

## MEMORANDUM

FROM: JULIANA SNELLING, DIRECTOR AND GAMBRILL ROBINSON, ASSOCIATE ATTORNEY  
TO: ROYAL GAZETTE  
DATED: SEPTEMBER 26, 2021  
RE: MANDATORY COVID-19 TESTING FOR EMPLOYEES

Canterbury Law agrees with the Bermuda Employers' Council that mandatory Covid-19 testing in the workplace is lawful in circumstances where the employer's duty of care to provide a safe workplace reasonably justifies such a measure.

The extent of measures that may lawfully be taken by employers to maintain workplace safety in the face of Covid-19 is obviously a fast-moving target, as the information has been constantly evolving, and Bermuda is currently in the midst of its fourth, and to date most widespread, outbreak. It is frightening that the U.S. Centre for Disease Control has this week has warned travelers not to visit Bermuda after our rating moved to Level 4 – “very high” risk – on the CDC's travel advisory list.

With over 1,500 active cases and 1/6<sup>th</sup> (over 10,000) of the Island's residents in quarantine last week and therefore not able to physically attend at work, it is no wonder that employers are looking to impose more protective measures for their workplaces, especially with Government's repeated warning that *“your workplace is not your bubble.”* On their part, employees are also no doubt wanting more protective measures to protect themselves from catching the virus from colleagues. No one wants another lockdown, so alternative Covid-19 protective measures are necessary to get the Island's health in check and the economy going again.

On its website, the Bermuda Government ([gov.bm](http://gov.bm)) recommends that employers have safety measures in place in the workplace, including a procedure to screen (question) employees returning to work for Covid-19 symptoms and a procedure to monitor employees should they develop symptoms of Covid-19 at work (the website has a screening sample template of questions to ask).

The Government has also recommended that employers carry out an Occupational Risk Assessment of the workplace. Occupational risk ratings vary from very high to lower risk according to Government. Where a workplace falls in the risk spectrum will depend on several factors, including:

- industry type and job responsibilities;
- the need for close contact (i.e., within a 6 foot distance) with persons who are known or suspected to be infected with COVID-19;
- the need for close contact with the general public;
- the need for repeated or extended contact with the general public; and
- employee susceptibility to infectious diseases.

For normal office environments that fall within Government's category of "lower risk" workplace (where there is minimal occupational contact as between employees and the general public), the Government recommends:

- ventilation in the office be maximized;
- where possible, buffer zones are created around workspaces to maximize social distancing;
- meetings are small or virtual; and
- hand sanitation stations are placed throughout the office.

In addition to such measures, Canterbury Law recommends that employers take reasonable steps during this outbreak to ensure that:

- employees who are able to work from home do so (consider rotating the staff to help keep numbers down);
- the workplace is regularly cleaned / sanitized;
- social distancing is maintained;
- masks are worn in common areas and when dealing with any visitors;
- temperatures are taken of employees entering the workplace and hand sanitation stations made available at the point of entry, as well as required handwashing once the employee has reached their floor;
- notices are put up near sinks mandating thorough washing of hands;
- employees being strongly encouraged to consult with their doctors about the benefits of taking the vaccine;
- visitors must wear a mask and fill out a Covid-19 screening form and be made to sanitize their hands on entry (if entry is a necessity – attending to them outside the office entry door is preferable);
- reputable scientific information about the benefits of taking the vaccine is shared with employees; and
- clear workplace policies are in place regarding Covid-19 protocols that are made known to employees and updated on a regular basis, including but not limited to policies regarding a mandatory quarantine period if employees have symptoms of the virus, or have been in close contact with someone exposed, or if an employee have recently travelled.

The Bermuda Government has not issued any formal protocols regarding Covid-19 testing for employees in the workplace save that all persons (and thus all employees) must have negative tests after travel abroad, after close contact with a person infected with coronavirus, and/or after having themselves contracted the virus. It is likely that employers already have policies in place in line with these Government requirements, or more conservative ones such as ours at Canterbury Law, where even immunized employees may not return to work after travel until after their Day 4 negative results have been submitted. Companies may lawfully require their employees to submit the results of these tests to a designated person before employees are allowed to return to the workplace

It is not much of a leap, given the current wide community spread in Bermuda, for employers to want to require employees to undergo mandatory Covid testing on a regular basis to help keep the workplace safe.

