



# What's New in HR Law

## Ontario to Require Vaccination Policies in Multiple Sectors

August 19, 2021

### Bottom Line

On August 17, 2021, the Ontario Government [announced](#) its intention to require businesses operating in certain high-risk settings to implement COVID-19 vaccination policies. In addition, and citing concerns about the transmissibility of the Delta variant, the government also announced that it was pausing the province's exit from the Roadmap to Reopen, approving third doses of the COVID-19 vaccine to vulnerable populations, and expanding eligibility for the Pfizer vaccine to children who will turn 12 before the end of the 2021 calendar year.

### Health Care Settings

In conjunction with the above-mentioned announcement, the Chief Medical Officer of Health issued [Directive #6 for COVID-19 Vaccination Policy in Health Settings](#) on August 17, 2021 ("Directive"). The Directive, and the requirements set out therein, will be effective as of **September 7, 2021**.

The Ministry has also since released the [Directive #6: Resource Guide](#), which provides practical guidance to affected organizations and includes an example policy as well as links to educational resources.

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The Directive applies to:

- Hospitals within the meaning of the *Public Hospitals Act* and any businesses or entities operating on the hospital site;
- Service Providers within the meaning of the *Home and Community Care Act, 1994* with respect to their provision of community service to which that Act applies;
- Local Health Integration Networks within the meaning of the *Local Health System Integration Act, 2006* operating as Home and Community Care Support Services with respect to the provision of community services and long-term care home placement services; and
- Ambulance Services within the meaning of the *Ambulance Act* with respect to paramedics.

#### a) Policy Requirements

Under the Directive, the above organizations, which are collectively referred to as “Covered Organizations” will be required to establish, implement, and ensure compliance with a COVID-19 vaccination policy.

The Directive mandates that Covered Organizations’ policies require their employees, staff, contractors, volunteers, and students to provide one of the following:

1. proof of full vaccination against COVID-19 (*i.e.* proof of having received the full series of a vaccine or combination of vaccines approved by the World Health Organization, and having received the final dose of the vaccine at least 14 days ago);
2. written proof of a medical reason, provided by a physician or registered nurse in the extended class that sets out: (i) a documented medical reason for not being fully vaccinated against COVID-19, and (ii) the effective time-period for the medical reason; or
3. proof of completing an educational session about the benefits of COVID-19 vaccination prior to declining vaccination for any reason other than a medical reason. Such education session must be approved by the Covered Organization and, at minimum, address the following topics:
  - a. how COVID-19 vaccines work;
  - b. vaccine safety related to the development of the COVID-19 vaccines;
  - c. the benefits of vaccination against COVID-19;
  - d. risks of not being vaccinated against COVID-19; and

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- e. possible side effects of COVID-19 vaccination.

Under the Directive, a Covered Organization's policy must also require that where an employee, staff, contractor, volunteer, or student does not provide proof of being fully vaccinated, they must submit to regular antigen point of care testing for COVID-19 and demonstrate a negative result at least once every seven days, or more frequently as determined by the Covered Organization. Verification of the negative test must be provided in a manner that enables the Covered Organization to confirm the result.

## b) Legal Authority for Mandatory Vaccination?

Interestingly, paragraph 2 of the Directive provides Covered Organizations with the ability to omit option 3 set out above (*i.e.* providing proof of completing an educational session) from their policies. Practically speaking, this appears to provide Covered Organizations with legal authority to make the provision of proof of full vaccination mandatory, subject to the accommodation of those individuals who provide proof of a medical reason for not being fully vaccinated and, as set out in more detail below, meeting any applicable accommodation obligations pursuant to the *Human Rights Code* ("*Code*") more generally.

Covered Organizations that do not want to make the provision of proof of completing an approved education session an option under their policies should take heed that, in such circumstances, the Directive nevertheless explicitly requires them to make available to all employees, staff, contractors, volunteers, and students an educational session that satisfies the requirements set out in paragraphs 3. a. to e. above.

