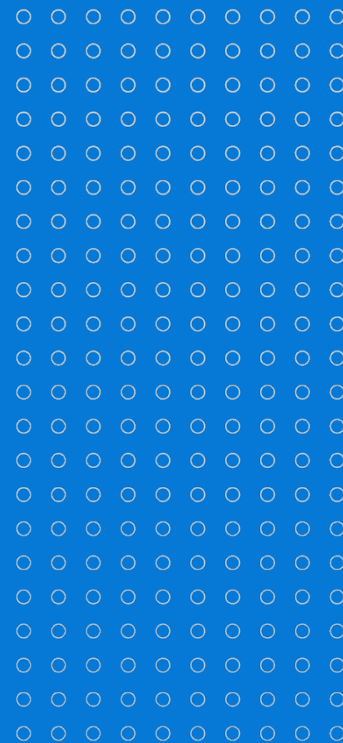


Employer Guide and FAQs on Vaccination Policies in the Workplace

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As Canada continues to reopen and with virtually all employees eligible for COVID-19 vaccines, many employers are moving forward with a gradual return to the workplace. As variants of concern continue to impact the roll-out of return-to-work plans, employers should address what steps they can take to ensure they meet their obligations under occupational health and safety legislation. This includes whether they will require their workforce to be vaccinated notwithstanding the absence of any provincial government-mandated vaccination or proof of vaccination requirement.

On August 20, 2021, Toronto's Medical Officer of Health (TMOH) issued a recommendation for local employers to institute a workplace vaccination policy to protect their employees and the public from COVID-19. This advice has since been updated and other public health authorities have followed suit. TMOH strongly recommends that workplace vaccination policies require at minimum:

- Employees to provide proof of their vaccination series approved by Health Canada or the World Health Organization;
- Unvaccinated employees to provide written proof of a medical reason from a physician or nurse practitioner that includes whether the reason is permanent or time-limited; and
- Unvaccinated employees to complete a vaccination education course on the risks of being unvaccinated in the workplace.

On **September 1, 2021, the Government of Ontario mandated that it** would require people to be fully vaccinated, and provide proof of their vaccination status, to access certain businesses and settings starting on September 22, 2021. Under this mandate, Ontarians will need to be fully vaccinated (two doses plus 14 days) and provide their proof of vaccination along with photo ID. This approach focuses on higher-risk indoor public settings where face coverings cannot always be worn (i.e., Restaurants, Sporting Events, etc.). Similar vaccine passport requirements have already been rolled out in British Columbia, Alberta, and Quebec. However, this mandate only applies to patrons, and not employees. Therefore, it remains the employer's responsibility to maintain a vaccine policy within their own workplaces.

Although the many provincial governments have not gone so far as mandating vaccination for all workplaces, the City of Toronto, the Government of Canada, and various federally regulated employers have announced their intention to require vaccination of all employees by a specified date.

Occupational health and safety legislation imposes an obligation on all employers to take every precaution reasonable in the circumstances to protect the health and safety of employees. It is up to each employer to consider its health and safety obligations in the context of their workplaces in respect of whether to mandate vaccination as part of the employer's vaccination policy.

Over the past number of weeks employers in many settings, not just the federal sphere, have announced an intention to mandate vaccination for those employees who are returning to the physical workplace. Some of these vaccination policies are not strictly speaking mandatory vaccination policies, as they include alternatives for those who are unwilling or unable to be vaccinated to comply with other measures, such as regular COVID-19 testing. The exact precautions that an employer elects to implement to protect their employees from COVID-19 may therefore depend on the level of risk posed by COVID-19 in each workplace setting.

On September 22, 2021, the Ontario Human Rights Commission (OHRC) released guidance regarding vaccine mandates and proof of vaccine certificates. They have deemed vaccine requirements to be “generally permissible”, if protections are put in place to make sure people who are unable to be vaccinated, for human rights related reasons, are accommodated. The OHRC stated that if employees are seeking a medical accommodation, they must provide a note from either a physician, registered nurse extended class or nurse practitioner stating they are exempt for medical reasons from being fully vaccinated, and for how long the exemption will apply. The OHRC also finds that COVID-19 testing is viewed as a reasonable accommodation, and employers ought to have such testing in place, and cover the costs of the same. OHRC recommends that any mandates or policies, which deny equal access to services and employment to vaccination status, ought to be time limited and reviewed regularly. At the same time, the OHRC’s position is that a person who chooses not to be vaccinated, based on personal preference, does not have the right to accommodation under human rights legislation. The OHRC stated it is not aware of any tribunal or court decision that has found a singular belief against vaccinations or masks amounted to a creed within the meaning of human rights legislation. While human rights legislation prohibits discrimination based on creed, personal preferences or singular beliefs do not amount to a creed for the purposes of human rights legislation.

