

**Private and Confidential**

**Sent by E-Mail**

June 30, 2021

Reply to:  
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File No. 38202-68

Lanny McInnes  
President & CEO  
Manitoba Home Builders' Association  
Unit I - 1420 Clarence Avenue Winnipeg, MB, R3T 1T6

**Attention: Lanny McInnes**

Dear Ms. McInnes:

**Re: Rights and Duties of Employers to maintain a Workplace  
Free of Covid-19**

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## **BACKGROUND**

We have been asked for an opinion regarding the obligation of an employer to maintain a workplace free of Covid-19 in the context of the duty of an employer to ensure a safe and healthy workplace, and in addition how to balance that obligation against the right of employees to privacy and the duty of the employer to accommodate disabilities and other prohibited grounds of discrimination. You also have asked that we provide an opinion regarding competing rights and obligations of employers and employees relating to the issue of vaccination and the contents of a vaccination policy. In responding to these issues we will refer to related jurisprudence arising from non-unionized and unionized workplaces.

## **ISSUES**

Specifically, the issues are as follows:

1. Does an employer's duty to maintain a safe and healthy workplace allow it to implement a mandatory workplace vaccination policy and/or mask policy?
2. Can employers require proof of vaccination from either employees or the public and in that context can an employer ask whether an employee or member of the public has been vaccinated?
3. How does the duty of accommodation apply to an employee who refuses to disclose their vaccination status or to be vaccinated or wear a mask?
4. What recourses are available to employers if an employee who refuses to disclose their vaccination status or to be vaccinated or wear a mask cannot be accommodated without undue hardship?
5. Do employees have the right to refuse work if some co-workers are not vaccinated?

## SUMMARY OF CONCLUSIONS

### ISSUE 1 - Does an employer's duty to maintain a safe and healthy workplace allow it to implement a mandatory workplace vaccination policy and/or mask policy?

Yes, provided that the risk of COVID-19 transmission in the workplace and/or the seriousness of the consequence of such transmission is significant, and employees who are unable to be vaccinated due to a prohibited ground of discrimination are accommodated to the point of undue hardship. Information regarding vaccination status must be held closely. There must not be existing policy and Collective Agreement provisions which prohibit the policy.

### ISSUE 2 - Can employers require proof of vaccination from either employees or the public and in that context can an employer ask whether an employee or member of the public has been vaccinated?

Yes, subject to the conditions referenced in number 1 above an employer may ask an employee to disclose their vaccination status. The right to ask a member of the public of their vaccination status is less clear.

### ISSUE 3 - How does the duty of accommodation apply to an employee who refuses to disclose their vaccination status or to be vaccinated or wear a mask?

The duty of accommodation arises once an employee establishes with credible evidence that they have a disability or belong to a group for which a prohibited ground of discrimination exists and which prevents them from disclosing their vaccination status or being vaccinated or wearing a mask. The duty of accommodation extends only to the point of undue hardship and it is not likely that employees will be able to establish that the duty of accommodation applies to a refusal to disclose vaccination status or to wear a mask. In some cases however there will be sufficient reason [e.g. pregnancy] to refuse to be vaccinated.

### ISSUE 4 - What recourses are available to employers if an employee who refuses to disclose their vaccination status or to be vaccinated or wear a mask cannot be accommodated without undue hardship?

Alternatives must be considered if an employee establishes that a duty of accommodation applies to them. A case by case approach is necessary but might include allowing the employee to work at home, or at the workplace in a location that is separate from other employees. Once viable alternatives have been exhausted and the employee is made aware that a continued refusal will end in termination of employment that step can be taken. The best approach would be to do this with a separation package and a release if possible.

### ISSUE 5 - Do employees have the right to refuse work if some co-workers are not vaccinated?

Probably not; however if an employee expresses concern regarding working with unvaccinated coworkers in the vicinity every reasonable effort must be made to find a solution.

