



Managing Employees in a Post-COVID-19 Environment

September 16, 2021



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OFFICIAL LEGAL SERVICES PARTNER
PARTENAIRE OFFICIEL DE SERVICES JURIDIQUES



Managing Employees in a Post-COVID-19 Environment

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Welcome

We hope you are keeping well and safe.

Fasken is committed to providing legal insight into the new and changing issues which are arising.

Please visit our [**Coronavirus \(COVID-19\) Knowledge Centre**](#) and [**The HR Space**](#) for the latest legal information and updates.

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▼ Agenda

Managing Employees in a Post-COVID-19 Environment

- Where are we now?
- Vaccination Policies
- Vaccination Status and Privacy
- The Duty to Accommodate
- Working from Home

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▼
Where are we
now?



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Current Situation

- 18 months into the pandemic
- Canadian provinces and territories are in various states of pandemic response
- Fourth wave underway

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Current Situation

In the past week in Canada...

New cases



There were 26,881 new cases, an increase of 8 per cent. That's 70.6 cases per 100,000 people.

Active cases



The number of active cases rose 13 per cent.

Deaths



There were 164 deaths, or 0.4 per 100,000 people, an increase of 41 per cent.

Hospitalizations



Hospitalizations rose 29 per cent and ICU beds filled rose 23 per cent.

Note: B.C. does not report COVID-19 data over the weekend. This results in inaccurate data on Saturday, Sunday and into Monday, until the numbers are updated.

Changes in how provinces and territories record and report results can result in sudden jumps in cases.

Source: [Tracking the spread of the coronavirus in Canada \(cbc.ca\)](https://www.cbc.ca/news/health/coronavirus-tracking-spread-canada)

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Current Situation

In the past week in Ontario...

New cases



There were 5,100 new cases, a change of 0 per cent. That's 34.6 cases per 100,000 people.

Active cases



The number of active cases didn't change.

Deaths



There were 54 deaths, or 0.4 per 100,000 people, an increase of 15 per cent.

Hospitalizations



Hospitalizations rose 16 per cent and ICU beds filled rose 3 per cent.

Note: B.C. does not report COVID-19 data over the weekend. This results in inaccurate data on Saturday, Sunday and into Monday, until the numbers are updated.

Changes in how provinces and territories record and report results can result in sudden jumps in cases.

Source: [Tracking the spread of the coronavirus in Canada \(cbc.ca\)](https://www.cbc.ca/news/health/coronavirus-tracking)

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Vaccine Roll-Out

- No legislation or public health rules mandating COVID-19 vaccinations
- Each province/territory is organizing their own vaccine rollout
- Rollouts initially prioritizing higher risk populations
- Now you can get vaccinations essentially on-demand

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Vaccine Roll-Out

Region	Total doses given	Percentage of people given at least one dose	Percentage of people fully vaccinated
Canada	54,324,987	74.43%	68.35%
Alberta	5,656,213	67.17%	60.33%
British Columbia	7,583,999	76.99%	70.18%
Manitoba	1,943,295	72.79%	68.06%
New Brunswick	1,131,475	76.19%	68.48%
Newfoundland and Labrador	795,546	80.83%	72.03%
Nova Scotia	1,469,063	78.05%	71.94%
Ontario	21,183,369	74.58%	68.99%

Source: [Tracking the spread of the coronavirus in Canada \(cbc.ca\)](https://www.cbc.ca/news/health/coronavirus-vaccine-1.54324987)

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Vaccine Roll-Out

Vaccinations by country

Search countries

	Doses administered		Pct. of population	
	▼ Per 100 people	Total	Vaccinated	Fully vaccinated
World	75	5,731,447,047	-	-
U.A.E.	194	18,942,543	91%	80%
Uruguay	171	5,918,663	78%	73%
Qatar	162	4,578,600	83%	78%
Malta	160	805,479	83%	83%
Israel	160	14,461,389	67%	61%
Chile	159	30,204,604	76%	73%
Singapore	158	9,035,988	81%	78%
Mainland China	154	2,148,120,000	78%	69%
Bahrain	154	2,522,055	70%	67%
Portugal	150	15,442,210	86%	80%
Denmark	149	8,688,480	76%	74%
Iceland	148	535,408	78%	74%
Spain	145	68,205,694	79%	74%
Canada	145	54,399,583	75%	69%

