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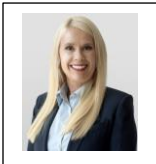
IN THIS ISSUE

With the vaccination rollout underway, Canadian employers are asking how to implement a mandatory COVID-19 vaccination policy. We advise what issues an Employer must consider and implement to draft an enforceable policy.

While Canadian-based, this article provides an excellent road map of items to consider regardless of country of practice.

Get The 'Jab' or Lose Your Job: How to Create an Enforceable COVID-19 Vaccination Policy (CVP) for Your Canadian Workplace

ABOUT THE AUTHOR



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With the Provincial vaccination delivery programs being implemented across Canada, now is the time for employers to draft and implement a mandatory COVID-19 Vaccination Policy (CVP) as a condition of continuing employment. Here, we review the considerations necessary to ensure your CVP is reasonable, necessary, and flexible so that it is both enforceable and creates a safe work environment.¹

Can an employer lay off or terminate an employee if they refuse to get vaccinated?

For an employer to lay off or terminate an employee who refuses to get vaccinated, the employer must invest in ensuring that its mandatory COVID-19 Vaccination Policy is reasonable, necessary, flexible and clearly implemented.

Any CVP will have to overcome the tension between an employer's obligation to provide a safe workplace and the employee's rights and entitlements under common law and/or collective agreement. To begin, there are at least five issues which an employer should consider and address to create an enforceable mandatory CVP:

1. Scientific evidence regarding available vaccines;

2. The purpose of the mandatory CVP;
3. Occupational Health & Safety considerations;
4. Human Rights considerations; and
5. Compliance with Privacy laws and Avoiding Constructive Dismissal.

1. Understanding the Available Vaccines: Their Benefits and Limits

The first issue and a key challenge to implementing an enforceable CVP is that the scientific evidence regarding the vaccines is developing daily. Consider retaining an expert to provide reliable advice regarding the efficacy and reliability of the vaccines. Use this expert advice as the basis for the CVP and secure the advice in a manner so that it can be produced as evidence in support of the CVP, if necessary.

To date, Health Canada has authorized two vaccines: Moderna COVID-19 vaccine and Pfizer-BioNTech COVID-19 vaccine.

Moderna COVID-19 vaccine

Health Canada reports: "*Based on studies in about 30,000 participants, the Moderna COVID-19 vaccine was 94.1% effective in preventing COVID-19 beginning 2 weeks after the second dose.*"²

¹ This article is intended for information only and my premise is untested (since the vaccine is not yet generally available); success will depend upon the development of scientific knowledge regarding vaccines, and a company's evaluation of whether the requirement for the vaccine is *reasonable* and

necessary which will require a workplace-specific assessment (i.e. healthcare v. congregate work environments) and, likely, legal advice. Use this article as a guideline but consult a lawyer for legal advice.

² IBID.

Pfizer-BioNTech COVID-19 vaccine

Similarly, “Based on studies in about 44,000 participants, the Pfizer-BioNTech COVID-19 vaccine was 95% effective in preventing COVID-19 beginning 1 week after the second dose.”³

Generally, the reported percentages mean that people vaccinated with either vaccine may still be vulnerable; of 100 vaccinated people, approximately five were reported to be COVID-19 positive, although with generally less severe symptoms and no deaths.

Further, it is not yet known whether a vaccination with either vaccine means that a person cannot be a source of infection for others.

2. What is the Purpose of the Mandatory CVP?

Ask: do I need the employees (or some employees) to be vaccinated to make the workplace safe?

Some environments, such as warehouses, distribution centers, and construction sites, which are referred to as ‘congregate work settings’, require workers to work for periods of time in proximity to one another which can lead to massive COVID-19 outbreaks.⁴ These and similar work environments represent a higher risk of

transmission of COVID-19 amongst workers, compared to others, and in these workplaces it will be reasonable to implement a mandatory CVP.

However, an employer must not implement a blanket CVP but must consider whether less intrusive options for workers (or some workers) would suffice instead. Consider the potential protections offered by physical distancing, PPE, masks, plexi-glass barriers and whether some employee’s job descriptions are such (or can be modified) so the employee can work from home.

