

COVID-19 Vaccinations and Workplace Rights

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Overview

More than one year ago the COVID-19 pandemic shut down most of the world. Such shutdowns gravely impacted many businesses, and otherwise shifted the landscape of working life for businesses that could legally remain open by providing working from home arrangements (when possible) or by requiring significant protective measures (for essential services). Although there is much speculation regarding how the pandemic might permanently shift working life for some sectors over the coming years (including more work from home positions), the reality is, many jobs can only be performed in person and some employers may prefer their staff attend the workplace for various reasons (such as increased productivity, improved morale, building relationships, and other reasons).

As the Canadian government attempts to ramp up its vaccination efforts, limited vaccine supplies, combined with vaccination hesitancy, have slowed the process. At the same time, Canadian public health officers have recently declared that we are in the third wave of the COVID-19 pandemic, and most recently we are seeing an increase of younger patients hospitalized, gravely ill or even dying as a result of contracting COVID-19. Unfortunately, many of these patients include essential workers (like teachers and factory workers) who may have contracted COVID-19 from workplace exposure.

In this context, Canadian employers must consider what measures can legally be taken to protect their workplace. Employers may be considering various measures such as: social distancing, personal protective equipment (“PPE”) and vaccination requirements. At the same time, some employees may have strong opinions or views on why they do not wish to get vaccinated. Other workers may have religious reasons or health related issues that preclude them from getting vaccinated. With all of these considerations, many employers and employees alike want to know their legal rights relating to the imposition of workplace vaccination rules. Balancing COVID-19 protections with workers’ rights is a difficult and unprecedented circumstance that many employers will face in the coming months. This article will discuss legal issues and considerations relating to implementing requirements or policies around COVID-19 vaccinations in Canadian workplaces and other related solutions to consider when trying to protect the workplace from a COVID-19 outbreak.

Vaccination Requirements in Canada

When considering the legality of vaccination policies in Canadian workplaces, a good place to start is reviewing whether or not the Canadian government generally mandates immunization. The Canadian government does not legally require its citizens to be vaccinated. Despite this, two Canadian provinces have vaccination requirements for school, requiring the production of immunization records for school aged children to attend school. For example, pursuant to Ontario's *Immunization of School Pupils Act*¹ children and adolescents attending primary or secondary school are required to be vaccinated against designated diseases², unless they have a valid exemption. Valid exemptions include medical and religious reasons. Similar legislation exists in New Brunswick³, demonstrating there are some legal requirements around vaccinating school-aged children in the two provinces; however, such requirements are not country-wide and do not go beyond the schoolyard.

In terms of workplace vaccination considerations, we have never faced a deadly pandemic in recent history. Because of this, no caselaw exists that canvasses workplace vaccination policies in the context of a virus as contagious and deadly as COVID-19. There are some labour arbitration cases that consider influenza vaccination policies. This existing jurisprudence relates to influenza vaccination policies for healthcare workers in unionized workplaces. Notably, these decisions relate to policies within unionized workforces (labour law). Non-unionized workplaces (employment law) usually have more flexibility in terms of implementing workplace policies (as non-unionized employees do not have grievance procedures allowing for the challenge of such rules).

In the context of unionized workplaces, workplace policies must be: (a) consistent with the applicable collective agreement; and (b) a reasonable exercise of management rights. In the unionized healthcare sector, there are several cases where arbitrators have considered whether or not Vaccinate or Mask ("VOM") policies should be upheld. The VOM policies considered over the years, generally relate to policies that require workers who refuse to get a flu shot to wear a mask during flu season (or flu outbreaks). Such caselaw is useful to consider, insofar as it balances the rights of workers with the health and safety of others;

¹ R.S.O. 1990, c. I.1

² Designated diseases include: diphtheria, measles, mumps, poliomyelitis, rubella, tetanus and any other disease prescribed by the Minister of Health and Long-Term Care.

³ For instance see section 10 of the [Education Act, SNB 1997, c E-1.12](#)

however, such caselaw is not directly comparable to COVID-19, which causes more serious symptoms and is more deadly than the regular flu.

