



COVID-19 VACCINATION IN THE CONSTRUCTION WORKPLACE

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With COVID-19 vaccination within reach for most Canadians, many construction employers want to know if they can require workers to be vaccinated once vaccines are readily available. Employers are also uncertain about the information they can collect about vaccination and whether widespread vaccination in the workplace means fewer health and safety protocols such as distancing, masking, disinfecting, etc.

For assistance related to COVID-19 in the workplace, contact your Sherrard Kuzz LLP lawyer or, if you are not yet a client, contact us at info@sherrardkuzz.com with the subject line: COVID-19.

CAN A CONSTRUCTION EMPLOYER, GENERAL CONTRACTOR OR SITE OWNER MANDATE COVID-19 VACCINATION AS A CONDITION OF EMPLOYMENT OR ACCESS TO A JOBSITE?

In most cases, an employer, general contractor or site owner can require COVID-19 vaccination as a condition of employment or access to a jobsite, subject to the considerations and risks addressed below.

HUMAN RIGHTS

A worker unable to receive the COVID-19 vaccine due to a health condition or religious belief may claim any requirement to be vaccinated is discriminatory in employment under human rights law. In that case, an employer must be able to demonstrate 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 accommodations might include:

- exempting the worker from the requirement to be vaccinated;
- moving the worker to a position or location on the jobsite that does not require direct and/or regular contact with co-workers, customers, clients, vulnerable individuals or the public; and
- requiring the continued use of personal protective equipment (PPE) to mitigate the risk of transmission, even if no longer required by law.

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. A vaccination policy should clearly outline why collection of vaccination information is reasonably necessary, the scope of its use and disclosure, and how it will be stored and destroyed.

NON-UNIONIZED EMPLOYEES

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 new worker, a vaccination requirement should be clearly set out in the offer of employment.

For an existing worker, 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 a worker refuses to be vaccinated on the basis of personal choice.

In some circumstances, an employer may try to reduce potential liability by implementing a vaccination policy that provides non-disciplinary alternatives if an employee elects not to be vaccinated. This could include: placing a worker on an unpaid leave of absence, requiring the continued use of PPE even after it is no longer required by law, or another measure to reduce potential COVID-19 transmission in the workplace. However, depending on the nature of the alternatives provided, a worker may argue the requirements of the policy constitute a constructive dismissal. Whether this is accurate will depend on the specific facts of each case. To minimize the risk to your organization, consult with experienced employment counsel *before* taking steps.

UNIONIZED EMPLOYEES

In a unionized workplace, a mandatory vaccination policy may be challenged as a violation of the collective agreement. In that case, an employer must establish 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 kept out of the workplace only for as long as the outbreak.
- The policy was non-disciplinary and provided options to an employee who refused to be vaccinated, including taking the prophylaxis treatment, taking an unpaid leave of absence or, in some cases, accessing vacation credits or banked time to offset the financial impact.

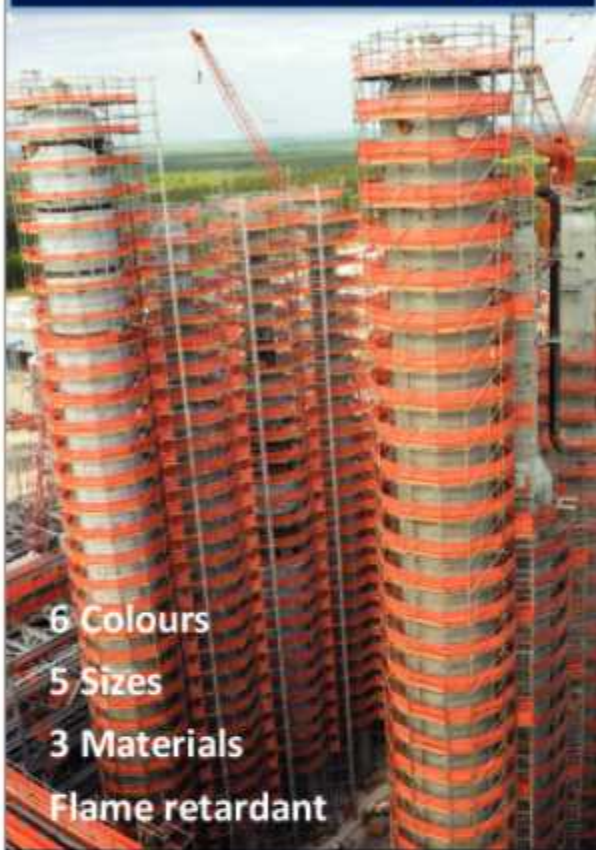
The circumstances surrounding COVID-19 are not identical to that of general influenza; for example, there does not yet appear to be a discrete COVID-19 "season." Nevertheless, the influenza decisions offer some helpful insight into the factors an arbitrator might consider when assessing whether a vaccination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

PRACTICAL TIPS

A clear and concise COVID-19 vaccination policy and rollout strategy can help reduce legal risk and encourage vaccination within the workplace. At minimum, a COVID-19 vaccination policy should:

- state why COVID-19 vaccination is a reasonable requirement in the workplace (e.g. in light of the nature of the work performed, risk to other employees and members of the public, etc.);
- identify what vaccination information will be collected and how it will be used, stored and destroyed;
- outline the steps a worker should take if they require accommodation due to a medical condition, religious belief or other human-rights-protected ground; and
- clarify if vaccination is required as a condition of employment. If not (or if vaccination is being required by a general contractor or site owner), identify non-disciplinary

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