

VACCINE MANDATES BY COMMERCIAL LANDLORDS: ARE THEY PERMITTED AND WHAT ARE THE RISKS?

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Many commercial landlords are considering implementing vaccine mandates in their properties as a response to the COVID-19 pandemic. In the absence of a governmental mandate, landlords are understandably concerned by the friction between their legal obligation to provide healthy workplaces and employee rights under human rights and employment legislation. In this bulletin, we address the question of whether landlords have the right to implement a vaccine mandate and the risks arising from potentially restricting tenants' and their employees' access to their premises and places of work. This bulletin does not address the case of landlords who must impose a vaccine mandate under a government directive (e.g. commercial tenants in Ontario hospitals) or other law.

Does a Landlord Have a Right to Mandate Vaccination?

Whether a landlord does or does not have the right impose a vaccine mandate will depend, in part, on the terms of the lease. There are several common lease terms that may assist in the analysis.

- **Quiet Enjoyment:** Most commercial leases contain the landlord's covenant to provide the tenant with quiet enjoyment, which means that a landlord will not, so long as the tenant is not in default, interfere with the peace or comfort of the tenant's exclusive possessory right to the premises. If a vaccine mandate prevents access to the premises, a tenant may claim that the landlord has breached its covenant for quiet enjoyment. However, if another lease provision requires the tenant to comply with reasonable health and safety requirements imposed by the landlord, e.g., a vaccine mandate, the tenant's failure to comply with such requirement would be a default under the lease and may be invoked as a complete defence to the tenant's assertion of a breach of its right to quiet enjoyment.
- **Compliance with Laws:** Many commercial leases also contain the tenant's covenant to comply with all present and future laws and regulations. Some leases may also provide that a tenant will use and occupy the premises in a safe, careful and proper manner. Although currently in Ontario there is no blanket law imposing a mandatory vaccination requirement on tenants and their employees as a prerequisite to the leasing of commercial premises, there are several other laws that may apply, such as occupiers' liability legislation and occupational health and safety laws. These laws generally require property occupiers and

employers, respectively, to take care to ensure that persons entering the property and its employees are reasonably safe. In the face of scientific and governmental guidance showing the efficacy of vaccination in inhibiting the spread of the COVID-19 pandemic, a landlord requiring the vaccination of its tenant's employees or, for that matter, a tenant requiring the vaccination of its employees, might reasonably be regarded as falling within an occupier's obligation to ensure that its premises are used and occupied in a safe, careful and proper manner.

- **Rules and Regulations:** Some commercial leases may grant the landlord the right to impose rules and regulations for the safety and benefit of all tenants and may require the tenant to comply with, and cause its employees, servants, agents, licensees and invitees to comply with, the rules and regulations adopted from time to time by the landlord. A landlord may be able to change or add new rules and regulations to which, upon notice thereof, tenants will be bound. Such rules and regulations might include a requirement that all tenants wear masks in common areas or, perhaps, that they be vaccinated before being permitted entry into the landlord's building.
- **Health Emergency:** As briefly discussed earlier, some commercial leases may explicitly permit the landlord to impose security and/or health screening measures during health emergencies.
- **Restrictions on Use & Occupancy and Access by Landlord:** Although these clauses alone will not independently justify a landlord's right to implement a vaccine mandate, they may play a supporting role in permitting a vaccine mandate.

As any commercial lease usually contains a complex combination of rights, obligations, restrictions and remedies of both landlords and tenants, landlords should take care to provide ample notice to their tenants and other occupiers of any changes, restrictions, or new rules and regulations in order to permit such persons to take the necessary steps to come into compliance.

Landlord's Liability for Discriminating against Commercial Tenants

Even if a landlord is entitled to impose a vaccine mandate under its lease, the landlord can still be liable under the Ontario *Human Rights Code*^[1] (the "**Code**") for exercising the mandate in contravention of the protections set forth in the *Code*.

The *Code* prohibits discrimination in certain contexts based on specified personal characteristics, such as disability (e.g. an allergy to vaccines) or creed (e.g. religion bars vaccination). Commercial landlords may be liable to their tenants if they discriminate in the context of providing facilities to,^[2] or contracting with, a tenant.^[3] In order to resist a claim for liability for an infringement of the *Code*, landlords should ensure that their vaccine mandates reasonably accommodate any *Code*-protected personal characteristics. One common example of an appropriate accommodation may be to permit antigen testing instead of vaccination for

individuals who have a legitimate medical or religious reason preventing vaccination. Whether a specific form of accommodation is sufficient, however, will vary from business to business.

Landlords' Liability for Discriminating against Commercial Tenants' Employees

A landlord that imposes a vaccine mandate may also be liable for contravening the *Code* if its mandate does not accommodate its commercial tenants' employees. Although there are no cases considering the liability of a landlord to its tenants' employees under the *Code*, it appears that a landlord could be liable under two sections of the *Code*.

Section 5 of the *Code* provides that each person is entitled to equal treatment with respect to employment. Section 5 does not limit discrimination claims to employers. Instead, it applies equally to any situation where there is a sufficient nexus between the discrimination and the employment. For example, liability under section 5 has been considered against a union where the union has either (1) created a discriminatory work rule or (2) impeded an employer's ability to accommodate an employee.^[4] Similarly, a municipality was liable under the *Code* to employees where the employees worked for a company contracting with the municipality.^[5] As section 5 is not exclusively an employer-employee area of liability, the section might apply to a landlord if its vaccine mandate affects the employee's ability to work.

Section 1 of the *Code* provides that each person is entitled to equal treatment with respect to accessing facilities. The Human Rights Tribunal has previously held that landlords were liable for discriminating against customers of tenants under section 1 by failing to provide an accessible facility to those customers.^[6] Since the landlord is similarly providing a facility to the employees of the tenant, it appears that section 1 liability could arise if the landlord's vaccine mandate prevents the tenants' employees from accessing their workspace. However, section 1 may only apply to premises that are open to the public, as "facilities" has been interpreted to mean places available for the public to request access to.

As with direct liability to tenants, the key to preventing liability is ensuring that the vaccine mandate reasonably accommodates any *Code*-protected personal characteristics. We recommend seeking legal advice in designing any vaccine mandate to limit liability under the *Code*.

Landlords' Liability to Their Own Employees

A landlord could also face discrimination claims from its own employees if it implements a vaccine mandate. For more information on employee claims, see our [bulletin for employers](#).

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[1] R.S.O. 1990, c. H.19.

[2] *Jensen v Ulanowicz*, 2012 HRTO 559.

[3] *Osman v Toronto District School Board*, 2011 HRTO 1476.

[4] *Gungor v. Canadian Auto Workers Local 88*, 2011 HRTO 1760.

[5] *Johnson v Regional Municipality of Peel*, 2019 HRTO 1028.

[6] *Saxon v 1762668 Ontario Inc*, 2014 HRTO 232 and *Brock v Tarrant Film Factory Ltd*, 2000 CanLII (ON HRT).

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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