Source: [Covid World Vaccination Tracker - The New York Times \(nytimes.com\)](https://www.nytimes.com/interactive/2021/04/27/world/coronavirus-vaccine-tracker.html)

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▼ Workplace Vaccinations

- Mandatory vaccination policies for workplace face practical (and legal) challenges
- When those practical constraints are lessened, voluntary vaccination may meet employer needs
- Context is key and the situation is evolving

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▼ Vaccination Policies



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▼ Key Considerations

- Legislation and Government Announcements
- Prior Case Law

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▼ Current State of Mandatory Vaccination – Government Announcements

- On August 13, 2021, the **Federal government** announced a plan to impose a broad vaccination mandate for employees of the federal public sector and federally regulated employers such as banks, airlines, and rail operators.
- The mandate also extends to certain domestic travellers and will be implemented by the end of October.

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▼ Current State of Mandatory Vaccination – Government Announcements

- As of September 1, 2021, **Quebec** instituted a vaccine passport requiring patrons of bars, restaurants, movie theatres and gyms, among other places, to present a QR-Code as proof of vaccination. Individuals with exemptions have been provided with an alternative QR-code to gain entry into selected sites.
- On September 13, 2021, **British Columbia** also instituted a vaccine passport, notably stricter than Quebec. Those who cannot be vaccinated cannot access spaces where vaccine passports are now required. Some of these spaces include: indoor sporting events, concerts, gyms, dance facilities and studios.

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▼ Current State of Mandatory Vaccination – Government Announcements

- In **Ontario**, as of September 22, 2021, proof of vaccination will be mandatory in select settings. Some of these settings include: indoor dining, sporting events and facilities used for sports and fitness activities.

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▼ Current State of Mandatory Vaccination

Certain sectors may be more likely to benefit from legislative enactments

- *Directive 6* under s. 77.7 of the *Health Protection and Promotion Act*
 - Applies to Hospitals, service providers under the *Home Care and Community Services Act*, LHINs and Ambulances
 - Require vaccination, proof of medical reason for not being fully vaccinated or proof of completing an educational session*
 - If unvaccinated, must have regular antigen tests
- Schools
 - Require rapid tests for staff who are not vaccinated

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▼ Current State of Mandatory Vaccination

- *Ontario Regulation 364/20: Rules for Areas at Step 3 and at the Roadmap Exit Step*
 - Any business that is open shall operate the business in compliance with advice from the MOH regarding implantation of a COVID-19 Vaccination Policy
 - Currently 18 public health units have recommended a policy

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▼ Current State of Mandatory Vaccination – Government Announcements

- Other provinces with variations of vaccine passport laws in place or in the works include: Manitoba, New Brunswick, Nova Scotia and Newfoundland and Labrador.

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▼ Current State of Mandatory Vaccination – Key Employer Announcements

- Mandatory vaccine policies across sectors and industries have also been announced in the past two months with varying obligations for employers and employees.
- Many policies require employees to provide proof of full vaccination (two-doses plus 14 days) of a Health Canada approved vaccine to be in the physical work setting, while accommodating for those who are found to be exempt under provincial human rights legislation.
- Other iterations of mandatory workplace policies include mandatory testing and/or educational classes on the benefits of vaccination for those who are unvaccinated.

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▼ Current State of Mandatory Vaccination – Key Employer Announcements

- Companies and organizations have decided to take a variety of approaches to the implementation of mandatory vaccination policies.
- Some hospitals in Ontario are taking a vaccination or termination approach while others are requiring unvaccinated employees to first take educational classes.
- In the airline industry, both Air Canada and WestJet have noted that employees must be fully vaccinated or risk unpaid leave or termination. For both airlines, vaccination is a condition of employment for new hires.