Importantly, any policy for mandatory vaccination should show that it is considered, flexible, and predicated upon ensuring a safe workplace for all.

A recent decision by an Arbitrator regarding a nursing home (healthcare environment) workplace with unionized workers provides some insight into the considerations employed in the enforcement of a similar policy.

In *Christian Labour Association of Canada v. Caressant Care Nursing & Retirement Homes*⁵, an Ontario Arbitrator dismissed a grievance challenging the reasonableness of a unilaterally imposed policy implementing mandatory COVID-19 testing.

The union tendered evidence that the employer’s policy was overbroad and argued the testing was only reasonable in

³ IBID.

⁴ [Ontario Canada Post facility with massive COVID-19 outbreak will now conduct mandatory testing | CTV News](#)

⁵ *Caressant Care Nursing & Retirement Homes and Christian Labour Association of Canada*, COVID Testing Grievance, Arbitrator Dana Randall, December 9, 2020, Barrie Ontario

circumstances where an employee is symptomatic. I note that this position did not address the employees who may be COVID-19 positive, but asymptomatic.

The employer tendered evidence that the testing was an “important tool” recognized by both medical professionals and the Ministry in controlling and tracking outbreaks. The employer allowed throat swabs instead of nose swabs when requested for medical reasons, and compensated the employees for the time taken to undergo testing conducted by third parties.

“Controlling COVID infection is not the same as monitoring the workplace for intoxicants”

Arbitrator Dana Randall held that the rationale found in drug & testing cases, relied upon by the union, was a “reasonable starting point for the analysis” because the appropriate analysis requires “weighing the privacy breach against the goals of the policy”. However, Arbitrator Randall concluded, “controlling COVID infection is not the same as *monitoring* the workplace for intoxicants...”⁶

In the nursing home workplace, the intrusiveness of the test was found to be reasonable when compared to the goal which was to prevent the spread of COVID-19. Essentially, the legal determination will require a balance of the intrusion on the employee’s privacy and breach of dignity

against the control of a highly infectious and potentially deadly disease.

Therefore, in support of the CVP, the employer must conduct a workplace assessment. This assessment is factual, and should also take into consideration the scientific findings and explanations regarding the protections the vaccines can or may deliver in the workplace.

We do know that vaccination combats the spread of the virus; a factor which led Arbitrator Randall to conclude: “What is known is that it is highly infectious and often deadly for the elderly, especially those who live in contained environments.” Like testing, vaccination is of limited value to the individual employee who is vaccinated, but it is of high value to the employer who is responsible for all workers, the workplace and customers.

In summary, record the workplace assessment and consult an expert for advice where necessary. This record of workplace consideration in light of applicable science will also assist in the defence of the CVP.

If an employer requires an employee to be vaccinated, and is subsequently sued or faces a human rights or labour board complaint, how can one limit or avoid damages?

⁶ Emphasis added

3. Occupational Health and Safety Considerations

When performing the workplace assessment to form the basis of the CVP, an employer should consider its occupational health and safety obligations: generally, the Ontario *Occupational Health and Safety Act* (OHSA) and its regulations requires employers to take every precaution reasonable in the circumstances for the protection of a worker's health and safety.⁷

Under this legislation, employers should consider whether all (or some) employees should be vaccinated to make the workplace safe. Employers should assess functions carried out by their workforce to ensure they take action to protect against the hazards presented by exposure to COVID-19. For example, equipment operators, material handlers, office staff, distribution or operations managers, and other warehouse sector employees participate in the nature of work that requires interaction with co-workers, customers and work surfaces.

These interactions, as well as the need to touch surfaces, could increase the likelihood the employees or customers could come into contact with the virus. Some employees though, may be exempt from this nature of work. Therefore, the workplace assessment is very important to ensure that the foundation for the CVP not only takes into account the functions carried out by the workforce, but it is flexible enough to reflect

the different roles employed by various workers.

