

Can the Construction Industry Require Mandatory Vaccination of Workers Against COVID-19?

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In the coming months, Canadians will have an opportunity to be vaccinated against COVID-19. Health Canada has approved two COVID-19 vaccines as of the date of this article, and more are expected to be approved in the coming weeks. The federal government has set a goal of ensuring that all Canadians who wish to be vaccinated can receive their vaccine before September of 2021.

For many employers, the rollout of COVID-19 vaccines promises a return to some semblance of normalcy in the workplace, including a resumption of in-person operations. The availability of vaccines, however, raises important questions about the legality of workplace vaccination policies, including (among others):

- What happens if an employee chooses not to be vaccinated against COVID-19?
- Can an employer require that an employee be vaccinated?
- What steps can an employer take if an employee chooses not to be vaccinated, or refuses to disclose whether they have been vaccinated?
- Can a construction site be for vaccinated persons only?

The construction industry presents unique challenges for COVID-19 vaccination policies and pandemic-related health and safety matters. These challenges arise primarily from the involvement of multiple employers being present at any given construction project with overlapping responsibilities relating to occupational health and safety. To the extent that project owners, constructors or employers adopt differing policies with respect to the vaccination of workers against COVID-19, questions will arise as to whose vaccination policy will govern.

The multi-party reality of a typical construction site is that construction industry participants are at increased risk of transmission of the COVID-19 virus, since sites often require workers to be in close proximity while performing work. There is an obvious incentive for owner, contractor and subcontractor corporations to insist on vaccinations for their employees, namely that COVID-19 puts the organization's workers at a huge health risk, which in turn impacts the organization's ability to perform work in a timely and organized manner. Whether mandatory vaccination will be a defensible policy, however, is something that many employers are still seeking to understand.

In this article, we will review the current state of the law in Canada relating to vaccination policies, the challenges associated with vaccination policies in the construction industry, and best practices for constructors and employers to consider before implementing a mandatory vaccination policy.

Mandatory Vaccination Policies in Canada

Mandatory vaccination in the workplace is not a new concept in Canada. Some provinces, including Ontario, have enacted legislation requiring workers such as paramedics and employees in long-term care homes to be vaccinated against certain diseases. The permissibility of these statutory vaccination requirements arises from the nature of each workplace and the increased risk of disease transmission to vulnerable individuals. To date, neither the federal government nor any provincial or territorial government in Canada has published any guidance on whether the COVID-19 vaccine will be added to the list of required immunizations for high-risk workers. Several provincial health ministries, however, including the Ontario Ministry of Health, have indicated that vaccinations will be voluntary, including for healthcare workers.

Apart from the statutory vaccination obligations described above, the issue of mandatory vaccination has been the subject of frequent litigation in the context of unions and seasonal flu vaccines. Labour arbitrators have repeatedly held that although mandatory vaccination policies for unionized workers are an "intrusive measure," some employers operating in high-risk settings, such as healthcare and residential care settings may be able to impose such measures provided that the underlying vaccination policy is:

- consistent with the applicable collective agreement;
- reasonable in the circumstances;
- clear and unequivocal;
- brought to the attention of affected employees before the employer can act on it; and
- consistently enforced by the employer from the time it is introduced.

In unionized environments, workplace policies requiring that all employees be vaccinated against the flu (or else lose their jobs) have generally been found to be an unreasonable exercise of management rights. For government employers, such policies have been found to be contrary to the *Canadian Charter of Rights and Freedoms*. By contrast, vaccination policies that provide a reasonable, non-disciplinary alternative to vaccination, such as permitting unvaccinated employees to wear a mask in the workplace, have typically been found to be both reasonable and compliant with *Charter* rights.

Although previous arbitral decisions relating to flu vaccination policies provide guidance to employers developing COVID-19 vaccination policies, flu vaccination policies are distinguishable from prospective COVID-19 policies for two primary reasons:

- preliminary medical evidence suggests that the COVID-19 vaccine is far more effective at preventing severe outcomes from COVID-19 than the seasonal flu shot is at preventing seasonal influenza; and
- statistically, COVID-19 carries a significantly higher risk of death than the flu.

These important distinctions suggest that the precedent set in flu vaccination policy cases may not actually

be applicable in the context of COVID-19 vaccination policies. Given the clear distinction, one expects that employers operating in high-risk workplaces will be afforded more leeway in implementing mandatory COVID-19 vaccination policies as compared to mandatory flu vaccination policies.