The Golden Rule for employers when it comes to the whole issue of Covid-19 is to act reasonably, taking objectively reasonable justifiable measures. Employers should consider whether the implementation of mandatory Covid testing for employees on a routine basis is reasonable for their workplace, taking into consideration all the relevant circumstances including the prevalence of the virus, whether other safety protocols in their workplace are able to control the risk of transmission in the workplace, such as masking, sanitizing, social distancing, ventilation, screening, etc. Important considerations will include the nature of the workplace and the population demographics of the workplace and its clients. For many types of workplaces, requiring workers to get regularly tested may be a very reasonable precaution to take to protect workers (e.g., elderly care homes, health care settings, public transport settings, retail stores, hotels, bars and restaurants, retail stores, etc.).

In others, the justification for regular Covid testing for staff will be more difficult. In a well ventilated office where a relatively small number of employees are able to remain socially distanced, do not generally share any communal workspaces, and are able to sanitize regularly, it may be considered unreasonable to require that employees undergo regular mandatory Covid testing as a condition of continued employment. (Note that mandatory testing regimes will always be easier to implement for incoming, new employees as opposed to for existing employees).

In Canada, where the government is requiring vaccinations for all federal public servants (the government being the biggest employer in the nation), many private sector employers are now mandating, or considering mandating, that employees get COVID-19 testing, either once, or at regular intervals, in order to enter the workplace. In both Canada and Bermuda, it is critical to consider whether the intrusiveness of the COVID-19 test is reasonable when weighed against the objective of the policy requiring such a test. Covid PCR tests are a medical procedure and privacy rights claims could hold up in certain circumstances.

In Ontario (whose human rights statute is largely the foundation for our own Human Rights Act 1981), many organizations with a proven need for COVID-related health and safety requirements are putting into place mandatory Covid testing for employees as an alternative to mandatory vaccinations, or as an option for accommodating people who are unable to receive a vaccine for medical or genuine religious reasons. Of note, the position of the Ontario Human Rights Commission's position (like the EEOC in the United States, see below) is that a person who chooses not to be vaccinated based on mere personal preference does not have the right to insist, from a human rights perspective, on alternative accommodations in the particular workplace concerned.

The issue of whether an employer can legally introduce a mandatory COVID-19 testing policy has been considered in at least three Ontario arbitration decisions. In all 3 cases, the labour arbitrator upheld the

policy as a reasonable measure to protect the health and safety of employees from the risks posed by COVID-19 in the workplace.

In [\*Caressant Care Nursing & Retirement Homes v Christian Labour Association of Canada\*, \(2020 CanLII 100531 \(ON LA\)\)](#), the union filed a grievance challenging the reasonableness of a policy requiring all workers in a nursing and retirement home to be tested for COVID-19 every two weeks. The labour arbitrator held that the employer's policy requiring compulsory testing was reasonable in the context of the vulnerability of the population in the home, the seriousness of a potential outbreak, and the public health and ministry guidelines. Of note is that the policy also included accommodations and alternatives to testing. The employer's decision to discipline an employee for failure to comply was upheld by the arbitrator.

Similarly, the arbitrator in [\*EllisDon Construction Ltd. v. Labourers' International Union of North America, Local 183\* \(2021 CanLII 50159\)](#) found that the employer's policy of requiring workers at many of its construction and building worksites to undergo a Rapid COVID-19 Antigen Screening test twice weekly in order to access the workplace was reasonable when weighed against the objective of preventing the spread of COVID-19. Factors such as the prevalence of the virus at the time the policy was implemented, and possibility of social distancing given the nature of the industry were considered by the arbitrator.

