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Legal Context for AHS's Immunization of Workers for COVID-19 Policy

The purpose of this analysis is to assess whether UNA has a basis to grieve a policy that places unvaccinated (or incompletely vaccinated) employees on an unpaid leave of absence. This analysis will assess the policy against the KVP test, applicability of the Charter, and in context of privacy, human rights and occupational health and safety legislation.

There are a number of cases where employer policies respecting influenza vaccinations have been upheld in Canada: Barkley v Mohawk Counsel of Akwesasne, [2000] C.L.A.D. No. 553; Trillium Ridge Retirement Home and Service Employees Union, Local 183, unreported, December 11, 1998; Carewest v. Alberta Union of Provincial Employees (Nasr Grievance), [2001] A.G.A.A. No. 76 (PA Smith); Chinook Health Region and United Nurses of Alberta, Local 120, November 25, 2002 (Jolliffe); and Re: Health Employers Association of BC and HSA BC (Influenza Control Program Policy Grievance) [2013] 237 L.A.C. (4th).

In Barkley, a registered practical nurse refused to comply with a facility's mandatory influenza immunization policy on the basis that she had never been sick with the flu, had faith in her own immune system and did not want to tamper with it in any way.

Trillium Ridge dealt with a policy imposed at a nursing home and retirement home requiring staff to have been vaccinated for influenza or take antiviral medication. In the event of an outbreak, if neither option was chosen staff could take time off without pay until the influenza outbreak was declared over at the facility.

The Carewest decision dealt with an influenza immunization policy that excluded unvaccinated employees from the workplace, without pay, for the duration of an outbreak.

In the Chinook case, UNA grieved an employer policy put in place at several continuing care sites. This policy stated that if employees were not vaccinated annually with the influenza vaccine, then they would be placed on a leave of absence without pay during an influenza outbreak. There was an option to take anti-viral therapy in this case. The purpose of the policy was, "To ensure the clients, staff, medical staff, students, volunteers, contractors or visitors are protected from possible exposure and cross-contamination during an influenza outbreak." The Union argued the policy presented a "mandatory choice" for employees that amounted to no choice at all because it could result in denying the employee the right to work scheduled hours.

The Health Employers case dealt with a policy that required either influenza immunization or masking. Essentially, during an outbreak, an unimmunized employee would be required to mask at all times.

We identified two cases where an arbitrator struck down an employer's immunization policy: Re St. Peter's Health Systems and C.U.P.E., Local 778, (2002) 106 L.A.C. (4th) 170; and Re St. Michael's Hospital and ONA 2018 Carswell Ont 14889, 137 C.L.A.S. 172, 295 L.A.C. (4th)

In St Peters, the arbitrator found an immunization policy that had the effect of suspending employees (non-disciplinary) for refusing to undergo medical treatment is a violation of common law rights where there is no consent. St Peters dealt with staff vaccination within a chronic care geriatric facility.

St. Michael's Hospital daleth with a Vaccinate or Mask Policy (VOM Policy) that stated health care workers who have not received the annual influenza vaccine, must, during all or most of the flu season, wear a surgical mask in areas where patients are present and/or patient care is delivered.

Is the Standard or Policy Inconsistent with the Collective Agreement?

Under Article 4.01 the employer "reserves all rights not specifically restricted o limited by the provisions of the Collective Agreement, including the right to (a) maintain order, discipline, and efficiency and (b) make or alter, from time to time, rules and regulations, to be observed by Employees, which are not in conflict with any provision of this Collective Agreement." The primary question, therefore, is whether the policy is in conflict with any provisions of the Collective Agreement.

The policy provides a mechanism for employees to request accommodation on the basis of protected grounds. The policy itself references the Alberta Human Rights Act. The Collective Agreement includes protections on the basis of "political beliefs," "membership or non-membership or activity in the Union," and "exercising any right conferred under this Agreement or any law of Canada or Alberta." The policy does not specifically reference accommodation on these grounds and to the extent it excludes those protected grounds the policy is inconsistent with the Collective Agreement. Nonetheless, it is our expectation that rather than strike down the entire policy on this basis, the most likely outcome is that an arbitrator will find the policy is inoperable is this narrow sense. The Union will hold the employer accountable to reasonable accommodation to the point of undue hardship on the basis of all protected grounds set forth in the Collective Agreement. Grievances will be considered on an individual basis.

Article 23 Discipline and Dismissal and specifically Article 23.09 prohibits the suspension, dismissal, or discipline except for just cause. On its face the unpaid LOA imposed on employees who are not immunized imposes a suspension on employees. The question remains whether this suspension is disciplinary or non-disciplinary. If non-disciplinary then the requirement is not in conflict with the collective agreement. If disciplinary then it is in conflict. In the Trillium Ridge decision, the arbitrator found, "The refusal to permit non-immunized staff to work was not disciplinary in purpose or intent." Trillium Ridge also commented that the underlying bargain is that employees will provide work in exchange for pay and the arbitrator found that employees who choose not to be immunized cannot provide work and should not expect to be paid.