## **A STEP BY STEP APPROACH**

### 1. Assess the Risk

This is a two part process. Part one is to consider the extent of the risk of transmission of COVID-19 in the workplace. An example of a high risk workplace would be a food processing plant where large numbers of employees are required to work in close proximity. The greater the risk of transmission the more likely it is that a mandatory vaccination policy would be reasonable. Part two is to consider the consequences of transmission. An example of a high risk workplace would be a long term care facility with elderly and frail residents. However other workplaces may include employees who are particularly at risk. Again the more serious the potential consequence of transmission the more likely it is that a mandatory vaccination policy would be reasonable. Of course actual experience with earlier waves of the pandemic would be important to establish the need for such a policy.

### 2. Consider Alternatives

Less intrusive alternatives must be considered. These include incentivizing employees to disclose their vaccination status and receive both doses of an approved vaccine. Further if employees are unable or unwilling to be vaccinated or wear a mask alternatives such as allowing the employee to work from home or in a location where they are less likely to transmit the virus must be considered. If a vaccination policy is challenged employers will be asked whether they considered alternatives and an answer which involves an insufficiently thorough consideration of alternatives likely will place the vaccination policy in danger of being found unreasonable.

### 3. Consider Existing Policies/Collective Agreement Provisions

If existing policy or the provisions of a Collective Agreement prohibit or restrict the right to introduce a vaccination policy this will be a confounding factor. It is important to consider in advance whether such provisions exist.

### 4. Reduce the Number of Dissenting Employees

Take all steps available to persuade employees voluntarily to disclose their vaccination status and get vaccinated. Incentives may include a draw for a prize that is likely to be attractive universally such as a trip. The lower the number of outliers the easier it will be to problem solve.

## 5. Consider the Reasons for Dissent

Not every excuse requires accommodation. Although an employer always should try to resolve concerns of employees, valid or otherwise, the legal duty to accommodate is established only if an employee can prove disability which relates directly to the issue, be it vaccination or mask wearing. Religious or cultural exemptions are theoretically possible but have not often been successful according to the case law.

## 6. Prepare a Policy with Care

Ensure the policy is clear, comprehensive and easily understood. Ensure employees are informed that the policy at the time of its inception.

## **ANALYSIS**

### *ISSUE 1 - Does an employer's duty to maintain a safe and healthy workplace allow it to implement a mandatory workplace vaccination policy and/or mask policy?*

Employers have a duty under *The Workplace Safety and Health Act*, C.C.S.M. c. W210 and Regulation to ensure the health and safety of their employees.<sup>1</sup> These duties include providing and maintaining a workplace, necessary equipment, systems and tools that are safe and without risks to health, so far as is reasonably practicable. Case law has established that this duty may include making reasonable efforts to limit employees' risk of contracting Covid-19.

### Vaccinations

There is legislation in Canada outlining certain vaccination requirements for specific workers.<sup>2</sup> However, as of the date of this opinion, Manitoba has no such legislation and the province has stated that COVID-19 vaccination will not be mandatory.<sup>3</sup> While Manitoba employers are required by *The Workplace Safety and Health Act* to ensure the safety, health and welfare of employees at work those obligations must be balanced against other competing rights and factors.

### Masks

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<sup>1</sup> *The Workplace Safety and Health Act*, C.C.S.M. c. W210, s. 4.

<sup>2</sup> See, e.g., [O. Reg. 137/15: GENERAL](#), ss. 35, 57; [Food and Drug Regulations \(C.R.C., c. 870\)](#) at [C.04.135](#).

