



Mandatory Vaccination Policies in the Workplace – Should You Implement One?

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With the rollout of COVID-19 vaccines underway in Canada, many employers are now asking whether they can or should implement a mandatory vaccination policy to ensure worker safety.

The ability to make vaccination a mandatory condition of employment depends on a number of factors, including the nature of an employer's business, whether employees are unionized, and if there are any human rights issues at play. An organization whose employees work in a higher risk environment or with vulnerable populations (e.g., a hospital, school, or retirement home), is more likely to be able to require vaccination for health and safety reasons, than an organization whose employees can easily work from home, or continue to work safely using personal protective equipment (PPE).

Although an employer may be able to require vaccination as a condition of employment, proactive measures to encourage voluntary COVID-19 vaccination may be preferable, as they will minimize potential legal risks (described below). Further, a mandatory vaccination policy may ultimately be unnecessary if employees choose to receive the vaccine at the earliest available opportunity due to their fear of contracting COVID-19 and becoming seriously ill.

Mandatory Vaccination in a Non-Unionized Workplace

Subject to human rights and privacy considerations, an employer may implement a mandatory vaccination policy for new non-unionized employees. This vaccination requirement should be expressly included in an offer of employment.

An employer may also implement a mandatory vaccination policy for existing employees (subject to human rights considerations); however, this could result in potential liability. If an employee refuses to be vaccinated on the basis of personal choice *and* the nature of the employee's work is not "high risk", the employer may have no option but to terminate that individual's employment without cause. Similarly, if the employee is not permitted to work without being vaccinated, this could result in a constructive dismissal claim. In either scenario, the employer could be liable for statutory, contractual or common law termination entitlements.

Mandatory Vaccination in a Unionized Workplace

In a unionized workplace, a mandatory vaccination policy could be grieved on the basis that it violates the collective agreement. If challenged, the employer would be required to establish that the policy is reasonable for health and safety reasons, among other factors.

To date, no arbitral decision has considered the reasonableness of a mandatory COVID-19 vaccination policy. Arbitrators have previously found mandatory flu vaccination policies to be reasonable; however, those decisions may be of limited assistance because the flu vaccine decisions principally arose in the healthcare sector and in respect of

workers who provide direct care to vulnerable patients. Further, none of the flu vaccine policies which were upheld made vaccination a mandatory condition of employment. Instead, if an employee refused vaccination, the flu vaccine policy provided for non-disciplinary measures such as taking an unpaid leave of absence for the duration of the influenza outbreak or continued use of PPE (i.e. masks).

As such, if a vaccination policy is implemented in a unionized workplace outside of healthcare, an employer should consider consulting with the union first and offering non-disciplinary alternatives for those who choose not to be vaccinated.

Human Rights Considerations

If an employee is unable to receive the COVID-19 vaccine due to a medical or religious reason, or any other human rights protected ground, an employer has a duty to accommodate the employee to the point of undue hardship. Some examples of accommodation include: an exemption from the requirement to be vaccinated; moving the individual to a location that does not require direct contact with coworkers, customers, residents or the public; and continued use of PPE to mitigate the risk of transmission.

If an employer asserts they are unable to accommodate an employee to the point of undue hardship, the employer should be prepared to demonstrate that vaccination is a *bona fide* occupational requirement of the position.

Bottom line: if an employer determines a vaccination policy is necessary, even if the policy does not make vaccination mandatory, the employer should work with experienced legal counsel to ensure the policy complies with all applicable privacy, human rights and health and safety-related requirements.

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