There is little guidance from prior case law on the implications of mandatory vaccination policies in non-union environments. Absent legislation requiring employees in certain industries to be vaccinated, a mandatory vaccination policy in a non-union workplace could be challenged on the basis that it amounts to a unilateral change to a fundamental term of the contract of employment, which could trigger a claim for constructive dismissal. Any termination decisions resulting from an employee's refusal to be vaccinated, or to disclose whether they have been vaccinated, could result in wrongful dismissal claims. We expect to see an increase in civil litigation around these issues in the coming months, as well as an increasing number of human rights applications alleging that mandatory vaccination policies are discriminatory.

To withstand scrutiny, any workplace vaccination policy, including a policy adopted by a construction industry participant, must be connected to the employer's legitimate business interests, including an employer's interest in maintaining a safe workplace. Whether a workplace vaccination policy is reasonable will depend on several factors, including expert medical evidence about the vaccine's effectiveness in reducing the risk of transmission to others, and the nature of the employer's operations.

Health and Safety Obligations on Construction Sites

In Ontario, both "constructors" and employers have a duty under the *Occupational Health and Safety Act* (OHSA) to protect workers from workplace hazards and dangers. In other words: overall responsibility for job site safety is statutorily assigned to the constructor of the project. Many standard construction contracts will further enforce prime contractors' obligations as the party/ies responsible for site safety.

A constructor or prime contractor must ensure that all employers and workers on a project comply with the OHSA and its regulations, as well as any policies that the constructor wishes to adopt to ensure worker safety in the context of the COVID-19 pandemic. With the coming flood of anticipated COVID-19 vaccination policies, challenges may arise for constructors if the various parties involved in a construction project adopt contradictory corporate policies about COVID-19 vaccination. Such contradictions could create tension, since a constructor may be required to ensure that its own COVID-19 health and safety policies, including any policies mandating vaccination of workers, are at least as stringent as those imposed by the owner of the site. Moreover, absent legislation mandating that workers be vaccinated against COVID-19 (and to date, no government in Canada has indicated that it intends to enact any such legislation), it will be very difficult for any employer on a construction site to compel employees to produce evidence of their vaccination status due to privacy concerns around the disclosure of personal health information.

A practical approach for projects in early development stages could be to try to use the procurement

process to require companies to provide evidence that they have implemented:

- vaccination policies requiring all onsite workers to be vaccinated, apart from those who cannot be vaccinated for substantiated reasons relating to protected grounds of discrimination; and
- alternative safety precautions for onsite workers who are unable to be vaccinated for reasons relating to protected grounds of discrimination.

While such policies might carry a risk of reduced bids/proposals from companies unwilling or unable to introduce such policies, owners and constructors may well feel that they are creating a safer workplace and insulating the project from significant productivity loss that would otherwise result from a COVID-19 outbreak onsite. Enforcement of such policies would, for all of the reasons already stated, of course be challenging.

Without intending to diminish the fact that the health and safety of workers is of paramount concern, organizations should also consider that even non-fatal cases of COVID-19 – or even just the proliferation of cases in the community – have significant negative financial ramifications for all parties involved in a project. If vaccination-related procurement policies become commonplace in the industry, construction industry participants could be incentivized to introduce mandatory vaccination policies in their organizations to ensure that they remain competitive.

COVID-19 Vaccination Policies in the Construction Industry: Best Practices

Before implementing a COVID-19 vaccination policy, employers and constructors should consider the following:

1. **Nature of Employer's Operations and Construction Site.** In determining whether to implement a COVID-19 vaccination policy, employers and constructors must weigh the risks posed by the nature of the typical worksite that they are involved in and the extent to which vaccination can mitigate those risks. A mandatory COVID-19 vaccination policy is more likely to be deemed reasonable for participants who can justify that they are commonly involved in high-risk construction projects (including those in or near hospitals, residential care facilities, and other sites where there are congregated or vulnerable populations) than others that are lower-risk (such as a construction project that is entirely outdoors and where physical distancing can be maintained). Since many participants are involved in multiple worksites over the course of the year, most organizations that aren't solely engaged in outdoor work should be able to justify that there is a high probability of high-risk projects in the organization's future.
2. **Reasonable Alternatives.** As noted above, blanket policies requiring that all workers be vaccinated have generally been deemed unreasonable in the unionized context and may trigger constructive

dismissal concerns in non-unionized workplaces. Given the invasive nature of vaccinations, an employer should consider including non-disciplinary alternatives to vaccination in their policy, such as requiring unvaccinated employees to perform modified duties in an area of the worksite where physical distancing can be maintained, wear a mask, and/or undergo regular COVID-19 tests.

