



# Vaccinations and Employer Obligations:

What you need to know about the COVID-19 vaccine and employees returning to work

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# TOPICS

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# The Current State

- Re-opening happening in three stages, we are now in Stage 3 – expanded indoor services with larger number of capacity allowances
- To-date, roughly 81% of Ontarians are double-vaccinated, about 5% single dose and remainder have not received any vaccination
- Ontario has introduced a proof of vaccination requirement which limits access to certain businesses for those who are not fully vaccinated.
- Prospective Delta variant related lock-down concerns

**Question: What are the Employer's  
health and safety obligations to Address COVID-19 in the  
workplace?**



## ***Occupational Health and Safety Act (“OHSA”)***

### **Employer Duties:**

- Employers must take every precaution reasonable in the circumstances for worker health and safety
- Employers must conduct a risk assessment: when and how to re-open
- Develop workplace health and safety procedures and policies
- Employers must provide protective equipment (PPE) as necessary
- Monitor employee compliance with health and safety procedures
- Provide training and instruction to employees on how to work safely
- Inform employees about known hazards in the workplace

## ***OHSA***

### **What are the employee's obligations:**

- Workplace health & safety is a joint obligation
- Employees must comply with health and safety measures
- Employees must wear protective equipment as required
- Employees must report workplace hazards
  - This includes reporting their own potential exposure to COVID-19 that caused or is likely to cause illness to the employee or to any other person.

## Health & Safety Considerations

- Not all workplaces have the same level of risk and transmission
- Examples: Educational institutions, industrial settings, retail, hospitality settings, grocery stores and health care institutions
- Safety precautions to vary based on level of risk
- Relevant factors:
  - work from home options,
  - physical distancing,
  - vaccination availability
  - level of interaction with the public
  - vulnerable clients / employees
  - history of workplace transmission,
  - community spread



## COVID-19 Safety Measures

### **(Until Threat Level is Contained)**

- Social distancing
- Protective supplies: masks, hand sanitizer
- Regular cleansing of common touch surfaces
- Directing traffic flows (arrows/markings)
- Plexiglass barriers as appropriate
- Screening for persons visiting on-site
- Capacity restrictions
- Mixed Remote/In-Person work
- Rotate/Stagger shifts
- Prioritize return of employees who live in low-risk regions





# COVID-19 Vaccination

## COVID-19 Vaccine

- Canada has approved the COVID-19 Vaccines, and deemed them safe, effective and of good quality.
- The list of authorized vaccines are:
  - Pfizer COVID-19 Vaccine
  - Moderna COVID-19 Vaccine
  - Astra Zeneca COVID-19 Vaccine
- There is discussion of 'Booster' shots that will supplement full vaccination as the virus is likely to adapt over time
- Public health authorities continue to maintain that vaccination is central to limiting the spread and severity of Covid-19.

## Step 3 – Roadmap to Reopening

- The Province has provided a detailed plan as to which businesses and services will re-open and those that will remain closed
- Step 3: 70-80% of Adults with 1 dose and 25% fully vaccinated – expand indoors where face coverings cannot always be worn
- This benchmark was reached however the Province has not transitioned out of Stage 3 to full re-open due to vaccine hesitancy and fear of Delta variant

## Step 3

- Re-opening (cont.)
  - PPE restrictions will remain in place depending on work environment and Regulations
  - Businesses continue to accommodate work from home, but there are some recalling their employees back to the workplace
  - Employers should continue to follow social distancing and health guidelines.
  - Proof of Vaccination to access certain types businesses is good indication that the return to full re-open will be slow and particularized to different sectors

## O.Reg. 364/20 – Rules for Step 3

- This regulation provides general COVID-19 risk mitigation measures for all businesses
- However, there are sector specific rules for higher risk industries (i.e. gyms, restaurants, bars)
  - PPE requirements
  - Screening and contact tracing
  - Social distancing
  - Capacity limits
  - Proof of vaccination

## Proof of Vaccination

- The following are (non-exhaustive) list of businesses that must obtain proof of vaccination for patrons:
  - Indoor areas of restaurants, bars and other food or drink establishments – no dance facilities
  - Indoor and outdoor areas for food and entertainment where dance facilities are provided
  - Indoor meeting areas subject to some exceptions
  - Sports and recreation facilities (gyms, stadiums) subject to some exceptions
  - Indoor areas of casinos, bingo halls or other gaming establishments (including horse racing)
  - Indoor areas of concert venues, theatres and cinemas
  - Indoor areas of commercial film and television production
  - Certain outdoor venues (large crowds, sporting, waterparks, theatres etc.)