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▼ Current State of Mandatory Vaccination – Key Employer Announcements

- Universities and colleges across the country are also requiring students to either voluntarily attest to their vaccine status or submit their proof of vaccination through online portals.
- Likewise, many small businesses and performance venues across the country are mandating vaccines for patrons.
- Many sports organizations requiring mandatory vaccination (universities, professional leagues for coaching and team staff, although not for players)

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▼ Travel Restrictions

- Currently some provinces and territories have additional travel restrictions, such as the requirement to quarantine, if you are not vaccinated (Manitoba, Quebec, New Brunswick, Newfoundland, Nova Scotia, Prince Edward Island, Nunavut and Northwest Territories)
- Canada – international travellers and those returning home must have:
 - No signs or symptoms of COVID-19
 - ArriveCAN receipt
 - Quarantine plan in case you do not qualify for the exemption
 - Proof of vaccination
 - Pre-entry test results
- If you are not vaccinated, you will not likely be able to enter Canada, although an NSO can apply for an exemption from the Department of Canadian Heritage
- To travel by rail or air, you will have to be vaccinated

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▼ Case Law

- No cases that examine mandatory COVID vaccination policy yet
- ***Caressant Care Nursing & Retirement Homes v. Christian Labour Association of Canada***, 2020 CanLII 100531 (Randall)
 - Mandatory nasal swab testing upheld
 - “In my view, when one weighs the intrusiveness of the test: a swab up your nose every fourteen days, against the problem to be addressed – preventing the spread of COVID in the Home, the policy is a reasonable one. While the Home had not had an outbreak, I agree entirely with the Employer that, given the seriousness of an outbreak, waiting to act until that happens, is not a reasonable option.”

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▼ In the beginning

- **Mandatory flu vaccination during outbreaks**
 - Cases initially examined policies that required employees to get a flu vaccine or an anti-viral
 - Policies limited to the health care sector
 - Widely found to be enforceable

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▼ What came next

- **Mask or Vaccinate Policies**
 - Cases then examined policies that required employees to get a flu vaccine or an anti-viral or wear a mask for the entire flu season
 - Policies still limited to the health care sector
 - Widely found to be unenforceable (except initial decision from BC)
 - Insufficient scientific evidence to show the efficacy of the vaccine and that using masks reduced the transmission of influenza
 - "In the face of all of this, the "ask" that HCWs wear a mask for their entire shift or possibly months on end when entirely free of symptoms is completely unreasonable and is contrary to the collective agreement." (para 81)

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▼ Now what?

Lumber & Sawmill Workers' Union, Local 2537 v. KVP Co. (1965)
16 LAC 73

1. It is consistent with the collective agreement;
2. It is reasonable;
3. It is clear and unequivocal;
4. It was brought to the attention of the employee(s) affected before the employer attempts to act on it;
5. Where the rule is invoked to justify discharge, the employee was notified that a breach of the rule could result in discharge; and
6. The employer has enforced the rule consistently since its introduction.

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▼ Now what

- Is it reasonable?
 - Are there exemptions/accommodations?
 - Do you deal with a highly vulnerable population or provide an essential service?
 - If so, can the risk be mitigated by requiring that population be immunized?
 - Is there evidence to suggest that masking will not be sufficient to protect against the spread of the virus?
 - Is there an inability to socially distance or have other safety protocols in place?
 - What evidence is there around efficacy, transmission rates when vaccinated, etc.?
 - Are there policies around requiring visitors to be vaccinated?
 - Does it impact all employees or only new hires?
 - What would be the consequences if an employee still refuses to be vaccinated?

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▼ Now What?

- **Constructive Dismissal**
 - A fundamental change to the terms of the employment relationship
 - Can you provide notice to mitigate?

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▼ Now What?

- **Just Cause Termination**
 - Do you need to be vaccinated in order to perform an essential duty of your job?
 - Do you need to travel or attend events?
 - Can you effectively work from home?
 - Is a mandatory policy necessary to ensure that you take all reasonable precautions?
 - Have there been outbreaks despite physical distancing policies being put in place?

