
COVID-19 Vaccination and the Workplace: Where Do We Stand?

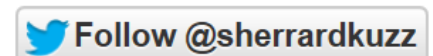
The webinar will begin at 9:00am EST



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COVID-19 Vaccination and the Workplace: Where Do We Stand?

Agenda

- Legislative review
- When is a vaccination policy “reasonable”?
- Vaccination and religious objection

LEGISLATIVE REVIEW



Legislative Review

■ Federal Requirements

- In October, 2021, the government required federal public servants and federally regulated employees working in transportation sectors to be fully vaccinated.
 - Subject to unpaid leave of absence if fail to comply

- In December 2021, the government announced its intention to require employees in other federally-regulated workplaces to be fully vaccinated under a Regulation to Part II of the *Canada Labour Code*.
 - To date, no regulation has been introduced

Legislative Review

■ Provincial requirements

- Provincial governments have been more reluctant to mandate COVID-19 vaccination.

- Ontario legislation requires mandatory vaccination for workers in specified high risk settings (e.g., long term care homes)
 - Requirement not extended to all health care professionals and hospital staff.

Legislative Review

- Instead, Ontario regulations require employers to comply with directives and recommendations of Medical Officers of Health to:
 - Implement a vaccination policy
 - Include specified content in a vaccination policy
 - Ensure compliance with the vaccination policy

- In British Columbia, regulated health professionals will soon be required to be fully vaccinated as a condition of providing health care to patients.
 - Effective March 24, 2022.
 - Monitored through professional governing bodies.

Legislative Review

- At this stage of the pandemic, it seems unlikely we will see new legislation requiring COVID-19 vaccination as a condition of employment.
- Many provinces are now signaling a gradual removal of COVID-19 related restrictions, including vaccination passports.
- However, for now, existing legislation mandating vaccination as a condition of employment remains in place.

WHEN IS A VACCINATION POLICY REASONABLE?



When is a Vaccination Policy “Reasonable”?

- In 2021, many employers implemented vaccination policies to protect health and safety in the workplace and incentivize employee vaccination.

- Generally, two types of policies:
 - Mandatory: vaccinate or discipline/terminate (immediately or at a later date).

 - “Alternative measures”: vaccinate or be subject to additional measures to reduce risk of transmission (*e.g.*, rapid tests, additional PPE, *etc.*).

When is a Vaccination Policy “Reasonable”?

- In a unionized workplace, a vaccination policy can be unilaterally implemented if it meets the “KVP Test”:
 - ❑ It must be consistent with the collective agreement
 - ❑ It must be reasonable
 - ❑ It must be clear and unequivocal
 - ❑ It must be brought to the attention of employees
 - ❑ The employee concerned must have been notified that a breach of the policy could result in discharge
 - ❑ It should be consistently enforced

When is a Vaccination Policy “Reasonable”?

- Unions in various sectors have challenged employer-implemented COVID-19 vaccination policies, alleging they are not “reasonable.”
- A number of decisions have been released to date, with more still to come...

When is a Vaccination Policy “Reasonable”?

- Electrical Safety Authority v. PWU (Nov. 11, 2021)

- Initially, ESA implemented a voluntary vaccination disclosure and rapid test policy, but later moved to the mandatory policy.
 - Union supported the earlier policy as a reasonable workplace health and safety measure, but challenged the later, mandatory policy.
- Evidence that vast majority (88.4%) of employees had disclosed vaccination status and more than 90% of employees were vaccinated.
 - Only 14 of 415 had not disclosed.

When is a Vaccination Policy “Reasonable”?

- Electrical Safety Authority v. PWU (Nov. 11, 2021)

- ESA then implemented a mandatory COVID-19 vaccination policy:
 - Employees could be disciplined, discharged or placed on an administrative leave if not vaccinated.

- No history of workplace outbreaks - only two cases of suspected workplace transmission.

When is a Vaccination Policy “Reasonable”?

- Electrical Safety Authority v. PWU (Nov 11, 2021)

- Arbitrator Stout held mandatory policy was unreasonable:
 - In the context of *this* workplace, mandatory policy was not required to protect health and safety.
 - Directed to provide a testing option for the unvaccinated.

