

VACCINATION MANDATES IN THE CONSTRUCTION INDUSTRY – WHAT YOU NEED TO KNOW

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Vaccination mandates have become a hot topic as employers and businesses across the country seek to establish and implement vaccination policies to help facilitate return to the in-person work environment. While construction across the country largely continued in-person throughout the pandemic, the introduction of vaccination mandates is resulting in changes to the COVID-19 policies implemented on construction sites as part of protecting health and safety. It is therefore important for participants in the industry to understand what may be included in vaccination mandates as well as the key considerations and risks associated with their implementation and enforcement.

1. Vaccination Mandates Are Not Mandatory in Construction

To date, no law has been passed requiring persons attending at construction sites or commercial offices (e.g., of clients, contractors and consultants) to be fully vaccinated. Certainly, COVID-19 safety plans and policies must be (and remain) in place under applicable health and safety legislation for protection of workplace health and safety, including for consistency with the directions of local public health units. While all policies must contain procedures for dealing with unvaccinated persons (as detailed below), mandatory vaccination is an option that may be included in these policies.

As more government entities and owners begin to implement vaccination mandates, however, it is likely to become the industry standard and expectation that all players have some form of vaccination mandate in place.

2. Owners, Contractors and Consultants May All Establish Vaccination Mandates

Employers, including owners, contractors and consultants, may each establish and implement a vaccination policy for their own employees. Additionally, parties may require others to comply with their vaccination policy by contract. For example, an owner may require its contractors and consultants to comply with its vaccination mandate when attending its site and offices.

Importantly, the implementation of a vaccination mandate is not a violation of employees' human rights. For

example, on September 22, 2021 the Ontario Human Rights Commission issued a policy statement confirming that vaccine mandates are “generally permissible under the *Human Rights Code (Code)* as long as protections are put in place to make sure people who are unable to be vaccinated for *Code*-related reasons are reasonably accommodated”.

3. All Vaccination Mandates Must Address Potential Exemptions

Regardless of the vaccination and testing requirements established in a vaccination mandate, as part of good practice and for compliance with human rights legislation (including the Ontario *Human Rights Code*), all vaccination mandates must include a protocol for review of exemption requests.

Although exemptions to vaccination for medical, religious, or other reasons are anticipated to be rare, all vaccination mandates must establish a process for submitting and reviewing exemption requests. Employers should thus consider and implement an internal process for documenting and evaluating such requests. As the law relating to vaccination mandates continues to evolve daily, we strongly recommend that employers obtain legal advice when considering exemption requests.

4. There is No “One-Size-Fits-All” Vaccination Mandate

A number of factors should be considered when creating a vaccination mandate, including:

- **Nature of work performed:** To what extent is in-person attendance required for job performance? How has work been accommodated throughout the pandemic? Do government mandates (i.e. travel) need to be considered and integrated?
- **Workforce tolerance:** What will happen if the policy is implemented? Could a big chunk of the employer’s workforce be lost?
- **COVID testing:** When will a negative COVID test be sufficient for access to office or site instead of full vaccination? How frequently must an unvaccinated person obtain a COVID test? What type of COVID test must person obtain? Who pays for the COVID test?
- **Government mandates:** How might the Federal vaccine mandate for air and rail travelers affect our employees? What if an unvaccinated employee is away when the deadline to be vaccinated passes and cannot fly or take a train to return?

With these factors in mind, an employer should include as part of its vaccination mandate any one or more of the following:

- A requirement that all employees be fully vaccinated by a stipulated date in order to attend at the office or site (which date may be chosen at the employer’s discretion)
- A requirement that all employees (whether vaccinated or not) obtain a negative COVID test prior to

attendance at any office or site.

- A requirement that any employees who are not fully vaccinated obtain negative COVID tests a stipulated number of times per week in order to attend any office or site (e.g., 2 or 3 times per week)

Employers should do their best to establish policies appropriate to their working conditions with a primary focus on protecting employee health and safety. As detailed below, the factors identified above should also be considered and discussed by project parties when compliance with a vaccination mandate is required by contract.

5. Vaccination Mandates Can Expose Employers to Litigation Risk

Employers should also consider the potential employment implications of imposing a vaccination mandate. For example, employees who are put on unpaid leave of absence because they remain unvaccinated by a stipulated vaccination deadline may claim they have been constructively dismissed because they will not be permitted to work until the pandemic is over. Alternatively, employees who are terminated (whether with or without cause) for remaining unvaccinated by a stipulated vaccination deadline may claim they have been wrongfully dismissed. In the unionized context, an employer may face grievances alleging unjust termination or improper layoff. As each circumstance is unique, we strongly recommend that employers who face such claims, or threats of such claims, obtain legal advice before responding.

