

COVID-19 VACCINATION AND THE WORKPLACE

March 15, 2021

With COVID-19 vaccination within reach for most Canadians, many employers want to know if they can require employees and, in some cases, customers 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.

This briefing note addresses four common vaccination questions:

1. **Can an employer mandate COVID-19 vaccination as a condition of employment?**
2. **Can an employer collect information about COVID-19 vaccination status from its employees, even if not mandating vaccination?**
3. **Can a business screen its patrons (customers, clients, etc.) for COVID-19 vaccination prior to entry into the workplace?**
4. **Is a business permitted to relax its masking, physical distancing and other public health and safety measures if it can confirm all employees have been vaccinated?**

For assistance preparing a COVID-19 Vaccination Policy for your workplace, or for any other question 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 re line: COVID-19.

Question 1: Can an employer mandate COVID-19 vaccination as a condition of employment?

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

Human Rights

An employee who is 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 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, 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 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, a vaccination requirement 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.

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 an employee 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, an employee 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 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 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 healthcare sector and, in most cases, applied to healthcare 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 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 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 the whether a vaccination policy is reasonable.

Practical Tips

A clear and concise COVID-19 vaccination policy and rollout strategy can assist to reduce legal risk and encourage vaccination within the workplace. At a 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 an employee should take if they require accommodation due to a medical condition, religious belief or other human-rights protected ground
- clarify if vaccination is required as a condition of employment; if not, identify non-disciplinary alternatives to vaccination if an employee elects not to be vaccinated. Options could include an unpaid leave of absence, continued use of PPE, or other measures to reduce potential COVID-19 transmission in the workplace.

An effective COVID-19 vaccination policy rollout will:

- encourage optional vaccination through education and incentives (if applicable) prior to mandatory vaccination

- provide advance notice of the effective date of the vaccination policy. Note: a longer period of advance notice may assist to reduce potential liability if an employee claims the policy requirements constitute a constructive dismissal.

In a unionized workplace, an employer might also consider seeking the union's input prior to rolling out a policy to minimize the potential for a policy grievance later.

Question 2: Can an employer collect information about COVID-19 vaccination status from its employees, even if not mandating vaccination?

Even if an employer does not mandate vaccination, it may still want to collect information about its employees' vaccination status for health and safety or commercial purposes. For example, a business may wish to advertise that its staff are vaccinated.

Requiring an employee to disclose vaccination status as a condition of employment is permissible, subject to the same legal considerations addressed above, with one more factor to consider. If the reason the information is collected is to advertise or promote the business as "fully vaccinated" (for example) an employer must obtain consent from each employee prior to disclosing this information to the public.

Question 3: Can a business screen its patrons (customers, clients, etc.) for COVID-19 vaccination prior to entry into the workplace?

This type of screening is permissible, subject to the considerations set out below.

Human Rights

An individual unable to receive the COVID-19 vaccine due to a health condition or religious belief may claim the requirement to be vaccinated constitutes discrimination in the provision of services contrary to human rights law. In that case, a business must be able to demonstrate vaccination is a *bona fide* requirement in light of the nature of the business, and accommodate the individual to the point of undue hardship.

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

- exempt the individual from the requirement to be vaccinated
- provide service through an alternate means (delivery, curbside pickup, etc.)
- require the continued use of PPE to mitigate the risk of transmission, even if no longer required by law.

Privacy

The *Personal Information Protection and Electronic Documents Act (Canada)* applies to the collection of personal information from an individual for commercial purposes. As such, the collection of

vaccination information must be done in a manner consistent with the requirements of this legislation. This means the business must:

- obtain informed consent
- only collect information needed to fulfill a legitimate business objective
- only use information for the purpose it is collected
- securely store information to avoid inadvertent disclosure or a data breach
- safely destroy information after it is no longer required.

Practical Tips

If a business does elect to collect information about patron vaccination, it should:

- implement a COVID-19 vaccination screening policy to clearly outline the reasons for collection and how it will use, store and destroy any personal information collected
- collect as little personal information as possible. For example, ask a patron to confirm vaccination (either verbally or through a visual scan of documentation) without collection of any identifying information or a physical copy of any proof of vaccination status.
- train employees on how to provide service to a customer who states they are unable to comply with the requirement for a human-rights related reason.

Question 4: Is a business permitted to relax its masking, physical distancing and other public health and safety measures if it can confirm all employees have been vaccinated?

The vaccination status of employees within a workplace does not (currently) impact the health and safety requirements mandated by law. They apply regardless.

To learn more and for assistance, contact Sherrard Kuzz LLP.

The information contained in this article is provided for general information purposes only and does not constitute legal or other professional advice, nor does accessing this information create a lawyer-client relationship. This article is current as of March 2021 and applies only to Ontario, Canada, or such other laws of Canada as expressly indicated. Information about the law is checked for legal accuracy as at the date the article is prepared, but may become outdated as laws or policies change. For clarification or for legal or other professional assistance please contact Sherrard Kuzz LLP.

