

HEALTH AND SAFETY/HUMAN RIGHTS AND PRIVACY

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Mandatory COVID-19 vaccination in the workplace

In most cases, an employer can require COVID-19 vaccination as a condition of employment



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WITH COVID-19 vaccination soon within reach for most Canadians, many employers want to know if they can implement a mandatory vaccination policy for health and safety reasons, corporate branding or both. Particularly in public-facing workplaces — such as retail, personal services, health care, education, etc. — there may be a competitive advantage to being able to “advertise” that employees in the workplace have all been vaccinated.

In most cases, an employer can require COVID-19 vaccination as a condition of employment, subject to the considerations addressed below.

Human rights

An employee unable to receive the COVID-19 vaccine due to a health condition or religious belief may claim mandatory vaccination is discriminatory under human rights law. In that case, an employer must be able to demonstrate that vaccination is a bona fide occupational requirement and accommodate the employee to the point of undue hardship.

Each request for accommodation must be assessed on an individual basis, and possible accommodation might include:

- exempt the employee from the requirement to be vaccinated
- move the employee to a remote work arrangement or a position or location in the workplace that does not require direct and/or regular contact with co-workers, customers, clients, vulnerable individuals or the public
- require the continued use of personal protective equipment (PPE) to mitigate the risk of transmission.

Privacy

An employer that operates in a province or

industry with privacy legislation applicable to employee personal information must ensure collection of vaccination information is done in compliance with that legislation. To this end, a vaccination policy should clearly outline why and how vaccination information is collected, the scope of its use and disclosure and how it will be stored and destroyed.

Non-unionized workplace

Subject to the human rights and privacy considerations set out above, an employer can implement a mandatory vaccination policy for its non-unionized employees.

For a newly hired employee, the requirement to be vaccinated should be clearly set out in the offer of employment.

For an existing employee, depending on the nature of the workplace and the employer’s justification to require mandatory vaccination, refusal to be vaccinated may or may not amount to just cause to terminate the employee. If not, the employee may be entitled to pay in lieu of notice and, in some cases, severance pay (under employment standards legislation). Common law notice may also be owed, depending on the terms and conditions of employment.

Accordingly, before implementing a mandatory vaccination policy, an employer should consider how it will respond and the associated cost — financial and otherwise — if an employee refuses to be vaccinated on the basis of personal choice.

Unionized workplace

In a unionized workplace, a mandatory vaccination policy may be challenged as a violation of the collective agreement. In that case, an employer will be required to establish that the policy is reasonable for health and safety purposes or other workplace factors.

At present, there is no reported case law on the reasonableness of a COVID-19 vaccination policy. However, there are a number of arbitration decisions in which an employer’s



influenza vaccination policy was found to be reasonable. While the respective vaccination policies differed slightly in each decision, they shared the following common features:

- they were implemented in the health-care sector and, in most cases, applied to health-care workers who provided direct care to vulnerable populations
- in the event of an outbreak of influenza, an employee was not permitted to work unless vaccinated or the employee had begun an anti-viral prophylaxis regimen (and remained out of the workplace for a specified period of time after beginning the regimen)
- an employee not permitted to work was excluded from the workplace only for the duration of the outbreak
- the policy was non-disciplinary and provided options to an employee who refused to be vaccinated, including take the prophylaxis treatment, take an unpaid leave of absence or, in some cases, access vacation credits or banked time to offset the financial impact.

The circumstances surrounding COVID-19 are not identical to that of general influenza. For example, there does not appear to be a discrete COVID-19 “season.” Nevertheless, the influenza decisions offer some helpful insight into the factors an arbitrator might consider when assessing whether a mandatory vaccination policy is reasonable. 

To learn more and for assistance regarding any COVID-19 workplace matter, contact Sherrard Kuzz LLP @ info@sherrardkuzz.com

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