

COVID-19 Vaccinations: Mandatory In The Workplace?



BC is now in Phase 2 of the province's COVID-19 Immunization Plan and there is emerging debate as to whether employers have the right to require employees to obtain COVID-19 vaccinations. With limited exceptions, there is currently no support for mandated employee vaccinations in Canadian law.

Traditionally, employers have not been allowed to impose blanket mandates for employee vaccinations and, in the case of COVID-19, to date, the provincial health authorities have not made vaccination mandatory for front-line workers or anyone else.

There is yet little judicial guidance on whether any attempt by employers to impose such a mandate would be valid, however, as we have learned from the unsuccessful "Vaccinate or Mask" hospital policies in Ontario relating to healthcare workers and the flu shot, a mandate of this kind would, at a minimum, require the support of clear scientific evidence.

Vaccine efficacy

In our view, the position that employers can force employees to obtain COVID-19 vaccinations is based on a fundamental misunderstanding of how the currently available COVID-19 vaccines work.

Presently, approved COVID-19 vaccinations work by drastically reducing the likelihood that the vaccinated individual will contract the virus, and lessening the severity of illness if they do. However, there is no evidence to support that the currently available COVID-19 vaccinations protect against transmission of the virus.

As quoted from the BC CDC's website: *"The vaccine won't stop everyone from getting COVID-19. For those who do get the virus, it is less likely you will experience severe illness."* Therefore, there can be no justification for mandatory COVID-19 vaccination policies in the workplace if there is no evidence that the vaccination stops the spread of the virus.

A related question that warrants a more nuanced answer is whether employers can terminate employees for failing to obtain COVID-19 vaccination, given the unique circumstances of the pandemic. In this case, we strongly recommend employers seek legal advice before taking any action, as such terminations would be high

risk and each case will turn on its facts.

Workplace impact

Employees refusing to obtain a vaccine can, however, negatively impact the workplace. Since vaccinated employees are protected from the serious effects of the illness, an infected but low-symptom employee can continue to work from home, and therefore maintain their general productivity.

Until further and better information can be known about the COVID-19 vaccines, namely whether they can be effective against transmission, employer best practices on this issue should include positive education and support, rather than hardline rules and shaming.

FAQs

Can employers make obtaining COVID-19 vaccination mandatory'

While employers can strongly encourage their employees to obtain the vaccine, it is unlikely they can require employees to obtain vaccination to attend the workplace. However, this position could change if the vaccine demonstrates it can protect against transmission, or if new public health orders require it.

What if an employee has a legitimate reason for not obtaining vaccination'

As stated above, it is unlikely employers can require employees to obtain vaccination in the first place. However, if this position changes due to new information from the scientific community or public health authorities, employers will have to assess the legitimacy of the reasons for not obtaining the vaccination on a case-by-case basis.

In every case, this assessment should be based on the available science and guidance from public health authorities, as well as whether it is possible for employees to work effectively from home.

What if vaccination clinics are only open during typical work hours'

If required, employers may provide employees with paid time off to obtain the vaccine and, in such a case, they can require proof that the vaccine was obtained.

Do employees have to attend the workplace if they do not know who is vaccinated and who is not'

A vaccinated employee brings as much risk into the workplace as a non-vaccinated employee, so whether other employees are vaccinated or not, workplace protocols (masks, physical distancing, sanitizing) should remain in place at least until public health authorities advise they can be removed. In this respect, on-site work schedules should not be impacted by the availability of vaccines.

What will happen to an employee's position if they refuse to attend

the workplace on the basis that they feel unsafe due to personal or health concerns'

As with other requirements in provincial employment standards legislation relating to leaves of absence, employers may require employees to provide medical support for requests to work from home. The unique circumstances of each employer will dictate whether the option to work from home is appropriate, and what the request procedure should be.

What if employees become sick or need to care for someone who becomes sick, and they have exhausted their paid sick and/or vacation days'

Provincial employment standards legislation, including BC's *Employment Standards Act*, provides for leaves of absence related to sickness/COVID-19, and employees may qualify for federal sickness insurance benefits while on one of these leaves.

Federal Sickness Insurance Benefits:

1. EI sickness benefits ' up to 15 weeks of financial assistance if you cannot work for medical reasons. Employees could receive 55% of their earnings up to a maximum of \$595 a week.
2. Canada Recovery Sickness Benefit (CRSB) ' \$500 for each one-week period up to a maximum of four weeks.
3. Canada Recovery Caregiving Benefit (CRCB) ' \$500 for each one-week period up to a maximum of 38 weeks.

Note that recently introduced federal legislation relating to recovery benefits disqualifies all international travelers who need to quarantine or isolate upon their return to Canada, including people returning from vacation, from the CRSB and CRCB.

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