

Ontario COVID-19 vaccination policy update for high risk settings: Key considerations for hospitals and healthcare organizations

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This communication was updated on August 25 to include a link to a Resource Guide the Ministry of Health has published in support of the Vaccine Directive.

On August 17, 2021, the Chief Medical Officer of Health issued a directive pursuant to section 77.7 of the *Health Protection and Promotion Act* (the Vaccine Directive). The Vaccine Directive makes it mandatory for hospitals and “Covered Organizations”, including, among others, home and community care service providers[1] to have a vaccination policy in effect for their employees, staff, contractors, students and volunteers, effective no later than September 7, 2021.[2]

The Vaccine Directive requires that the vaccine policies adopted require, at a minimum, individuals to provide proof of full vaccination, a medical reason for not being vaccinated, or completion of a vaccination education session[3]. The Vaccine Directive does not mandate that healthcare workers must be vaccinated in order to attend the premises absent a medical reason, but instead requires that unvaccinated individuals undertake antigen testing, no less than once every seven days.[4]

The Vaccine Directive is similar to the directive issued pursuant to section 174.1 of the *Long-Term Care Homes Act* on July 1, 2021.[5] Organizations subject to the Vaccine Directive also will be required to disclose statistical information to the Ministry of Health regarding the implementation of their vaccination policies.

The Ministry of Health subsequently published a Resource Guide in connection with the Vaccine Directive, which includes guidance for Covered Organizations implementing vaccines policies, including sample key messaging, an example policy and responses to frequently asked questions.[6]

When updating or adopting new vaccination policies to ensure they reflect no less than the minimum requirements of the Vaccine Directive, and considering whether it is necessary to introduce measures that go beyond the Vaccine Directive, healthcare employers, their boards of directors and officers should be aware of certain specific common law, contractual and statutory obligations described below, and give appropriate consideration to all of the applicable issues. When considering what is reasonable under the circumstances, employers should take into account the relative risks of implementing vaccination policies, the impact of their decision on key impacted stakeholders, then-current COVID-19 circumstances, and the measures and policies adopted by other employers and healthcare organizations.

The Ontario Medical Association, the Registered Nurses' Association of Ontario, and SEIU

Healthcare have all publicly announced their support of making COVID-19 vaccination mandatory for the province's health-care workers[7].

In the past, some unions representing healthcare workers have successfully challenged mandatory flu shots as an unreasonable exercise of management rights. However, given the scope of the risk arising from COVID-19 and the various states of emergency and other legislative measures implemented in response to the pandemic, we believe that the analysis that applied in these previous contexts may not be applicable when assessing whether a mandatory vaccination policy in regards to COVID-19 is reasonable and enforceable. We further note that some unions have asked that employers collect COVID-19 vaccine data from employees and have even supported the idea of mandatory vaccination policies.

OHSA obligations

Under the *Occupational Health and Safety Act* [8] (OHSA), boards of directors are required to ensure that employers comply with their general duty to take "every precaution reasonable in the circumstances" for the protection of a worker.[9] OHSA expressly includes provisions that "prevail" over any general or special act in Ontario, and the Vaccine Directive specifically references that organizations are required to comply with OHSA and its regulations.[10]

In addition, the Health Care and Residential Facilities Regulation to OHSA[11] sets out a specific statutory requirement for employers to develop, establish and put into effect measures and procedures for the health and safety of workers, and specifically contemplates the measures and procedures that an employer may reduce to writing include the immunization and inoculation against infectious diseases.[12] There is an ongoing requirement to review and revise these measures and policies,[13] reiterating the importance of healthcare organizations remaining vigilant and reacting to quickly changing circumstances.

With the above context, the determination of what is "reasonable in the circumstances" is not a static decision, but must be continually assessed in consultation with the employer's internal and external stakeholders taking into account all relevant information at the particular time.

