



# Mandating COVID-19 Vaccinations in the Workplace

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In Ontario, the COVID-19 vaccine rollout has begun. With doses of the vaccination now available for many individuals working in the health care, hospital and long-term care sectors, employers in these fields and beyond are considering whether immunization against COVID-19 should become a mandatory requirement in their workplace.

No federal, provincial or local health authority has indicated that they will mandate vaccination, and the Chief Medical Officer of Health for Ontario, Dr. David Williams, has explicitly indicated that he does not intend to do so within the province. Accordingly, the decision regarding whether vaccination will be mandatory in a particular workplace falls squarely on the shoulders of the employer.

## Can Employers Require Employees to get Vaccinated Against COVID-19?

This precise issue has yet to be the subject of a legal challenge, either before a court or a labour arbitrator. Accordingly, employers and their legal counsel will have to carefully consider the particular facts and circumstances when determining whether a workplace rule mandating COVID-19 vaccination is appropriate in any given case.

### a) Why Mandate Vaccination?

Employers must be mindful of their occupational health and safety-related obligations, which are all the more significant now as a result of the ongoing global public health crisis. In particular, under the Ontario *Occupational Health and Safety Act*, employers have a duty to protect their workers from health and safety risks. There exists a similar duty for federally regulated employers subject to the *Canada Labour Code*. Accordingly, in certain circumstances, an argument could eventually be made that, in the face of evidence demonstrating that the COVID-19 vaccination is an effective measure for reducing the risk of *transmitting* (as opposed to contracting) the virus, employers are within their rights to mandate immunization in order to protect all other employees in the workplace.

This argument is unlikely to succeed in many cases, however. For example, in workplaces where employees are not in contact with vulnerable populations, or where employees have no or limited contact with others in the workplace at all, such an argument would be given little weight.



In any case, even assuming occupational health and safety considerations justify the implementation of a mandatory vaccination requirement, that requirement will remain subject to several limitations, as detailed below.

### **b) What does the Arbitral Jurisprudence Say About Mandatory Vaccinations?**

There is some arbitral precedent, specific to unionized workplaces, which addresses the issue of mandatory influenza vaccinations. These cases may provide some helpful commentary and guidance as to how arbitrators will view the novel issue of a mandatory COVID-19 vaccination, at least in the healthcare sector. (Note that, as arbitral decisions, these cases are not binding on other arbitrators or on courts, however.)

Generally speaking, and subject to the limits discussed in greater detail below, mandatory influenza vaccination policies have been allowed by arbitrators in private healthcare institutions as a reasonable exercise of management authority. In order for such a requirement to be introduced unilaterally, however, the rule or policy must be:

- Consistent with the applicable collective agreement;
- Reasonable in the circumstances,
- Clear and unequivocal,
- Brought to the attention of affected employees, including specifically as it relates to the potential for the imposition of disciplinary measures in cases of non-compliance; and
- Consistently enforced since its implementation.

As an alternative to mandatory influenza vaccination policies, some healthcare institutions have implemented “vaccinate-or-mask” (“VOM”) policies. Arbitrators have historically been far less favourable to VOM policies than they have to mandatory influenza vaccination policies. In many cases, since the evidence that masking effectively prevented flu transmission was contested, arbitrators concluded that the requirement for unvaccinated employees to wear an uncomfortable mask for the full duration of flu season was essentially a tactic used to compel those employees to vaccinate, and was thus unreasonable.

It is important to note that, since the evidence regarding the efficacy of vaccination and masking as measures for preventing the transmission of COVID-19 is, so far, significantly different than in the case of influenza, an arbitral decision as to what is “reasonable in the circumstances” may be entirely different in the context of COVID-19 as opposed to the usual seasonal flu context. In attempting to justify any mandatory vaccination requirement, employers are thus well-advised to consider the most up-to-date, objective and reliable scientific evidence available.



### **c) On What Basis Might a Mandatory COVID-19 Policy be Challenged?**

Even where an employer determines that the implementation of a mandatory COVID-19 vaccination policy is justified in their workplace, the new policy may raise legitimate concerns, especially in the unionized setting.