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▼ Vaccine Status and Privacy



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▼ Privacy Issues

- Collection of vaccination status
- Use of vaccination status
- Disclosure of vaccination status
- Safeguarding personal medical information

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▼ Private-Sector Privacy Legislation

- Federal: Personal Information Protection and Electronic Documents Act (“PIPEDA”)
- British Columbia: *Personal Information Protection Act* (“PIPA”)
- Alberta: *Personal Information Protection Act* (“PIPA”)
- Quebec: *Act respecting the protection of personal information in the private sector*

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▼ Collection and Use of Vaccination Status

- Can likely request vaccination status, but:
 - Needs to be for reasonable purposes; and
 - Needs to be reasonable in the context.

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▼ Disclosing and Safeguarding Vaccination Status

- Disclose only on a need-to-know basis.
- Store in a secure file with restricted access.
- Retain until the end of employment or the purposes of collection are no longer served, whichever is earlier.
- Protect the anonymity of employees who have not been vaccinated.

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▼ Vaccination Information Policy

- Provide notice of the purposes of collection, use, and disclosure; how it will be used; how it will be disclosed; how it will be securely and safely stored; and for how long.
- Seek express written consent.

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Reasonable Accommodation

Human Rights Considerations



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Legislation

- Human Rights Legislation:
 - *Canadian Human Rights Act*
 - *Ontario Human Rights Code*
 - *Quebec Charter of Human Rights and Freedoms (Charte des droits et libertés de la personne)*
 - *BC Human Rights Code*
 - Other provinces' human rights legislation
- Grounds: disability, religion/creed, family status

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▼ Accommodation: Purpose, Goal and Limits

- Accommodation is a shared responsibility for both the person seeking accommodation and the employer
- Employees not entitled to perfect accommodation
- Not required to “alter the essence of the contract of employment, that is, the employee’s duty to perform work in exchange for remuneration”

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▼ Undue Hardship

- Occurs when accommodation creates onerous conditions for the employer
- Requires assessment on case-by-case basis
- BC Human Rights Commissioner: point of undue hardship is fact dependent, though it is often reached when accommodation would be inordinately expensive or creates health and safety risks for others

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▼ Accommodation and Vaccines

- Reasonable accommodation may be required with:
 - Mandatory vaccination requirements
 - Vaccination incentives
 - Returning to the workplace
- Examples of accommodation:
 - COVID-19 safety measures: PPE, physical distancing, masks, testing
 - Reassignment/redeployment
 - Working remotely
 - Leaves of absence

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▼ Supporting Evidence of Protected Ground

- Depending on the circumstances, reasonable evidence for accommodation may include:
 - Disability: medical documentation (e.g. doctor's note)
 - Religion/creed: letter from religious elder, written declaration
 - Family Status: nature of childcare obligations and availability of childcare support

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▼ Disability Accommodation

- An employer is NOT entitled to diagnostic information.
- Employers may generally request:
 - Details of any functional limitation(s)
 - Assessment of how any limitation(s) will impact on the employee's job duties
 - Projected duration of limitations
 - Timeline for further assessment
 - Referral to specialist
 - Prognosis for recovery, with or without limitations

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▼ Religious Accommodation

- Includes practices, beliefs and observances that are part of a religion or faith
- What must be accommodated:
 - An employee's personal or subjective understanding of his or her religion or creed
 - Employee must demonstrate a sincere or honest belief or practice
- Does not include lack of belief in the science of vaccines and their safety or efficacy

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▼ Family Status Accommodation

- Differs from province to province
 - In BC, an employee must demonstrate a “serious interference with a substantial parental or other family duty or obligation of the employee”
- May arise in context of returning to work
- Employee childcare obligations or employee resides with at-risk family members
- Employers not obligated to accommodate personal preference or conflicting schedules

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▼ Checklist for Employers

1. Identify need for accommodation
2. Collect relevant information
3. Examine accommodation options
4. Implement accommodation and follow up