Article 34.06 says, "Where an Employee requires specific immunization and titre, as a result of or related to the Employee's work, it shall be provided at no cost." As stated in Chinook, "it is apparent that the Employer finds some support in the collective agreement language, which is article 34.03 referring to employee required specific immunization being provided at no cost at least indirectly suggests there can be situations arising at work where immunization is reasonably necessary."

Article 22 sets out provisions for leaves of absence including unpaid leaves of absence. Article 22.02 says, "Leave of absence without pay may be granted to an Employee at the discretion of the Employer and the Employee shall not work for gain during the period of leave of absence except with the express consent of the Employer. If a request for leave of absence is denied, the Employer will advise the Employee in writing of the reasons for denial."

The employer's policy states that employees will be placed on an unpaid leave of absence. The wording of article 22.02 does not permit the employer to unilaterally place an employee on a paid leave of absence; an employee must make a request for a general leave of absence. The alternative to an Article 22 LOA would be a non-disciplinary suspension that may restrict access to benefit entitlements contained in Article 22. UNA's analysis is that Article 22 unpaid leave is preferable and will be supporting its application in this circumstance. To the extent an Employee requests a non-disciplinary suspension in place of a General Leave of Absence, the Union will advocate for the same to the employer.

The Employer's requirement for immunization is not inconsistent with the Collective Agreement. The Employer's accommodation section is inconsistent with the Collective Agreement because it fails to contemplate additional protected grounds not covered by the Alberta Human Rights Act. The Employer's decision to place someone on a leave of absence may be inconsistent with the Collective Agreement in certain circumstances and can be dealt with on a case-by-case basis.

Is the Standard or Policy Connected to a Legitimate Interest of the Employer?

The AHS policy describes its objectives: "To set out worker immunization requirements for COVID-19 to protect the health and safety of workers, patients, and the communities Alberta Health Services (AHS) serves." Alberta Health Services is the largest employer of health care workers in Canada and has borne the responsibility of managing and responding to the COVID-19 pandemic. The vast majority of the emergency, acute care and intensive care units who provide care to COVID-19 patients fall under the purview of AHS. Those that do not, fall under the purview of Covenant Health.

In Barkley, the arbitrator found, "There was on the part of the Council a legitimate interest which was the residents' health and well-being."

In Trillium Ridge, the arbitrator found evidence that although vaccinations were not perfectly effective, the vaccination of staff and residents was an effective means to prevent transmission of influenza A and reduced the severity of symptoms and incidence of complications arising from infections with the virus. Additionally, "The purpose of such measures was to encourage the widest vaccination of staff and residents possible, while not imposing these measures in the absence of apparent consent." On this basis, the arbitrator concluded the Employer's policy was rationally connected to the legitimate objective of protecting the health and safety of residents and staff at the facility.

In Carewest, the arbitrator accepted evidence that influenza was a serious health concern for the frail elderly. In light of those consequences, the arbitrator accepted the employer's goal to in preventing and containing outbreaks. And found a rational connection between that goal and immunization having regard to "the importance, effectiveness and safety of the influenza vaccine."

In Chinook, the arbitrator adopted a balancing of interests approach. The decision says, "…a balancing of interests approach strongly favours the Employer in the circumstances presented in evidence for all those reasons discussed by the arbitrators in dealing with the immunization policies in Trillium Ridge and Carewest."

As COVID-19 cases and hospitalizations surge, the capacity of AHS to respond to the health care needs of Albertans is jeopardized. Recently we have seen emergency departments shut down and surgical services reduced or stopped due to a shortage of beds, health care workers, or both. The pressure on the health care system results in overtime, canceled vacation and widespread burnout among health care workers. The health care system is in crisis.

On September 16, 2021 the Government of Alberta declared another State of Public Health Emergency in order to protect the health care system during the 4th wave of the COVID-19 pandemic. Dr. Verna Yiu, AHS President and CEO, stated in regards to this announcement "Our health care system continues to experience severe capacity challenges, greater than we have faced throughout this long and exhausting pandemic. Yesterday, we reached 270 patients in ICU, that is the highest number of ICU patients we have ever seen at any time during the pandemic or ever in our provincialized health care system." Dr. Yiu indicated that in response to this capacity crisis, AHS will be reaching out to other provinces to see if they have any available ICU space or if they have skilled front-line staff to come to assist in Alberta. In addition, Dr. Yiu announced they are taking further steps to educate their clinical teams on a critical care triage protocol, as a planned and pre-determined province wide approach to guide their response should the demand for life-sustaining critical care support become greater than the available resources.

AHS has a legitimate interest in preventing the collapse of Alberta's Health Care system. The standard or policy is connected to a legitimate interest.

Is the Standard or Policy Unreasonable?

Registered Nurses and Registered Psychiatric Nurses are and have been required to obtain vaccines as a pre-condition of enrolling in the degree and diploma programs for those areas of study. As such, it will not be uncommon for these health care workers to have been vaccinated in the past. It is reasonable to conclude that the vast majority of the opposition is not to vaccines generally, but rather to the specific vaccines designed to address COVID-19. Therefore, we will begin our analysis of the reasonableness of the employer's policy with an examination of the COVID-19 vaccine.

