

The Great Debate

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THE GREAT DEBATE

Mandatory Vaccination Policies

In this update we provide answers to some of employers' most pressing questions about COVID-19 vaccinations and the workplace.

CAN EMPLOYERS REQUIRE EMPLOYEES TO BE VACCINATED?

There is currently nothing at law that prevents an employer based in Ontario from making COVID-19 vaccination a term or condition of employment. However, mandatory vaccination policies raise both privacy and human rights considerations and legal risks of which employers will want to be aware before forging ahead with implementation.

WHAT PRIVACY ISSUES ARE ASSOCIATED WITH A MANDATORY VACCINATION POLICY?

From a privacy perspective, mandatory vaccination policies will require the collection of personal health information with respect to workers' vaccination status. Employers who collect this information – whether in the context of a mandatory vaccination policy or otherwise – will want to clearly outline why the collection of this information is reasonably necessary, how it will be used, to what extent it will be disclosed, how it will



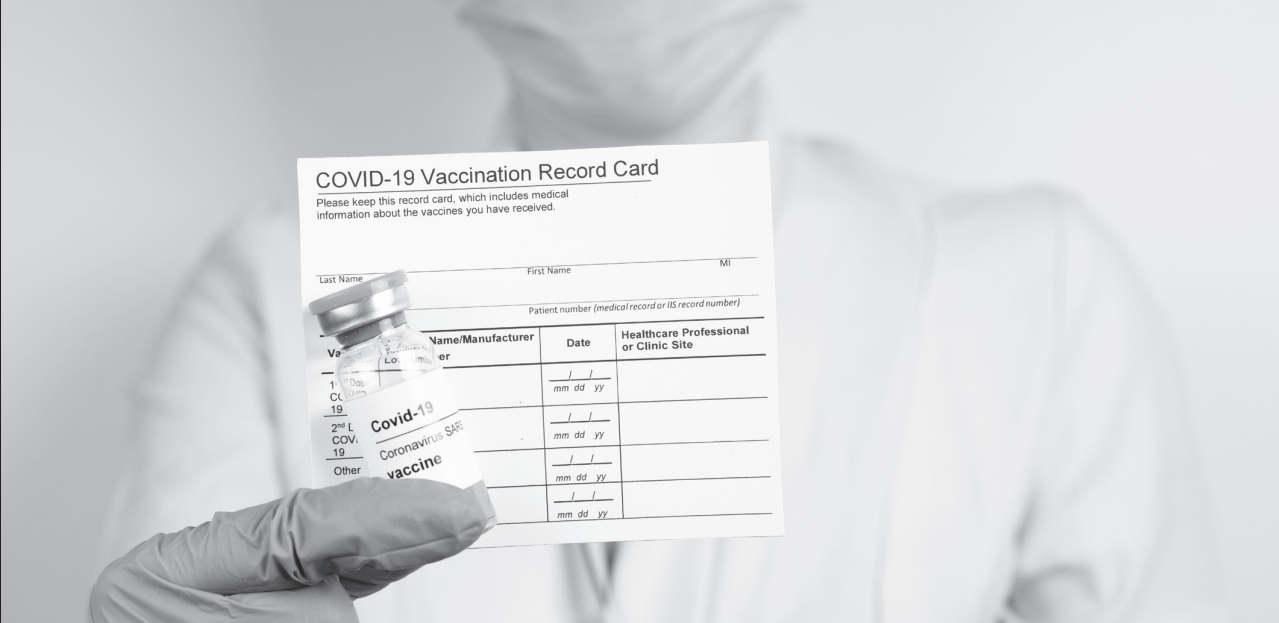
be stored, as well as when and how it will ultimately be destroyed.

The Office of the Privacy Commissioner of Canada, recently released a joint statement along with provincial and territorial privacy commissioners entitled Privacy and COVID-19 Vaccine Passports (“Joint Statement”). The statement is generally geared toward government entities, but it does provide some guidance to businesses operating in the private sector.