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Returning to the Workplace



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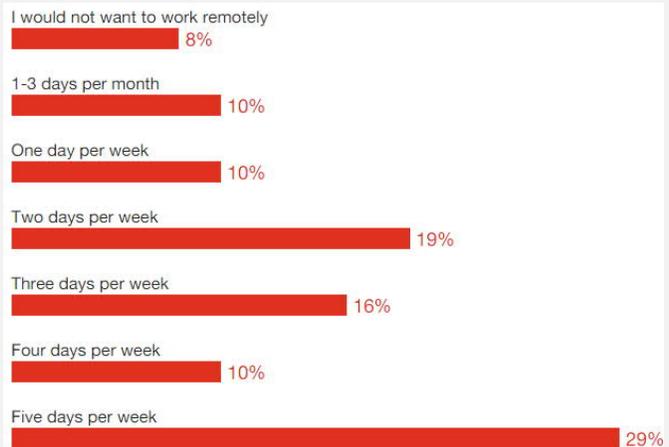
Pre-Pandemic

- One year ago, only a fraction of the Canadian workforce worked from home or remotely
- Typical:
 - 100% work from office arrangements
 - Some integration of work from home, hoteling, etc.
 - Accommodation of disabilities
 - Many workplaces: we cannot accommodate work from home

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What Employees Want – A work schedule that allows them to work from home

- ADP Study (September 2020)
 - 45% of Canadians would prefer to work remotely 3/5 days per week
 - 25% prefer flexible work hours
- RBC (December 2020):
 - 63% of Canadians want at least 50-50 in office/remote work
- PwC (January 2021):
 - 55% of US workers would prefer to work remotely at least three days per week.



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The “New Normal”

- Work from home was employer’s discretion, and now is legally required in some cases during the pandemic
 - Many jurisdictions in Canada are mandating or encouraging remote work unless attendance is required by the nature of the work
- Old position “we cannot accommodate work from home” may no longer be a practical answer in future
- Pandemic has shown remote work is possible and can be highly productive

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▼ Flexible Work Arrangements

- Location Flexibility
 - Continuation of Remote Work
 - Hybrid Model: Remote Work and Office Work
 - “Hoteling”
- Schedule Flexibility
 - “Flextime”
 - Compressed Work Week
 - Job-Sharing

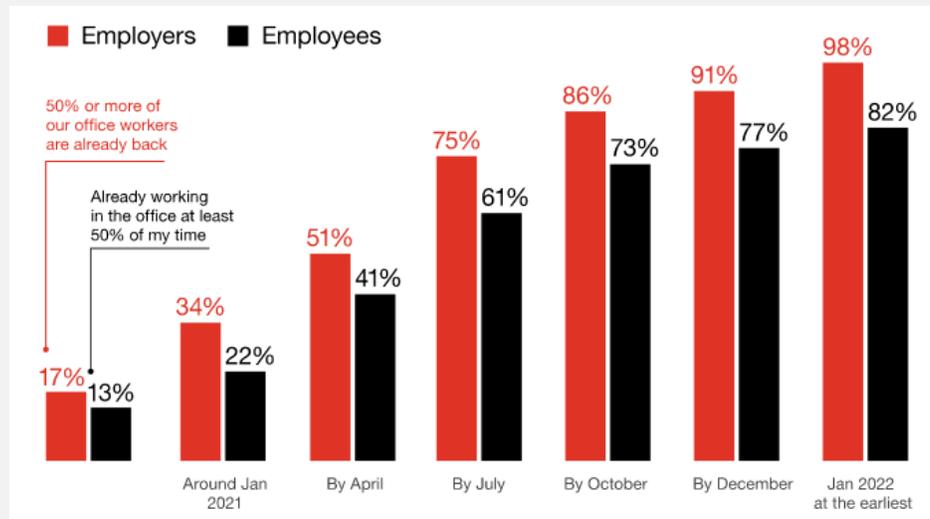
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▼ Flexible Work Arrangements

- Hybrid Model
 - Once workplaces have reopened, organizations who have to-date worked remotely, may choose to employ a hybrid return to work model, whereby employees alternate the days when they work at the office or remotely.
 - There is no consensus on the optimal balance of work days at home versus work days in the office.