Does the COVID-19 Vaccine Limit the Transmission COVID-19, Limit Hospitalizations and Limit Severe Outcomes for Those Who Become Infected?

The policy in St. Michael's was struck down, in part based on inadequate or insufficient evidence that vaccination prevented or significantly reduced nosocomial influenza: "the case establishing a link between vaccination and prevention of nosocomial influenza was not made." In other cases, arbitrators accepted that health care workers served as 'vectors' because they circulated throughout the health care setting from patient to patient.

UNA has concluded that an arbitrator will accept that vaccination against COVID-19 is a highly effective way to prevent COVID-19 infection, severe disease, hospitalization, and death, and as such, encourages all nurses, other health care workers, and the general public to be vaccinated against COVID-19 to protect themselves, their families, their colleagues and vulnerable patients/residents/clients,

as well as to prevent the overextension of all our health care services, including hospital, long-term care, home care and public health resources. This position is in line with the Canadian Federation of Nurses Unions COVID-19 Vaccination Position Statement: https://nursesunions.ca/wp-content/uploads/2021/08/2021-08-24-CFNU-position-statement-on-SARS-CoV-2-vaccination_EN.pdf

This position is based on the latest evidence on COVID-19 vaccination from leading public health and disease control institutions in Canada and around the world and from real-world vaccine outcome data as reported by the Government of Alberta.

Canada's National Advisory Committee on Immunization (NACI), a national advisory committee of experts in the fields of pediatrics, infectious diseases, immunology, pharmacy, nursing, epidemiology, pharmacoeconomics, social science, and public health, makes recommendations to the Public Health Agency of Canada (PHAC) for the use of vaccines currently or newly approved for use in humans in Canada, based on the best current available scientific knowledge. As such, they have issued an Advisory Committee Statement on Recommendations on the use of COVID-19 Vaccines (July 22, 2021). In this statement they conclude that "the first dose of the authorized COVID-19 vaccines has been shown to offer at least short-term protection against confirmed COVID-19 disease. For mRNA vaccines, the highest efficacy is seen after the second dose is administered" and that "emerging real-world evidence from studies in the United Kingdom (UK), Israel, the United States (US), and Canada suggests moderate to high vaccine effectiveness against severe COVID-19 outcomes after the first or second dose of mRNA COVID-19 vaccines in adults."
Reference: https://www.canada.ca/en/public-health/services/immunization/national-advisory-committee-on-immunization-naci/recommendations-use-covid-19-vaccines.html#a7.2

The United States Centers for Disease Control and Prevention (US CDC) in their Science Brief: COVID-19 Vaccines and Vaccination (Updated September 15, 2021) state that "all COVID-19 vaccines currently authorized in the United States (Pfizer-BioNTech/Comirnaty, Moderna, and Janssen [Johnson & Johnson] are effective against COVID-19, including against severe disease, hospitalization, and death. Available evidence suggests the currently approved or authorized COVID-19 vaccines are highly effective against hospitalization and death for a variety of strains, including Alpha (B.1.1.7), Beta (B.1.351), Gamma (P1), and Delta (B.1.617.2)." In terms of the effect of vaccination on transmission, the US CDC states "a growing body of evidence suggests that COVID-19 vaccines also reduce asymptomatic infection and transmission. Substantial reductions in SARS COV-2 infections (both symptomatic and asymptomatic) will reduce overall levels of disease, and therefore, SARS-CoV-2 virus transmission in the United States. Investigations are ongoing to further assess the risk of transmission from fully vaccinate persons with SARS CoV-2 infections to other vaccinated and

unvaccinated people. Early evidence suggests infections in fully vaccinated persons caused by the Delta variant of SARS-CoV-2 may be transmissible to others; however, SARS-CoV-2 transmission between unvaccinated persons is the primary cause of continued spread."
Reference: https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/fully-vaccinated-people.html

The Government of Alberta publicly reports up to date data on vaccine outcomes for Albertans who have been vaccinated. This data provides real-world Alberta specific evidence that vaccines are highly effective against preventing infection, severe disease, and death. As of September 14, 2021:

- 89.3% of cases (152,290/170,555) since Jan 1, 2021 were unvaccinated or diagnosed within two weeks from the first dose immunization date.
- 88.3% of hospitalized cases (6,696/7,586) since Jan 1, 2021 were unvaccinated or diagnosed within two weeks from the first dose immunization date.
- 81.7% of COVID-19 deaths (785/961) since Jan 1, 2021 were unvaccinated or diagnosed within two weeks from the first dose immunization date.
- Data on alberta.ca (updated to September 15, 2021) shows that in the previous 120 days, there were 800 COVID-19 cases that required admission to ICU. 40 patient (5%) were completely vaccinated, 47 (5.8%) were partially vaccinated, and 713 (89.1%) were unvaccinated.