- Caveat: *“this award should not be taken as vindication for those who choose, without a legal exemption, not to get vaccinated. Those individuals are in my view misguided and acting against their own and society’s best interests.”*

When is a Vaccination Policy “Reasonable”?

- Ontario Power Generation v. PWU (Nov 12, 2021)

- OPG implemented a “vaccinate or test” policy which required employees who were not fully vaccinated to:
 - Test twice weekly.
 - Pay for the test and take it on their own time.
- Employees who refused to comply were placed on a six-week unpaid leave of absence and subject to dismissal if they continued to refuse to test.
- Union grieved policy as unreasonable.

When is a Vaccination Policy “Reasonable”?

- Ontario Power Generation v. PWU (Nov 12, 2021)

■ Arbitrator Murray held:

- ❑ If an employer requires the test, the employer is required to pay the cost of test.
- ❑ However, the employer is not required to pay for time to test as it could incentivize employees *not* to vaccinate.
- ❑ It is reasonable to place employees on unpaid leave and eventually dismiss them for refusing to comply (*i.e.*, refusing to vaccinate or undergo testing).
- ❑ Failure to comply renders employees unfit to work as it puts co-workers at risk of contracting COVID-19.

When is a Vaccination Policy “Reasonable”?

- Bunge Hamilton v. UFCW, Local 175 (Jan. 4, 2022)

- Bunge Hamilton’s business located primarily on land leased from Hamilton-Oshawa Port Authority (HOPA).
 - Required to comply with Transport Canada requirement that all employees on HOPA property be fully vaccinated.

- Bunge Hamilton implemented a policy that required employees to attest to being fully vaccinated.

When is a Vaccination Policy “Reasonable”?

- Bunge Hamilton v. UFCW, Local 175 (Jan. 4, 2022)

- Employees who did not comply would be placed on unpaid leave of absence and the employer would make a “final determination” of their employment status.
- Employees were given more than two months notice to comply.
- Arbitrator Herman held the policy was reasonable:
 - Bunge Hamilton was bound to HOPA policy.
 - Intrusion on privacy was minimal as all that was required was disclosure of vaccination status.

When is a Vaccination Policy “Reasonable”?

- Bunge Hamilton v. UFCW, Local 175 (Jan. 4, 2022)

- Arbitrator disagreed that a lesser measure (rapid testing) was appropriate as this would not meet HOPA requirement and would result in a breach of Bunge Hamilton’s lease obligations.
- The requirement to be placed on a leave of absence was reasonable.
- Policy did not state unvaccinated employees *would* be terminated or subject to a disciplinary suspension - only that a final determination of their employment status would be made.

When is a Vaccination Policy “Reasonable”?

- MLSE v. Teamsters, Local 847 (Jan. 12, 2022)

- MLSE implemented a vaccination policy that required employees to be fully vaccinated by October 31, 2021 (two months after the policy was implemented).
- Employees not fully vaccinated by the deadline would be placed on unpaid leave and *might* be subject to termination.

When is a Vaccination Policy “Reasonable”?

- MLSE v. Teamsters, Local 847 (Jan. 12, 2022)

- MLSE said policy was required as:
 - Patrons attending the stadium were required to be vaccinated.
 - There had been an outbreak in October 2021.
 - Public health authorities recommended that employers implement vaccination policy.
 - Medical evidence showed vaccination provided substantial protection against hospitalization and serious illness.
- Employee refused to disclose vaccination status and was placed on unpaid leave of absence.

When is a Vaccination Policy “Reasonable”?

- MLSE v. Teamsters, Local 847 (Jan. 12, 2022)

■ Arbitrator Jesin dismissed the grievance:

It is clear that the weight of authority supports the imposition of vaccine mandates in the workplace to reduce the spread of COVID-19. That is particularly so where employees work in close proximity with other employees... the authority to impose such mandates arises not only from management’s right to implement reasonable rules and regulations but also from the duty of employers to take any necessary measures for the protection of the workers as set out in the OHSA.

When is a Vaccination Policy “Reasonable”?