In [\*Unilever Canada Inc. v United Food and Commercial Workers, Local 175 \(Bloch\)\* \("Unilever Canada"\)](#) the arbitrator upheld a mandatory COVID-19 testing policy requiring all staff at a food processing plant to be tested for COVID-19 once per week by nasal swab. Employees who refused the test were to be placed on a non-disciplinary unpaid leave of absence until testing was completed. The arbitrator weighed the employer's objective of preventing the spread of COVID-19 in the workplace against the invasive nature of the test on one's bodily integrity against the employees' contractual, privacy and human rights and found that the policy was reasonable in the circumstances because: (i) notwithstanding that there was no evidence of transmission within the facility, some employees had tested positive, so it was prudent to err on the side of caution and permit the employer to take reasonable steps to prevent the spread of COVID-19 at the facility; (ii) the facility was subject to food safety regulations and employed as many as 310 individuals depending on the season, many of whom worked on multiple production lines, thereby increasing the risk of infection and/or transmission; and (iii) the potential benefits of having a COVID-19 testing program were well documented and, in this case, outweighed the interests of employees who refused the test.

When looking at the reasonableness of a mandatory COVID-19 testing policy, common law courts will consider questions such as:

- Does the employer's policy have something built in for accommodations/exemptions?
- Is the workplace serving a high or low risk population?
- Is the organisation providing an essential service?

- Is there evidence that current safety protocols (social distancing measures, etc.) are not controlling the risk of transmission?
- Is there evidence that alternative measures (temperature check, etc.) would be insufficient to prevent the spread of the virus in the workplace?
- Are there policies around requiring visitors to be tested?
- What happens if an employee refuses to get tested?

Across the pond, the British Government expressly recommends Covid testing of the workforce on the basis that an expansion of workplace testing will identify more positive cases of COVID-19 and ensure that those infected will self-isolate. The Government’s website explains that this programme is crucial given that around 1 in 3 people who are infected with COVID-19 have no symptoms, so could be spreading the disease without knowing it. Broadening testing to identify those showing no symptoms will mean finding positive cases more quickly, and thereby break chains of transmission. Testing of employees will also reduce the risk of transmission among those who cannot work from home and ensure vital public and economic services can continue. Further, testing can provide confidence to workers and customers in the workplace, helping to protect and enable business continuity.

In the circumstances, the British Government wants as many employers as possible to sign up to regularly test their employees whilst not making it mandatory for them to do so. Rather it is a voluntary decision for employers to run testing programmes for their staff, which is actively encouraged by Government.

The UK Government has published that there are 3 options for businesses:

**Option 1:** employer-led set-up (“Do it yourself”): Employers can set up their own on-site testing programmes, outside of that which currently exists with the NHS Test and Trace service.

Canterbury Law does not recommend that testing take place on an employer’s actual workplace premises as this creates additional potential liability insofar as an employer is responsible for the health and safety of its employees, and also in its capacity as an “occupier” of the premises. If an organization mandates testing in the workplace, the Company may be liable if an employee is injured or becomes ill as a result of the testing process. Workers’ compensation policies are likely to cover such injuries or illness (i.e., injury to an employee at work that is not the fault of the employer)<sup>1</sup>. Further, an injury or illness caused by administering the vaccine in the office may give rise to mandatory reporting under Bermuda’s health and safety legislation that mandates the reporting of workplace accidents or injuries. Furthermore, the employer will be liable for responsible for ensuring that any persons performing the on-site testing on its premises are qualified and acting within protocols, and that the tests are being

---

<sup>1</sup> Many courts in the U.S. are refusing to entertain lawsuits related to contracting Covid-19 at work, instead telling plaintiffs to seek relief through workers’ compensation which provides wages and medical benefits for those injured on the job.

performed safely and hygienically. In our view, this is inviting extra unnecessary administrative work and potential risk and liability, unnecessary, because there are alternative excellent testing facilities available to all.

**Option 2:** use a third-party provider: Just like in Bermuda, there are third-party private-sector (non-governmental) providers who are able to provide COVID-19 testing services. Employers who prefer a private provider (such as Helix or Venus) to organize and run the testing on their behalf can partner with one of the providers on the Government's list of providers.

**Option 3: Community testing:** For organizations in the public and private sector that have fewer than 50 employees, access to testing is through British government local authorities who are establishing testing sites for those without symptoms within their local areas. Organizations with fewer than 50 employees, sole traders and the self-employed may avail themselves of the local authority's testing services.