<sup>3</sup> See Global News, December 3, 2020: "*Vaccines won't be mandatory; Manitoba teachers to get priority for rapid COVID-19 testing*", online: <https://globalnews.ca/news/7499240/manitoba-premier-to-provide-update-on-covid-19-rapid-testing/>

Public Health Orders under *The Public Health Act*, C.C.S.M. c. P210 currently require persons to wear a mask in an indoor public place.<sup>4</sup> An indoor public place is defined as "any part of an enclosed place to which members of the public have access, including, but not limited to,

- (a) any part of
  - (i) an office building,
  - (ii) a retail store or other commercial establishment, or
  - (iii) the common areas of a residential building or shopping mall,
- (b) a health care facility,
- (c) a day care centre or nursery,
- (d) an educational institution or facility,
- (e) a restaurant,
- (f) an elevator,
- (g) a licensed premises,
- (h) an enclosed place, other than a private residence, in which a private function is being held,
- (i) a private club to which a member or invited person has access,
- (j) a bus shelter, pedestrian tunnel or enclosed pedestrian walkway, and
- (k) any other place or class of places prescribed by regulation.

Employers should note that there are important exceptions to this Public Health Order, including for children under the age of five years and individuals with medical conditions that prevent them from safely wearing a mask.<sup>5</sup> Requiring proof of a medical condition which prevents mask wearing is a controversial issue currently and Human Rights Commissions in Canada have recommended that businesses not require proof from members of the general public. However, requiring proof from employees likely will be deemed reasonable as the onus is on employees to establish that they have a disability or otherwise are a member of a group for which a prohibited ground of discrimination applies. So long as the use of masks is mandated by the provincial government, it is our view that requiring employees or members of the public to wear a mask will be deemed reasonable (subject to the exceptions provided in the Order).

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Public Health Order effective as of 12:01 a.m. on June 26, 2021, and to remain in effect until 12:01 a.m. on August 2, 2021, unless terminated earlier. Manitoba Government Website:  
<https://www.gov.mb.ca/covid19/restartmb/prs/orders/index.html#orders>

<sup>5</sup> See the Current Public Health Orders on the Manitoba Government Website:  
<https://www.gov.mb.ca/covid19/restartmb/prs/orders/index.html#orders>

## Mandatory Mask or Vaccine Policies

Notwithstanding an employer's duty to maintain a safe workplace, absent government legislation, a mandatory workplace vaccination and/or mask policy outside the healthcare context carries risk and could be subject to legal challenges based on privacy concerns, human rights concerns, potential constructive dismissal claims or wrongful dismissal claims.

The legal precedents available for “vaccinate or mask” policies are for the most part in the context of unionized employers and the rulings from arbitrators have been inconsistent. It is our opinion that a policy providing a choice between vaccination or masking carries less risk than mandatory vaccination on its own, as it minimizes the degree of actual or perceived coercion. Further, it provides an employee with more flexibility concerning a personal health care decision.

Moreover, the more likely the spread of COVID-19 is at a workplace, the more likely a mandatory COVID-19 vaccination or mask policy would be deemed reasonable. Further, the greater the chance of serious consequences if someone at the workplace spreads Covid-19 the more likely that strict employer policies will be upheld. As such, enacting a policy carries more risk if employees are not required to work in close contact with members of the public and/or other employees or if vulnerable persons are not present in the workplace.

We would recommend that any vaccination and/or mask policy address privacy and human rights concerns, and contain a carefully fashioned accommodation process to address employee challenges or concerns on a case-by-case basis. Provided such safeguards exist, we are of the opinion that such a policy would stand up to scrutiny provided the risk of spreading Covid-19 in the particular workplace is significant.

## ISSUE 2 - Can employers require proof of vaccination from either employees or the public and in that context can an employer ask whether an employee or member of the public has been vaccinated?

The Manitoba Human Rights Commission (MHRC) has noted that an employer requiring proof of vaccination to ensure fitness to safely perform work or protect people receiving services may be permissible under the *Code* if the requirement is made in good faith and is reasonably necessary for reasons related to safety. The MHRC also notes that *The Human Rights Code (The Code)* protected characteristics of disability and/or religious belief may need to be considered when employers require proof of vaccination. Additionally, according to the MHRC, organizations should make clear the reasons why proof of vaccination is needed in the circumstances, and ensure prior informed consent.

