

# COVID-19 Vaccinations: Moving The Needle On Return To Work Planning

written by vickyp | February 15, 2021



With the hope that the COVID-19 vaccine will be more readily available to Canadians in the coming months, employers are beginning to consider what the vaccine rollout means for return to work planning. This bulletin outlines the key issues employers should be considering as they address the complexities of COVID-19 vaccinations and return to work planning.

## What you need to know

- **Requirements and further guidance.** To date, the federal and provincial governments have not indicated that they will require Canadians to get the COVID-19 vaccine and have yet to provide further guidance on whether, or under what circumstances, employers may be allowed to mandate employees to get it. This means employers are in the position of having to assess what actions are necessary to meet their competing legal obligations.
- **On mandating vaccinations.** Whether an employer can mandate that employees be vaccinated will require a workplace-specific analysis. Employers will need to balance their legal responsibility to provide a safe workplace with their employees' human rights and privacy rights. Although there is currently limited case law to guide the analysis, employers with vulnerable workers or clientele (long-term care facilities, hospitals, etc.) will have a stronger basis to require vaccinations.
- **Privacy rights.** Employee privacy rights should be considered before requesting disclosure of COVID-19 vaccination status. Privacy regulators are likely to view such requests as the collection and use of sensitive personal information. The privacy risk will be lower where employees have meaningful choice on whether to share their COVID-19 vaccination status.
- **Encouraging vaccination.** Employers can encourage employees to get the vaccine. Employers may wish to consider implementing measures aimed at encouraging employees to be vaccinated.

## Can employers require that employees get the COVID-19 vaccine?

Ultimately, whether an employer can lawfully require its employees to get the COVID-19 vaccine as a condition for returning to work will depend on, among other things, the nature of the employer's operations, composition of its clients and workforce, modes of interactions with individuals (including clients and personnel), and importantly, whether lesser health and safety measures would be adequate to satisfy its legal obligations.

Historically, with very limited exceptions, employers cannot legally require that employees obtain vaccinations or other medications as a condition of employment. However, existing guidance largely arises out of the labour arbitration context (such that it is not binding on Canadian courts) and in wholly different circumstances than a worldwide pandemic. Accordingly, there is limited precedent upon which to rely in determining whether workplace mandatory vaccination measures will pass judicial or regulatory scrutiny.

Outlined below are some of the main legal issues employers will need to balance in determining whether to impose a vaccine requirement on their employees.

- **Occupational health and safety considerations.** Under occupational health and safety legislation, employers across Canada have a responsibility to take reasonable steps to protect the health and safety of the workplace. In determining whether to impose a mandatory vaccination requirement, employers must consider whether they need their employees (or some of them) to receive the vaccine in order to make the workplace safe. When conducting this analysis, employers should consider whether less intrusive options (e.g., physical distancing, plexiglass, wearing masks, increased sanitization and practicing good hand and respiratory hygiene) are available and adequate. Working from home may also be a viable option in some cases for those employees who do not wish to get the vaccine and where there are concerns that other protective measures would be insufficient in the workplace itself.
- **Privacy considerations.** Imposing a mandatory vaccination requirement necessarily makes disclosure of an employee's vaccination status a condition of employment. To justify such a requirement under privacy law, an employer will need to show why such a measure is necessary and proportionate. Accordingly, employers considering making the COVID-19 vaccine mandatory must first identify the purpose for requiring employees to provide proof of vaccination. To the extent the purpose for requiring such disclosure (for example, protection of the workplace) could be achieved by less intrusive means, it may be difficult for employers to lawfully impose such a requirement on employees.
- **Human rights considerations.** Under human rights laws, including, in Québec, the *Charter of Human rights and freedoms*<sup>1</sup>, employers who ultimately decide to impose a mandatory vaccination requirement must accommodate employees who cannot or choose not to get the vaccine on the basis of a protected ground of discrimination to the point of undue hardship. For example, employees may be unable or unwilling to get the vaccine based on a religious objection, disability or other protected ground. The undue hardship analysis must be done on a case-by-case basis, taking into account whether other measures can be implemented in the absence of the vaccine – for example, allowing the employee to work from home.
- **Liability for vaccine side effects.** Employers considering the imposition of a mandatory vaccine requirement should also take into account potential liability for any negative side effects of the vaccine suffered by an employee (particularly if the employee would not have received the vaccine but for their employer's requirement that they do so). Although the federal government has set up a compensation fund for individuals who suffer negative side effects from the vaccine, it is conceivable that an employee could assert a claim against his or her employer to the extent the compensation fund does not fully compensate them for their injuries.