Whether a proposed alternative to vaccination is reasonable and protects the health and safety of workers will depend on the nature of the worksite and the worker's duties. Masking may suffice for an office worker who is able to maintain a two-metre physical distance from other workers in the workplace, but it would likely be inadequate for an on-site worker who is frequently in close physical contact with other workers while performing their duties. It is worth noting that as the new variants of the COVID-19 virus proliferate, the acceptability of even masked close-contact may also be reconsidered.

3. **Human Rights Considerations.** Any COVID-19 vaccination policy would be subject to the duty to provide reasonable accommodation to employees who are unable or unwilling to be vaccinated for reasons relating to protected grounds of discrimination, such as disability or religion. Reasonable accommodation options at a construction site could include requiring an unvaccinated employee to wear personal protective equipment, start and end their shifts later or earlier than other workers to minimize close-contact interactions, or take leaves of absence or be temporarily reassigned to an in-office role during outbreaks of the virus.

In the unionized context, both unions and employers will also need to consider how a mandatory vaccination policy would apply to employees hired from union halls. Union hall provisions in existing collective agreements would not expressly permit a union to select employees from the hiring hall based on their health status (let alone their vaccination status), nor would they permit an employer to stipulate that any dispatched employees must be vaccinated against COVID-19. An employer's refusal to hire, or decision to layoff, an employee from the union hall on the grounds that the employee has not been vaccinated against COVID-19 could lead to grievances and allegations that such practices are discriminatory.

4. **Privacy.** Constructors and employers that intend to ask employees to disclose whether they have been vaccinated, provide proof of vaccination, and/or disclose any health reasons for not receiving the COVID-19 vaccine should consider the applicable privacy law implications, as vaccination status would be considered "personal information" within the meaning of provincial and federal privacy legislation. Privacy laws in Canada governing the collection, use and disclosure of personal information (including health information) vary by jurisdiction, and employers should seek the advice of legal counsel before requiring employees to produce such information.
5. **Disciplinary Action.** When developing a COVID-19 vaccination policy, an employer must consider the disciplinary measures, if any, it will impose for an employee's failure to comply with the policy. It is very unlikely that an employer will be able to dismiss an employee for cause if they refuse to receive the vaccine or disclose whether they have received the vaccine. An employer may be able to dismiss an employee who refuses to be vaccinated without cause (with some risk), but not if the

employee's refusal to be vaccinated relates to a ground protected under human rights legislation. In cases where the vaccine is contraindicated due to the employee's health condition or religious belief, an employer will not be able to impose disciplinary action for a refusal to be vaccinated.

6. **Notice to Employees and Enforcement.** Employers must bring to the attention of employees any disciplinary action that will be imposed for non-compliance before any COVID-19 vaccination policy is in effect. Providing mandatory training to employees on the content of the policy before the policy takes effect is a useful strategy for ensuring vaccination requirements are properly communicated to affected employees. Such training may also provide an opportunity to share information and resources (based on publications from public health authorities) on the effectiveness and lack of side effects of the COVID-19 vaccine as well as the risk of workplace transmission, with a view to educating employees on the benefits of receiving the vaccine. It is equally important for employers to develop policies and procedures to enforce their vaccination policy from the time it is in effect.

Looking Ahead

The COVID-19 pandemic has created immense challenges for employers in virtually every industry. The construction industry is no exception. The long-awaited rollout of COVID-19 vaccines appears to promise a return to significantly safer worksites and fewer disruptions, but is not without its challenges. Although employers have a duty to take all reasonable steps to ensure the health and safety of workers, they must also be prepared for the reality that not all employees will be willing or able to receive a vaccine for justifiable reasons related to protected grounds of discrimination. Accordingly, before establishing a mandatory COVID-19 vaccination policy, construction industry employers should be prepared to defend the reasonableness of such a policy, possibly by reference to expert medical evidence on the risk of transmission at their worksites. Employers should further consider acceptable alternatives to vaccination policies that protect worker safety and incorporate such alternatives into their policy.

As provinces and territories in Canada develop plans to perform mass vaccinations over the coming year, we anticipate that governments, workers' compensation boards and human rights commissions across Canada will issue further information and guidance to assist employers in developing and implementing vaccination policies. The Cassels Construction and Employment & Labour Groups are continuing to monitor developments in this area and will provide updates as they become available.