



# Vaccinations and Employer Obligations:

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



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# TOPICS

1. The Current State
2. Occupational Health and Safety Act (“OHSA”)
3. COVID-19 Vaccine
4. Can employers mandate COVID-19 vaccines for employees?
5. Proof of Vaccination
6. Work Refusal
6. Workplace Health and Safety Insurance
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# The Current State

- The Government of Canada continues to characterize the COVID-19 risk to Canadians as “*high.*”
- In Ontario, total of 255, 002 cases, with 5,803 deaths.
- Employers must develop new ways of doing business under the ‘new normal.’
- Province Extended Emergency Orders to February 9, 2021.

## Ontario's second State of Emergency

- The Province declared a second State of Emergency effective January 14, 2021 with an end of February 9, 2021.
- Stay at home order
- Only essential services to remain open
- New restrictions include:
  - Limit of 5 people in outdoor organized public and social gatherings;
  - All non-essential stores offering curbside pickup or delivery may only open between 7 am – 8pm (does not apply to pharmacy, gas stations, stores that sell food, convenience stores and restaurants who are open for take out and delivery);
  - Non-essential construction is closed;
  - Stores are permitted to open if patrons ordered items before arriving for curbside pickup;

## Ontario's second State of Emergency

- New restrictions (cont.)
  - No in-class instruction until February 10, 2021 at the public health units of Windsor-Essex, Peel Region, Toronto, York Region, and Hamilton;
  - **Businesses must ensure employees who can work remotely do so; and**
  - Face mask must be worn inside businesses and masks are now recommended to be worn outdoors if physical distancing of more than 2 metres is not possible
  - Child care centres for non-school aged children to remain open



***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



## 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





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

### **COVID-19 Safety Measures (on re-opening)**

- 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
- Remote work arrangements



## **OHSA – employers have an obligation to ensure a safe workplace for all**

- **Step 1: Hazard assessment to determine risk of COVID-19 transmission areas**
  - Assessing layout, where are the high touch areas, frequency of workers coming into contact with others
  - Designate areas according to risk level: low, medium, high or very high risk of transmission
- Address accordingly: eliminate, substitute, or modify
- Ask employees for input on where the biggest potential of transmission may occur and what can be done to control a spread



## Employer's obligation to ensure a safe workplace for all

- Step 2: Act on the hazard assessment
- Step 3: Post COVID-19 return to work safety plan/policies on website or at workplace
  - Creates assurance and increases morale
- Step 4: Review & Reassess
  - Given the unknown of the coronavirus, always reassess the safety of the workplace according to the pandemic's development
- Resource for best practices in the workplace: [https://www.toronto.ca/wp-content/uploads/2020/03/9538-Fact-Sheet-for-Workplaces-Non-Healthcare\\_final.pdf](https://www.toronto.ca/wp-content/uploads/2020/03/9538-Fact-Sheet-for-Workplaces-Non-Healthcare_final.pdf)
  - [https://covid19.wsps.ca/?gclid=Cj0KCQiA3smABhCjARIsAKtrg6Kou4MMNniPdBmhq56Rd9QAS9IBOpWbII\\_tH6SpLp7vlreKKz24Kv0aAi2eEALw\\_wcB](https://covid19.wsps.ca/?gclid=Cj0KCQiA3smABhCjARIsAKtrg6Kou4MMNniPdBmhq56Rd9QAS9IBOpWbII_tH6SpLp7vlreKKz24Kv0aAi2eEALw_wcB)

## ***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.



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## ***Garda Security Screening v. IAM (2020- Arb. Keller)***

- Employer communicated public health guidelines requiring isolation while waiting COVID-19 test results
- Security Guard indicated she was unaware of the guideline
- April 6, she obtained COVID-19 test
- While waiting for results, she reported for work (no symptoms)
- Did not inform employer she was tested
- She tested positive
- Employer terminated for cause



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## ***Garda Security Screening v. IAM (2020- Arb. Keller)***

### **Decision**

- Discharge upheld
- “The actions of the grievor were a clear violation of the employer’s and public health guidelines. Her claim of not feeling sick is absolutely irrelevant. She was required to isolate, as she knew, for the safety and health of others. She chose not to, thereby putting countless of others at risk of illness or death.”