In the unionized context, unions will be able to pursue individual grievances in respect of claims of discrimination or discipline, as well as policy grievances challenging the mandatory vaccination rule or policy as a whole.

In the non-unionized context, an employee who is terminated with cause following their refusal to be vaccinated might sue the employer in court for damages arising from wrongful dismissal. An employee who has not been expressly terminated but feels that the requirement for vaccination alters the fundamentals of the employment relationship may similarly claim they have been constructively dismissed and seek damages from the employer.

In terms of human rights, any mandatory vaccination requirement must exempt workers who advance a credible human rights claim under the Ontario *Human Rights Code* or the *Canadian Human Rights Act*. In the case of COVID-19 vaccination, such claims are most likely to be based on religious or medical grounds. Although employers have the right to ask questions in order to verify the legitimacy of such a claim, if proven, the employee's restriction will have to be accommodated to the point of undue hardship. Discipline or other adverse or differential treatment of an employee who has asserted that their refusal to be vaccinated is related to a protected human rights ground may therefore result in an application to the Ontario Human Rights Tribunal or the Canadian Human Rights Tribunal.

Mandating a potentially invasive medical treatment like vaccination, especially in the absence of long-term data on effectiveness and side-effects, and requiring subsequent disclosure of that employee's immunization status, could also potentially be viewed as a serious violation of employees' privacy rights.

Furthermore, where an employer is a public institution, the rule or policy may be challenged through invocation of section 7 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"), which guarantees an individual's security of the person. Case law has consistently held that consenting to invasive medical treatment like vaccination is an inherently personal decision that individuals should ultimately be permitted to make for themselves. Of note, however, is the fact that, in unionized healthcare settings, such a violation has historically been saved by section 1 of the *Charter*, where arbitrators have found that limiting an employee's individual rights was justified in order to ensure the pressing objective of patient safety. It remains unclear as to whether section 1 might come into play in other contexts and for other similarly important policy reasons.



#### **d) So, Can Employers Require Employees to get Vaccinated Against COVID-19 or Not?**

In light of the above, employers will need to be prepared to defend a decision regarding mandatory COVID-19 vaccination from numerous potential legal challenges and with uncertain results. Based on how arbitrators have decided the issue in relation to influenza vaccinations, as well as the significant health and safety risks created by COVID-19, it is likely that employers in at least some sectors will be permitted to implement a mandatory COVID-19 vaccination policy, subject to the above limitations. In the healthcare sector, for instance, where employees tend to frequently interact directly with the most vulnerable populations, some form of mandatory COVID-19 vaccination policy may be justified. Employers in other sectors, by contrast, should expect to face more of an uphill battle in successfully imposing a requirement for COVID-19 vaccination.

In all cases, the policy must be reasonable in the circumstances. This means it should be based on verifiable facts and evidence, and consider factors including, but not limited to, the nature of the workplace, the level of risk, and the competing rights and interests at play.

#### **How do I Implement an Effective Mandatory COVID-19 Vaccination Policy in my Workplace?**

Employers who do ultimately decide to implement a mandatory COVID-19 vaccination requirement in their workplace should first ensure that it is consistent with the relevant employment agreement(s), in the case of a non-unionized setting, or with the applicable collective agreement(s) in the case of a unionized setting.

When drafting the new policy, employers should minimally make sure to be clear and unequivocal with respect to the purpose of the policy, how compliance with the policy will be determined (e.g., What is the timeline for compliance? Will documentary proof of immunization be required, or will self-reporting suffice?), whether there will be consequences for a failure to comply with the policy, and what those consequences are.

The policy should clearly indicate that an employee's vaccination status will have no bearing on their continued employment with the employer, as "vaccinate-or-terminate" policies have historically been found to be an unreasonable exercise of management's rights from a labour law perspective, and are potentially problematic from a *Charter* perspective. Instead, the policy should include a reasonable, non-disciplinary alternative to vaccination. Alternatives might include, for example, the option to continue to wear a mask, or the option to take an unpaid leave of absence during periods of high transmission (such as during an outbreak in the workplace).