## Proof of Vaccination Cont.

- What is considered fully vaccinated?
  - 2 doses of an approved vaccine and 2 weeks since 2<sup>nd</sup> dose
- Visitor must present proof of 2 doses and 2 weeks elapsed along with photo ID prior to entry
- There are exceptions such as using the bathroom only, but scope is limited

## Proof of Vaccination

- Agencies governed by the *Home and Community Care Act, 1994* –Directive 6
- Employers are to develop, implement, monitor, and maintain vaccination policies for employees, contractors, students, and volunteers are vaccinated or antigen tested regularly.
- Minimum of one test within every 7 days.
- At a minimum, these individuals will be required to provide proof of one of the following:
  - a) Full vaccination against COVID-19; or
  - b) Written proof of a medical reason for not being vaccinated against COVID-19; or
  - c) Completion of a COVID-19 vaccination educational session.
- Employers at liberty to mandate proof of full vaccination (option (a))



## Rules Regarding Child Care for Covid-19

### O. Reg. 137/15 Under the *Child Care and Early Years Act, 2014* (Under Part IV.1)

- Record keeping obligations for visitors
- Must have policy for sanitizing, reporting, communications with parents, physical distancing measures, PPE scheduling, record keeping, pickup/dropoff – all in accordance with recommendations of medical officer of health
- No law stating mandatory vaccination of parents – but you can choose make that a policy subject to the *Human Right Code*.

## Special Rules Regarding Certain Day Care Providers

### Providers in Community Centres and multi-purpose facilities/Public Libraries – Section 3&4

- Childcare providers operating out of community/recreation centres or libraries, social distancing requirements are not applicable
- Proof of vaccination for patrons in recreation centres not applicable
- \*Note that dedicated childcare facilities may have different rules (see links below)
- However there are capacity limits and signage requirements
- Section 16 imposes more restrictions for recreational activity, but creates several exceptions for space used for child-care, so long as it is child-care pursuant to *Child Care and Early Years Act, 2014*.
- Social services also have exceptions

## **Businesses Providing Teaching and Instruction – Section 14 of the O.Reg 364/20**

- Must provide for 2 metres of social distancing, except where necessary to do otherwise
- There are capacity limits to ensure 2 metre distance requirement
- Students must be screened according to instructions of Chief Medical Officer of Health
- Person responsible for business must record contact information and retain for at least one month, and only disclose such records to an inspector under the *Health Protection and Promotion Act*
- Record keeping for all attendees
- Not required to have students vaccinated



**Question: Can employers mandate COVID-19 vaccines for employees?**

## **Answer: Generally yes, as a condition of employment**

- Employers cannot force employees to take the vaccine
- Individuals have a *right to choose*
- That choice, however, has employment consequences
  - Regular testing
  - Possible termination
  - Prohibited from attending on site
  - Requirement to wear PPE or socially distance
  - Work from home
  - Modified hours or duties
- Narrow *Human Rights Code* exemptions

## **Question: How Many Employees Must Be Vaccinated before Employees Can be Required to Return?**

- There are no minimum threshold requirements under current laws.
- Safest option is keeping unvaccinated employees out of workplace
- Private and public sector institutions reportedly pushing 100% mandatory vaccine compliance subject to narrow exemptions:
  - Hospitals and senior care facilities
  - School Boards
  - Toronto Transit Commission
  - Toronto Police Services
  - University of Toronto
  - Ryerson University
  - YMCA

**Question: Can Employer be Held Liable for Adverse Health Outcome caused by Vaccine if Encouraging employees to get vaccinated?**

**Answer:**

- No precedent, but most likely not
- Public Health authorities have strongly encouraged vaccination
- Repeating public health guidance is unlikely to be grounds to attributing liability