- Elexicon Energy Inc. v. PWU (Feb. 4, 2022)

- Elexicon implemented a COVID-19 vaccination policy that required employees to confirm “full vaccination status” by January 21, 2022, with further steps for those who were in the process of obtaining vaccination.
 - “Full vaccination status” included a third booster shot.

- Employees not vaccinated by February 21, 2022 would be placed on unpaid leave and subject to discipline, up to and including termination.

When is a Vaccination Policy “Reasonable”?

- Elexicon Energy Inc. v. PWU (Feb. 4, 2022)

- Arbitrator Mitchell held the policy was generally reasonable, subject to a few exceptions, as:
 - The policy was consistent with the OHSA obligation to take every reasonable precaution in the circumstances.
 - Elexicon provided a critical essential service and had to take steps to ensure it could provide that service during a pandemic where there are real threats to health and availability of the workforce.
 - The arrival of Omicron changed the effectiveness and reliability of testing as compared to the situation in the *ESA* case. Due to Omicron, rapid testing was no longer a reasonable alternative to vaccination.

When is a Vaccination Policy “Reasonable”?

- Elexicon Energy Inc. v. PWU (Feb. 4, 2022)

The enormous change in circumstances since the policy was introduced three months ago... demonstrates very clearly that what constitutes a reasonable mandatory vaccination policy in the course of a pandemic is contextual and highly dynamic. In such an environment both the overall circumstances in the community and the circumstances of the particular employer take on great significance, while precedents decided in a completely different context, even as recently as November 2021, necessarily become less relevant than they might be.

When is a Vaccination Policy “Reasonable”?

- Elexicon Energy Inc. v. PWU (Feb. 4, 2022)

- While the policy was generally reasonable, there were a few groups of employees for whom it was not:
 - Employees who worked exclusively from home and for whom there was no expectation of a return to the workplace in the near future (*i.e.*, until at least April 2022).
 - If they do return in the future, not known if vaccination will still be required.
 - Application of the policy can be reviewed at that time.
 - Employees who worked exclusively outside or could be accommodated such that they can work exclusively outside.
 - Policy not reasonable for this group as outdoor work does not engage the same risk of transmission as indoor work.

When is a Vaccination Policy “Reasonable”?

- Chartwell v. HOPE, Local 2220 (Feb. 7, 2022)

- The first decision to consider a true “vaccinate or terminate” COVID-19 vaccination policy.
- Chartwell implemented a vaccination policy in June, 2021 requiring employees to vaccinate.
- Unvaccinated employees had to undergo an educational program.
 - Implemented in compliance with a Ministry of Long-Term Care (MLTC) Directive.

When is a Vaccination Policy “Reasonable”?

- Chartwell v. HOPE, Local 2220 (Feb. 7, 2022)

- At the end of August, Chartwell updated the policy (in conjunction with other long-term care providers)
 - Employees not fully vaccinated as of October 12, 2021 would be placed on unpaid leave or employment terminated.

- On October 1, MLTC issued another directive that, as of November 15, unvaccinated employees could not attend long-term care homes.

When is a Vaccination Policy “Reasonable”?

- Chartwell v. HOPE, Local 2220 (Feb. 7, 2022)

- On October 12, Chartwell placed non-compliant employees on a leave of absence.
- Chartwell notified employees that failure to comply by December 13 would result in termination of employment.
 - 14 employees ultimately terminated.
- Union grieved and took the position:
 - Termination was unreasonable and unvaccinated employees should have been maintained on an unpaid leave.
 - Termination was contrary to a specific provision of the collective agreement.

When is a Vaccination Policy “Reasonable”?

- Chartwell v. HOPE, Local 2220 (Feb. 7, 2022)

- Arbitrator Misra held the policy was unreasonable:
 - Policy violated collective agreement provision requiring the employer to continue any “existing rights, privileges, benefits, practices and working conditions” to the extent they are more beneficial to employees, unless the union agreed otherwise.
 - “Automatic discharge” unreasonable because it failed to allow for individual considerations and mitigating factors; and failed to give employees on leave enough time to make a decision.
 - Proving a breach of the policy alone does not necessarily discharge an employer’s responsibility to prove just cause.

When is a Vaccination Policy “Reasonable”?