The MHRC comments that organizations should only request and share medical information, including proof of vaccination, in a way that intrudes as little as possible on a person's privacy, and does not go beyond what is necessary to ensure fitness to safely perform work, or protect people receiving services and comply with the duty to accommodate a specific employee. Absent consent, employers should not share the vaccination status of individual

employees as a means to encourage vaccination, even if that information is kept in the workplace. Generally, employers also should ensure that any collected information is kept securely and destroyed once it is no longer needed.

The timeframe within which proof of vaccination must be provided should be clear.

### ISSUE 3 - How does the duty of accommodation apply to an employee who refuses to disclose their vaccination status or to be vaccinated or wear a mask?

Any policy requiring all staff to vaccinate or alternatively mask has human rights implications. *The Human Rights Code*, C.C.S.M. c. H175 (the “**Code**”) prohibits discrimination in employment on a number grounds, including religion or creed, or religious belief, sex (including sex-determined characteristic such as pregnancy), and physical or mental disability.

Any policy should be drafted carefully to ensure it does not contravene employee rights set out in the Code. A primary reason that individuals claim the right to refuse to wear a mask or vaccinate is based on religious grounds; however, in Canada this allegation has had little to no success to date before Human Rights Commissions. In one Ontario human rights decision, the employer had a policy of requiring paramedics to be vaccinated against influenza. One employee alleged discrimination on the basis of creed as he was not vaccinated, and he claimed his employer discriminated against him in shift scheduling, discipline and refusing him work. The human rights application was dismissed, as the tribunal held that the employee’s objections in that case were not based on sincerely held religious beliefs.<sup>6</sup> The case illustrates that some human rights-based objections may ultimately prove baseless, but all employee objections should nevertheless be explored and addressed.

Conversely, discrimination on the basis of pregnancy has been more successful as it was found to be contrary to the Ontario *Human Rights Code* to suspend a woman because she refused to take a flu vaccine because she was pregnant. Of note, the employee in that case had offered to wear a mask.<sup>7</sup> Accordingly, an employer likely would have a duty to accommodate pregnant employees up to the point of undue hardship. The point of undue hardship is reached when accommodation adjustments to the workplace would be prohibitively or unduly expensive, create undue risks to health or safety or do not have a reasonable likelihood of success.

The policy therefore should contemplate a reasonable accommodation process, including how requests for accommodation may be made. An employer must consider and address accommodation requests on a case-by-case basis. Examples of accommodations may include allowing an employee to work from home, or taking other precautions (such as regular COVID-19 tests, or requiring the employee to maintain physical distancing from

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<sup>6</sup> *Ataellahi v. Lambton County (EMS)*, [2011 HRTO 1758](#).

<sup>7</sup> *Muskoka Algonquin Healthcare v Ontario Nurses’ Association*, 2015 CanLII 32027 (ON LA).

others). For individuals who cannot wear masks, organizations should explore the feasibility of offering an alternative, such as a clear face shield. Additionally, it may be necessary to provide free masks or other protective equipment so that individuals can continue to access employment or services without barriers. The threshold for establishing undue hardship can be high and therefore employers should be prepared to assess, identify and implement reasonable accommodations in a timely manner if they enact a vaccination and/or mask policy.

Under human rights law, a discriminatory employment rule or policy may be valid if it is a *bona fide* occupational requirement (“**BFOR**”), meaning a requirement that is necessary for the performance of a job. There may be some employees within some workplaces with respect to whom an employer will be able to justify a mandatory vaccination policy as a BFOR (e.g., in the interest of workplace safety) that cannot be accommodated without undue hardship. For example, a workplace where employees cannot work from home and are required to be in close and regular contact with each other may be able to establish that the policy is a BFOR.

To accommodate employees unwilling to vaccinate, we recommend, if possible that the policy provide a choice between vaccination or masking. This carries less risk than mandatory vaccination on its own, as it minimizes the degree of actual or perceived coercion. Further, it provides an employee with more flexibility concerning a personal health care decision.

