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MEMORANDUM

To: CUPE School Board Local Presidents

From: Laura Walton, President – OSBCU
Paul Sylvestre, CUPE National Health and Safety Representative

Date: September 9, 2021

RE: **Medical Surveillance Programs under s.28(3) OHSA**

Many members and local leaders have raised the possibility that the policy of mandatory testing of unvaccinated workers violates the Occupational Health and Safety Act. In particular, they often cite [s. 28 \(3\)](#) of the OHSA. Although this subsection addresses the right of workers not to participate in a medical surveillance program, the provision only applies to medical surveillance programs described in the regulations under the OHSA.

Duties of workers

28 (1) A worker shall,

- (a) work in compliance with the provisions of this Act and the regulations;
- (b) use or wear the equipment, protective devices or clothing that the worker's employer requires to be used or worn;
- (c) report to his or her employer or supervisor the absence of or defect in any equipment or protective device of which the worker is aware and which may endanger himself, herself or another worker; and
- (d) report to his or her employer or supervisor any contravention of this Act or the regulations or the existence of any hazard of which he or she knows.

Idem

- (2) No worker shall,
 - (a) remove or make ineffective any protective device required by the regulations or by his or her employer, without providing an adequate temporary protective device and when the need for removing or making ineffective the protective device has ceased, the protective device shall be replaced immediately;
 - (b) use or operate any equipment, machine, device or thing or work in a manner that may endanger himself, herself or any other worker; or
 - (c) engage in any prank, contest, feat of strength, unnecessary running or rough and boisterous conduct.
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Consent to medical surveillance

(3) A worker is not required to participate in a prescribed medical surveillance program unless the worker consents to do so.

What are prescribed medical surveillance programs under the OHSA?

The OHSA defines the term “prescribed”:

“prescribed” means prescribed by a regulation made under this Act;
(emphasis added)

Three regulations under the OHSA require employers or the Ministry to establish a medical surveillance program for workers. These programs affect those who work with or are exposed to highly toxic substances. The surveillance is carried out through routine medical examinations to determine if workers develop related occupational diseases often associated with the toxic substance. The regulations (listed below) provide that workers can submit results of medical examinations to the employer if they so choose:

- O.Reg 833: Control of Exposure to Biological or Chemical Agents (s. 8)
- O.Reg 278/05: Designated Substance – Asbestos on Construction Projects and In Building and Repair Operations (s. 22)
- O.Reg 490/09: Designated Substances (s. 27 – 31)

None of these regulations apply to COVID-19 testing programs.

Recent decisions by the Ontario Labour Relations Board have confirmed the reasonableness of asymptomatic testing programs, in addition to the implementation of other health and safety measures, to reduce the risks of exposure to COVID-19 in the workplace. Nevertheless, school boards must comply with applicable privacy legislation when collecting workers’ personal health information. Any personal health information provided to school boards must be treated as strictly confidential. Policies should set out the purpose of collecting the information, how the information is collected and used, who receives the information, and when the collected information will be destroyed.

Employers are permitted to gather personal health information for a legitimate employment purpose, provided they gather no more than is necessary to achieve that purpose.