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What Employees Want - A slow return to the office



PwC, Remote Work Survey

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The Workplace

- Recall: Employers have general duties under health and safety legislation to take every precaution reasonable in the circumstances for the protection of workers at the workplace
- In some jurisdictions, the “workplace” can include a worker’s home (e.g. in British Columbia), while in others it does not (Ontario).

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▼ What Employees Want – Compassion



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▼ Second Checklist for Employers

1. Make a point of checking in often
2. Improve access to resources
3. Encourage virtual bonding (or, socially-distant bonding where safe!)
4. Celebrate milestones and accomplishments
5. Encourage employees to use assistance programs

Morneau Shepell

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▼ Discrimination and Harassment

- Reports of racism and discrimination towards Asian-Canadian population have sparked since the beginning of the COVID-19 pandemic
- Employees who have had and/or are perceived to have had COVID-19 may also experience discriminatory treatment
- From both an employee morale perspective and health and safety perspective, it is imperative employers protect these employees from discrimination and harassment, whether online or at work

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▼
Q&A

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Biographies



Areas of Expertise

Labour, Employment & Human Rights | Labour Relations and Collective Bargaining | Employment Advice and Litigation | Labour Mergers and Acquisitions | Human Rights | Canada

Education

2014, LLM, Labour and Employment Law, Osgoode Hall Law School at York University

2003, LLB, Queen's University

1998, BEd, Western University

1997, BA (Honours), Western University

Jurisdiction

Ontario, 2004

Language

English

Erin Porter's practice is focused on advising and representing employers in labour, employment and human rights matters. With considerable experience in the health care sector, Erin offers strategic and practical advice to her clients.

Erin returned to Fasken after spending more than 11 years as in-house counsel for one of Canada's largest retirement and long term care home providers. In her position as Vice President, Legal, she was responsible for providing advice on acquisitions and dispositions, accommodation, employment contracts, terminations and various other workplace matters.

Erin frequently appears before arbitrators, the Ontario Labour Relations Board, and the Human Rights Tribunal of Ontario. Although she is a passionate advocate, Erin also knows the benefit of pursuing a settlement under the right terms and conditions.

In addition to her appearance work, Erin also has experience negotiating and interpreting collective agreements, drafting employment policies and conducting workplace investigations. A former teacher, Erin loves to present

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and has been a speaker at professional and client-based seminars on topics such as the duty to accommodate, preparing for arbitration, workplace investigations, code of conduct and last chance agreements.





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Areas of Expertise

Labour Relations and Collective Bargaining | Labour, Employment & Human Rights | Employment Advice and Litigation | Labour Mergers and Acquisitions | Occupational Health and Safety and Workers Compensation | White Collar Defence and Investigations | Human Rights | Executive Compensation and Incentive Plans | Occupational Health and Safety (OHS) Prevention Services | ESG and Sustainability | Federal Sector

Education

2008, JD, Queen's University

B. Mgmt., 2004, University of Lethbridge

Jurisdiction

Ontario, 2009

Language

English

Shane D. Todd advises employers on workplace issues and represents them in legal proceedings. Shane was recognized as a “Rising Star: Leading Lawyer under 40” by Lexpert in 2019, and is also recognized by the Canadian Legal Lexpert Directory in the category of Workplace Human Rights.

Shane worked as a human resources professional before becoming a lawyer. He knows how workplace issues or changes can impact an organization. With this in mind, Shane works to find the most efficient way to resolve issues, or to support employers through major initiatives, including reductions in force, sale and acquisition of businesses, and policy changes among other things. He also regularly represents employers and supervisors in regulatory prosecutions, investigations, inquests, and appeals related to workplace safety.

Shane is a frequent writer on workplace law developments. He is the Editor-in-Chief of the HR Space - the firm's weekly e-bulletin on labour, employment and human rights issues. He is also routinely asked to speak as an expert on workplace issues in the media, including in the Financial Post, the Globe and Mail, on CBC News and on 680 NEWS radio.