# COVID-19 Vaccination

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## 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
- J&J Vaccine in trials (95% efficacy; possible approval by spring)
- Everyone in Canada will have access to the free COVID-19 vaccine as supply increases
- A phased approach to the delivery of the vaccine based on priority
- After each vaccination, a proof of vaccination will be provided to each person





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



## Mandatory vaccination – There is precedent

- There is precedent for mandatory vaccinations (unless valid exemption) in primary or secondary schools – *Immunization of School Pupils Act*
  - i.e. for designated diseases: inoculation tetanus, polio, measles, mumps, meningitis
- Valid exemptions: medical or religious grounds
- Children seeking exemption must provide a statement of medical exemption form signed by physician/nurse OR commissioned statement of conscience or religious belief form



### Answer:

- In most workplaces, employers *probably* cannot force employees to take the vaccine
- But *probably* can make vaccination a condition of access to premises (with reasonable exception) if there are no safe alternatives
  - Wearing a mask or social distancing *may* be safe alternatives if virus risk is contained



**Q: Can you fire an employee for refusing the COVID-19 vaccine?**



## **Answer: It depends on the reason for refusal**

- Those who may be lawfully protected under the Ontario *Human Rights Code* (“Code”)
  - Objection for medical reasons (i.e. health risks associated with vaccination)
  - Objection on religious grounds
- Employer has a duty to accommodate to the point of undue hardship
- Undue hardship considerations: cost, legal requirements, health & safety
- Employers can require adequate documentation to substantiate the refusal



## Refusal based on Individual Preference

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

- Termination
  - Cause for termination?
  - Frustration of contract?
- Reasonable alternate work
- Unpaid leave of absence (until virus threat is contained)
- Work from home
- Modified work schedule
- Mandatory PPE



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



## **Answer: Probably Yes**

- Employee have a right to personal privacy in connection with their health
- But health and safety need to verify vaccination is likely to trump privacy concerns
- Proof of vaccination already required in some situations, i.e. educational setting





## **Question: What if employee refuses to return to work for fear of COVID-19?**

## Work Refusals under the Occupational Health and Safety Act

- Reasonableness of work refusal is likely to depend on, among other things:
  - the nature of the workplace,
  - the employee's age and health status,
  - proximity of workers,
  - health measures being implemented
- Work refusal (if unresolved internally) can result in a Ministry of Labour (MOL) Inspection
- If the MOL inspector concludes that working conditions are unlikely to endanger anyone, the worker is expected to return to work.
- If the inspector concludes that the working conditions are unsafe, the MOL inspector will generally order the employer to institute necessary measures to address the safety issue
- Most work refusals at early stages of pandemic were denied



## **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 be notified if a WSIB claim related to COVID-19 has been filed



# Question: When can Employers Require Employees to Return to work?



## If workplace is safe, employers can require employees to return (with exception)

- Employees may report fear of taking public transit to work
- Employees may also fear generally catching COVID-19 at work
- Employees may fear for co-workers who refuse the COVID-19 vaccine
- If workplace is safe, employers can require employees to return to work
- To put employees at ease, develop robust safety protocol & educate employees on safety precautions being taken



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



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





## Workers Compensation (WSIB)

### WSIB Participating Employers Only

- If WSIB coverage applies, employees must go through WSIB regime. They cannot sue
- No fault insurance scheme
- Employees are entitled to claim WSIB benefits, including loss of earnings benefits and compensation for medical expenses, if they catch COVID-19 from the workplace and if the employee suffers from COVID symptoms.
- Benefits are not available for COVID-positive workers who are symptom-free.
- How do you know if the virus was transmitted from the workplace?



## Workers Compensation (WSIB) Policy on COVID-19 Claims

Workers entitled to benefits if:

1. The nature of the worker's employment created a risk of contracting the disease *to which the public at large is not normally exposed*; and
2. Has the Worker's COVID-19 condition been confirmed

Weighing Evidence : the key issue is to determine work-relatedness, whether the worker's employment duties or requirements were a significant contributing factor in the worker contracting COVID-19



## Employers not covered by WSIB

- Employers have a common law duty of care to exercise due diligence for the protection of workers
- Employees (or their estate) can sue employer if an employer's negligence results in severe illness or fatality
- Employee must prove COVID-19 transmission occurred at the workplace (or arising out of the course of the employee's work)



## Lawsuits

Diamond & Diamond have filed a class action lawsuit on behalf of victims who died due to avoidable negligence.

- Targeting major long-term care providers in Ontario
- Half a billion dollars claim
- Naming the Ontario government, several municipal bodies in Hamilton, Toronto, Essex, Ottawa and more



**Questions?**

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