In the United States, the so-called "Land of the Free" where human rights are the subject of regular vociferous debate, the U.S. Occupational Safety and Health Administration ("OSHA") was directed by President Biden on September 9th to issue an Emergency Temporary Standard which must mandate vaccination or, alternatively, weekly testing, for all employers with at least 100 workers. The announcement was made on the same day the President signed Executive Orders requiring [federal employees](#) and most [federal contractors](#) to be vaccinated (with no alternative option for testing). Additionally, nursing home, hospital, home health care facility and other medical facility workers are all now required to be vaccinated.

American employment attorneys advise that there are few decided cases on mandatory testing, probably because no one seriously thinks an employer is not within its rights to mandate Covid testing. Further, they advise that a testing mandate will almost certainly going to be considered reasonable for employers to enforce in most jurisdictions.

Further, the Equal Employment Opportunity Commission ("EEOC") has updated its pandemic preparedness guidelines and deemed COVID-19 a "direct threat" due to its highly contagious nature. That means that individuals with COVID-19 who refuse the vaccine for personal reasons (not human rights related) generally do not have to be accommodated in the workplace from a human rights perspective, which, in turn, has opened the door to coronavirus testing in the workplace. In contrast are those employees who may refuse testing based on a recognized disability under the American Disabilities Act ("ADA") or a sincerely held religious belief consistent with the Civil Rights Act. In these situations, the employer must provide a reasonable accommodation to allow the employee to work unless if doing so would be an undue hardship, and mandatory Covid testing will no doubt constitute a reasonable accommodation.

As for employees raising privacy and human rights objections, the ADA prohibits employers from requiring employees to undergo medical examinations. There is, however, an exception for tests that are job-related, and consistent with a business necessity. According to the EEOC, coronavirus testing

satisfies this standard because infected employees pose a direct threat to the safety and welfare of others. As a result, employers can lawfully require employees to undergo viral testing as a condition of entering the workplace. For employees who refuse for purely personal reasons or because of a general skepticism about the virus, given that COVID-19 poses a direct threat to the workforce, such employees are at risk of being dismissed (lawfully).

If employers in Bermuda do wish to strengthen measures in their workplace by imposing Covid test requirements, demanding a government-issued Safe Key from employees appears to be the most logical method to employ, as the “work has already been done” by Government in terms of testing protocol, confidentiality protections, etc. The Bermuda Government has already implemented a Safe Key protocol whereby access to high-risk activities or services that have been restricted due to the COVID-19 pandemic is restricted to persons possessing a Safe Key document (for bars, clubs, gyms, indoor dining, boats over 20 people, etc.)

The Bermuda Hotel Association adopted mandatory testing protocols for their unvaccinated employees in June. Hotel staff not vaccinated must get tested for the coronavirus once a week, the stated purpose being to ensure that all non-immunized hotel employees are aware of their health status as a means of protecting themselves, their co-workers, family members, visitors and guests, as well as all members of the wider community. The BHA’s CEO Stephen Todd has reported that the scheme, which incorporates Safe Key, has been highly effective.

This is similar to Italy’s requirement to show a Green Pass. Italy, like Bermuda, has a 65% fully vaccinated rate and continues to suffer from the contagious spread of the Delta variant. From October 15<sup>th</sup>, Italy is making it compulsory for all employees to have a Green Pass to attend at every workplace and across all sectors, including the self-employed. Italy’s Green Pass, which is currently required in “at risk” places, can be obtained either through demonstrating:

- proof of a recent vaccination (with no need for testing); or
- a negative Covid test result in the past 48 hours; or
- recovery from the virus in the last 6 months.

Anyone without a Green Pass will reportedly face suspension from work and may have their pay stopped after five days.

For unvaccinated Italian employees, the requirement that the negative Covid test result must have been obtained “within the past 48-hours” (the current requirement for a Green Pass) would seem to be overly onerous if that is also to apply to all employees, promising major disruption in the workplace. This, however, appears intentional in that the Italian Government, like our own, is doing whatever it can to encourage residents to get vaccinated in a country that has been badly hit by the virus. This would mean unvaccinated employees having to test at least twice, maybe 3 times per week.

