

## Exemptions from mandatory COVID-19 vaccination policies: key considerations for hospitals and healthcare organizations

SEPTEMBER 28, 2021 5 MIN READ

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The Chief Medical Officer of Health's August 17, 2021 directive (Directive #6 under section 77.7 of the *Health Protection and Promotion Act*) (the Vaccine Directive) required hospitals and other healthcare organizations (Covered Organizations) to implement COVID-19 vaccination policies for their employees, staff, contractors, students and volunteers by September 7, 2021.<sup>[1]</sup> An earlier Osler Update provides [an overview of the Vaccine Directive](#).

Although the Vaccine Directive does not require mandatory vaccination, many Covered Organizations have implemented mandatory vaccination policies requiring all employees and professional staff to be vaccinated. Given the unique risks and obligations of Covered Organizations generally and during the COVID-19 pandemic in particular, these Covered Organizations have determined that mandatory vaccination is necessary to protect patients, staff and visitors, as well as to enable continued delivery of healthcare.

Exemptions from mandatory vaccination policies may be available based either on a protected ground under the Ontario *Human Rights Code* (the Code) or a documented medical reason. For the reasons outlined below, these exemptions — both human rights and medical exemptions — are likely to be limited, and certain steps should be taken by Covered Organizations when assessing exemption requests.

### Medical exemptions

Medical exemptions from COVID-19 vaccination will be rare. An individual must have a documented legitimate medical condition that warrants an exemption from receiving a COVID-19 vaccine. The College of Physicians and Surgeons of Ontario (CPSO) has published guidance stating that there are very few and rare medical reasons not to get vaccinated against COVID-19, including

- allergist- or immunologist-confirmed severe allergy or anaphylactic reaction to a previous dose of a COVID-19 vaccine or to any of its components
- a diagnosis of myocarditis (inflammation of the heart muscle) and pericarditis (inflammation of the sac around the heart) after receiving an mRNA vaccine

The CPSO has also stated that the circumstances of the pandemic support physicians declining to provide documentation for an exemption where a patient requesting the exemption does not have a medical reason for an exemption.<sup>[2]</sup> Covered Organizations should carefully assess all medical exemption requests and require supporting documentation for any exemption request. Given the rarity of medical conditions warranting exemption from COVID-19 vaccination, Covered Organizations may require that medical

exemption requests be supported with documentation from a specialist physician. Additionally, when granting medical exemptions, Covered Organizations should consider whether those exemptions are time-limited or permanent.

## Human rights exemptions

An exemption from receiving a COVID-19 vaccine may be available where an individual cannot be vaccinated based on a ground protected under the Code.<sup>[3]</sup>

Most requests for human rights-based exemptions from mandatory vaccination will be based on creed. Under the Code, creed can include religious beliefs and non-religious belief systems that resemble religion. Among other things, an individual's claimed creed must have a connection to an organization or community that professes a shared system of belief. To support an exemption based on creed, an individual must provide objective evidence that their claimed creed/religion prohibits vaccination against COVID-19. Many religious leaders and authorities have publicly and repeatedly urged vaccination against COVID-19. Additionally, personal preference or philosophical objection to vaccination will not support an exemption. In its [September 22, 2021 Policy Statement](#), the Ontario Human Rights Commission stated that "while the Code prohibits discrimination based on creed, personal preferences or singular beliefs do not amount to a creed for the purposes of the Code."

## The duty to accommodate

Even if an individual establishes a Code-based reason for an exemption from mandatory vaccination, a Covered Organization may not be able to accommodate the individual's request for an exemption without undue hardship. In general, Covered Organizations are higher-risk settings and provide care to vulnerable populations, and vaccination is a critical measure to mitigate transmission of COVID-19 and enable continued delivery of healthcare services.

The duty to accommodate in the context of mandatory vaccination policies has yet to be considered by the Ontario Human Rights Tribunal and courts. However, the Ontario Human Rights Commission has stated that the duty to accommodate can be limited if it would significantly compromise health and safety amounting to undue hardship, such as during a pandemic. The unprecedented nature of the COVID-19 pandemic and the singular importance of healthcare organizations to the public health response will certainly be key to any assessment of Covered Organizations' duty to accommodate exemptions from mandatory vaccination.

Hospitals and healthcare organizations should also find comfort in a recent Ontario decision related to visitor access during the ongoing COVID-19 pandemic, which we discussed in a [previous Update](#). The Court recognized that hospitals have "enormous expertise and specialized knowledge" in exercising their discretion during a pandemic.<sup>[4]</sup>

When considering whether a legitimate human rights exemption request can be accommodated, Covered Organizations should

- carefully consider whether the applicant could be accommodated short of undue hardship. Requests need to be addressed and any supporting documentation should be evaluated. This process should be documented to protect against future scrutiny.<sup>[5]</sup>
- be prepared to show that accommodating an exemption request would cause undue hardship. Both the magnitude of the risk and the identity of those who bear it (e.g., for

vulnerable patients) are relevant to determining undue hardship.

Our Osler Health Advocacy Team is available to advise on mandatory vaccination policies, assess and respond to exemption requests, and manage any related disputes. For further information, please contact Paula Trattner or Aislinn Reid.

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[1] Chief Medical Officer of Health, Directive #6 for COVID-19 Vaccination Policy in Health Settings (August 17, 2021), Ontario Ministry of Health. See also the accompanying Resource Guide.

[2] On September 27, 2021, the CPSO Inquiries, Complaints and Reports Committee imposed practice restrictions on a physician which, among other things, prohibit him from providing medical exemptions in relation to COVID-19 vaccines and face masks. The doctor has also been referred to discipline for, among other things, allegedly engaging in unprofessional conduct and failing to maintain the standard of practice in relation to his communications, including on social media and other digital platforms, regarding the COVID-19 pandemic and related issues. Our earlier Osler Update outlines risks and considerations of public commentary by physicians during the COVID-19 pandemic.

[3] Protected grounds under the Code include race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability.

[4] *Sprague v. Her Majesty the Queen in right of Ontario*, 2020 ONSC 2335.

[5] *Kittmer v. Shepherd Gourmet Dairy (Ontario) Inc.*, 2019 HRTO 1445, at paras 67, 84.