

Persistent COVID-19 vaccine refusal potential firing offence, say employment lawyers

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Employers could potentially make COVID-19 vaccination mandatory in some workplaces, with persistent refusal even punishable by firing, said employment lawyers during a recent Ontario Bar Association professional development session.

An employer's duty under Ontario's *Occupational Health and Safety Act* to take all reasonable precautions to protect the health and safety of workers provides a sound starting point for requiring workers to be vaccinated, especially in high-risk environments, said the three panellists at a Jan. 28 session titled Vaccination Requirements and Other Pandemic-related Issues in the Workplace.

Attendees received a [document](#) listing relevant cases in recent years.





Tatha Swann, Levitt Sheikh Chaudhri Swann

“I think that employers are going to want to mandate vaccinations for commercial reasons and health and safety reasons, and I think that probably they’re going to be able to show that there’s sufficient reason for public health,” said Tatha Swann, a Toronto-based employment lawyer and partner with Toronto-based Levitt Sheikh Chaudhri Swann.

The big caveats are human rights and privacy objections, she cautioned. “But employers ultimately set the conditions of employment, work requirements and health and safety regulations,” she added, “and certainly the purpose of implementing a mandatory vaccine would be to protect workers, customers and anyone else coming into the workplace to give them that ability to carry on the employer’s operations.”

Potentially, persistent vaccine refusal could even amount to a firing offence, she added.

“I think in the absence of a human rights reason or something medically related, I think an employee opens themselves up to an employer saying that it’s a health and safety risk,” she said. “And if they’ve been instructed to get the vaccination and they’ve refused that, maybe they’ve repeatedly refused it after getting extensions, then it could warrant just cause.”

Daniel Chodos, an employment lawyer and partner with Toronto-based Whitten & Lublin, noted that one of the overriding outcomes of pre-COVID vaccination-related cases was a reference to “an absence of contractual authority.”

“It would really help, if you’re going to impose this policy, to have it in a contract,” he told attendees. “It’s almost always going to be more enforceable as against an individual worker if that individual worker has signed off in their contract in exchange for consideration in the requirement to do this. It’s not going to be foolproof. Nothing is. But it’s certainly going to help.”

Katherine Ford, an employment lawyer and manager of knowledge management with Toronto-based Sherrard Kuzz LLP, agreed that vaccination could be made a condition of employment in contracts in non-union settings. But in unionized workplaces, she said, vaccination policies have been arbitrated — in most cases involving the standard influenza vaccine.

But COVID-19 is much more serious than traditional influenza, she noted.

“Just look at how it’s dramatically changed our workplaces, our society,” she said. “The response to it within the health-care context in particular has to be different.

“That said, she added, “I wonder how arbitrators are going to treat efficacy rates. A lot of that is still unclear because when we read about the vaccine, are we protected from serious illness, are we protected from transmission? So I think that until those issues are resolved, the harm and risk reduction element of it is at least in question.”

Chodos recommended that employers put a policy in place that requires employees to report when they are vaccinated. “As a general proposition,” he added, “I can’t see where you’re going to run into too many problems by making it a general expectation.”

Under strict workplace vaccination policies, a person who is genuinely against being vaccinated could effectively become unemployable, he noted. At the same time, he added, such policies

effectively put employers in the position of being the COVID-19 vaccination police – and that is not an employer’s job.

“That’s on the government if that’s the direction the government decides to go,” he said. “And how do we really know that it’s going to curb transmission? So if I’m going to fire someone with cause based on a medical view that hasn’t yet been proven, there’s going to be some controversy there, for sure.”

Swann suggested that a gentler approach to mandating vaccination might be more effective in some workplaces.

“It can be a very happy, friendly message, but it has an invitation to report when you’ve gotten it,” she said. “Please let us know. And then you see what your numbers are until you’ve narrowed it down to maybe 10 per cent or one per cent of the workforce. And then you probably want to have communications directly with those individuals as opposed to having a public debate in the workplace about what the consequences might be for those who don’t comply.”

Under the *Occupational Health and Safety Act* and the *Reopening Ontario Act*, it’s incumbent on the person responsible for the business to ensure that the various COVID health and safety measures are being taken, said Ford.

“For a lot of organizations, that really opens up the risk that not only could an organization or business be held liable, in terms of from a fine and penalty perspective,” she said, “but those individual managers or people who are responsible for that business need to make sure that they are ensuring compliance, or else they themselves may be personally subject to fines.”

For many companies and organizations, employees are the first line of defence – so it pays to communicate, said Swann.

“Listen and think about whether additional safety protocols could be

put in place,” she said. “And certainly document alternatives that have been discussed so that you can later have a rationale for why you maybe decided against going with a certain process and a challenge is taken to the Ministry of Labour.”

Priya Sarin, a labour, employment and human rights lawyer with Sherrard Kuzz LLP who served as moderator, asked the panellists if employers are entitled to medical documentation confirming diagnosis if an employee contracts COVID-19.

“I don’t think it’s a breach of privacy. I think you should ask for it,” said Ford. “Most of the time, we’re not really even asking for medical documentation as much as we just asking for a screen shot or a printout of the website sheet.

“And the rationale,” she added, “is our obligation to reach out to those individuals who they were in close contact with in the workplace to ensure that we are meeting our obligation to ensure that they go get tested.”

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