PHA obligations applicable to hospitals

There are additional specific considerations applicable to public hospitals, including that under the Hospital Management Regulation[14] of the *Public Hospitals Act* [15] (PHA), the board of directors of every public hospital in Ontario must ensure that management develops plans to deal with emergency situations that could place a greater than normal demand on the services provided by the hospital or disrupt the normal hospital routine (i.e., COVID-19), and the failure to provide services who ordinarily provides services in the hospital.[16]

As a result, boards of directors and management of a hospital will need to weigh and consider various matters in connection with ensuring that the hospital is able to continue operations. These considerations may include evaluating whether requiring that all staff be vaccinated in order to attend the workplace (with limited exceptions to address human rights concerns) could have a negative effect on retention or moral versus whether an outbreak caused or exacerbated by unvaccinated staff could lead to a shortage of staff available to provide services in the hospital. These considerations will differ based on the size of the hospital and its community.

Elevated duty of care: precautionary principle

Following the SARS outbreak, the SARS Commission's Final Report established that hospitals are expected to exercise an elevated duty of care in accordance with the "precautionary principle," meaning that scientific proof of a particular risk is not required before taking precautionary measures against that potential risk.^[17] The precautionary principle remains relevant and applicable as a guiding principle when considering the content of a vaccination policy.

Hospitals have a private duty of care

As discussed in our previous [Osler Update Lessons learned from SARS – A guide for hospitals and employers](#), litigation arising from the 2003 SARS outbreak (collectively, the SARS Litigation)^[18] demonstrated that it is hospitals and employers, and not the government, that have a private duty of care to both patients and their staff. As part of the SARS Litigation, the court also pointed out that healthcare facilities and professionals are liable for "negligence at the operational level".

In an effort to insulate parties from liability associated with COVID-19 when using good faith efforts to comply with public health guidance, Ontario enacted the *Supporting Ontario's Recovery Act (SORA)*.^[19] However, the protection from liability provided by SORA does not apply to "[a] cause of action of an individual in respect of an actual or potential exposure to or infection with coronavirus (COVID-19) that occurred in the course, or as a result, of employment with a person or in the performance of work for or supply of services to a person".^[20] This limitation is consistent with the principles of OHSA, establishing the protection of workers from harm as a paramount obligation of the employer, the board of directors, and officers when determining vaccination policies.

These considerations are particularly relevant given that the SARS Litigation highlighted that hospitals and health care sector institutions (and potentially their officers, directors, supervisors or other personnel) may be legally liable for failures to protect patients and staff from harm, even when having relied on federal, provincial or municipal government directives and guidance.^[21]

In light of the foregoing, in formulating a decision with respect to specific details, measures and procedures to be included in any vaccination policy, healthcare organizations and boards of directors should carefully review their obligations at law, while being cognizant of their private duty of care. Boards of directors should also exercise their judgment in approving the organization's vaccination policy on an informed and independent basis, after reasonable investigation and analysis of the situation, and with a reasonable basis for believing that their actions are in the best interests of the organization.

[1] "Covered Organizations" include public hospitals within the meaning of the *Public Hospitals Act*, service providers within the meaning of the *Home and Community Care Act*, with respect to their provision of community services to which the act applies, Local Health Integration Networks within the meaning of the *Local Health System Integration Act*, operating as Home and Community Care Support Services with respect to the provision of community services and long-term care home placements services, and Ambulance Services within the

meaning of the *Ambulance Act*, with respect to paramedics.

[2] Chief Medical Officer of Health, Directive #6 for COVID-19 Vaccination Policy in Health Setting (August 17, 2021), Ontario Ministry of Health, available [here](#) [PDF] [Directive]; Ontario Newsroom, "Ontario Makes COVID-19 Vaccination Policies Mandatory for High-Risk Settings" (August 17, 2021), Government of Ontario, available [here](#).

[3] The approved educational session referred to above must, at a minimum address: how COVID-19 vaccines work; vaccine safety related to the development of the COVID-19 vaccines; the benefits of vaccination against COVID-19; risks of not being vaccinated against COVID-19; and possible side effects of COVID-19 vaccination.

[4] The province of Ontario's guidance on antigen screening programs states that: "Rapid antigen tests are less sensitive and specific than lab-based PCR tests, so results are not as accurate... Results should therefore be interpreted with caution and employees should be reminded of the possibility that the test result may be inaccurate." Positive results on an antigen tests should be interpreted as a preliminary positive result that must be confirmed by a lab-based PCR test as soon as possible.

