

MANDATORY VACCINATION POLICIES FOR EMPLOYEES: ENFORCEABLE OR A SHOT IN THE DARK?

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At the time of writing, Health Canada has approved two COVID-19 vaccines, vaccinations of front-line health workers in Canada have begun, and there will be (at some point) enough for everyone in Canada to receive it. However, what happens if your employees choose not to be vaccinated? Employers are rightly concerned about the impact that this could have on their workplaces. The question is: what steps can an employer take to ensure its workforce is vaccinated?

Some employers may consider implementing a mandatory vaccination policy for their employees. However, there are conflicting views on whether an employer can implement such a policy for COVID-19, as there is no case law or legislation that directly addresses this novel situation.

Existing legislation addresses specific instances in which employers must require their employees to be vaccinated against specific diseases. There are also labour arbitration decisions dealing with annual flu shots, where the issue was whether an employer could implement a mandatory vaccination policy in the healthcare sector.

We will address each of the above in turn, and then discuss what employers should consider in deciding how to proceed.

In Limited Circumstances, Vaccines are Mandatory for Specific Workers

Ontario is unique in Canada for having vaccination requirements for specific workers:

- Under the Regulations of Ontario's *Child Care and Early Years Act*, operators of child care centres (or a home child care agency) must ensure that their employees have "immunization as directed by the local medical officer of health."^[1]
- Under the Regulations of Ontario's *Long-Term Care Homes Act*, 2007, licensees must ensure a series of five immunization measures, which includes a requirement for a "staff immunization program in accordance with evidence-based practices, and if there are none, in accordance with prevailing practices."^[2]

- Under the Regulations of Ontario's *Ambulance Act*, emergency medical attendants, paramedics, volunteers and students must hold a Certificate of Immunization for a specified list of diseases.^[3]

There is also federal legislative requirement for vaccination of workers engaged in manufacturing of certain vaccines per the *Food and Drug Regulations*.^[4]

The above legislative requirements are clearly motivated by safety concerns that arise from heightened risk of transmitting communicable diseases to at-risk individuals. There is no guidance (yet) from any government on whether vaccination for COVID-19 will be added to the list of required immunizations for such workers.

More commonly, provinces have the power to order mandatory vaccination, at the direction of a government official or the province's Chief Medical Officer of Health.^[5] However, at the time of writing, most of provinces, including Ontario, have stated that vaccination will continue to be a voluntary procedure.

“Flu Shot” Labour Arbitration Decisions Suggest that Courts May Not Always Uphold Mandatory Vaccination Policies

An individual's bodily integrity is accorded the highest degree of privacy protection. As such, 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.

However, labour arbitrators have recognized that some employers may be able to insist their workforce be immunized. Specifically, employers engaged in the provision of health care and residential care services, especially those catering to the elderly or immunocompromised, have been found justified in temporarily removing employees who refuse to be vaccinated.^[6]

Labour arbitrators have held that mandatory vaccination policies must be connected to the employer's legitimate business interests. Protecting employee, client, and patient health and safety have been held to be legitimate business interests.

Flu shots are different than COVID-19 vaccines, both in the severity of the illness they attempt to immunize against, and in their effectiveness. This distinction could assist an employer that is seeking to implement a mandatory vaccination policy. The severity of COVID-19, particularly on vulnerable populations, may increase the weight given to the employer's interest in protecting the safety of others, and a more effective vaccine helps to connect the policy to the employer's legitimate business interests. However, without any such cases having gone to Court or to arbitration, it remains highly uncertain whether a COVID-19 mandatory vaccination policy would be upheld.

Vaccination Policies Will be Considered by Balancing Safety with Employee Rights

A mandatory vaccination policy is an intrusive measure; it requires employees to undergo a specific medical procedure which may produce adverse reactions in some employees or be contrary to an employee's religious beliefs.

Employers who intend to require employees to disclose whether they have been vaccinated, or their reasons for not receiving the COVID-19 vaccine, should also consider the privacy implications, which vary between jurisdictions. For more information about the privacy considerations in this respect, please contact a member of McMillan's [Privacy and Data Protection Group](#).