*ISSUE 4 - What recourses are available to employers if an employee who refuses to disclose their vaccination status or to be vaccinated or wear a mask cannot be accommodated without undue hardship?*

If any proposed policy is intended to contemplate discipline or discharge arising from any breach, this must be clear and unequivocal, and it should be brought to the employees’ attention at the time of inception.

Employee Challenges

In addition to a complaint to the MHRC, an employee has the option of a claim for wrongful dismissal if they are terminated for cause due to their unwillingness to vaccinate and/or mask. Whether imposing termination for cause for breaching the policy is a just and proportional response would depend upon an analysis of all relevant circumstances, and this would likely need to be assessed on a case-by-case basis. As there is a high bar in Canadian employment law to prove just cause, the employer may wish to consider progressive discipline and/or other corrective measures before terminating employment for any breach of the policy.

According to the MHRC, an inability to follow a health and safety procedure must not lead to automatic negative consequences such as employee discipline or termination. Additionally,

the MHRC notes that no one should experience harassment or other discriminatory treatment based on a *Code* ground because they are unable to receive a vaccine. Conversely, the MHRC has noted also that the right to be free from discrimination can be limited under *The Code*, where, for example, broader health and safety risks are serious, like in a pandemic, and would amount to undue hardship. In circumstances where an employer has the right to terminate without cause, such as a provincially regulated employer who is non-unionized, the employer must be aware of the risk of possible human rights complaints and consider if the risk of spreading Covid-19 to other employees would justify an action which otherwise could constitute prohibited discrimination.

### Constructive Dismissal

Non-unionized employers must also be mindful of the potential for constructive dismissal claims. Constructive dismissal describes situations where the employer has not formally terminated the employee. Rather, the employer has failed to comply with an essential term of the contract of employment, unilaterally changed the terms of employment or expressed a settled intention to do either. The employee can either accept conduct or changes made by the employer, or treat the conduct or changes as a repudiation of the contract and sue for damages for wrongful dismissal.

Imposing a mandatory COVID-19 vaccination and/or mask policy may trigger a constructive dismissal claim. An existing employee could argue that the employer is unilaterally introducing a substantial new term and condition of employment affecting the contract in a major respect. Likewise, an employee disciplined or terminated for non-vaccination or non-masking may be able to claim constructive dismissal or wrongful dismissal.

While a mandatory COVID-19 vaccination likely would constitute a substantial change to an essential term of employment, it is our opinion that it would be more difficult for an employee to establish that a policy offering an alternative between being vaccinated or wearing a mask would constitute a substantial change, especially while public health orders continue to mandate mask wearing in public places.

Moreover, an employer could take the position that the right to enact such a policy is an implied term of the employment contract. The employer could point to its obligations under *The Workplace Safety and Health Act* to argue that this right is implied by law (as previously stated the Act imposes safety and health obligations on employers). A finding that the employer has such an implied right may depend on the particular workplace: the more likely the spread of COVID-19 is at a particular workplace (i.e. workplaces necessitating in-person work performed in close proximity to other employees/the public), or the greater the danger of severe consequences, the more likely would be the implied right to enact such a policy.

An employee probably is not entitled simply to resign and claim constructive dismissal without making an attempt to negotiate with the employer. As such, employee concerns or challenges with respect to the policy could potentially be addressed and resolved, thus avoiding a constructive dismissal claim.

It is important to note that an employer would have more leeway to make vaccination or masking a condition of employment offers for new hires.

### Possible alternatives

Until there is greater clarity in the law surrounding mandatory vaccination policies, there are alternative approaches that employers could consider to encourage employees to vaccinate, while minimizing the risks of legal challenges associated with such policies. The alternatives might include:

- Ensuring that employees are provided with access to reliable, accurate and timely information about vaccines and their safety;
- Addressing barriers to obtaining the vaccine (for example, offering transportation to vaccination sites or clinics);
- Ensuring that employees receive paid time off to obtain the vaccine;
- Offering rewards (incentive prizes or payments) for employees who get the vaccine; this has the additional benefit of obtaining voluntary information from employees regarding their vaccination status.
- Having a mobile/temporary vaccination clinic set up at the office (which may be possible to organize with Public Health).