Shane is an active member of the Firm. He is a member of the Firm's Professional Development Committee and Chair of the Fasken Pride Network, - the hub of our firm's LGBTQ2+ initiatives. The Network does community outreach and fundraising for organizations like Rainbow Railway, Covenant House, Casey House, and the 519 Church Street Community Centre. The Network also provides mentoring and support to Fasken staff, students and lawyers.

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Shane also previously served as a Board Member and Vice-Chair of VOICE for Deaf and Hard of Hearing Children. VOICE supports deaf and hard of hearing children and their families by providing access to information, education, mentoring, and self-advocacy skills training.





Areas of Expertise

Labour Relations and Collective Bargaining | Workplace Equity | Labour, Employment & Human Rights | Employment Advice and Litigation | Occupational Health and Safety and Workers Compensation | Human Rights | Pensions and Benefits

Education

2012, LLB, Laval University

Jurisdiction

Quebec, 2013

Languages

French | English

Valérie Gareau-Dalpe is a member of the Labour and Employment Group in the firm's Montréal office. Passionate and experienced in all aspects of employment relations, Valérie deals more specifically with issues relating to the negotiation and interpretation of collective agreements, grievance arbitration cases, labour relations, labour standards, and health and safety.

Valérie has extensive experience in employment-related litigation, including judicial reviews and appeal proceedings. She regularly intervenes with her clients from various sectors, providing them with strategic input in complex situations involving human resources. She is also frequently invited to offer customized training in the workplace.

Valérie graduated from Laval University's Faculty of Law, where she is on the Honour Roll. With philanthropy at heart, she has been involved for several years with the Young Governors of *Les Grands Ballets Canadiens de Montréal*. She has held the position of co-president since the summer of 2019.





Area of Expertise

Labour, Employment & Human Rights

Education

2011, JD, Bond University, Australia

2007, BA, University of Victoria

Jurisdictions

Alberta, 2013 | British Columbia, 2012

Language

English

Alexandra MacCarthy is a labour, employment and human rights lawyer in Vancouver, providing employers with effective solutions to workplace issues in both union and non-union environments.

With an extensive background in litigation, Alexandra represents clients before the BC Provincial Court, the BC Supreme Court and in labour arbitrations. She has also worked on matters involving the BC Human Rights Tribunal, and Employment Standards Branch.

Frequently advising employers on a wide range of labour, employment and human rights, Alexandra has expertise in termination of employment, including wrongful dismissal, constructive dismissal and for-cause terminations, constructive dismissal claims, and compliance with employment standards legislation, including payment of wages, hours of work and overtime, annual vacation.

In addition, she provides advice to companies with union operations on labour disputes including strikes and picketing, collective agreement interpretation issues, and arbitration hearings. In her human rights practice Alexandra counsels clients on compliance with human rights matters including discrimination issues, accommodation, and responding to human rights complaints.

Prior to joining the firm, Alexandra was an Associate at regional law firms in Victoria and Calgary.





Areas of Expertise

Labour, Employment & Human Rights | Canada

Education

2018, JD, with recognized specializations in public law and dispute resolution/professionalism, Cum Laude, University of Ottawa

2018, B. Soc. Sc., (Honours) Cum Laude, University of Ottawa

Jurisdiction

Ontario, 2019

Languages

English | French

Vincent Rocheleau provides advice on labour and employment issues and the labour and employment aspects of corporate transactions to national and international employers. He also provides representation in labour and employment related disputes which includes responding to class actions and government inquiries. Vincent practices law in French and in English.

Vincent has supported counsel at all levels of Court, including the Supreme Court of Canada. Vincent is well versed in classification matters. He supported counsel in the matter of *Thurston v Ontario*, 2019 ONCA 640, one of the key appellate court decisions on the issue.

Vincent gives his time, energy, and insights to issues he is passionate about, including addressing official languages concerns and promoting French culture. He is the current President of the Franco-Fete de Toronto and a member of the Official Languages Committee of the Ontario Bar Association.

Vincent joined Fasken after working at a top tier regional firm in Toronto and articling with the Ministry of the Attorney General's Crown Law Office – Civil, the central civil litigation and advisory office for the Government of Ontario.



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