**Question: Can you fire a (non-union) employee for refusing the COVID-19 vaccine?**



**Answer: Generally yes, but subject to *Code* exemptions**

- Under the Ontario *Human Rights Code*, employers have a duty to reasonably accommodate to the point of undue hardship
- Some employees may have job-protected reasons for refusing the vaccine:
  - Medical grounds (i.e. health risks associated with vaccination)
  - Religious grounds
- Employers can require adequate proof to substantiate the refusal

## OHRC Policy Statement: Vaccine Mandates and Proof of Vaccine

- On September 22, 2021, the Ontario Human Right Commission released further guidance
- Mandating and requiring proof of vaccines generally permissible subject to accommodation of those who have code related reasons for not being able to get one

### Medical

proof of medical reason to be exempted necessary, written by health professional. Exemptions are limited to:

- Allergic reactions; or
- Myocarditis/Pericarditis

### Creed (Religion)

- Personal Preferences and Beliefs NOT Protected
- While vaccination is voluntary, a person who refuses for personal reasons is not protected under the Code.
- The duty reasonably accommodate to the point of undue hardship

## Cont.

### Creed Cont.

- What does this mean? There may be an accommodation based on creed (religion) but will need to be proven
- Creed does not cover conscious objectors, or preference against vaccines or PPE
- **Testing as Alternative** - where it may be necessary, can implement regular testing as alternative to vaccine. Employer should pay for testing and for only for shortest period of time to satisfy the extraordinary need during the exceptional circumstances of a pandemic. Not an indefinite practice.
- **Obligations to Ensure Access to Vaccine** – in developing a vaccine policy, account for potential barriers to access vaccination like language, disability barriers, time and resources of individuals, prior trauma with healthcare etc
- **Vulnerable People** – be mindful of policies that may disproportionately target or criminalize the indigenous, racialized people, homeless, those experiencing mental health and/or addiction challenge

**If you fire an employee for refusing the vaccine,  
are they entitled to a severance package?**

If no *Code*-related grounds for refusal, possible options open to employer:

- Termination for cause? Probably not
- Termination for frustration of contract?
  - Not if the employee can complete essential duties from home
- Termination without cause
  - Employers probably have to provide a severance package if dismissing employee due to vaccine refusal

## Question: Can you fire a non-union employee for refusing to return b/c of COVID-19 fears?

- The *OHSA* gives a worker the right to refuse work that they believe is unsafe
- Every work refusal must be assessed and any necessary precautions implemented
- If not resolved, Ministry of Labour Inspector must be notified
- If MOL Inspector deems it safe, employee is required to return to work
- Most work refusals during height of pandemic were denied

## Can you fire Unionized Worker for Refusal to Get Vaccine?

- Most collective agreement limit on employer's right to dismiss unless there is just cause (high threshold)
  - Refusal to take vaccine probably not cause for dismissal
- Unionized employers will have to consider the following:
  - Collective Agreement restrictions; and
  - *Human Rights Code* protections if triggered.



## Other Options Instead of Termination

- Reasonable alternate work
- Unpaid leave of absence (until virus threat is contained)
- Work from home
- Modified work schedule
- Mandatory PPE
- Regular testing

**Question: Can employers require that employees return once the Province has fully re-opened?**



## **Answer: Yes, in accordance with Provincial restrictions**

- Most work refusals at early stages of pandemic were denied
- As the lockdowns progressed, only “essential workers” were permitted to work outside the home
- Restrictions have loosened under Stage 3 – many employers are recalling employees to work
- Working from home is not a right, employers can decide subject to balancing safety and duty to accommodate
- Facing opposite problem as well, employees who wish to return but are not complying with vaccine policies



**Question: Can employers ask for proof of vaccination?**



## **Answer: Probably Yes**

- Employee have a right to personal privacy in connection with their health information
- Employers have a legitimate need to determine employee fitness to safely return to workplace
- Health and safety need to verify vaccination is likely to trump privacy concerns

## Privacy Considerations When Collecting Vaccination Information:

- Employers should be mindful of their privacy obligations when asking for this information
- Obtain voluntarily signed consent to evidence compliance with privacy obligations
- The consent should inform the employee the purpose of collection, who will have access and how the data will be protected and for how long
- The consent should also clearly state that info is collected for the purpose stated only

**Question: If Employee has anti-bodies from exposure, is proof of vaccination still required?**

**Answer:** The health authorities are not recognizing natural immunity as a valid exemption. The gold standard is full vaccination and will likely continue to be the case going forward.