In the other arbitration decisions, the arbitrators dealt with annual influenza vaccines that provided less reliable protection against infection for staff than the efficacy evident for the COVID-19 vaccine. UNA's assessment is that an arbitrator will find the evidence is clear that vaccination prevents or significantly reduces infection, spread, hospitalization and death. Additional data is also pointing to vaccination reducing transmission.

Are There Other Measures the Employer Could Have Used in Lieu of Mandatory Vaccines?

Alberta Health Services began to roll out their immunization program for health care workers in December 2020, using a phased approach, based on priority groups and available vaccine supply. On April 12, 2021, all health care workers became eligible to book a first dose COVID-19 immunization appointment in Alberta. On April 21, 2021, the Government of Alberta introduced job-protected paid leave to allow Albertans to access their COVID-19 vaccine. This means that all AHS Employees, whether full-time, part-time, or casual, can access up to three consecutive hours of paid leave (or longer if the employer deems it reasonable) to get each dose of the COVID-19 vaccine. On May 7, 2021 AHS launched a COVID-19 immunization awareness campaign directed at their employees titled "Stick with the facts, stick together" to share fact-based information and encourage vaccination.

As employee vaccination was voluntary prior to the introduction of this policy, AHS does not yet know the exact number/proportion of Employees that have been vaccinated but have shared with UNA that they believe the number to be higher than the rate of the general public in Alberta, where just over 71.5% of the 12+ population in Alberta is fully vaccinated as of September 15, 2021.

UNA asserts the application of a hierarchy of controls to protect health care workers against COVID-19 is necessary. This approach is in line with Alberta's Occupational Health and Safety legislation, which requires employers to conduct hazard assessments and to eliminate the hazards identified. If they cannot be eliminated, the employer must introduce controls to protect against them.

The Canadian Federation of Nurses Unions (CFNU) also advocates for application of the occupational health and safety principle of the hierarchy of controls as it relates to COVID-19 and worker safety. It starts with eliminating the hazard whenever possible. When that cannot be accomplished, a combination of engineering and administrative controls, combined with appropriate personal protective equipment, must be applied. The system is called a hierarchy because you must apply each level in the order they fall in the list; a systematic comprehensive and integrated approach must be taken to reducing hazards; a hierarchy of controls cannot be applied in a piecemeal fashion.
Reference:https://nursesunions.ca/position-statement-on-covid-19/

Alberta Health Services (AHS) and other health care employers implemented various controls to attempt to protect their Employees throughout the pandemic including engineering controls such as designated COVID-19 units and isolation spaces; administrative controls such as fit for work screening and outbreak management protocols including rapid testing; and provision of PPE for workers (masks, gowns, gloves, eye wear). Despite these measures being in place, hundreds of COVID-19 outbreaks were declared in health care facilities across Alberta, where hundreds of patients and employees acquired and transmitted the virus, resulting in significant morbidity and preventable patient deaths. According to AHS, "while PPE used diligently is highly effective in preventing virus transmission, there is always the potential for equipment failure and human error. Unfortunately, a large portion of the healthcare worker cases determined to be occupationally acquired are attributable to these causes."
Reference: https://www.albertahealthservices.ca/assets/info/ppih/if-ppih-covid-19-vaccine-immunization-policy-faqs.pdf

The Government of Canada states that the use of rapid tests as a screening tool is another layer of protection but it is not a substitute for other public health measures including mask wearing, hand hygiene, physical distancing, proper ventilation, and getting the COVID-19 vaccine.

Reference: https://www.canada.ca/en/public-health/services/diseases/coronavirus-disease-covid-19/testing-screening-contact-tracing/workplace/rapid-antigen-tests.html

AHS states that rapid testing is not an alternative to immunization as "there are significant safety and efficacy concerns with rapid testing. Current rapid testing technology is designed for those experiencing symptoms, which creates a large risk of false positives (up to 30 percent), and this could lead to workers being unnecessarily restricted from work. The occurrence of false negatives is even more significant (reported as high as up to 50 percent) where workers may be entering care environments infected with COVID-19)."
Reference: https://www.albertahealthservices.ca/assets/info/ppih/if-ppih-covid-19-vaccine-immunization-policy-faqs.pdf

UNA has consistently advocated for AHS and all health care employers in Alberta to apply a hierarchy of controls, the precautionary principle, and take every measure necessary to protect employees and patients from acquiring COVID-19. It is clear that vaccination against COVID-19 is another highly effective control that can be used by employers, as one of several layers, to mitigate transmission and infection in their facilities among employees and patients. Notably, the arbitrator in the Health Employers described the precautionary principle: "The essence of that principle is it can be prudent to do a thing even though there may be scientific uncertainty." The arbitrator then gave due regard to this principle in upholding the masking component of the employer's policy, having found the science less settled on that consideration than with respect to vaccines.