- However, left open the door that termination could still be an appropriate response *at some point*:

...it is important to state that this decision should not be taken by those employees who choose not to get fully vaccinated as indicating that the Employer would never be able to terminate their employment for non-compliance with the policy in question, or indeed any reasonable policy. It is only the automatic application of this policy as it respects discharge that has been found to be unreasonable.... No employer has to leave a non-compliant employee on a leave of absence indefinitely. At some point, and subject to the Employer warning employees of the possibility of termination, and having considered other factors, it will likely have just cause to terminate the employment of such an employee.

When is a Vaccination Policy “Reasonable” in a Non-Union Workplace?

- To date, there have been no decisions on whether dismissal of non-union employees constitutes “just cause” for summary dismissal.
- However, arbitral jurisprudence may inform how courts will respond.
- Employers may also face claims of constructive dismissal if they elect to use a unilateral unpaid leave of absence as an alternate measure to immediate termination.
- We will keep you updated as this case law develops.

When is a Vaccination Policy “Reasonable”?

- Takeaways

- Nature of the workplace and associated risk of exposure is a critical factor to consider. To date, cases suggest:
 - If indoors and in-person, a vaccination-or-test policy is likely reasonable to protect health and safety of workplace.
 - If a workplace is one where there is a higher risk of transmission, higher consequences (*e.g.*, vulnerable population) and/or history of outbreaks, vaccination-or-leave of absence policy is likely reasonable.
- Discipline or termination can be contemplated as a later step if employee on a leave of absence continues to refuse

When is a Vaccination Policy “Reasonable”?

- Takeaways

- Expect to see more cases on “vaccinate or terminate” policies in the health care sector in the coming months (*e.g.*, long-term care, retirement homes, hospitals).
 - Arbitrators not bound to the *Chartwell* reasoning.

- The trajectory of COVID-19 will also impact the reasonableness analysis.
 - Employers should be prepared to amend or update policies.
 - For assistance, reach out to Sherrard Kuzz. We’ve helped numerous clients in various industries.

VACCINATION AND RELIGIOUS OBJECTION



Vaccination and Religious Objection

- An employee who cannot be vaccinated for a reason protected by human rights legislation (e.g., disability or religion/creed) may claim mandatory vaccination constitutes discrimination.

- Any workplace vaccination policy must:
 - Constitute a *bona fide* occupational requirement (i.e. reasonably necessary for the employee's position); and
 - Address accommodation (to the point of undue hardship to the employer) for employees unable to be vaccinated based on a protected ground

Vaccination and Religious Objection

- Very few medical conditions have been accepted as grounds for exemption from vaccination.
 - Ministry of Health guidance document

- Most human rights-based exemption requests are based on religious beliefs.
 - Can be challenging to address because subjective.
 - Employee often claims to be a member of a lesser-known branch or division of a “traditional” religious group.
 - An increase in “online” religious groups that appear to have been formed primarily in response to COVID-19 vaccination.

Vaccination and Religious Objection

- To date, no decision has directly addressed a claim of discrimination based on a religious objection to vaccination.
- However, decisions are likely to come...
- Case law on religious objection to other COVID-19 related requirements (*e.g.*, masking) may indicate how adjudicators will approach vaccination objections.
- HRTO Policy Statement also provides some guidance:
 - Personal preferences and singular beliefs not protected.
 - Duty to accommodate can be limited if significant compromise to health and safety.

Vaccination and Religious Objection

-The Worker v. The District Managers (2021 BCHRT 41)

- Employee refused to comply with mask requirement due to his “religious creed.”
- Employment terminated because employee refused to comply with mask requirement.
- Employee claimed termination was a violation of the British Columbia *Human Rights Code*.
- Complaint dismissed on a preliminary basis.
- Mask objection was not based on a “sincerely held religious belief.”

Vaccination and Religious Objection

-The Worker v. The District Managers (2021 BCHRT 41)

- Employee claimed mask requirement was contrary to his religious belief as, *“We are all made in the image of God, a big part of our image that we all identify with is our face. To cover-up our face arbitrarily dishonours God.”*
- Employee also stated he was ethically and morally obliged to follow the truth and that, as *“forced mask wearing does not help protect anyone from viruses”* he could not *“live in that lie.”*

Vaccination and Religious Objection

-The Worker v. The District Managers (2021 BCHRT 41)

- Tribunal held the evidence did not satisfy the requirement for the objection to be “experientially religious in nature.”

