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## Refusal to Vaccinate: Disentitlement to EI Benefits and “Just Cause”

By Peter C. Straszynski

In past articles, we have addressed an employer’s right to introduce mandatory vaccination policies in the workplace. The introduction of such a policy raises the question “can an employee’s refusal to comply with a mandatory vaccination policy be just cause for termination?”

Recent developments, including public and medical Officers of Health (at different levels) directing mandatory employee vaccination in certain sectors and new guidelines issued by the federal government regarding refusal to vaccinate and the collection of Employment Insurance benefits, suggest that the answer may be “yes” in some circumstances.

The Government of Canada has updated its website guidance/instruction on the completion of Records of Employment (ROEs) by Canadian employers in relation to the COVID-19 pandemic. These updates suggest that an employee’s refusal to comply with an employer’s mandatory vaccination policy may disentitle them to *Employment Insurance* (“EI”) benefits. Specifically, the new guidance offered by *Employment and Social Development Canada* is reproduced here:

### Block 16 - Reason for issuing this ROE1 Updated

Block 16 should indicate the reason for the employee’s leave or separation from employment, or the reason why the ROE is being issued. Don’t add comments unless absolutely necessary.

When the employee is no longer working because the business has decreased operations or closed due to COVID-19, use **code A (shortage of work)**.

When the employee is sick or quarantined, use **code D (illness or injury)**.

### COVID-19 vaccination

When the employee doesn't report to work because they refuse to comply with your mandatory COVID-19 vaccination policy, use **code E (quit)** or **code N (leave of absence)**.

When you suspend or terminate an employee for not complying with your mandatory COVID-19 vaccination policy, use **code M (dismissal)**.

If you use these codes, we may contact you to determine:

- if you had adopted and clearly communicated to all employees a mandatory COVID-19 vaccination policy
- if the employees were informed that failure to comply with the policy would result in loss of employment
- if the application of the policy to the employee was reasonable within the workplace context
- if there were any exemptions for refusing to comply with the policy

This update is very significant because it indicates that the Government of Canada may accept refusal to comply with mandatory vaccination policies as either a "resignation" or a "dismissal" under the *Employment Insurance Act*, which could thereby deny the "refusing" employee from the collection of *EI* benefits.

Perhaps more significantly, these guidelines are consistent with (and may support) an employer's position that refusal to comply with vaccination policies, particularly in settings where an Officer of Health or government is mandating vaccination (and in the absence of a legitimate human rights based exemption) will constitute just cause for dismissal under the common law.

While we have not yet had the benefit of guidance from Ontario or federal court or tribunal decisions on these specific topics, we expect that we will soon.

If you have any questions about mandatory vaccination policies in the workplace, please contact any member of our Employment & Labour Law Group.

[1] The full update can be found here <https://www.canada.ca/en/employment-social-development/programs/ei/ei-list/ei-roe/notice-covid-19.html>

## Author

**Peter C. Straszynski**  
Partner

Peter Straszynski is a partner in our Employment & Labour, Cannabis Law, Health Law and Not-for-Profit & Charities Groups.

**Tel:** 416 777 5447  
[pstraszynski@torkinmanes.com](mailto:pstraszynski@torkinmanes.com)

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