



What's New in HR Law

The Great Debate: Mandatory Vaccination Policies

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The Bottom Line

As Canada's vaccine supply steadily increases, and more people gain access to inoculations, it has spurred renewed hope that an end to the pandemic is in sight. Increased vaccine access has also caused many employers to consider afresh the viability of mandatory vaccination policies. In this update we provide answers to some of employers' most pressing questions about COVID-19 vaccinations and the workplace.

Can employers require employees to be vaccinated?

There is currently nothing at law that prevents an employer based in Ontario from making COVID-19 vaccination a term or condition of employment. However, mandatory vaccination policies raise both privacy and human rights considerations and legal risks of which employers will want to be aware before forging ahead with implementation.

What privacy issues are associated with a mandatory vaccination policy?

From a privacy perspective, mandatory vaccination policies will require the collection of personal health information with respect to workers' vaccination status. Employers who collect this information – whether in the context of a mandatory vaccination policy or otherwise –

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will want to clearly outline why the collection of this information is reasonably necessary, how it will be used, to what extent it will be disclosed, how it will be stored, as well as when and how it will ultimately be destroyed.

The Office of the Privacy Commissioner of Canada, recently released a joint statement along with provincial and territorial privacy commissioners entitled [Privacy and COVID-19 Vaccine Passports](#) (“Joint Statement”). The statement is generally geared toward government entities, but it does provide some guidance to businesses operating in the private sector.

In particular, the Joint Statement suggests that the necessity, effectiveness, and proportionality requiring vaccination must be assessed. The Joint Statement also discusses the need for consent or some other legal authority to collect personal health information. While the Joint Statement is not binding and does not hold the weight of law, employers may consider answering the following questions in the context of their individual workplaces before implementing a mandatory vaccination policy:

- **Necessity:** Is requiring vaccination objectively necessary to ensure the health and safety of the workplace, such that no less intrusive means are available to achieve this goal?
- **Effectiveness:** Is vaccination empirically proven to be effective at curbing the transmission of COVID-19 in the workplace?
- **Proportionality:** Is the privacy risk associated with the policy proportionate to the issue it is intended to address?

Based on this recent guidance, employers are likely well advised to try other less intrusive means of preventing the spread of COVID-19 (e.g. incentivizing vaccination, implementing rapid antigen testing programs, etc.) before moving to an approach that mandates inoculation.

Where a decision is made to require vaccination, employers will also want to employ principles of data minimization to ensure that the least amount of personal health information necessary is being collected.

Employers should also take heed that to the extent any vaccination information will be collected and used for commercial purposes, they will need to ensure compliance with the *Personal Information Protection and Electronic Documents Act*.

What human rights issues are associated with a mandatory vaccination policy?

From a human rights perspective, some employees may be unable to receive a vaccination for reasons relating to disability, religion/creed, or another ground protected under the *Human Rights Code* (the “Code”).

A mandatory vaccination policy should therefore account for an employer’s duty to accommodate to the point of undue hardship under the *Code* to avoid potential discrimination claims. As noted in the privacy section above, employers will also want to be able to demonstrate that inoculation is a necessary condition such that it constitutes a *bona fide* occupational requirement.

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What risks might an employer face with the introduction of a mandatory vaccination policy?

We have yet to see a case involving a mandatory vaccination policy in the context of the COVID-19 pandemic adjudicated in Canada. There is a body of arbitral case law that has developed in the healthcare sector which deals primarily with vaccination policies in the context of influenza vaccines. These decisions do provide some, albeit limited, guidance.

What is clear from the existing arbitral decisions is that a person's freedom to make choices regarding their own body is afforded the highest degree of protection. As such, mandatory vaccination policies are likely only to be upheld in contexts where there is a real and justifiable connection to a significant and demonstrable risk to employee, client, and/or patient health and safety.

Factors such as the nature of the workplace; the degree of vulnerability of the population served; the extent of the infectious outbreak; the efficacy of the vaccination; and the availability of other less intrusive means of protection are likely all to be relevant factors when it comes time to assess whether mandating COVID-19 vaccination is necessary or appropriate in any given workplace setting.

