

## GENDER IDENTITY AND EXPRESSION IN THE WORKPLACE

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As June is Pride Month, it is a good opportunity to spotlight two protected grounds under the Ontario *Human Rights Code* (“Code”): gender identity and gender expression. Gender identity and gender expression have been protected grounds under the Code since 2012. In 2014, the Ontario Human Rights Commission (“Commission”) released its *Policy on preventing discrimination because of Gender Identity and Gender Expression* (“Policy”). The Policy does not create freestanding legal obligations. However, as with all Commission policies, it can be considered by the Human Rights Tribunal of Ontario in any proceeding. Accordingly, employers ought to be aware of the Policy and the clarification it brings to this rapidly developing area of law. In this article, we review the Policy’s guidelines, and provide our best practices for employers seeking to understand and appropriately respond to gender identity and gender expression issues in the workplace.

### Understanding Gender Identity and Gender Expression

The *Code* does not define “gender identity” or “gender expression”. However, the Policy provides helpful guidance on the subject, including the following definitions:

**Gender Identity** is each person’s internal and individual experience of gender. It is their sense of being a woman, a man, both, neither or anywhere in between. A person’s gender identity may be the same or different than their birth-assigned sex. Gender identity is fundamentally different from a person’s sexual orientation.

**Gender Expression** is how a person publicly presents their gender. This can include behaviour and outward appearance such as dress, hair, make-up, body language and voice. A person’s name and chosen pronoun are common ways of expressing gender.

**Trans** or **transgender** is an umbrella term referring to people with diverse gender identities and expressions that differ from stereotypical gender norms. It includes but is not limited to people who identify as transgender, trans woman (male-to-female), trans man (female-to-male), transsexual, cross-dresser, gender non-conforming, gender variant or gender queer.

**Gender non-conforming** individuals do not follow gender stereotypes based on the sex they were assigned at birth, and may or may not identify as trans.



### Accommodating Gender Expression and Gender Identity in the Workplace

As the above suggests, gender identity and gender expression are highly personal in nature and can vary significantly from person-to-person. As a result, employers must be sure to address employees’ lived gender identities and gender expression on a case-by-case basis. There is no “one-size fits all” response to gender in the workplace. Notwithstanding this, we have comprised a list of our “best practices”, so that employers may take steps towards becoming *Code* compliant:

- **Review human rights policies.** In order to comply with the *Code*, gender identity and gender expression ought to be included as protected grounds within your harassment and discrimination policies.
- **Review workplace violence and harassment policies.** Your workplace violence and harassment policies should clarify that gender-based violence, which includes violence against trans persons, is prohibited in your workplace.
- **Review human resources forms and documents.** Gender identifiers on application forms, benefits enrolment forms, communications forms including employee work records, identification cards, email accounts and office directories should be updated to ensure options are provided for employees and job applicants who do not exclusively identify as either male or female (e.g. "X"), and/or to eliminate gender identifiers where they may not be required.
- **Review your dress code.** Assess existing dress codes to eliminate gender specificity. Absent a *bona fide* occupational requirement, dress codes should be uniform across all individuals so that employees can dress in a manner that conforms with their personal gender identities.
- **Be proactive.** All employees, including managers and supervisors, should receive training on workplace violence, harassment and discrimination. This training should include training on gender identity issues.
- **Accommodate.** Gender identity and gender expression do not exist in a vacuum. When providing accommodations on this basis, consider whether other grounds under the Code may intersect and require accommodation. For example, the Commission's Policy provides that trans people have the right to use washrooms and changing facilities that match their lived gender identity. Consider accommodations that would permit trans employees to access corresponding gender-specific washrooms and change rooms. In certain circumstances, it may be appropriate to offer gender non-specific, single-stall, or single-occupant facilities.

In addition to physical accommodations, employers should accommodate employees' chosen names and pronouns in all communications, including work records, identification cards, email accounts, and office directories.

- **Ask for input.** Gender identity is extremely personal and dynamic. In many circumstances, it will be necessary and appropriate to ask for input from the employee so that the employer can better understand the nature of the need(s). Be sensitive and employ respect in these discussions.
- **Protect privacy of personal information.** Information that relates to an employee's sex, gender identity or medical history should only be collected where relevant and necessary, and must be stored in secure filing systems and kept confidential and private. Review your document retention and access policies to ensure they protect sensitive and confidential records.

Gender identity and expression can pose unique challenges for employers seeking to comply with the *Code*. The key to successful outcomes is to ensure that all persons are treated with dignity and respect, in accordance with their lived gender identity. Sensitivity must be employed in addressing the topic of gender identity and expression in the workplace. However, in most circumstances communication and awareness will be key to creating workplaces that are tolerant and accommodating to persons from all gender identities.

Grant Nuttall and Jamie Burns specialize in labour and employment issues facing municipalities. If you have questions about gender identity, gender expression or any other labour, employment, or human rights matter, please contact Grant Nuttall at 416-864-7262, or Jamie Burns at 416-864-7019, either of whom would be pleased to assist you.