In reviewing the Canadian caselaw on point, it appears there are often inconsistent findings, often favouring workers' rights and limiting employers ability to impose rules. Below is a summary of some relevant decisions for consideration:

- **Unpaid Leave Policy Overturned:** In *St. Peter's Health System v. CUPE, Local 778 (Flu Vaccination Grievance)*,⁴ a 2002 decision from Ontario, the arbitration board found that the employer's vaccination policy was not reasonable. The employer (a geriatric facility) implemented a policy requiring staff get vaccinated when there was a flu outbreak among patients (i.e. two or more patients having the flu). Employees who refused to be vaccinated were to be placed on a non-disciplinary unpaid suspension until the outbreak was over. Several employees refused to be vaccinated and the union filed a grievance in relation to the policy. The arbitration board found in favour of the union, and held that a public hospital cannot enforce a requirement that its staff be vaccinated in the event of a flu outbreak among its patients. The policy in this case forced unpaid leave which had a greater impact on the affected employees (i.e. no income) than a VOM policy.
- **Vaccinate or Mask Policy Upheld:** In *Health Employers Assn. of British Columbia and HSA BC (Influenza Control Program Policy)*⁵, a 2013 decision from British Columbia, an arbitrator found that the VOM policy was reasonable, upholding same. In that case, the government of British Columbia had implemented a province-wide policy requiring healthcare workers to either get vaccinated or wear a face mask during the flu season. The stated purpose of this policy was to increase vaccination rates among healthcare workers against influenza for patient safety. The union unsuccessfully grieved the policy in that case, as the arbitrator found that the VOM policy was reasonable and that it was the least intrusive way to increase patient safety.

⁴ [2002] O.L.A.A. No. 164, Feb. 7, 2002⁴ (2013) 237 L.A.C. (4th) 1 (Diebolt)

- **Vaccinate or Mask Policy Overturned:** In [*Sault Area Hospital and Ontario Nurses' Association*](#)⁶, a 2015 decision from Ontario, an arbitrator struck down a VOM policy for nurses, finding it was an unreasonable exercise of management rights. That decision followed previous decisions which had favoured the union and employee rights against the imposition of forced medical treatment.
- **Vaccinate or Mask Policy Overturned:** In [*St. Michael's Hospital v Ontario Nurses' Association*](#)⁷, a 2018 decision from Ontario, an arbitrator held that the Hospital's VOM Policy was not reasonable, quoting a previous decision that stated: "There is scant scientific evidence concerning asymptomatic transmission, and, also, scant scientific evidence of the use of masks in reducing the transmission of the virus to patients".
- **COVID-19 Testing Policy Upheld:** In [*Caressant Care Nursing & Retirement Homes v Christian Labour Association of Canada*](#)⁸, a 2020 decision from Ontario, an arbitrator found that the policy implemented by a retirement home to require employees to regularly test for COVID-19 was reasonable and therefore upheld. The union argued that this policy, which mandates a nasal swab every two weeks, is both an intrusion on their privacy and a breach of their dignity. The arbitrator specifically noted in this decision that "Certainly, having a swab stuck up your nose represents both of those things and certainly more so than merely undergoing a breathalyzer test" (because breathalyzer tests were used as a comparable). Despite this, the arbitrator found that when weighing the intrusiveness of the testing against the prevention of spreading COVID-19 (in a retirement community), the policy was reasonable. Although this decision does not relate to vaccinations, it is important to illustrate how this arbitrator viewed stopping the spread of COVID-19 as a top priority balanced over personal intrusion (which often requires significant scrutiny in arbitral law).

⁶ [2015 CanLII 55643 \(ON LA\)](#)

⁷ [2018 CanLII 82519 \(ON LA\)](#)

⁸ [2020 CanLII 100531 \(ON LA\)](#)

In considering all of the above arbitral examples, it is clear that it can be difficult for employers operating in a unionized setting to implement rules that intrude on workers' rights. In reviewing these decisions after experiencing the COVID-19 pandemic, it is surprising to review some of the decisions that find VOM policies to be unreasonable. For example, after the COVID-19 pandemic (and the normalization of mask wearing in public settings and public health campaigns to encourage masks to protect transmission), arbitrators might differently view policies that require healthcare workers to wear face masks during flu season, especially if working with vulnerable populations. While the above cited decisions illustrate that it can be difficult for employers to impose rules in unionized workplaces, the context of COVID-19 is far more serious than the regular flu season. For example, one article from Johns Hopkins Medical states that the COVID-19 virus could be up to ten times more deadly than the regular flu, specifically as follows:

“Doctors and scientists are working to estimate the mortality rate of COVID-19, but at present, it is thought to be substantially higher (possibly 10 times or more) than that of most strains of the flu.”⁹

Knowing that COVID-19 is significantly more deadly than influenza and considering public health officials have mandated face masks, lockdowns, social distancing requirements and other extreme measures, it appears more likely than not that Canadian employers could implement far more rigid policies for COVID-19 protections than previously considered for influenza control. This would be especially true in hospitals or long term care facilities where vulnerable patients could suffer serious complications or die without such protections (as demonstrated by the Caressant Care decision¹⁰ cited above). Beyond considering the needs of patients, workers' rights to a safe environment are also paramount in the context of COVID-19, and especially relevant for essential workers (in healthcare, grocery stores, factories and other sectors that cannot operate remotely during a pandemic). Employers are required to protect the health and safety of their workers, and the question becomes, how employers can balance protecting employees without infringing on their rights.

