

COVID-19 VACCINE POLICIES IN THE WORKPLACE

By Shane Buchanan

VACCINES PLAY AN IMPORTANT role in the fight against COVID-19, but there are several key questions facing employers when it comes to vaccination policies in the workplace.

The first question is often about whether employers can implement a mandatory vaccination policy, which requires employees to get a COVID-19 vaccination. Currently, there is no legislation mandating that the public, or certain members of the public, receive the COVID-19 vaccination. Given the roll out of the vaccinations to date, it is unlikely that we will see such legislation.

Health and Safety Obligations

The underlying question regarding mandatory vaccination policies is whether vaccination is necessary to ensure the health and safety of employees, patrons to the business and the general public, or if other available protective measures are sufficient in the circumstances.

First and foremost, employers have a legal obligation to ensure the health and safety of both their workers and patrons of their business as far as reasonably practicable. Each employer

is required to assess the level of risk of exposure and transmission among workers and clients, customers and patrons. Employers will need to account for the level of risk in different services areas and only implement the measures necessary in each context. It may be possible that required employee vaccinations are reasonable in some service areas but not others.

Based on the current state of the law, it appears to be an uphill battle for employers to establish that vaccinations are required by employees in order for them to continue to fulfill their job duties and ensure the safety of themselves and those around them. There are several factors that play into this, including our evolving knowledge of the COVID-19 virus.

On the one hand, the severity of COVID-19, evidence of asymptomatic spread and proven efficacy of the approved vaccines weigh in favour of requiring vaccination where workers or clients are at a high risk of exposure or a severe adverse response to infection. On the other hand, researchers do not yet have sufficient data to assess whether the vaccine prevents individuals from carrying or transmitting the

virus to other individuals. Additionally, as more Canadians are vaccinated, the risk of exposure may decrease and a mandatory vaccination policy may lose its defensibility over time in certain contexts.

For example, there may be a defensible argument that vaccinations are absolutely necessary for employees who regularly work with vulnerable individuals with compromised immune systems. To establish that it is necessary, an employer will need to be prepared to demonstrate how other measures, such as the use of personal protective equipment (PPE), are not sufficient protection. Conversely, it would likely be much more difficult to demonstrate that all employees in a typical office setting, who do not regularly interact with vulnerable individuals, should be required to be vaccinated.

Another consideration from a health and safety standpoint is whether PPE is sufficient protection for employees. If an employer's position up until now has been that the use of PPE and other preventative measures are sufficient to ensure the health, safety and welfare of workers in the course of their employment, it may be difficult to take the



position that vaccines are a necessary measure to protect employee health and safety.

At the end of the day, should an employer wish to implement a mandatory vaccination policy, the employer should be prepared to defend the reasonableness of that policy through litigation if ever challenged. These challenges are likely to be quite contentious and will require expert evidence on the efficacy and necessity of the vaccinations.

Risks of a Mandatory Vaccination Policy

Absent the introduction of legislation that supports a mandatory vaccination policy, mandatory vaccine policies carry several risks and high liability for employers. Employers should be prepared to address grievances about the implementation and application of such a policy in the workplace, or potential wrongful or constructive dismissal claims for non-unionized operations.

There may also be complaints to the privacy commissioner regarding personal information sought as part of a mandatory vaccination policy.

Additionally, there is also the possibility of complaints to the Human Rights Commission for alleged discriminatory action in requiring certain individuals to receive the vaccine.

Similar issues have been canvassed by the case law in relation to mandatory influenza vaccinations. The general conclusions among the case law is that employers are not permitted to implement mandatory vaccination policies.

For unionized operations, the policy must pass the scrutiny of reasonableness, known as the KVP Test. For non-unionized operations, introducing the requirement may amount to constructive dismissal as it would be significant change to the fundamental terms and conditions of individual contracts of employment to require an employee to be vaccinated in order for their employment to continue with your operations for government employers, there are also constitutional law issues related to the Charter of Rights and Freedoms-related security of person and equality rights.

There will inevitably be human rights and accommodations issues presented for employees who refuse

to be vaccinated because of religious or medical reasons. As a result, employers who do decide to implement a mandatory vaccine policy will need to ensure that there are several exceptions within the policy for these situations.

There are also possible privacy concerns regarding what personal information employers collect and store about an employee's vaccination status, as well as coerced medical treatment allegations that may arise.

With all of these risks in mind, it is important that the decision to implement a mandatory vaccination policy is not taken lightly. It is recommended that employers who are considering a mandatory vaccination policy obtain legal advice specific to the workplace as to whether the policy will be found to be reasonable or not, as it will inevitably be challenged in some way.

Alternative Options

Although mandatory vaccination policies are unlikely to be upheld in most workplaces, it is still highly recommended that employers implement some type of vaccination policy that addresses the COVID-19 vaccine.

Alternative vaccination policies might include a purely voluntary policy or a vaccination or mask policy.

A voluntary vaccination policy would focus on educating and informing employees about the vaccine and the risks of exposure or spreading COVID-19 if they are not vaccinated. Depending on how matters progress over the next number of years, organizations may even wish to consider facilitating vaccinations in the workplace,

similar to what some offices do now in holding flu shot clinics at the place of work.

Another alternative is a vaccinate or mask policy and/or additional PPE and other measures along with masking. This type of policy would require employees to wear a mask and/or additional PPE and other measures if they choose not to receive a vaccine. There has been litigation regarding flu shot or mask policies, where such

policies are not always upheld or found to be reasonable in the circumstances. Accordingly, vaccination or mask policies are likely only allowable in specific circumstances. Regardless of the type of vaccination policy in place, it will be important for employer to review and update the policy as circumstances change.

Additional Considerations

Organizations that are subject to a collective agreement will have to consider whether they are permitted to implement a vaccination policy in the first instance and what consequences can flow from a refusal under the agreement. For example, a collective agreement may limit the ability of an employer to reassign an employee to alternative duties.

In both unionized and non-unionized environments, organizations will need to consider the level of risk to staff and clients, any human rights concerns that may arise from refusals, and limiting any intrusion on the employees' privacy rights.

We know that COVID-19 is a severe and deadly disease and that the vaccines are highly efficacious for individuals who are vaccinated. This may support that a vaccination policy is a reasonable measure. However, researchers do not yet know whether the vaccination can prevent a vaccinated person from carrying the virus and passing it on to others. If it does not, a vaccination policy may not be justified. Until clinical trials can provide data on this issue, personal protective equipment and social distancing practices will likely need to be maintained in the workplace even if there is a vaccination policy.

Before implementing any vaccination policy, it is recommended that employers obtain legal advice to assess whether a vaccination policy may be appropriate for an organization's particular circumstances. 

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