

QUEBEC: AN EMPLOYER'S RIGHT TO REQUEST ITS EMPLOYEES' VACCINATION STATUS

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Introduction

While the COVID-19 vaccine passport has been deployed in various sectors of activity in Quebec and the federal government has imposed mandatory vaccination on federal public service employees as well as on employees under federal jurisdiction, on November 3, 2021, the Quebec government confirmed that it will not require mandatory vaccination for public or private employers, subject to some very limited exceptions in the health sector^[1]. Accordingly, without a Quebec government decree or clear directive from Public Health allowing employers to impose mandatory COVID-19 vaccination on their employees, employers were left in the dark as to whether mandatory vaccination policies could be challenged by employees on the basis of an infringement of their rights under the *Charter of Human Rights and Freedoms* (the "**Charter**").

On November 15, 2021, the first decision on the implementation of a vaccination requirement in a private company was rendered by the arbitrator Denis Nadeau (the "**Decision**")^[2]. This Decision confirms the employer's right to request the disclosure of an employee's vaccination status. While this Decision does not confirm an employer's right to terminate an employee who refuses to be vaccinated, nor does it directly address the validity of an employer's mandatory vaccination policy, it does confirm that an employer can legitimately require its employees to provide their vaccination status in order to comply with a client's requirements.

Overview of the Facts

Clients of unionized cleaning companies had implemented policies requiring their employees, suppliers and subcontractors to be vaccinated against COVID-19 in order to have access to the workplace. As a result, cleaning companies were required to collect their employees' vaccination status. If the cleaning companies failed to comply with this requirement, their contracts with client companies that have these vaccination policies would likely be terminated, thus resulting in the lay off of all employees assigned to these contracts. Accordingly, in order to ensure compliance with their clients' policies, the cleaning companies asked their employees who were assigned to these contracts to provide their vaccination status. In the event that an

employee refused to provide his or her vaccination status or was not vaccinated, the employer would assign the employee to another workplace that does not have vaccination requirements, in accordance with the collective agreement in effect.

It is under these circumstances that the arbitrator was asked by the cleaning companies and the union to render a declaratory judgment determining whether an employer is subject to its clients' policies requiring all persons accessing the workplace to be adequately vaccinated against COVID-19 and thus to confirm that the employers can legally require their employees to disclose their vaccination status.

The Decision

In this case, the union objected to the employers' collection of the employees' vaccination status based on the employees' right to privacy and, incidentally, the employees' right to their physical integrity (sections 5 and 1 of the Charter).

The arbitrator recognized that this requirement effectively violates employees' privacy (section 5 of the Charter) since it relates to confidential and personal information. Furthermore, since the requirement of proof of vaccination implies that an employee is adequately vaccinated, it is possible to consider that this requirement also infringes the employees' freedom and their physical integrity (section 1 of the Charter). However, the arbitrator then proceeded to analyse whether this infringement of the employees' rights was justified under section 9.1 of the Charter. Indeed, this section of the Charter provides that the infringement of an individual's rights may be justified on the basis of public order and the general well-being of Quebec citizens.

In his analysis, the arbitrator considered the following:

- The clients' purpose for instituting a mandatory vaccination policy, requiring employers to ask their employees for proof of vaccination, was to protect the clients' employees, clients, suppliers, visitors, etc. and is part of a contribution to the collective effort in the fight against COVID-19, supported by public health and the various government authorities.
- Under section 51 of the *Act respecting occupational health and safety* ("AOHS"), a law of public order, an employer must take the necessary measures to protect the health and safety of its employees. This obligation extends to the employer's suppliers and subcontractors who have access to the workplace (section 51.1 of the AOHS). In addition, section 49 of the AOHS requires employees to protect the safety of other employees.
- An unvaccinated employee is more likely to be severely impacted by COVID-19 and is also more likely to transmit the virus.
- Section 46 of the Charter recognizes the right of every employee to reasonable working conditions that respect his or her health, safety and physical integrity. This article is in line with the provisions of the

AOHS mentioned above and with article 2087 of the *Civil Code of Québec* which provides for the specific obligation to protect the health and safety of employees.