In particular, the Joint Statement suggests that the necessity, effectiveness, and proportionality requiring vaccination must be assessed. The Joint Statement also discusses the

need for consent or some other legal authority to collect personal health information. While the Joint Statement is not binding and does not hold the weight of law, employers may consider answering the following questions in the context of their individual workplaces before implementing a mandatory vaccination policy:

- **Necessity:** Is requiring vaccination objectively necessary to ensure the health and safety of the workplace, such that no less intrusive means are available to achieve this goal?
- **Effectiveness:** Is vaccination empirically proven to be effective?



tive at curbing the transmission of COVID-19 in the workplace

- **Proportionality:** Is the privacy risk associated with the policy proportionate to the issue it is intended to address?

Based on this recent guidance, employers are likely well advised to try other less intrusive means of preventing the spread of COVID-19 (e.g. incentivizing vaccination, implementing rapid antigen testing programs, etc.) before moving to an approach that mandates inoculation.

Where a decision is made to require vaccination, employers will also want to employ principles of data minimization to ensure that the least amount of personal health information necessary is being collected.

Employers should also take heed that to the extent any vaccination information will be collected and used for commercial purposes, they will need to ensure compliance with the Personal Information Protection and Electronic Documents Act.

WHAT HUMAN RIGHTS ISSUES ARE ASSOCIATED WITH A MANDATORY VACCINATION POLICY?

From a human rights perspective, some employees may be unable to receive a vaccination for reasons relating to disability, religion/creed, or another ground protected under the Human Rights Code (the “Code”).

Where a decision is made to require vaccination, employers will also want to employ principles of data minimization to ensure that the least amount of personal health information necessary is being collected.

A mandatory vaccination policy should therefore account for an employer’s duty to accommodate to the point of undue hardship under the Code to avoid potential discrimination claims. As noted in the privacy section above, employers will also want to be able to demonstrate that inoculation is a necessary condition such that it constitutes a bona fide

occupational requirement.

WHAT RISKS MIGHT AN EMPLOYER FACE WITH THE INTRODUCTION OF A MANDATORY VACCINATION POLICY?

We have yet to see a case involving a mandatory vaccination policy in the context of the COVID-19 pandemic adjudicated in Canada. There is a body of arbitral case law that has developed in the healthcare sector which deals primarily with vaccination policies in the context of influenza vaccines. These decisions do provide some, albeit limited, guidance.

What is clear from the existing arbitral decisions is that a person’s freedom to make choices regarding their own body is afforded the highest degree of protection. As such, mandatory vaccination policies are likely only to be upheld in contexts where there is a real and justifiable connection to a significant and demonstrable risk to employee, client, and/or patient health and safety.

Factors such as the nature of the

workplace; the degree of vulnerability of the population served; the extent of the infectious outbreak; the efficacy of the vaccination; and the availability of other less intrusive means of protection are likely all to be relevant factors when it comes time to assess whether mandating COVID-19 vaccination is necessary or appropriate in any given workplace setting.

While this assessment must be made on a case by case basis for each workplace, there are distinguishing features of COVID-19 and the vaccinations that may support the need for mandatory vaccination policies. Unlike other viruses, like influenza, the consequences of catching COVID-19 if a person has not been vaccinated are severe. The virus is also easily transmissible, especially with new variants spreading throughout communities. These two factors, as well as the strong efficacy of the vaccinations establishes a better argument than in the past with other virus for mandatory vaccination policies.

However, there are also some clear unknowns surrounding the above factors at the present time. For instance, we do not currently know how long vaccinations will last, whether an annual booster shot may be required, and the specific extent to which vaccination curbs transmission of the virus in the workplace.

Given all the above, the implementation of a mandatory vaccination policy may be met by legal challenge, which may include the following:

- Grievances in the unionized context;
- Constructive dismissal claims in the non-unionized context;

- Allegations of invasion of privacy and human rights violations;
- Workers' compensation liability for injuries or harm sustained in the event negative side-effects are experienced from the vaccination; and
- For public sector employers, challenges may also be made under the Canadian Charter of Rights and Freedoms.

As this issue has yet to be litigated, the full extent of exposure to liability in the context of any of the above claims is currently unknown. However, given the nature of the issues

Many employers have been lobbying the government to provide legislative direction on this issue, thereby taking the guesswork and risk out of the equation for individual businesses. However, to date, government direction and guidance on the topic of workplace vaccination initiatives has been relatively minimal.

that are likely to be involved in such litigation, and the type of evidence required in the context thereof, employers can expect that legal proceedings are likely to be lengthy and complex.