UNA also considered whether this policy is unnecessary for individuals who have previously been infected with COVID-19, essentially considering the issue of natural immunity. It is not currently known that antibody level correlates with protection against COVID-19. Although an employee may test positive for antibodies through serological testing, it does not tell us whether that employee is protected from reinfection. We understand there are studies examining natural immunity and we will continue to monitor progress in this regard. At this time, it is unlikely an arbitrator would find the evidence meets the evidentiary threshold necessary to render the employer's policy unreasonable. In this case, the unsettled science of natural immunity works against the Union at arbitration and works in the employer's favour with respect to its rationale for requiring a vaccine.

It is our assessment that the employer attempted other measures to contain the spread of COVID-19 and to limit the severe impacts on the health care system prior to implementing a mandatory policy. It is reasonable for AHS to implement and maintain this policy, at this time.

Is There Reason to Believe That Workplace Transmission Presents a Risk to Health Care Workers?

The National Advisory Committee on Immunization (NACI) identified frontline healthcare workers as a key population for early COVID-19 immunization because they are a group more likely to acquire and transmit COVID-19, because of the nature of their work, to and from those at high risk of severe illness and death and are essential to maintaining the COVID-19 response.
Reference: https://www.canada.ca/en/public-health/services/immunization/national-advisory-committee-on-immunization-naci/guidance-key-populations-early-covid-19-immunization.html

A study conducted on the early impact of Ontario's COVID-19 vaccine rollout on Long-Term Care home residents and health care workers concluded that the "rollout of COVID-19 vaccines in Ontario's LTC homes substantially reduced SARS CoV-2 infections, COVID-19 hospitalizations and deaths among LTC residents and HCWs. Completing and maximizing the uptake of the full COVID-19 vaccine series according to recommended schedules will maximize the safety and well-being of Ontario's LTC residents and staff."
Reference: https://covid19-sciencetable.ca/sciencebrief/early-impact-of-ontarios-covid-19-vaccine-rollout-on-long-term-care-home-residents-and-health-care-workers/

According to data released by the Canadian Institute for Health Information (CIHI) over 90,000 health care workers in Canada have been infected with COVID-19, including 43 deaths, since the start of the pandemic, representing 6.8% of all COVID-19 cases, as of June 15, 2021. Although the origin of these health care workers infection is not known, this data demonstrates the disproportionate burden that health care workers face when it comes to acquiring COVID-19 in Canada.
https://www.cihi.ca/en/covid-19-cases-and-deaths-in-health-care-workers-in-canada

AHS regularly shares information with UNA on the number of Employees that have tested positive for COVID-19 and the likely origin of that infection (occupational, non-occupational, or indeterminate) based on case reviews they conduct internally within AHS. As of September 7, 2021, for those cases where the source of infection had been determined, 11.6% (608 positive cases) were likely acquired in the workplace (i.e. occupational).

To What Extent Does the COVID-19 Vaccine Pose Risks to the Public? What About Long-Term Side Effects?

UNA believes an arbitrator will conclude all approved COVID-19 vaccines in Canada are safe and effective and the benefits of receiving the vaccines outweigh any potential risks. This assessment is based on the following information.

Health Canada's independent vaccine approval process is recognized around the world for its high standards and rigorous review. Their decisions are based only on scientific and medical evidence showing that vaccines are safe and effective. The benefits must also outweigh any risks. The development of COVID-19 vaccines has progressed quickly for many reasons including: advances in science and technology; international collaboration among scientists, health professionals, researchers, industry, and governments; and increased dedicated funding.

Health Canada has put in place a fast-tracked review process to assess COVID-19 vaccines. They've dedicated more scientific resources to complete these reviews so that they're done quickly without cutting corners. A similar process was used in 2009 to review and authorize the H1N1 pandemic vaccine.

Reference: https://www.canada.ca/en/public-health/services/diseases/2019-novel-coronavirus-infection/prevention-risks/covid-19-vaccine-treatment.html

The Government of Canada publicly shares data on reported side effects following COVID-19 vaccination in Canada. As of September 3, 2021:

- 53,559,981 total doses have been administered
- 14,702 (0.027% of all doses administered) total adverse events following immunization were reported. That's about 3 people out of every 10,000 people vaccinated.
- Of total adverse events, 10,735 were non-serious (0.020% of all doses administered) and 3,967 were deemed serious (0.007% of all doses administered).
- Most adverse events are mild and include soreness at the site of injection or a slight fever.
- Serious adverse events are rare but do occur. They include anaphylaxis (a severe allergic reaction), which has been reported 162 times for all COVID-19 vaccines across Canada. That's why you need to wait for a period of time after you receive a vaccination so that you can receive treatment in case of an allergic reaction.
- As a result, the Government of Canada concludes that the benefits of the vaccines authorized in Canada continue to outweigh the risks.
- Reference: https://health-infobase.canada.ca/covid-19/vaccine-safety/