In Bermuda, eligible persons for a Safe Key include:

- a person who has received the complete recommended single dose or two doses of an approved COVID-19 vaccine, plus 2 weeks have passed (with no need for testing); or
- Persons with a negative COVID-19 PCR test within the last 72 hours (3 days after the test day) at either a government testing location or with a private lab if that lab is authorised to issue a Safe Key with its results

Testing every 72 hours again seems onerous for unvaccinated employees but we are operating now in a major Covid crisis involving community spread through workplaces where it must be accepted that more protective measures are justified.

One legal advantage of using Safe Key is that there is no need to require employees to disclose sensitive personal medical information as to whether or not they are vaccinated and there is no need to store and track this information. Employees can choose to maintain their privacy (vaccination status) and the employer can receive the important information that they have via a Safe Key without making an overt distinction between vaccinated and unvaccinated employees. [G Robinson]

However, a drawback from employing Safe Key that employers may want to consider is that there is then no requirement for testing vaccinated employees. Safe Keys are automatically renewed electronically for vaccinated persons without testing requirements. Considering that vaccinated persons comprise approximately 25% of active Covid cases in Bermuda, a company may also want to consider requiring periodic testing of vaccinated employees (which, in turn, would mean having to know who is vaccinated). Our experience is that vaccinated employees are generally open and transparent about the fact that they have been vaccinated.

The notion of regular testing will be far more palatable to employees if the testing procedures are less intrusive, involve less effort, and are less time-consuming.

The British Government recommends that private-sector employers offer their workforce (who are working on-site) access to a minimum of 2 **lateral flow tests** every week. These tests, also known as **rapid antigen tests**, give a quick result using a device similar to a pregnancy test. It involves rubbing a long cotton bud (swab) over your tonsils (or where they would have been) and inside your nose, or inside your nose only. You then put the end of the swab in a small pot of liquid, and put a few drops of the liquid onto a testing device. The solution creates a reaction in the testing device. If the test is positive you will see two lines and if negative, just one line. Lateral flow tests are similar to PCR tests, in that they are both an antigen test, and are both designed to pick up active Covid-19 infection rather than antibodies to the disease; the tests look for specific molecules (antigens) found on the surface of the virus that causes COVID-19. The major benefit of a lateral flow test over a PCR test is that it does not need to be sent away to a laboratory for confirmation, and instead provides results within 30 minutes.

However, medical experts advise that antigen tests are less accurate than the “gold standard” PCR method and have produced some false positives in asymptomatic people, and therefore a positive result must be followed up immediately with a test by PCR.

As to how often testing should be performed, in England it is recommended that private-sector employees have access to a minimum of 2 lateral flow tests every week. Packs can be ordered from the gov.uk website.

Rapid antigen (lateral flow) test kits are now legal to import to Bermuda for personal use; the Ministry of Health urges that you contact David Kendall before importing, to ensure the brand you wish to import is authentic and will clear customs ([dskendall@gov.bm](mailto:dskendall@gov.bm)).

Your newspaper has reported that rapid antigen tests may now be used by airline passengers from Bermuda to destinations except Boston and Canada. The Royal Gazette has further documented reports that the widely used Ellume brand antigen test does not require a prescription and has been cleared for use by symptomatic and asymptomatic people. The test has its own smartphone app that gives a walk-through on how to collect a specimen with the included swab. The device tests the specimen and delivers results in about 15 minutes to the app through a bluetooth connection. For employers agreeing to employ these tests, the test results can then be forwarded to the employer.

Warwick Academy, like other schools, has been hit by a few positive Covid test results since school started on September 1<sup>st</sup>. The school has reacted quickly by securing a shipment of antigen lateral flow tests (through the Bermuda Pharmacy Group) which are expected to arrive in Bermuda this week from the UK. The School believes that more regular and rapid testing at home is a good way to help keep the school open and help avoid future quarantines by helping to reduce positive cases on campus. The school will look to trial an at-home twice-weekly testing process (on Sundays and Wednesdays), and monitor its success, which will add a broad and regular layer of surveillance to support keeping the school open to in-class learning. The Principal reports that such tests have been successfully used in schools in other countries.

Employers may well want to follow suit and immediately start importing these types of less invasive tests for their employees to employ regularly.

