

THE SATURDAY DEBATE

Can an employer force an employee to get a COVID-19 vaccination?

YES

It can be justified in certain circumstances



SAMIA HUSSEIN

OPINION

A COVID-19 vaccination can be a condition of employment, so long as the vaccination policy meets the following requirements:

➤ It accommodates those who cannot, or will not, be vaccinated based on grounds protected under human rights legislation (in Ontario, that is the Human Rights Code).

➤ It is consistent with the terms of any collective agreement that may apply to a unionized employee.

However, even if an employer has the right to implement a COVID-19 vaccination policy, an employee's refusal to comply for personal (non human rights-related) reasons may not, in every case, amount to "just cause" for dismissal, in which case the employer may be liable for damages.

This is because just cause has been described by some courts as the capital punishment of employment law, reserved only for the more serious of offences, which includes fraud, dishonesty, violence, harassment, habitual neglect of duty, use of demeaning racial or ethnic slurs by one employee to another and wilful disobedience to the employer's orders in a matter of substance.

As such, depending on the circumstances, refusal to be vaccinated may, or may not, rise to the level of just cause. Each case will be evaluated on its own merits.

If an employer implements a policy mandating vaccination, an employee may not be able to comply with the policy due to religious belief or disability, both of which are protected grounds under Canadian human rights legislation.

In this case, an employer is permitted to request evidence of the employee sufficient to substantiate the employee's claim they cannot be vaccinated.

In the case of disability, this will generally be medical evidence confirming the existence of a disability and identifying the restrictions that prevent the employee from complying with the policy (for example, a medical contraindication).

In the case of creed (or religion), the employee will need to demonstrate they are acting out of a sincere religious belief or practice, and not merely a political position or personal choice.

In a recent decision before the Human Rights Tribunal of Ontario, an individual refused to wear a mask in compliance with the City of Toronto by-law. He claimed he was being discriminated against on the basis of his creed which, he said, required that he "not blindly accept what government or agencies claim, mandate or enact into laws (or by-laws). Instead it [was his] civic duty to be critical of government and their decisions".

The Tribunal rejected this creed-based argument on the basis the individual's belief was more political than religious. "Creed", said the Tribunal, while not defined in the Code, "most often engages an applicant's sincerely held religious beliefs or practices... However, mere political opinion does not engage creed...".

If an employee demonstrates they are unable to be vaccinated for a reason protected by human rights legislation, the employer must make reasonable efforts to accommodate the employee to the point of undue hardship to the employer.

This may include a requirement the employee wear personal protective equipment in the workplace, a work-from-home arrangement or, in extenuating circumstances, a leave of absence.

In a unionized workplace, if there is nothing in the collective agreement to prohibit mandatory vaccination, an em-

ployer may unilaterally institute a such a policy under its management rights.

If the union grieves the policy on the basis it is violation of the collective agreement, the employer will need to demonstrate the policy is a reasonable workplace standard, and is not implemented discriminatorily, arbitrarily or in bad-faith.

When evaluating the reasonableness of a policy, an arbitrator will balance the interests the employer seeks to protect with the personal choice of an employee. Factors an arbitrator will likely consider include: evidence of workplace transmission; health and safety risks posed to workers and others (e.g., clients, patients, visitors, etc.); and, if lesser measures could be adopted to address the potential risk.

If an arbitrator concludes a policy is unreasonable, it will be struck down. If a policy is upheld, an employee may be disciplined and ultimately terminated for just cause if they fail to comply with its requirements.

In a non-unionized workplace, an employee who refuses to comply with a mandatory vaccination policy can be disciplined and ultimately terminated (subject to the human rights considerations already discussed).

However, an employee's failure to be vaccinated may not always amount to just cause for termination. If not, the employee may be entitled to statutory, contractual or common law notice, or pay in lieu. Each case will be determined on its own facts.

Samia Hussein is a lawyer with Sherrard Kuzz LLP, one of Canada's leading employment and labour law firms, representing employers.

NO

Individuals still have control of their bodies



MICHAEL BRYANT

OPINION



CARA ZWIBEL

OPINION

Employer-mandated vaccines, in early 2021, is a solution looking for a problem. This is an issue best answered only with ifs and buts. If not for the current vaccine scarcity, the answer could be different. But demand for the vaccine will outpace supply in the near future, so any vaccine mandate is impossible until that changes. And, if sufficient numbers of individuals become vaccinated, mandates may prove unnecessary.

As of this writing, we think that coercing inoculation by threat of termination would today be a premature employer dictate; at most, it could one day be a measure of last resort, but only after ascertaining its necessity based on facts not fears.

Employer commandments are false hopes in a crisis marked by scarcity of what's being commanded. Public cooperation is exponentially more powerful and effective than legal or labour mandates, concluded Ontario SARS Commission.

In the first instance, then, promotion of voluntary vaccinations and ensuring effective and equitable allocation and

distribution of vaccines should be a top priority, not rushing to penalize something that may never happen.

Besides, we are asking the wrong question. Most employers are not in the business of vaccinating people, so they would not be the vaccinators. As such, the first question is whether they can insist on obtaining private health information about employees. No point insisting on employees getting vaccinated if there is no way to prove it.

What's the problem with requiring employees to disclose personal health records to an employer, without consent? Well, is it any business of your employer if you receive treatment for depression, that you have cancer or diabetes, that you are pregnant, or that you suffer from chronic incontinence? There are privacy laws already protecting employees from having to disclose that information under duress. Would inoculation records be an exception?

The legal test boils down to what is in the collective agreement or individual employment contract. If nothing in either of those, then the question is whether it's "reasonable."

For example, it would be unreasonable of our organization, CCLA, to require vaccination. It's not in our employment agreements, and we have no health or safety risks arising from our work; we can all work from home.

And the answer will change as we learn more about both the virus and the vaccine — such as the efficacy and risks arising from a particular vaccine, over time. Pregnant women, children, and immunocompromised individuals were not part of the clinical trials that resulted in granting emergency authorization for the vaccines currently available, which means there is much more to learn for these populations in particular.

The answer further depends on epidemiologists' goals (herd immunity or something more?) and the employer's actual purpose (public health protection or private liability risk management?). Starting from first principles, Canadian law has long recognized that individuals have the right to control what happens to their bodies. Medical treatment without informed consent is a legal wrong (battery) that can be pursued in our civil courts.

The law recognizes how crucial this right is to our bodily integrity and personal autonomy — it is evident in the right to abortion, to refuse life-saving medical treatment, to dying with dignity.

Alongside these key legal principles, there are also laws that require employers to take measures to protect the health and safety of their employees and that confer obligations on businesses to ensure that they adequately protect the public they serve.

How these obligations play out on the ground will be contingent on factors we can only begin to identify: employees who care for vulnerable populations are in different circumstances than those who provide online services. Even for those working with COVID-vulnerable populations (eg., long-term care homes), there would still have to be exemptions for individuals who are unable to be vaccinated. Religious and conscientious refusals would also have to be considered; and accommodations made, such as working apart from the at-risk.

There is no correct answer to this question once and for all time. The case for a vaccine mandate shifts, depending on what we know about the virus, the vaccine, the risk/benefits thereto, the state of supply and demand, and rates of inoculation and voluntary disclosure of same. As of today, that makes mandates a non-starter, boss man.

Michael Bryant and Cara Zwibel are lawyers who both clerked at the Supreme Court of Canada and now work at the Canadian Civil Liberties Association.



CHLOE CUSHMAN ILLUSTRATION FOR THE TORONTO STAR