WHAT OPTIONS ARE AVAILABLE TO EMPLOYERS WHO MAY NOT WANT, OR YET BE PREPARED, TO IMPLEMENT A MANDATORY VACCINATION POLICY?

For many employers, particularly those whose business is not focused on dealing with vulnerable populations, where their workplace presents little or no risk of viral transmission,

or where the risks associated with a mandatory vaccination policy are simply seen as too costly, educational and incentive programs may be viewed as preferable courses of action.

For example, employers may wish to encourage employees to receive a COVID-19 vaccine by way of educational initiatives that focus on the individual and communal benefits of inoculation. Some employers may even wish to pair such educational campaigns with incentive programs designed to further motivate uptake among their workforce. Such incentives may include prizes, draws, or monetary rewards. Employers should ensure, however, that any incentive programs comply with human rights legislation, as well as any applicable public sector wage restraint legislation.

WILL THE GOVERNMENT PROVIDE FURTHER GUIDANCE TO EMPLOYERS ON WHAT WORKPLACE VACCINATION POLICIES CAN OR SHOULD BE IMPLEMENTED?

Many employers have been lobbying the government to provide legislative direction on this issue, thereby taking the guesswork and risk out of the equation for individual businesses. However, to date, government direction and guidance on the topic of workplace vaccination initiatives has been relatively minimal.

Most recently, the Minister of Long-Term Care issued a Minister's Directive which takes effect on July 1, 2021 ("Directive"). This Directive requires long-term care homes to implement COVID-19 immunization policies for staff, requiring each staff member to do one of the following: (i) provide



proof of vaccination of each dose; (ii) provide a documented medical reason for not being vaccinated; or (iii) participate in an educational program about the benefits of vaccination and the risks of not being vaccinated.

Employers who are subject to the Directive will be required to track and report on the implementation of their policies, including staff immunization rates, but not the immunization status of individual staff members.

While this new Directive provides helpful guidance to employers operating in the long-term care sector as to what policies are legally required,

it notably stops short of requiring employers to mandate vaccination among workers. We have yet to see whether similar, or more stringent, directives will be issued in this or other sectors.

CHECK THE BOX

Employers wishing to roll out a vaccination policy in their workplace, whether mandatory or voluntary, should carefully consider the nature of their workplace, the population they serve, and what specifically they hope to achieve with the policy itself.

We recognize that this is a complicated and challenging issue for employers who are diligently looking to take every reasonable step to

ensure the health and safety of their workplaces. As such, we are continuing to closely monitor developments in this area, and will provide updates as they arise.

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The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

MODEL POLICY

COVID Vaccination Passport Policy

Although courts have yet to weigh in on the issue, regulatory guidelines indicate that employers may follow the lead of some provincial governments and implement COVID-19 vaccination passport policies requiring employees to verify their vaccination status, provided that they follow certain legal ground rules. Here's a vaccination passport policy template that you can adapt for your own use.

MODEL POLICY

1. POLICY

The scientific evidence clearly shows that the COVID-19 vaccinations currently available in Canada are safe and effective. They are also provided free of charge. ABC Company strongly urges all employees to receive the COVID-19 vaccination if they are able to do so. ABC Company will provide education, information support and assistance [including paid time off from work] as necessary to enable employees to get the vaccination.

2. MANDATORY VERIFICATION OF VACCINATION STATUS

COVID-19 coronavirus is highly contagious and ensuring that persons who are actually infected, symptomatic or at undue risk of being infected do not enter the workplace is essential to the health and safety of the workplace. Based on an assessment of the health and safety risks of its specific facilities and worksites and current public health guidelines, ABC Company has determined that it is necessary to implement a COVID-19 vaccination passport system until the

health and safety situation improves. Accordingly:

Until further notice, no person may enter an ABC Company work site or facility without a COVID-19 vaccination passport.

3. DEFINITIONS

For purposes of this Policy:

"COVID-19 symptoms" include [monitor and revise this list as public health guidelines change]:

- Fever or chills;
- Cough;
- Shortness of breath or difficulty breathing;
- Fatigue;
- Muscle or body aches;
- Headache;
- New loss of taste or smell;
- Sore throat;
- Congestion or runny nose;
- Nausea or vomiting;
- Diarrhea.

