

# Requiring Employees to Provide Proof of COVID-19 Vaccination



Asking for proof of vaccination may be a justifiable workplace health and safety measure.

Even though COVID-19 vaccinations supplies are currently limited, employers can and should use their influence to get employees to get vaccinated. The 2 basic approaches:

- Encourage employees to be vaccinated voluntarily;
- Implement a mandatory vaccination policy, which is justifiable as long as the policy is essential for health and safety (which is most likely to be the case in health care, educational and other “congregate” settings), fair, flexible and no more intrusive than it has to be.

In either case, employers will likely want employees to provide proof of vaccination and, in some cases, bar them from entering the workplace if they don't provide it. But this practice also carries legal risks. Here's what HR directors must know to help their organizations recognize and manage those risks.

## Proof of Vaccination & Privacy Law

The COVID-19 vaccinations available in Canada are safe, effective and free of charge. Even so, current COVID-19 public health laws encourage but don't require individuals to get vaccinated. For as long as vaccination remains voluntary, making employees submit proof of vaccination puts employers on shaky legal ground. One big sticking point are personal privacy laws which ban collection, use and disclosure of protected health information (PHI) without consent. Information about a person's vaccination status clearly counts as PHI protected by the laws.

However, there are exceptions. And all through the pandemic, privacy commissions across the country have stressed that employees can collect information about an employee's COVID-19 status as a reasonable workplace safety measure, provided that they collect no more information than what they need to accomplish that purpose. These same principles, which so far have been invoked to allow employers to perform workplace screening, make employees get tested and/or

disclose an employee's positive status to third parties for contact tracing, apply equally to requiring proof of COVID vaccination.

## **Proof of Vaccination & Human Rights Law**

Requiring employees to show proof of vaccination may also create problems under human rights laws, which ban discrimination and require employers to make accommodations to the point of undue hardship. Three potential red flags:

- **Disability discrimination:** Employers generally aren't allowed to ask employees or job applicants about their disabilities;
- **Religious discrimination:** Requiring proof of vaccination may discriminate against employees who refuse to be vaccinated because of their religious beliefs; and
- **Creed discrimination:** Requiring proof of vaccination may also discriminate on the basis of creed, generally defined as a system of non-religious beliefs that are integral to a person's self-identity and a standard for conduct, which arguably may include the "anti-vax" movement.

However, as with privacy laws, human rights duties are subject to exceptions, including for otherwise employment practices that discriminate on the basis of a person's race, sex, disability, etc., but which are still okay because they serve a legitimate, non-discriminatory purpose and do it in a way that's reasonable, limited and used only when less discriminatory alternatives aren't available. In the U.S. where similar principles apply, the federal Equal Employment Opportunity Commission has issued guidance giving the green light for requiring proof of vaccination on the basis of these principles.

It's highly likely that Canadian human rights commissions will soon do the same. In fact, one already has. The Ontario Human Rights Commission (OHRC). On January 12, 2021, the OHRC reissued its COVID guidance to address the vaccination question. **Punchline:** "Requiring proof of vaccination to ensure fitness to safely perform work may be permissible if the requirement is made in good faith and is reasonably necessary for reasons related to safety." But, the OHRC continues, employers still must accommodate people who may be unable to be vaccinated due to disability or creed unless it would amount to undue hardship based on cost or health and safety.

## **The 5 Things to Do**

If you have an on-site vaccination program at your workplace you won't have to ask employees for proof. But if, like at most organizations, your employees need to go offsite to get vaccinated, you can make proof of vaccination a mandatory condition for entry by adopting a screening policy that includes appropriate safeguards and mechanisms for accommodations. (It's no coincidence that the government of Ontario is currently considering the exact same strategy in deciding whether to require people to show proof of vaccination to participate in certain public activities.) Five key pointers:

1. Clearly explain the reasons why proof of vaccination is required;
2. Remember that asking about an employee's disabilities is a red flag for discrimination and don't ask for any medical information other than proof of vaccination;
3. Keep records of proof secure and confidential and disclose them to third

parties on a strict need-to-know basis;

4. If employees can't take the vaccination because they have a disability or principled objection based on religion or creed, activate the accommodations process by doing an individualized assessment to determine whether letting the employee enter the workplace would pose an unacceptable threat to health and safety;
5. Accommodations to consider may include letting the employee work from home or allowing entry provided that the employee take additional safety precautions at the workplace, such as:
  - Wearing a mask at all times;
  - Remaining physically isolated from other people;
  - Following specific medical self-monitoring protocols; and/or
  - Taking extra personal hygiene, cleaning and disinfection measures.

## **The Need for Flexibility**

If employees belong to a union, you must also account for the terms of the collective agreement and whether you can implement a proof of vaccination policy without the union's consent. You also need to be flexible and prepared to account for external factors based not so much on law but practical reality, such as agreeing to relax the rules when employees can't get vaccinated because of inadequate supplies. You should also consider giving employees who must get the vaccine during work hours paid leave so they don't have to sacrifice vacation days or part of their wages.