The obvious question then arises whether, if an employer believes they have reasonably justifiable grounds for demanding Covid testing, only unvaccinated employees should have to submit to testing or whether all employees be required to test.

Of course, less legal risk arises if all employees (and not just unvaccinated employees) are subject to the same periodic testing as this will stave off potential human rights discrimination claims.

Having said that, it is logical for employers to want to only test unvaccinated employees regularly for Covid-19, given that the science has repeatedly shown that all the attendant health risks are that much higher with unvaccinated employees as has been extensively documented in this newspaper. Importantly, your paper has reported, based on information received from legitimate, medical experts:

- the viral load in vaccinated persons is much lower than that of unvaccinated persons, meaning that their ability to pass on the virus is greatly reduced (Dr. Carika Weldon);
- Over 20 studies from the U.S., UK, Israel, Scotland, Denmark and Sweden have shown significant reduction in the rate of infection of those vaccinated compared to those unvaccinated, and that

infection rates plummeted once vaccination programmes began (Dr. Carika Weldon's evidence submitted to the Supreme Court)

- Since June, an unvaccinated passenger is 19.6 times more likely to test positive than a fully vaccinated passenger (Dr. Carika Weldon evidence put before Supreme Court)
- contact tracers in Bermuda are regularly seeing transmission of the virus from unvaccinated people to vaccinated persons, whereas the reverse appears to happen "in only a few instances" (Minister of Health based on expert evidence gathered);
- in August the Government reported that 3 out of 4 active cases (75%) from local transmissions are unvaccinated, yet the unvaccinated make up only 35% of the population; that alone shows how much more likely non-vaccinated persons are to test positive.

However, given that the current community spread includes vaccinated employees and that vaccinated employees can pass on the virus like everyone else, and to reduce the potential for discrimination claims as well as more division amongst our people, employers might consider it sensible to require vaccinated employees to undergo antigen testing once a month and unvaccinated employees to do so at least once weekly in accordance with Safe Key requirements like the hotel workers are already doing. If rapid antigen home testing kits are used, the frequency of testing can easily be increased and for both types of employee.

Anti-vaxxers will complain that even this difference in treatment is discriminatory, but as the Chief Justice ruled in July in the Supreme Court case where an unsuccessful challenge was made to the rule that unvaccinated incoming travelers must quarantine for 14 days in a government-approved hotel at their own expense, the difference in treatment is legally justifiable to impose different measures for vaccinated vs. unvaccinated given the great danger that Covid 19 presents to everyone, and the higher risks that pertain to the unvaccinated.

Preferential treatment is also currently given to vaccinated employees through the Workplace Quarantine rule for vaccinated workers (only) who are required to quarantine by the Government due to being identified as having been a close contact with someone with the virus. Such persons can receive specific permission from the Government to attend at the workplace provided that they have a negative PCR test result, have no symptoms and self-monitor for symptoms at least twice daily, wear a mask at all times and practice good hygiene, practice physical distancing to the greatest extent possible, avoid communal workspaces, and only move between work and home.

If employers do mandate testing, they should consider how to reduce the burdens associated with testing in order to increase the effectiveness of a testing program, including, where feasible, offering testing options near the workplace. Employers should also do the right thing and offer paid time off for employees to take the test. Employees should cooperate and use their lunch hours to get tested to help minimize interruption.

if an employer does decide to implement mandatory testing, employees should be told in advance: the type of test used, how it will be administered, who will pay for it, the reliability of the test, and the limitations of the test. Employees should also be told what the test results mean, how they can be used,

what happens when they test positive or negative, and the consequences for refusing to be tested (e.g., unpaid leave until they get tested).

Again, employers must continue to be careful not to discriminate against employees who are protected under the HRA 1981 by reason of a medical disability, genuinely held religious belief, etc. Protected classes of employee like this will need to be accommodated through alternative measures in such circumstances. It will be for the employee to disclose such a reason if they refuse to get tested.

