

Can employers mandate vaccines? Answering the biggest COVID-19 employment and labour law questions

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This article was written by Shaun Parker of Osler, Hoskin & Harcourt LLP. The author would like to thank Adam Rempel, articling student, for his contributions to this article.

The end of the so-called “third wave” of the COVID-19 pandemic brought the long-simmering debate over how the economy would reopen back to the forefront. A central feature of this discourse was whether employees who had worked remotely, been furloughed, or had been laid off could or should physically return to their workplaces. These twin questions raise grave legal concerns including those related to workplace safety, employee privacy, vaccine mandates, and public health. To untangle this complex, controversial, and continually evolving issue, Lexpert asked Osler’s Shaun Parker, an employment and labour law partner, to demystify the uncertainties of returning to work and break down the practical steps employers can take to ensure that their workforce remains happy and healthy.

One of the major questions in employment law is whether or not employers can force their workers to get vaccinated. Are businesses permitted to mandate vaccinations? Are they legally allowed to ask their employees their vaccination status? What does Canadian law and jurisprudence say about balancing privacy concerns against the duty to provide a safe workplace? Are employers legally allowed to discriminate based on vaccination status?

Since August 2021, we have observed a culture shift in Canada. While employers were initially reticent to adopt mandatory vaccination policies, we have increasingly seen a number of major employers (including the federal government and provincial health authorities) mandate vaccinations for their employees, and we have seen private industry begin to follow suit.

The key considerations are as follows:

1. There is no law that expressly prohibits employers from mandating vaccinations or implementing a return-to-work plan linked to vaccination status.
2. If an employer implements a vaccination policy, the main legal risks it might face are through a challenge by way of human rights (discrimination) complaint or possibly a privacy-related complaint. In this regard:
 1. Human rights-related risks can be managed through a process that accommodates employees on the basis of a protected grounds (e.g., disability, religion, or other enumerated grounds) to the point of undue hardship.
 2. Privacy-related risks can be managed through a carefully designed process to address

the collection, use and disclosure of employee personal information in a privacy-compliant manner.

3. Employers with a unionized workforce may face additional challenges as unions have an ability to challenge policies as being an unreasonable exercise of management rights by way of a grievance arbitration process.
3. Regardless of the means by which a vaccination policy is challenged, in general the key consideration will be whether the employer has implemented a clear and reasonable policy. Canadian jurisprudence recognizes the inherent struggle in the balance between workplace safety and privacy and, in general, a “reasonable” policy will be one that goes no further than is reasonably necessary in the circumstances to achieve a bona fide workplace objective. What is “reasonable” will be highly fact dependent and depend on, among other things, medical guidance and the nature of the employer’s operations.
4. An employer is permitted to ask an employee their vaccination status. However, care ought to be taken to ensure that irrelevant personal information or health information is not captured, and that the employer has a plan for how such information will be collected and stored (if at all) and for securing such information.
5. Unless a human rights protected ground from discrimination is engaged, an employer is free to differentiate in its treatment of vaccinated and unvaccinated employees. However, employers ought to be aware that this could engage other legal considerations. This will be highly fact dependent, but, for example, constructive dismissal risks could arise depending on the nature of the employer’s policies and practices.

[Read more of Shaun and Adam’s discussion about vaccine mandates and workplace safety amid COVID-19 on the Lexpert website.](#)