Given the above, the arbitrator indicated that an employee who does not provide proof of vaccination, and therefore is not vaccinated, represents a risk in the workplace for the employee as well as for all other persons on the premises and is a violation of his or her duty under section 49 of the AOHS. The arbitrator therefore recognized that the employer of such a person, or in this case, the clients doing business with that person, are entitled to take steps to control and eliminate the risks to the employee's health and safety. The method retained here is requiring proof of vaccination. Therefore, this justifies, within the meaning of article 9.1 of the Charter, the infringement on the employees' privacy and, by extension, the infringement on their physical integrity. However, the arbitrator added that this justification for the violation of the right to physical integrity is justified in particular by the fact that the employee can be reassigned, in principle, to other work sites not requiring proof of vaccination.

It is important to note that the arbitrator did not extend the requirement to disclose proof of vaccination to all of the employers' employees, but only to those who were assigned to the clients who required such proof since he was of the opinion that requiring proof of vaccination for all of their employees goes beyond the scope of what was previously justified.

Furthermore, it is interesting to note that the arbitrator mentioned that the presence or absence of government action regarding vaccination policies is not the only standard for assessing the legality of the policy at issue, since the employers' and employees' obligations under the AOHS are not conditional upon government action. It is therefore up to the individuals subject to this law to comply with their obligations.

Key Take Aways

Status of mandatory vaccination policies

Although in this case it was not an employer directly imposing a mandatory vaccination policy on its employees, but rather clients imposing this requirement on employers (and consequently on the employees of those employers), the arbitrator nonetheless analyzed this case as if this requirement came directly from the employers, since it is the employers who are now making it a mandatory requirement for their employees. Therefore, this Decision tends to support the argument that a mandatory vaccination policy originating from an employer would be valid.

Nonetheless, the arbitrator did make some comments regarding mandatory vaccination policies, namely, that in the present scenario, the infringement of Charter rights was less direct and compelling than if it was the employers who required that all of their employees be adequately vaccinated and that the infringement on the

employees' physical integrity was justified in particular by the fact that the employees could be reassigned. In light of these comments, we recommend that a mandatory vaccination policy provide alternatives to dismissal of unvaccinated employees, in order to increase the likelihood that such a policy would be considered enforceable. Depending on the employee's position, alternatives to dismissal can include remote work, a change of position, testing prior to reporting to the office or unpaid leave. Of course, the employer also has an obligation to accommodate employees, up to the point of undue hardship, for medical or other grounds protected by the Charter.

Finally, we mentioned in [our previous bulletin](#) that Bill 59, also known as the *Act to Modernize the Occupational Health and Safety Regime* ("Bill 59") will require all employers to implement a prevention program that identifies the main sources of occupational health and safety hazards by April 6, 2022. Specifically, the program must detail the measures to be taken in order to eliminate or control the risks permanently. Following this Decision confirming that COVID-19 is a risk that employers must prevent and that employers must ensure that sustainable corrective measures are put in place, it is clear that employers will have to take into consideration the risks related to COVID-19 in their prevention program. As a result, we consider that this Decision, plus the adoption of Bill 59, support the validity of mandatory vaccination policies in Quebec workplaces.

Privacy

In his Decision, the arbitrator set out guidelines for the employer's collection of vaccination status in order to comply with the obligations arising from the *Act respecting the protection of personal information in the private sector*. The arbitrator recommended that the person collecting the information be a human resources representative rather than the employee's immediate superior. This way, the disclosure of the personal and confidential information will be restricted to individuals whose role is generally to work with confidential information. In terms of the type of proof of vaccination that can be collected, the vaccine passport created by the Quebec government, via the *Vaxicode* application, or a paper version of this document, is considered adequate evidence according to the arbitrator. Information regarding the number of doses received and the dates of these doses should not be requested, unless it is impossible to provide a vaccine passport or any other official document attesting to adequate vaccination. With respect to the retention of the proof of vaccination, only the vaccination status (i.e. whether adequately vaccinated or not) should be retained. Finally, if the employer must communicate this information to its clients, the employer should refrain from communicating a list of names and other related information on the vaccination status, and instead limit itself to confirming that all employees assigned to this client are adequately vaccinated.

Should you have any questions regarding the above or should you need assistance with drafting a vaccination policy, do not hesitate to contact:

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[1][ps2id id='1' target=''] Arrêté No 2021-080 du ministre de la Santé et des Services sociaux en date du 14 novembre 2021.

[2][ps2id id='2' target=''] Union des employés et employées de service, section locale 800 et Services ménagers Roy ltée., 2021 QCTA 570.

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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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