- No evidence that masks are objectively or subjectively prohibited by any religion.

- No evidence that not wearing a mask “engenders a personal, subjective connection to the divine or the subject or object of [his] spiritual faith.”

Vaccination and Religious Objection

- Pelletier v. 1226309 Alberta Ltd. (2021 AHRC 192)

- Complainant (a customer) alleged he was denied service when he refused to comply with mask policy on the basis of disability and religion.
 - Complainant offered accommodation through alternate service models but claimed they were inadequate and unreasonable.
- Complaint dismissed and complainant sought review by Alberta Human Rights Commission.
- Initial decision upheld.

Vaccination and Religious Objection

- Pelletier v. 1226309 Alberta Ltd. (2021 AHRC 192)

- On the issue of religious objection, Complainant stated:
My faith instructs me that however well-meaning government health provisions are, they may conflict with my personal conscientious convictions and when they do, I am to choose the later [sic].
- Complainant provided Bible references in an attempt to support his objection.
- Commission held Bible references did not appear to relate to a “tenet or practice of not covering one’s face.”

Vaccination and Religious Objection

- Pelletier v. 1226309 Alberta Ltd. (2021 AHRC 192)

- Regarding the evidence needed to demonstrate a legitimate religious objection, the Commission stated:
... an individual must do more than identify a particular belief, claim it is sincerely held, and claim that it is religious in nature. This is not sufficient to assert discrimination under the Act. They must provide a sufficient objective basis to establish that the belief is a tenet of a religious faith (whether or not it is widely adopted by others of the faith), and that it is a fundamental or important part of expressing that faith.

Vaccination and Religious Objection

- Hydro One v. PWU (November 25, 2021)

- Employee suspended and ultimately terminated for failure to comply with mask policy.
- Claimed he was unable to do so for religious reasons as it was contrary to his Catholic beliefs.
 - Provided a letter from his pastor to support his claim that wearing a mask was in direct conflict with his personal conscience and that the Church teaches one to obey the dictates of conscience.
 - Letter also stated the Catholic Church does not teach that there is an intrinsic problem with wearing a mask.

Vaccination and Religious Objection

- Hydro One v. PWU (November 25, 2021)

- Arbitrator Stout dismissed the grievance and held the policy did not discriminate against the employee:
 - The Catholic Church supported the use of masks as a way to reduce COVID-19 transmission.
 - The Pastor's letter confirmed the employee's refusal to wear a mask was based on his conscience - not on any sincerely held religious belief.
 - An employee's individual right does not trump the collective right of fellow employee to a safe and healthy workplace.

Vaccination and Religious Objection

- Hydro One v. PWU (November 25, 2021)

...One of the foundational doctrines of Christianity is the belief that Jesus Christ sacrificed his life by dying on the cross for the sins of world. Mr. O'Reilly's faith is based on a belief in sacrifice, but somehow, he can't bring himself to make the simple sacrifice of wearing a mask for 15 minutes for the protection of himself and a fellow employee.

Vaccination and Religious Objection

- Hydro One v. PWU (January 24, 2022)

- 12 employees put on unpaid leave for refusing to comply with a “vaccinate-or-test” policy.
- Eventually, all employees complied, except one who retired.
- Union alleged employees had “legitimate concerns” about the policy that were not addressed in a timely manner and therefore they should be paid for the time off.

Vaccination and Religious Objections

- Hydro One v. PWU (January 24, 2022)

- Union also asserted workers should have been permitted to work remotely
- Arbitrator did not set out the specific reason for the employees' refusal to comply with the policy, but he did address accommodation
- Arbitrator held it was not necessary to provide remote work as accommodation if reasonable alternative accommodation is provided (*i.e.*, rapid testing).
 - If an employee refuses the reasonable alternative, the employer has no further obligation to accommodate.