While this assessment must be made on a case by case basis for each workplace, there are distinguishing features of COVID-19 and the vaccinations that may support the need for mandatory vaccination policies. Unlike other viruses, like influenza, the consequences of catching COVID-19 if a person has not been vaccinated are severe. The virus is also easily transferrable, especially with new variants spreading throughout communities. These two factors, as well as the strong efficacy of the vaccinations establishes a better argument than in the past with other virus for mandatory vaccination policies.

However, there are also some clear unknowns surrounding the above factors at the present time. For instance, we do not currently know how long vaccinations will last, whether an annual booster shot may be required, and the specific extent to which vaccination curbs transmission of the virus in the workplace.

Given all the above, the implementation of a mandatory vaccination policy may be met by legal challenge, which may include the following:

- Grievances in the unionized context;
- Constructive dismissal claims in the non-unionized context;
- Allegations of invasion of privacy and human rights violations;
- Workers' compensation liability for injuries or harm sustained in the event negative side-effects are experienced from the vaccination; and
- For public sector employers, challenges may also be made under the *Canadian Charter of Rights and Freedoms*.

As this issue has yet to be litigated, the full extent of exposure to liability in the context of any of the above claims is currently unknown. However, given the nature of the issues that are likely

to be involved in such litigation, and the type of evidence required in the context thereof, employers can expect that legal proceedings are likely to be lengthy and complex.

What options are available to employers who may not want, or yet be prepared, to implement a mandatory vaccination policy?

For many employers, particularly those whose business is not focused on dealing with vulnerable populations, where their workplace presents little or no risk of viral transmission, or where the risks associated with a mandatory vaccination policy are simply seen as too costly, educational and incentive programs may be viewed as preferable courses of action.

For example, employers may wish to encourage employees to receive a COVID-19 vaccine by way of educational initiatives that focus on the individual and communal benefits of inoculation. Some employers may even wish to pair such educational campaigns with incentive programs designed to further motivate uptake among their workforce. Such incentives may include prizes, draws, or monetary rewards. Employers should ensure, however, that any incentive programs comply with human rights legislation, as well as any applicable public sector wage restraint legislation.

Will the government provide further guidance to employers on what workplace vaccination policies can or should be implemented?

Many employers have been lobbying the government to provide legislative direction on this issue, thereby taking the guesswork and risk out of the equation for individual businesses. However, to date, government direction and guidance on the topic of workplace vaccination initiatives has been relatively minimal.

Most recently, the Minister of Long-Term Care issued a [Minister's Directive](#) which takes effect on July 1, 2021 ("Directive"). This Directive requires long-term care homes to implement COVID-19 immunization policies for staff, requiring each staff member to do one of the following: (i) provide proof of vaccination of each dose; (ii) provide a documented medical reason for not being vaccinated; or (iii) participate in an educational program about the benefits of vaccination and the risks of not being vaccinated.

Employers who are subject to the Directive will be required to track and report on the implementation of their policies, including staff immunization rates, but not the immunization status of individual staff members.

While this new Directive provides helpful guidance to employers operating in the long-term care sector as to what policies are legally required, it notably stops short of requiring employers to *mandate* vaccination among workers. We have yet to see whether similar, or more stringent, directives will be issued in this or other sectors.

Check the Box

Employers wishing to roll out a vaccination policy in their workplace, whether mandatory or voluntary, should carefully consider the nature of their workplace, the population they serve, and what specifically they hope to achieve with the policy itself.

We recognize that this is a complicated and challenging issue for employers who are diligently looking to take every reasonable step to ensure the health and safety of their workplaces. As such, we are continuing to closely monitor developments in this area, and will provide updates as they arise.

Need more information?

For more information about, or for assistance preparing, a vaccination policy for your workplace, contact [Natalie Garvin](#) at 416.408.5512, or your regular lawyer at the firm.



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