The English organisation ACAS (the Advisory, Conciliation and Arbitration Service), whose aim is to improve the working life of organizations through better employment relations, has introduced guidelines for employers who may wish to bring in testing as part of their workplace policy namely:

1. First, talk and consult with either staff or their recognised trade union or other employee representatives. It's a good idea to discuss:
  - how testing would be carried out
  - how staff would get their test results
  - the process to follow if someone tests positive for COVID-19
  - what the policy is on pay if someone needs to self-isolate but cannot work from home
  - how someone's absence would be recorded if they need to take time off work
2. how testing data will be used, stored and deleted, in line with data protection laws.
3. Any decision after that discussion should be:
  - put in writing, for example in a workplace policy
  - made in line with the organisation's existing disciplinary and grievance policy
4. ACAS recognizes that staff may not want to get tested because they're worried that if they test positive they will get paid less for being off work, or will get treated differently. To help reassure staff about being tested, ACAS recommends that employers could consider changing the way they deal with time off after testing positive for COVID-19. For example:
  - keeping staff on their usual rate of pay instead of just paying them sick pay
  - not counting the time off in their absence record or towards any 'trigger' system the organisation may have
5. Employers must make sure they follow data protection laws if they test staff for COVID-19.

On point 4, irrespective of whether the testing is on or off-site, employers in Bermuda will need to have access to the test results if testing is part of their workplace policy; it is only logical and reasonable that they should, as it will invite legal risk if an organization simply relies on the word of its employee as to

whether they tested positive or negative. The employer will then need policies and procedures in place regarding the treatment and storage of this information. This data will be considered “sensitive personal information” as it pertains to the Personal Information Protection Act 2016 (“PIPA 2016”). Adequate data protection measures should already be in place now in any event respect of employees’ Covid-19 results obtained after travel, exposure, etc. Mandatory testing will mean that companies must be alive to potential legal liability if Covid-19 personal information is incorrectly processed, controller, stored, or used without the employee’s permission, or used in a discriminatory manner. All employers will soon have to carefully consider how to process this and similar types of data when the provisions of PIPA 2016 come fully into force, expected soon. If a company has global operations, it will have to comply with other countries’ data protection laws which may well be more onerous than PIPA, particularly with regard to the overseas transmission of sensitive information about employees. Consent by employees to these procedures should be recorded in the contract of employment or by way of a separate written agreement.

In regard to unionised workplaces, as with any mandatory policy introduced by an employer in the unionized context, in order for a mandatory COVID-19 testing policy to be enforceable, the policy must be:

- consistent with the applicable collective agreement;
- reasonable;
- clear and unequivocal;
- brought to the attention of the employees prior to employer action based on the policy;
- clear that a breach may result in discipline (this fact must also be brought to the attention of the employees in advance); and
- enforced consistently by the employer following its introduction to the workplace.

In addition, prior to introducing a mandatory COVID-19 testing policy in the workplace, employers should

- Review the employees’ employment contract(s) or collective agreement(s) and any applicable legislation to ensure that the policy is not inconsistent with same.
- Evaluate and weigh the objective evidence available regarding the health and safety risks posed by COVID-19 against employee human rights and privacy interests.
- Consider whether mandating COVID-19 testing would be a reasonable measure in the particular workplace, or whether less intrusive alternatives could be appropriate.
- Seek to ensure that employees will not be required to choose between testing or losing their job (other jurisdictions have turned to laying off such employees on an unpaid basis until and unless they agree to take the test).
- Determine how human rights accommodation requests will be addressed; and
- Consider how employees’ personal health information will be safeguarded and destroyed when it no longer needs to be retained by the employer.

Any exemptions or more complex scenarios with employees should be considered on an individual case by case basis with an empathetic discussion taking place with the employee. Acting reasonably in all the circumstances of the individual case will help stave off potential legal liability, as will continued clear communications with your employees that include clear pre-announced and consistent guidelines for all.

Employers who do choose to implement a mandatory COVID-19 testing policy should review their policies on an ongoing basis to determine whether it continues to be reasonable in light of current public health guidance and the current state of the ongoing pandemic.

Juliana Snelling, Director & Gambrill Robinson, Associate Attorney

***Canterbury Law Limited is the exclusive Bermuda member of the Employment Law Alliance (ela.law) and consulted with leading employment attorneys in 135 countries on Covid testing in their jurisdictions. We are grateful for the feedback received from our fellow employment attorneys around the world, some of which has been incorporated here.***