"Vaccination passport" means a form of acceptable verification showing that a person has received both doses of an approved COVID-19 vaccination. Such forms may include (without limitation):

- An official digital or hard copy passport of vaccination issued by the

[province] Chief Public Health Officer or other governmental agency;

- A signed letter from a physician indicating that the person has received the vaccination;
- A certificate of vaccination from a vaccine provider; and
- A personal written attestation of vaccination.

4. SCOPE

This Policy applies to ABC Company employees and others seeking entrance to ABC Company facilities, including but not limited to contract workers, couriers, clients, customers and visitors. These requirements will not be waived and those seeking to avoid them may do so by not seeking to enter the facility. However, ABC Company will make accommodations to the point of undue hardship in accordance with the requirements of the [province] human rights code, as set forth in Section 6 below.

5. VACCINATION PASSPORT PROCEDURE

5.1 Initial Presentation of Passport

Employees must provide their vaccination passport to the ABC Company HR department for photocopying. The HR department will maintain

[Download an editable PDF or WORD document at \[www.HRInisder.ca\]\(http://www.HRInisder.ca\) to customize this model policy.](#)

a list of all employees who have furnished an appropriate passport (the "passport list") and provide that list to security personnel stationed at building entrances.

5.2 Entry Procedure

Rather than having to display their passports each day, employees will only have to provide their name and ID to security upon entering the premises for verification that they are on the passport list. Employees on the passport list will be allowed to enter the building without undergoing medical screening unless they exhibit COVID-19 symptoms.

5.3 Admittance Criteria

Employees who are not listed on the passport list or who exhibit COVID-19 symptoms will not be allowed to enter the facility, subject to the provisions of Section 7 below.

6. PRIVACY PROTECTIONS

ABC Company will not ask for nor allow HR or security screening personnel to ask for any medical information other than verification that an individual has received two doses of an accepted COVID-19 vaccination as listed in the vaccination passport. ABC Company will retain the photocopy of the vaccine passports that employees provide in a confidential personnel file. The vaccination list will also be kept confidential. None of such records will be used or disclosed except in accordance with this Policy and the Company Employee Privacy Policy. All such records will also be kept secure in accordance with the Company Data Security Policy.

7. EMPLOYEES' ACCOMMODATION RIGHTS

ABC Company will make accommodations, possibly including exemp-

tions, to the point of undue hardship for employees who cannot receive the COVID-19 due to disabilities, age, religion, national origin or other characteristics protected from discrimination under the human rights code. Refusal to receive the COVID-19 vaccine due to personal preference is not a protected characteristic, particularly when that personal preference is based on misinformation or misunderstandings of scientific information. Accommodations will be based on an individualized assessment of the employees' circumstances and the potential danger allowing them to enter would pose to health and safety.

ABC Company will also honour the terms of applicable collective agreements and external circumstances that may make it difficult or impossible for employees to get vaccinated.

8. TEMPORARY POLICY

This is a temporary policy that will expire when the health and safety purpose justifying its implementation no longer applies. ABC Company also reserves the right to revise this Policy as the COVID-19 public health guidelines, pandemic situation and scientific information changes and evolves.

What To Do

When an Employee Defies Your Mandatory Vaccination Policy

Although courts have yet to weigh in on the question, we know from pre-COVID 19 court cases and guidelines issued by human rights commissions during the pandemic that workplace mandatory vaccination policies are enforceable when a premises-specific hazard assessment shows that they serve a vital health and safety objective.

Before the pandemic, mandatory vaccination policies were rare and limited to sensitive sectors like health care and travel. But as Delta variant cases surge, requiring employees to prove they've been fully vaccinated to keep their jobs is becoming increasingly common. And that begs a question of crucial importance, especially to HR directors: What should you do when employees defy your organization's mandatory vaccination policy?

1. Terminate them immediately
2. Accommodate them immediately
3. None of the above

The answer is 3, none of the above. It's not that termination and accommodation aren't valid options; it's the word "immediately" that makes them the wrong choice.

THE 2 THINGS TO DO WHEN EMPLOYEES REFUSE MANDATORY VACCINATION

Here's what you should do if one of your employees refuses to comply with your mandatory vaccination policy.