### ISSUE 5 - Do employees have the right to refuse work if some co-workers are not vaccinated?

Under section 43 of *The Workplace Safety and Health Act and Regulation*, employees have a right to refuse work in dangerous conditions if they believe on reasonable grounds that the work constitutes a danger to their safety or health or to the safety or health of another worker or another person. Pregnant or nursing women are also protected under section 2.5 of *The Workplace Safety and Health Act and Regulation* which requires employers to identify risks in the workplace to pregnant or nursing women and to take steps to minimize their risk. The legislation requires that the employer temporarily provide alternate work for the pregnant or nursing employee if it is available, involves no risk or less risk and the worker is reasonably capable of performing that work.

*The Province of Manitoba* has published a "Right to Refuse Work" document that discusses a worker's right to refuse work in the Covid-19 pandemic. This document notes that a danger to safety and health is different than a risk to safety and health. For something to be considered dangerous certain conditions must be met. The hazard must:

- (a) be generally unusual to the normal working conditions or tasks, or the health or physical condition of the worker increases the risk;
- (b) the hazard is likely to result in serious injury or illness; and
- (c) reasonable controls have not been put in place to eliminate the risk.

In assessing the risk, questions to be asked include: (a) Has someone in the workplace has been confirmed to have the virus or was very likely exposed to the virus and symptomatic? (b) Is the workplace a known or high-risk source of the virus? and (c) Does the worker have a

pre-existing medical condition that puts them at increased risk? If the risk is high, the employer must have a pandemic plan with adequate control measures (i.e., adequate handwashing and sanitation facilities, appropriate protective equipment and training for infection control practices).

If an employer has put reasonable measures into place in order to control the spread of Covid-19 and these measures consider persons who do not or cannot receive the vaccine, it will be difficult for an employee to exercise their right to refuse work on the basis of safety. The *Toronto Star* has reported that in Ontario, workers who fear contracting the virus have filed more than 200 work refusals and not one has been upheld. Notwithstanding, employers should do their best to be flexible with their employees and adequately address health concerns of employees in the workplace. Special attention must be paid to pregnant or nursing women or those who have health conditions that increase their susceptibility to Covid-19.

## **Legal Precedents**

There are arbitral decisions in which unions have challenged mandatory vaccination or mask policies (for the flu) as an unreasonable exercise of management rights. Those cases generally arise within the healthcare and residential care industries, and the results have been inconsistent. In some cases, such policies have been upheld, while in others, such policies have been found to be unreasonable. Below are some examples:

- *North Bay General Hospital v ONA*, 2008 CarswellOnt 9040: In Ontario, an arbitrator upheld a mandatory vaccination requirement imposed by the North Bay General Hospital on nurses during a widespread influenza outbreak in North Bay community.
- *Health Employers Assn. of British Columbia and HSA BC (Influenza Control Program Policy)*, 2013 CarswellBC 3189: a BC arbitrator upheld a policy that required employees to wear a mask or provide proof of vaccination against the seasonal flu.
- *Sault Area Hospital and Ontario Nurses' Association*, 2015 CanLII 55643 (ON LA): The Hospital's "Vaccinate or Mask" was found to be an unreasonable exercise of management rights, as it attempted to coerce flu immunization and thereby undermined an employee's established right under the collective agreement to refuse vaccination.
- *St. Michael's Hospital v Ontario Nurses' Association*, 2018 CanLII 82519 (ON LA): In this 2018 decision, an Ontario arbitrator found a "Vaccinate or Mask" Policy to be unreasonable; there was insufficient evidence showing that vaccines or masks worked to reduce the spread of influenza.
- *Caressant Care Nursing & Retirement Homes v Christian Labour Association of Canada*, 2020 CanLII 100531 (ON LA): This case does not concern vaccination, but it deals with a policy aimed at preventing the transmission of COVID-19. In 2020, an

arbitrator held that a surveillance testing program mandating biweekly nasal swab testing for employees of a nursing home was a reasonable exercise of management's rights; the policy's goal of preventing the spread of COVID-19 in the retirement home reasonably justified it.