Employers will have to contend with opposition, however; until we know whether vaccination reduces risk of transmission to others, there is scope for employees to argue they do not wish to undergo the risk of vaccination, particularly since there is no accepted proof their undertaking of this risk will protect others.

This argument, however, does not address the fact that a person who is vaccinated likely has less risk of serious illness due to COVID-19. After a 2-week period during which a person is recognized as potentially being a contagious virus host, the likelihood of transmission by a vaccinated person will decrease until the risk is eliminated.

When it is proven that vaccination does inhibit the ability to spread the vaccine, then the unvaccinated would be proven to represent the risk of contagion. Not only do the unvaccinated take on the risk to themselves, but they pose a risk to the five persons who are vaccinated, but who are still potentially susceptible to COVID-19.

4. Human Rights Considerations

Employers who implement a mandatory CVP must anticipate that some employees may present a medical or other (protected) reason to avoid vaccination. With a mandatory CVP, the employer may lay off

⁷<https://www.wsps.ca/WSPS/media/Site/Resources/Downloads/covid-19-warehouses-health-and-safety-guidance.pdf>

the non-vaccinated employee or terminate their employment if a worker's continued refusal to be vaccinated leads to the worker frustrating the employment contract -- particularly where a work from home option is unavailable for that position.

In the event the employee claiming a medical reason is laid off or their employment is terminated, they may file a complaint with the Ontario Human Rights Tribunal.

The employee would allege their right to be accommodated under the Human Rights Code for their disability is violated by the employer which refused to accept their medical reason to avoid vaccination.

However, a claim alone is insufficient to win an award. The employee's claim would have to be supported by a physician who would testify regarding the reason to avoid vaccination *based upon scientific evidence*. (An employer who has already consulted an expert to ensure their CVP has a scientific basis will be able to show that it has obtained expert evidence supporting the mandatory vaccination policy in advance of the complaint which is credible and persuasive.) If the employee's scientific evidence supports a medical reason to avoid vaccination, then the employer could continue to require all employees to take precautions within the workplace, including requiring vaccinated employees to practice physical distancing (staying 2 metres away from others); minimizing contact with droplets of mucous or saliva; keeping hands, surfaces and objects clean, and preventing

contact with potentially infected people for an indefinite future.

However, if the employer is unable to enforce vaccinated employees to comply with COVID-19 related restrictions (where the vaccinated employees have taken the risk of being vaccinated to alleviate the requirements to take precautions indefinitely), the employer may be able to prove that it has accommodated the non-vaccinated employee to the point of undue hardship required by Ontario Human rights law.

Employees who chose not to vaccinate could counter the employer's undue hardship defence by arguing they do not need to attend at the workplace and, for example, explain they can perform their duties at home. However, this will have been addressed, in advance, with the workplace assessment on a position by position basis. With this evidence obtained in advance of the complaint, forming the basis for the CVP, the evidence of undue hardship for accommodation is credible and persuasive in favour of the employer.

5. Privacy & Constructive Dismissal Considerations

Implementation of the CVP contemplates requiring employees to report or prove their vaccination status, and perhaps changes their job descriptions. Either aspect can lead to a breach of privacy laws or constructive dismissal.

In advance of implementation, ensure the reporting requirements comply with privacy law obligations.

Further, evaluate whether the implementation of the CVP can result in a unilateral substantial change to a fundamental term of employment for if so, the affected employee may conclude they have been constructively dismissed.

An award of damages for constructive dismissal can include significant termination costs, depending upon whether an employee has an enforceable termination provision in their employment contract, or if not, whether the employee is entitled to reasonable notice at common law.

In anticipation of this issue, consider requesting and obtaining consent to the Mandatory CVP, or providing reasonable advance notice of the implementation date of the Policy, calculating roughly, one month per year of employment for the average employment term of the employees: for example, if the Policy is implemented for June 1, 2021 but not put into effect until January 1, 2022, then the employees (who do not consent) will have received 6 months notice. Whether this is sufficient notice would require a legal determination on an employee by employee basis; but as a guide, it indicates the benefit of a notice requirement for the implementation of a Policy intended to control a highly contagious and potentially deadly disease.

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