Can You Require Employees to Get a Flu or COVID Shot?



Mandatory vaccination policies are allowed under 4 conditions

Bottom Line on Top: Yes, a mandatory flu vaccination policy is legally justifiable as long as:

- It's a necessary health and safety measure for the particular workplace;
- It's no more intrusive than it has to be;
- It doesn't violate the contractual or collective agreement rights of employees; and
- It doesn't discriminate on the basis of religion, disability or other grounds protected by human rights laws.

The Legal Justification for Mandatory Flu Vaccination Policies

Courts and arbitrators have historically upheld mandatory flu vaccination policies (as well as their slightly less restrictive cousin, the vaccination-or-mask policy requiring all employees to either get vaccinated or wear a mask during flu season) as a legitimate workplace health and safety measure. This consensus is based on 3 undisputable facts:

- **Fact 1:** While OHS laws don't specifically address flu or flu vaccinations, they do require employers to take measures "reasonable in the circumstances" to protect workers from hazards;
- **Fact 2:** When a worker gets the flu, it poses a hazard to not just co-workers but everybody in the workplace, including customers, patients, guests, etc.; and
- **Fact 3**: Flu vaccinations have been proven to be safe and effective in preventing the flu.

The 4 Legal Restrictions on Mandatory Vaccination Policies

Even though mandatory vaccination is generally justifiable, demanding that employees get a flu shot is highly intrusive and subject to certain limits. Here are the 4 basic ground rules.

1. Policy Must Be a Necessary Health & Safety Measure for the Particular Workplace

You need to be able to show that the rationale for a mandatory vaccination policy is a justifiable health and safety measure for your particular workplace based on objective, scientific facts about flu risks. This is easiest to do in health care, nursing home, education and retail settings involving exposure to the public or physically vulnerable. In fact, mandatory flu shots for healthcare workers is actually a legal requirement in some municipalities. Conversely, mandatory vaccination is harder to justify in non-healthcare and other workplaces where the imperative for infection control isn't significant enough to warrant overriding employees' control over their own bodies.

2. Policy Must Be as Minimally Intrusive as Possible

Even where mandatory vaccination is justifiable for a setting, there must be a clear, written policy whose terms are limited to the minimum necessary to accomplish the health and safety purpose. The vaccination requirement should be based on job description and limited to employees for whom having the flu would pose an unusually significant hazards, as opposed to being staff-wide. Also consider the possibility of alternatives, such as a vaccination-or-mask policy, and leave room for religious and other exemptions, as we'll explain below.

3. Policy Can't Violate Employees' Collective Agreement or Contract Rights

Almost all of the court cases challenging the legality of mandatory flu vaccination policies are grievances from unions. The theory: Employees still have the choice not to get a flu shot, the unions acknowledge. But by making refusal grounds for discipline, mandatory vaccination has the same basic effect as coercion and violate the parts of the collective agreement ensuring employees' bodily integrity, autonomy and privacy. Even though there have been nearly a dozen such cases over the years, all but one of them were decided in the employer's favour.

Employer Wins: During a flu outbreak, a BC health authority adopted a policy to suspend non-immunized employees without pay. without pay during a flu outbreak. The union claimed the policy essentially coerced medical treatment but the arbitrator dismissed the grievance. The policy was an effective and reasonable way to prevent and contain flu outbreaks, it reasoned; and even though suspension without pay would be harsh, employees still did have that choice [*Health Employers Assn. of BC v. BC Nurses' Union*, [2006] B.C.C.A.A.A. No. 167, Sept. 15, 2006].

Employer Loses: The one outlier case where an employer lost was a 2002 Ontario arbitrator's ruling that suspending geriatric hospital employees for not getting a flu shot without pay during an outbreak violated employees' privacy and right to "bodily integrity" [*St. Peter's Health System v. CUPE, Local 778 (Flu Vaccination Grievance),* [2002] O.L.A.A. No. 164, Feb. 7, 2002].

4. Policy Must Provide for Religious, Disabilities & Other Accommodations

According to human rights commissions' guidance, forcing an employee to get vaccinated might violate his/her "sincerely held religious belief, practice or observance" in violation of human rights laws. It could also be disability discrimination if employees have a disability preventing them from getting the vaccine. In either case, you'd have to engage the employee and determine what accommodations to offer. Possibilities may include:

- Exempting the employee from the policy, which could be conditioned on his/her agreement to wear a mask;

- Temporarily reassigning the employee to another position where lack of immunization would pose less of a hazard to others; and
- Letting the employee work from home or take a leave of absence until the flu outbreak ends.

Discrimination & the "Anti-Vax" Movement

The human rights codes of most jurisdictions protect not only religion but also creed, which is defined in Ontario as "a set of sincerely held religious beliefs or practices which need not be based on the edicts of an established church or particular denomination." That opens the door for a challenge by employees who subscribe to the so-called "anti-vax" philosophy that objects to vaccinations of any kind. Is mandatory flu vaccination a form of creed discrimination?

So far, only one case has addressed this question. In 2011, the Ontario Human Rights Tribunal ruled against a paramedic who claimed that his employer discriminated against him by refusing to schedule him until he was vaccinated. According to the Tribunal, a general objection to immunization doesn't amount to creed [*Ataellahi v. Lambton County (EMS),* 2011 HRTO 1758].

What to Do

The key to compliance is to have a clear, written policy on flu vaccinations. There are 2 approaches:

- Adopt a mandatory vaccination policy; or
- Adopt a non-mandatory policy that encourages but doesn't require flu shots.

The mandatory policy makes the most sense and may even be legally required if you're in health or nursing care, and is highly advisable for education, retail and other public-facing industries. If you opt for a non-mandatory policy, be sure to keep records documenting employees' refusals to be injected.

Same Principles Apply to COVID-19

Even though this story talks about flu vaccination, the same principles will almost surely apply if and when a safe and effective vaccination for COVID-19 coronavirus becomes publicly available.