

Mandatory Vaccinations For Employees: What Are The Issues?



While Canada is still in the early stages of its COVID-19 vaccine rollout, given the limited availability and potential interruptions in vaccine supply, many employers are already turning their minds to what their workplaces will look like once COVID-19 vaccines are widely available to the public in Canada. In particular, employers are beginning to consider whether to adopt a vaccine policy.

Having a vaccination policy in place will be advisable for most employers, given their obligation to take all reasonable precautions to protect the health and safety of their workers. However, the content of such policies will necessarily vary depending on the nature of the workplace. Vaccine policies being contemplated range from encouraging employees to get vaccinated up to requiring vaccines as a pre-requisite to attend work.

Employers who are considering a mandatory vaccination policy will need to balance workplace safety against their workers' contractual and privacy rights and human rights legislation. Unfortunately, there is currently no governmental or public health guidance that will assist employers in achieving and maintaining this balance.^[1]

Legal precedent for mandatory vaccination policies

While there is case law that considers whether employers can implement mandatory flu vaccination policies within their workplaces, it generally arises within the healthcare and residential care industries and involves unionized employees. And, of course, the comparisons between the flu vaccine and COVID-19 vaccine are limited.

Unions have historically challenged mandatory vaccination policies as an unreasonable exercise of management rights. In this context, if the mandatory vaccination policy is not expressly allowed by a collective agreement, the arbitrator will assess whether the policy is reasonable and enforceable by taking into consideration whether the policy is:

- consistent with the collective agreement;
- reasonable;
- clear and unequivocal;
- brought to the attention of the affected employees in advance of the

- employer attempting to act on it;
- clear that a breach of the policy would result in discharge from employment (and this fact is brought to the attention of the affected employees); and
- consistently enforced by the employer from the time it is introduced.

Although the factors above were developed in the context of union grievances, they provide helpful guidance for vaccination policies in non-unionized settings. In particular, any vaccination policy introduced in a non-unionized context should be reasonable, clear and brought to the attention of employees well in advance of attempts to implement or enforce the policy. Once in place, a vaccine policy would need to be consistently enforced by the employer to avoid complaints or allegations ranging from simple unfairness to discrimination.

Reasonableness

Subject to the human rights and privacy considerations discussed below, it remains to be seen whether employers will be able to require all of their employees to be vaccinated once the vaccines become widely available, whether they can discipline, terminate or refuse to hire individuals who refuse to be vaccinated and whether mandatory vaccination policies may provide a basis for constructive dismissal claims. Whether or not a mandatory vaccination policy will be enforceable or lead to claims will likely depend largely on whether the policy is reasonable in the specific circumstances.

As noted above, there is currently no governmental or public health guidance on whether employers should encourage employees to be vaccinated or require vaccinations as a pre-requisite to enter any workplace, and it is possible that no clear guidance will be issued. If the Canadian or provincial governments were to issue recommendations or guidance on vaccines, or make vaccines mandatory in certain settings (such as daycares or schools) or public spaces, this would likely help inform employers' decisions on whether they should make vaccines mandatory within their own workplace.

Absent governmental or public health guidance, the reasonableness of a mandatory vaccination policy will likely depend on the type of workplace in which the policy is being implemented. Employers in health care or congregate care settings (and, it could be argued, the hospitality, retail, and travel industries, among others) may be more likely to be able to successfully defend mandatory vaccination policies as compared to employers in lower risk workplaces where employees are not required to work in close contact with co-workers or the public.

The data being collected by various levels of government on workplace COVID-19 transmission may help to inform whether a workplace or role is at higher risk for COVID-19 transmission. For example, recent data collected in Ontario seems to suggest that workplaces related to food processing have had double the number of COVID-19 outbreaks as compared to retail workplaces (whether that relates to the nature of such workplaces or is simply a reflection of the amount of time each industry has been actively operating over the last year remains to be seen).