Furthermore, while the Directive appears to provide Covered Organizations with the flexibility to make vaccination mandatory, it does not dictate or provide any guidance as to what should occur in the event an employee, staff, contractor, volunteer, or student fails to provide proof of full vaccination or proof of a medical reason for not being fully vaccinated. Different considerations are likely to apply depending on the former categories in which an individual may be classified.

From an employment perspective, Covered Organizations will want to give careful consideration to what the resultant effect will be where an individual is unable to provide proof of full vaccination, or proof of a valid medical reason for not being fully vaccinated. For instance, will the individual be placed on a leave of absence, will their employment come to an end, or will another consequence be imposed (*e.g.* imposition of a remote work arrangement, transfer to another department, *etc.*)?

As set out in a [previous insight](#), mandatory vaccination policies carry the risk of, among others, constructive dismissal claims from non-unionized employees, grievances from unionized employees, and the possibility of human rights applications where the duty to accommodate is not met.

On this latter point, Covered Organizations should take note that while the Directive provides for accommodation of unvaccinated individuals who provide a medical basis for their unvaccinated status, the more general duty to accommodate under the *Code* can be triggered for reasons other than disability. For instance, creed is also a protected ground under the *Code*.

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Where, for example, an individual provides a religious basis for being unvaccinated, the duty to accommodate under the *Code* may be triggered. Covered Organizations should understand that the Directive does not override or remove any responsibilities they may owe to employees, staff, contractors, volunteers, or students under the *Code*.

Given the complexity of these issues, a full assessment of the legal risks and financial implications of the available options should be undertaken before a mandatory policy is implemented. Covered Organizations are encouraged to seek legal advice to help guide their policy development and implementation.

### c) Collection of Statistical Information

In addition to implementing vaccination policies, the Directive further requires Covered Organizations to collect, maintain, and disclose statistical (non-identifiable) information as follows:

1. the number of employees, staff, contractors, volunteers, and students that provided proof of being fully vaccinated against COVID-19;
2. the number of employees, staff, contractors, volunteers, and students that provided a documented medical reason for not being fully vaccinated against COVID-19;
3. the number of employees, staff, contractors, volunteers, and students that completed an educational session about the benefits of COVID-19 vaccination, where applicable; and
4. the total number of employees, staff, contractors, volunteers, and students to whom the Directive applies.

Covered Organizations may be required to disclose the above statistical information to the Ministry of Health upon request of the Chief Medical Officer of Health. The Directive provides that the Ministry may seek additional detail within the requested statistical information, and also that it may disclose any information provided and make it publicly available.

As a risk mitigation tactic, Covered Organizations will want to consider employing principles of data minimization to ensure that the least amount of personal information as is necessary to comply with the Directive is ultimately collected and stored.

### Similar Requirements Expected in Other High-Risk Settings

In addition to implementing the Directive for Covered Organizations, as part of the August 17<sup>th</sup> announcement, the Ontario Government advised that similar requirements would be introduced for businesses operating in other high-risk settings.

In particular, it is expected that the Ministry of Education will introduce a vaccination disclosure policy for all publically funded school board employees, as well as for staff in private schools and licensed child care settings, which will require regular rapid antigen tests for unvaccinated individuals.

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Vaccination policy requirements are also expected to be imposed on post-secondary institutions, licensed retirement homes, women’s shelters, congregate group homes, day programs for adults with developmental disabilities, children’s treatment centres and other services for children with special needs, and licensed children’s residential programs.

The details of the requirements that will apply to businesses operating in the above settings have not yet been released. We are continuing to monitor developments in this area, and will keep our readers apprised as additional information becomes available.

## Check the Box

Covered Organizations will want to develop, or revise, their policies to ensure compliance with the Directive. Businesses operating in other identified high-risk settings will want to proactively consider what policies they may be required to implement, and be prepared to act quickly once details of the expected requirements have been released.

## Need more information?

The legal team at Filion is ready to help employers meet these new requirements, and to provide proactive guidance that will assist them to maintain a healthy and safe workplace. For more information about, or for assistance preparing or revising, a vaccination policy for your workplace contact [Natalie Garvin](#) at 416-408-5512, [Ashley Brown](#) at 416-408-5563, or your regular lawyer at the firm.



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