**Question: Does an employer have to disclose whether a co-worker has been vaccinated?**



## **Answer: Probably not**

- Vaccine information is personal health information to be safeguarded on a need to know
- If there is COVID-19 spread in the workplace, employees have limited right to know whether they are at risk of contracting the virus for their own health & safety

**Question: Does an employer still have to mandate  
PPE?**



## **Answer: Yes, but only if necessary**

- The odds of 100% vaccination of all employees is ideal but not realistic
- Until threat level in the community is contained, PPE should be required for those not fully vaccinated
- PPE is one way to mitigate the risk to unvaccinated employees or visitors on site
- Human Rights Commission agrees it is a reasonable restriction where no recourse

**Question: What if there is COVID-19 exposure in workplace?**

## Reporting Rules (Toronto)

- Employers must notify Toronto Public Health (“TPH”) at (416) 338-7600 if 2 or more people test positive for COVID-19 within 14-day interval in connection with workplace premises by:
  - Providing contact information for a designated contact person at the workplace who is ready to communicate with TPH & take additional measures required by TPH
  - Ensure accurate and updated contact information for workers are available to be produced to TPH within 24 hours of request in support of case management and contact tracing requirements for COVID-19
  - Cooperate with infection prevention and control personnel from TPH to allow entry into the workplace for inspection, to support enhanced infection prevent and control measures and recommendations
- Ontario Ministry of Labour must also be notified if an employee work-related exposure to COVID-19 or WSIB claim related to COVID-19 has been filed

## Mandatory Screening and Testing In Step 3

- Screening (temperature checks, questionnaire) is already prescribed by the Ontario Public Health Authority and likely to stay in place until threat level is contained
- Covid testing is now considered a viable alternative to vaccination where appropriate. Be mindful of reasonableness
- In workplaces where testing may be justified, frequency/need balanced with the heightened safety afforded by vaccines
- On re-opening most employees are likely to be vaccinated, those without valid exemptions likely on leave of absence or terminated without cause.
- In *Christian Labour Association of Canada v Caressant Care Nursing & Retirement Homes*, a union grievance arbitration decision released September 2020, the arbitrator found that regular testing was reasonable in the circumstances



**Question: Can an employer be sued if worker catches  
COVID-19 at work?**



**Answer: It depends whether Employer has workers compensation (WSIB) coverage**

## Common Law Negligence

- Employer has duty of care to employees
- Employers must exercise due diligence for protection of employees
- Employers may be held liable for foreseeable harm suffered for catastrophic outcomes
- Evidentiary issue: How do you prove where an employee contracted Covid-19?

### **Ontario Bill 218: Liability Protection for Businesses (Does NOT apply to Employees)**

- If the business acts in good faith to follow public health directives and laws, they are generally immune from liability if someone catches Covid-19 in connection to the workplace.

### **WSIB Employers**

- Subject to WSIB regime



**What will an open Ontario look like in the workplace?**



- With the proof of vaccination roll out the government has strongly signalled the private sector
- Businesses likely to follow suit with a push to have close to all employees vaccinated
- Individuals without valid exemptions or workable accommodation will be in a difficult situation for the foreseeable future.
- While Covid-19 is likely to stay with us, the heightened risk unlikely to be indefinite. Further public health guidance will inform the reasonableness of strict vaccine/PPE policies on an ongoing basis.
- Employers will need to update their policies regularly with changing situation – Delta Variant etc.

## Best Practices

- Have a clear Covid-19 policy that also addresses vaccination
- Clear policies regarding accommodations (i.e. medical / creed exemptions)
- Conduct a risk assessment
- Exercise due diligence
  - Mandating vaccine may be most prudent choice
  - PPE
  - Testing
  - Remote work
- Assess alternatives to dismissal



**Questions?**



## Disclaimer

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