According to the United States Centers for Disease Control and Prevention (US CDC), "Researchers have been studying and working with mRNA vaccines for decades. Interest has grown in these vaccines because they can be developed in a laboratory using readily available materials. This means the process can be standardized and scaled up, making vaccine development faster than traditional methods of making vaccines. mRNA vaccines have been studied before flu, Zika, rabies, and cytomegalovirus (CMV). As soon as the necessary information about the virus that causes COVID-19 was available, scientists began designing the mRNA instructions for cells to build the unique spike protein into an mRNA vaccine. Beyond vaccines, cancer research has used mRNA to trigger the immune system to target specific cancer cells."
Reference: https://www.cdc.gov/coronavirus/2019-ncov/vaccines/different-vaccines/mrna.html

The US CDC also concludes that long-term side effects are unlikely stating "serious side effects that could cause a long-term health problem are extremely unlikely following any vaccination, including COVID-19 vaccination. Vaccine monitoring has historically shown that side effects generally happen within six weeks of receiving a dose. For this reason, the FDA required each of the authorized COVID-19 vaccines to be studied for at least two months (eight weeks) after the final dose. Millions of people have received COVID-19 vaccines, and no long-term side effects have been detected."
Reference: https://www.cdc.gov/coronavirus/2019-ncov/vaccines/safety/safety-of-vaccines.html

Safety monitoring is ongoing in Canada. The Public Health Agency of Canada, Health Canada, and provincial and territorial health authorities continue to: monitor the use of all COVID-19 vaccines closely and examine and assess any new safety concerns. According to Immunize BC, the medical and scientific community is confident in the vaccine's long-term safety, because of the track record of Canada's vaccine approval process and provincial and territorial monitoring systems that are in place. Overall, this means that the end data and safety tests are exactly the same as other vaccines that have been approved in Canada. The safety monitoring system in Canada happens both passively and actively.
Reference: https://immunizebc.ca/ask-us/questions/are-there-long-term-side-effects-caused-mrna-covid-19-vaccines-how-do-we-know

The vaccines are widely regarded as safe for the public and for health care workers. The issue of safety does not therefore render this policy unreasonable.

Does This Policy Subject Employees to an Assault or Battery?

In Trillium Ridge, the arbitrator concluded the policy did not mandate vaccination: "Ultimately, the employee was permitted to refuse either measure, but there was a

cost to such refusal. Such an employee would not be allowed to attend at work and be paid during the period of an outbreak." Similarly, Arbitrator Smith in the Carewest decision found, "The Employer has not required anyone to take the shot or lose his or her job."

While there are consequences for those who chose to remain unimmunized, the policy does not force an employee to be vaccinated. It is a choice with consequences.

Is the Application of the Policy to All Employees Unnecessarily Broad?

In Carewest, the arbitrator noted, "The employer has not applied the policy to everyone in the facility, but only those persons involved in front line delivery of health care with daily, frequent and intimate contact with patients." Adding, "The employer has not excluded employees without pay for the entirety of the flu season if they are unvaccinated, but only during the periods where the risk of transmission from patient to patient is highest, namely, during outbreaks."

Those aspects do not exist with the AHS policy. So, it is possible that the broad application and unlimited timeframe to the unpaid leave could be seen as unreasonable but given that COVID-19 is a global pandemic with more serious risks than influenza, an arbitrator is unlikely to make a direct comparison, and instead find a higher threshold for what is reasonable.

While the policy does not explicitly state that there will be no exceptions to the requirement except those unable to be vaccinated, the accompanying FAQ makes this clear. The standard or policy is clear that even those who work remotely and have no reasonable expectation of contact with patients, families or colleagues are required to be immunized. The FAQ states, "It is important that all AHS workers, including those working remotely are fully immunized as you may need to access an AHS site, facility or have contact with another AHS worker at any time."

The United Nurses of Alberta are concerned that the health care system is nearing collapse and that it may be necessary to recruit individuals who might otherwise not be required to report to work. However, this is an extraordinary hypothetical and UNA takes the position this should be assessed on a case-by-case basis.

Therefore, UNA has advised AHS that while we will not grieve the standard or policy, we reserve the right to take issue with individual circumstances where in our opinion the employer's application of its policy is unreasonable.

Does AHS Require an Order by a Medical Officer of Health Under the Public Health Act to Impose This Policy or Standard?

The United Nurses of Alberta strongly believes that the issue of mandatory vaccination for health care workers is a public health issue and should have been addressed through an order of a medical officer of health. While we maintain that position, our finding is that the standard of policy does not violate the Collective Agreement and rather the possibility has been contemplated by the parties as evidenced by Article 34.06.

The MOH should have issued an order but it was not necessary for AHS to issue this standard or policy.

Is it Reasonable to Impose the Immunization Requirement in Perpetuity or Should it Be Tied to a Declared Public Health Emergency or Outbreak?

In each of the previous decisions that upheld employer immunization policies, the standard or policy only applied for the duration of a declared outbreak. UNA's assessment is that a policy that ties unpaid leave to an ongoing pandemic or outbreak would be reasonable. The AHS policy does not tie an unpaid leave of absence to the duration of an outbreak and therefore could result in an indefinite period of unpaid leave. This must be viewed as a significant departure from existing caselaw where the expected duration of unpaid time could be days or weeks. The lengthier and therefore more severe consequences place additional influence or coercion on employees to comply with the order.