### ***Considerations in Québec***

Like other Canadian jurisdictions, Québec's government would prefer widespread immunity through voluntary vaccination. However, Premier Legault recently stated that

he would not exclude the possibility of resorting to “other scenarios”<sup>2</sup> if employees in the medical sector refused to get the vaccinated, thereby alluding to resorting to the government’s powers under the Québec *Public Health Act*<sup>3</sup> to order compulsory vaccination. To the extent Québec requires certain groups of employees to be vaccinated, employers will likely be *required* to develop mandatory vaccination policies in order to ensure compliance with their legal obligations.

Unless the COVID-19 vaccination is legally mandated, it will also be difficult for Québec employers to impose a mandatory vaccination policy, particularly outside sectors such as healthcare and long-term care. Québec employers will have to balance similar considerations to those discussed above to determine whether to impose a vaccine requirement on their employees (i.e., whether less intrusive measures are available and adequate under the circumstances, etc.). We note that dismissing a Québec employee on the grounds that they have refused to be vaccinated may result in the employee filing a complaint with the Commission des normes, de l’équité, de la santé et de la sécurité au travail (the Quebec Commission on workplace standards, fairness, health and safety) alleging that their dismissal was made without “good and sufficient cause” and seeking reinstatement with backpay. Subject to certain exceptions, this recourse is open to Québec employees who have two or more years of uninterrupted service in the same enterprise.

## ***The United States***

Although not binding in Canada, we note that in the United States the Equal Employment Opportunity Commission issued [guidance](#) which suggests that a mandatory vaccine program is lawful, subject to a number of caveats and statutory considerations.

### **Can employers require employees to disclose their vaccination status?**

In the absence of legal basis for a mandatory vaccination requirement, employers may consider asking employees to voluntarily disclose their intention to obtain the COVID-19 vaccine or to confirm if they have been vaccinated.

An employer may *ask* employees to provide information with respect to their vaccination status. If the employees have a meaningful opportunity to consent to the disclosure of this information, the request does not raise any significant legal issues. On the other hand, *requiring* employees to provide this information raises issues of employee privacy, which must be balanced against an employer’s health and safety obligations (discussed above). Practically, many employees may be willing to voluntarily disclose their vaccination status, if it is simply a “yes” or “no” response, without the requirement to provide proof of receiving the vaccination.

Where employees disclose their COVID-19 vaccination status, employers must follow proper privacy protocols, including:

- ensuring they have a clearly identified the authority and purpose for the collection and use of this information;
- providing employees with sufficient notice of the collection, use and disclosure of this information;
- limiting i) the purposes for which they use the information, ii) the type and amount of information that is collected and iii) access to the information to only those that require it; and
- making sure that the information is appropriately safeguarded and only retained as long as it is necessary<sup>4</sup>.

For employees who refuse to provide proof of vaccination status, employers must

consider whether this information is necessary for maintaining a safe workplace and if the employee's privacy choice can be accommodated through alternative work or safety measures.

## Looking ahead

We are still in the early stages of vaccine rollout and do not know what guidance-if any-public health and other governmental authorities might provide to employers. Employers would nonetheless be wise to begin to consider these issues to be prepared to deal with them down the road:

- Consider whether vaccination is essential for employee safety, or if workplace safety can be effectively managed through current or other measures.
- Consider whether a voluntary disclosure scheme provides sufficient information regarding the use/prevalence of vaccination among the employee population.
- Develop transparent communication strategies, including ensuring there is a contact person who can address and escalate employees' vaccine related questions and concerns.
- Closely monitor government and public health guidance to evaluate and proactively address any impact such guidance may have on the organization's vaccination and return to work policy.

## Footnotes

1. CQLR c C-12.

2. "[François Legault n'écarte pas l'idée de la vaccination obligatoire](#)"

3. During a public health emergency, section 123 of the *Public Health Act* allows the Government of Québec to order compulsory vaccination of the entire population or any part of it against contagious diseases seriously threatening the health of the population.

4. The Saskatchewan Privacy Commissioner's recently published [general vaccination guidelines](#) reinforces the importance of these privacy best practices.

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