The OHRC approach will likely be consistent across provisional and federal jurisdictions.

Overall, while a vaccination policy should be introduced, subject to health and safety, employee privacy and human rights considerations and limitations, an employer must weigh and consider the nature of the policy it will adopt in the context of what makes sense for its workplace.

Mandatory vaccination or not, any vaccination policy that is implemented should consider the factors addressed by the TMOH as listed above, but should also include:

- The process for requesting proof of vaccination, taking into account privacy considerations
- Discussion about the process an employee may take for requesting accommodation if the employee is unable to receive a COVID-19 vaccine for reasons related to a human rights ground, such as disability or creed. The policy should contemplate accommodation requests being addressed on an individual, case-by-case basis, and accommodation being provided to the point of undue hardship. Examples of accommodation may include remote work, the use of PPE or physical distancing, regular COVID-19 testing, or unpaid leaves of absence
- Dates by which employees must comply with the policy, including any requirements on being fully vaccinated, if that requirement is ultimately adopted by the employer
- The steps the employer will take in the event of non-compliance with the policy
- The additional measures in place to protect employees from COVID-19 in accordance with public health measures, which may be augmented or relaxed as the fourth wave continues or dissipates in concert with public health direction

The vaccination policy itself is but one part, albeit an important part, of an employer’s overall comprehensive health and safety response to the pandemic in this period of gradual return to work. The pandemic and vaccination landscapes are changing rapidly. Employers must continue to be vigilant about their health and safety obligations.

Frequently Asked Questions

1. Can an employer mandate its employees receive a vaccine?

As noted above, an employer may require employees to be vaccinated where the employer has in place a policy that balances workplace safety against their employees' contractual, privacy and human rights. Mandatory vaccination policies for COVID-19 are untested in Canadian law. Accordingly, where employee vaccination is not a legislated requirement, any mandatory vaccination policy must balance interests arising under existing workplace laws.

Ultimately, whether a mandatory vaccination policy is a reasonable precaution will be a fact-driven analysis for each workplace that should be informed by evidence of both the realistic infection risk in the workplace and the effectiveness of the vaccine requirement compared to alternative options.

2. What human rights issues should an employer consider when implementing a mandatory vaccination policy?

As noted above, the OHRC has stated that vaccine requirements are “generally permissible”, if protections are put in place to make sure people who are unable to be vaccinated, for human rights related reasons, are accommodated. Employers will have to ensure that any policy contemplates the duty to accommodate any such refusal to the point of “undue hardship”.


All employee challenges or concerns with the policy should be addressed on a case-by-case basis, and it is always prudent to seek legal advice before a decision is made.

3. Can an employer ask an employee if they have been vaccinated or request proof of vaccination?

Based on the TMOH guidance, there appears to be a growing consensus that employers may make requests regarding an employee's vaccination status. However, an employer should still approach this with caution considering that requesting proof of vaccination is a collection of personal health information, and triggers privacy considerations. An employer should consider whether its workplace is one in which safety mandates that it is reasonable for employees to be vaccinated, and collection of their vaccination status is necessary to guarantee that safety.

The following key principles are best practices regardless of whether an employer is subject to privacy legislation:

- Establish the purpose and authority for asking for the information and notify employees of the purpose;
- Collect the least amount of information to meet the purpose;
- Share information with only those who need to know; and
- Store the information, keep it secure, and destroy it when no longer needed.



4. What should an employer do if an employee refuses to be vaccinated or disclose whether they have been vaccinated?

When confronted with an employee's refusal to receive a vaccine or disclose their vaccination status, employers should inquire into the reason for refusal, keeping in mind the human rights considerations above. Where the reason for the refusal is rooted in a protected characteristic, the employer must respond with accommodation efforts rather than discipline. Where an employee refuses to vaccinate for reasons other than a protected ground, the employer may have the option of lawfully terminating employment, but should seek legal advice before doing so.