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MEMORANDUM

To: Jia Hu

From: Erin Porter

Date: May 9, 2021

Client/File: 19 to Zero Inc.
326456.00001

Re: Frequently Asked Questions – COVID-19 Vaccination Incentive Policy

You have asked us to provide you with answers to various *frequently asked questions* from employers about COVID-19 vaccination incentive policies. We have provided a response to these questions based on the current state of the law. Given the unprecedented nature of COVID-19, the law, particularly as it pertains to the employment situation, is rapidly evolving.

The answers below offer a general application of the law. Employers should always reach out to legal counsel about the specific factors that apply to them as this may change our response and the advice given.

We have tried to provide a response to your questions that would be applicable across Canada; however, given that employment, health care and privacy are provincially regulated, answers in each province may vary. We have specifically reviewed the answers to these questions with lawyers in our regional offices in British Columbia, Alberta, Ontario and Quebec. If you are seeking information about another province, please let us know and we can put you in touch with counsel from that jurisdiction.

1. Is it permissible for an employer in Canada to establish a vaccination incentive program against COVID-19?

In general, the case law¹ provides that it is acceptable for an employer to promote the vaccination of employees, including by providing incentives and carrying out awareness campaigns for its employees. The typical reasoning is that vaccination is generally viewed as an acceptable means of reducing the risk of contagion in the workplace; thus, the employer is considered justified in supporting vaccination given its obligation to ensure the health and safety of workers and others in the workplace.

¹ *Trillium Ridge Retirement Home v. S.E.I.U., Local 183*, 1998 CarswellOnt 7647; *Carewest v. A.U.P.E.*, 2001 CarswellAlta 1851; *Chinook Health Region v. U.N.A., Local 120*, 2002 Carswel.lAlta 1847.

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As stated below, it is important to note that there are some considerations when developing a vaccination incentive program. Furthermore, some provinces have now introduced legislation that requires that employees be provided with a paid leave of absence so that they may be vaccinated. Provincial rules and regulations must be considered when developing a vaccination incentive program.

2. If an employer introduces a vaccination incentive program, could it be liable for potentially adverse side effect related to vaccination?

It is important to address potential liability from adverse side effects related to vaccination. Each province has a workers' compensation system that provides access to income replacement and other benefits for eligible workers who are injured or become ill in the course of employment. It is possible that a worker who accepts to be vaccinated against COVID-19 as part of the employer's vaccination incentive program will be considered to have been vaccinated in the course of employment. Accordingly, if the worker develops an injury as a result of the administration of the vaccine, he or she may be entitled to receive benefits under applicable workers' compensation law. Although the risk of such a claim succeeding may be low given the indirect connection between the vaccination and the course of employment, employers should nevertheless be aware of the possibility that an employee may bring a claim. With only a few limited exceptions, these workers cannot sue their employer for workplace injuries or illness. This may preclude a lawsuit against the employer by covered workers for negative side effects caused by the vaccine.

This being said, in cases where a lawsuit against the employer was not barred by workers' compensation legislation, it is unlikely that the employer would be held liable for adverse side effects resulting from a vaccination incentive program, as the vaccination would be administered by a third party healthcare professional and the employer would be relying on the assessment of Health Canada regarding the general safety of approved vaccines.

3. Is a vaccine incentive program discriminatory?

Employers should consider allowing employees who are not vaccinated for legitimate reasons protected by the applicable human rights legislation (e.g. disability or creed/religion), and who provide reasonable evidence of this reason, to also receive these incentives on the same terms. Otherwise, the incentive program may be found to be discriminatory. In deciding whether to grant an exception, the employer should limit its request for information to only what is reasonably required to establish that there is a protected ground under human rights legislation. In a medical exemption, for example, this may be written confirmation from a qualified health practitioner that there is a disability, as defined in human rights legislation, that prevents the employee from being vaccinated. The employer is generally not entitled to more specific diagnosis information.

Additional Guidance from Quebec

In Quebec, the right to refuse to be vaccinated is protected under the provisions of the *Quebec Charter of Human Rights and Freedom*, which affirms an individual's fundamental right to bodily integrity and inviolability. This right is complemented by the provisions of the *Civil Code of Quebec* which stipulated that no one may be made to undergo care of any nature, except upon their consent. In our view, this does not prevent an employer from encouraging its employees to get

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vaccinated. Case law in Quebec recognizes that an employer may promote vaccination and conduct an awareness campaign in the workplace. In the circumstances of the COVID-19 pandemic, immunization is a rather clear way to reduce the risk of contagion in the workplace. An employer would therefore likely be justified in incentivizing vaccination, in view of protecting the health and safety of workers.

With respect to the information that may be required by the employer of an employee who claims that he or she cannot receive the vaccination due to religious beliefs, case law provides that it may be enough for a claimant to demonstrate that the religious precept is real and at the heart of his or her religion, and that his or her beliefs are sincerely held. This is confirmed by the *Amselem*² decision of the Supreme Court of Canada, in which the Court stated that “*freedom of religion is triggered when a claimant demonstrates that he or she sincerely believes in a practice or belief that has a nexus with religion*” and that “*as such, a claimant need not show some sort of objective religious obligation, requirement or precept to invoke freedom of religion. It is the religious or spiritual essence of an action, not any mandatory or perceived-as-mandatory nature of its observance, that attracts protection.*” On this basis, the applicant’s sincerity may be able to be assessed through a simple observation without anything further being required to evidence the religious belief.

