

Can A Québec Employer Force Employees To Get The Future COVID-19 Vaccination?



Since surfacing in Québec, COVID-19 has had its share of drawbacks for workers and employers, and continues to impose numerous human resource management and administration challenges. Employer obligations and responsibilities regarding occupational health and safety have increased significantly. These include stricter hygiene and maintenance measures in the workplace, social distancing, and wearing masks, among others.

The upsurge in COVID-19 cases seen recently is an unfortunate reminder of its high rate of contagion and its virulence among at risk populations. The global scientific community is working hard to develop an effective vaccine, and for many, such a vaccine is the long-awaited solution. In this context, several legal issues arise. For example, could an employer require employees to be vaccinated against COVID-19?

Applicable legal principles

Whether we are talking about a vaccine against COVID-19 or any other vaccine currently available, the answer should be the same: in Québec, it is not possible to force anyone to get a vaccine. Québec law strictly regulates the issue of health care delivery.

Section 11 of the *Civil Code of Québec* states that “No one may be made to undergo care of any nature, whether for examination, specimen taking, removal of tissue, treatment or any other act, except with his consent.” Second, the *Charter of Human Rights and Freedoms* (the Charter) enshrines the principles of the right to inviolability and freedom, as well as freedom of religion and the rights to dignity and privacy. It is difficult to imagine how an employer imposing the COVID-19 vaccine on their employees could *a priori* evade these principles, despite the devastating effects of this disease on Québec society.

That being said, in the current context of a health emergency, a more nuanced response may be required. First, without specifically targeting the situation of employers, the *Public Health Act* offers an unequivocal solution by providing that the government “may, without delay and without further formality, to protect the health of the population, (1) order compulsory vaccination of the entire population or any part of it against any other contagious disease

seriously threatening the health of the population.”.

Unless the health situation degenerates, it would be surprising to see the Québec government take this drastic step. If the government did opt for such a measure, it is reasonable to believe that it would target, at least initially, only the population directly involved in the chain of transmission within at-risk populations, including employees in the health network.

If such legislation were not implemented by the government, an employer whose activities include ongoing interactions with vulnerable customers could argue that such vaccination of its employees is required to protect its customers and prevent potential outbreaks. In fact, despite the supremacy of the rights and freedoms mentioned above, the Charter stipulates that these rights and freedoms must be exercised with respect for democratic values, public order and the general well-being of the citizens of Québec.

This means that it is nonetheless possible to derogate from it, as long as it is shown that the limitation is “imposed in furtherance of a legitimate and substantial objective and that the limitation is proportional to the end sought...”. In concrete terms, some employers could implement a vaccination policy, provided they can prove it is a justified occupational requirement, taking into account the health and safety of employees and clients. For instance, the health care sector senior citizens’ residences, among others, are higher risk settings. This possibility would not, however, allow employers to compel their employees to be vaccinated against their will, but rather to take alternative measures with respect to employees refusing the vaccine.

Although there is no extensive case law on the subject, a 2008 arbitral award is a good illustration of the balancing exercise required by the Charter. In this case, employees of the Centre de santé et de service sociaux Rimouski-Neigette challenged the three-day unpaid suspension imposed following their refusal to receive a vaccine. The vaccine was required as part of an intervention protocol put in place by the Ministry of Health and Social Services following an influenza outbreak in the establishment.

In his reasons, the arbitrator reiterates at the outset the employee’s right to refuse to be vaccinated. However, after balancing the employees’ right to physical integrity against the criteria of proportionality and the objective sought, he concluded that the employee concerned had to “live with the consequence of his refusal.” In other words, the employee has the right to refuse the vaccination, but because of the particular circumstances justifying the deployment of preventive measures, the employee may face administrative measures, such as suspension without pay.

That said, other types of workplaces (e.g. administrative offices where social distancing is easy) may not meet the requirements of the applicable test for demonstrating that vaccination is a justified occupational requirement. It is not enough to claim that a measure is a justified occupational requirement based on general health and safety considerations: it must be demonstrated in the specific context of the employer’s operations.

Conclusion

The issue of employers imposing vaccines in a global pandemic context is

unprecedented. However, given the applicable principles and the absence of government directives requiring mandatory vaccination, it is reasonable to believe that only certain workplaces where there is an increased risk of an outbreak will be able to implement a policy to eliminate the risk of contagion and impose administrative measures on employees who oppose vaccination.

It should be noted that it would be acceptable for employers to facilitate employee access to the vaccine (based on the practice of annual influenza vaccination campaigns), regardless of the company's sector. In addition, the early availability of a safe and effective vaccine should hopefully encourage voluntary vaccination in the general population.

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