⁹ Maragakis, L. (n.d.). Coronavirus disease 2019 vs. the flu. Retrieved April 05, 2021, from

<https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/coronavirus-disease-2019-vs-the-flu>

¹⁰ [Caressant Care Nursing & Retirement Homes v Christian Labour Association of Canada, 2020 CanLII 100531 \(ON LA\)](#)

Occupational Health and Safety Requirements

It is unlikely that Canadian employers could require employees to get COVID-19 vaccinations; however, employers must engage in other measures to help stop the spread of COVID-19 within the workplace. In fact, Canadian employers must provide a safe workplace under applicable occupational health and safety legislation. To this end, it is an employer's responsibility to ensure that employees are kept safe, and employees can legally refuse to work in unsafe environments. It is also important for employers to protect patients, customers, suppliers and whoever else might be entering their facilities. The section below will address what legal measures employers can take to protect their workplace.

What can an Employer do to Protect the Workplace?

In the context of COVID-19, what can an employer do to take all reasonable health and safety precautions if some workers refuse to get vaccinated? Below are some key points for consideration.

Can an employer force an employee to be vaccinated?

No. An employer cannot force an employee to get vaccinated. It is considered an intrusion on a person's body. It could also create liability for an employer if the employee suffers a negative reaction to the vaccination. Most importantly, this requirement could discriminate against an employee based on human rights grounds (such as disability or religious beliefs). For example, some persons with allergies may not be physically able to get a vaccine and therefore mandatory vaccine requirements could be found to be discriminatory for such persons based on human rights protections. Similarly, other persons may have religious beliefs that preclude vaccination, and requiring those persons to be vaccinated would similarly be discriminatory based on human rights grounds. Despite the foregoing, an employer can implement measures such as offering vaccinations on site (if available) and/or paid time off to encourage its employees to get vaccinated (for those employees open to vaccination).

Can an employer require that its employees provide health records confirming vaccination status?

No. An employer cannot mandate that an employee supply health records and this type of practice could be risky from a human rights perspective. That said, in certain jobs (like healthcare) it might be found to be reasonable for an employer to request voluntary disclosure confirming vaccination, and in that case, persons who do not wish to disclose could be treated as if they have not been vaccinated. In this regard, where vulnerable populations or health and safety risks exist, it might be seen as “reasonable” that non-vaccinated persons (or those who do not disclose) will be assigned to less risky work assignments during the pandemic (i.e. a long-term care facility might have staff who do not disclose status or who are not vaccinated assigned to different areas of work, which does not include the most high risk residents). There is no caselaw testing this specific issue in the context of COVID-19; however, given that COVID-19 is known to be deadly, an employer has a strong argument to suggest it is reasonable to introduce more stringent rules to protect persons including other staff, patients and customers from COVID-19 exposure, when failure to do so might be deadly. In fact, employers could face a different type of liability (which could be far greater than workplace law liabilities) if there is a failure to protect staff and patients/customers from infection.

Can an employer terminate an employee for refusing to get vaccinated?

The answer to this question must be considered in various parts:

- ***Just Cause Termination:*** It is generally unlikely that an employee’s refusal to get vaccinated could be seen as misconduct or otherwise justify disciplinary action. It follows that it is very unlikely that an employer can discipline or terminate an employee for “just cause” based on a refusal to be vaccinated. A finding of “just cause” for termination requires that an employee is guilty of serious misconduct, habitual neglect of duty, incompetence or other serious incompatibility with their duties. It is always difficult for an employer to prove just cause in any circumstance. It is highly unlikely an employer could ever successfully argue an employee’s personal choice to refuse vaccination could amount to “just cause” for termination.
- ***Without cause termination:*** It is possible that in a non-unionized setting, an employer could terminate an employee on a “without cause” basis for refusing to

get vaccinated. *However, if and only if this refusal is not based on a human rights protected ground (such as disability or religious reasons).*

- ***Human Rights Protected Grounds:*** If an employer is considering taking action based on an employee's refusal to get vaccinated (or refusal to disclose), the first step is to inquire if the employee's refusal is based on a human rights protected ground. When human rights protected grounds impact the employee's decision, an employer must accommodate that employee to the point of undue hardship. Accommodations might include: providing additional PPE, offering work from home arrangements, providing a work area that is socially distanced, or placing the employee on unpaid leave if other options are not available.
- ***No Human Rights Protected Ground:*** Where a non-unionized employee refuses vaccination, and confirms there are no human rights protected grounds impacting that decision, an employer could choose to terminate that employee on a without cause basis. For a without cause termination, an employer is required to pay an employee a termination package (i.e. notice or pay in lieu of notice based on all relevant factors including employment standards legislation, contractual obligations and/or common law). It would be expensive, extreme and not practical for employers to terminate all employees who refuse vaccination; therefore, it is important to consider what other measures an employer may take to ensure a safe working environment.