4. Can the employer require proof of vaccination in order to determine which employees will receive the incentive? How would the employer collect this information?

Employers can require proof of vaccination in order to determine eligibility for a vaccination incentive, subject to the comments below. These comments are provided on a preliminary basis based on existing case law and the public health and regulatory guidance currently available; however, we recommend revisiting this question when new public health and regulatory guidance becomes available or when COVID-19 vaccination becomes more prevalent in the general population.

Ontario:

In Ontario, provincially-regulated employers are not currently subject to any privacy legislation in relation to employee privacy, aside from narrow protections in the *Occupational Health and Safety Act*. Under that legislation, an employer requires a worker’s written consent to access their health record. While “health record” is not defined, proof of vaccination could be considered a health record. To ensure compliance with this requirement, employers should consider obtaining an employee’s signed acknowledgment that they consent to allowing the employer to review their certificate of vaccination.

Despite this being the only applicable statutory privacy protection in Ontario, employers should generally limit the collection, use, and disclosure of personal information of employees to what is reasonably necessary for employment purposes and take appropriate steps to safeguard personal information. For proof of vaccination, the employer should not keep or make copies of the employee’s certificate of vaccine, and should limit the information it records to essential information only, which may include the following:

² *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, 2004 SCC 47.

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- the identity of the employee;
- the name of the vaccine received; and
- the date that each dose of the vaccine was received.

This information should be kept secure and separate from the employee's regular personnel file and should only be accessible on a confidential need-to-know basis. In terms of the method of collection, if the most practical approach to obtaining the information is for employees to send a scan or screenshot of their vaccine certificate by email, only designated employees should be accessing the emails, and the emails should be deleted once the essential information has been recorded. Collection may also be done in person with the same principles applying.

Quebec, British Columbia, and Alberta:

The recommendations mentioned above with respect to Ontario apply equally in Quebec, British Columbia, and Alberta, although it should be noted that there are additional legal requirements that apply in Quebec, British Columbia, and Alberta due to privacy laws. Under Quebec's privacy laws, employers are required to obtain express consent from employees in order to collect personal information. Under British Columbia's and Alberta's privacy laws, employers are permitted to collect, use, and disclose employee personal information without consent when the collection, use, and disclosure is reasonable for the purposes of establishing, managing, or terminating the employment relationship and notice of the collection, use, and disclosure and the purposes of same is provided to the employee.

However, given the sensitive nature of vaccination information, it is recommended in all three provinces that written consent be obtained to ensure compliance. This means that employers have the obligation to inform employees of the following elements in order to obtain valid consent:

- The purposes of the collection of personal information;
- The use which will be made of the collected information and the categories of persons who will have access to it within the enterprise;
- The place where the information will be kept (including whether the information will be stored by a service provider outside Canada);
- Their rights of access and rectification; and
- The name, title, and contact information for an officer or employee of the organization who can answer questions about the collection of personal information.

Employers are also required to take appropriate safeguards to protect this personal information (particularly regarding the sensitivity of the personal health information collected). This includes physical measures (e.g., locked filing cabinets and restricted access to offices), organizational measures (e.g., security clearances and limiting access on a "need-to-know" basis) and technological measures (e.g., the use of passwords and encryption) in order to ensure the protection

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of any personal information collected. Employers are required to minimize the amount of personal information they collect, use, disclose and retain to the only extent necessary to accomplish the identified purpose of the collection (particularly regarding personal health information). For example, seeing a copy of a vaccination certificate and recording essential information could suffice for the employer's purposes, rather than keeping a copy.

5. Are there privacy law considerations with a vaccination incentive program?

Vaccination status necessarily involves the personal medical information of employees. Privacy obligations and best practices should be considered when establishing a voluntary vaccination incentive policy. There appears to be three types of personal information that may potentially be collected as a result of this policy: (1) the fact that an employee will be getting vaccinated; (2) an employee's status of vaccination; and (3) an employee's reasons regarding why they cannot or will not get the vaccine³ (collectively, the "**Incentive Information**").

Although the British Columbia and Alberta *Personal Information Protection Acts* ("**PIPA**") do allow for the collection, use, and disclosure of employees' personal information without consent where certain conditions are met, we recommend seeking employees' consent to the collection, use, and disclosure of the Incentive Information, given the nature of the Incentive Information and how it will be used. Even where consent is obtained, the collection, use, and disclosure of the Incentive Information must still be reasonable.