While many employers are cautious about exposing themselves to litigation risk, many others have said “bring it on” and are prepared to defend such claims on principle. These employers may also anticipate reputational benefits to standing up in favour of vaccinations to protect public health. As the potential for litigation risk will depend on each employer’s specific circumstances, we recommend obtaining legal advice to help consider and evaluate this potential risk when implementing a vaccination mandate.

6. Vaccination Records Are Personal Information

Vaccination records and related details (i.e. type of vaccination received, date of vaccination, who administered the vaccination, whether the person experienced any adverse reactions, etc.) are personal health information protected by the Ontario *Personal Health Information Act* and other applicable privacy legislation & common law in other provinces, but vaccination status (i.e. yes/no) is not.

An employer is permitted to collect and store details of an employee’s vaccination, such as the date the vaccine was administered and the type of vaccine administered. Where an employer has decided to collect and keep records of this information, such as copies of vaccination receipts, they must keep this personal health information strictly confidential and treat it with the same care as any other employee medical records.

However, collection of this information should not be required to fulfil the health and safety objectives of a

vaccination mandate – only confirmation that an employee is fully vaccinated is needed. Deletion of an employee's vaccination records following review and confirmation of fully vaccinated status is thus strongly recommended.

An employer may not provide vaccination records of its employees to third parties, such as an owner or contractor, without the employee's express written consent. In order to avoid potential liability relating to individual's personal information, it is recommended that project parties avoid accepting vaccination mandates and related contractual obligations that require or contemplate the collection or storage of personal information.

7. Compliance with Vaccination Mandates Should Be Confirmed Without the Sharing of Vaccination Records

As previously noted, an employer may not share its employees' vaccination records without each employee's express written consent. Owners and other project parties, however, will likely want to ensure all persons attending the site and their offices are in compliance with their vaccination mandates.

Options for obtaining this confirmation while avoiding the collection, storage and sharing of personal information is thus strongly recommended, such as the following:

- **Sworn Attestation:** Parties may by contract require the provision of a sworn attestation confirming compliance with the vaccination policy, including through review of the necessary records of the party's own employees. This sworn attestation could be provided by a stipulated date (e.g., the deadline for full vaccination) or, alternatively, with each invoice submitted by a party under the contract.
- **Vaccination Passports:** In order to allow other project parties to confirm an individual's fully vaccinated status without having to review an individual's private vaccination records, a vaccination passport system may be created.
 - **Project-Specific:** Vaccination passports could be established on a project-specific basis. For example, each project party would be responsible for verifying the vaccination status of its own employees and, upon confirmation of fully vaccinated status, a vaccination passport (e.g., laminated card) prepared specifically for the project could be issued. Project parties could then be required to show their project vaccination passport whenever the site or project offices are accessed.
 - **Government Issued:** Ideally, vaccination passports established by provincial governments may be used by project parties to administer their vaccination mandates. In such a case, vaccination mandates could simply require that as of a stipulated date the province's vaccine passport will need to be shown by any person accessing the site or a project office. Reliance on government

issued vaccination passports will be subject to the passport procedures in each jurisdiction – for example, some jurisdictions may issue their vaccination passport to persons who are not vaccinated due to a valid exemption. In such a situation, a project-specific vaccination passport may be preferable to ensure exempt persons are still tested regularly in order to access the site or project offices.

8. Cost and Schedule Implications of Vaccination Mandate Should be Addressed in the Contract

Where compliance with a vaccination mandate is required by contract, the cost and schedule implications of the mandate should be considered and expressly addressed. For example, costs will be incurred to implement any mandatory COVID testing requirements and time for performance could be impacted if a vaccination mandate results in loss of workers. These matters should be addressed up front prior to execution of any contract imposing a vaccination mandate. Where compliance with a vaccination mandate is requested under an existing contract, these matters should be addressed by way of Change Order.

By the end of the year it is anticipated most employers across the country will have established some form of vaccination mandate. As detailed above, each mandate should be tailored to the specific needs of the business or project with the primary objective of protecting employee health and safety as well as personal information. As with many pandemic-related issues, the law surrounding vaccination mandates continues to evolve and project parties would be well advised to obtain legal advice in the preparation and administration of their vaccination mandates, including related contract terms.

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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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