

Intelligence MEMOS



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To: Canadians Concerned about Vaccine Passports

Date: February 4, 2022

Re: HUMAN RIGHTS LEGISLATION AND VACCINATION MANDATES

Last week, we [examined](#) privacy law considerations about the vaccination requirements that have been variably imposed across the country to combat the COVID-19 pandemic.

This patchwork of requirements and mandates leaves key questions unanswered for the private sector. Today we consider the human rights law implications for businesses that are not covered by these requirements, and the legal limitations on requiring proof of vaccination from patrons and employees. (This memo is derived from our recent [paper](#) on vaccination requirements).

There has been considerable debate as to whether government vaccine passport regimes and workplace vaccination mandates comply with the *Canadian Charter of Rights and Freedoms*.

It is worth clearly distinguishing this debate from private sector vaccination requirements. Provincial human rights codes, which apply to the private sector, are narrower in scope than the Charter, which applies only to governmental action. Whereas the Charter empowers individuals to challenge government interferences with an array of protected interests – e.g., rights to “life, liberty and security of the person,” freedom of peaceful assembly, freedom of mobility – provincial human rights legislation is addressed primarily at preventing or remedying discrimination.

Thus, private sector policies can only be challenged under human rights law by alleging discrimination on the basis of some protected characteristic – such as religion, creed, or disability status.

To begin, there may be concern that private sector vaccination requirements risk discriminating against employees or patrons on the basis of their religion or philosophical convictions. As regards religion, it is worth noting that all major religious denominations have endorsed COVID-19 vaccines. Nevertheless, there may be isolated individuals who proclaim idiosyncratic religious beliefs related to vaccination and allege discrimination when confronted by private sector vaccine requirements.

In interpreting the Charter right to religious freedom, the Supreme Court of Canada has extended protection to idiosyncratic religious beliefs – provided they are sincerely held. By contrast, human rights legislation – in some provinces at least – puts a greater onus on claimants alleging religious discrimination. Under the *Ontario Human Rights Act*, for example, those alleging religious discrimination will be required to show that their refusal of vaccination has some “connection to an organization or community that professes a shared system of belief.” This is sure to be challenging for would-be claimants looking to challenge private sector requirements for vaccination, given the unanimous support for COVID-19 vaccination across major religions.

Provincial human rights legislation also protects against discrimination on the basis of non-religious creed or conscience. However, in recent policy statements, both the Saskatchewan and Ontario human rights commissions have taken the position that people who choose not to be vaccinated based on personal preference do not have the right to accommodation. In part, this reflects the idea that conscience protections are reserved only for comprehensive belief systems that are integral to a person’s identity. Vaccine hesitancy, grounded in views about the efficacy of vaccines or the trustworthiness of government regulators, does not rise to this level.

For these reasons, it is unlikely that private sector vaccination requirements can be challenged under human rights legislation as a form of religious or conscience-based discrimination.

Apart from religious- or conscience-based objections to vaccination, there is a small subset of the population for whom COVID-19 vaccination is medically contraindicated. This may constitute a ‘disability’ under human rights acts, and thus require accommodation by businesses. A further question is whether businesses can require a physician-issued medical exemption as a precondition to making disability accommodations. There is some legal ambiguity here. While provincial human rights commissions traditionally urge employers to accept requests for disability accommodation on good faith, employers may be legally justified in applying increased scrutiny to requests for medical exemptions to vaccination requirements. After all, accommodating an unvaccinated person may entail an increased risk to others in the workspace, in a way that accommodating, say, an individual’s mobility issues does not.

Assuming that a patron or employee can make out a case that vaccination requirements discriminate on the basis of religion or disability, there is then the question of what lengths businesses must go to in order to accommodate.

Under the law, accommodations must be offered up to the point of ‘undue hardship,’ which is context dependent. The hardship of providing exemptions to vaccine requirements may vary depending on the risk profile of employees and clientele, the nature of the workplace environs, the feasibility of work-from-home arrangements, and so on.

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