The right to bare arms: Considerations for COVID-19 vaccines in the workplace

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One of the most talked about topics when it comes to the scheduled roll out of the COVID-19 vaccine this year is whether an employer is entitled to require its employees to receive the vaccine in order to remain at or return to the workplace.

It's a multifaceted issue, and it deserves fulsome consideration when discussing the important role employers could play in the national vaccination campaign, which is a key component of the fight against the spread of COVID-19 within an employer's workplace and more broadly. However, that is not the only interest at play. An employer's obligation to provide a safe workplace must be balanced with employees' potentially competing interests, such as the fundamental freedom to make inherently personal choices about one's own body. This can include competing rights relate to health or religious beliefs and trigger protection under human rights legislation.

Considerations for a mandatory vaccination program at your workplace

With these potentially competing issues in mind, here are our top ten things to think about when considering a mandatory vaccination program at your workplace:

Science

If a mandatory vaccination program is challenged by an employee or union, and comes before an arbitrator or other decision-maker, that decision-maker will review the scientific evidence available to determine whether the program was likely to achieve the goal sought out by the employer. For example, if the employer's goal is to limit the transmission of COVID-19 in the workplace, the scientific evidence will need to demonstrate that vaccination effectively protects *others* from infection more effectively than other mitigation measures do, such that the infringement on an employee's competing interests is justified. This science is currently evolving, so while there is good reason to believe that a vaccinated individual is less likely to transmit COVID-19 to others, it has not been specifically tested or conclusively proven.

Alternatives

A decision-maker considering a mandatory vaccination program should also consider whether less intrusive alternatives to vaccination would be as effective in achieving the employer's goal of maintaining a safe workplace, and whether an employer gave genuine consideration to those alternatives before implementing the mandatory vaccination program. Depending on the workplace considerations, an employer may be obliged to explore (and *demonstrate* that it legitimately explored) alternatives like masking, physical distancing, and work-from-home arrangements, before requiring vaccination. The evidence to demonstrate the relative effectiveness of each of these types of mitigation measures will be critical.

Nature of the workplace

In workplaces where employees work closely with vulnerable populations or in close physical proximity to other employees, vaccination may be more likely to be upheld. In workplaces where employees work more independently, not in close proximity to other employees or to the public, or where less intrusive alternatives are feasible and effective, mandatory vaccination may not be as well-supported. External factors may also be relevant. For instance, if the vulnerable population has itself been widely vaccinated, the case for mandatory vaccination of the employees working with them may not be as strong.

Human rights

Some employees may legitimately refuse vaccination for reasons relating to protected grounds under human rights legislation, such as religious or medical grounds. In these situations, an employer will have to accommodate those protected grounds to the point of undue hardship and in accordance with the applicable legislation and case law. If vaccination is not an option for an employee, an employer will need to consider alternatives, such as adjusted work schedules or locations, personal protective equipment, a leave of absence, or others. If an employer does not permit this employee to continue working without penalty, they may need to defend that choice before a decision-maker, and demonstrate that it was necessary despite all applicable considerations. For example, in Ontario, "health and safety" is one consideration in whether the threshold of undue hardship has been reached.

Incentives

There are many steps an employer can take to encourage employees to receive the COVID-19 vaccine aside from requiring employees to show proof of vaccination to continue working. Firstly, employers should consider rolling out a vaccination campaign (drawing inspiration from the annual flu vaccination campaigns) to encourage and facilitate voluntary vaccination. Employers may also consider incentive programs to reward employees for showing proof of vaccination but should be wary of any barriers to adding new employment terms (such as broader public sector restraint legislation, or a collective agreement that cannot be varied without union consent) as well as indirect penalizing of employees who legitimately cannot be vaccinated for human rights reasons. Educational campaigns to encourage voluntary vaccination are another option.

Compensation

If an employer has implemented a vaccination program, whether mandatory, incentive-based, or purely voluntary (such as facilitating a clinic), it should consider whether employees are entitled to be paid for the time spent to get vaccinated. Depending on whether the vaccine is reasonably viewed as a condition of employment, and on the language in the applicable employment standards legislation, there may be an argument that going to get vaccinated is “time worked” and could be compensable.

Special legislation

In certain sectors, the government may issue specific directives or regulations regarding mandatory vaccination programs. In particular, Quebec’s *Public Health Act* provides that the government may order the compulsory vaccination against any contagious disease to the entire population or a certain portion thereof that seriously threatens the health of the population. However, such legislation would need to be compliant with the *Charter of Rights and Freedoms*, including its protections on equality and security of the person. In British Columbia, under the *Public Health Act*, a person that is subject to a regulation that requires "preventative measures" must not be in a place and/or go against the prohibited regulations set out until the person has taken preventative measures. Vaccination is considered one potential “preventative measure”. In British Columbia, at this time, the government has indicated it will not implement a mandatory COVID-19 vaccine policy.

Other legislation, such as employment standards legislation, may also be relevant. In Ontario, for instance, noncompliance with a mandatory vaccination program could, depending on the specific circumstances, entitle an employee to a job-protected Infectious Disease Emergency Leave under the *Employment Standards Act, 2000*.

Prior case law

There is currently no case law considering a mandatory COVID-19 vaccine program. There are cases considering mandatory “vaccinate or mask” policies (where hospital staff were required to either get the seasonal flu shot or wear a mask while working). However, the decisions were split on the mandatory “vaccinate or mask” policies. One arbitrator in British Columbia upheld the policy as reasonable, while two arbitrators in Ontario struck down similar policies as unjustified invasions of privacy. The Ontario decisions were based, in part, on limited evidence regarding the efficacy of masks vs. vaccination on stopping transmission. In Alberta, an arbitrator upheld a mandatory flu vaccination policy (without the masking alternative) in a long-term care setting. In Quebec, an arbitrator upheld an employer’s decision to suspend without pay an employee who opposed vaccination during an influenza outbreak in a long-term care facility, thus offering an interesting alternative to mandatory vaccination (i.e. imposing administrative measures). These cases may be useful, but certainly not determinative, when applying similar questions in the COVID-19 pandemic context.

Record-keeping

When implementing a vaccination program, employers will need to ask employees for proof of vaccination and will need to keep a record. Depending on the province and any applicable privacy legislation, the content and nature of that record, as well as measures to protect an individual’s personal information, should be considered.

Travel

Employees who travel for work are currently required to have a negative COVID-19 test prior to entering Canada. Presently, there is no exemption to that requirement for individuals who have been vaccinated. However, this rule may evolve as vaccine supply increases and a greater proportion of the population has access to vaccination.

Takeaways

In many ways, the promise of widely available vaccines feels like the light at the end of a long, dark tunnel. Employers have the potential to play a key role in the vaccination campaign, and in doing so, should be mindful of possible competing interests.

For more information on these issues, we encourage you to reach out to BLG's Labour & Employment team. See key contacts below.

By

Maddie Axelrod, Robert Weir, Marie-Pier Emery, Stéphanie Desjardins

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BLG Offices

Calgary
Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa
World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver
1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal
1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto
Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

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