Generally, employers should consider how a proposed mandatory vaccination policy balances the employee's human rights and privacy interests against the legitimate safety risks posed by COVID-19. In particular, given the invasive nature of vaccinations, any employer looking to uphold a mandatory vaccination policy would need to explain why alternative measures, such as mask-wearing, hand-washing, and physical-distancing, would be inadequate compared to employees receiving a vaccine.

Takeaways for Employers

An employer considering a mandatory vaccination policy should consider the full effects of the policy, especially with respect to any disciplinary measures for non-compliance. For any mandatory vaccination policy, in either a unionized or non-unionized setting, an employer should consider how the policy satisfies the below criteria:

1. The policy must not be inconsistent with the employment agreement or collective agreement.
2. The policy must not be unreasonable.
3. The policy must be clear and unequivocal.
4. The policy must be brought to the attention of the employees affected before the employer can act on it.
5. The employees concerned must be notified that a breach of the policy could result in discipline if the policy is to be used as a foundation for discipline.
6. The policy should be consistently enforced by the employer from the time it is introduced.

Employers should be aware of potential liability arising from an employee having an adverse reaction to the vaccine, as well as the potential for human rights claims by employees who may allege discrimination if accommodation options are not considered. Accordingly, employers should develop a strategy to accommodate individuals who have a valid reason not to receive the COVID-19 vaccine.

Employers should also consider whether a voluntary vaccination program, or incentives to receive the vaccine, would be sufficient in lieu of a mandated vaccination program.

Finally, while an employer can look to previous arbitration decisions on flu shot policies for assistance, each

workplace is unique, and as such, it is important to consult with counsel to determine how such guidance would apply to your specific workplace.

If you have any questions related to the above, please do not hesitate to contact a member of the [Employment and Labour Relations Group](#).

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[1] [O Reg 137/15, s 57](#), made under the [Child Care and Early Years Act, 2014, SO 2014, c. 11, Sched. 1](#).

[2] [O Reg 79/10 s 229](#), made under the [Long-Term Care Homes Act, SO 2007 c 8](#).

[3] [O Reg 257/00, ss 6\(h\) and 14\(d\)](#), made under the [Ambulance Act, RSO 1990 c A19](#).

[4] CRC c 870, ss [C.04.071](#), [C.04.135](#), made under the [Food and Drugs Act, RSC 1985 c F-27](#).

[5] [Public Health Act, RSA 2000, c P-37, s 38](#); [Public Health Act, SBC 2008, c 28, s 28](#); [Public Health Act, SM 2006, c 14, ss 26-27](#); [Public Health Act, SNB 1998, c P-22.4, s. 33](#); [Public Health Protection and Promotion Act, SN 2018, c P-37.3, s.32](#); [Health Protection Act, SNS 2004, c 4, s 32](#); [Public Health Act, SNWT 2007, c 17, s 11](#); [Public Health Act, S Nu 2016, c 13, s 55\(2\)](#); [Health Protection and Promotion Act, RSO 1990, c H7, s 22\(1\)](#); [Public Health Act, SPEI 2012, c 20 \(2nd Sess\), s 39](#); [Public Health Act CQLR c S-2.2, s 123](#); [The Public Health Act, 1994, SS 1994, c P-37.1, s 38](#); [Public Health and Safety Act, RSY 2002, c 176, s 17](#).

[6] *Trillium Ridge Retirement Home* [1998] O.L.A.A. No. 1046; *Carewest v. A.U.P.E.*, 104 L.A.C. (4th) 240; *Chinook Health Region v. U.N.A.*, [2002] 113 L.A.C. (4th) 289; *Interior Health Authority v. BCNU*, 155 L.A.C. (4th) 252; *Syndicat des professionnelles en soins infirmiers et cardio-respiratoires de Rimouski (FIQ) v. CSSS Rimouski-Neigette*, 2008 CanLII 19577 (QC SAT) (Application for judicial review dismissed (2009 QCCS 2833)); *Health Employers Assn. of British Columbia and HSA BC (Influenza Control Program Policy)*, Re, [2013] B.C.C.A.A.A. No. 138; and *Interior Health Authority v. B.C.N.U* [2006] B.C.C.A.A.A.

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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