STEP 1: FIND OUT WHY THEY WON'T GET VACCINATED

Although courts have yet to weigh in on the question, we know from pre-COVID 19 court cases and guidelines issued by human rights commissions during the pandemic that workplace mandatory vaccination policies are enforceable when a premises-specific hazard assessment shows that they serve a vital health and safety objective. At the same time, employers must make accommodations as required by human rights.

Compliance Strategy: When employees refuse to comply with a mandatory vaccination policy, the first thing you must do is ask them why they won't get vaccinated so you can determine whether you need to accommodate them. There are 2 possibilities:

- **Employees are entitled to accommodations** when they can't or won't get vaccinated due to a medical condition or other disability, a bona fide religious objection or some other personal characteristic or circumstance that the human rights laws protect from discrimination. If employees claim they have such a

disability, religious belief, etc., you're allowed to ask them for written proof, like a doctor's note verifying that the employee has a medical issue that precludes vaccination.

- **Employees aren't entitled to accommodations** when they can take the vaccine but choose not to do so out of personal preferences or beliefs. According to the BC Human Rights Commissioner, "a person who chooses not to get vaccinated as a matter of personal preference—especially where that choice is based on misinformation or misunderstandings of scientific information—does not have grounds for a human rights complaint against [an employer] implementing a vaccination status policy." New guidelines from the Ontario Human Rights Commission also stipulate that "personal preferences and singular beliefs" about the vaccine aren't grounds for accommodation.

STEP 2: TAKE ACTION BASED ON EMPLOYEE'S REASON FOR REFUSING VACCINATION

Once you find out why refusing employees won't get vaccinated, take appropriate actions based on their reasons. The 2 basic options: accommodation or discipline.

Scenario 1: Accommodating Refusing Employees

Your duty under human rights laws is to make reasonable accommodations up to the point of undue hardship. In the vaccination context, that basically means not making the employee get the vaccine. However, that doesn't necessarily mean letting the exempt employees just go about their business as normal. As an employer, you still have a duty to protect employ-

ees, customers, patients and others in your workplace from infection. Allowing unvaccinated employees into the workplace would be deemed undue hardship if it would put others at undue risk.

Compliance Strategy: You must perform a hazard assessment based on the type of workplace you have, the employee's job duties, with whom and for how long they have close contact and other risk factors specific to the work site. If, on the basis of that assessment, you determine that letting the employee come to work and go about her normal routine poses unacceptable infection risks, you must explore other accommodations, such as:

- Requiring the employee to undergo rigorous and regular COVID-19 testing;
- Requiring the employee to work from home; and/or
- Letting the employee come to work, provided that he keeps himself isolated, wears a mask at all times, self-monitors, carries out extra hygiene measures and follows other special health and safety protocols.

Scenario 2: Disciplining Refusing Employees

People with disabilities, religious beliefs or other legitimate grounds for accommodations under human rights laws should be few and far between. Consequently, you should be in the position to enforce your mandatory vaccination policy in the vast majority of cases. At that point, it becomes a matter of following your standard discipline policies and procedures (or any special procedures you include in the enforcement provisions of your mandatory vaccination policy) the way you

would with any other employee who deliberately defies an essential HR or health and safety policy. In addition to endangering others, you can justify discipline on the basis of insubordination.

What we don't know, at least not yet, is whether a vaccine refusal rises to the level of just cause for termination even for a first offence, or requires the imposition of discipline on a progressive basis. But as companies enforce their mandatory vaccination policies, this issue is bound to wind up before courts and arbitrators before too long.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

The Impact Of COVID-19 On The Reasonable Notice Period

In every non-unionized employment relationship, the employer has an implied common law obligation to give the employee reasonable notice of its intention to terminate the employment relationship, unless there is just cause for termination. If the employer fails to give the employee reasonable notice of termination, the employer risks a wrongful dismissal action for breach of that implied term.

The purpose of providing reasonable notice is to allow the employee a period of time in which to secure alternative employment. Reasonable notice is decided with reference to the following key factors (known as the “Bardal Factors”):

1. The character of the employment;
2. The employee’s length of service;
3. The employee’s age; and
4. The availability of similar employment, having regard to the experience, training, and qualifications of the employee.