- *Alberta Health Services v. United Nurses of Alberta, Local 301, 2020 CanLII 77085 (AB GAA)*: The Arbitrator ruled that the employer was justified in placing an employee on unpaid leave of absence because she failed to produce vaccination history records in a timely fashion, i.e. in time to be cleared to perform her work duties. The Arbitrator made it clear that the employer was entitled to proof of vaccination status, it did not have to rely on the word of its health care workers.

In sum, those cases reveal that a vaccination policy should be:

- Reasonable in all of the circumstances;
- Consistent with the collective agreement or the employment contract;
- Clear and unequivocal;
- Brought to the attention of the affected employees;
- Clear that a breach of the policy would result in discharge or discipline;
- Consistently enforced by the employer from the time it is introduced;
- Backed up by expert / scientific evidence; and
- Minimize the degree of actual or perceived coercion.

On the other hand, the reasonableness of a mandatory vaccination or mask policy likely will depend on the type of workplace in which the policy is being implemented. Employers in settings where there is a high degree of close contact between employees and residents may be more likely to successfully defend mandatory vaccination policies as compared to employers in lower risk workplaces, where employees are not required to work in close contact with members of the public.

### **Privacy Considerations**

A vaccination or mask policy may require an employer to collect and store employees' personal information, including their vaccination status and any related information, which may raise privacy issues. Provincially regulated private sector employers in Manitoba are not subject to any privacy laws of general application, to the extent that personal information of employees is collected, used or disclosed for employment purposes. *The Privacy Act*, C.C.S.M. c. P125, however, creates a statutory tort where a person "substantially, unreasonably and without claim of right" violates the privacy of another person.<sup>8</sup>

An employee could in theory try to bring a civil claim if they believe their privacy has been violated. While we believe collecting information about COVID-19, including vaccination status to limit exposure in a workplace is likely reasonable in the current climate, employers

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<sup>8</sup> *The Privacy Act*, C.C.S.M. c. P125, s. 2(1),

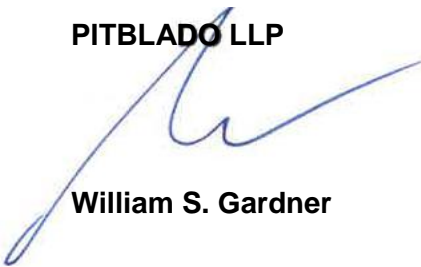
should remain mindful of privacy concerns. Accordingly, we would recommend that any policy include a statement addressing privacy matters. For example the policy could include a statement of the purpose (i.e. “to keep the workplace safe” or “to prevent the spread of COVID-19 to others in the workplace”), of what information will be collected/stored, of where it will be stored, with whom it will be shared, the individuals to whom access to the information will be limited and a statement of when the information will be destroyed. As a general rule, an employer should not collect, use or disclose more personal information than is necessary to accomplish the purposes that are sought to be achieved. Personal information should be stored securely and shared on a “need to know” basis, and it should be destroyed when no longer needed.

## **CONCLUDING REMARKS**

We trust the foregoing is appropriate for your purposes but if you have any questions or wish to further discuss this matter, please contact the writer. If an employer decides to implement a mandatory vaccination or mask-wearing policy for its employees, such a policy should be drafted carefully, and should address both human rights and privacy concerns. We would be happy to assist with the drafting of such a policy, should your members wish.

Yours very truly,

**PITBLADO LLP**



**William S. Gardner**