Vaccination and Religious Objection

- Takeaways

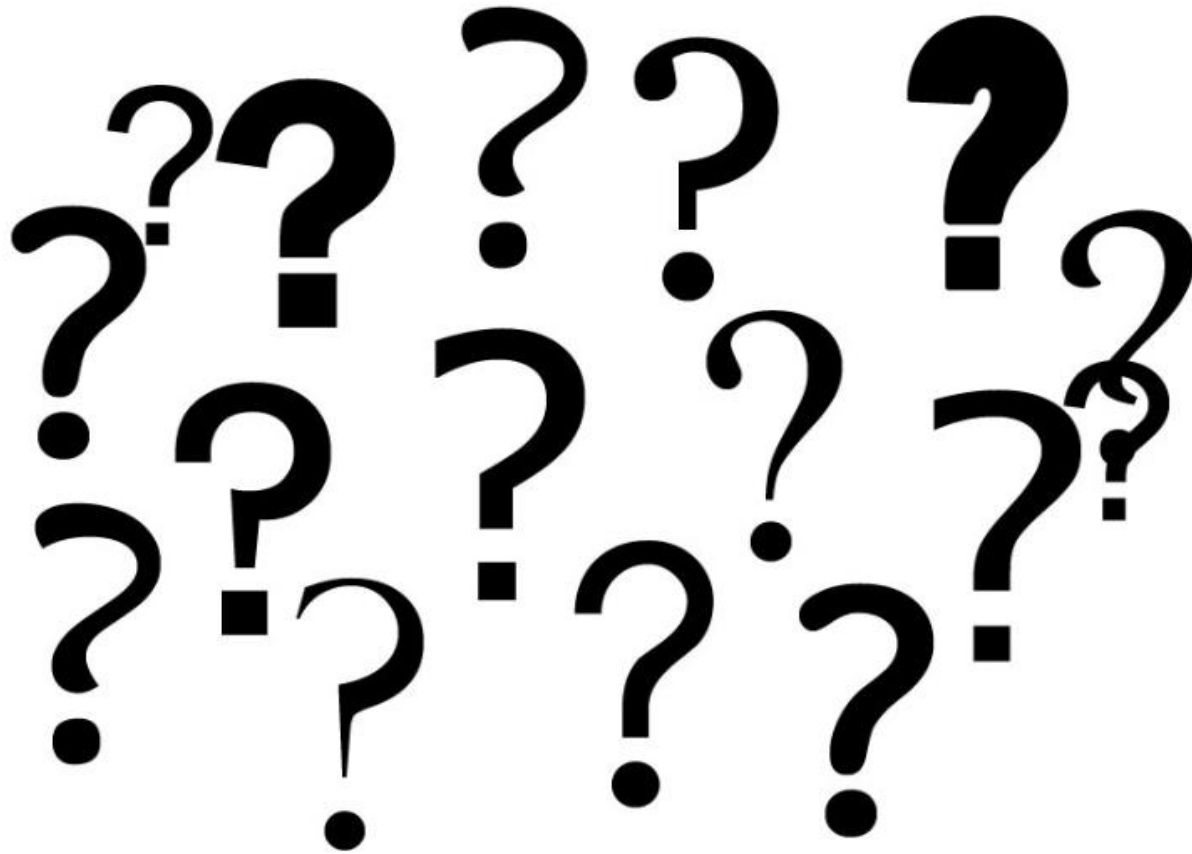
- Ask for information to support accommodation request:
 - ❑ What religion/creed do you practice?
 - ❑ How long have you practiced this religion/creed?
 - ❑ Why does your belief in this religion/creed prevent you from being vaccinated against COVID-19?
 - ❑ Have you previously been vaccinated against any other illnesses? If so, why were those vaccinations permissible under your religion/creed?
 - ❑ Do you have objective documentation to support the position you are unable to be vaccinated?

Vaccination and Religious Objections

- Takeaways

- Critically review information received.
 - Unlikely that claims based on an employee's conscience will be sufficient, even if claim is that religion protects the ability to follow one's conscience.
- If accommodation is required, employees are not entitled to 'choose' a remote work arrangement if another arrangement is feasible (i.e. testing).
- Reach out to a Sherrard Kuzz lawyer to assist with any challenging accommodation requests.
 - We've seen a lot of them....

Questions?





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