## RETENTION OF VACCINATION STATUS AND RAT RECORDS

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Throughout the COVID-19 pandemic, workplace health and safety issues arose which prompted the collection of personal data in order to address them. These workplace safety issues were addressed in a manner of ways including: screening employees and patrons through the use of questionnaires for COVID-19 symptoms, verifying COVID-19 test results prior to entering a workplace, and perhaps most prominently, by requiring COVID-19 vaccination. All of which likely entailed some form of data collection by employers.

The types of collection varied from employer to employer. For some, their COVID-19 vaccination policies subjected employees to some sort of COVID-19 testing protocol, such as Rapid Antigen Testing (RAT) or Polymerase Chain Reaction (PCR) testing. Others also required employees to attest to vaccination status or even to provide official proof of vaccination.

The question arises: what are an employer's retention obligations after they collect COVID-19 test results or vaccination status of its employees?

For Ontario municipalities, there are two pieces of privacy legislation at-play: (1) the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)*, and (2) the *Personal Health Information Protection Act, 2004 (PHIPA)*.

Under *MFIPPA*, Ontario municipalities are normally required to retain any personal information, as defined under the Act, for a minimum period of one (1) year from their use unless the individual for whom the information is about consents to an earlier disposal or the municipality passes a by-law or resolution abridging the period.

Notably, not all "personal information" is covered by *MFIPPA*. *MFIPPA* expressly excludes records that are collected, prepared, maintained or used

by or on behalf of an institution in relation to labour and/or employment-related purposes.<sup>1</sup>

Therefore, if COVID-19 testing results and/or proof of vaccination records are collected and used by a municipality for labour and/or employment-related purposes, then those records would not be covered under *MFIPPA* and no minimum retention period would apply. However, there is no definitive case law on the topic at this time, and an adjudicator could determine differently. In which case, the records are covered under *MFIPPA* and the minimum one (1) year retention period would apply.

Under *MFIPPA*, municipalities are also required to maintain any records that may be the subject of an ongoing access request.

Municipalities also need to consider if *PHIPA* may apply. If the records are collected by a municipality's occupational health and safety department, there may be a question as to whether they are acting as a Health Information Custodian and therefore potentially subject to the regulation of *PHIPA* in their collection, use, disclosure and retention of personal health information they handle. There is a second question as to whether those records constitute "personal health information" in any event. That question arises from s. 4(4) of *PHIPA* which contains a carve-out for personal health information in a record where: (a) the information contained in the records primarily relates to one or more employees of the custodian (i.e. the employer); and (b) the record is maintained primarily for the purpose other than the provision of health or assistance in providing health care to employees. If both criteria are met, then the information contained in the record will be deemed not to constitute personal health information and will not be covered by *PHIPA*.

There is conflicting case law as to whether an employee's occupational health file is truly an employment file and maintained primarily for a purpose other than the provision of health care. In

1 Note: the reference to "labour and/or employment-related purposes" is a generalization of the legislation. Reference should be made to the exact language of the legislation to determine its application to any given circumstance(s) (see section 52(3) of *MFIPPA*).

fact, there are arbitral decisions which found that an employee's occupational health file was maintained primarily for the purpose of health care and covered by the *Act* whereas there are a number of IPC decisions that have come to the opposite result.

Should *PHIPA* apply to the records, then a municipality would be required to retain those records for a period prescribed by regulation to ensure that the individual to whom the information relates has a reasonable opportunity to obtain access to it. At this time, there are no regulations identifying a specific retention period for COVID-19 testing results or vaccination status records. Municipalities are also required to maintain any such records that may be the subject of an ongoing access request.

What this means for Ontario municipalities is that, as employers, municipalities ought to consider:

- Who collected the COVID-19 testing information and/or vaccination status? Was it someone from Human Resources or Occupational Health and Safety? Whomever collected and stored the information may impact the applicable retention period.
- What information did the municipality actually collect? A simple refusal to respond which deemed an employee to be "non-compliant" with a vaccine policy may not even be considered personal health information depending on the other information collected in the process. Or did the municipality actually collect the provincially-issued QR code/certificate of vaccination? The information actually collected will impact which retention period applies, if any.
- Have employees consented to an earlier destruction of records or did the municipality pass a regulation abridging the time period? MFIPPA permits institutions (i.e. municipalities) to dispose of records before reaching the minimum one (1) year retention period in these circumstances.
- Are there reasons why the municipality may want to retain the records beyond the minimum period? For example, if litigation in which the records may be relevant is anticipated.

Municipalities should consult with their internal privacy team or external legal counsel when determining the applicable and appropriate retention period for COVID-19 testing results and/or vaccination status for its employees.

Andrew Movrin and Victoria McCorkindale specialize in privacy issues facing municipalities. If you have questions about privacy obligations or any other labour and employment matter, please contact Andrew Movrin at 416-864-7257, or Victoria McCorkindale at 416-864-7228, either of whom would be pleased to assist you.