If the only purpose of collecting, using, and disclosing the Incentive Information is to determine eligibility to receive the incentive, then the collection, use, and disclosure is likely reasonable. There is unlikely to be a less privacy intrusive way to determine eligibility and collecting the Incentive Information is necessary to determine eligibility. However, the amount and the sensitivity of the personal information should be considered as well. For example, will it be sufficient for an employee to inform an employer that they have a medical condition which prevents them from getting the vaccine, or will they have to provide a doctor's note which discloses that they have a medical condition which prevents them from getting the vaccine? The employer may violate applicable privacy laws if it collects personal information that is not reasonably necessary to determine eligibility to receive the incentive.

To mitigate the risk of over-collecting personal information, we recommend visually inspecting proof of vaccination (which does not necessarily have to be a vaccination certificate – for example, an employer may decide that visually inspecting a booking confirmation for an appointment to receive the COVID-19 vaccine would suffice) or proof of a protected ground under human rights legislation, and retaining the minimum amount of information necessary to administer the incentive program (for example, a "yes" or "no" response to whether the employee will receive the incentive). Once the incentive program has ended, then continued retention of the information may no longer be necessary, in which case the information should be destroyed.

It is unlikely that an employer would be subject to Ontario's *Personal Health Information Protection Act* ("**PHIPA**") in respect of this activity as it would not fall within the definition of a

³ Being understood that reasons regarding why an employee cannot or will not get the vaccine is personal information that must only be collected from employees when it is determined as necessary to justify eligibility to the incentive for non-discrimination purpose.

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health information custodian under *PHIPA*. Employers should only receive information directly from employees, and not from a health information custodian (such as a physician). It should further ensure it does not receive an employee's health card number in any information it collects, such as any proof of vaccination, otherwise this information would fall within the scope of *PHIPA*.

In Quebec, the right to privacy is governed primarily by the provisions of the *Act respecting the protection of personal information in the private sector*, CQLR c P-39.1 (the "Private Sector Act"), section 5 of the Quebec Charter and article 35 of the *Civil Code of Quebec*. As a basic principle, an employer cannot require employees to disclose information that is protected by their right to privacy, such as medical information, which would include an employee's vaccination status or proof of vaccination. In order to justify seeking the disclosure of such information, an employer would be required to have a "serious and legitimate reason" to collect the information, the information collected must be necessary for the employer's stated purpose, and the employee must give "manifest, free, and enlightened" consent, which must be given for specific purposes (sections 5, 6 and 14, Private Sector Act). In the current context of the COVID-19 pandemic, an employer could most likely justify requiring the disclosure of an employee's vaccination status and/or proof of vaccination, on the basis of its overriding interest in and legal obligation to protect the health and safety of its employees. This obligation is provided for under Quebec occupational health and safety legislation as well as under section 217.1 of the *Criminal Code*. Pursuant to this legislation, employers must take all reasonable precautions to protect its employees from a COVID-19 outbreak, which could include reorganizing the workplace, work schedules and other means to reduce the risk of transmission of the disease. An employer's knowledge of the vaccination status of its employees and, by inference, their vulnerability and risk of infection, may be a determinative factor in implementing these workplace arrangements. To strengthen the employer's position, it is advisable that the employer only seek the disclosure of this information from employees working in a Quebec establishment where COVID-19 is strongly present in the region or zone where that particular establishment is located.

In all jurisdictions, we would recommend that a policy should be developed to provide notice to employees regarding how and for what purpose(s) the Incentive Information will be collected, used, and disclosed, who will have access to the information collected, the employees' right of access and rectification in accordance with privacy laws, and the implication for employees if an employee does not provide their status of immunization or the proof of vaccination (for example: requirement to require mask in the workplace, social distancing, etc.). The policy should also describe how the Incentive Information will be securely and safely stored, and for how long. The policy should be communicated to all employees. Consent language should be included at the end of the policy for employees to sign that sets out the information described herein. It is important for all applicable purposes to be included in the policy. For example, if the employer states in the policy that the Incentive Information will only be used to determine eligibility to receive the incentive, it cannot then use employees' proof of vaccination information to modify employees' schedules, as an example. Notice of any new purposes needs to be provided to the employees in advance, and depending on what those new purposes are, consent may also be required. In the absence of a robust policy, a Privacy Commissioner might find that even though the Incentive Information was collected and used in a reasonable manner, the lack of proper notification or proper consent, as the case may be, resulted in non-compliance with *PIPA* or Quebec privacy laws.

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Employers will also need to implement safeguards to keep the collected Incentive Information secure. There may be a violation of privacy laws where an employee's vaccination status is directly or indirectly disclosed to other employees. Therefore, the Incentive Information should only be shared on a need to know and need to access basis, and care should be taken to maintain the confidentiality of employees' vaccination status. In particular, the identity of employees who have not been vaccinated should remain anonymous to prevent potential harassment or discrimination.

6. Can employers ask employees about their reasons for not obtaining the COVID-19 vaccine through an anonymous survey?

Privacy laws do not apply to anonymous information. As long as the comments cannot be attributed to an employee, then there should be no privacy concerns in collecting information about why employees have decided not to be vaccinated. Employers must take steps to ensure that the information that is collected cannot be attributed to an employee and that it is stored in a secure and safe manner.

Please see the points raised in the prior question for general privacy considerations when collecting Incentive Information.