Further discussion on the operation of the Bardal Factors can be found here: [Notice Periods for Without Cause Terminations](#)

The COVID-19 pandemic has had a negative effect on businesses, and many were forced to temporarily lay-off

or dismiss employees. Likewise, with many businesses closing or abandoning recruitment efforts, some job seekers have struggled to re-enter the workforce following termination or lay-off. Over the past seven months, courts across the country have considered the impact that COVID-19 has had on the fourth Bardal Factor (the availability of similar employment), and the reasonable notice analysis as a whole.

The following five cases are recent examples of how the courts have determined the applicable notice period in light of the COVID-19 pandemic:

Herreros v Glencore Canada, 2021 ONSC 5010: Ms. Herreros was dismissed without cause by the Company in October 2019. She urged the Court to consider the COVID-19 pandemic as a negative factor reducing her opportunity to obtain other employment, therefore justifying a lengthier notice period. In its analysis, the Court noted that the pandemic had not yet materialized at the time of Herrero’s dismissal. Given that an assessment of the Bardal Factors is to take place as of the time of termination, the Court held that the pandemic was not a relevant factor in its consideration of the fourth Bardal Factor.

Kraft v Firepower Financial Corp, 2021 ONSC 4962:

Mr. Kraft was working in a highly specialized salesperson role when his employment was terminated in March 2020. The Court noted that at which point, the economy was

already shutting down and remained closed during Kraft's inevitably prolonged job search. Additionally, Kraft tendered evidence that his inability to gain alternate employment directly related to the pandemic. In light of that evidence, the Court found that Kraft deserved "to receive at least somewhat above the average notice period" (para 22). The Court assessed the reasonable notice period at 10 months, being one month more than he would have received during non-pandemic times.

Abdon v Brandt Industries

Canada Ltd, 2021 SKPC 37: Mr.

Abdon was dismissed for cause on February 6, 2020. While the Court in this case held that the Company did in fact have just cause to terminate Abdon's employment, the Court assessed what he would have been entitled to had he been successful. At the time of termination, Abdon was working as a welder. At trial, the Company brought evidence that there were at least four welding jobs available in the vicinity of where Abdon resided. Accordingly, the Court held that equivalent employment was available to Abdon, who did not tender any evidence that the COVID pandemic played a negative role in his job search.

Moore v Instow Enterprises

Ltd, 2021 BCSC 930: Mr. Moore, a long-term (26.5 years) employee, was dismissed from his employment as a commercial tire salesperson on a without cause basis in May 2020. The Court noted that while Moore was not entitled to greater notice simply by virtue of the COVID-19 pandemic, the current pandemic impacted the relative availability of similar employment. The Company identified a list of job postings that they submitted would have provided reasonably similar employment to

Moore's previous job. Several of these jobs were in tire sales, while others were in related industries or involved senior sales positions. Despite this evidence, the Court did not specifically comment on whether these job postings impacted its decision to award 20 months of reasonable notice. The Court did, however, consider the availability of similar employment when assessing Moore's duty to mitigate. As Moore did not take active steps to pursue alternate employment, the Court reduced his notice period by three months.

Iriotakis v Peninsula Employment Services Limited, 2021 ONSC 998:

Mr. Iriotakis' employment was terminated on March 25, 2020, after just over two years of service. In this case, the Court agreed that the Plaintiff's age (56) and the uncertainties in the job market at the time of termination both served to tilt the period of reasonable notice away from the fairly short period of notice that his brief tenure might have otherwise indicated. Nevertheless, the Court held that "these factors do not apply to the exclusion of the others. A balanced approach is what is called for" (para 22). The Court held that Iriotakis was entitled to three months of notice.

KEY TAKEAWAYS

Reasonable notice is determined on a case-by-case basis. Despite the impact that the pandemic has had on the availability of similar employment in many industries, the law remains clear – no one Bardal Factor is given disproportionate weight in the analysis.

When considering whether the COVID-19 pandemic has impacted the availability of similar employment, the courts will consider the timing of termination. Where termination has

occurred prior to the commencement of COVID-19 pandemic in Canada, courts have been less likely to consider COVID-19 as a factor influencing the notice period. Further, courts will assess the job market for a specific industry, and not the market as a whole when determining the availability of alternate employment.

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