A mandatory vaccination policy implemented by an employer is more likely to survive a legal challenge if it is responsive to and distinguishes between different types of workspaces and risk profiles for transmission of COVID-19.

Human rights law principles informing vaccine policies

Pursuant to provincial and federal human rights legislation, employers may have a duty to accommodate up to the point of undue hardship any employees who cannot be vaccinated for a reason related to a prohibited ground of discrimination under applicable human rights legislation. Two prohibited grounds that may form a basis for an employee refusing to be vaccinated are disability (which is a broadly-defined term under human rights legislation), sex (which would include an employee who is pregnant) and religious beliefs or creed.

If an employee refuses to be vaccinated due to a documented disability, a pregnancy or for a religious reason, the employer will have to consider whether the employee can be accommodated without undue hardship. Accommodation must be considered on a case-by-case basis, taking into consideration the employee's specific needs.

Examples of accommodation may include allowing an employee to work from home, or taking other precautions such as requiring the employee to wear personal protective equipment and maintain physical distancing (consistent with the health and safety precautions being taken in most workplaces at the time of writing). The threshold for establishing undue hardship can be high, inconvenience alone is generally not determinative of whether the threshold of undue hardship has been reached. It may be difficult for an employer to argue that allowing an employee to work from home, or work within the physical workplace with appropriate safety precautions, will result in undue hardship to the employer if the employer has previously claimed that it was safe for employees to work under these conditions prior to the vaccine becoming widely available.

There may be some employees within some workplaces with respect to whom an employer will be able to justify a mandatory vaccination policy as a *bona fide* occupational requirement (e.g., in the interest of workplace safety) that cannot be accommodated without undue hardship. For example, in a workplace where employees truly cannot work from home and are required to be in close and regular contact with each other, or where employees are required to regularly travel by air if airlines were to refuse boarding to non-vaccinated passengers. The appropriate response to an employee in this situation would be determined on a case-by-case basis.

Return to workplace and vaccination rollout

Depending on timing, employers considering a vaccination policy may want to include it with their return to the workplace program. Earlier in the pandemic, we saw many employers utilize anonymous questionnaires to evaluate employees' comfort with returning to the workplace. Similarly, employers could ask employees whether they have been vaccinated, intend to get vaccinated (and when) or do not intend to get vaccinated. Employees who have been vaccinated may be permitted to return to the workplace first, and be allowed to reintegrate with their other vaccinated co-workers. If an employee advises they do not intend to get vaccinated, they could be asked to disclose the reason, which would allow the employer to make a determination of whether a prohibited ground of discrimination is engaged (in which case the above-mentioned accommodation analysis would need to take place on a case-by-case basis).

Privacy considerations

Employers ' regardless of whether they are subject to privacy legislation in Canada ' will want to take care in collecting and storing employees' personal information, including their vaccination status and any related information. Such personal information would generally be deemed to be sensitive in nature, and should be accordingly protected by putting appropriate safeguards in place. Those employers that are subject to private sector privacy legislation in Canada will also need to consider compliance with the limitation on collection and use principles, and what personal information is strictly necessary to collect and to store, all for the purposes of ensuring a safe workplace. For example, an employer with a mandatory vaccination policy for a particular workplace may need to collect information to verify vaccination status of an employee, but may not need to retain such information once it has been reviewed and a decision has been made to permit the employee to return to the workplace. Consideration should also be given as to when such personal information will no longer be required and can be securely destroyed.

Conclusion

Absent government and medical directives for employers to require all employees to be vaccinated, or even strongly recommend that all employees be vaccinated, even a carefully drafted mandatory vaccination policy that addresses both human rights and privacy concerns for employees outside the healthcare context could be subject to a legal challenge.

Footnote

1 Though we note that there are certain industries where vaccines are mandatory for specific workers (for example, in Ontario, under the Regulations of Ontario's *Child Care and Early Years Act*, the operators of child care centres must ensure that their employees have had immunizations as directed by the local medical officer of health).

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