

Can Canadian Employers Require Employees To Take The COVID-19 Vaccine?

written by Rory Lodge | February 3, 2021



Employers in Canada want to know whether they can implement a mandatory vaccination policy and, if so, what are the practical, human rights, and privacy considerations that need to be taken into account.

By the end of 2021, most Canadians will likely have received the COVID-19 vaccination. Although the vaccination rollout is in its early stages, employers are already asking how this might impact their workplaces. One frequently asked question is whether employers can mandate that their employees take the vaccine. In this article, we outline the requirements and considerations for implementation of a mandatory COVID-19 vaccination policy, should an employer deem one necessary for their workplace.

Each industry and workplace is unique, and this could significantly affect the legality of a given company's vaccination policy. The current legal environment is also incredibly dynamic. With respect to mandatory vaccination, the government could, on short notice, introduce guidance or legislation that considerably alters this legal analysis.

Given the above, the information provided in this article is general in nature, and employers are strongly encouraged to seek legal advice prior to implementing a mandatory vaccination policy.

Workplace Policies Generally

In the absence of legislation, an employer cannot force an employee to be vaccinated. However, an employer may be able to implement policies which require vaccination if an employee wishes to remain employed.

Any workplace policy, including one that would mandate employees to receive the COVID-19 vaccination, must be reasonably necessary and rationally connected to the workplace. For example, a mandatory vaccination policy could be considered reasonably necessary if an employee is employed in the healthcare sector or is required to have frequent close contact with members of the public. However, if the employee is working from home or in an office that has sufficient safety precautions in place, the policy may not be considered reasonably necessary.

Given this, employers should not assume that a mandatory vaccination policy is going to be legal. As noted above, it will depend on the nature of the workplace itself, with particular regard to the level of exposure to individuals who are especially

vulnerable or at-risk.

Human Rights Considerations

Canadian human rights legislation requires that exceptions or accommodations in the implementation of workplace policies be made for those who cannot meet the requirements of a given policy due to certain protected grounds, including religion or disability. In these situations, an employer is obligated to either a) accommodate the employee to the point of undue hardship or b) prove that the policy is a *bona fide occupational requirement* where no such accommodation is possible due to the very nature of the position.

With respect to imposing a mandatory vaccination policy, employers could expect to see objections from employees with auto-immune or other pre-existing conditions which prevent them from being able to safely receive the vaccine. Objections based on religious beliefs may also arise and will have to be assessed by the employer.

However, where an employee refuses to follow a policy because of personal concerns about the safety or effectiveness of the vaccine, those concerns are not protected under human rights legislation. Although such claims have not been tested, absent a compelling reason that links the employee's concern to a protected ground of discrimination, a general objection or mere 'preference' is not protected and therefore would not displace the policy.

Privacy Considerations

Generally speaking, employers have the right to seek reasonable information from employees to manage the employment relationship and to ensure workplace safety. How those rights apply in the context of vaccination in a worldwide pandemic remains to be seen. Likely, the answer will depend to some extent on the risk of transmission in the workplace and the reasonable measures employers are expected to put in place to help ensure safety.

It is worth noting that the appropriate balance between workplace safety and employee privacy has been shifting since the beginning of the pandemic, and is likely to continue to evolve. A year ago, most employers would not have considered screening employees daily for their temperature, for example – which now is a practice common across Canada, due to the circumstances associated with the pandemic.

Any mandatory vaccination policy will have to consider the ways which employee medical information will be collected, used, and/or disclosed. It must also ensure that appropriate safeguards are in place to protect this information. At a minimum, a mandatory vaccination policy should consider and expressly state:

- how and why the information is being collected and stored;
- the type of information being collected, stored, and/or used and if so, for what purposes regarding employees who receive vaccination (i.e. proof of vaccination) and employees who request or require related accommodations;
- who will the above information be disclosed to and how; and
- whether consent is required.

Employee Morale

A mandatory vaccination policy is an inherently invasive step for an employer to take with respect to its employees. As such, perhaps the most significant decision for employers to consider is whether it is worthwhile to implement a mandatory vaccination policy, as it may be viewed as controversial and lead to discontent

amongst employees. There may be other less intrusive means to reach the same goals, such as encouraging employees to vaccinate as opposed to outright requiring it, educating employees on vaccination, scheduling free vaccination at the workplace (if and when possible), or issuing weekly reminders on vaccination.

Preliminary Recommendations

Based on information currently available to us, we would recommend the following to any employer considering implementing policies around mandatory vaccinations:

- Instead of a mandatory vaccination policy, consider instituting a voluntary policy.
- If a mandatory policy is necessary, consider providing employees with a reasonable, non-disciplinary alternative to vaccination, such as remote working or allowing non-vaccinated employees to go on an unpaid leave of absence when the risk of workplace transmission is particularly high.
- For employees unable to be vaccinated for health reasons, disability, religion, or creed, provide appropriate accommodations.
- Include a provision in the policy that states that applicable human rights legislation will be followed.
- The policy should be clear, unequivocal, consistently enforced, and communicated to all affected employees.

Conclusion

Employers are obligated by law to ensure the health, safety, and welfare of their employees in the workplace and the desire to immediately implement a mandatory vaccination policy in an effort to protect staff, and the public, is understandable. However, employers must be mindful of potential human rights implications which could arise, as well as the impact it could have on employees' privacy rights. Employers should consider whether such a policy is truly necessary for their particular workplace and, if so, ensure that the policy takes all of these factors into account.

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