

Employer Mandatory COVID-19 Vaccination

Recently the Federal and Ontario Provincial government have mandated mandatory vaccination across various sectors. On August 17th, 2021 the Ontario government announced that "COVID-19 vaccinations would be mandatory in high risk sectors such as hospitals, health care settings, long term care and education. This policy also applies to **contractors**, volunteer's and students. Additionally, commencing on September 21st, 2021 Ontario will require proof of vaccination in select non-essential settings.

Many private sector employers are considering or in the process of mandating mandatory vaccinations for all staff and or those they serve. Some unions have been directed by their internationals to implement mandatory vaccination of all their union staff

Given the rapidly evolving circumstances of the COVID-19 pandemic and increasing concerns about the variants it's only a matter of time when owner clients, general contractors, contractors and sub-contractors will mandate mandatory vaccinations for all construction workers.

A move to mandatory vaccination in the unionized construction sector is bound to cause concern for individual unions and their members. The Provincial Building Trades and other local unions have received legal opinions that support that a workplace can implement a mandatory vaccination policy.

Although to date, there are no cases in the individual employment or unionized employment context where the lawfulness of workplace COVID-19 vaccination or disclosure policies have been litigated. Nevertheless, there is relevant jurisprudence that sheds light on how a court, administrative tribunal and/or privately appointed labour arbitrator may assess the matter.

This jurisprudence suggests that a "one size fits all" policy is likely not appropriate and that in order for any policy to withstand legal scrutiny, it must strike an appropriate balance of workplace party interests and give due consideration to the following factors:

- legitimate employee privacy, medical and human rights interests;
- legitimate employer business and health and safety-related objectives and interests, including the nature of the industry where the work is being performed;
- the actual risk of COVID-19 exposure and spread in the workplace;
- application of the precautionary principle;
- the efficacy of any existing workplace policies short of vaccination;
- the availability, access to and efficacy of vaccinations; and
- any government, public health agency and/or third-party legislation, rule and/or policy that may directly or indirectly impact the employment relationship including job site property owner policies and travel industry requirements.

The case law also confirms that any decision on the legal enforceability of any employer COVID-19 vaccination policy will involve the consideration and balancing of the aforementioned factors.

Employer COVID-19 vaccination policies **that are specifically tailored to meet legitimate workplace and public health and safety objectives and that give due consideration to the risk of COVID-19 exposure and spread as well as the need for bona fide human rights-based exceptions will be more likely to withstand legal scrutiny.**

The Ontario Building Trades and all its affiliated local unions are not shy about defending a worker's rights and their individual liberties, even when they are unpopular. At the same time, the Ontario Building Trades is not supportive of workers exercising individual rights at the expense of the health and safety of all workers.

But we see no civil liberties or infringement of a worker's human rights or Charter rights with requiring COVID-19 vaccines in most circumstances. As long as employer vaccination programs allow for accommodations for legitimate **medical and bona fide religious grounds. It is important to state that scientific skepticism about vaccination is not grounds to receive accommodation.**

Any employer vaccination mandate should have exceptions for those workers whom the vaccine is medically contraindicated, such as people who have allergies to it. The absence of such exceptions would directly undermine the public health goals of a mandate, although other mandatory precautions, like masking, social distancing, regular testing or working remotely, may be appropriate. Where a vaccine is not medically contraindicated, however, avoiding a deadly threat to the public health typically outweighs personal autonomy and individual freedom.

Similar to medical grounds, religious freedom is an essential right, but not an unfettered license to inflict harm on others. The right to practice religion freely does not include liberty to expose the community or a workplace to communicable diseases ill health or death.

A consideration for employers in adopting a vaccination policy would be to implement a mechanism in which a neutral third party would review and determine legitimate worker medical and religious exemptions to vaccinations.

In the employment context, provincial law requires medical and religious accommodations in some circumstances, but not if they would cause an "undue hardship" to the employer. Refusing a Covid-19 vaccination poses a direct threat to the health and safety of others in the workplace, and likely amounts to an undue hardship unless the employer can devise some other accommodation for the employee, such as working from home. Workplace requirements for testing of COVID-19 and/or virus variants will be paid for by the employer/owner.

While the permissibility of requiring vaccines for particular diseases depends on several factors, when it comes to Covid-19, all considerations point in the same direction. The disease is highly transmissible, serious and often lethal; the vaccines are safe and effective; and crucially there is no equally effective alternative available to protect workers and the public health.

While vaccine mandates are not always permissible, they rarely run afoul of civil liberties and a worker's human rights when they involve highly infectious and devastating diseases like Covid-19. Although this disease is novel, vaccine mandates are not. Schools, health care facilities, and many other institutions have long required vaccination for contagious diseases like mumps and measles that pose far less risk than the coronavirus does today.

The Ontario Building Trades and its affiliated local unions have no ability to create or control an employer's workplace. We **strongly support and encourage all our members to be vaccinated.** However, at the same time we respect a worker's individual choice and those who can't be vaccinated due to legitimate medical and bona fide religious grounds need to be accommodated to the point of undue hardship.

Although we would prefer a provincial mandate from the government requiring workplace vaccinations which would eliminate any confusion and establish clear policies for all employers. That said under the current circumstance the Ontario Building Trades will support vaccine mandate if they are specifically tailored to meet legitimate workplace and public health and safety objectives and that give due consideration to the risk of COVID-19 exposure and spread as well as the need for bona fide human rights-based exceptions.

A workplace cannot take a "one size fits all" policy and the requirement to be vaccinated is just one part of workplace measures to prevent the spread of COVID-19. Workplaces need to continue to take a risk based analysis and determine what the best safety measures are to be implemented irrespective of vaccination status and would still be required to utilize all Personal Protective Equipment (PPE), testing, social distancing and all other measures.