What steps may an employer take to protect the workplace where employees refuse to get vaccinated (or will not disclose same)?

Since mandatory vaccination for workers is not likely legal in Canada, and termination of employment is an extreme action and not practical in many cases, employers should consider other reasonable measures to protect the workplace from COVID-19, while also balancing the decisions of workers who cannot get vaccinated yet (due to age restrictions and short supply) or who will not get vaccinated in the future. Employers should consider taking actions in line with most current public health recommendations. At today's date, such measures may include some of the following:

- **PPE:** Obtaining sufficient PPE including masks, face shields, hand sanitizer, plexiglass and other such measures.
- **Education:** Offering non-mandatory educational sessions or materials to assist employees in better understanding any questions they have about COVID-19 vaccines.
- **Covid Testing:** Implementing a voluntary COVID-19 testing program when appropriate. This measure would be suitable in essential workplaces, and sectors (like healthcare or factories). In some cases, mandatory testing could be justifiable.
- **WFM:** Offering work from home arrangements for jobs that do not require attendance at the workplace (such as professional services, administrative support and any other jobs that can be done remotely). For workplaces offering essential services, it may be decided that not all staff are required on site. Limiting persons on site to those who are absolutely necessary will help reduce workplace exposures.
- **Work Environment:** Creating a safer environment, which might include: posting signs to communicate public health recommendations, increasing distance between work areas, installing physical barriers (such as plexiglass) where appropriate and improving ventilation. Employees who are higher risk should ensure to communicate this to their employers to seek out appropriate accommodations (which might include working in a more isolated space).
- **Leave of Absence:** Offering leaves of absence for employees who cannot attend work, when other accommodations cannot be made. For instance, perhaps an employee is immunocompromised and unable to get vaccinated for medical reasons, making attending work too high risk in current circumstances. The parties may work together to consider whether the employee would qualify for sick leave (paid or unpaid sick leave, short-term and/or long-term disability) and failing this, canvass available government benefits while the employee is on unpaid leave.

Conclusion

Mandatory vaccination policies in the workplace are not likely legal in Canadian law. At the same time, employers must ensure workers are provided with a safe environment. Best practices and solutions will vary depending on the industry and current public health and safety guidelines and requirements. Employers should encourage open communication and dialogue in order to facilitate a safe and positive working environment during these challenging times. The COVID-19 pandemic has been a difficult and onerous circumstance

for employers and employees alike. Ideally, all parties should work together collaboratively to create healthy working environment with the same goal in mind, keeping the environment as safe as possible so we can get to the other side of the pandemic.

About the Author



Deborah is the founding lawyer at Hudson Law, where she represents both employers and employees in all aspects of labour and employment law. She was called to the Ontario Bar in 2008, and has practiced exclusively in the areas of labour and employment for her entire career. She spent the first eight years of her career at a prominent management-side firm, and then spent several years at a boutique workplace law firm where she broadened her practice experience to include acting as employee-side counsel and workplace investigator.

Deborah provides her clients with practical, timely and highly specialized legal advice. She regularly advises both employers and employees in relation to matters occurring at all stages of the employment relationship. She values the importance of early and productive resolution discussions when beneficial and appropriate. In circumstances where resolution is not achievable or advantageous, Deborah advocates on behalf of her clients in all legal forums. Deborah also conducts workplace investigations as an external, independent investigator relating to various workplace circumstances and allegations including: harassment/bullying, human rights matters, privacy breaches and fraud.

Deborah has authored and contributed to a number of publications concerning workplace issues. Most recently, Deborah was a contributing author of: [Startup Law 101: A Practical Guide](#) (2017)¹¹; [Ontario Human Rights Code: Quick Reference](#) (2015)¹²; and [Accommodation Issues in the Workplace](#) (2014).¹³ Deborah has also published numerous articles for Queen's University IRC.

¹¹ Lovrics, Catherine et al, *Startup Law 101: A Practical Guide* (Toronto: LexisNexis Canada, 2017)

¹² Jamie Knight et al, *Ontario Human Rights Code: Quick Reference*, 2015 ed. (Toronto: Thomson Reuters Canada, 2014).

¹³ Jamie Knight et al, *Accommodation Issues in the Workplace*, (Toronto: Wolters Kluwer Limited, 2014).

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