations, though the risk of human rights violations can be mitigated by ensuring clear exemptions to the policy and allowing for accommodation relating to protected grounds like disability or religion.

There is some potential that an employee who suffers an injury or harm related to the side-effects of a vaccine could claim the employer has some liability. If covered by WSIB, this would be a worker's compensation claim. If not, the employer potentially could have a lawsuit if it is proven that there were negative effects arising from the vaccination that was compelled by the employer. However, liability for an employer not covered by WSIB should be significantly reduced if the policy was implemented because of a recommendation or requirement of public health.

It is difficult to know the extent and degree of liability that may arise given that these issues are largely unprecedented. It would be expected that legal proceedings arising from a constructive dismissal claim or arising out of injuries suffered from vaccinations, would likely be lengthy and complex. However, it is also expected that the vast majority of employees will be vaccinated, such that the risk of a claim in a workplace is low.

The recent amendments to the Reopening Ontario Act suggest that vaccination policies could be recommended by Public Health units. The recommendation would further reduce the possible liability for employers who are simply complying with their statutory obligation to follow recommendations of Public Health.

3) Events and Meetings

So long as Ontario remains in Stage 3 there remain limits on numbers of individuals who may attend gatherings, and restrictions on venues relating to capacity. A Mutual Company planning a meeting or event must be mindful of specific public health restrictions, and venue limitations, which would require screening, and capacity limits and vaccination certificate/proof requirements

Testing and Vaccination Requirements for Meetings and Events

A business will have more leeway requesting testing or implementing vaccination requirements for events, than they would have implementing a policy for employees. Attendance at the event is optional. Whereas the main risk of requiring an employee to vaccinate is that it could be a unilateral change to a fundamental term of employment, attendance at an event is not compulsory or in many cases could be accommodated remotely.

The event holder could insist upon confirmation of vaccine status, and limit attendance only to vaccinated individuals, subject only to Human Rights accommodation.

Moreover, the event holder would also need to take efforts to obtain consent to the collection of the information, and to delete the information after it is no longer required. Safeguards for personal information would need to be implemented.

4) Director's Liability

There are a few areas that could create potential liability claims for Directors:

1) Occupational Health and Safety - Directors of a business are responsible under the *Occupational Health and Safety Act* for exercising reasonable care to ensure a business is complying with the *OHSA* and regulations.

This would include the obligation to make sure that reasonable steps are taken to ensure there is a safe work environment for employees, including having a Covid Safety Plan, requiring screening, physical distancing where possible, masking and generally following the recommendations of public health, including relating to a vaccine policy if recommended by the local Public Health unit.

Following the requirements of the Reopening Ontario Act, and Public Health mandates and recommendations should be sufficient to protect against a claim for Director's Liability.

2) Personal Injury or Workplace Injury – There is some concern that directors could be liable for Covid exposure to employees in the workplace or for implementing mandatory vaccine policies (if they lead to side effects).

Ontario did pass Bill 218 intended to restrict liability of individuals and businesses (including directors) relating to covid exposure and transmission. The legislation would apply to claims by visitors and patrons or clients at the business, and protect against most claims, so long as there is not ‘gross’ negligence or intentional wrongdoing. Gross negligence would generally require not following public health requirements at all.

However, Bill 218 does not apply to employees, as employers must still comply with their obligations to maintain a safe workplace.

Mutuals who have opted to be covered by WSIB will be exempt from most workplace claims, as employees exposed to Covid-19 at the workplace will be treated as a workplace injury. Other than deliberate or intentional acts, most exposures would be in the course of employment and civil claims would be barred.

For Mutuals who are not covered by WSIB, there is a potential concern a claim may be made if an employee contracts Covid-19 at the workplace. However, it is difficult to envision a situation where the employer or individual Directors could be liable if reasonable steps are taken (as required by the OHSA), and policies are enforced. Moreover, disability insurance may mitigate damages for lost wages.

Lastly, if implementing a policy for vaccination is recommended by Public Health, it is difficult to see liability extended for employees who suffer side effects from the vaccine. In that case, the employer is enacting a policy that is statutorily required by the Province.

To assist with protecting against a claim of Director’s Liability a Director or Manager should:

1. Follow objective, Public Health recommendations and occupational health and safety guidance on managing COVID-19 in the workplace.
2. Complete all recommended or required steps of reopening the workplace after the COVID-19 shutdown.
3. Ensure that changes or new requirements and best practices are monitored and updated including public health recommendations or workplace safety regulations.
4. Verify the scope and type of Officers and Directors coverages and make sure the employer has adequate protection in relation to claims by employees.

The standard of care in most cases will require the Director to show that reasonable care was taken. It would be important to ensure that necessary policies are in place **and** being followed. If so, it would be difficult to impose liability on a Director acting reasonably and who is following the recommendations of Public Health.