



Novel Coronavirus (COVID-19)

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Mandatory Vaccination and Your Workplace

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With return-to-work on the horizon, many Canadian employers are considering vaccination policies for their workplace... raising the question “Are mandatory vaccination policies even legal?”

The Law

There is currently no federal or provincial legislation in Canada *requiring* mandatory COVID-19 vaccination for all employees, nor is any such legislation expected.

Occupational health and safety legislation at both the federal and provincial levels, however, does require that employers protect their workers from health and safety risks in the workplace. If vaccination can be shown to effectively minimize the transmission of COVID-19, mandatory vaccination policies may be argued to be one way to satisfy this obligation.

While Canadian employers are not legally *required* to mandate vaccination at work, it is not *illegal* for employers to introduce mandatory vaccination policies, subject to the following important considerations and limitations.

Unionized Workplaces

Unions can challenge an employer’s right to introduce policies by filing a “grievance”. In these circumstances, an arbitrator has the power to determine whether the policy is a reasonable exercise of the employer’s management rights under the collective agreement, considering:

- consistency of the policy with the collective agreement;
- the reasonableness of the policy;
- whether the policy is clear and unequivocal;

- whether employees have been made aware of the policy;
- whether it is clear that breach of the policy may result in discipline or termination; and
- whether the policy has been consistently enforced.

While there has been no arbitration decision on mandatory COVID-19 vaccinations, Arbitrators have, in the past found mandatory flu vaccines to not be reasonable in all circumstances. More recently, Arbitrators have ruled that a mandatory testing policy was reasonable in a case that we recently argued, which may signal that arbitrators might be prepared to uphold reasonable vaccination policies.

If the policy does not pass the test, the employer will not be allowed to apply or enforce it. Significantly, there is no comparable “grievance” or “arbitration” process in the non-union workplace, giving non-unionized businesses much more freedom to introduce and enforce such policies.

Human Rights

Human rights legislation across Canada prohibits discrimination in employment on certain grounds, including disability (which includes most medical “conditions”), sex (which includes pregnancy) and religion, any of which could potentially justify an employee’s refusal to vaccinate, contrary to the employer’s policy. Where a refusal is based on a justifiable human rights ground, the employer will be required to accommodate any such refusal to the point of “undue hardship”. Forms of accommodation could include working remotely from home or situation-specific masking, hygiene and distancing protocols in the workplace. A policy that does not address and offer accommodation will violate human rights legislation, resulting in the potential for litigation and resulting damages and costs.

Medical Restrictions

Employees may offer medical evidence (from a health professional) substantiating their refusal to vaccinate on the grounds that it would be harmful to their health due to a particular health circumstance (allergy, for instance) or a medical condition. Enforcement of a mandatory vaccination policy in these circumstances (in the form of discipline or termination of employment) could be either a wrongful dismissal or human rights violation (or both), resulting in the potential for litigation and related damages and costs.

Constructive Dismissal

A “constructive dismissal” occurs when an employer unilaterally changes fundamental terms of an employee’s employment, and it gives the employee the right to leave their employment and to claim damages for wrongful dismissal. Some employees may try to take the position that imposition of a mandatory vaccination policy amounts to a constructive dismissal.

Enforcement

Where an employee refuses to vaccinate for reasons other than a “protected” medical or human rights ground, the employer has the option of lawfully terminating employment. A refusal to vaccinate would not likely constitute “just cause”, however, and the employer would likely have to comply with its obligation to provide the employee with notice of termination or payments instead of notice. In the union context, the employer’s right to terminate employment might be further affected by the terms of the applicable collective agreement.

Privacy

Employers governed by federal or provincial privacy legislation will have to ensure that their collection, storage and use of personal health information complies with applicable statutory requirements. Employers who are not currently subject to privacy legislation must nonetheless ensure the confidentiality and safekeeping of employee health information that is collected in accordance with any vaccination policy.

Do You Need a Vaccination Policy?

Employers in environments serving vulnerable persons (health or long-term care, for example) will be the ones most likely to consider mandatory vaccination policies. Next would be employers in industries that are public-facing or involve large groups of people (entertainment, hospitality, retail, as examples).

Implementation of any mandatory policy will have to be considered carefully and in the context of all of the above considerations.

Where an employer concludes that a mandatory vaccination requirement is either un-necessary or un-reasonable in the circumstances, there continue to exist alternatives to mandatory vaccination, including recommended vaccination, masking and distancing protocols, and testing and self-isolation requirements (consistent with the directives of public health officials).

Where to start

Every business is different and not all businesses will need (or want) a mandatory vaccination policy. If your business is considering a vaccination policy, you first need to assess the transmission risks in your particular workplace and determine whether mandatory vaccination is a reasonable requirement, or otherwise, whether alternatives to mandatory vaccination would be adequate to protect the health and safety of your employees and the public.

When it comes to the crafting of the policy itself, consult with your employment and labour counsel for their help in minimizing the potential for legal challenges and associated liability and costs.

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