[5] Minister of Long-Term Care, "Minister's Directive: Long-term care home COVID-19 immunization policy" (July 1, 2021), Ontario Government, available: <https://www.ontario.ca/page/ministers-directive-long-term-care-home-covid-19-immunization-policy>.

[6] Ministry of Health, "Resource Guide: Chief Medical Officer of Health's Directive #6 for Public Hospitals within the meaning of the Public Hospitals Act, 1990 , Service Providers in accordance with the Home Care and Community Services Act, 1994, Local Health Integration Networks within the meaning of the Local Health System Integration Act, 2006 operating as Home and Community Care Support Services (providing community services and long-term care home placement services), and Ambulance Services paramedics within the meaning of the Ambulance Act, 1990 (collectively the "Covered Organizations")" (August 18, 2021), Government of Ontario, available: https://www.health.gov.on.ca/en/pro/programs/publichealth/coronavirus/docs/vdirectives/directive_6_policy_resource.pdf.

[7] Registered Nurses' Association of Ontario, "Open Letter to Ontario's Premier Hon. Doug Ford" (July 20, 2021), available: https://rnao.ca/sites/default/files/2021-07/RNAO%27s_Open_Letter_to_Premier_Hon._Doug_Ford_re_Mandatory_Vaccination_for_HCW_July_20%2C_2021.pdf [PDF]; McKenzie-Sutter, Holly, "Ontario health worker groups want mandatory COVID shots for health-care workers" (July 16, 2021), available: <https://www.thestar.com/news/gta/2021/07/16/ontario-health-worker-groups-want-mandatory-covid-shots-for-health-care-workers.html>; "SEIU Healthcare Supports Mandatory Vaccinations" (August 19, 2021), available: <https://www.newswire.ca/news-releases/seiu-healthcare-supports-mandatory-vaccinations-818331687.html>.

[8] RSO 1990 c O1. [OHSA]

[9] OHSA at section 25(2)(h).

[10] OHSA at section 2(2); Directive.

[11] O. Reg 67/93 Health Care and Residential Facilities. [OHSA Reg]

[12] OHSA Reg at section 9(1)(5).

[13] OHSA Reg at section 9(4).

[14] RRO 1990, Reg 965: Hospital Management. [Hospital Management Reg]

[15] RSO 1990, c P 40. [PHA]

[16] Hospital Management Reg at section 2(3)(e).

[17] 2003-2007 Commission to Investigate the Introduction and Spread of SARS in Ontario, "The SARS Commission, Final Report" (December 2006), available: http://www.archives.gov.on.ca/en/e_records/sars/report/index.html. [SARS Commission Report] As Honourable Mr. Justice Archie Campbell stated in the SARS Commission Report, "[t]he point is not science, but safety ... We should be driven by the precautionary principle that reasonable steps to reduce risk should not await scientific certainty."

[18] *Williams v. Canada* (Attorney General), 2005 CarswellOnt 3785 (ONSC) [Williams 1]; *Jamal Estate v Scarborough Hospital – Grace Division*, [2005] OJ No 3506 (ONSC); *Henry Estate (Trustee of) v Scarborough Hospital*, 2005 CarswellOnt 3758 (ONSC); *Abarquez v Ontario*, 2005 CarswellOnt 3782 (ONSC); *Laroza v Ontario*, 2005 CarswellOnt 3784 (ONSC).

[19] *Supporting Ontario's Recovery Act*, 2020, S.O. 2020, c. 26, Sched. 1. [SORA]

[20] SORA at section 4(2) para 3.

[21] Ministry of Health, "COVID-19: Guidance for Prioritizing Health Care Workers for COVID-19 Vaccination" (March 17, 2021), Government of Ontario, available: https://www.health.gov.on.ca/en/pro/programs/publichealth/coronavirus/docs/Guidance_for_Prioritizing_HCW_covid19_vaccination_2020-01-08.pdf [PDF]. [Ontario COVID-19 HCW Vaccination Guidance]