While there is no specific end date to the consequence of being unimmunized, the current policy states, "This Policy will be reviewed regularly, and at least every six (6) months, to ensure alignment with public health measures and regulations, and to confirm it adequately cover the health and safety risks it addresses." Does this save the policy? The requirement for employees to immunize is an extraordinary measure and the employer's policy has been issued in the midst of a pandemic unlike any seen in the last century. The combination of the statement that the policy will be reviewed and the current state of public health emergency leads us to conclude that the absence of a definitive end to the consequence of unpaid leave does not render the policy unreasonable at this time. UNA will reserve its right to challenge this policy when the current public health conditions change.

In addition to these considerations, a standard or policy may be unreasonable if it violates other legislation. UNA has considered the standard or policy in light of legal requirements or standards set out in the Canadian Charter of Rights and Freedoms, Privacy legislation, human rights legislation and professional standards.

Does the Standard Violate the Charter?

There is a two-step test to make out a violation of section 7 of the Canadian Charter of Rights and Freedom. First, there must be a deprivation of life, liberty, or security of the person, and second, such a deprivation is contrary to the principles of fundamental justice. It is unlikely the first step will be found to be met. The choice to receive the vaccine remains with the employee, notwithstanding that the choice to not receive a vaccine may carry financial consequences. In Interior Health Authority v. BCNU, 2006 CAswell BC 3377, Arbitrator Burke dismissed a section 7 Charter argument with respect to an influenza vaccination policy on this basis (para 102): "The employees have a choice in the matter. Financial consequences may occur if there is both an outbreak declared and they do not have any residual vacation or other leave remaining, other than sick leave. That does not eliminate the reality of a choice, albeit one that may be difficult." Vaccination policies that provide for appropriate human rights exemptions will also not infringe freedom of religion protected under section 2 of the Charter.

The standard or policy does not violate the Charter.

Does the Standard Violate Privacy Legislation?

Section 2.4 of the AHS policy states that proof of immunization records are collected under the authority of Section 33(c) of the Freedom of Information and Protection of Privacy Act (Alberta) and shall be used, accessed, and disclosed in accordance with the legislation and AHS's Collection, Access, Use, and Disclosure of Information Policy.

Section 33(c) Purpose of collection of information

> No personal information may be collected by or for a public body unless … (c) that information relates directly to and is necessary for an operating program or activity of the public body.

AHS is a public body. AHS has a legitimate purpose for requiring employees to be immunized. The collection of proof of immunization records is directly related to and is necessary to monitor the immunization status of its employees.

AHS must inform employees of the purpose for which the information is collected (this has been addressed already), the specific legal authority for the collection (the policy references s. 33(c) of the FOIP Act), and the title, business address and business telephone number of an officer or employee of AHS who can answer questions about the collection. With respect to the latter requirement, AHS has confirmed this information will be included on the forms where employees provide or enter their personal information (Got My Flu Shot) on inside.

The standard or policy does not violate privacy legislation.

Does the Standard Violate Human Rights Legislation?

The policy specifically contemplates and references the Alberta Human Rights Act. Section 3 of the employer policy permits employees who are unable to be immunized for reasons related to a protected ground of discrimination under the Alberta Human Rights Act to request reasonable accommodation to the point of undue hardship. The policy sets out the process for employees to request accommodation.

The term "unable to be immunized" may be overly restrictive as it relates to employees making a request for accommodation. For example, there may be employees of indigenous backgrounds who are vaccine hesitant due to experience with or knowledge of historical injustices perpetrated by the Canadian government or the Canadian health care system. They may or may not be "able" to be immunized but they should not be required to justify a request for accommodation on a medical basis (physical or mental disability).

Ultimately, it is UNA's position that whether the standard or policy meets the obligations set out in human rights legislation will depend on how the employer applies its policy to those requesting accommodation. On its face, the policy does not violate human rights legislation but there may be instances where human rights are violated and UNA will assist employees through the accommodation process.

Does the Standard Violate Professional Standards?

With respect to professional standards, the United Nurses of Alberta have heard from employees concerned that by administering the vaccine they will violate professional standards. The AHS Informed Consent Policy states that consent shall be voluntary. It then defines voluntary as:

> a) The patient shall have the opportunity, without undue influence, to accept or refuse a treatment/procedure(s).
> b) As time permits in the clinical circumstance, informed consent discussions shall occur when the patient has a reasonable opportunity to reflect on the decision and ask questions.
> c) When appropriate to do so, informed consent discussions should not take place in the operating room or the operating room environment.
> d) The patient shall be given an opportunity to take the time required to reflect on the information and to consult with whom they choose prior to making a decision.
> e) A patient's decision to accept or refuse a treatment/procedure(s) shall not prejudice their access to ongoing or future health care."

