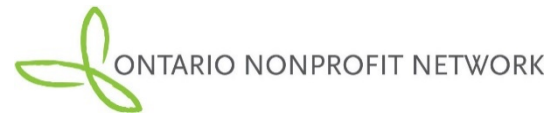




Ontario Nonprofit Network

What To Consider When Thinking About Your Vaccination Policy
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Presenters



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Overview

- Vaccination Policy issues: workplace health and safety: human rights: and privacy
- Given legal issues it is unlikely that employers will be able to make a COVID-19 vaccine mandatory as a condition of employment
- Employers may strongly recommend that their employees get vaccinated for COVID-19 to decrease the chance of the spread of the virus in the workplace



Overview

- A vaccination policy based on a fact-driven assessment, and backed by convincing evidence, of a need for the policy in the workplace is required
- Employers will need to continue to monitor government and public health directives to ensure their workplace is compliant with current COVID-19 response protocols



Does Your Organization Need A Vaccination Policy?

Pursuant to the *Occupational Health and Safety Act*, employers have a legal obligation to ensure the health and safety of the workplace and its employees.

COVID-19 experts say that vaccination is the most effective way to respond to the pandemic.



Implementing A Vaccination Policy Considerations

Employers who are considering implementing a COVID-19 vaccination policy should take the following steps prior to implementation:

- Consider whether a COVID-19 vaccination policy would be a reasonable measure in the particular workplace, or whether less intrusive alternatives would be appropriate
- Evaluate and weigh the evidence available regarding the health and safety risks posed by COVID-19 **against** employee human rights, and privacy interests

Implementing A Vaccination Policy

Considerations

- Determine how human rights accommodation requests will be addressed with respect to protected grounds of disability, sex/pregnancy, and/or creed
- Consider how employees' personal health information will be safeguarded and destroyed when it no longer needs to be retained by the employer
- The need to review the policy on an ongoing basis to determine that it continues to be reasonable in light of evolving public health guidance

Implementing A Vaccination Policy

Human Rights Considerations

Employers have to consider human rights prohibitions against discrimination on the basis of a protected ground of disability, sex/ pregnancy, and/or creed.

And to what extent they can accommodate employees who decline to be vaccinated for a reason related to a protected ground, under an employer's duty to accommodate to the point of "undue hardship".



Implementing A Vaccination Policy

Human Rights Considerations

Under Human Rights legislation, there are two ways in which a vaccine requirement can be challenged:

Medical Objection

- In the case of a medical objection, the employee would have to provide substantive, evidence from a doctor that COVID-19 vaccination is contra-indicated
- Medical exemptions may include allergies to vaccine components, a history of Guillain-Barré syndrome, or other health ailments that make the vaccine risky for the individual

Implementing A Vaccination Policy

Human Rights Considerations

Religious/Conscientious Objection

- In the case of a religious/conscientious objection, an employee has to provide a substantive, significant basis for their objection
- Ex. Vaccination undercuts their faith in God's ability to protect their body from harm
- Opposed to vaccines that were developed or tested using cells derived from the fetal tissue of elective abortions
- The number of people who could successfully petition for a religious exemption from a vaccine mandate is likely small

Accommodating Staff Who Choose Not To Be Vaccinated

Whether an employee can be accommodated in the workplace must be assessed on a case-by-case basis, having regard to the specific needs of the employee.

Depending on the nature of the workplace, reasonable accommodation might include: requiring the employee to wear personal protective equipment and to maintain physical distancing in the workplace; assigning the employee to work from home; or placing the employee on a temporary non-disciplinary unpaid leave of absence until it is safe to return to work.

Introducing A Vaccination Policy

- Employers considering introducing a vaccination policy should begin by:
 - performing a fact-based assessment of risks posed in the workplace and the extent to which vaccination can be used to mitigate them;
 - considering what alternatives to vaccinations can be offered, taking into account any possible accommodation-related obligations;
 - devising ways to properly communicate vaccination requirements in the workplace and the consequences for non-compliance; and,
 - planning how the policy will be consistently enforced

Contents of a Vaccination Policy

Include:

- A Policy Statement that the employer supports and recommends vaccination
- That the employer will follow Public Health guidelines
- A requirement that employees indicate that:
 - They have been vaccinated
 - Vaccination is medically contraindicated
 - Decline to be vaccinated
- Provide assurance that a privacy process is in place



Contents of a Vaccination Policy

Set out:

- That the employer will attempt to accommodate. **However**, this may require:
 - Wearing of PPE and distancing that may be different from vaccinated employees
 - Changes to working conditions, duties and responsibilities, including temporary unpaid layoff

Contents of a Vaccination Policy

COVID-19 Acknowledgement

- Sets out the three options
- Reiterate that without vaccination, employer will accommodate to extent possible
- For protection of other employees and visitors, may be necessary to disclose that an employee has not been vaccinated
- Employee acknowledges understanding that without vaccination, job duties, location may be changed to comply with Public Health directives including leave without pay
- May be required to follow protocols others may not be required to follow

Contents of a Vaccination Policy

COVID-19 Attestation

- That employee:
 - Will stay current with Public Health and government protocols
 - Will report if experiencing symptoms
 - Will follow the employer's COVID-19 requirements for working on-site, including PPE
- Acknowledgement that the employer reserves the right to require rapid testing

Training

Before implementing a vaccination policy, employers should introduce the policy to their employees and train them on the applicable requirements and on the disciplinary sanctions for non-compliance.

