



Mandatory Vaccination Policies: Considerations for Employers

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Following the Government of Canada's announcement on August 13, 2021 that it would be mandating COVID-19 vaccinations for those employed in the federal public sector and in the federally-regulated air, rail, and marine transportation industry, a growing list of Canadian employers have followed suit in announcing their own vaccine mandates. This list now includes five of Canada's largest banks, the City of Toronto, a large financial services company and at least several large law firms, to list only a few. With momentum for workplace vaccine mandates growing by the day, employers are facing increased pressure to address the issue of COVID-19 vaccinations among their workforces.

Although the details vary, employer vaccine mandates require employees to be vaccinated against COVID-19 as a condition of in-person work. But do employers have the right to impose such mandates? What if employees refuse? What if there are medical reasons why an employee cannot receive a vaccine?

Imposing Vaccine Mandates

As mandatory government and public health restrictions begin to ease, employers will feel pressure both internally and externally to ease their own restrictions. Inevitably, the easing of restrictions without a plan will give rise to a variety of risks in relation to COVID-19. As government has taken a hands-off approach in requiring vaccinations thus far, employers must determine for themselves if and how to incorporate vaccines into their COVID-19 health and safety plans. But what is an employer's right to mandate vaccinations?

Given the novelty of this issue, we have yet to see case law pertaining specifically to COVID-19. However, in mandatory vaccination and testing cases involving influenza and other contagious illnesses, adjudicators and courts have applied a "balancing of interests" approach to assess the reasonableness and enforceability of the mandatory policy.

This requires the weighing of (1) the employer's obligations under Occupational Health and Safety ("OHS") legislation and (2) the individual privacy and human rights of employees.

Employer Occupational Health and Safety ("OHS") Obligations

In each Atlantic province, OHS legislation requires that employers take every *reasonable* precaution to ensure the health and safety of employees. Infectious disease outbreaks, like COVID-19, are an occupational hazard risk that employers are expected to assess and address, where reasonable. It is possible that vaccinations could be deemed a "reasonable" precaution in certain workplace settings; however, it is not clear at present whether OHS enforcement will take this view. Nevertheless, employers who fail to properly assess the risk of COVID-19 and take appropriate precautionary measures could face liability including fines, prosecutions, or shutdowns of operations if an outbreak were to occur.

Under OHS legislation, employees also have a right to refuse unsafe work. At present, it is uncertain how a work refusal based upon potential exposure to COVID-19 in the workplace will be decided. This is particularly so where an employee will be exposed in the workplace to those who do not have the protection of the vaccine. However, a similar question came before the Canadian Labour Relations Board in 2006:

In *Cole v Air Canada*, an Air Canada employee refused to work out of fear of contracting SARS from passengers she encountered at the airport.^[1] Both the investigating Health and Safety Officer and Appeals Officer found in favour of Air Canada, holding that based on the WHO and Health Canada recommendations, it was not reasonably expected that Cole would be exposed to SARS.

One wonders if this may have been decided differently in the 'post-COVID' period. Not only is the social-distancing requirement greater for COVID-19 than it was for SARS, but the awareness of the dangers of infectious disease is much more acute now than before.

Employee Privacy and Human Rights

On the other hand, arbitrators and Courts have recognized that an individual's bodily integrity is accorded the highest degree of privacy protection. At common law, any medical procedure carried out on a person without the person's consent is considered battery. Because

of this, an employee generally cannot be compelled to submit to vaccination without the employee's consent or a contractual or statutory right of the Employer to insist on employee immunization.

Further, reasonable accommodations must be made where individuals are medically unable to receive a vaccination (e.g., masks, social distancing, work from home and etcetera). This is because under human rights legislation, employers are prohibited from discriminating against employees on a number of grounds, including disability. Where an employee is able to show that they have a disability, the employer must make efforts to accommodate that employee to the point of undue hardship.

If implementing a mandatory vaccination policy, employers need to be cautious when acquiring information relating to immunity or vaccination status, both at the individual level and within the workforce generally. Information about employee immunity or vaccination status constitutes employee medical information. Employers must therefore ensure that there is a process in place which accords with accepted practices and legal requirements.

Overall, the employer must consider and balance:

- *The nature of the workplace.*

What aspects of your business create a risk of spread of COVID-19? Assess your workplace for likely sources of COVID-19 infection and spread.

- *Degree of contact with vulnerable populations.*

What would be the impact of COVID-19 spread in your workplace? Could it also effect third parties?

- *What is an effective response to the risks identified?*

Vaccines are proven effective. What other alternatives might also be effective, including for those who may require accommodation? For example:

- Masks/PPE
- Regular testing
- Paid vacation time
- Paid/unpaid leave
- Return to work upon proof of immunity

Consult with health experts and your Joint OHS committee or representative.

- *Employee Privacy.*

Never discuss an employee's health situation with another employee without consent and always ensure employee health information is protected. Federal employers should look to the *Personal Information Protection and Electronic Documents Act* (PIPEDA) and its employee information provisions.

When implementing a vaccination policy, employers should remember that each workplace will be different, and an individual assessment should be performed. What might be right for one workplace may not work for another. Although a policy at one workplace may be challenged and upheld, that does not mean that same policy will be upheld in another workplace. Employers must be aware of their obligations, the rights of their employees and the challenges associated with implementing a vaccination policy.

[1] *Cole v Air Canada*, 2006 CLRB



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