As with any workplace policy, in order to have the best chance of the policy withstanding scrutiny, affected employees should be educated on the new policy and on its contents, including in particular any consequences that may be imposed. Employers should also ensure consistent enforcement of the



policy from the time of its introduction.

### **If Not Vaccination, Can Employers at Least Mandate COVID-19 Testing?**

As an alternative to mandatory COVID-19 vaccination policies, an employer may consider implementing a mandatory COVID-19 testing policy. For example, an employer whose workplace has functioned relatively effectively with masking requirements throughout the pandemic may determine that their argument in favour of the reasonableness of mandatory immunization is weakened by that health and safety history, and thus may pursue a mandatory testing policy instead.

At least one arbitrator has already been willing to deem a mandatory COVID-19 testing policy imposed in the healthcare sector to be reasonable. In *Caressant Care Nursing & Retirement Homes and Christian Labour Association*, Arbitrator Randall held that a surveillance testing program mandating biweekly nasal swab testing for employees of a nursing home was a reasonable exercise of management's rights. After weighing the intrusion to the employees' privacy against the health and safety goals that the policy aimed to support, including the protection of the particularly vulnerable residents of the nursing home, he concluded that the policy was reasonable – even though there had not yet been a COVID-19 outbreak in the nursing home – because of the potential and even likely consequences of waiting until such an outbreak before introducing regular testing.

Whether a mandatory COVID-19 testing policy is practicable for a given workplace will depend on the availability of tests and, in many cases, public health guidelines regarding eligibility for testing. Accordingly, this may not be a suitable option for some, while other employers may find traction with this approach, especially as opposed to the implementation of a mandatory vaccination policy.

### **What Else Can Employers Do?**

Where it is determined that a mandatory vaccination (and/or testing) requirement is not reasonable in the context of a particular workplace or sector, employers are not left without options. Employers are not prohibited from, for example, strongly suggesting vaccination as a measure for decreasing the spread of COVID-19 in the workplace. Employers may even be able to incentivize vaccination to a limited degree; for instance, employers could decide that employees who are properly immunized will no longer be subject to a masking requirement in the workplace (subject, of course, to local bylaws and public health recommendations). Employees who have been working with uncomfortable masks on for the better part of the last year may just be swayed by the prospect of being able to ditch them once and for all.



## In Our View

We anticipate that it is going to be a challenge for many employers to successfully impose a requirement that their employees be vaccinated against COVID-19 in order to attend the workplace, particularly in unionized settings. We do, however, expect distinctions to emerge based on sector - for example, it is much more likely that such a requirement would meet the reasonableness test in sectors like healthcare, and perhaps even retail and manufacturing. Distinctions are also likely to become apparent as scientific evidence surrounding the efficacy and mechanics of the COVID-19 vaccines becomes more widely available.

In any event, employers that are considering mandating COVID-19 vaccinations in their workplace should ensure that they take the following important steps before proceeding:

- Weigh objective evidence regarding the level of health and safety risk against other competing interests, including employees' privacy interests;
- Determine whether, given the circumstances and based on the available evidence, a mandatory COVID-19 vaccination policy would be a reasonable measure in this particular workplace;
- Explore potential alternatives;
- Review the relevant employment contract(s) or collective agreement(s), as well as any applicable workplace legislation, to ensure that the new policy is compliant;
- Plan for how to address accommodation requests made based on an employee's disability, religion or other protected human rights grounds;
- Make sure the new policy is brought to the attention of all affected employees, including specifically as it relates to any discipline that might result from non-compliance; and
- Ensure consistent enforcement of the new policy and of any consequences for non-compliance from day one.

Emond Harnden remains ready and available to advise and assist employers who are considering introducing a mandatory COVID-19 vaccination policy in their workplace. For more information or for assistance with this process, please contact **Sébastien Huard** at 613-940-2744, **J.D.**

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