

Requiring Proof of COVID-19 Vaccination for Entry into the Workplace



3 ways asking workers if they've been vaccinated can get you into legal trouble.

Current COVID-19 public health guidelines not only allow but may even require employers to screen workers before letting them enter the workplace. Now that the COVID-19 vaccination has become available, you may be considering modifying your protocols to require workers to furnish proof that they've received the vaccine in lieu of or in addition to undergoing screening. Are you legally allowed to do this? **Bottom Line on Top:** Yes, provided that you do it in a way that recognizes and respects workers' privacy, accommodations and other personal rights. Here's what OHS coordinators must know to help their organizations keep their pre-screening protocols within legal limits, along with a [policy template](#) you can adapt for your own workplace.

Vaccine in the Workplace Law, 101

The COVID-19 vaccinations currently available have been shown to be safe and effective. They're also free. The one thing they're **not**, though, is mandatory. However, employers can encourage workers to get vaccinated voluntarily by offering education, information and perhaps even incentives. We also know from previous flu vaccine cases that in some situations, employers can implement a mandatory vaccination policy which, while not physically forcing anybody to get vaccinated against their will nevertheless imposes employment-related consequences on those who refuse to get the vaccine voluntarily. Those consequences may include denying the non-vaccinated entry to the workplace.

Rule of Thumb: Requiring workers to provide proof of vaccination is justified only when it can be shown that the policy is essential for health and safety (which is most likely to be the case in health care, educational and other 'congregate' settings), fair, flexible and no more intrusive than it has to be. There are 3 ways you can get into legal trouble by not letting workers into the workplace without proof of vaccination.

1. Privacy Violations

Whether a person has received a particular vaccination may be deemed personal health information (PHI) that privacy laws ban employers from collecting, using or disclosing (which, for simplicity's sake we'll refer to collectively as 'use')

unless the context requires otherwise) without consent. However, consent requirements are subject to exceptions, one of which allows employers to use PHI to carry out legitimate and essential employment functions. Throughout the pandemic, privacy commissions across Canada have indicated that pre-entry medical screening to keep the infected and recently exposed out of the workplace is not only a legitimate and perhaps even infection control measure. These same principles apply equally to requiring proof of COVID vaccination.

But there's also an important qualifier: Employers are allowed to use only the minimum PHI necessary to accomplish this purpose. Example:

- **OK:** Asking workers if they've been vaccinated or have any COVID-19 symptoms;
- **Not OK:** Asking workers if they have any non-COVID related medical conditions or what medications they use.

The latter inquiries are illegal because they solicit information you don't need for COVID screening.

2. Disability Discrimination

Human rights laws ban employers from requiring employees to undergo a medical examination or asking questions designed to elicit information about a person's disability. Human rights commissions in Canada are likely to greenlight asking about vaccination status the way they have in the U.S. In fact, one already has. On January 12, 2021, the Ontario Human Rights Commission (OHRC) made it clear that 'requiring proof of vaccination to ensure fitness to safely perform work may be permissible if the requirement is made in good faith and is reasonably necessary for reasons related to safety.' But, the guidance continues, employers still must accommodate people who may be unable to be vaccinated due to disability or creed unless it would amount to undue hardship based on cost or health and safety.

3. Duty to Accommodate

Employers must also be mindful of their duty to accommodate employees to the point of undue hardship. Such accommodations may include exemptions for employees:

- That can't take the vaccine due to disabilities or medical conditions;
- For whom taking the vaccine would violate a sincerely held religious belief, practice or observance or creed; and/or
- To whom the vaccine isn't yet currently available.

Accommodations may also include letting employees who can't or won't furnish proof of vaccination to work from home or admitting them to the workplace, provided that they can be physically self-isolated and agree to wear a mask, practice extra hygiene and engage in medical self-monitoring at all times.

The question of whether a particular accommodation is reasonable or undue hardship varies by the circumstances involved. The only blanket rule is that there are no blanket rules other than the duty of the employer to perform an individualized assessment of each case, i.e., engage in a flexible, interactive process to identify workplace accommodation options based on how big a danger allowing that particular unvaccinated individual to enter the workplace would

pose.

The 5 Things to Do

If you do demand proof of vaccination:

1. Clearly explain the reasons why;
2. Remember that asking about disabilities is a red flag for discrimination;
3. Be careful not to ask for any medical information other than proof of vaccination;
4. Keep vaccination records secure and confidential and disclose them to third parties on a strict need-to-know basis; and
5. If workers belong to a union, account for the terms of their collective agreement.