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Mandatory Vaccination Policies for Canadian Workplaces



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As the COVID-19 vaccination becomes more widely available to Canadians, can it be made mandatory? Both the federal and provincial governments have so far maintained the message that they will not make the vaccine mandatory for the general public. But what are the rights of employers and employees with respect to mandating policies in the workplace? Our network of firms across Canada has considered these issues.

There is currently no vaccination being publicly mandated by the government of Canada for COVID-19 and it is not anticipated that there will be one mandated by the provinces. This leaves the decision to create a mandatory vaccination policy directly within the power of each employer.

Federal Legislation - Charter of Rights and Freedoms

Regardless of the province or territory, the Charter of Rights and Freedoms may impact the ability of governmental employers to impose a mandatory vaccination policy. If applicable, the Charter dictates that every person has the right to life, security, integrity and personal freedom, and protects a person's rights to freedom of religion, privacy, and dignity.

This means that such employers may need to consider how their policies affect these enshrined rights. The employer may need to balance the rights of employees to safety in the workplace and security of health with an employee's rights of privacy, dignity, and to not vaccinate for religious or medical reasons. Such a balancing act will need to be managed delicately and seeking legal consultation is highly recommended.

Provincial Legislation

Each province has its own specific laws that dictate similar rights as the Charter does, outlining similar protections for employees. Provincial laws that may have an impact on vaccination rights and obligations typically fall under the categories of employment standards, public health, privacy and human rights.

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Much like the Charter, provincial laws will require a delicate balancing between the rights of the employees to make their own choice about being vaccinated and the necessity of the employer to guarantee a safe workplace environment to all. The employer must remember that safety to all does not necessarily mean that the employer can disregard legally protected considerations relating to individual employees.

Employers are being presented with a difficult question: How do they balance the different and often competing protections that are afforded to all employees?

Judicial Decisions

The topic of mandatory vaccinations has rarely been judicially considered. There are some judicial and arbitral decisions regarding vaccination policies, but they are few in number and do not provide a clear answer. These decisions have typically examined mandatory vaccination policies for influenza in health care settings. Courts and arbitrators are more likely to uphold mandatory vaccination policies where:

- risk to others is high because employees are in contact with individuals whose health is vulnerable,
- there is clear scientific evidence supporting the benefits of the vaccine or the policy, and
- the employer can demonstrate that there is a rational occupational requirement made in good faith to protect the health and safety of others.

However, without further direction at this time from the courts or administrative tribunals or from our legislatures, it is not clear whether an employer's decision to mandate employee vaccinations would be upheld by a judicial or arbitral decision-maker outside an environment where vulnerable individuals are present.

Mandatory Vaccination Policy Factors

Employers have an obligation to provide a safe work environment. An employer's ability to impose vaccination will require a contextual analysis of the specific workplace. Should an employer decide to implement a mandatory vaccination policy to meet their obligation, there are a number of factors that must be considered:

- First, the employer should try to **strike a balance** between an employee's rights to a safe workplace environment and the employee's human rights and privacy interests.
- Second, the policy **must be compliant with privacy laws** and expectations, as vaccination information can be considered personal health information which is subject to unique protections.
- Third, the policy **must not discriminate** against those who have refused the vaccine based upon protected grounds, such as for medical or religious reasons. If such a situation were to arise, the employer would likely need to accommodate the employee. This **duty to accommodate** is only to the point of undue hardship. A personal preference is not a protected ground.
- Fourth, if challenged, the employer will need to show the policy is **reasonable and provides a clear benefit**. Therefore, ensure there is sufficiently convincing evidence that the policy meets the legitimate needs of the workplace and that the policy was a bona fide occupational requirement that could not be achieved through other means, such as remote work arrangements, hand-washing or by wearing personal protective equipment, such that compulsory vaccination is required to ensure protection.

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- Fifth, the policy must be **clear and unequivocal**. Before it is implemented, ensure that all employees are made aware of the policy and the disciplinary consequences, and provide employees with an opportunity to request human rights accommodations. The vaccine will need to be available for all employees to access, and a reasonable amount of time must be provided for employees to comply with the policy. Offering paid time for employees to get vaccinated during work hours can help employers to more easily achieve compliance, and to require proof of vaccination. In some jurisdictions, paid time off may actually be required.
- Sixth, once implemented, the policy must be **applied and enforced consistently**.

Risks

Employers must also consider the risks associated with such a policy. Vaccination is a medical procedure, and such procedures can ordinarily be performed only with the consent of the patient. Individuals have the right to have control over their own bodies, even where medical treatment is involved. Deciding to vaccinate can be a deeply personal choice, and one that ought to be informed after weighing the individual risks and benefits. Additionally, many people have strong feelings about vaccinations. Mandating vaccinations as a requirement for employees to attend the workplace, without regard to individual circumstances, and without adequate measures in place to accommodate reasonable refusals may lead to litigation or human rights complaints.

Seek legal advice. Know your options, rights, and responsibilities and understand if a mandatory vaccination policy aligns with the rules and regulations in your area. An employment lawyer can advise on the benefits and risks of such a policy and help navigate the intricacies of properly creating one. Whether you are an employee or an employer, the Lawyers Associated Worldwide network has experienced lawyers across Canada who can assist you with a more in-depth review on how you might be affected within your particular province.