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Mandatory in-person work policies

Can mandatory in-person work policies violate the Charter?

Background

During the COVID-19 pandemic, some workers were given the option to work remotely. These “work-from-home” policies were seen by many employers as a temporary measure to reduce the spread of the virus. Once workers were vaccinated and the health risks were lower, some employers began to reverse the work-from-home policies.

Some workers thrived under the remote work structure. Some workers moved to a different place during the years of remote work, and moving to be closer to an office would be a financial burden. Employees with particular mental health needs or family situations would be more heavily impacted by a mandatory in-person work policy.

The [Canadian Charter of Rights and Freedoms](#) guarantees the rights and freedoms of individuals. These rights can only be limited if the limits are demonstrably justified in a free and democratic society. The two relevant provisions of the Charter are Sections 7 and 15. Section 7 of the Charter protects “life, liberty and security of the person” and Section 15 of the Charter protects equality.

Do mandatory in-person work policies threaten Charter rights? How can an employer justify any infringements that these policies create?

About section 7

“Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”

There is precedent for interpreting s. 7 as extending to “inherently private choices” that go to the “core of what it means to enjoy individual dignity and independence”. This includes ensuring the physical and psychological health of individuals. The Court has ruled that daily or ordinary stresses due to government action are not infringements, but that the violations must be serious.

To determine if there is a violation of Section 7 of the Charter, the Courts will use a two-part test:

1. Is there an infringement of the right to life, liberty, or security of the person?
2. If so, is the infringement contrary to the principles of fundamental justice?

The first part of the test is to determine if the law has a grossly disproportionate, overbroad, or arbitrary effect on individuals.

Gross disproportionality: Governmental actions that are so extreme that they are disproportionate to any legitimate government interest.

Overbreadth: Situations where the law is too broad and interferes with some conduct that bears no connection to the objective.

Arbitrariness: Where there is no rational connection between the object of the law and the way in which it seeks to achieve that objective.

If there is indeed an infringement, the second step of the test is to determine if the infringement is contrary to principles of fundamental justice. For example, the Supreme Court of Canada (the “SCC”) has held that “the best interests of children” is a principle akin to a principle of fundamental justice that can justify a deprivation of an individual’s liberty or security of the person so long as it is done so with the goal of advancing the child’s best interests.

When thinking about the proportionality of infringing on section 7 protected rights consider the following questions:

1. What is the objective of a mandatory in-person working arrangement? Are these objectives rationally linked to the policy?
2. Can the right to liberty can include the fundamental choice of deciding where to make one's home, and the requirement to live near a particular office constitute an unwarranted intrusion by an employer into a personal choice of residence?
3. If only some employee positions are classified as "in person essential", is this an arbitrary decision?
4. How can an employer objectively determine who should receive flexibility in their working arrangements while respecting individual privacy?

Section 15

"(1)Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

This section of the Charter outlines that every individual in Canada is to be treated with the same respect and consideration. This means that any listed (enumerated) or similarly protected (analogous) characteristic must not be discriminated against.

The test for determining whether s. 15(1) rights are being infringed upon consists of two stages:

- 1) Does the law in question create a distinction based on an enumerated or analogous ground?
- 2) Does this distinction create a disadvantage by perpetuating prejudice or stereotyping?

Once a law is determined to treat people differently based on a protected ground, the second stage of the test is implemented to determine if s. 15 is infringed upon.

When thinking about determining if there have been violations to s. 15, consider the following questions:

1. Since the subjectivity of accommodation fulfilment can be difficult to quantify, how can you determine the success of workplace accommodations?

2. Could family status be a protected characteristic? If employees are required to live far away from family members to meet mandatory in-person policies, what accommodations might be required to avoid violating the Charter?

Justifying an Infringement to ss. 7 and 15

Infringements to Charter rights must be justified through a three step test to determine if the limits are demonstrably justified in a free and democratic society.

1. Was the limit on the right or the breach “prescribed by law”?
2. Was there a pressing and substantial objective or purpose for the limit on the right?
3. Was the limit or breach proportionate?

Step three, proportionality, has three further considerations, which are:

1. Whether there was a rational connection between the infringement and the benefit sought on the basis of reason or logic;
2. Whether there was minimal impairment of the rights protected; and
3. Whether there was proportionality between the deleterious effects of the measures that infringe the Charter rights or freedoms and the salutary effects of the objective.

Some questions to consider when thinking about this test:

1. How pressing and substantial is the need for a mandatory in-person policy?
2. Is the mandatory in-person policy rationally connected to the policy objectives? Is it the least intrusive way to achieve the objective? Does the policy disproportionately impact certain employees? Are there reasonable alternatives?

Additional Reading

Canadian cases:

[*Godbout v. Longueuil \(City\)*](#)

[*Association of Justice Counsel v. Canada \(Attorney General\)*](#)

[*Law v. Canada \(Minister of Employment and Immigration\)*](#) - Contextual factors relevant to proof of discrimination

[*R v Oakes*](#) - Justification of infringement test

[*Thomson Newspapers Co. v. Canada \(Attorney General\)*](#) - The distinction between the rational connection and minimal impairment considerations from the third proportionality consideration

News articles and websites posts¹:

Why your options may be limited if your employer wants you back in the workplace -

<https://www.cbc.ca/news/business/canada-employers-wfh-office-return-1.6507545>

Why forcing employees back to the office is the very definition of insanity -

https://www.thestar.com/business/why-forcing-employees-back-to-the-office-is-the-very-definition-of-insanity/article_1db7ac4f-ba6f-5682-b615-a0985d8516bf.html

Meeting the accommodation needs of employees on the job - <https://www.ohrc.on.ca/en/iv-human-rights-issues-all-stages-employment/8-meeting-accommodation-needs-employees-job>

Federal workers strike highlights desire for work-from-home flexibility -

<https://www.cbc.ca/news/canada/british-columbia/psac-strike-remote-work-1.6822467>

How flexible back-to-work plans could tap the talents of workers facing employment barriers

- <https://www.cbc.ca/news/canada/calgary/back-to-work-market-flexibility-1.6364618>

Back-to-office plans fall flat amid arbitrary rules, lack of communication -

<https://www.ctvnews.ca/business/back-to-office-plans-fall-flat-amid-arbitrary-rules-lack-of-communication-1.6547157>

¹ The opinions expressed in these articles and on these websites are not representative of those of participating school boards, Ontario courts or the Ontario Justice Education Network.