For the purposes of this analysis, we will focus on (a) and in particular consider the term "undue influence". First, UNA raised this concern with AHS. AHS response stated,

- AHS does not believe that the policy provisions will amount to undue influence and has consulted with CARNA on this topic. CARNA supports that employers make decisions on vaccination and defers to employers and public health measures. If a nurse needs to be vaccinated to go to work, CARNA supports the employer policies and public health measures to keep patients safe.
- Implied consent is obtained when the client arrives to the office. The nurse then obtains consent to go ahead with the vaccination after doing their due diligence to explain the risks and benefits. Documentation should reflect that the nurse obtained consent and that the client expressed discontent with having the vaccine.

UNA notes that although CARNA has not issued a public statement on mandatory vaccinations, the Canadian Nurses Association (CNA), has called for mandatory vaccinations for health care workers. We note that the decision in Health Employers took note of a CNA position statement when assessing the policy in that case.

The policy or standard will not require nurses to violate professional standards.

Does the Standard or Policy Violate the Nuremberg Code?

While the previous section dealt with the implications of the standard or policy from the perspective of employees who will administer the vaccine to others, UNA has also heard concerns from employees from the perspective of a patient. The most common concern raised is the belief that the vaccine is a form of experimentation and therefore subject to the Nuremberg Code. The Nuremberg Code has 10 principles for ethical, medical treatment and research. The first of those requirements is that a human subject must provide voluntary consent to participate in an experiment. The United Nurses of Alberta accepts that COVID-19 vaccination is not an experimental treatment. All approved vaccines have been approved by Health Canada. As mentioned above, Health Canada has put in place a fast-tracked review process to assess COVID-19 vaccines. They've dedicated more scientific resources to complete these reviews so that they're done quickly without cutting corners. A similar process was used in 2009 to review and authorize the H1N1 pandemic vaccine. This is not experimentation.

The standard or policy does not violate the Nuremberg Code.

Does the Standard Find Support in Occupational Health and Safety Legislation?

Section 3 of Alberta's Occupation Health and Safety Act states,

> Every employer shall ensure, as far as it is reasonably practicable for the employer to do so, (a) the health and safety and welfare of (I) workers engaged in the work of that employer, (ii) those workers not engaged in the work of that employer but present at the worksite at which that work is being carried out, and (iii) other persons at or in the vicinity of the work site who may be affected by hazards originating from the work site.

As already discussed, the scientific evidence demonstrates that the COVID-19 vaccines prevent the spread of COVID-19 and contain COVID-19 outbreaks. Setting aside the benefits to those employees who receive the immunization (fewer hospitalizations and deaths), the science supports that vaccines will help prevent or reduce the risk of infection from one health care worker to another.

From the outset of the pandemic, the United Nurses of Alberta has advocated for the employer to apply the precautionary principle when addressing the health and safety of employees. Unfortunately, AHS chose to ignore this principle as it related to providing N95 masks to staff.

The standard or policy puts in place a reasonably practicable mechanism for the Employer to protect workers and therefore finds support from the OHS Act.

For all of the above reasons, the standard or policy is not unreasonable.

Is the Standard or Policy Clear and Unequivocal?

The policy applies to any person who provides services to or on behalf of Alberta Health Services. It provides clear timelines for employees to comply, explains how to provide proof of immunization records, describes the process to follow to request accommodation, sets forth consequences for non-compliance, and clearly defines what is meant by "fully immunized."

The standard is clear and unequivocal.

Has the Standard or Policy Been Properly Promulgated to Affected Employees Along with Clear Notice of the Potential Consequences for a Breach of the Standard or Policy?

Verna Yiu first announced AHS's intention to implement mandatory vaccination for all health care workers on August 31 2021. Alberta Health Services widely distributed its policy on September 14 2021. The policy is clear that if an employee fails to abide by the requirement the Employer will first provide education to the employee and then place that employee on an unpaid leave of absence until such time as they comply with the policy.

The standard or policy has been properly promulgated to affected employees along with clear notice of the potential consequences for a breach of the standard or policy.

Has the Standard or Policy Been Consistently Enforced by the Company?

The standard did not previously exist. The employer states it will be applied consistently to all workers as defined in the policy. There is no reason to doubt those intentions, but it will be important to monitor how the policy is implemented.

Summary of Conclusions

The United Nurses of Alberta determines that a grievance alleging the employer's Immunization of Workers for COVID-19 policy is unlikely to succeed at this time. The policy has been adopted for a legitimate purpose and the requirements set out in the policy are rationally connected to that purpose. The policy is reasonable having regard to all of the scientific and medical evidence regarding the vaccines and the virus. In addition, the evidence relating to the unique pressures placed on the health care system at this time is compelling. The policy contemplates reasonable accommodation to the point of undue hardship for those with legitimate claims on protected grounds and the Union will address inappropriate denials by the employer as circumstances arise. To the extent the policy conflicts with the Collective Agreement, that conflict will be best addressed having regard to individual circumstances in the context of the risks in the workplace at that time.

Therefore, UNA has decided not to make a grievance at this time.