Failing to properly do so can open the door to serious legal risks, including the possibility of the policy being found to be unenforceable.



Training

To help ensure vaccination requirements are properly communicated to employees, employers may:

- provide mandatory virtual training and Q&A sessions
- provide employees with additional resources on vaccine information and vaccination hesitancy

Consistently enforcing the policy from the time it is introduced is important. Employers can work to achieve this by ensuring management, Human Resources and other responsible staff are committed to properly enforcing their vaccination policy.

Can Employers Require Masks And Distancing Indefinitely?

There is no legal necessity to lift mask and distancing policies at any specific time.

Currently, the requirement to wear a face covering is compliant with the advice on personal public health measures issued by the World Health Organization recommendations; Public Health Agency of Canada; and local Public Health and government protocols.



Can Employers Require Masks And Distancing Indefinitely?

In future, the question of whether to lift or modify existing mask and distancing policies will be a business decision for each employer, based on its assessment of its workplace and employee health and safety requirements.



Mandatory Regular Rapid-Testing

Employers can mandate that staff receive the rapid test as part of their job duties.

This requirement could be challenged if the individual employee objects to being tested on the basis that:

- They have a medical condition that precludes them from taking/receiving the test; and/or
- They object to taking/receiving the test on religious or conscientious grounds

Employers are required to accommodate valid medical contraindication and religious observances and practices, unless doing so imposes an undue hardship on the business.

Legal Issues

The issue of whether an employer can legally introduce a COVID-19 vaccination policy has yet to be addressed by a court or adjudicative body in Ontario.

However, arbitrators have considered the enforceability of mandatory testing and mask policies for unionized employees in the health and residential care sector.

In these cases, arbitrators have held that, for these policies to be enforceable, they must be:

- consistent with the employees' collective agreement (or employment agreement in the case of non-unionized employees);
- reasonable;
- clear and unequivocal;
- brought to the attention of the employees;
- clear that a breach may result in discipline (this fact must also be brought to the attention of the employees in advance); and
- enforced consistently by the employer following their introduction.

Case Law

In the 2020 arbitration case of *Caressant Care Nursing & Retirement Homes v Christian Labour Association of Canada*, the union filed a grievance challenging the reasonableness of a policy requiring all workers in a nursing and retirement home to be tested for COVID-19 every two weeks.

The arbitrator held that the employer's policy requiring compulsory testing was reasonable in the context of the vulnerability of the population in the home, the seriousness of a potential outbreak, and the public health and ministry guidelines.

Of note is that the policy also included accommodations and alternatives to testing.

The employer's decision to discipline an employee for failure to comply was upheld by the arbitrator.

Case Law

In the 2021 case of *EllisDon Construction Ltd. v. Labourers' International Union of North America, Local 183*, the Arbitrator upheld that the intrusiveness of an employer's compulsory Rapid COVID-19 Antigen Screening Program Policy as evaluated against the goal of preventing the spread of COVID-19, was reasonable.

As his analysis, the Arbitrator noted the following:

- The risk of COVID-19 spread was increased by the nature of the construction industry and employees could not maintain social distancing
- There was a tangible risk of COVID-19 spread, while the employer had numerous outbreaks on their sites, in addition to cases of apparent workplace transmission
- Measures were taken to protect the privacy and dignity of the individuals tested
- The screening test was minimally invasive
- There was no evidence that the mitigation efforts in place had “significantly reduced” transmissions, or that all workers where testing had been performed were working in an “open air” environment

Establishing a Safe Work Environment for Employees and Community Members

The best way to ensure a safe work environment is to implement/continue COVID-19 protocols to keep employees and community members safe.

For guidance on COVID-19 protocols, check your community's local public health unit's directives:

Resources

- [Toronto Public Health COVID-19 Guidance for Community Non-Profit Services](#)
- [Ottawa Public Health COVID-19 Information for Community Partners and Service Providers](#)
- [Ontario Nonprofit Network: COVID-19 Resources for Nonprofits](#)

Summary

Employers should consider introducing a vaccination policy.

However, given individual medical considerations and human rights protections, an employer cannot mandate that all employees be vaccinated.

A policy must comply with public health directives; be reasonable for the workplace and can recommend receiving the vaccine but must provide for accommodation of employees who legitimately do not want to, or cannot, receive a vaccine.

QUESTIONS

THANKS

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