



What's New in HR Law

Workplace Vaccination Policies: Where Are We Now?

September 07, 2021

Bottom Line

In addition to provincial vaccination policy mandates issued for specific high-risk settings (see our earlier update on this topic [here](#)), on August 24, 2021 the Ontario Government amended [O. Reg 364/20: Rules for Areas at Step 3 and at the Roadmap Exit Step](#) (“Regulation”). The amended Regulation now includes a requirement that businesses comply with any advice, recommendations, and instructions issued by public health officials about vaccination policies. In the wake of this amendment, many municipal health officials have issued directives and recommendations on the topic of workplace vaccination policies. At the same time, employers across all sectors have shown an increased interest in the development and implementation of vaccination policies for workers, contractors, volunteers, and clients alike. In this update we review the new legal requirements and outline practical issues that employers will want to consider when developing their own policies.

The Regulation

Following the recent amendment, the Regulation now requires that open businesses and organizations operate in compliance with “any advice, recommendations, and instructions” issued by the Office of the Chief Medical Officer of Health, or by a medical officer of health after consultation with the Office of the Chief Medical Officer of Health that:

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- requires the business or organization to establish, implement and ensure compliance with a COVID-19 vaccination policy; or
- sets out the precautions and procedures that the business or organization must include in its COVID-19 vaccination policy.

Practically speaking, the impact of this regulatory amendment is that employers will need to be on the lookout for, and ensure they comply with, any advice, recommendation, or instruction about workplace vaccination policies that may be issued by both provincial and municipal public health officials in the jurisdiction(s) in which they operate.

Recommendations from Medical Officers of Health

A number of medical officers of health across various public health units have now issued some form of “advice, recommendation, or instruction” on the topic of workplace vaccination policies. Included among those whose medical officers of health have issued such a communication are the following health units:

- [Durham Region](#)
- [Grey Bruce](#)
- [Halton Region](#)
- [City of Hamilton](#)
- [Leeds, Grenville and Lanark District](#)
- [Middlesex-London](#)
- [Ottawa](#)
- [Peel](#)
- [Peterborough](#)
- [Simcoe Muskoka District](#)
- [Sudbury & Districts](#)
- [Toronto](#)
- [Wellington-Dufferin-Guelph](#)
- [Windsor-Essex County](#)

The various communications that have been issued by public health units to date generally recommend employers to implement workplace vaccination policies that, at a minimum, encourage workers to get vaccinated. However, some have gone further. The Middlesex-London Health Unit’s medical officer of health, for instance, issued a recommendation calling on all businesses, regardless of sector or setting, to **mandate** that all employees, volunteers, and contractors who have any in-person interactions in the workplace be vaccinated against COVID-19, subject only to human rights considerations. Employers operating in jurisdictions in which these stronger recommendations have been issued may be able to assert more readily than others that there is legal authority for the imposition of a mandatory vaccination policy.

Many public health units have also issued “toolkits”, policy templates, or have provided specific guidance about what elements employers should include when developing their own policy documents. These resources are generally available online on the applicable public health units’ websites.

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Additional public health units may follow suit. Employers are encouraged to regularly check with their local public health unit(s) for updates on this issue to ensure that they are in a position to respond quickly to, and comply with, any recommendations that may be issued.

Practical Considerations for Employers

Even in jurisdictions in which medical officers of health may not yet have issued any formal advice, recommendations, or instruction on the topic of workplace vaccination policies, employers may still wish to implement vaccination policies of their own.

Indeed, we have seen a significant uptick in employers forging ahead in this direction; and taking varying approaches to their policies in the process. While some employers are electing to simply encourage and/or incent vaccination, others are making full vaccination a mandatory condition of employment, while others still are landing somewhere in between, strongly encouraging vaccination and subjecting un-vaccinated workers to enhanced health and safety protocols (e.g. regular rapid antigen testing).

When contemplating what type of policy to develop and administer in a given workplace, employers are encouraged to think critically about the following:

- **Nature of Workplace** – The type of work performed, the environment in which work occurs, the degree of in-person interaction required, and any other unique risks factors for transmission of the virus are all important considerations when deciding how stringent a given vaccination policy needs to be. For instance, where a business' operations are largely or entirely remote, a policy that makes vaccination a condition of employment may not be necessary or appropriate.
- **Scope** – To the extent a business employs a range of workers, it will be important to determine if the same requirements will apply to staff, volunteers, and contractors alike, or if differing standards will apply to each category of worker. Some businesses may also [need](#) to or want to consider implementing vaccination policies that apply to their customers/clients as well.
- **Human Rights** – In limited circumstances, an employee may be unable to receive a vaccination for medical reasons, or for reasons related to another ground protected by human rights legislation. The College of Physicians and Surgeons recently provided [guidance](#) to doctors on when medical notes may be issued exempting an individual from vaccination for medical reasons. Although the circumstances in which an employee may legitimately be unable to receive a vaccination may be rare, vaccination policies of any variety should contemplate the issue of human rights accommodation.
- **Privacy** – When it comes to personal information, particularly medical information, employers should consider reviewing, collecting, and storing only what limited information is necessary to meet their needs. For instance, will employees be asked to self-declare their vaccination status, or will documentation be required to confirm an employee's status? What information will be collected, how it will be reviewed, stored,

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used, saved, and ultimately destroyed should ideally all be set out in an employer's vaccination policy.

- **Consequences** – What, if any, consequences will be imposed for employees who are not vaccinated? For instance, will unvaccinated employees be prevented from returning to the workplace and required to work remotely? Will they be required to undergo regular rapid antigen testing? Or will unvaccinated workers be terminated from employment? Vaccination policies should contemplate what consequences may be imposed and set out clearly any timelines for compliance. Employers may also consider providing employees with reminders of the consequences, and multiple opportunities to bring themselves into compliance with any policy requirements.

Check the Box

With few exceptions, the advice, recommendations, and instructions that we have seen issued by medical officers of health to date allow employers considerable flexibility to devise vaccination policies that best suit their individual workplaces, goals, and risk tolerances. When developing policy documents, employers should keep in mind that, consistent with their obligations under the *Occupational Health and Safety Act*, the overarching focus of any vaccination policy should be on ensuring the health and safety of the workplace and reducing hazards associated with COVID-19.

Need more information?

For more information or for assistance preparing a workplace vaccination policy, contact Ashley Brown at 416-408-5563 or your regular lawyer at the firm.



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